

# ESSAY

## CARTESIAN LOGIC AND FRONTIER POLITICS: FRENCH AND AMERICAN CONCEPTS OF ARBITRABILITY

THOMAS E. CARBONNEAU\*  
WITH FRANÇOIS JANSON\*\*

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\* Professor of Law and Director, Eason-Weinmann Institute of Comparative Law, Tulane Law School. Diplôme, l'Université de Poitiers; A.B., Bowdoin College; M.A., Oxford University; J.D., M.A. University of Virginia; LL.M., J.S.D., Columbia University.

\*\* Associate, Willkie Farr and Gallagher (New York). D.E.A. (*Droit des affaires*), *Matrise (Droit des affaires)*, l'Université de Paris X; Diplôme, IEP Paris; LL.M., Tulane Law School.

## I. INTRODUCTION

This comparative essay represents an attempt to introduce a measure of counterpoise in a growing and much-heralded development in the world law of arbitration. Recent decisional law in the United States, France, and other countries have challenged the strategic significance of the concept of arbitrability in the legal regulation of arbitration. The essay seeks, first, to clarify the function of arbitrability in the law of arbitration and, second, to argue against its judicial deconstruction in either the international or domestic context. The key objective of the analysis is to demonstrate the vital role of demarcation that arbitrability plays between state authority and the exercise of private rights. Despite the vogue of liberal arbitration statutes and the concurrent movement toward the privatization of political and judicial functions, it is inconceivable that arbitrability would be reduced to a perfunctory status in the legal conceptualization of arbitral adjudication. This essay first examines developments in United States law and provides a critical assessment of their implications for transborder and domestic adjudication and the institution of arbitration. It then establishes a comparison between United States and French laws on arbitration to determine whether civil law courts address the issue of arbitrability any differently than their United States counterparts. The study of United States, French, and other European court opinions that follows clearly demonstrates that the dilution of arbitrability in United States law is also occurring in France and other European civil law jurisdictions. This essay criticizes the "a-legal" approach to arbitration law on a number of grounds and makes the case for greater moderation in defining the jurisdictional scope of arbitral adjudication and its relationship to the legal system.

## II. ARBITRABILITY: A DEFINITION

The concept of arbitrability is critical to the legal regulation of arbitration.<sup>1</sup> It determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins. In effect, it establishes a dividing line between the transactional pursuit of private rights and the courts' role as custodians and interpreters of the public interest. Whenever contractual rights become intertwined with the

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1. For a discussion of arbitration, including the concept of arbitrability see, e.g., 1 MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION: THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* (Gabriel M. Wilner rev. ed. Supp. 1993).

exercise of sovereign state authority, designated juridical institutions are generally necessary to effect justice.

Arbitrability manifests itself in two ways in the legal regulation of arbitration: (1) as a means of gauging the validity and scope of the arbitration agreement (contractual inarbitrability);<sup>2</sup> and (2) as a subject matter defense to arbitration (substantive inarbitrability).<sup>3</sup> Contractual inarbitrability usually does not raise questions of fundamental policy or intricate issues of doctrinal interpretation in the law of arbitration. Rather, the law of contracts and its principles of construction are at the core of determinations regarding whether the reference to arbitration exists and, if so, whether it covers the dispute in question.<sup>4</sup>

Substantive inarbitrability represents the classical function of arbitrability. It curbs the contractual right to arbitrate by holding that certain subject matters are precluded from arbitration as a matter of law.<sup>5</sup> Substantive inarbitrability can overlap with the public policy exception to the validity of arbitration agreements and the enforceability of arbitral awards. Public policy is a separate ground for challenging agreements and awards,<sup>6</sup> but it interfaces with substantive inarbitrability when it prohibits arbitration because the claims in question pertain to matters of public interest.<sup>7</sup> In order to declare subject areas inarbitrable, legislatures, and especially courts, must elaborate a working definition

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2. *Id.* §§ 12:00-02.

3. *Id.* § 8:06.

4. Parties can attack the jurisdictional authority of the arbitral tribunal by alleging that the contract of arbitration is null and void or is non-existent. The controlling principle is that disputes cannot be submitted to arbitration unless the parties have entered into an enforceable agreement to arbitrate. Even when a valid agreement exists, a dispute can fall outside its scope, making the dispute inarbitrable because of the parties' failure to agree to submit that particular controversy to arbitration. Under either set of circumstances, the parties can enter into a submission agreement, proceed to a judicial trial, or reach a settlement. *See id.* §§ 12:00-02.

5. *Id.* § 8:06.

6. *See DOMKE, supra* note 1, § 19:02.

7. To illustrate, when an arbitral tribunal fails to provide a party with an opportunity to be heard or present essential evidence, the resulting award would be unenforceable for reasons of procedural lapses that converge with public policy. Substantive inarbitrability does not play a role in such a challenge to an award. A dispute involving the application of currency regulations or criminal sanctions, however, usually would be deemed substantively inarbitrable because these regulations are part of mandatory law. Their violation implicates the public interest or public policy. *See generally id.* §§ 4:02, 19:02-04.

of the public interest and explain how a particular subject area is integrated into or excluded from its domain.

The traditional basis for invoking substantive inarbitrability centered upon the distinction between claims arising from contract and claims brought pursuant to the provisions of regulatory laws.<sup>8</sup> Contract disputes ordinarily involve matters relating to formation, governing law, and performance (e.g., timeliness of payment, delivery, conformity to specifications), as well as the defenses of frustration of purpose or impossibility of performance. Disputes based on statutes (e.g., laws pertaining to bankruptcy, commercial competition, currency transactions, import-export, taxation, the sale of securities, and the validity of patents) normally fall outside the contractual mandate of arbitral adjudication.<sup>9</sup>

The principal reason behind the distinction is that regulatory statutes contain special safeguards and remedies and proscribe conduct for the good of society. Therefore, these laws should not be applied and interpreted by private tribunals and adjudicators. The litigation of statutory claims in public judicial fora and according to established procedures guarantees public debate and accountability and allows the laws to develop dynamically in response to changes in the social or political order. Statutory claims, therefore, are inarbitrable because they implicate the vital principles upon which social organization was erected.

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8. An analogy can be drawn between the distinction advanced in the text and the debate on the question of what damages can be recovered in product liability suits under warranty and under tort. The celebrated debate on this issue between the courts in *Seely v. White Motor, Co.* and *Santor v. A & M Karagheusian* represented a dialogue on the boundary between and on the gravamen of tort and contract causes of action. The distinction between contract and statutory claims reflects the same type of discussion on fundamental issues. See *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (discussing whether injury to product itself falls under product liability or contract); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660 (N.J. 1985) (discussing whether buyer is restricted to cause of action under Uniform Commercial Code or should be allowed cause of action under negligence and strict liability principles); *Seely v. White Motor, Co.*, 403 P.2d 145 (Cal. 1965) (holding no distinction between physical injury to property and personal injury); *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305 (N.J. 1965) (discussing doctrine of strict liability in tort).

9. For an illustration of the segregation of contract and statutory claims in French law see, e.g., Decree No. 85-1387 of Dec. 27, 1985, art. 174, 1986 D.S.L. 1 (Fr.); Judgment of Feb. 4, 1992, Cass. civ. 1re, 1992 D.S. Jur. 181 (Fr.).

## III. ARBITRABILITY FROM A CONTEMPORARY PERSPECTIVE

With the development of the recourse to arbitration and the parallel decline in the efficiency of judicial administration, the stature of the inarbitrability defense waned in some legal systems. In fact, areas fundamental to the public interest and requiring exclusive judicial jurisdiction are becoming fewer and more difficult to identify. In United States law, for example, the Federal Arbitration Act (FAA) only recognizes contractual inarbitrability,<sup>10</sup> and the grounds for reviewing domestic arbitral awards do not include the public policy exception to enforcement.<sup>11</sup> Moreover, in several jurisdictions, statutes and decisional law distinguish between substantive inarbitrability in its application to domestic law and to matters of international arbitration.<sup>12</sup> The content of arbitrability, therefore, varies from one setting to another, making a stable definition even more elusive. Substantive inarbitrability in the domestic context is usually more restrictive than its international counterpart because the regulatory authority and interests of the state are stronger domestically.<sup>13</sup> In international arbitration, the domestic

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10. United States Arbitration Act, ch. 213, 43 Stat. 883-86 (1925) (codified at 9 U.S.C. §§ 1-16 (1993)) [hereinafter FAA]. § 2 of the Federal Arbitration Act provides:

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

*Id.* § 2.

11. *See id.* § 16.

12. *See* Thomas E. Carbonneau, *American and Other National Variations on the Theme of International Commercial Arbitration*, GA. J. INT'L & COMP. L. 143 (1988).

13. The rules of territorial sovereignty and political autonomy allow the state to enact whatever regulatory laws best suit the needs of the national polity. Domestic perceptions of substantive inarbitrability lose some of their effect when applied beyond national borders, especially in matters pertaining to international commerce when "the sovereign national state is not essentially interested." Clive M. Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 19, 21 (Norbert Horn & Clive M. Schmitthoff eds., 1982).

imperatives underlying the legislation have a reduced significance and function.

The sovereign authority and mandate that accompany the statutes, however, are not completely extinguished in their transborder extension. The exercise of national political will is represented by legislative enactments of statutory rights that nonetheless govern or are connected to private commercial agreements. Despite calls for unitary arbitral proceedings, maintenance of an autonomous arbitral system, and recognition of the specialty of transborder justice,<sup>14</sup> controversy persists in the international context over whether claims founded upon statutory rights should be submitted to commercial arbitrators, who are, generally, private adjudicators unfamiliar with the history, function, and interpretation of the applicable statutes.

The primacy of national law over the needs of international commercial adjudication is best illustrated by a feature of English arbitration law.<sup>15</sup> When English commercial law governs a domestic or international contract, the courts retain the right to supervise the merits of the arbitral tribunal's determination.<sup>16</sup> A limited right of appeal to the High Court exists.<sup>17</sup> This practice--objectionable on a number of grounds--reintegrates merits supervision into arbitration law and challenges the independence of the international arbitral process for the sake of maintaining the would-be juridical integrity of national commercial law. Nonetheless, this practice also provides the elements of a basic system for safeguarding the inviolability of national regulatory legislation in transborder arbitration. International contract claims involving provisions of national regulatory law should be resolved by a process that at least includes national judicial mechanisms and allows them to exercise meaningful authority over determinations.<sup>18</sup>

The English experience demonstrates that a national public law bar or limit on the exercise of arbitral jurisdiction at the transnational level, although a hindrance, is not fatal to the practical operation of the arbitral

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14. See, e.g., Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9 (1986).

15. On English arbitration law, see SIR MICHAEL J. MUSTILL & STEWART C. BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* (1989); A. H. Hermann, *Business and the Law: Light in Arbitration's Obscure Corners*, FIN. TIMES, Nov. 2, 1993, at 17.

16. MUSTILL & BOYD, *supra* note 15, at 456-58.

17. *Id.*

18. See Thomas E. Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 VAND. J. TRANSNAT'L L. 265 (1986).

process.<sup>19</sup> The implementation of such a procedure, in fact, could have a number of benefits. For example, national regulatory law could be enriched by its judicial application in the transborder commercial setting. The scope and content of the law could be expanded and adapted to a larger mission of settling international disputes. As a result, the regulatory framework might improve. Statutory claims could become arbitrable once national courts elaborate settled positions on major issues. The disposition of statutory claims would then require only modest judicial supervision.

A system under which arbitrability is progressively established, by initial reliance upon judicial jurisdiction and then upon coordinated judicial and arbitral authority, might lead to the elaboration of regulatory laws with truly international dimensions. This process should achieve more cogent results than an abdication of all sovereign legal authority and a complete elimination of the function of substantive inarbitrability from the process of international commercial arbitration. Maintaining a sovereign role in the protection of rights created by state authority should not be perceived as overly intrusive to the operation of a mechanism for resolving contractual controversies.

The complexity of international commercial transactions and litigation, however, further complicates the question.<sup>20</sup> Claims of contractual breach can be met with allegations of statutory violations. The mixed character of some claims make jurisdictional delineation difficult.<sup>21</sup> On one hand, international arbitrators have the ability and perhaps the right to rule no matter what statute or law governs the merits of the litigation. On the other hand, a sovereign state's interests in exercising its lawful regulatory authority are implicated by the arbitration and any eventual award.<sup>22</sup>

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19. Approximately 10,000 arbitrations are done in London each year. See Mann, *Preface to LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* (Thomas E. Carbonneau ed., 1990).

20. See Carbonneau, *supra* note 12, at 149-51.

21. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 617-23 (1985).

22. The following discussion summarizes a debate among Andreas Lowenfeld, Hans Smit and myself. See Carbonneau, *supra* note 18; Thomas E. Carbonneau, *Mitsubishi: The Folly of Quixotic Internationalism*, 2 *ARB. INT'L* 116 (1986); Andreas F. Lowenfeld, *The Mitsubishi Case: Another View*, 2 *ARB. INT'L* 178 (1986); Hans Smit, *Mitsubishi: It is Not What it Seems to Be*, 4 *J. INT'L ARB.* 7 (1987). Upon reflection, Professor Smit's commentary is the most persuasive, although few courts or commentators have seen the case in that light. The proposal advanced in the text incorporates a number of

A possible resolution of the dilemma is to have arbitral tribunals first rule on the significance of the statutory claim to the litigation. The dispute would be inarbitrable only when the arbitrators conclude that the litigation is principally related to the claim of statutory rights violations. When the statutory claim is ancillary to the main dispute, as would be the case with a counterclaim or possibly a defense to liability, the tribunal could disregard it as inoperative in the context of international arbitration and rule solely on the merits of the principal dispute.

The arbitral tribunal's authority to rule upon jurisdictional challenges (*kompetenz-kompetenz*) would permit it to dispose of this question initially. The tribunal's determination could then be made subject to judicial review. The effectiveness of this procedure would depend on the existence of a like-mindedness among arbitral tribunals and the supervising courts. Such a cooperative alliance is not uncharacteristic of the current international arbitral process.<sup>23</sup> Functioning properly, this procedure would have the benefits of sustaining the role of arbitrability in the international process and having the application of the concept established by a mutuality of perspectives among arbitral tribunals and national courts. Despite the time required to construct such a process and the delay it would cause in individual proceedings, this form of institutional cooperation would avoid a systemically costly all-or-nothing approach, give national law a presence in the process, and preserve arbitral autonomy. Moreover, it would allow arbitral tribunals to assert openly their status as a "shadow" or unofficial court system for transborder contract claims.

#### IV. AN ASSESSMENT OF ARBITRABILITY

Arbitrability is vital to the legitimacy of the arbitral process. A failure to elaborate and implement a functional concept of substantive, and even contractual, inarbitrability could have dire consequences. A breakdown of sovereign authority in both domestic and international regulatory areas and of rights protection mechanisms might occur. Fundamental concerns could disappear from the landscape of public debate and scrutiny. The definition and implementation of core political

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recommendations made by Professor Smit.

23. For example, 94 sovereign states have ratified the New York Arbitration Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (codified at 9 U.S.C. §§ 201-208 (1988)) [hereinafter New York Arbitration Convention]. See also Carbonneau, *supra* note 12.



rights and values might be relegated to an invisible and unaccountable private sector. Increasing the mandate of the arbitral process might also imperil its legitimacy and capabilities. Civil rights claims should not be arbitrated in the same fashion as disputes concerning conformity to contract specifications or delivery. Thus, the addition of statutory claims could compromise arbitral operations and distort the adjudicatory purpose of the mechanism.

The current tendency to minimize the application of substantive inarbitrability, especially in the context of international arbitration, may be a necessary part of forging a modern destiny and role for arbitration. A new adjudicatory order may be developing that demands the re-evaluation of traditional concepts and attitudes. The transborder regulation of securities markets, for example, clearly implicates the public interest of various states. A claim of securities fraud brought under a given national law, however, can represent merely a contractual dispute between two parties to a private transaction that, despite the origin of the right, has no direct public law significance.<sup>24</sup>

The privatization of statutory claims via contract is a useful shield against public policy and public law considerations. The rights to be adjudicated, however, would not exist were it not for the governing national statute and the enabling sovereign authority. Moreover, the wholesale abandonment of substantive inarbitrability elicits an analytical response that transcends the fear of the unfamiliar. Arbitrability goes to the core of law and adjudication in any age and context. In a system guided not only by history but also by reason, arbitrability cannot be subdued to the point of extinction. Courts must remain legitimate. Decisions must have a juridical basis. Legal rules cannot simply be eviscerated to purge dockets, and the intrinsic meaning of rules cannot be denied to facilitate business or the national export of professional services.<sup>25</sup>

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24. See Robert W. Hillman, *Cross-Border Investment, Conflict of Laws, and the Privatization of Securities Law*, 55 LAW & CONTEMP. PROBS. 331 (1992). See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518, *reh'g denied* 419 U.S. 885 (1974).

25. The export of professional services appears to have motivated the enactment of the 1979 UK Arbitration Act, Arbitration Act, 1979, ch. 42 (Eng.). In the United States, the Supreme Court's decisional law on arbitration owes much to the Court's desire to achieve efficiency in the federal court system. For further, more detailed discussion, see THOMAS E. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS* 59-155 (1989); Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 233 (1990).

## V. THE UNITED STATES LAW ON ARBITRABILITY

The United States legal system is unique even within the common law tradition.<sup>26</sup> From the reliance on civil juries to the awarding of punitive, treble, and hedonic damages, to its development of contingency fees and class action lawsuits, the United States legal system is the fountainhead of creative, albeit unorthodox, contributions to legal science. The systemic uniqueness is even more apparent when the United States process is compared to its Romanist analogues in which civil codes, professional jurists and bureaucracies, and fixed interpretative training provide for more stable and predictable juridical determinations. While some United States contributions cause consternation and are met with disbelief in Europe,<sup>27</sup> others are emulated and used to establish precedent.<sup>28</sup>

The United States law of arbitration, especially on the question of arbitrability, falls squarely into the general pattern of United States legal developments. The law of arbitration in the United States has undergone several distinct stages of evolution, each responding to a particular view of the role and mission of arbitration. First, Congress enacted the FAA,<sup>29</sup> which was the result of lobbying efforts of several commercial organizations. It legitimized the contractual recourse to arbitration and ended a longstanding practice of judicial hostility toward arbitration.<sup>30</sup> The FAA was premised on the pragmatic beliefs that merchants have the right to seek a commercially-adapted brand of justice for contractual disputes<sup>31</sup> and that elaborate judicial proceedings are not necessary in self-regulating private sectors.<sup>32</sup>

Second, the institutional recognition of the legitimacy of arbitration was followed by a gradual federalization of the law of arbitration.<sup>33</sup> At

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26. See generally COMPARATIVE LAW FOR THE GLOBAL LAWYER (Thomas E. Carbonneau & L. Newman eds., forthcoming 1994).

27. For example, the awarding of treble damages in antitrust litigation and the pursuit of discovery practices abroad by United States lawyers.

28. The best example is the export of United States law firm organization and the model for commercial lawyering. Moreover, § 402A of the Restatement of Torts has been influential in framing foreign laws as have antitrust laws.

29. *Supra* note 10.

30. See CARBONNEAU, *supra* note 25, at 105-06 and sources cited therein.

31. See *id.* at 105-06.

32. See *id.* at 140-41 n.3.

33. See *id.* at 107-14.

first, the FAA was deemed to have created merely procedural rights; however, it slowly acquired the status of substantive law as the process of arbitration gained importance.<sup>34</sup> Interpreting Section 2 of the FAA as a congressional command to uphold individuals' contractual recourse to arbitration, the United States Supreme Court was determined to insulate arbitration from any dilatory reference to unfavorable state legislation.<sup>35</sup> As a consequence, most notably in specialized sectors like commerce and labor, the FAA governed, provided there was some basis for applying federal law (interstate commerce and the supremacy clause, for example).<sup>36</sup>

Third, these domestic developments converged with the United States Supreme Court's elaboration of a federal court doctrine on international commercial litigation and arbitration.<sup>37</sup> The Court adopted a highly internationalist view of transborder cases.<sup>38</sup> It reasoned that arbitration was a necessary component of the transnational commercial process.<sup>39</sup> Agreements to arbitrate and arbitral awards, therefore, had to be enforced.<sup>40</sup> The Court emphasized the sanctity of contract and the need for adjudicatory predictability in international commerce.<sup>41</sup> Accordingly, disputes that could not be submitted to arbitration under domestic law (securities and antitrust matters, for instance) could be

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34. *See id.* at 108.

35. *See* CARBONNEAU, *supra* note 25, at 108, 110-12. For cases interpreting this section, see *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) (emphasizing intent of FAA was to provoke expeditious resolution of claims); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding federal legislation created duty on federal and state courts to apply federal policy on arbitration in FAA); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (defining § 2 of FAA as congressional declaration of federal policy favoring arbitration agreements).

36. CARBONNEAU, *supra* note 25, at 108.

37. *New York Arbitration Convention*, *supra* note 23; *Mitsubishi*, 473 U.S. at 614 (holding antitrust claims can be submitted to arbitration in international setting); *Scherk*, 417 U.S. at 506 (finding importance of arbitration outweighs public policy interest in consumer protection in Securities Exchange Act); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (holding forum selection clause valid where both parties had special expertise and negotiation was at arm's length by experienced and sophisticated business people).

38. *See sources cited supra* note 37.

39. *Mitsubishi*, 473 U.S. at 629; *Scherk*, 417 U.S. at 506.

40. *Mitsubishi*, 473 U.S. at 629.

41. *Id.*

submitted to arbitration in the international context.<sup>42</sup> This dilution of substantive inarbitrability for transborder commercial matters, the Court reasoned, was necessary to further United States economic interests.<sup>43</sup> Since the post-World War II world had changed and the United States military and economic hegemony had been reduced, the Court concluded that the United States no longer could transact international business on its own terms.<sup>44</sup>

The elaboration of a distinct and more flexible policy on international commercial arbitration was not unique to United States law.<sup>45</sup> In fact, it had become and was to continue to be a fundamental part of modern arbitration statutes and the accompanying decisional law.<sup>46</sup> The transnationalism it embodied reflected the worldwide consensus underlying the New York Arbitration Convention.<sup>47</sup> The critical point of difference was that, while other countries had relaxed public policy and other enforcement requirements, the United States law had in addition loosened the substantive inarbitrability defense. Unlike the liberalization practice in other countries, the parallel developments in the United States not only had made the judicial attitude toward arbitration more accommodating, but also had expanded the jurisdictional scope of arbitration to include statutory claims.<sup>48</sup>

In the final stage of its development under the aegis of the Supreme Court's decisional law, the United States law on arbitration gained a unitary character.<sup>49</sup> The Court abandoned any mention of the specialty of international commerce and proclaimed that what applied to international arbitration also governed domestic arbitration.<sup>50</sup> The Court's pronouncements were always embedded in references to the FAA's provisions and to the original legislative purpose to validate the right of contractual recourse to arbitration.<sup>51</sup> Congressional amendments

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42. *Id.* at 640; *Scherk*, 417 U.S. at 516-17.

43. *Mitsubishi*, 473 U.S. at 628-32; *Scherk*, 417 U.S. at 516-17.

44. *Bremen*, 407 U.S. at 9.

45. See Carbonneau, *supra* note 12.

46. *Id.*

47. New York Arbitration Convention, *supra* note 23.

48. See Carbonneau, *supra* note 25.

49. *Id.*

50. *Id.*

51. *Id.*

to the FAA subsequently confirmed the content of the Court's rulings,<sup>52</sup> making a legislative repeal or amendment of the "emphatic federal policy" on arbitration unlikely. Accordingly, statutory claims based upon the securities acts, antitrust laws, RICO, and even civil rights legislation could be submitted to arbitration in a purely domestic setting.<sup>53</sup> Substantive inarbitrability no longer was a barrier to the right to select merely another remedy or form of trial, known as arbitration.<sup>54</sup> Contractual inarbitrability, in the form of a disparity of bargaining

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52. In 1988, Congress enacted § 16 of the FAA, severely limiting appeal of judicial rulings that confirm the recourse to arbitration and providing for appeal of judicial rulings that disfavor arbitration. § 16 provides:

- (a) An appeal may be taken from-
  - (1) an order-
    - (A) refusing a stay of any action under section 3 of this title,
    - (B) denying a petition under section 4 of this title to order arbitration to proceed,
    - (C) denying an application under section 206 of this title to compel arbitration,
    - (D) confirming or denying confirmation of an award or partial award, or
    - (E) modifying, correcting, or vacating an award;
  - (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
- (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order-
  - (1) granting a stay of any action under section 3 of this title;
  - (2) directing arbitration to proceed under section 4 of this title;
  - (3) compelling arbitration under section 206 of this title; or
  - (4) refusing to enjoin an arbitration that is subject to the title.

9 U.S.C. § 16.

53. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (compelling arbitration of ADEA age discrimination claim); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (enforcing predispute agreement to arbitrate between securities investors and brokerage firm with respect to investors' Securities Act claims); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (enforcing predispute arbitral agreement where investors brought claims under Securities Act and under RICO).

54. This statement refers to the Court's remark in *Rodriguez* and elsewhere that arbitration was simply a form of trial that had no impact upon the substantive content of the right under dispute. *Rodriguez*, 490 U.S. at 480. That characterization is hardly plausible and clearly subject to challenge.

position, adhesion, or a related but separate arbitration agreement,<sup>55</sup> also was eliminated as an obstacle to arbitral recourse. In effect, inarbitrability in both forms was relegated to a perfunctory status.

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55. The latter allusion refers to the federal court practice of consolidation. See *Maxum Foundations, Inc. v. Salus Corp.*, 817 F.2d 1086 (4th Cir. 1987) (permitting consolidation of related arbitral proceedings between owner and contractor and between contractor and subcontractor to promote efficiency); *Weyerhaeuser Co. v. Western Seas Shipping*, 743 F.2d 635 (9th Cir.), cert. denied, 468 U.S. 1061 (1984) (holding arbitral proceedings could not be consolidated where separate arbitration agreements did not provide for consolidation); *Compania Espanola de Petroleos v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir.), cert. denied, 426 U.S. 936 (1976) (upholding agreement to arbitrate executed by owner's agent). See also David E. Branson & Richard E. Wallace, Jr., *Court-Ordered Consolidated Arbitrations in the United States: Recent Authority Assures Parties the Choice*, 5 J. INT'L ARB. 89 (1988). But see *Government of Great Britain and Northern Ireland v. The Boeing Company*, 998 F.2d 68 (2d Cir. 1993) (holding that district court may not order consolidation of separate arbitral proceedings involving same questions of fact and law if parties have not agreed to consolidation). The FAA contains no mention of consolidation. Some federal courts rely on Rule 42(a) and Rule 81(a)(3) of the Federal Rules of Civil Procedure to order consolidation of arbitral proceedings. The circuits are divided on the question of consolidation: The Second Circuit espouses the view that the federal courts can order consolidations without an arbitration agreement to that effect or the consent of the parties. It employs an "interest of justice" analysis that looks to common questions of law and fact between the proceedings, the complexity of the related issues, and the danger of conflicting findings. But see *Boeing*, 998 F.2d at 68. The Fifth, Eighth, Ninth, and Eleventh Circuits take the position that consolidations cannot be ordered unless the parties have consented and the arbitration agreement provides for multiparty arbitration. The Fourth Circuit intermediates by stating that an agreement to allow consolidation can be inferred from the parties' agreement. See Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473 (1987); T. Evan Schaeffer, Comment, *Compulsory Consolidation of Commercial Arbitration Disputes*, 33 ST. LOUIS U. L.J. 495 (1989).

Australia, Canada, Ecuador, England, Hong Kong, and the Netherlands also provide for consolidation. The English practice requires the consent of both parties; Hong Kong law gives the courts wide discretion to order consolidation with or without party consent; while Australia follows the English practice of consensual consolidation. The Netherlands Arbitration Act of 1986 allows parties to seek an order of consolidation, "unless the parties have agreed otherwise." One party may seek consolidation and the decision is within the court's discretion. See The Netherlands Arbitration Act 1986, art. 1046(1), translated in PIETER SANDERS AND ALBERT JAN VAN DEN BERG, *THE NETHERLANDS ARBITRATION ACT 1986*, 26 (1987). See generally ISAIAK I. DORE, *THEORY AND PRACTICE OF MULTIPARTY COMMERCIAL ARBITRATION* (1990); Julie C. Chiu, *Consolidation of Arbitral Proceedings and International Commercial Arbitration*, 7 J. INT'L ARB. 55 (1990); Howard S. Miller, *Consolidation in Hong Kong: The Shui On Case*, 3 ARB. INT'L 87 (1987).

Consolidation may raise enforcement problems under Article V(1)(d) of the New York Arbitration Convention. See G. BERNINI, *CONSENSUAL MULTIPARTY ARBITRATION: PRINCIPAL ISSUES RAISED IN JUDICIAL REVIEW AND ENFORCEMENT PROCEEDINGS* (1991).

This extraordinarily radical development in United States arbitration law coincided with the meteoric rise of the alternative dispute resolution (ADR) movement and the concomitant paralysis of federal judicial administration.<sup>56</sup> ADR, arbitration especially, had been touted by two successive Chief Justices as an essential alternative method of dispensing justice.<sup>57</sup> With increasingly limited public resources and the volume of and delays associated with drug cases and other forms of criminal litigation, the federal court system had become and remains stymied by the enormity of dockets and elaborate constitutional criminal protections. ADR, arbitration in particular, offered a means of channelling non-criminal litigation to private adjudicatory processes. The 1990 Civil Justice Reform Act<sup>58</sup> manifested congressional affirmation of the Court's view that federal courts no longer could effectively or efficiently dispense justice in civil, commercial, and some political rights cases.

In short, frontier politics prevailed in United States arbitration law. Some interests had to be abridged or eliminated to afford safe passage to other more important interests. The only means of salvaging the justice system was to have arbitrators function as *de facto* federal judges in a private setting and at the cost of the parties instead of the taxpayers. The United States no longer could afford the brand of justice required by the federal constitution. Lawyerly due process had turned on itself and the system it served.<sup>59</sup> Only a few societal and political interests were given the privilege of being guided by the rule of law.

As a further result, lawyers invaded the arbitration process.<sup>60</sup> The due process principles that paralyzed the federal court system began to infest arbitral proceedings.<sup>61</sup> Given that the arbitral process now ruled upon significant litigious concerns, it needed to be judicialized.<sup>62</sup> The

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56. See CARBONNEAU, *supra* note 25, at 1-5 and sources cited therein.

57. See *id.* (referring to Chief Justices Burger and Rehnquist).

58. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified at 9 U.S.C. §§ 201-208 (1993)).

59. See CARBONNEAU, *supra* note 25, at 1-5.

60. See Richard Karp, *Wall Street's New Nightmare: For Brokerage Firms, Arbitration Has Turned Unexpectedly Nasty*, BARRON'S, Feb. 21, 1994, at 15.

61. *Id.*

62. See Thomas E. Carbonneau, *National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 115 (Richard B. Lillich & Charles N. Brower eds., 1994).

adjudicatory character of arbitration was transformed as a result of its new mission and by the fact that it no longer was protected and circumscribed by substantive and contractual inarbitrability.

The implications of this development for American society are as extraordinary as the court decisions themselves. For all but criminal prosecutions, citizens may seek recourse in the judicial system, which requires waiting years before the federal dockets permit operation of due process of law and equal protection, or agree to resolve their disputes through private adjudication at their own cost. Moreover, the implementation and interpretation of substantial pieces of national legislation, such as the securities laws, RICO, and the Sherman Act, are delegated to private adjudicators sitting in confidential proceedings which do not produce public opinions. The statutes do not involve matters of timely delivery or frustration of purpose, but provide essential civil liberties and consumer protection and articulate the nation's political and economic creed. The solution to the problem of limited accessibility to the judicial system makes federal justice even more inaccessible and gives arbitration whatever claims that can be shoved in its direction on whatever basis.<sup>63</sup> The Bill of Rights, in effect, was amended, if not rewritten, without any public discussion and without generating any significant public or professional attention.<sup>64</sup>

The critical question for comparative purposes is whether the decline of substantive inarbitrability, announced in the international decisions and eventually followed in the domestic rulings, will be perceived by other legal systems as a self-contained United States eccentricity or as a development worthy of emulation. It is difficult to understand the attraction of the federal case law.<sup>65</sup> The domestic cases are poorly reasoned and transparently designed to achieve a particular result no matter how unconvincing the logic.<sup>66</sup> The Court appears to care little about the institution of arbitration and its fate, and even less about understanding its processes. The international cases have more substantial and rigorous analytical content, but their reasoning and rationale are embedded outright in policy. High-minded idealism is masterfully combined with the dictates of pragmatism, giving the opinions considerable currency in the age of globalization. Despite the ideological

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63. See *Carbonneau*, *supra* note 25.

64. See *id.*

65. See *id.*

66. *Id.*



and intellectual glow of the international cases, they do not eliminate skepticism about their central thesis.

Civil law courts demonstrated a more systematic and cogent understanding of the law of arbitration in prior decisional rulings on the subject. The civil law version of the legal regulation of arbitration is founded upon the proposition that arbitration is a creature of contract and that, pursuant to well-settled principles, the contractual recourse to arbitration is limited to those areas in which rights fall within the domain of contractual freedom (*droits disponibles*).<sup>67</sup> The state maintains its authority and responsibility to safeguard the public interest by adjudicating claims that implicate the larger interests of society. In terms of basic principles, the civil law recognizes a clear distinction between contractual and statutory claims, between the jurisdictional domain of arbitration and the public authority and adjudicatory duties of the judiciary.

The *Scherk v. Alberto-Culver* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* rulings, however, stand in contradistinction to the traditional civilian view. Despite the recognition of court-ordered consolidation in one European statute,<sup>68</sup> the French Court of Cassation appeared to hold fast to settled principles in a recent decision on multi-party arbitration, refusing to extend the effect of a contract beyond its specifically agreed-upon perimeters and parties.<sup>69</sup> Other recent French judicial decisions, however, demonstrate that the United States Supreme Court's decisional law on substantive inarbitrability has made considerable inroads into French legal thinking, nearly acquiring the force of precedent among French lower courts.

This unexpected shift of position is understandable in light of the competition surrounding the export of arbitration laws and services. The liberalization of rules for international matters gives the national jurisdiction a non-nationalistic image and confirms its allegiance to globalization. The elimination of arbitrability from the legal regulation of arbitration, as if a more moderate approach is impossible, however, remains difficult to understand and to accept even in transborder relations. To their credit, the French opinions, no matter how staggering the final disposition, still exhibit an intimate understanding of the institution of

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67. CODE CIVIL [C. CIV.] art. 2059 (Fr.).

68. The Netherlands Arbitration Act 1986, *supra* note 55, art. 1046.

69. See Judgment of Jan. 7, 1992, Cass. civ. I, 7 INT'L ARB. REP., Feb. 1992, at B-1 (Fr.).

arbitration and rely upon the force of well-wrought logic to arrive at their determinations.

## VI. THE FRENCH LAW ON ARBITRABILITY

French law distinguishes between objective and subjective inarbitrability.<sup>70</sup> The distinction is roughly comparable to substantive and contractual inarbitrability. Objective inarbitrability prohibits arbitration by reason of the subject matter of the dispute, while subjective inarbitrability relates to deficiencies in contractual capacity or other problems in the formation of the agreement.<sup>71</sup> The purpose underlying objective inarbitrability is to preserve the integrity of the public interest in adjudication.<sup>72</sup> Subjective inarbitrability regulates the contractual validity of agreements to arbitrate in the context of particular arbitral proceedings.<sup>73</sup>

In contrast to its United States counterpart, the French law on arbitrability is based upon express provisions of law. Articles 2059 and 2060 of the Civil Code<sup>74</sup> contain abstract formulations that outline the general contours of substantive inarbitrability. Recourse to arbitration is permitted in contractual matters, impliedly prohibited in the adjudication of statutory rights and the application of mandatory law, and expressly prohibited for matters that pertain to public policy.<sup>75</sup>

Article 2059 legitimizes the recourse to arbitration in the adjudication of contractually accessible rights (*droits disponibles*).<sup>76</sup> These are personal rights over which individuals have basic authority and discretion.<sup>77</sup> The rights that proceed from contract only implicate the domain of public law in the sense that the exercise of individual rights

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70. Patrice Level, *L'Arbitrabilité*, REVUE DE L'ARBITRAGE 213, 219 (1992). This difference is similar to the distinction between objective law (*droit objectif*) and subjective law (*droit subjectif*). JEAN-PIERRE GRIDEL, NOTIONS FONDAMENTALES DE DROIT ET DROIT FRANÇAIS: INTRODUCTION MÉTHODOLOGIE SYNTHÈSES 7-8 (1992).

71. Level, *supra* note 70, at 232.

72. *Id.*

73. *Id.*

74. C. CIV. arts. 2059-2060.

75. *Id.*

76. *Id.* art. 2059. The Article provides that "all persons may make arbitration agreements on rights of which they have the free disposition." *Id.*

77. Level, *supra* note 70, at 219.

cannot violate the strictures of public policy.<sup>78</sup> Moreover, such rights, despite their private character, emerge from the political will of the state, the ultimate purveyor of rights within political society.<sup>79</sup>

Statutory rights differ from contractually accessible rights.<sup>80</sup> Statutory rights are political commands, enacted in the name of the common good, which are for or against certain types of conduct or groups in society.<sup>81</sup> Within this category of rights, individual prerogative ceases and the collective interest takes hold.<sup>82</sup> Statutory rights, born not of contract but directly of political authority, are therefore inarbitrable because their content and character transcend the private realm of contractual privilege.<sup>83</sup>

Accordingly, Article 2059 expressly permits arbitration in the domain of contract, while it impliedly precludes arbitration in subject areas that the state regulates via statutes for the public good.<sup>84</sup> Article 2060 reinforces the implied content of Article 2059 by prohibiting arbitration generally in all matters pertaining to public policy.<sup>85</sup> Article 2060 specifically lists areas in which the public policy bar to arbitration applies, including matters of status and capacity, divorce, and disputes to which the state is a party.<sup>86</sup> Public policy matters, therefore, encompass activities that can be performed only by a duly-constituted government and that are instrumental to its political mandate and public mission.<sup>87</sup>

Under Article 2060, a wide range of private disputes arising in a variety of areas of French law were deemed inarbitrable for reasons of public policy.<sup>88</sup> The public policy bar in Article 2060 encompassed any

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78. *Id.*

79. *Id.*

80. *Id.* at 220.

81. *Id.*

82. Level, *supra* note 70, at 220.

83. *Id.*

84. C. CIV. art. 2059.

85. *Id.* art. 2060. The Article provides that "[t]here may not be arbitration agreements on questions of status and capacity of persons, on those relative to divorce and judicial separation or on disputes involving public organizations and public institutions and more generally in all matters which concern public policy." *Id.* See also Judgment of Jan. 20, 1989, Cour d'appel de Paris, REVUE DE L'ARBITRAGE 280, 288 (1989) (Fr.).

86. C. CIV. art. 2060.

87. GRIDEL, *supra* note 70, at 74.

88. Level, *supra* note 70, at 234-35.

dispute involving the application or interpretation of mandatory law.<sup>89</sup> For example, the imposition of criminal liability and sanctions, although not specifically mentioned in Article 2060's abbreviated list, presumably fit into its purview because the criminal process compromises individual rights as it acts to further public security.<sup>90</sup> In the civil setting, statutes establishing rights for groups of individuals, especially for reasons of ideological or political conviction, also implicated public policy and were, therefore, outside the contractual privilege of arbitral recourse.<sup>91</sup> Labor laws are a particularly good illustration of such laws in the French and European context.

In addition to the matters specifically enumerated and those integrated by implication into the prohibition of arbitration under Article 2060, one would assume that litigation pertaining to testamentary dispositions, immovable property, and family law matters, including, but not limited to, the pronouncement of divorce, would be substantively inarbitrable as well.<sup>92</sup>

Under the provisions of the Civil Code, therefore, the effect of substantive inarbitrability remains particularly vigorous when the state acts to give identity to the polity and its members (e.g., attributing civil status, legal capacity, nationality, marital status) or to limit the freedom or property rights of individuals for general security purposes (e.g., criminal liability and sanctions), or when basic and essential individual rights are at stake (e.g., political liberties, privacy, and personality interests).<sup>93</sup> Arbitrators cannot rule on these matters because they pertain

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89. *Id.*

90. *Id.* at 227.

91. *Id.* at 228.

92. Public law matters involving the relationship between the state and private individuals also come within the ambit of the public policy bar in Article 2060. French law distinguishes between private law (*droit privé*) and public law (*droit public*). According to Gridel, *droit privé* is "le droit de la reconnaissance, de la défense et de la mise en oeuvre des intérêts privés" and *droit public* "institute les personnes et pouvoirs publics, définissant, outre les activités de ceux-ci, les modes de gestion des services publics. Il est la mise en oeuvre du régime de puissance publique." GRIDEL, *supra* note 70, at 82, 73. In civil law systems, public law matters are subject to an entirely separate body of law, court system, and supreme court. See *id.* at 75. This exercise of state authority involves a more complex measure of legal accountability than the civil litigation of private disputes. See *id.* State conduct always implicates a public mission that involves collective interests. But see (as to international matters) Yves Gaudemet, *L'Arbitrage: Aspects de Droit Public, Etat de la Question, Revue de L'Arbitrage* 241 (1992).

93. GRIDEL, *supra* note 70, at 530.

to the state's basic mission and core functions.<sup>94</sup> This is precisely the meaning of public policy as it relates to substantive inarbitrability.

Although the architecture of the Civil Code establishes clear guidelines for defining the scope of arbitral jurisdiction, the French courts began to question key concepts and discover definitional ambiguity in the provisions. When does a right become accessible by contract? When is public policy an absolute bar to the arbitration of a claim involving an alleged breach of a statutory right? What if a dispute implicates mandatory law only in a subsidiary fashion?

The development of a more subtle domestic decisional law on substantive inarbitrability began in 1950 with *Tissot v. Neff*.<sup>95</sup> The objective of the ruling was to develop a judicial doctrine that would compensate for the absence of *kompetenz-kompetenz*<sup>96</sup> in the prevailing French arbitration law. The lack of arbitral authority to rule on jurisdictional challenges allowed parties to undermine the reference to arbitration by alleging that the dispute involved public policy violations. Such challenges at least delayed and could completely undermine the arbitral tribunal's ability to rule on the dispute.

In an attempt to remedy the lacuna, the French Court of Cassation ruled that the mere convergence of public policy provisions with the merits of a contractual dispute did not necessarily render the dispute inarbitrable. Emphasizing the central importance of Article 2059,<sup>97</sup> the Court established the doctrine of the selective inarbitrability of statutory rights. Although the subject matter of some disputes was per se inarbitrable, other disputes could be submitted to arbitration if the statutory provision generated an actionable individual right in the circumstances.<sup>98</sup> In effect, the Court held that disputes involving claims

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94. *Id.*

95. Judgment of Nov. 28, 1950 (*Tissot v. Neff*), Cass. com. [1950] Bull. Civ., No. 316, at 154 (Fr.) [hereinafter *Tissot*].

96. See NOUV. C. PR. CIV. art. 1466, which provides "si, devant l'arbitre, l'une des parties conteste dans son principe, ou son étendue le pouvoir juridictionnel de l'arbitre, il appartient à celui-ci de statuer sur la validité ou les limites de son investiture." *Id.* See also Judgment of May 19, 1993 (*Société Labinal v. Sociétés Mors et Westland Aerospace*), Cour d'appel de Paris, REVUE DE L'ARBITRAGE 645 (1993) (Fr.) [hereinafter *Labinal*] (permitting reference to arbitration in dispute implicating international public policy issues).

97. *Tissot*, [1950] 7 Bull. Civ. No. 316 at 154.

98. See generally Level, *supra* note 70, at 222, 232, 233, 236, 237. Article 2060 reflected the nineteenth century precept of non-interventionist government policy in economic matters. After 1950, as an activist French government policy developed and

of mandatory law violations were not per se inarbitrable.<sup>99</sup> Rather, such disputes became selectively inarbitrable, or inarbitrable only when a statutory breach had actually taken place.<sup>100</sup> In the Court's view, inarbitrability arose, not from the mere application of mandatory law to a dispute, but from a direct public policy violation.<sup>101</sup>

This rather opaque distinction, in effect, gave arbitrators ruling under French law the equivalent of *compétence sur la compétence* authority.<sup>102</sup> Arbitrators now could determine for themselves (subject to later judicial review) whether a public policy violation had taken place and prevented them from ruling on the merits. It also created confusion among doctrinal writers and lower courts.<sup>103</sup> As the ruling took hold,

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statutory economic law grew, Article 2060 became obsolete. The activist state began to intervene either to proscribe or prescribe certain types of conduct in the furtherance of the public good, protection of creditors, or maintenance of the integrity of the marketplace. As a result, the application of these laws triggered disputes between private parties, and questions arose as to whether provisions for arbitration remained lawful in regard to those claims.

In an attempt to adapt the law to this evolution, the French Court of Cassation shifted the central analytical reference from Article 2060 to Article 2059 by distinguishing between disputes that were per se inarbitrable and disputes that merely involved allegations of a violation of mandatory law. Under Article 2059, disputes that were per se inarbitrable either directly implicated public policy or centered upon contractually inaccessible rights.

99. *Tissot*, [1950] 7 Bull. Civ. No. 316 at 154. See generally Level, *supra* note 70.

100. *Id.*

101. *Id.*

102. Judgment of June 15, 1956, Paris 1re, 1956 J.C.P. II, No. 9419 (Fr.); Judgment of May 7, 1963, Cass. Civ. 1re, 1963 J.C.P. II, No. 13405 (Fr.); Judgment of Nov. 29, 1968, Colmar 2e, 1970 J.C.P. II, No. 16246 (Fr.). These cases attempted to prevent dilatory tactics from frustrating the recourse to arbitration. The claim of public policy violation could send the matter to court because the agreement to arbitrate might also be void. The rulings allowed the arbitrators to determine whether public policy had indeed been violated. These problems were eventually eliminated by the judicial and legislative recognition of the *kompetenz-kompetenz* doctrine in both domestic and international arbitration. See Judgment of May 7, 1963, *supra*; NOUV. C. PR. CIV. art. 1466.

103. The principle received a surprisingly wide application in a number of areas. For example, the doctrine of selective inarbitrability has affected the inarbitrability of both matrimonial and testamentary rights. See Judgment of Jan. 25, 1963, Cass. civ. 2e, 1964 J.C.P. II, No. 13472 (Fr.) (settling community property dispute by arbitration); Judgment of Nov. 7, 1974, Cass. civ. 2e, REVUE DE L'ARBITRAGE 302 (1975) (Fr.) (settling dispute regarding share in estate by arbitration). Its application to labor law rights also created controversy. It should be noted that French labor and social security laws provide a complete and comprehensive protection to employees; in certain cases, this protection includes criminal penalties for violations. See Decree No. 85-1388 of Dec. 27, 1985, art.

however, it came to represent the view that the presence of public policy in litigation, especially regulatory provisions involving economic issues,<sup>104</sup> could not prevent arbitrators from fulfilling their adjudicatory responsibilities under the contract. It, therefore, became increasingly difficult to identify subject areas that were inarbitrable. In fact, under Article 2060, only matters of status and capacity and the fundamental rights of privacy and personality, as well as bankruptcy protection and patent infringement, are now clearly within the reach of substantive inarbitrability under the French law.<sup>105</sup>

As a consequence, the French courts have held that the statutes establishing special rights for employees, consumers, and lessees, for example, allow some measure of private contractual determination.<sup>106</sup> While public policy may prohibit the arbitration of employee claims arising from the performance of an employment contract, arbitration may be invoked once the violation of a statutory right occurs.<sup>107</sup> The French courts reason that the statutory protections afforded to employees, conferred as a matter of political authority, are established for the benefit of private individuals.<sup>108</sup> Generally, these rights are per se inarbitrable

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174. 1986 D.S.L. 84 (Fr.); Law No. 78-742 of July 13, 1978, art. 57, 1978 D.S.L. 315 (Fr.).

104. See Laurence Idot, *Arbitrabilité et Application du Droit de la Concurrence par l'Arbitre*, REVUE DE L'ARBITRAGE 280 (1989).

105. As a matter of principle, the basic rule of decision for arbitrability is clear: Statutory rights cannot be submitted to arbitration. The rule is akin to the prohibition in French law against plea-bargaining. Under French notions, a defendant cannot barter about what the criminal law provides. Courts do justice according to law and in the name of the state. Their jurisdiction in these matters is exclusive and clearly intolerant of private party interference. The analogy between substantive inarbitrability and plea-bargaining is pertinent, however, only at the level of abstract principle. See also Judgment of Feb. 4, 1992, Cass. civ. 1re, [1992] Bull. civ. No. 38, at 28 (Fr.) (reversing Judgment of Jan. 26, 1990, Cour d'appel de Paris, 1991 D.S. Jur. 127). The law of July 13, 1978, however, provides that the Tribunal de grande instance has exclusive jurisdiction to hear these disputes, and a number of commentators view infringement cases as involving a determination of the validity of the patent. Law No. 78-742, 1978 D.S.L. at 315.

106. Judgment of Nov. 5, 1984, Cass. soc., 1985 J.C.P. II, No. 20510 (Fr.); Judgment of Dec. 30, 1954, Cass. soc., 1955 D. Jur. 321 (Fr.); Law No. 48-1360 of Sept. 1, 1948, art. 16, 1948 J.C.P. III, No. 13528 (Fr.).

107. Judgment of Nov. 5, 1984, at 1985 J.C.P. II, No. 20510. See C. TRAV. art. 511-1. The Article states "les conseils de prud'hommes...règlent par voie de conciliation les différends qui peuvent s'élever à l'occasion de tout contrat de travail...entre les employeurs...et les salariés qu'ils emploient." *Id.*

108. See cases cited *supra* note 105.

and subject to the mandatory jurisdiction of the designated courts when they are expressions of social and political public policy.<sup>109</sup> As a right benefitting a particular individual, however, they become part of *droits disponibles*, enter the domain of contractual prerogatives, and become arbitrable.<sup>110</sup>

The French Court of Cassation itself has held that disputes pertaining to an employment contract, such as overtime pay, paid vacations, promotions, or severance allowance, are inarbitrable only for as long as the contract of employment is in effect.<sup>111</sup> The rationale for specialized remedies before the labor courts is to realign the disparity of position between employers and employees during the period of employment.<sup>112</sup> Employees must be protected while they are under the employer's authority and supervision.<sup>113</sup> Once the contract of employment is terminated, however, employee disabilities cease.<sup>114</sup> At this point, the statutory right is transformed into a contractually accessible right, arbitrable through a submission agreement.<sup>115</sup>

Another example is the French law on leases. These laws contain strict regulatory provisions which prevent over-reaching by setting rental amounts and terms for the renewal of leases.<sup>116</sup> Despite the public policy character of these regulations, parties can refer disputes to arbitration.<sup>117</sup> Arbitrators can rule on the rent due under a residential lease as long as the ruling on the amount owed is within the mandatory statutory limits.<sup>118</sup> Arbitrators also can rule on claims pertaining to the right of renewal, provided the lease is terminated at the time of arbitration.<sup>119</sup> Public policy merely prohibits a breach of the right.

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109. GRIDEL, *supra* note 70, at 530.

110. Judgment of Nov. 5, 1984, at 1985 J.C.P. II, No. 20510.

111. *Id.*

112. Level, *supra* note 70, at 227.

113. *Id.*

114. *Id.*

115. *Id.*

116. Judgment of Dec. 30, 1954, Cass. soc., 1955 D. Jur. 321 (Fr.); Law No. 48-1360 of Sept. 1, 1948, art. 16, 1948 J.C.P. III, No. 13528 (Fr.).

117. See cases cited *supra* note 105.

118. *Id.*

119. *Id.*



Once a breach occurs, some of the consequences of the violation can be arbitrated.<sup>120</sup>

The doctrine of selective inarbitrability of statutory rights has enabled the French courts to redefine the significance and role of substantive inarbitrability in French domestic law. The distinction between the inarbitrability of statutory rights and the arbitrability of the consequences of a breach of a statutory right, which vest a personal contractual right at the time of breach, upholds the principle of the code provisions, but is coterminous with United States common-law precedent. The stature and scope of substantive inarbitrability have dwindled subtly but mightily. A few areas, such as bankruptcy and patent infringement, remain where French law maintains a public-law-inspired concept of inarbitrability, but the tendency is clearly toward nearly unlimited arbitrability.

#### VII. THE FRENCH CONCEPT OF INARBITRABILITY AND INTERNATIONAL ARBITRATION

Recent landmark cases reflect a substantial alignment of the French law on arbitrability with its United States counterpart in the international area as well.<sup>121</sup> Given the Court of Cassation's ruling on the consolidation of related but different international arbitral proceedings,<sup>122</sup> it was plausible that the French approach toward transborder arbitral jurisdiction might provide some necessary legal limits upon the process, while remaining a strong proponent of the mechanism. In light of *Société Labinal v. Sociétés Mors et Westland Aerospace*<sup>123</sup> and arbitration decisions in other European jurisdictions,<sup>124</sup> however, the aspiration toward order and structure in the world law of arbitration will seemingly be disappointed.

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120. *Id.*

121. These decisions have been decided by the strategically important Paris Court of Appeal. This Court has prepared the way for the elaboration of the most significant developments in French arbitration law.

122. See, e.g., Judgment of Jan. 7, 1992, Cass. Civ. 1re, 7 INT'L ARB. REP., Feb. 1992, at B-1 (Fr.).

123. *Labinal*, REVUE DE L'ARBITRAGE 645.

124. See cases cited *infra* notes 140, 142.

*Société Ganz v. Société Nationale des Chemin de Fers Tunisiens*,<sup>125</sup> decided in 1991, extended the *Tissot* reasoning into international arbitration and set the stage for an ambitious re-evaluation of public policy and substantive inarbitrability in international arbitration cases. It represented the first step in assigning substantial and fully autonomous powers over public policy and the implementation of arbitrability to international arbitrators. The Paris Court of Appeal ruled that arbitrators have not only the authority but also the jurisdictional right to apply the rules of international public policy.<sup>126</sup> Their task as private judges includes the responsibility of assuring party compliance with these rules.<sup>127</sup> International arbitrators, therefore, may even impose sanctions for the parties' failure to abide by the rules of international public policy.<sup>128</sup>

In *Ganz*, the redirection of the French law of arbitrability led to an elaboration of a rather spectacular rule of law for international arbitration. With the new emphasis on Article 2059 in French domestic law, arbitrators were prevented from ruling only when adjudication of the case clearly involved an actual violation of a public policy statute. In international arbitration, the rule became even more accommodating: arbitrators were declared custodians of international public policy and could rule on public policy violations as long as they did not attempt to impose criminal sanctions.

*Labinal* completed the French judicial deconstruction of the international public policy bar and shifted judicial focus to the substantive inarbitrability defense.<sup>129</sup> The Paris Court of Appeal eliminated any lingering doubts about the import of the French international decisional law. After *Labinal*, statutory claims can be submitted to international arbitration and the public policy underlying the national law giving rise to the statutory claim is completely ineffective to preclude the reference to arbitration.<sup>130</sup>

In *Labinal*, the litigation involved Community competition laws<sup>131</sup> and, consequently, the allegation that national courts and the

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125. Judgment of Mar. 29, 1991 (*Société Ganz v. Société Nationale des Chemin de Fers Tunisiens*), Cour d'appel de Paris, REVUE DE L'ARBITRAGE 478 (1991) (Fr.).

126. *Id.* at 480.

127. *Id.*

128. *Id.*

129. *Labinal*, REVUE DE L'ARBITRAGE at 650.

130. *Id.* at 650.

131. *Id.* at 646.

European Court of Justice had exclusive jurisdiction to hear the dispute.<sup>132</sup> The Paris Court of Appeal rejected this argument, holding that:

[I]n matters international, the arbitral tribunal assesses its own jurisdictional authority in regard to the arbitrability of the dispute pursuant to international public policy and has the authority to apply the principles and rules that emerge from it and to sanction instances of non-compliance under the supervision of the court of enforcement.<sup>133</sup>

The Court added that, although international arbitrators could not grant injunctions or assess fines, they "could nonetheless impose civil liability for conduct they found to violate the rules of [international] public policy."<sup>134</sup>

The French rulings parallel the United States Supreme Court decision in *Mitsubishi*. *Mitsubishi* also held that the specialty of transborder commerce and the autonomy of the international arbitral process required arbitrators to have the jurisdictional capacity to rule upon statutory claims.<sup>135</sup> In effect, both the United States and French courts appointed international arbitrators, rather than national legislatures, as custodians and, ultimately, as promulgators of international public policy.<sup>136</sup> Given the breadth of the holdings, international public policy

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132. *Id.*

133. *Id.* at 650.

134. *Labinal*, REVUE DE L'ARBITRAGE at 650. The Court of Appeal confirmed its holding in a subsequent case. See Judgment of Oct. 14, 1993 (*Société Aplex v. Société Velcro*), Cour d'appel de Paris, REVUE DE L'ARBITRAGE 164 (1994) (Fr.) [hereinafter *Velcro*]. The Court reiterated the basic tenets of the *Ganz-Labinal* doctrine: A dispute is arbitrable even though a public policy provision applies to the dispute. In matters of international arbitration (e.g., in the application of EC competition laws), arbitrators have the authority to assess their jurisdictional authority according to international public policy. They can apply public policy provisions and impose civil liability for their breach, subject to the scrutiny of the court of enforcement. Arbitrators, however, cannot impose fines. The *Velcro* decision adds that international arbitrators, like national courts, cannot assert jurisdiction over EC matters that are within the exclusive jurisdiction of EC institutions, such as the European Commission. Nor can they apply EC laws relating solely to institutions, rather than individuals. See Charles Jarosson, *Répertoire pratique de l'arbitrage commercial international*, REVUE DE L'ARBITRAGE 170 (1994).

135. *Mitsubishi*, 473 U.S. at 636-37.

136. *Labinal*, REVUE DE L'ARBITRAGE at 645. See also Jarosson, *supra* note 134, at 653, 655.

includes not only competition law, but also every other type of economic regulation including tax, currency, and customs.<sup>137</sup> In each case, the delegation of jurisdictional authority is accompanied by the caveat that the arbitral tribunal's disposition of the statutory claim can be supervised by the court of enforcement.<sup>138</sup> In both *Mitsubishi* and *Labinal*, the formulation for safeguarding the national public interest hardly addresses the true practical concerns. It is not clear, for example, whether the relevant court will have any interest in the statutory law or be willing to engage in a merits review prohibited by the New York Arbitration Convention.<sup>139</sup>

The French courts are not alone in succumbing to the aura of *Mitsubishi* and the surfeit of liberality in regard to international arbitration. A Swiss federal tribunal recently nullified an international arbitral award because the arbitral tribunal did not base the award on European Community competition law.<sup>140</sup> The arbitral tribunal refused to apply Community law on the ground that it was only empowered by contract to apply Belgian law.<sup>141</sup> In light of the federal tribunal's decision, it seems that international arbitrators not only are justified in ruling upon public policy matters, but also are obligated to do so whenever the dispute demands it. Thus, substantive inarbitrability not only cannot prevent arbitration in matters of regulatory law, but also forces arbitrators to rule on regulatory matters even when they believe that they have no jurisdiction over such issues.

Another example of the excessive liberality in international arbitration law is found in an opinion issued in 1992 by the German Supreme Court for Civil, Commercial, and Criminal matters.<sup>142</sup> The Court suggested that customary trade usage could serve as a basis for an implied arbitration agreement in a sales contract that omitted the reference to arbitration.<sup>143</sup> The holding represents yet another challenge to the viability of the arbitrability concept. It appears to attack directly the function of the contractual inarbitrability defense. Private agreements to arbitrate no longer provide exclusive access to the arbitral process.

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137. *Mitsubishi*, 473 U.S. at 637.

138. See Jarrosson, *supra* note 134, at 656.

139. See Carbonneau, *supra* note 18.

140. See Judgment of Apr. 28, 1992, REVUE DE L'ARBITRAGE 124, 136 (1993).

141. *Id.* at 134-35.

142. Judgment of Mar. 12, 1992, reprinted in 28 NEUE JURISTISCHE WOCHENZEITSCHRIFT (NJW), July 14, 1993, at 1798 (Ger.).

143. *Id.*

Eminent French doctrinal writers have advanced a host of reasons to sustain the latest national contribution to international arbitral autonomy.<sup>144</sup> The *Labinal* ruling is seen variously as necessary, inevitable, and highly desirable.<sup>145</sup> To complete the parallel to *Mitsubishi* and its progeny, one commentator suggests that the *Labinal* ruling also should apply to matters of domestic arbitration.<sup>146</sup> The proponents of the majority trend believe steadfastly that public policy considerations should never interfere with the exercise of the arbitral mandate.<sup>147</sup> Arbitral tribunals should be empowered to rule and assess the scope and foundation of their own jurisdictional authority.<sup>148</sup> Public policy considerations linked to statutory regulations should not prevent arbitrators from undertaking and fulfilling their adjudicatory functions.<sup>149</sup> The contract of arbitration should mean that arbitrators rule. The dictates of public policy or of juridical subject matter should not frustrate that contractual command.

### VIII. CONCLUSIONS

Although the tempo and logic differ, "a-legality"<sup>150</sup> informs the arbitral decisional law of the United States Supreme Court and the French courts alike. Each madness has its own method. The United States Court simply denies the existence of arbitrability's traditional function and supplants it with its own version of how it should operate. The French courts, ever faithful to the canons of Romanist interpretation, peel away at the content of existing rules until the subtlety of distinctions silently alters and eventually undermines the rules. Given the decisions of other national courts, it is clear that a-legality has become the new heading of world arbitration law.<sup>151</sup>

Arbitration, privatization, and globalization are the new watchwords. At the end of the day, transborder adjudication will be

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144. See Bertrand Moreau, *Introduction to REVUE DE L'ARBITRAGE* 193 (1992).

145. *Id.*

146. See Jarrosson, *supra* note 134, at 658.

147. Moreau, *supra* note 144, at 195-98.

148. *Id.*

149. *Id.*

150. See Thomas E. Carbonneau, *A-legality and Arbitration: The German Supreme Court Joins the Fray*, 4 *AM. REV. INT'L ARB.* (forthcoming 1994).

151. For a discussion of world arbitration law, see *id.*

guided by the dictates of the marketplace and the international commercial community and completely exempt from the reach of sovereign national authority. Law will be generated within the confines of a fully privatized system that is unaccountable to any public organization or process. Arbitrators, lawyers, arbitral institutions, and law firms will become the *de facto* government and the courts of international trade and commerce.

The abuses that may arise from this new legal abandonment of arbitration probably can be averted or cured by the growing participation of lawyers in the process and by the professionalism of arbitrators and arbitral institutions. The likely effect, however, will be the development of the arbitral process into not only a *de facto* court system, but also an adjudicatory mechanism governed by lawyerly "values." Ironically, these values initially triggered the migration both internationally and domestically toward the arbitral process.