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SYMPOSIUM: INTERNATIONAL ARBITRATION

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SYMPOSIUM: INTERNATIONAL ARBITRATION

INTERNATIONAL ARBITRATION BETWEEN STATES:
THE FUTURE PROSPECTS

K. R. Simmonds*

In a recent essay,1 Bin Cheng has written that "[the] Alabama Arbitration (1872) marked the zenith of the prestige of international adjudication and indeed of the whole image of international law. It created the myth that international law and arbitration can by themselves effectively replace war and it was this myth2 which led eventually to the establishment of first the Permanent Court of Arbitration and subsequently the Permanent Court of International Justice."

THE INSTITUTION OF INTERNATIONAL ARBITRATION SINCE 1872

I would agree with a comment made by the late Judge Baxter—that there never was a golden age of international adjudication, much as we might like to believe the contrary. Simpson and Fox, among others, claim that the Jay Treaty of 1794 "rescued arbitral process as a means of settling international disputes from desuetude."3 Is there today a need to restore its credibility?

The Alabama Claims Arbitration,4 between Britain and the United States, has been claimed to be the major turning point in the history of arbitration between states. It is often said that the reference to arbitration averted war between the parties. Lord Russell of Killowen made a famous speech in 1896, in the midst

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* Professor of International Law at the University of London (Queen Mary College); Gresham Professor of Law in the City of London; General Editor, The International and Comparative Law Quarterly; Editor, Common Market Law Review.
4. 1 J.B. MOORE, INTERNATIONAL ARBITRATION 496 (1898).
of the pacifist wave that was sweeping parts of Western Europe, in which he extolled the potential of arbitration as a pacific means of settling major political disputes.\(^5\) However, he was careful to point to the dangers he saw in institutionalizing recourse to third party settlement and he did not support the form of collegiate international tribunal that received general approval from the world community in the Hague Peace Conferences of 1899 and 1907. Nevertheless, as Lord McNair said some years ago and Sir Gerald Fitzmaurice repeated at the inauguration of the hearings in the Beagle Channel case in the Alabama Hall in Geneva in August, 1976,\(^6\) two features of the Alabama Claims arbitration are undeniable:

(i) the award settled a major dispute which affected the honor and the vital interests of two major World Powers, and,
(ii) it established in principle a pattern of development which means that today there are in practice only two ways in which states can obtain a *judicial* settlement of legal differences which may arise between them—they may either submit the dispute to an arbitral tribunal set up by themselves jointly and expressly constituted for a particular case—or they may refer the dispute to a standing international tribunal whose jurisdiction extends to the subject-matter concerned.

Nevertheless, if one examines the *Alabama Claims* award itself, it is significant that the most crucial issue in the affair—the claim by the United States for indirect damages—was not decided in the award but dealt with in a separate declaration in the form of an interlocutory order. The real legal argument in the case emerges as much from diplomatic activity as from arguments by counsel. The award has been styled a “face-saving adjudicatory act,” at once “an avoidance of decision-making responsibility and a head-on exercise of authority”\(^7\) and the case depended for its immediate effect on negotiated settlement. Even so, the award contains much impressive draftsmanship and the members of the tribunal certainly manifested that prime quality demanded of arbitrators—flexibility in the face of unprecedented situations.


\(^6\) Id. at 19. See also the documents collected in J.Wetter, supra note 5, at 276-406, and the Note in 71 *Amer. J. Int'l L.* 733-740 (1977).

\(^7\) See J.Wetter, supra note 5, at 160-171.
The *British Guiana-Venezuela Boundary Arbitration of 1899*, some twenty-five years later, is, in my view, intrinsically of much greater interest. The tribunal was a very strong one and the pleadings contain outstanding argumentation. Yet the award has been widely challenged as null and void and the dispute is still both unresolved and politically alive. Procedurally, it is of great interest with the British members of the tribunal engaging in extensive dialogue with counsel, and it is a treasure-house of documentation on the evolution of customary law—especially with regard to discovery, conquest, occupation, recognition, and the administrative, jurisdictional, and political control of territory.

In this century the arbitral process has waxed and waned in a remarkable way. The Permanent Court of Arbitration, which was established by the Hague Convention of 1899, with an imposing Permanent Administrative Council and a Bureau acting as a secretariat or registry for the tribunals set up under its aegis, was influential from 1900 to about 1920. Twenty tribunals were set up under this system, using the panel of arbitrators between those dates; only three have been established under this system since 1932. The functions of the Permanent Court of Arbitration were substantially usurped by the Permanent Court of International Justice which, from 1920 until its demise in 1945, rendered no fewer than seventy-seven judgments and advisory opinions.

Arbitration, as a flexible process of third party settlement of disputes, must be supported by reference to appropriate basic procedural standards. Apart from the provisions relating to the Permanent Court of Arbitration in the Hague Conventions of 1899 and 1907, we now have the 1958 International Law Commission Model Rules on Arbitral Procedure. They were originally framed as the basis of a convention but the early 1950s

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9. 32 Stat. 179, 2 Malloy 2016 (1899); *see also* the revised Convention of 1907, in 36 Stat. 2199, 2 Malloy 2220 (1907). The best general account of the early history of the institution is given in J.H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LO-CARNO (1929).

10. *See* 32 Stat. 179, 2 Malloy 2016 (1899) at arts. 15-18; 36 Stat. 2199, 2 Malloy 2220 (1907) at art. 44.

clearly did not provide a favorable political climate for such a substantial step forward. Even so, the Model Rules are enormously helpful and referred to often in arbitral practice. Of particular interest is Article 3, which provides for the intervention, at the request of one party, of the President or the Vice-President of the International Court of Justice, to appoint an arbitrator if a tribunal fails to agree on the constitution of a neutral member within three months of the parties’ agreement to submit their dispute to arbitration.

In this connection, the development of the arbitral process this century has frequently seen a reduction in the national element of the membership of tribunals. The Lac Lenouz,12 Buraimi Oasis,13 and Rann of Kutch14 arbitrations are important instances of this, but it is a tendency which, while reversing the general trend in the nineteenth century, is not without problems.15 The three-man or five-man international tribunal in which neutral members are in the majority can produce objectivity and a high degree of legal or technical expertise, but it lacks the authority that the backing of a modern government can give to the process, especially where there is a territorial dispute when expert mapping and surveying is required. The Argentina-Chile Awards of 190216 and 196617 illustrate this very well, as does, in a different way, the collapse of the Buraimi Oasis Arbitration in 1955.18 Dependence on the parties alone for the execution of the powers of the arbitrators is often dangerous.

The advantages and disadvantages of the arbitral process in its contemporary form have been frequently rehearsed.19 Arbitration gives the parties the power to exercise a high degree of

16. The text of the treaty of May 28, 1902, is to be found in W.R. Manning, ARBITRATION TREATIES AMONG THE AMERICAN NATIONS 327ff (1924).
17. The full text of the Award is given in Award of H. M. Queen Elizabeth II for the Arbitration of a Controversy between the Argentine Republic and the Republic of Chile, collected in 1 Wetter, supra note 5, at 300-306.
18. See supra note 13; the compromis is contained in 65 U.K.T.S. 9272 (1954).
19. See the materials collected and discussed in 1 Wetter, supra note 5, at 37.
control over the proceedings that lead to an award. The parties are comforted by being involved in the choice of arbitrators, and in the selection of the terms of reference of the tribunal, and they often like to insert detailed provisions on the conduct of the proceedings in their *compromis*. Although the arbitrator may claim an inherent jurisdiction to determine the limits of his own jurisdiction, the parties may well seek to agree on a very narrow definition of the issues to be resolved; the *compromis* documents in the *Juan de la Fuca* and *Bulama* arbitrations are instructive in this regard. Even so, the process may triumph in the end if there is collegiate strength and skill in the tribunal, or if, as in the *British Property in Spanish Morocco* and *Island of Palmas* awards, there is a sole arbitrator of outstanding ability. Max Huber's award in the *Island of Palmas*, a tribunal set up under the Permanent Court of Arbitration, is unparalleled—a model of its kind. Huber, the greatest Swiss international lawyer since Vattel, was a sensitive and tactful innovator; his crystallization of principles relating to territorial prerogatives and to the probative value of state activities in disputed territories was masterly.

The disadvantages of the process have become equally clear in the court of time. Many *compromis* are ill-drawn and some awards are ill-determined; there is a correlation, although not an inevitable one, between the two. Some arbitrations have displayed an exiguous control over the pleadings and procedure. Some arbitrators have shown a tendency to exceed their jurisdiction and decide beyond the scope of the *compromis* or to attempt to resolve the dispute by a legal solution outside the submissions of the parties. In the *Rann of Kutch* arbitration, the part of the award dealing with the inlets on either side of the Nagar Parkar was certainly decided upon "ex aequo et bono" even though the tribunal expressly declared that it had been given no authority so to decide.

Since World War II, instances of arbitrations between states have been few, although, in my view, increasing opportunities

24. The award is reproduced and discussed in 1 Wetter, supra note 5, at 213-214.
25. See 1 Wetter, supra note 5, at 262-264; and Fox, supra note 15, at 171-172.
have existed either when the adversary model of procedure before a standing tribunal is inappropriate or it is easier to engage an opponent in this way than before the International Court of Justice. Yet there have been a number of major arbitral awards which have secured their full (some would say more than their full) measure of comment and analysis in the juristic literature. Did they resolve major political disputes or advance international law generally? Or both? Or neither? The Rann of Kutch arbitration, to which earlier reference was made, produced a very valuable award (and an almost equally valuable dissent) and was speedily applied. The disputed area was, however, sparsely populated and of little economic or strategic value. On the contrary, there has been no arbitration or adjudication between the same parties (Pakistan and India) over Kashmir. The 1966 award in the Encuentro-Palena case between Argentina and Chile was handled with the greatest skill by Lord McNair and his assessors but hardly can be said to have resolved a major political issue between the parties. Yet it did provide a most significant interpretation of the evidentiary value of the acts of the parties in relation to the disputed territory and in relation to each other. This award was essentially about the later frustration of the arbitrator of 1902's intention by an incorrect appreciation of geography. The later conduct of the parties, which was examined in much detail in the award, did not throw light on the intention of the arbitrator of 1902, but did on the doctrine of preclusion or estoppel (as that had been used in the Grisbadarna case, the Anglo-Norwegian Fisheries, and in the merits stage of the Temple of Preah Vihear case. One could fairly conclude from this award that arbitration has an important role in the resolution of disputes over obliquities and errors of fact made by treaty-makers.

More recently the arbitration between Britain and France on the Delimitation of the Continental Shelf in the Western Approaches, the first between parties to the 1958 Geneva Conven-

27. See the documents collected in 1 WETTER, supra note 5, at 250-275.
28. See Fox, supra note 15, at 170.
tion on the Continental Shelf, has given us much to analyze in its treatment of the role of equidistance in the delimitation of shelf boundaries, the concept of "proportionality," the criteria for the assessment and identification of "equitable principles" for use in special circumstances, and the doctrine of "half-effect" as applied to an apportionment of the maritime space to be accorded to islands when "special circumstances" preclude the application of the equidistance principle of delimitation.

FUTURE PROSPECTS

I think that we can today take the flexibility of the international arbitral process for granted. We can accept that states frequently take comfort from the infinite variety of expertise and experience that they can call on. The identity, personality, and professional skills of the chosen arbitrators are crucial to success; even if these are assured, the creation of a sympathetic atmosphere and rapport between the president of the tribunal and the parties, between the tribunal and the parties, and between the parties themselves, does not necessarily follow. The parties' right to a choice of locale and language is very attractive. Can one imagine the Rann of Kutch materials with the institutional dual language requirement of the International Court imposed? Why then do we hear so many calls for international arbitration to regain its credibility?

I believe that all international lawyers should promote the process of international adjudication but keep an open mind about the institutions involved. The International Court is unattractive to much of the world community because of its present size, limited accessibility, the mixed composition and experience of its members, and the dual language problem. We cannot, in present political conditions, expect a rapid movement toward compulsory jurisdiction nor can we expect amendments to the Statute of the

35. See the review by H. Van Mangoldt, Judicial Settlement of International Disputes 417, 551-52 (symposium vol. 1974).
36. See art. 26(2) of the Statute of the Court; this provision was first used in the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Can. v. U.S., 1982 I.C. J. 3, (Order of the Court) and 1984 I.C.J. 246 (1984), (Decision of the Chamber).
Court. There are, of course, some hopeful signs. The cause list of the Court is lengthening. More and more treaties (more than 225 since 1945) contain clauses invoking reference to the Court. Even the United States has accepted some sixty of these. The Court has taken important initiatives in the last two decades with the revision of its own rules on the composition of chambers (1972) and consultation with parties (1978). There has also been much informed debate over the possibility of giving state parties before the Court the option of seeking an advisory opinion or even a declaratory judgment. However, amendment of the Court’s statute (for example, Art. 96(2)) is unlikely in the near future, and, in a run of six contentious cases recently before the Court, the defendant state refused to appear. That must be very worrying, even if it is false to place too much reliance on progress by an extension of compulsory jurisdiction.

The unpopularity of the Court with the Soviet-bloc countries and with a large part of the developing world was reflected in the views on judicial and quasi-judicial adjudication that emerged from the last years of debates in the Third United Nations Conference on the Law of the Sea (UNCLOS III). With the creation of a new regime for the International Sea-Bed Area (ISBA), it was first thought that a very specialized technical court would be necessary to resolve disputes among the regulatory authority, the “enterprise,” national public-owned corporations, and private entrepreneurial interests. Fears arose as to the large number of likely cases, the potentially small number of adjudicators and the residual worry in the smaller nations of “how neutral are the neutrals?”

The next stage saw the so-called “Riphagen choice”—a choice between arbitration (initially favored by France and the United Kingdom), an ISBA tribunal, reference to the International Court of Justice (favored by The Netherlands and Japan), or reference to specialist commissions of a technical character. At this stage, there seemed support for a residual reference to arbitration if

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the parties failed to agree on another form of settlement.

In the final compromise, we have a compulsory and final but four-choice system with some exceptions in favor of the use of conciliation on EEZ questions and some scientific research matters. We are to have a tribunal of general jurisdiction with a sea-bed chamber that may hear disputes between state parties, disputes between state parties and the authority, or disputes between parties to a contract, whether state parties, the authority, the enterprise, state entities, and natural and juridical persons. Alternatively, reference of a dispute may be made by state parties to a special chamber of the tribunal (at the request of the parties jointly involved in the nomination of the five members of the chamber), or to an ad hoc chamber of the Sea-Bed Disputes Chamber (of three members, which, failing contrary agreement, may be nominated by the parties to the dispute), or to binding commercial arbitration if the dispute involves the interpretation or application of a contract. It is perhaps encouraging here to see that reference to the UNCITRAL arbitration rules may be made (by agreement), but this fourth of the four choices is limited by not being able to rule on “any question of interpretation of [the] Convention.” So we can perhaps envisage an arbitral tribunal having to make reference on such a question of interpretation to the Sea-Bed Disputes Chamber—a two-stage procedure—and possibly also references by way of conciliation to arbitration and then to the Sea-Bed Disputes Chamber.

This compromise on a plethora of choice seems to me to illustrate well the doubts, confusions, and uncertainties in much of the world community over a willingness to confide substantial issues to judicial or quasi-judicial adjudication.

Where then is the supposed universal appeal of the flexible, adaptable, comfortable instrument of arbitration? Do the UN-CLOS III signs indicate a return to a strong national element in the composition of tribunals? I hope not. I still believe, of course, that the best form of dispute resolution is negotiated settlement. But we have in international arbitration an instrument that has

40. CONVENTION, supra note 38, arts. 187, 287 & annexes 6-8.
41. Id. at art. 188.
a number of substantial successes to its credit in recent years and can show a marked and even a sophisticated sensitivity to national interests without the direct representation of nationals of the disputants on the tribunal. The major awards do not, generally, in my view, demonstrate any excessive unpredictability or excessive conservatism; both are features that are supposed to inspire distrust in international courts and tribunals. There is no evidence that this method of procedure relates to some lack of finality at the end of the process. Hambro's research some years ago showed a minimal element of noncompliance with awards.\textsuperscript{42} Arbitration can be complex, expensive, and time-consuming—so, of course, can adjudication. I suspect that one of the key reasons for its limited use, limited both geographically and in the content of disputes, is that more and more states look—wrongly—to judicial and quasi-judicial adjudication to settle disputes that are essentially concerned with demands for a change in the law. While we can applaud, and make use of, the flexibility of the institution of arbitration, we must never forget that the arbitral process is a process of decision according to international law and supported throughout by reference to appropriate procedural standards. Arbitration between states or other international persons, with which I am primarily concerned here, cannot only resolve disputes but can also materially assist in the clarification and development of the law governing interstate relations and the law of international institutions. International arbitration is essentially a judicial process\textsuperscript{43} distinguished from formal adjudication before a standing court by the \textit{ad hoc} character of the tribunal and the extent of control over the arbitration by the parties to the dispute. Although international arbitral procedure varies from tribunal to tribunal according to the provisions adopted in the agreement establishing the tribunal or the rules formulated by it when the tribunal is left free to establish its own procedure, the development of the institution has over the years produced a general pattern of procedure — with written statements of the case and arguments, written evidence attached as annexes, and oral arguments for each side. The submission of oral testimony is relatively unusual, with primary reliance usually being placed upon documentary evidence and sworn statements.

\textsuperscript{42} See Sohn, \textit{supra} note 39, at 199.

\textsuperscript{43} E. Hambro, \textit{L'EXECUTION DES SENTENCES INTERNATIONALES} (1936).
in writing. The variations in practice of arbitral tribunals arise often from the divergent private law backgrounds of individual arbitrators—and this results, for example, in differing attitudes to the admissibility of evidence and the weight to be attributed to it. However, I believe—and I think the early surveys carried out by Sandifer and Carlston will support this—that the real variety and diversity for which the institution of arbitration is noted (or notorious) lies rather in the terms of submission of the dispute than in the procedure.

The parties establish the tribunal and select its personnel. The parties stipulate in the *compromis* the exact subject of the dispute, the jurisdiction to be given to the tribunal, and the procedures to be followed. The parties may provide that the tribunal is to arrive at its decision by the application of international law to the facts found on the basis of the evidence submitted. Or they may lay down specific rules that are to be applied by the tribunal even though they do not form a part of general international law. Sometimes liability may be admitted and the arbitrator's task limited to determining the extent of damages suffered. The institution, and the process, can be assessed properly only on a basis of understanding of the evolution of the terms of submission of disputes. As a consensual procedure, it necessarily reflects the overall condition of the relationships between the parties at the time of the *compromis*, which frequently contain provisions as to the nonjusticiability of certain categories of dispute. The future evolution of the institution of international arbitration, as between states and on an ad hoc basis, will substantially depend upon agreement between disputant states on common concepts of the law to be applied in a given field. Recent experience would seem to indicate that the use of international arbitration between states will essentially relate to problems concerning the delimitation and demarcation.

44. See 1 Moore, supra note 4, at xxxix-xc, and 1 Wetter, supra note 5, at 3-5, 19-26.
48. See the recommendations of the International Law Commission in art. 2 of the 1958 Model Rules on Arbitral Procedure, No. 11, supra.
of boundaries, the interpretation and application of treaties, the protection and preservation of the environment, rights of communication and transportation, and diplomatic and consular law. In a decentralized legal order, it can continue to offer an important, even if limited, alternative to auto-interpretation—the interpretation by states themselves of their international obligations—and thus to support and enhance the consensus upon which the legal order ultimately rests. If it is to perform this function, then neither its role nor its limitations must be misunderstood.

49. However, in the prospects for the more recent phenomenon of the international arbitration of disputes between States and foreign corporate entities, see Simmonds, supra note 26.

ARBITRATION IN SHIPPING DISPUTES UNDER ENGLISH LAW

Samir Mankabady*

INTRODUCTION

No statistics are published on the number of disputes submitted to the various international arbitration centers. However, it is estimated that some 10,000 disputes in commodity, shipping, and construction contracts are settled by arbitration in London every year. The figures thus point to London as the leading international arbitration center.

There are many reasons why English arbitration in the city of London is attractive. On the other hand, it had become obvious in commercial circles, at least in the ten years prior to 1979, that there were defects in the English arbitration system that seriously offset London's attractions. For example, the special case procedure under section 21 of the 1950 English Arbitration Act had tended to cause considerable delay and increased arbitration costs. Moreover, under the 1950 Act, parties to an arbitration agreement had an almost unfettered right to invoke this procedure, making it possible for them to inject inordinate and inexorable delay into the process virtually at will. Arbitrators were reluctant to impose sanctions against such behavior for fear of a charge of "misconduct" under the then existing law.

Apart from the defects in the English arbitration system, two other important developments were operating during this period to discourage London-based arbitrations. The first was that new arbitration centers had grown in importance and had started to

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* Reader in law, Liverpool, United Kingdom.
1. Examples of the commodity contracts are the Grain and Food Trade Association (GAFTA), the London Corn Trade Association, and the Incorporated Seed Association.
2. The Baltic Exchange offered a meeting place for arbitrators and the political stability in England encouraged contracting parties to use the standard forms that usually provided for solving disputes by arbitration in London. For an analysis of these reasons, see Kerr, International Arbitration v. Litigation, J. Bus. L. 164 (May 1980).
attract multilateral arbitrations. The second was that many developing countries had become aware of the need to establish their own systems. Faced with these developments and with the prospect of losing its leading position as a center for international arbitration, the English legislature moved to modernize its 1950 Arbitration Act with the enactment of the 1979 Arbitration Act on August 1, 1979.

A full understanding of the 1979 Act can be gained only after a preliminary survey of the types of shipping disputes with which it was intended to deal, as well as a discussion of the reforms effected by the 1979 Act.

Generally, the shipping disputes can be categorized as (1) disputes concerned with bills of lading; (2) disputes under charter-parties; and (3) salvage agreements.

II. DISPUTES CONCERNING BILLS OF LADING

A. Cases in Which There is Reference to a Bill of Lading in a Related Charter-Party Contract that Contains an Arbitration Clause

1. Contracts and documents for the carriage of goods by sea: charter-party contracts and bills of lading

The Hague Rules (hereinafter "the Rules") do not apply to charter-parties. A charter-party is one bound by a contract by which "the ship owner undertakes to make the vessel available to the charterer." Rather, the Rules deal with bills of lading transactions. Bills of lading are negotiable instruments issued by a shipowner to a shipper when cargo is loaded on board a ship.  

4. A wide variety of arbitration clauses are used in shipping contracts. They could be found in ship building, ship repairing, ship sale and purchase, ship finance, and charter-party contracts.
5. The Hague Rules have been amended by the Visby Rules, 1968.
7. Not all bills of lading are subject to the Rules. Bills of lading for the carriage of live animals, for deck cargo and "received for shipment" cargo are outside the scope of the Rules.
8. This is called "shipped bill of lading."
The Hague Rules regarding bills of lading are compulsory in their character but allow certain exceptions.9

Thus, sea cargo may be transported under a charter-party contract10 or under a contract of carriage as evidenced by a bill of lading. Arbitration contracts are usual in the former but seldom found in the latter.

However, shipping practice has developed in such a way that a charterer may acquire both a charter-party contract and a bill of lading for the same shipment. The bill in such a case is a short one and usually refers to the charter-party contract by stating “freight and all other conditions as per charter-party.” In this way, the bill avoids repeating verbatim the clauses of the charter-party contract or reproducing these clauses in unreadable small print. In these circumstances, the bill is considered to be a mere receipt and not the document that embodies the terms of the carriage.

2. Transfer of the bill of lading to a third party

So long as the bill of lading remains in the hands of the charterer, there will be no problem because the relationship between the charterer and the shipowner will be governed by the terms of the charter, including any term on arbitration. In cases where there is conflict between the terms of the charter and the terms of the bill of lading, the former supersedes. Difficulties may arise, however, when the bill of lading is transferred to a third party. A bill separated from the charter contract acquires independent significance and the Rules attach to it. The issue may arise as to whether the holder of the bill of lading is bound by an arbitration clause found in the charter-party contract to which he is not a party.

3. Referencing clauses

If a reference to the charter-party contract is made in the bill of lading, it may be considered due notice to the holder of the

9. There are seventeen exceptions. The shipowner cannot decrease his liability by adding more exceptions but he can increase his liability by omitting some of the seventeen.

10. Traditionally, there are three types of charter-party contracts: voyage, time, and demise. Recently, we have seen a different legal structure, namely a contract of carriage, as an umbrella under which voyage charters are issued. See the forms known as Intercoa 80 and Volcoa 82. Charter-parties are subject to the principle of freedom of contract.
bill that the full terms of the transaction cannot be found in the bill alone. However, such reference alone does not give the holder sufficient notice of the terms of the charter-party contract. Under English law, notice of an agreement to arbitrate disputes is sufficient only if the parties use specific words in the bill of lading or in the charter-party contract indicating that arbitration is to be the method of settling any disputes. In fact, there are three different ways to do this: (1) by specifically including the word "arbitration" in the referencing clause; (2) by making reference in the bill of lading to a specific numbered clause in the charter-party contract that deals with arbitration; or (3) by making a more general reference to a charter-party contract that includes an arbitration clause, specifying that it covers disputes under either document.

As a result, the issue as to whether the "directly germane" clauses in the charter-party contract have been incorporated into the bill of lading may well be reduced to a question of interpretation of the referencing clause. The wider the scope of the

11. In Hamilton & Sons v. Mackie & Co., 5 T.L.R. 677 (1889), the court held that the arbitration clause referred only to disputes "under this charter" and did not include disputes under the bill of lading. In T.W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd., 1 A.C. 6 (1912), the bill of lading contained a marginal clause written in ink saying: "Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause." The House of Lords held that the arbitration clause in the charter-party was not incorporated in the bill of lading. See also The Njegos, 90 (1936); The Merak, 223 (1965); The Phoinizien 1 Lloyd's Rep. 150 (1966). For recent cases, see Astro Valiente Compania Naviera v. The Government of Pakistan (The Emmanuel Colocotronis No.2), 1 Lloyd's Rep. 286 (1982), where Staughton, J., discussed two separate points at page 289: "First, are the words of incorporation apt to describe the clause sought to be incorporated? This I call the description issue. Secondly, would the clause be consistent with the bill of lading if it were incorporated? ... This I call the consistency issue." In The Varenna, 1 Lloyd's Rep. 416 (1983), Hobhouse, J., held that the construction of the bill of lading was that, when it referred to conditions, it referred only to conditions properly so called to be performed by the consignee on the arrival of the vessel; on no view was an arbitration clause such a condition. On appeal, The Varenna, 2 Lloyd's Rep. 592 (1983), the Court of Appeal added that (1) an incorporation of the "conditions" of the charter did not suffice as a matter of authority to incorporate an arbitration clause; and (2) the authorities clearly showed that the use of general incorporating words whether "terms" or "conditions" in a bill of lading were and had for years been construed in the restrictive way, i.e., such conditions and exceptions were appropriate to the carriage and delivery of goods and did not as a matter of construction extend to a collateral term such as an arbitration clause.

12. Under American law, general words such as "subject to all terms, conditions and exceptions" are considered to be sufficient to incorporate the arbitration clause so long as bills of lading disputes are not excluded. See Kranger v. Pennsylvania Rail Co., 174 F. 2d. 556 (2d Cir. 1949); Muller v. Swedish American Lines Ltd., [1955] A.M.C. 1687; Amoco Oil v. Mary Ellen, [1982] A.M.C. 1758.
referencing clause, the greater the uncertainty. This uncertainty can be reduced by drafting a precise referencing clause in the bill of lading. Use of the words “conditions” or “exceptions” should be avoided because arguments in older authorities centered around whether an arbitration agreement was incorporated by the use of either of these words. Alternatively, the terms of the charter can simply be printed on the back of the bill of lading. The holder of the bill will then be aware of all the terms of the charter, including the clause on arbitration. This is the practice used in some Scandinavian countries.

4. Conflict with the Hague Rules

Even if the arbitration clause is effectively incorporated in the bill of lading, another problem may arise, namely, whether the incorporated clause conflicts with the Hague Rules. Article III of the Rules provides, for example, that the time limit for bringing an action is one year from delivery of the goods or from the time when the goods should have been delivered (in the case of goods lost). The arbitration clause in the charter-party contract incorporated in the bill of lading may stipulate for a shorter time limit. This was the precise point raised in the 1971 case of The Ion, where the referencing clause of the bill of lading stated, “All the terms, conditions, liberties and exceptions of the charter-party including the Centrocon arbitration clause are herewith incorporated.” The Centrocon clause provided that the arbitrator had to be appointed by the claimant within three months of the final discharge of the goods. Finding that the Hague Rules prevailed over such incorporated provisions, Justice Brandon held that the part of the Centrocon clause specifying the shorter time limit was void.

13. In Russell v. Nieman, 34 L.J.-C.P. 10 (1864), the word “conditions” was held to cover the shipowners’ right over the cargo in respect of deadfreight and demurrage. It did not include exceptions, cesser or arbitration clauses. See also The Varenna, 2 Lloyd’s Rep. 592 (1983).

14. See The Iron, 1 Lloyd’s Rep. 541, 545 (1971). In this case a cargo of fishmeal in bags was shipped from Peruvian ports for delivery at a number of Japanese ports. Discharge was completed at Kobe in August 1969, following which a shortage of 510 bags was discovered. The cargo-owners submitted a claim in October 1969 and, at their request, the shipowners extended the time for claiming until May 1970. However, no arbitrator was appointed until July 1970, and the shipowners submitted that by this time the claim was waived and barred.

15. It seems that the American courts adopt a different solution. In Lowry & Co. v.
B. Cases Involving Oil Transport Contracts

1. Measurement of oil cargoes

The quantities of oil to be carried by a tanker may be expressed in contracts in two ways: by volume or by weight. Cubic feet, cubic meters, barrels, gallons, and liters are commonly used measures of volume. Long or English tons and metric tons are the usual measure of weight in the oil industry. However, most forms of charter-party contracts use the cubic foot as a volume measure and the English ton of 2,240 pounds as a weight measure. When the quantities are expressed by volume measure, the weight cannot be calculated unless the gravity of the liquid is known. Similarly, when the quantity is stated by weight, the volume cannot be computed unless the temperature is known.

Thus, conversion from weight to volume measure, or vice versa, is not easy. Moreover, the equipment used for such measurements yields an average rather than a precise figure. This, of course, leads to disputes regarding the quantities delivered and cargo loss.

2. The 0.5 percent allowance

It is widely accepted in shipping circles, and in the tanker trade in particular, that some loss is to be expected in bulk oil

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S.S. Le Moyne D'Iberville, 253 F. Supp. 396 (S.D.N.Y. 1966), there was a reference to the Centrocon arbitration clause and the court refused to consider that the three-month time limit is contrary to article III, r.6 of the Rules.

16. Oil has different grades, but for chartering purposes, it is classified under two groups: clean (or white) and black (or dirty). Clean oils cover motorspirit, aviation spirit, benzene, white spirit, aviation turbine fuel, kerosene, and sometimes gas oil or high-speed diesel. Black or dirty oil is the term used for crude oil, diesel oil, fuel and furnace oils, and also for gas oil. For contamination purposes, oil is classified according to its degree of volatility and inflammability.

17. When the oil is heated it expands but the increase in temperature does not affect the weight, although it affects the volume. The specific gravity, which is the link between volume and weight, is only correct at one particular temperature and this is known as the Standard Temperature. This has been fixed at 60 degrees Fahrenheit; when measuring any liquid whose temperature differs from that standard, an adjustment must be made to the standard specific gravity of the liquid under consideration.

18. There is no agreement on the terms to be used to indicate the shortage and the following terms are frequently used:

- trade allowance—a term used in many American cases that indicates an acknowledgment of an admitted allowance;
shipments due to the inherent characteristics of the cargo. The figure usually mentioned as an allowance is 0.5 percent. This tolerance is supported by a number of American cases and by decisions of the Society of Maritime Arbitrators. In The London Confidence, for example, it was stated:

While the panel majority recognizes that there are practical aspects of the loading, transportation and discharge of petroleum products which vary substantially between types of carrying vessels and the nature of cargoes shipped, it has been generally accepted by the trade that normal trade shortage losses equate to 0.5%. This is not to say that certain petroleum cargoes will show average short delivery outturns as low as 0.2% while others may well show in excess of 1% ... The customary petroleum trade allowance of 0.5% has been in effect for many years and has been widely accepted as such. In this respect, it has almost universally been applied by arbitration panels, thereby giving it the full effect of charter party law. Accordingly, we have applied it here.

All the court and arbitration decisions that have recognized the tolerance have been premised upon the existence of a trade usage, a binding custom, or the practical difficulties in measuring exact quantities of oil shipped.

However, it has been argued that a mere usage in previous settlements of cargo disputes did not mandate that the 0.5 percent allowance should be treated as a hard-and-fast rule of law. Moreover, for a custom to be binding, it was argued, it must be

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normal losses--a term which indicates that the loss is usual, regular and of a common occurrence;
ordinary losses--a term usually used in insurance, it may imply the idea that the losses are most frequent or of a regular nature; and
inevitable losses--a term that points out that the losses could not be avoided.

19. See Textor, Oil Shortages Caused by the Inherent Properties of Petroleum Cargoes, 13 J. OF MAR. LAW & COMM., 281-94 (No. 3, April 1983). In this article, the author examined the causes of shortage, mainly evaporation and clingage. However, there is a strong view that the shortage is only on "paper" rather than physical and that in most cases it could be prevented.


22. In Sun Oil Company v. M/T Mercedes Maria and Ore Sea Transport, [1983] AMC 718, it was stated: "In addition to measurement imprecision and inaccuracy, there might be actual loss of bulk oil cargo occurring from clingage, as not all oil could be removed from the inner surface of the tank, and from settling sedimentation, and evaporation."
certain, definite, uniform, and well-known. In practice, the 0.5 percent allowance has not been uniformly applied. The actual percentages of tolerance allowed have differed depending upon the grade of oil being transported and the age of the tanker. With the use of more advanced techniques, the fixed 0.5 percent allowance could well be reduced or disappear.

The force of these arguments has led many courts and arbitral tribunals to deny the existence of the 0.5 percent allowance. In *The San Jaciento*,\(^\text{23}\) the panel said:

*As to the so-called trade allowance of half of one percent on which Owners rely, we suggest that some basic concepts should be restated. It would be helpful if the industry would refer to this issue in different terms. In our view, there is not any such thing as a trade allowance in these matters.*

No one reasonably suggests that for every 100 barrels carried, one half barrel may be kept, disposed of or otherwise unaccounted for. The [allowance] term is a misnomer. An allowance is ... a share or portion allotted or granted ... a bounty ... a reduction from a list price or stated price.

Similarly, in *The Tychos*,\(^\text{24}\) the panel stated:

*Cognizant of the wealth of prior arbitration awards on the subject, the Panel, initially, was favourably disposed towards Owners' view that the 0.5% allowance is so strong a custom of the trade that judicial notice of that fact should be taken.*

*However, upon further reflection it becomes abundantly clear that this allowance figure is an average and, thus, an arbitrary one which is predicted upon the reality that in the carriage of any oil cargo, an inevitable loss will occur arising from the nature of the product, the characteristics of the carrying vessel, and the specifics of the voyage, for which there is no liability on the part of the carrier. This loss can be considered more or less an average depending upon the variables involved. An aging vessel with pitted cargo tank surfaces, numerous internals and uneven temperature control will offer greater opportunities for clingage or shortage than will a more modern products tanker carrying the same cargo. By the same token, a vessel carrying cargoes of different sediment and wax content, for example, will experience different discharge results. Variations in tank cleaning procedures and slop recovery methods, as well as changes in weather during the course of the*

\(^{23}\) SMA No. 1405 (N.Y. Arb. 1980).

\(^{24}\) SMA No. 1408 (N.Y. Arb. 1980).
voyage will also materially affect the quantity of cargo ultimately discharged. The Panel is of the opinion that, with these factors in mind, it would not be correct to adhere rigidly to the arbitrary allowance of 0.5% in all circumstances.25

One would think that the allowance issue would have been settled26 as a result of these costly claims.27 On the contrary, the recent decision in *Sun Oil Co. v. M/T Mercedes Maria and Ore Sea Transport*28 not only supported the idea of the existence of an allowance but added a new legal ground, that there is an implied term in the contract to this effect. The court recognized that such an implied term could be excluded if the contracting parties expressly provided.

It is very difficult to accept the *Sun Oil* court's position that a quantitative term could be implied in a contract. Furthermore, the decision of the court will give rise to many practical difficulties, such as how the allowance will be applied to cases in which there has been a total loss of a cargo, where there is a right on the part of an assured to claim a return of premium to the extent of the allowance, or where there is a right to have an adjustment in the price of the oil in case of a sale in transit.

**III. DISPUTES CONCERNING CHARTER-PARTY CONTRACTS**

A variety of disputes arising under charter-party contracts are submitted to arbitration. For example, the arbitration clause in the Centrocon charter covering shipment of grain and other cereals from the River Plate to the United Kingdom has given rise to many disputes since it was first used. The clause29 has

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26. The issue is not settled under English law. In Shell International Petroleum v. Seabridge Shipping Metula, 2 Lloyd's Rep. 436 (1977), the charterers, to avoid any dispute, paid the freight on the delivered quantity plus 0.5% as the transit loss. In Laheport Navigation Company v. Anonima Petrolia Italiana (The Olympic Billiance), 2 Lloyd's Rep. 205 (1982), a clause on 0.5% was attached to the Exxonvoy 69 charter.

27. The London market underwriters estimate that they have $13 million in paid and outstanding claims for oil cargo shortage over the last 18 months in addition to major casualties and contamination losses. Lloyd's List December 9, 1984.


29. The amended Centrocon arbitration clause reads as follows: "All disputes from time to time arising out of this contract shall ... be referred to the final arbitrament of two arbitrators ... one to be appointed by each of the parties ... Any claim must be made in writing and claimant's arbitrator appointed within 12 months of final discharge and
been borrowed for use in other charter contracts of the same and different kind, such as those contracts for other grain shipments (e.g., Austral and Austwheat) or timber (e.g., Nubalwood).

In addressing charter-party contracts, it is useful to divide discussion into three parts: (1) matters of general character; (2) disputes concerning voyage charters; and (3) disputes concerning time charters.

A. Matters of General Character

1. Arbitrators to be commercial men

In Rahcassi Shipping Co. v. Blue Star Line Ltd.,\(^{30}\) the arbitration clause specified that "arbitrators and umpires shall be commercial men and not lawyers." A dispute arose and two commercial men were appointed as arbitrators, but being unable to agree, they appointed a practicing member of the bar as umpire, a fact which was not known until the awards had been published. Holding that the appointment of the umpire was invalid and that the award was null and void, Justice Roskill said:

I have to give this clause a sensible construction. It is not necessary to consider what exactly the words "commercial men" mean and who precisely falls within or without them, for the phrase is a general one. Businessmen like using general phrases of this kind because they leave open the possibility of arbitrators being chosen from a wide field of persons with commercial experience, so long at least as they are not practicing lawyers.

2. The time within which an arbitrator may be appointed

Some arbitration clauses state that if the claimant's arbitrator is not appointed within a certain time, the claim shall be absolutely barred. In Tradax Export S.A. v. Volkswagenwerk A.G.,\(^{31}\) a charter-party contract containing the Centrocon arbitration clause provided that if any dispute arose, each party would "appoint an arbitrator within three months of final discharge" of

the cargo. Discharge of the cargo took place on December 15, 1963. A dispute had arisen between the parties. The charterers nominated an arbitrator on January 27, 1964, but did not inform him that they wished him to act as their arbitrator until July 24, 1964. The shipowners, who had appointed their arbitrator on February 17, 1964, contended that the charterers' claim was barred under the clause because the charterers had not effectively appointed their arbitrator in time. The court held that the claim was barred, interpreting the clause's provision for appointment to refer to an effective appointment and not merely a nomination unknown to the appointee.

In *The Simonburn*, the dispute involved a vessel that was under a consecutive voyage charter-party contract covering five voyages from Baltimore or Philadelphia to Antwerp/Hamburg Range or Tilbury. The contract contained a clause providing that disputes would be referred to arbitration and that the claimant's arbitrator was to be appointed "within three months of final discharge." If these provisions were not met, the claim was to be waived and absolutely barred. The vessel arrived at Baltimore and completed loading on November 24, 1970. During loading, the ship grounded and the plaintiffs sought to hold the defendants responsible for it. The vessel completed discharge at Tilbury under the first voyage on December 23, 1970. The second and third voyages were also carried out. Discharge under the fourth voyage was completed on May 1, 1971. The parties agreed that there should be no fifth voyage. The plaintiffs appointed their arbitrator with respect to their first voyage claim on April 26, 1971. However, the court of appeal decided that the appointment was too late, holding that the words "within three months of final discharge" meant completion of discharge with respect to the voyage out of which the claim arose, i.e., the first voyage. The appointment of the arbitrator should have been made by March 23, 1971, the court decided, which was three months after the December 23, 1970 discharge of that voyage. Consequently, the plaintiffs' appointment of an arbitrator on April 26, 1971 was more than a month late and was void.

Lord Denning observed in his opinion that the objects of the Centrocon clause are "(a) to provide some limit to the uncertain-

ties and expense of arbitration and litigation; (b) to facilitate the obtaining of material evidence; and (c) facilitation of the settling of accounts for each voyage as and when they fell due.

B. Disputes Concerning Voyage Charters

Disputes with respect to a voyage charter are usually submitted to arbitration and the cases and Arbitration Reports reflect a large number of decisions in this area. Most of the decisions deal with general issues or certain clauses, such as the clause dealing with the particulars of the vessel, sea worthiness, loading orders, freight, liens, laytime and demurrage, and cancellation. Since it will be beyond the scope of this paper to deal with all these matters, I will focus on the more important decisions in this field.

1. Laytime and demurrage in oil charters

The term "laytime" refers to the agreed time during which the ship is to be loaded or discharged. A delay beyond the stipulated laytime is regarded as a breach of contract. The

33. It must be noted that, according to Section 27 of the Arbitration Act of 1950, the court may extend the time, if it is of the opinion that, in the circumstances of the case, undue hardship would otherwise be caused. The leading authority on the correct approach to this section is now the decision of the court of appeal in Liberian Shipping Corporation "Pegasus" v. A. King and Sons Ltd., 2 Q.B. 86 (1967). The majority of the court held that "undue hardship" should not be construed narrowly, as had been suggested in earlier cases, and that its existence or nonexistence in any particular case did not involve the application of any rule of law.

34. Most of the oil companies have their own forms of charter-parties. There are seven forms: the "Exxonvoy 69," "Texacovoy," "Finavoy," "Shellvoy 4," "Beepeevoy 2," "Mobilvoy 80," and Intertankvoy 76." All forms, except the "Beepeevoy 2," contain an arbitration clause.

35. E.g., Overseas Bulktank Corp. v. World Wide Transport Inc. 3 LMCLQ 390 (1977) (N.Y.Arb., Aug. 17, 1976). In this case, involving an optional port, the charterer, operating under an Exxonvoy 69 contract sailed from Libya to the United States. The owners claimed an increase in the freight because discharge had been carried out in two ports instead of one. The Arbitration Panel decided in favor of the owners because the contract gave the option to discharge at one or two safe ports north of Cape Hatteras.

In Emvits Tankers Inc. of Monrovia v. Getty Oil Company S.T. ("E.M. Tsangaris"), 2 LMCLQ 217 (1979)(N.Y. Arb., Feb. 24, 1978), the voyage charter party was on the Exxonvoy 69 form. When the vessel sailed, she was seaworthy. Five days later, the vessel developed mechanical failure and the oil had to be transferred to a barge. The arbitration panel decided that the charterers were not entitled to withhold the expenses for transferring the oil to the barge from the freight.
damages agreed to be to be paid by the charterers for such delay is called demurrage.

Before laytime starts, a shipowner must have satisfied three conditions: (a) the ship must have arrived at the agreed destination; (b) the ship must be ready to load or discharge; and (c) notice of this readiness must have been given.

Usually, laytime in oil charters is fixed at seventy-two hours and commences six hours after receipt of the notice of readiness. Demurrage is paid per running hour and is sometimes based on World scale demurrage rates, which vary according to ships sizes i.e., the dead weight capacity of the particular vessel. Demurrage may be payable in a currency different from that paid for freight.

Issues of shifting time and the six-hour laytime commencement period have arisen in several disputes before arbitration panels in both the United Kingdom and the United States. The shifting time issue and its resolution is best explained in the following excerpt from an American arbitration award.

Although clause 7 (Part II) [on an Exxonvoy 69 contract form] excludes the shifting time from ‘used laytime,’ clause 8 (Part II) does not expressly exclude shifting time from the running of demurrage. The vessel receives its instructions from charterers who are to provide ‘...safe place or wharf, or along side vessels or lighters reachable on her arrival...’ [The] charterers' failure to provide a berth on arrival should not entitle them to consideration above what they had bargained for. If, for argument’s sake, charterers had directed the vessel to discharge at an anchorage, they certainly would have paid the same freight rate (World scale) as if the vessel had proceeded to a specific berth within the same port. To expect owners to absorb the shifting time in a demurrage situation would be equivalent to granting charterers an allowance despite their failure to provide a safe place reachable on arrival.

37. Shellvoy 4 has no six hour provision.
38. N.Y. Arb. Award No. 1383, Bimco Bull. II, 5523-24 (1980). See also N.Y. Arb. Award No. 1365, Bimco Bull. II, 5524 (1980), where the dispute concerned the time used for shifting from anchorage to berth after the expiration of laytime (under a Mobilvoy contract). The panel said: "It is well known that the running of demurrage is only excepted by faults of the vessel or by an express exception in the contract nullifying the running of demurrage during its occurrence. Shifting time is not exempted in this contract’s demurrage clause, No. 9.”
2. The six-hour laytime commencement period

In another United States Arbitration Award, the panel dealt with the six-hour period before laytime commences. The panel explained that there are conflicting authorities as to whether the provision that laytime shall commence six hours after tender of the notice of readiness is applicable in a situation where a vessel is already on demurrage. However, the majority of the panel supported the view that the six-hour period is inapplicable where allowed laytime has already expired.

C. Disputes Concerning Time Charters

A great many decisions addressing time charters usually turn on the construction of particular clauses in the contract. Among the clauses that have been subject to arbitration are those concerned with the period of contract, sea worthiness of the vessel, duties of the owner, duties of the charterer, trading limits, safeport, hire, speed, fuel and pumping warranties, and withdrawal of the vessel. The discussion here with respect to time charters will be limited to two points: (1) structural changes to the vessel and (2) the contract clause dealing with safe port.

1. Structural changes to the vessel

In The Ultramara a dispute arose between Golden Eagle (the shipowners) and Burmah Oil Tankers Ltd. concerning the costs

40. See N.Y. Arb. Award No. 1316, Bimeo Bull. II, 5452 (1980). The charter was in the Beepeevoy form and the panel ruled that the charterer was not entitled to deduct six hours free time at the port of discharge. The panel said: "In our view the charterer's engagement to a fixed period of laytime is absolute and unconditional and if exceeded is answerable by uninterrupted demurrage regardless of any impediments delaying the charterer's time, unless such impediments were caused by the vessel's inability to perform or unless covered by specific exceptions entered in the contract. Since none of the five exceptions stipulated in clause (g) identify with the six hours question, and in the absence of some clear language to the contrary, also in the absence of evidence of inability of the vessel to directly proceed to its discharge berth, the often quoted maxim 'once on demurrage always on demurrage' takes effect here and the uninterrupted continuity of demurrage is unshakeable." See also N.Y. Arb. Award No. 1288, Bimeo Bull. V, 5306 (1979).
41. For time oil charters, see Mobiltime 73, Shelltime 4, SBT Time, and Intertank time 80.
of installing an inert gas system and a segregated ballast tank arrangement in the ship Ultramar.

The Ultramar, a ship of 82,000 tons deadweight capacity (dwt), was employed under a time charter for ten years. The ship was described in the charter as Ore/Bulk/Oil (OBO).

In 1978, the Port and Tanker Safety Act was passed. It required that tankers of 40,000 dwt. or above be equipped with either inert gas and segregated ballast tanks or a crude oil washing system, not later than June 1, 1981. The shipowners thought that the charterers (Burmah Oil Tankers Ltd.) would share in the costs of the installation of the new equipment. However, Burmah refused to pay any of the costs and the dispute was submitted to arbitration in New York.

Golden Eagle contended that it had neither expressly nor impliedly agreed to bear the expense of retrofitting the Ultramar to comply with the legislation since it had been enacted after delivery of the vessel to Burmah. Alternatively, Golden Eagle asserted that if the panel determined that it was bound to bear the significant expenses that compliance with the Act required, its performance under the charter should be considered frustrated. 44

The panel majority ruled that it was the owner's obligation to comply with the requirements of the Act and to fully bear the cost of the refitting. A panel majority further agreed that the Ultramar would be unable to trade as a tanker without this refitting. The panel unanimously found that neither the passage of the 1978 Act nor the obligation of the owner to install new equipment rendered the charter commercially impracticable. The charter was not frustrated, the panel held, merely because an event had occurred that had imposed a heavier financial burden than expected on one of the parties. It ruled that only an extraordinary financial loss would justify that result.

44. Where from the nature of the contract and surrounding circumstances the parties must have known from the beginning that it could not be fulfilled unless when the time for performance arrived some particular condition continued to exist, under the doctrine of "frustration," (in the absence of warranty that such condition would continue to exist), the contract is construed as subject to an implied condition that the parties shall be excused in case performance becomes impossible or its purpose frustrated (from such condition ceasing to exist without the default of either). Johnson v. Johnson, 53 Cal. App. 2d 430, 127 P.2d 1027-30 (1942).
In a dissenting opinion, one arbitrator said that he believed "the majority has concluded wrongly, for lack of a satisfactory legal rationale, in declining an equitable resolution of [the] owner and charterer's dilemma. A fair, commercial solution to this dispute would be to pro rata share the costs."

2. Safe port clauses

In every time charter, a clause usually states that the ship shall use a safe port. A safe port is one that is physically, politically, and sanitarily safe for the particular ship involved. A port that lacks the essential services necessary for the ship or its cargo is considered to be unsafe, as is a port that presents hazards to the ship in entering, lying off shore, or loading and discharging cargo.

In The Eva, the ship was one of seventy trapped in the Shatt-al Arab waterway as a result of the Iran/Iraq war. She had been time-chartered using the Baltime contract form. On the date the charterers ordered the Eva to Basrah to discharge a cargo of cement, Basrah was considered to be a "safe port" because at that time there was no anticipation of hostilities affecting the port. The Eva berthed on August 20, 1980, and completed discharging cargo on September 22, 1980. On that day, heavy fighting broke out in and around Basrah and the vessel was trapped. There were still eight months of the charter-party left to run.

The shipowners claimed damages from the charterers on the ground that the charterers were in breach of the 'safe port' warranty. The charterers denied any breach and contended that the charter-party contract had become frustrated on October 4, 1980. At arbitration, the umpire held that the charterers were not in breach of the "safe port" warranty and could rely on the doctrine of frustration. Justice Goff reversed, holding that the charterers were in breach and, therefore, the frustration doctrine did not apply. Frustration is available as a defense, he said, only when a condition (in this case a safe condition) ceases to exist without the default of either party. The matter eventually came before the court of appeal and the House of Lords, where Lord Roskill said:

The charterer will exercise his contractual right by giving the shipowner orders to go to a particular port or place of loading or discharge. It is clearly at that point of time when that order is given that that contractual promise by the charterer regarding the safety of that intended port or place must be fulfilled. But that contractual promise cannot mean that that port or place must be safe when that order is given, for were that so, a charterer could not legitimately give orders to go to an ice-bound port which he and the owner both knew in all human probability would be ice-free by the time that vessel reached it. Nor, were that the nature of the promise, could a charterer order the ship to a port or place the approaches to which were at the time of the order blocked as a result of a collision or by some submerged wreck or other obstacles even though such obstacles would in all human probability be out of the way before the ship was required to enter. The charterer's contractual promise must, I think, relate to the characteristics of the port or place in question, and in my view, means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary, and in due course, leave. But if those characteristics are such as to make that port or place prospectively safe in this way, I cannot think that if in spite of them, some unexpected and abnormal event thereafter suddenly occurs which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial.

Lord Roskill stressed that the obligation of a charterer will arise at the time such an order is given because it is then that the relevant employment of the ship will begin. 47

IV. SALVAGE AGREEMENTS

Since it is difficult to make a precise determination concerning an appropriate level of remuneration before salvage operations

47. The rule established by the House of Lords is that the charterer will not be in breach if at the time he nominated the port, it was 'prospectively' safe. However, the application of this rule may seem harsh in the following situations:
(a) the port at the time of nomination was safe but became unsafe before the arrival of the ship. The charterer will still have time to divert the ship to another place;
(b) the port became unsafe while the ship was loading or unloading but she can leave the port safely.

In these circumstances, the charterer can avoid the risks of the unsafe port by changing the nominated port or by ordering the ship to leave the unsafe port.
commence, a salvor's willingness to render services will depend
upon his acceptance and confidence in procedures for fixing
remuneration afterward. The Lloyd's form has provided such
reliable procedure for many years. In particular, the form fea-
tures a means of collecting and holding security that not only
meets Lloyd's stringent requirements but also provides a pro-
cedure to collect awards when Lloyd's has been holding the
security. Thus, the Salvage Form,48 Lloyd's Open Form 1980
(hereinafter referred to as "LOF 1980"), is, in essence, an arbi-
tration agreement. One of its advantages is that it provides for
a speedy and effective system of arbitration, one that can usually
proceed with documentary evidence alone.

The first sentence of clause 1(b) of LOF 1980 reads, "The
Contractor's remuneration shall be fixed by arbitration in Lon-
don in the manner here prescribed and any other difference
arising out of this Agreement or the operations thereunder shall
be referred to arbitration in the same way." Clause 1(d) provides
that LOF 1980 "shall be governed by, and arbitration thereunder,
shall be in accordance with English law." Accordingly, the form
directs that arbitration must take place in London. The means
by which an arbitrator is appointed and arbitration is claimed is
provided for in clauses 6 to 10. The conduct of the arbitration is
covered in clauses 11 to 12. The provisions on appeal are to be
found in clauses 13 and 14. It must be noted that the jurisdiction
of the arbitrator is not limited to claims by the contractor, but
extends to counterclaims by the owners of the salvaged property
as well as to claims by persons who are parties to the agreement
but whose property has not been salvaged.

Under clause 6(a) and (b), the appointment of an arbitrator is
automatic where security is given and also (whether security has
been given or not) upon receipt of a notice of claim for arbitration.

Clause 7 provides the procedure for terminating the appoint-
ment of an arbitrator. However, even if the procedure for joint
notification of termination set out in clause 7 were not followed,
it would be unlikely that an improperly terminated arbitrator

48. The form was first published in 1892 in order to protect underwriters against
excesses of salvors. Its recent version, the eighth edition (Lloyd's Open Form 1980),
became effective on June 23, 1980. It remains an underwriter's document and not a
salvor's contract. Renowned for its principle "no cure, no pay," it is the most important
of all forms of salvage agreements.
could nevertheless proceed to make an award. There would have to have been a hearing before any award could be made and published.

Clauses 11 and 12 deal with the conduct of the arbitration. Frequently, the arbitrator will be asked to make an order for discovery. In case an arbitrator is required to apportion a salvage remuneration between various claimants, he should be asked to do so during the course of the hearing. In making his award (which is confidential and published by the Committee of Lloyd's), the arbitrator follows the same principles of law as those applicable to proceedings in the Admiralty Court.

Provisions as to appeal and as to the conduct of the appeal are set out in clauses 13 and 14 of LOF 1980. It is not usual to give the grounds for an appeal when giving Notice of Appeal or Cross-Appeal to the Committee of Lloyd's. The same considerations as to the exclusion or admission of new evidence, or alteration of the remuneration award usually apply on the appeal as they would apply in proceedings in the court of appeal. As to findings of fact, the appeal arbitrator is usually in the same position as the original arbitrator since evidence is, in most cases, entirely documentary rather than testimonial.

V. REFORMS EFFECTED BY THE 1979 ACT

The reforms effected by the 1979 Act concern three main areas: (1) appeal to the High Court (the commercial court); (2) exclusion agreements; and (3) control of the conduct in arbitration.

A. Appeal to the High Court

The 1979 Arbitration Act abolished the "special case" procedure provided for in Section 21 of the 1950 Arbitration Act. In

49. The "special case" procedure was used in two situations. The first was when one of the parties, or both, did not wish the arbitrator to decide questions of law and therefore, asked him to make his award in the form of a "special case." Such a request could be made at any time before the publication of the award. If the request for a special case procedure was made by both parties, then the arbitrator would accede to it as a matter of course. If only one party asked for the special case, it was a matter for the discretion of the arbitrator. If he refused this request, the party making it could apply to the Court for an order that the arbitrator should comply with the request. The second situation was when the arbitrator was not sure of the answer to certain legal questions and therefore put them to the court as a consultative case.
its place, the new Act limited appeal to the High Court to "any question of law arising out of an award made on arbitration agreement."

1. "Any question of law"

These words invite a distinction between a question of law and a question of fact. The latter is left entirely to be decided by the arbitrator without any judicial control.

2. "Arising out of award"

These words cover disputes as to whether a breach of contract by one party has operated to discharge the other. They also cover the case where a contract has been frustrated; they do not, however, extend to agreements later determined to be void or illegal.

3. "Arbitration agreement"

These words have the same meaning as they had in the 1950 Act. Section 32 of the 1950 Act defined this term as meaning "[a] written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or no." The words cover both an arbitration clause and an actual submission of a dispute to arbitration.

4. Right of appeal

The right of appeal may be exercised only with (a) the consent of all parties or (b) leave of the court.

5. Consent of the parties

Where all parties have given their consent to an appeal, none can later complain of a misuse of the procedure or a delay in solving the dispute.

6. Leave of the court

Section 1(4) of the 1979 Act states that the High Court shall not grant leave to appeal unless it considers that, having regard

to all the circumstances, "the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement." Questions concerning the extent of the court's discretion to grant leave to appeal under this section and questions as to what considerations should influence the judge in deciding how to exercise his discretion have caused conflicts between the Commercial Court and the guidelines laid down by the court of appeal in May 1980. On July 16, 1981, this issue was finally settled by a decision of the House of Lords.

In The Nema, Lord Diplock observed that "the judicial discretion conferred by subsection (3)(d) to refuse leave to appeal from an arbitrator's award in the face of an objection by any of the parties to the reference was in terms unfettered but it must be exercised judicially."

In exercising discretion under section 1(2), a judge should normally ask himself not whether he agrees with the arbitrator's conclusion, but rather whether it appears on perusal of the award either that the arbitrator had misdirected himself in law or that his decision was one that no reasonable arbitrator could have reached. There may, however, be cases where, for example, the events relied on to invoke the frustration doctrine were events of a general character that had a high probability of recurring in similar transactions between other persons engaged in the same kind of commercial activity. In such a case, unless there were prospects that an appeal might be consented to by the parties as a test case under section 1(3)(a), it might be proper exercise of discretion for a judge to give leave to appeal to permit him to make a determination that would stand in future cases as binding precedent for similar arbitrations.

Despite the reforms brought by the 1979 Act, section 1 practically reinstated the special case procedure of the 1950 Act. The Nema case reflects this interpretation. Consequently, there was a need for further amendment to the 1979 Act.

B. Appeals to the Court of Appeal

The Supreme Court Act of 1981 further amended Section 148 of the 1979 Arbitration Act. The amendment provides that two

51. Section 148 adds the following paragraphs:
conditions are required for an appeal, regardless of whether it concerns a question of law arising out of an award or the determination of a preliminary point of law arising in the course of arbitration. As stated in the amendments, the two conditions are that (1) the Commercial Court grants leave to appeal, and (2) the Commercial Court certifies that the question of law “either is one of general public importance or is one which for some other special reason should be considered by the court of appeal.”

C. Exclusion Agreements

Under prior English law, the parties to an arbitration agreement were not allowed to make provisions to exclude or restrict the judicial review of the courts on the arbitration. Such agreement was considered to be contrary to public policy. The courts frequently felt the need to extend protection to one of the parties, especially where contracts of adhesion were involved.

1. The character of exclusion agreements

The 1979 Act permits an agreement to exclude judicial control of the arbitration. The new Act merely requires in Section 3(1), that such an agreement shall be in writing and provides that the agreement can be either part of the arbitration clause or separate. The agreement may relate to a particular award, to a number of awards under a particular reference, or to any other description of awards.52

The exclusion may have a wide or a narrow scope. It may, for example, refer to both sections 1 and 2 of the 1979 Act or to only one section. Also, it may exclude the judicial review of the High Court or that of the court of appeal. Therefore, the construction of an exclusion agreement depends on its language and the courts have not yet had an opportunity to provide guidelines on this issue.

(6A) Unless the High Court gives leave, no appeal shall be to the court of appeal from a decision of the High Court:
(a) to grant or refuse leave under subsection (3)(b) or (5)(b); or
(b) to make or not to make an order under subsection 5.

(7A) Unless the High Court gives leave, no appeal shall be to the court of appeal from a decision of the High Court to entertain or not to entertain an application under subsection (1)(a).

2. *Ineffective exclusion agreements: statutory arbitrations*

An exclusion agreement is of no effect in statutory arbitrations, i.e., arbitrations stipulated under certain statutes as the only means of solving the disputes. Section 7(3) of the Act states:

For the avoidance of doubt, it is hereby declared that the reference in subsection (1) of section 31 of the principal act (covering statutory arbitrations) to arbitration under any other act does not extend to arbitration under section 92 of the County Courts Act 1959 (cases in which proceedings are to be or may be referred to arbitration) and accordingly nothing in this Act or in Part I of the principal Act applies to arbitration under the said Section 92.

3. *Ineffective exclusion agreements: misconduct*

An exclusion agreement is of no effect in cases concerning "misconduct" of arbitrators and arbitrations, or as phrased by Sir Michael Kerr, "any instances in which there may be infringements of the rules of natural justice." Consequently, the reference and award in such cases may be reviewed under the judicial powers granted in sections 22 and 23 of the 1950 Arbitration Act.

4. *Exclusion agreements in particular kinds of arbitration*

a. *Domestic agreements*

An exclusion agreement has no effect with respect to an award or question of law arising under a domestic arbitration agreement unless it is entered into after the commencement of the arbitration. The bargaining powers of the parties in standard form contracts may not be the same before and after the commencement of arbitration. Only those exclusion agreements entered into after the commencement of an arbitration in which an award is made or, as the case may be, in which a question of law arises, are effective. Section 7(2) of the 1950 Arbitration Act provides that an arbitration commenced

... when one party to the arbitration agreement serves on the other party or parties a notice requiring him or them to appoint or

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53. Arbitration Act of 1979, § 3(2).
54. Id. at § 3(5).
concur in appointing an arbitrator, or, where the arbitration agree-
ment provides that the reference shall be to a person named or
designated in the agreement, requiring him or them to submit the
dispute to the person so named or designated.

Section 3(7) of the 1979 Act defined domestic arbitration agree-
ments as follows:

In this section 'domestic agreement' means an arbitration agree-
ment which does not provide, expressly or by implication, for
arbitration in a State other than the United Kingdom and to which
neither:

(a) an individual who is a national of, or habitually resident in,
any State other than the United Kingdom; nor

(b) a body corporate which is incorporated in, or whose central
management and control is exercised in, any State other than the
United Kingdom, is a party at the time the arbitration agreement
is entered into.

This definition is similar to the one adopted in Section 1(4) of
the 1975 Arbitration Act.

Thus, Section 3(7) of the 1979 Act makes it clear that any
change in the nationality of the parties, their habitual residence,
or in the situs of control of corporate management after the time
the arbitration agreement is entered into (as opposed to the
commencement of the arbitration) would not affect its character-
ization as a "domestic" agreement. Consequently, an exclusion
agreement in an international contract would not become inef-
fective simply because one of the parties later becomes connected
with the United Kingdom in one of the ways mentioned in Section
3(7).

b. Special-category disputes

Section 4(1) of the 1979 Act states:

Subject to subsection (3) below, if an arbitration award or a
question of law arising in the course of a reference relates, in whole
or in part, to:

(a) a question or claim falling within the admiralty jurisdiction
of the High Court; or

(b) a dispute arising out of a contract of insurance; or

(c) a dispute arising out of a commodity contract, an exclusion
agreement shall have no effect.

(1) Maritime contracts

The admiralty jurisdiction of the High Court is set out in the
Administration Act of 1956, which lists some eighteen questions
or claims of a maritime nature. A large number of maritime disputes are submitted to arbitration each year, especially disputes dealing with charter-party contracts.

Disputes arising out of ship building contracts or contracts for the sale and purchase of ships do not fall under this category unless they involve a claim to the ownership or possession of the ship.

(2) Insurance contracts

In practice, very few insurance disputes are submitted to arbitration. Section 4(1)(b) of the 1979 Act refers only to contracts of insurance and not reinsurance. It could be argued that this provision covers contracts of reinsurance since the usual form of reinsurance policy states: "Being a reinsurance subject to the same clauses and conditions as the original policy or policies, and to pay as may be paid thereon." However, contracts of insurance and reinsurance are distinct. Furthermore, many reinsurance contracts could be properly described as international agreements.

(3) Commodity contracts

A commodity contract is defined in Section 4(2) of the Act as a contract "for the sale of goods regularly dealt with on a commodity market or exchange in England and Wales which is specified ... by an order made by the Secretary of State and of a description so specified." By an order in council, the Secretary of State for Trade has applied this provision to all the main commodity markets, exchanges and trade associations in England and to their standard forms of contract. When any of the above categories of questions or claims are referred to arbitration, an exclusion agreement is of no effect unless either (1) the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or in which the question of law arises, or (2) the award or question of law relates to a contract which is governed by a system of law other than the law of England and Wales.

Thus, where the parties to a shipping contract, e.g., a charter-party contract, agree to apply the law of Bermuda or Hong Kong, which is identical to English law, the exclusion agreement would be effective. This loophole is known in London as "the Bermuda hole".
(4) Possible future changes in special-category disputes

The draftsmen of the 1979 Act were not sure (1) whether prohibiting exclusion agreements in the special-category disputes would serve the objective of the new reform, or (2) whether the prohibitions should be applicable to all three special categories, i.e. maritime, insurance, and commodity contracts.

Therefore, the Secretary of State was empowered by Section 4(3) to remove any of the foregoing categories from the prohibition.

D. Multilateral agreements

These international agreements, sometimes called "one-off" or "transnational" contracts, are not defined in the act. The main feature of these agreements is that they contain a number of contracts related to certain projects. A dispute under one contract may thus affect parties under another contract. Furthermore, disputes under these agreements might be subject to litigation or arbitration in more than one country. To avoid such a situation, the arbitration clause in such agreements is drafted in a way to ensure that all disputes are submitted to an ad hoc body and to allow parties affected by the dispute to intervene before that body. These types of contracts are not subject to the Act nor to any of its limitations affecting domestic or special-category disputes. An exclusion agreement in such contracts would be valid whether it is agreed to before or after the commencement of arbitration and irrespective of the governing law.

E. Controlling the Conduct of Arbitration

One of the disadvantages of arbitration, as compared with litigation, is the absence of sanctions to assure compliance with the arbitrator's orders. This disadvantage has made it difficult for an arbitration to prevent one of the parties from causing frustrating delay. It has been generally recognized that an arbitrator may determine and set a timetable for the steps to be taken, such as delivery of pleadings, disclosure of documents, amendment of pleadings, and day for hearing. However, arbitrators have been reluctant to set limits for compliance with their orders for fear of being accused of misconduct. This reluctance stemmed from the fact that prior to the 1979 Act, an arbitrator
was not entitled to impose sanctions for failure to comply with his directions. More recently, however, an important related question has been raised: whether the arbitrator has the power to dismiss a claim for failure to prosecute?

The Bremer Vulkan decision in 1981 was one of the most important in the history of English arbitration. The issue was: if a claimant in an arbitration delayed the pursuit of his claim to such an extent that a fair hearing of the dispute was no longer possible, did the arbitrator or the court have the power to bring the reference to an end by exercising jurisdiction similar to that available to the High Court when dismissing actions for failure to prosecute?

The answer, accepted in principle by the House of Lords, relied on the idea of a severable contract to arbitrate. The court recognized that if a term could be found that required the claimant to pursue the arbitration with dispatch, then a grave breach of that term would amount to a repudiation, entitling the respondent to bring the arbitration agreement to an end. Consequently, the court would be able to grant an injunction to protect the respondent from being harassed by further proceedings that would no longer have any contractual foundation. The relief so granted would not take the shape of an intervention in the pending reference, but would be of an essentially declaratory nature and would recognize that, quite apart from any order of the court, the arbitration agreement had come to a premature end.

1. Interlocutory orders under Section 5 of the 1979 Act

The problems in controlling conduct of the parties were, as discussed above, mainly due to the limited powers provided to arbitrators under Section 12 of the 1950 Act. To remedy this deficiency, Section 5 of the 1979 Act gave arbitrators and umpires more powers to ensure compliance with their directions through the courts. Section 5(1) states:

If any party to a reference under an arbitration agreement fails within the time specified in the order or, if no time is so specified, within a reasonable time to comply with an order made by the arbitrator or umpire in the course of the reference, then on the

application of the arbitrator or umpire or of any party to the reference, the High Court may make an order extending the powers of the arbitrator or umpire as mentioned in subsection (2) below.

Thus, Section 5 enables an arbitrator to seek from the High Court a power to strike out a pleading or defense, refuse an amendment of pleadings, and to proceed ex parte. It also enables him to dismiss a claim for want of prosecution in the event of noncompliance with his orders even where the exercise of such power would be contrary to an express term of the arbitration agreement.

In the case of a reference to a judge-arbitrator or judge-umpire, the powers conferred by Section 5 may be exercised either by the High Court or the judge-arbitrator or judge-umpire himself. Anything done by a judge in either of the latter capacities shall have the same effect as if done in his capacity as a judge of the High Court.

VI. CONCLUSION

The foregoing survey shows that shipping disputes fall under different categories. In the field of salvage, the Lloyd's form and its principle "no cure, no pay" has served the maritime world for generations. It is still the most appropriate and acceptable form of contract, providing for a unique system of arbitration that is different from commercial arbitration.

The main feature of arbitration dealing with charter-party contracts and bills of lading, as compared with commercial arbitration, is that, in the former, arbitrators must decide the disputes according to established legal rules. These arbitration panels are regarded as "private tribunals" that follow the procedure of ordinary courts. Restrictions on appeals imposed by the 1979 Arbitration Act were intended to avoid overburdening the appeal courts with numerous appeals raising points of little or no general importance, even to the shipping industry. However, gaps were soon discovered in the 1979 Act that have since been removed by the amendments of the Supreme Court Act of 1981. The amendments give arbitrators more freedom in deciding shipping disputes, a freedom needed to meet the needs of commerce.
I. INTRODUCTION

A completely new arbitration act passed the Dutch parliament and became effective on December 1, 1986. This article is intended to provide a general survey of the major changes and innovations introduced by the new law.

The old act dated from 1838. It had remained virtually unchanged for 150 years. During this entire period, only a single provision, one that had prohibited women from acting as arbitrators, had been abolished. The Dutch courts, however, had insured the old act’s proper functioning through the years by broadly interpreting its provisions. Accordingly, by 1986, a reliable picture of arbitration practice in the Netherlands could not be gained by consulting the language of the 1838 Act alone. The vast body of case law that had developed over 150 years had grown to be equally important, and had to be consulted as well. This situation had become rather cumbersome, especially for foreigners.

Additionally, by 1986, the time had come not only to consolidate statutory and case law, but also to modernize arbitration legislation. After World War II many countries had undertaken modernization, countries like England, France, and Switzerland, to name only a few. Several international arbitration conventions had come into being and UNCITRAL had embarked on the drafting of The Model Law for International Commercial Arbitration, which it adopted in 1985 as a model for drafting new, or

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* Professor of Comparative Law, Erasmus University (Rotterdam); first Dean of the Law Faculty, forming part of the Netherlands’ School of Economics; Master of Laws, Leyden University, 1934. Doctor of Laws, Leyden University, 1940. President of the Netherlands Arbitration Institute; Editor of the Yearbook of Commercial Arbitration; Special Consultant to UNCITRAL for the preparation of UNCITRAL Arbitration Rules.

amending existing laws.\textsuperscript{3} All of these developments inspired the Dutch legislature to initiate a complete overhaul of its arbitration law.

The new Act is now contained in Book IV of the Code of Civil Procedure, Articles 1020-1076. It is more detailed than the 1838 Act and contains quite a number of innovations which will be explained in this article. Book IV is divided into two Titles. Title I (Articles 1020-1073) covers arbitrations taking place in the Netherlands; Title II (Articles 1074-1076) pertains to arbitrations outside the Netherlands.

The 1986 Act is organized according to a territorial principle. When an arbitration takes place in the Netherlands, Title I of the Act applies regardless of the parties' nationality. The Act differs in this respect from the new French arbitration legislation,\textsuperscript{4} although in other respects the latter often served the Dutch legislature as a source of inspiration. The French law attempts to deal with national and international arbitrations separately. It is organized to include a special section on international arbitration with many cross-references to provisions in the national section. This requirement for continual cross-referencing is the French Act's principal shortcoming. Additionally, such an attempted categorization requires a definitive distinction between international and national commercial arbitration. From the UNCITRAL Model Law exercise we know how difficult it is to make such a definitional distinction and the questions raised by an attempt to do so. For example, the new French law commences its international section with the following definition in article 1492: "Est international 'arbitrage qui met en cause des intérêts du commerce international" (An arbitration is international if it involves international commercial interests).\textsuperscript{5} But, what is international, and what is commercial?


\textsuperscript{5} This provision appears in article 1492 of the C. Pr. Civ.. The French Code is
The Dutch legislature, on the other hand, devoted considerable attention to this problem and opted to avoid it by making a single regulation adaptable to both domestic and international arbitrations. Consequently, only three provisions in Title I (Articles 1030-1073) were necessary to directly address the Act's international aspects. Two of them, Articles 1027 and 1035, merely provide for the extension of certain time limits whenever a foreign party is involved in an arbitration. The only provision which, in its entirety, is conceived specifically for disputes of international character is Article 1054, an Article that sets forth the substantive law applicable when foreign parties are in contention in an in-country arbitration. All of the other 53 Articles of the Act apply equally well to both domestic and international arbitrations.

The new Dutch Arbitration Act is characterized by its great flexibility, and by the freedom it provides to parties and arbitration institutes (the latter regarding their rules) to deviate from the Act's provisions when this is deemed desirable. In assembling the Act, the drafters paid due attention to the new arbitration laws and conventions that first saw the light after World War II, developments which tended to adapt arbitration to modern day business and political realities. In addition, extensive comparative research is reflected in the product. As a result, it serves as a good example of modern arbitration legislation.

I will now turn to the most important aspects and novelties of the new Dutch Arbitration Act, from the arbitration agreement to the enforcement of foreign awards.

II. THE ARBITRATION AGREEMENT

The Arbitration Act requires that an arbitration agreement shall be in writing. This requirement, often found in arbitration laws of other nations, is new for the Netherlands. Under the old Dutch law, an arbitration agreement could be concluded orally; moreover, a party could be obliged to submit a dispute to arbitration even in circumstances in which no agreement to arbitrate


6. See infra § XVIII for further discussion of art. 1054.
had been concluded, if, in the branch of trade concerned, arbitration was customary. The new Act now provides:

The arbitration agreement shall be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party.\(^7\)

This provision largely corresponds with Article 7(2) of the UNCITRAL Model Law.\(^8\) It provides for acceptance by an agent on behalf of a party, and binds a party to arbitration only when he has explicitly or tacitly agreed to an arbitration clause included among standard conditions contained in any written instrument proffered by the other party, e.g., in a sales confirmation.

III. THE DOMAIN OF ARBITRATION (ARBITRABILITY)

A legislature can enlarge or restrict the domain of arbitration. In Article 1020(4)(c), the Dutch Arbitration Act allows the parties to submit to arbitration "the filling of gaps in, or modification of, the legal relationships between the parties referred to in paragraph (1)."\(^9\) It is one of the first Acts to include such a provision.

Paragraph (1) of Article 1020 states that parties may agree to submit to arbitration "disputes which have arisen or may arise between them out of a defined legal relationship, whether contractual or not." This provision corresponds with Article 7(1) of UNCITRAL's Model Law and is also found in many other arbitration acts and international arbitration conventions (such as Article I(1) of the 1958 New York Convention).\(^{10}\) Accordingly, Article 1020(4)(c) is an optional additional provision, applicable only when the requirements of Article 1020(1) are also met. The provisions of Article 1020(4)(c) must be agreed to specifically. They are particularly useful in providing for arbitration of long-term contracts.

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7. NEW DUTCH CODE, supra note 1, art. 1021.
8. UNCITRAL Model Law, supra note 3, art. 7(2).
9. NEW DUTCH CODE, supra note 1, art. 1020(4)(c).
IV. COMMENCEMENT OF ARBITRATION

When an arbitration clause is used in an agreement addressing future disputes, the Act provides that the arbitration shall be deemed to have commenced on the day of receipt of a notice in writing in which one party informs the other that he is commencing arbitration. When an already existing dispute is submitted to arbitration, the arbitration shall be deemed to have commenced on the day the submission agreement was concluded. When Article 1024 or 1025 are applied, they generally determine the time period allowed for the appointment of an arbitrator. However, the Act allows the parties to circumvent these Articles and to agree on a different manner of commencing the arbitration. Often, such details will be contained in arbitration rules established or referred to in the parties' agreement.

V. APPOINTMENT OF ARBITRATORS

The Act provides that an arbitrator or arbitrators shall be appointed in accordance with the method agreed to by the parties. It permits the parties to entrust such appointment to a third person. This is consistent with many other sections of the Act that also allow the parties to delegate powers they otherwise would exercise themselves. As a rule, the appointed third person will be an arbitration institute, but any other natural person may be chosen as well.

If no method of appointment was specified in the original agreement of the parties, the arbitrators may nevertheless be appointed at any time by mutual agreement of the parties. If such appointment is not mutually agreed upon within two months after the commencement of the arbitration (or three months if one of the parties' domicile or residence is outside the Netherlands), the President of the District Court may be requested to make the appointment.

Article 1027(3) is only one of the many provisions in the new law enabling the intervention of the President of the District Court to insure that the arbitration machinery runs smoothly

11. NEW DUTCH CODE, supra note 1, art. 1025.
12. Id. art. 1024.
13. Id. art. 1027(1).
14. Id. art. 1027(3).
and without interruption. This is one of the Act's main characteristics. Another is the deference to the autonomy of the parties expressed in many provisions by the phrase "unless the parties have agreed otherwise."

The Dutch Act provides that there shall always be an uneven number of arbitrators appointed. Should the parties agree upon an even number, however, this does not invalidate the arbitration agreement. In this situation, the Act provides that the arbitrators appointed by the parties are to agree to an additional arbitrator who shall be appointed as the chairman. Failing such agreement, the President of the District Court will appoint the chairman (unless the parties have agreed otherwise). For example, the parties may instead designate an arbitration institute to make this appointment.\(^{15}\)

The new law expressly deals with the situation in which an arbitration agreement has given one party a privileged position with regard to the appointment of arbitrators. The mere inclusion of such a provision, as in the case of the agreement for an even number of arbitrators discussed above, does not invalidate the arbitration agreement. However, "the [disadvantaged] party may within one month after the commencement of the arbitration, request the President of the District Court to appoint the arbitrator or arbitrators."\(^{16}\)

The Act provides that any natural person of legal capacity may be appointed as an arbitrator.\(^{17}\) In this regard, the new Act abolished a provision in the former Dutch code of Civil Procedure that had precluded active judges from serving as arbitrators and did not change the old Act's provision that no person is precluded from appointment by reason of his nationality.\(^{18}\) The nationality provision is tempered with the phrase "unless the parties have agreed otherwise." In international commercial arbitration it is not uncommon to require that the tribunal's chairman have a different nationality than the parties.\(^{19}\)

According to Article 1027(4), the President of the District Court or any other empowered person shall appoint arbitrators without

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15. *Id.* art. 1026(4).
16. *Id.* art. 1028.
17. *Id.* art. 1023.
regard to the question of whether a valid arbitration agreement exists. Moreover, the parties do not forfeit their right to invoke the lack of jurisdiction of the arbitral tribunal on this ground by their mere participation in appointment proceedings.\textsuperscript{20} The whole issue as to whether a valid arbitration agreement exists has, therefore, been removed from appointment proceedings altogether and reserved for later stages in the process by Article 1027(4). The implications of this are more fully discussed later in this article.\textsuperscript{21}

VI. RELEASE FROM MANDATE AND REPLACEMENT OF ARBITRATOR

The Act provides that an arbitrator who has already accepted his appointment may subsequently be released at his own request or by mutual agreement of the parties.\textsuperscript{22} In addition, the Act provides for the possibility of such release at the request of one party, if the arbitrator has become de jure or de facto unable to perform. In such case, the arbitrator may not be in a position to make the request himself and, if release by mutual agreement of the parties is also not possible, the President of the District Court, or a third party appointee (if provided for), may be empowered to release the arbitrator from his mandate.\textsuperscript{23} In all these cases, as well as when an arbitrator dies, an arbitrator is replaced in the same manner provided for in his initial appointment.\textsuperscript{24}

VII. TERMINATION OF THE MANDATE OF THE ARBITRAL TRIBUNAL

The mandate of an arbitral tribunal may be terminated by mutual agreement of the parties.\textsuperscript{25} The new law also introduces the possibility that the President of the District Court may, at the request of a party, and "having regard to all circumstances," terminate the arbitration "if, despite repeated reminders, the arbitral tribunal carries out its mandate in an unacceptably slow

\textsuperscript{20} Id. art. 1027(4).
\textsuperscript{21} See generally, infra, § XVI.
\textsuperscript{22} New Dutch Code, supra, note 1, art. 1029(2),(3).
\textsuperscript{23} Id. art. 1029(4).
\textsuperscript{24} Id. art. 1030.
\textsuperscript{25} Id. art. 1031.
manner.\textsuperscript{26} In other words, if Article 1031(2) is invoked, the jurisdiction of the court is revived to terminate the mandate of the arbitral tribunal unless the parties have made other provision.

VIII. CHALLENGE OF AN ARBITRATOR

The appointment of an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. The same applies to a secretary engaged by an arbitral tribunal.\textsuperscript{27} The Act, therefore, provides that a prospective arbitrator or secretary who anticipates that he could be challenged must disclose the presumed grounds for challenge.\textsuperscript{28} This duty to disclose, now codified, is expected to reduce the incidence of challenge proceedings.

Article 1035(2) suggests that withdrawal by an arbitrator is the most appropriate reaction to most challenges. The rationale is that by challenging, a party has demonstrated a lack of confidence in the arbitrator concerned. This being the case, it would more often than not be appropriate for the arbitrator to withdraw, unless it is clear that the challenge is unjustified and has only been introduced to cause delay. If the challenged arbitrator declines to withdraw, the Act provides that the challenge shall be decided, without appeal, by the President of the District Court. This provision does not, however, preclude an arbitration institute from providing in its rules that it will be empowered to determine the merits of such a challenge in the first instance and that the President will be resorted to only in exceptional circumstances. As a practical matter, a challenging party will be well aware that the President will usually follow the decision of the arbitration institute except in such exceptional circumstances.

IX. ARBITRAL PROCEEDINGS IN GENERAL

The Act leaves considerable latitude to the parties in organizing arbitration proceedings. As a rule, parties will organize according to procedures established by existing arbitration rules. To the extent that parties have not done so, or the rules referred

\begin{itemize}
  \item \textsuperscript{26} Id. art. 1031(2).
  \item \textsuperscript{27} Id. art. 1033.
  \item \textsuperscript{28} Id. art. 1094.
\end{itemize}
to are silent, the Act provides that the arbitral tribunal will decide the procedure.

Many provisions in the Act from which the parties are permitted to deviate, contain the phrase "unless the parties have agreed otherwise." Certain provisions, however, are considered too important not to be mandatory. Examples of this are subsections(1) and (2) of Article 1039 that deal with the equality of the parties, their right to substantiate their claims and present their case, and their right to make an oral presentation. The latter provision corresponds with Article 24(1) of the UNCITRAL Model Law, which provides that the arbitral tribunal shall hold a hearing if so requested by a party.

X. THE PLACE OF ARBITRATION

The Act provides that the place of arbitration will determine the place of the award. The place of arbitration will be fixed by the agreement of the parties or, failing this, by the arbitral tribunal. If neither the parties nor the tribunal fix the place of arbitration, the place designated in the award is decisive. The place of the award is not changed by the fact that the arbitral tribunal holds hearings, deliberates, or chooses to examine witnesses or experts at any other place it deems appropriate, within or outside the Netherlands.

As mentioned in the Introduction, Title I of the Act applies to arbitrations held in the Netherlands. According to Article 1073(2), the Act also applies if the place of arbitration has not been fixed by the parties, and at least one of them is domiciled or has established actual residence in the Netherlands. The benefit of such an appointment is that the arbitrator (in cases where the parties cannot otherwise agree) is empowered to proceed directly to decide upon the place of arbitration, a place that may be outside the Netherlands if this appropriate and desirable.

XI. EVIDENCE

The Act provides that if witnesses, expert-witnesses included, are to be heard, the arbitral tribunal will determine the manner

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29. Id. art. 1039(1).
30. Id. art 1039(2).
31. UNCITRAL Model Law, supra note 3, art. 24(1).
32. New Dutch Code, supra note 1, art. 1037.
33. Id. art. 1073(2).
of their examination.\textsuperscript{34} This refers also, in appropriate cases, to the method of cross-examination. Court assistance is available in cases where a witness does not appear voluntarily or, having appeared, refuses to testify. The Act provides that the arbitral tribunal may, in these instances, allow a party to petition the President of the District Court for the appointment of a judge-commissary before whom the examination, in the presence of the arbitrators, shall take place.\textsuperscript{35}

The arbitral tribunal may also appoint one or more advisory experts. The fact of their appointment and terms of reference will be communicated by the appointing tribunal to the parties. The parties will receive a copy of the expert’s report and, if one of the parties so requests, the expert shall be examined at a hearing. The parties will be given an opportunity at the hearing to examine the expert and to present their own experts.\textsuperscript{36}

If witnesses are to be heard, the tribunal has the power to designate one of its members to conduct the examination.\textsuperscript{37} This is useful when witnesses reside abroad or when travel for examination by the entire tribunal would be too costly. In such a case, the testimony will be recorded in a transcript or in minutes.

The arbitral tribunal also has the power, according to the Act, to order the parties to produce documents.\textsuperscript{38} If this order is not complied with, the arbitral tribunal will draw its conclusions.\textsuperscript{39}

\section*{XII. Third Parties}

The Act provides that a third party may request to join the arbitral proceedings as co-claimant or co-respondent (\textit{voeging}) or to intervene for the purpose of safeguarding his rights (\textit{tussenkomst}).\textsuperscript{40} A party who claims a right to be indemnified by a third party may serve a notice of joinder on this party (\textit{vrijwaring}).\textsuperscript{41}

\begin{itemize}
\item\textsuperscript{34} Id. art. 1041(1).
\item\textsuperscript{35} Id. art. 1041(2).
\item\textsuperscript{36} Id. art. 1042.
\item\textsuperscript{37} Id. art. 1039(3).
\item\textsuperscript{38} Id. art. 1039(4).
\item\textsuperscript{40} New Dutch Code, supra, note 1, art. 1045(2).
\item\textsuperscript{41} Id. art. 1045(2).
\end{itemize}
In each of these cases, the arbitral tribunal, having heard the parties, may only permit this third party to participate if he accedes, by written agreement with the parties, to the arbitration agreement.\(^{42}\)

XIII. CONSOLIDATION

Article 1046 introduces the possibility that an arbitral proceeding that is commenced before one arbitral tribunal convening in the Netherlands and which deals with subject matter associated with matters pending in arbitral proceedings before another in-country arbitral tribunal may be consolidated with that other proceeding. As a practical matter, however, the parties may opt out of this possibility by simply referring to the fact that the rules of the arbitration institute to which they are bound do not provide for, or require, consolidation. Additionally, of course, they are free to agree not to consolidate, as provided for in Article 1046(1).

Absent such agreement or rules, however, the Act provides that either party may make a request for consolidation. The President of the Amsterdam District Court is designated to rule on such request. The Amsterdam District Court is specified since Amsterdam is an important venue for arbitration of disputes in the construction industry, an industry in which consolidation of arbitration is needed most.

Consolidation may be useful in avoiding conflicting awards. It may be total or partial. Partial consolidation is appropriate when some but not all of the issues are the same or require the same decision. As consolidation provisions are seldom found in arbitration acts, it is interesting to examine Article 1046 in its entirety:

(1) If arbitral proceedings have been commenced before an arbitral tribunal in the Netherlands concerning a subject matter which is connected with the subject matter of arbitral proceedings commenced before another arbitral tribunal in the Netherlands, either party may, unless the parties have agreed otherwise, request the President of the District Court in Amsterdam to order a consolidation of the proceedings.

(2) The President may wholly or partially grant or refuse the request, after he has given all parties and the arbitrators an

\(^{42}\) Id. art. 1045(3).
opportunity to be heard. His decision shall be communicated in writing to all parties and the arbitral tribunals involved.

(3) If the President orders consolidation in full, the parties shall in consultation with each other appoint an uneven number of arbitrators and determine the procedural rules which shall apply to the consolidation proceedings. If, within the period of time prescribed by the President, the parties have not reached agreement on the above, the President shall, at the request of either party, appoint the arbitrator or arbitrators and, if necessary, determine the renumeration for the work already carried out by the arbitrators whose mandate is terminated by reason of the full consolidation.

(4) If the President orders partial consolidation, he shall decide which disputes shall be consolidated. The President shall, if the parties fail to agree within the period of time prescribed by him, at the request of either party, appoint the arbitrator or arbitrators and determine which rules shall apply to the consolidated proceedings. In this event, the arbitral tribunals before which arbitrations have already been commenced shall suspend those arbitrations. The award of the arbitral tribunal appointed for the consolidated arbitration shall be communicated in writing to the other arbitral tribunals involved. Upon receipt of this award, these tribunals shall continue the arbitrations commenced before them and decide in accordance with the award rendered in the consolidated proceedings.

(5) The provisions of article 1027(4) shall apply accordingly in relation to the appointment of arbitrators under paragraphs (3) and (4) above.

(6) An award rendered under paragraphs (3) and (4) above shall be subject to appeal to a second arbitral tribunal if and to the extent that all parties involved in the consolidation proceedings have agreed upon such an appeal.43

XIV. SUMMARY ARBITRAL PROCEEDINGS

In ICC circles in recent years, many discussions have been focused on the subject of référé arbitral, or summary proceedings, in arbitration. This special form of arbitration is now incorporated in Article 1051 of the new Dutch Act; if parties wish to use it, they should authorize the arbitral tribunal or its chairman accordingly. The purpose of summary arbitral proceedings is the

43. Id. art. 1046.
same as that of summary court proceedings before the President of the District Court; to obtain provisional remedies. In practice, parties may still prefer to go to court for provisional remedies. If however, in spite of an agreement on summary arbitral proceedings, the parties elect to bring the case before the President of the District Court, it is at the court's discretion to refer the parties to arbitration, or to deal with the case itself.  

XV. APPEAL TO A SECOND ARBITRAL TRIBUNAL

The old Act provided for appeal from an arbitral award only to the court. The new Act abolished this appeal which, in practice, had fallen into disuse. In its place, the Act provides for appeal to a second arbitral tribunal. Such arbitral appeal is exercised most commonly in commodity arbitration.

XVI. PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 1052(1) of the Act sets forth the familiar rule that an arbitral tribunal may rule on its own jurisdiction, and provides in detail for the regulation of procedure governing pleas challenging this jurisdiction.

When a plea is founded on an allegation that an arbitral tribunal is irregularly constituted, a party is barred from raising it if he participated in the constitution of that tribunal. If the party did not participate in the constitution of the arbitral tribunal but appears in the arbitration, he must raise this plea \textit{in limine litis} (i.e., before any issue is raised concerning the substance of the dispute).  

A plea attacking the jurisdiction of an arbitral tribunal may also be based on an allegation that there had been no valid agreement between the parties to arbitrate. According to the Act, such an issue will not be addressed during the appointment stage. As discussed above, the President, or a third party appointee may proceed to appoint arbitrators without regard to this question. However, if a party appears in the arbitration, the Act provides that he should raise this plea \textit{in limine litis}, on

44. Id. art. 1051.
45. Id. art. 1052(3.
46. Supra, § V.
pain of being barred from raising this plea thereafter in the arbitral proceedings or before the court. An exception to this rule is made for a plea that the dispute is not capable of settlement by arbitration.47

If an arbitral tribunal rules that it lacks jurisdiction, the District Court has jurisdiction to try the case.48 If the tribunal rules that it has jurisdiction, the arbitration proceedings will continue. The tribunal's jurisdiction may then not be challenged until later, in an action to set aside the award.49

This procedure precludes interruption of an arbitration by means of a challenge to the arbitral tribunal's jurisdiction in District Court. The court still has the last word in this matter, but if arbitrators assume jurisdiction over a case, the court will postpone its decision until after the arbitrator's final award is rendered.

The Dutch legislature had specific reasons for preferring this procedure. First, arbitral tribunals are usually very careful in deciding the issue of their jurisdiction. Second, a favorable award will in most cases cause a party who would have earlier challenged the tribunal's jurisdiction to abandon further efforts to do so. Thus, the procedure operates in the interests of judicial economy. Moreover, in practice, actions for setting aside awards rarely succeed on the issue of lack of jurisdiction. Courts tend to uphold a well-reasoned decision by the arbitral tribunal by simply ruling that the tribunal has jurisdiction.

Allowing court proceedings attacking the jurisdiction of arbitral tribunals to proceed during the preliminary stage of arbitration has its advantages, but these are outweighed, in the judgment of the Dutch legislature, by the considerable delay such a procedure would cause in the arbitral process and by the fact that such a procedure would open the door for delaying tactics. Accordingly, the legislature has chosen not to allow such attack until later in the proceedings.

XVII. SEPARABILITY OF THE ARBITRATION CLAUSE

The principle of separability of the arbitration clause from the main contract, long recognized in Dutch case law, is now codified in Article 1053 of the new Act:

47. New Dutch Code, supra note 1, art. 1052(2).
48. Id. art. 1052(5).
49. Id. art. 1052(4).
An arbitration agreement shall be considered and decided upon as a separate agreement. The arbitral tribunal shall have the power to decide on the validity of the contract of which the arbitration agreement forms part or to which the arbitration agreement is related. 50

XVIII. LAW APPLICABLE TO THE SUBSTANCE OF THE DISPUTE

Article 1054 provides that the arbitral tribunal shall decide a dispute in accordance with the rules of law unless the parties have agreed that it shall decide as amiable compositeur. The tribunal shall, in every case, however, take into account the applicable trade usages.

Article 1054(2) specifically addresses international commercial arbitration. It reads:

(2) If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the rules of law chosen by the parties. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the rules of law it considers appropriate. 51

This provision is virtually identical to Article 1496(1) of the new French Code of Civil Procedure:

L'arbitre tranche le litige conformément aux règles de droit que les parties ont choisies; à défaut d'un tel choix, conformément à celles qu'il estime appropriées (The arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to the rules he deems appropriate). 52

These provisions provide the arbitrator with flexibility. He may make a direct choice of law without resorting to complex conflict-of-laws rules.

XIX. THE AWARD

The Dutch Act provides that an award shall be made by a majority vote of the arbitral tribunal unless the parties have agreed otherwise. The parties are free to deviate; they may

50. Id. art. 1053.
51. Id. art. 1054(2).
52. Supra note 5. Article 1496(1) falls in that part of the C.Pr. Civ. (Fr. 1981) dealing with international arbitration.
provide, for instance, that the chairman has the deciding vote.

The Act further provides that the award shall announce the reasons for the arbitration decision, and that it shall be signed by the arbitrators. Article 1057 specifies that "if an arbitrator refuses to sign or is incapable of signing and it is unlikely that this impediment shall cease to exist within a reasonable time," this fact shall be noted beneath the signatures of the other arbitrators. 53

An award acquires the force of res judicata on the day it is made. A copy of the award is sent to each party. The original of the award is deposited with the registry of the district court that has jurisdiction over the place of arbitration. 54

In order to obtain leave for enforcement of the award (exequator), the President of the District Court must be petitioned. 55 The President may refuse exequator only if the award is manifestly contrary to public policy or good morals. The petitioner may appeal from the refusal within two months. If the refusal is confirmed on appeal, recourse to the Supreme Court is provided for. 56

If leave for enforcement is granted, the only recourse for the opposing party is an action to set aside the award. If such action is successful, the exequator is annulled by operation of law. 57

In Article 1060, the Act provides for the possibility of rectifying an award in case of a manifest error in computation or a manifest clerical error. This Article also provides for correction of an award when an error or omission regarding the names and addresses of the parties or the arbitrators, the date on which the award is made, or the place of award has been made. 58

Article 1061 further introduces the possibility of an additional award if an arbitral tribunal has failed to decide on one or more matters that have been submitted to it.

XX. SETTING ASIDE OF THE AWARD

The area of prior law that has been most radically changed in the new Act is the setting aside of awards, both substantively and procedurally.

53. NEW DUTCH CODE, supra note 1, art. 1057.
54. Id. art. 1058.
55. Id. art. 1062.
56. Id. art. 1063.
57. Id. art. 1062(4).
58. Id. art. 1057(4)(a-d).
A. Procedure

Procedure for setting aside an award is available as soon as the award acquires the force of res judicata. In practice, this occurs when a party receives the award. The action to set aside the award is barred after three months from the day the award is deposited with the district court registry. An award officially served on an opposing party together with a leave for enforcement by the President may be set aside until three months after this service.60

Enforcement of an award is not suspended automatically by an action to set it aside. A specific request to suspend must be made to the court.61 If the court grants a suspension, it may also order security from the requesting party. If the court denies the request, it may demand security from the opposing party, usually in the form of a bank guarantee. As soon as a decision to set aside an award is final, the court's jurisdiction revives, unless the parties had agreed otherwise.63

B. Grounds

The grounds for setting aside an arbitral award under the Act are largely inspired by the new French arbitration law.65

(1) Absence of Valid Arbitration Agreement

In order to raise this ground in a setting aside procedure, a party who has appeared in the arbitration must have previously raised it before any substantive defense was offered. A contention that the dispute is not capable of settlement by arbitration, however, may be raised at any time.66

(2) Arbitral Tribunal Constituted in Violation of Applicable Rules

To raise this ground for the setting aside of an award, a party must not have participated in the constitution of the arbitral

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59. See § XIX, supra for further discussion.
60. New Dutch Code, supra note 1, art. 1064(3).
61. Id. art. 1066.
62. Id. art. 1066(5).
63. Id. art. 1067.
64. Id. art. 1065.
65. See note 4 supra.
66. New Dutch Code, supra note 1, art. 1065(2); see discussion of this point at § XVI supra.
tribunal, or, if he did not participate, but has appeared in the arbitration, the party must have raised a timely plea to this effect in the arbitral proceedings. A timely plea is one raised prior to the pleading of any substantive defense. 67

(3) Arbitral Tribunal Did Not Comply With Mandate

The mandate of the arbitral tribunal consists of a procedural and substantive part. An arbitral tribunal must comply with procedural rules applicable to it (the formal part of its mandate) as well as with the agreed substantive rules for deciding the issues submitted to it (the substantive part). The potentially extensive scope of this ground is limited, however, in further provisions of Article 1065.

For example, the lack of compliance ground cannot be raised if the party invoking the ground has not raised it earlier in the arbitral proceedings although he knew at the time that the arbitral tribunal had not complied with its mandate. 68 In practice, a party participating in the arbitral proceedings will only be aware of the arbitral tribunal's non-compliance with procedural rules. Its non-compliance with the substantive part of its mandate will usually not be revealed until the tribunal has rendered its award. The utility of Article 1065(4) is, therefore, as a practical matter confined to preventing awards from being set aside on the basis of procedural error that was not objected to at the time it occurred.

Upon receiving an award, the parties may find that the arbitral tribunal has omitted to decide one or more of the issues that were before it. Technically, this would constitute a non-compliance on the part of the tribunal with the substantive part of its mandate. However, the Act requires that an action for an additional award under Article 1061 be brought at the outset. 69 The lack of compliance ground may only be raised after this request has been rejected by the arbitral tribunal. 70

Finally, the law prevents the total annulment of an award on non-compliance grounds by providing that where an arbitral

67. Id. art. 1065(3).
68. Id. art. 1065(4).
69. See § XIX supra.
70. NEW DUTCH CODE, supra note 1, art. 1065(6).
tribunal has made an award that is in excess of, or different from, the relief claimed by the winning party, and the excess or different part of the award can be separated from the rest, the award will be only partially set-aside.71

(4) Award Not Signed or Not Containing Reasons

The Act requires that the basis for an arbitral award must be explained in the award itself. However, an award not containing this explanation that is made abroad in a country where such explanation is not required by law is enforceable in the Netherlands. This is in deference to international public policy.

(5) Award or Manner of Making Award Violates Public Policy or Good Morals

This ground enforces public policy both in a procedural sense (mandatory requirements of due process or fair trial) and in a substantive sense (such as the arbitrability of a dispute).

XXI. REVOCATION OF AWARD

In addition to its provisions for setting aside an award, the new Act offers a second means of recourse that leads to revocation of the award.72 This action is termed request civiel (after the French requete civile; an English translation is almost impossible to give). This action is similar in its results to an action to set-aside but its grounds are totally different. They are invoked in exceptional circumstances where:

(a) the award is wholly or partially based on fraud which is discovered after the award is made and which is committed during the arbitral proceedings by or with the knowledge of the other party;
(b) the award is wholly or partially based on documents which, after the award is made, are discovered to have been forged;
(c) after the award is made, a party obtains documents which would have had an influence on the decision of the arbitral tribunal and which were withheld as a result of the acts of the other party.

71. Id., art. 1065(5); see § XXIV infra.
72. Id., art. 1068.
The action or *request civiel* must be brought before the court of appeal which would have had jurisdiction to decide an appeal on an action for setting aside, within three months after the fraud or forgery became known, or after the new documents were obtained by a party.\(^{73}\)

**XXII. Arbitral Award On Agreed Terms**

Prior to the new Act there had been doubt as to whether arbitrators, whose task it was to decide disputes, could also act to record the settlement of awards. Article 1069 now enables them to do so. A settlement is an arbitral award on agreed terms and is, therefore, an award like any other. Such an award, however, need not include reasons. An award on agreed terms may only be set aside on the ground that it is contrary to public policy or good morals.\(^{74}\)

**XXIII. Arbitration Outside the Netherlands**

Title II of Book IV (Articles 1074-1076) is specifically dedicated to arbitration outside the Netherlands. Article 1074 provides that courts in the Netherlands should not invoke jurisdiction if the existence of a valid agreement to arbitrate outside the Netherlands is proved. This Article mirrors Article 1022 of Title I dealing with arbitrations taking place in the Netherlands.

Article 1075 addresses the enforcement of foreign awards under a treaty, with the New York Convention of 1958 in mind. Foreign awards may be recognized and enforced in the Netherlands in accordance with this treaty.\(^{75}\)

Article 1076 deals with recognition and enforcement of foreign awards in cases where no treaty applies, or where the applicable treaty allows a party to rely upon the law of the country in which recognition or enforcement is sought. For example, the New York Convention has such a provision.\(^{76}\) When a party seeks enforcement of such an award in the Netherlands, it may, therefore, be to his advantage to rely on article 1076 rather than to rely on the New York Convention. This will depend upon his

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73. *Id.* art. 1068(2).
74. *Id.*, art. 1069.
76. *Id.* art. VII(1).
comparison of the grounds for refusal of recognition and enforcement contained in Article V of the New York Convention\(^\text{77}\) with those of Article 1076.

XXIV. **Grounds For Refusal Under Article 1076**

According to article 1076(1), the grounds for refusal to recognize or enforce an out-of-country award where no treaty applies or where the applicable treaty allows reliance upon the law of the country where recognition or enforcement is sought are as follows:

- (A) the party against whom recognition or enforcement is sought asserts and proves that:
  - (1) a valid arbitration agreement is lacking under the law applicable thereto;
  - (2) the arbitral tribunal is constituted in violation of the rules applicable thereto;
  - (3) the arbitral tribunal has not complied with its mandate;
  - (4) the arbitral award is still open for appeal to a second arbitral tribunal, or to a court in the country in which the award is made;
  - (5) the arbitral award has been set aside by a competent authority of the country in which that award is made.
- (B) the court finds that the recognition or enforcement would be contrary to public policy.\(^\text{78}\)

**A. Lack of Valid Arbitration Agreement**

To successfully avoid enforcement of an award on this ground, the party asserting it must, if he appeared in the arbitration procedure, have timely invoked it there, i.e., before raising any substantive defenses.\(^\text{79}\)

**B. Irregular Constitution of the Arbitral Tribunal**

This ground cannot be validly asserted by a party who participated in the constitution of the tribunal. If the party did not participate in the constitution of the tribunal but appeared in

\(^{77}\) Id. art. V. Compare New Dutch Code, supra note 1, art. 1076.

\(^{78}\) New Dutch Code, supra note 1, art. 1076(1).

\(^{79}\) Id. art. 1076(2).
the arbitration, this ground must have been timely invoked, i.e., before raising any substantive defenses.  

C. Non-Compliance of the Tribunal with Its Mandate

The party invoking this ground will not be successful if he participated in the arbitration procedure but failed to assert his objections there, although he was aware at the time that the arbitral tribunal was not complying with its mandate.

D. Award Still Open for Appeal

This ground for refusal of enforcement corresponds with the first part of Article V(1)(e) of the 1958 New York Convention, which provides that an award will not be enforced if it has not yet become binding on the parties.

E. Award Set Aside in Country of Origin

This ground corresponds with the second part of Article V(1)(e) of the New York Convention, which provides that an award will not be enforced if it was earlier set aside by a competent authority of the country where or under whose law it was made. Unlike the New York Convention, the new Dutch Act does not further extend this to cases in which the foreign authority has merely suspended rather than set-aside the award. Only where an application to set-aside has been made in the award's country of origin, may suspension of enforcement in the Netherlands be applied for in a Dutch court. Article 1066, that addresses suspension of enforcement in these cases, applies. Its provisions also permit the court to order security as appropriate.

F. Public Policy

The Dutch legislature considered making a specific reference to the restrictive notion of international public policy in Title II of the Act. It refrained from doing so, leaving further develop-

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80. Id. art. 1076(3).
81. Id. art. 1076(4).
83. New Dutch Code, supra note 1, art. 1076(7).
84. See § XXA. supra.
ment of this law to the courts who apply it regularly and who understand its nuances. A classic example of an occasion meriting the application of international public policy by a court would be the case of an award made in England by an arbitral tribunal composed of an even number of arbitrators who made the award without providing reasons for the decision. Such an award would nevertheless be enforceable in the Netherlands because of its validity under English law.

In summary, the grounds for refusal under Article 1076 may be compared with the grounds for setting aside under Article 1065.85

XXIV. PARTIAL ENFORCEMENT

Similarly, as does Article 1065(5) of Title I with respect to an in-country award, Article 1076(5) of Title II provides for partial enforcement of a foreign award. The Article states that if the foreign award is in excess of, or different from, what was claimed by the winning party, the arbitral award may be partially recognized or enforced to the extent that the part of the award that is in excess of or different from the claim can be separated from the remaining part of the award.86

XXV. SUMMARY AND CONCLUSION

The 1986 Dutch Arbitration Act contains a number of innovations. Arbitrators are now empowered to fill gaps in a contract.87 Consolidation of arbitral proceedings has become possible.88 Summary arbitral proceedings89 as well as the possibility of an award on agreed terms90 have been introduced.

The new Act allows parties and arbitration institutes great freedom to make their own procedural rules. Like any other statute, the Act contains provisions from which the parties cannot deviate. However, provision for the parties' freedom to agree as they see fit is a guiding characteristic of the new Act and it

85. See § XXB supra.
86. NEW DUTCH CODE, supra note 1, art. 1076(5).
87. See § III supra.
88. See § XIII supra.
89. See § XIV supra.
90. See § XXII supra.
leaves no doubt in this regard as to which of its provisions are mandatory and which are not. To the extent that parties have not themselves established any procedural rules for their arbitration, either directly or by reference to existing arbitration rules, the new Act provides such rules. Consequently, the Act is quite detailed.

The most important changes which the new Act has brought about are two-fold: a different approach to the plea attacking the arbitrator's jurisdiction, and a simplified and more limited procedure for setting aside arbitral awards.

The new Act is organized on a territorial principle. It applies to domestic arbitrations as well as to arbitrations with international aspects that take place in the Netherlands. No conceptual distinction between domestic and international arbitration was deemed necessary. The Netherlands is a country where arbitration is resorted to frequently. Over 100 arbitration institutes linked to specific industries or branches of trade administer arbitrations. The Netherlands Arbitration Institute (NAI) is the only general arbitration institute. Its rules, which are adapted to the new law, are also available in English. French and German translations are under preparation. In addition, the NAI, which was closely involved in the drafting of the new law, has prepared a publication in English, French, and German containing the text of the new law with short explanatory notes to each of its sections.

Domestic arbitration in the Netherlands is almost a way of life. International arbitration in the Netherlands may now be an attractive option. Most important, in my opinion, is that this country now has a law that must be recognized as a model of internationally oriented arbitration law.

91. See § XVI supra.
92. See § XX supra.
INTERNATIONAL COMMERCIAL ARBITRATION AND
THE ARBITRABILITY OF ANTITRUST CLAIMS:
MITSUBISHI MOTORS CORP. V. SOLER CHRYSLER-
PLYMOUTH

Michael R. Voorhees*

INTRODUCTION

International commercial arbitration has become a common and important form of dispute resolution in the world today. Ever since its attractiveness was enhanced by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 Convention), which simplified enforcement of arbitral awards abroad, international commercial arbitration has boomed. This trend has been apparent in the United States since 1970, when Congress adopted the 1958 Convention.2

In the landmark decision of Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the United States Supreme Court ruled that antitrust issues raised in relation to international contracts are arbitrable. In so holding, the Court recognized “that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.”4 This decision is evidence of the ever-increasing acceptance of arbitration and the courts' reluctance to interfere with the arbitral process.

* Constable to Judge Ralph Winkler, Court of Common Pleas, Hamilton County, Ohio. B.S., Northern Kentucky University, 1979; M.B.A., University of Cincinnati, 1980; J.D., Salmon P. Chase College of Law, Northern Kentucky University, 1987.


4. Id. at 3355.
This article will discuss the *Mitsubishi* case, placing it in its proper historical perspective and analyzing its impact. Certain aspects of international commercial arbitration will also be discussed, in light of *Mitsubishi* and the growing trend favoring the use and acceptance of arbitration in the international commercial setting.

### I. BACKGROUND

The arbitral process has a long history. Despite the fact that at one time courts of general jurisdiction refused to recognize or enforce arbitration agreements, members of organized commercial groups in the trading countries of the West have long favored arbitration. Traditional sanctions in self-contained groups for refusing to honor an arbitration award were disciplinary proceedings or expulsion, rather than court action.

The refusal of courts to enforce or recognize arbitration agreements was based on the English common-law view that such agreements were inherently revocable because they "ousted" the courts of jurisdiction and were therefore void as contrary to public policy. Although there was some indication of favoring arbitration in the United States as early as 1855, the American courts essentially adopted the English view as part of the common law up to the time of the Federal Arbitration Act of 1925.

5. Of all mankind's adventures in search of peace and justice, arbitration is among the earliest. Long before law was established, or courts were organized or judges had formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes. KELLOR, *AMERICAN ARBITRATION, ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 1, 3 (1948). See also de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 37 Tul. L. Rev. 42, 43 n.5 (1982).


8. Burchell v. Marsh, 58 U.S. 540 (17 How. 344) (1855), held if an award is within the submission and contains the decision of the arbitrators, after a full and fair hearing, a court of equity will not set it aside for error in law or fact.

With the expansion of world trade after World War I and following the first treaty on arbitration in 1923, the trading countries of the West increasingly enacted arbitration statutes. The Geneva Arbitration Treaties of 1923 and 1927 were enacted by various countries throughout the world, although they were not adopted by the United States. The New York Arbitration Act of 1920 was the first arbitration law in the United States to provide a systematic framework capable of supporting institutional arbitration as well as individual agreements to arbitrate future disputes.

The common law attitude of judicial hostility toward arbitration was substantially reversed in the United States by the Federal Arbitration Act of 1925 (1925 Act). The 1925 Act "was designed to allow parties to avoid 'the costliness and delays of litigation', and to place arbitration agreements 'upon the same footing as other contracts'. . . ." The 1925 Act upholds arbitration agreements in contracts involving maritime transactions and contracts evidencing transactions involving interstate or foreign commerce. Since its enactment, the 1925 Act has governed arbitration in the United States which involves interstate or foreign commerce.

The 1925 Act declared arbitral agreements to be "valid, irrevocable and enforceable." The Act provides for enforcement of arbitration agreements in the federal courts and permits the federal court in the district in which an award is rendered to confirm the award. It also provides for the staying of litigation instituted by one party in defense of an arbitration agreement between the parties. Under the 1925 Act, however, a party must satisfy all
the usual requirements to gain access to the federal courts.\textsuperscript{24} Furthermore, arbitration clauses in international contracts that do not affect the foreign commerce of the United States are not within the scope of the 1925 Act regardless of whether an American citizen is a party to the contract.\textsuperscript{25} The Act directs the court to order specific performance of the agreement in the event of "the failure, neglect or refusal" by a party to abide by the terms of the arbitration agreement.\textsuperscript{26}

The 1925 Act is the most important of the arbitration statutes for the purposes of international arbitration. Although it was years after the passage of the 1925 Act that arbitration agreements began receiving consistent treatment in the courts, foreign parties need not be overly concerned with the separate arbitration laws in the various states.\textsuperscript{27} A long line of cases have held that the 1925 Act creates a body of federal substantive law to be applied by state and federal courts alike.\textsuperscript{28}

Although American courts were more inclined to uphold the validity of arbitration agreements after the passage of the 1925 Act, certain kinds of issues were still considered to be nonarbitrable by their very nature. The most prominent categories that were considered to be nonarbitrable at one time were those disputes that concerned patent validity,\textsuperscript{29} antitrust claims,\textsuperscript{30} and disputes arising under the securities laws.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{24} 9 U.S.C. \S 4 (1982).
\item \textsuperscript{25} 9 U.S.C. \S 2 (1982).
\item \textsuperscript{26} 9 U.S.C. \S 4 (1982).
\item \textsuperscript{27} Hoellering, \textit{International Commercial Arbitration: A Peaceful Method of Dispute Settlement}, 40 \textit{ARB. J.} 19, 23 (Dec. 1985). Most states have arbitration statutes patterned on a model law, the Uniform Arbitration Act.
\item \textsuperscript{29} Beckman Instruments, Inc. v. Technical Dev. Corp., 433 F.2d 55 (7th Cir. 1970), held that issues concerning the validity of a U.S. patent were incapable of being determined by arbitration proceedings. Disputes on the validity, infringement, and interference of patents have been made arbitrable by legislation. 35 U.S.C. \S 294 (1983)(effective February 27, 1983). Its importance for foreign parties is illustrated by the fact that approx-
In 1953, the Supreme Court dealt for the first time with the conflicting provisions of the 1925 Act and the federal securities law in *Wilko v. Swan.* In *Wilko,* the purchaser of securities sued the seller to recover damages under Section 12(2) of the Securities Act of 1933 for false representations made in inducing the sale. The contract between the purchaser and seller contained an arbitration clause that ordinarily would have made the 1925 Act applicable. However, Section 14 of the Securities Act of 1933 declares void any "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Act. The issue before the Supreme Court was whether Section 14 rendered the arbitration agreement void. The Court held the arbitration agreement to be void, pointing out that the effectiveness of the provisions of the Securities Act that are advantageous to the buyer is lessened in arbitration since the award of the arbitrators may be made without explanation of their reasons and without a complete record of their proceedings. It was also pointed out that in unrestricted submissions, errors of the arbitrators as to the interpretations of the governing law are not subject to judicial review. In short, *Wilko* held that public policy concerns dictated that federal laws governing the sale of corporate securities be applied exclusively by the courts.

Relying on *Wilko,* the Second Circuit in the 1968 case of *American Safety Equipment Corp. v. J. P. Maguire & Co.* held that antitrust claims may not be settled by arbitration. At issue was a license agreement that contained an arbitration clause. The licensee brought an action for declaratory judgment of the issues that included an allegation that certain paragraphs of the license
agreement violated the Sherman Antitrust Act. The licensor made a motion under the United States Arbitration Act to stay the declaratory judgment action, pending arbitration of all issues. The district court entered interlocutory orders staying the declaratory judgment and directing the parties to proceed to arbitration. The Second Circuit Court of Appeals held that the antitrust claims were inappropriate for arbitration.

The court in American Safety gave three major reasons for holding antitrust matters nonarbitrable. First, a "claim under the antitrust laws is not merely a private matter....Antitrust violations can affect hundred of thousands—perhaps millions—of people and inflict staggering economic damage." Second, "the issues in antitrust cases are prone to be complicated, and the evidence extensive and diverse, far better suited to judicial than to arbitration procedures." And third, it is not proper for commercial arbitrators drawn from the business community "to determine these issues of great public interest."

Although the court in American Safety held antitrust claims to be nonarbitrable, it expressed general support for the enforcement of arbitration clauses in most instances. Even in that decision, the antitrust claims were severable, and thus, the other disputes were appropriate for arbitration. It was only four years later, in Coenen v. R. W. Pressprich & Co., that the same court limited its holding in American Safety to future dispute clauses, ruling that post-dispute agreements to arbitrate antitrust matters were enforceable.

A large step toward acceptance of arbitration came when Congress finally adopted the 1958 Convention with the enactment of

42. The motion was made pursuant to 9 U.S.C. 2-4, 6 (1982).
43. 391 F.2d at 823.
45. 391 F.2d at 828.
46. Id. at 826.
47. Id. at 827.
48. Id.
49. Id. at 828.
51. Id. at 1215.
52. See supra note 1.
Chapter 2 of the Arbitration Act in 1970. Despite the growth of international commercial arbitration, this was the first time the United States became a party to a multilateral arbitration treaty. Previously, international arbitration was largely dependent on non-uniform, inadequate bilateral treaties, and certain insufficient multilateral treaties. The purpose of the 1958 Convention was to facilitate and encourage international arbitration by providing uniform standards for the enforcement of arbitration agreements and awards.

The Federal Arbitration Act of 1970 (1970 Act) is composed of eight short sections. The 1970 Act covers arbitration agreements and arbitral awards “arising out of a legal relationship, whether contractual or not, which is considered as commercial.” The Act will not apply if both parties are United States’ citizens “unless that relationship involve[s] property located abroad ... or has some other reasonable relation with one or more foreign states.” The Act grants the federal district courts of the United States “original jurisdiction ... regardless of the amount in controversy.” A party may remove an action or proceeding from a state court to the federal district court “where the subject matter of an action or proceeding in a State court relates to an arbitration agreement or award” covered by the Act. A court “may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.” The Act allows a party to have an “arbitral award falling under the Convention” to be confirmed.

54. The United States has been a party to a number of bilateral friendship, commerce, and navigation treaties that include provisions enforcing arbitral awards. See deVries, supra note 5, at 55 n.56.
55. See Quigley, supra note 10, at 1051-55.
57. 9 U.S.C. 201-08 (1982).
59. Id.
within three years after the award was made unless an Article V defense applies.\textsuperscript{63}

The 1970 Act has upgraded the enforcement of foreign arbitral awards in the United States. Not only have United States' courts upheld international arbitral awards more readily, but they have also construed defenses against arbitration narrowly. Such defenses are pleaded on the basis of: (1) procedural due process; (2) nonarbitrable subject matter; (3) manifest disregard of the law by the arbitrators; (4) forum non conveniens; (5) a conflict with national policy or domestic law; or (6) issues which are contrary to public policy.\textsuperscript{64}

The Supreme Court cases of \textit{M/S Bremen v. Zapata Off-Shore Co.}\textsuperscript{65} and \textit{Scherk v. Alberto-Culver}\textsuperscript{66} had a great impact on international commercial arbitration. Zapata involved a contract between a German corporation (Unterweser) and an American corporation (Zapata) for the towing of the off-shore drilling rig of Zapata. The contract contained a provision that "any dispute arising must be treated before the London Court of Justice."\textsuperscript{67} When the rig was seriously damaged, Zapata sued Unterweser and Unterweser's vessel (M/S Bremen) in the United States District Court. Unterweser moved to dismiss or stay the suit and sued Zapata in the High Court of Justice in London.

Ultimately, the United States Supreme Court held that the forum-selection clause, which was a vital part of the contract, was binding on the parties unless Zapata could meet the heavy burden of showing that its enforcement would be unreasonable, unfair, or unjust.\textsuperscript{68} This decision was relied upon in the influential case of \textit{Scherk v. Alberto-Culver}.

\textsuperscript{63}9 U.S.C. § 207 (1982). Article V defenses are listed under 9 U.S.C. § 201 (1982) and those defenses include: the parties were under some incapacity; the agreement was not valid under the applicable law; improper notice; matters were beyond the scope of the submission to arbitration; composition of arbitral authority or procedure was contrary to agreement; the subject matter of the difference is not capable of settlement by arbitration under the law of that country; and recognition or enforcement of the award would be contrary to the public policy of that country.


\textsuperscript{65}407 U.S. 1 (1972).

\textsuperscript{66}417 U.S. 506 (1974).

\textsuperscript{67}407 U.S. at 2.

\textsuperscript{68}Id. at 15.
Scherk involved an American corporation (Alberto-Culver Co.) that purchased from a German citizen, Fritz Scherk, three enterprises owned by him and organized under the laws of Germany and Liechtenstein, together with all trademark rights of these enterprises. The sales contract provided that "any controversy or claim [that] shall arise out of this agreement or the breach thereof" would be referred to arbitration before the International Chamber of Commerce in Paris, France. Contending that Scherk's fraudulent representations concerning the status of the trademark rights constituted violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder, Alberto-Culver commenced an action for damages and other relief in United States district court. The district court, relying entirely on Wilko v. Swan, held that an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933. The United States Court of Appeals for the Seventh Circuit affirmed on the same grounds. However, the Supreme Court reversed the lower courts' decisions.

In Scherk, the Supreme Court held that the agreement of the parties to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the provisions of the Arbitration Act of 1925, even though there were alleged violations of the Securities Exchange Act. The Court distinguished Wilko on the ground that "Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement" that results in different policy considerations. In contrast to Wilko, a purely domestic matter, in Scherk serious uncertainty would exist concerning the law to be applied to any dispute arising out of the contract without a prior agreement as to the forum and law to be used. The Court recognized "[s]uch uncer-

69. 417 U.S. at 508.
72. 346 U.S. 427 (1953)(holding that an agreement to arbitrate could not preclude a buyer of securities from seeking a judicial remedy under the Securities Act of 1933).
73. 417 U.S. at 510.
74. Alberto-Culver Co. v. Scherk, 484 F.2d 611 (7th Cir. 1973).
75. 417 U.S. at 519-20.
76. Id. at 515.
tainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. Choice-of-law and choice-of-forum provisions are almost "indispensable precondition(s) to achievement of the orderliness and predictability essential to any international business transaction." The Scherk Court did not downgrade the general importance of the Securities Act, but showed that national public policy may lose much of its rationale and force in an international context.

The Scherk and Zapata decisions acknowledge the freedom of selection of forum and choice of governing law by the parties to international contracts. These cases reverse the earlier judicial resistance to being "ousted" of jurisdiction in international commercial disputes. The courts have come a long way from the common-law view.

The adoption of the 1958 Convention and the decision in Scherk has led to an even broader acceptance of arbitration. Scherk has been widely followed. The strong policy of favoring arbitration was illustrated in the 1985 Supreme Court cases of Dean Witter Reynolds, Inc. v. Byrd and Mitsubishi. The decision in Byrd has raised serious doubt as to whether Wilko is still good law. Byrd involved an individual who sold his dental practice and invested the proceeds in securities through a broker-dealer. The value of the account declined substantially and the investor filed a complaint against the broker-dealer in United States district court, alleging violations of federal securities law and various state-law provisions. The investor had signed an agreement to arbitrate any controversy arising out of the securities account. Accordingly, the broker-dealer filed a motion for an order to sever the pendent state claims, compelling their arbitration, and staying arbitration of those claims pending

77. Id. at 516.
78. Id.
79. Note, supra note 56, at 665.
80. deVries, supra note 5, at 55.
83. Id. at 1239. The federal laws allegedly violated were §§ 10(b), 15c, and 20 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b), 78o(c), and 78t, respectively).
resolution of the federal court action. The district court denied in its entirety the motion to sever and compel arbitration of the pendent state claims, to which the Ninth Circuit Court of Appeals affirmed.\textsuperscript{84} The Supreme Court reversed and held that arbitration should proceed. The Court stated that "the Arbitration Act (9 U.S.C. \textsuperscript{14} 1-14) requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even when the result would be the possibly inefficient maintenance of separate proceedings in different forums."\textsuperscript{85}

Prior to \textit{Byrd}, the lower courts had generally assumed that the rationale of \textit{Wilko} concerning the nonarbitrability of Section 12(2) claims\textsuperscript{86} applied to claims brought under the Securities Exchange Act of 1934 (1934 Act).\textsuperscript{87} In \textit{Byrd}, the Court noted that assumption, but then went on to indicate that the question is open.\textsuperscript{88} Justice White emphasized this point in his concur- rence with his caution that the prior contrary authority "must be viewed with some doubt."\textsuperscript{89}

Although \textit{Byrd} was limited to the narrow issue that was before the Court, its thoroughly pro-arbitration emphasis suggests some important questions. What federal claims should continue to be viewed as nonarbitrable? How should the courts sequence litigable and arbitrable claims? And what collateral estoppel effect should one kind of proceeding have on related issues being resolved in a different forum?\textsuperscript{90} Since the \textit{Byrd} decision, lower courts have addressed the arbitrability of claims brought under Rule 10b-5 of the 1934 Act.\textsuperscript{91} In the absence of prior controlling authority, these courts have generally concluded that \textit{Wilko} does not apply and that such claims may be arbitrated.\textsuperscript{92} \textit{Byrd} has

\footnotesize{84. Byrd v. Dean Witter Reynolds, Inc. 726 F.2d 552 (9th 1984).
85. 105 S. Ct. at 1241.
87. 15 U.S.C. \textsuperscript{3} 78, et seq.
88. 105 S. Ct. at 1239-40. Ironically, the federal claims in \textit{Byrd} itself were in part based on \textsuperscript{4} 10b-5. But since Dean Witter had assumed them to be nonarbitrable under \textit{Wilko} and had not raised the issue before the trial court, the Supreme Court refused to address it. \textit{See} Palmer, \textit{Arbitration of Securities Complaints}, at 17 n.9, Nat'L L.J. (Dec. 9, 1985).
89. 105 S. Ct. at 1244.
91. 17 C.F.R. \textsuperscript{5} 240.10b-5.
also been applied to compel arbitration for a claim under the Racketeer Influenced and Corrupt Organization Act. 93

Byrd was decided just four months before the Supreme Court decided Mitsubishi 94. The trend of Supreme Court cases has been to stress the significance of the Arbitration Act, allowing it to prevail over other policy considerations. 95 It was in accordance with this trend that the Mitsubishi case was decided.

II. Mitsubishi v. Soler

Mitsubishi Motors Corporation (Mitsubishi) is a Japanese corporation that manufactures automobiles. Mitsubishi has a joint venture with Chrysler International, SA (CISA), a Swiss corporation, to distribute vehicles manufactured by Mitsubishi through Chrysler dealers outside the continental United States.

Soler Chrysler-Plymouth, Inc. (Soler), a Puerto Rico corporation, entered into a distributor agreement and a sales procedure agreement with CISA on October 31, 1979. 96 The distributor agreement provided for the sale by Soler of Mitsubishi-manufactured vehicles within a designated area. The sales agreement provided for the direct sale of Mitsubishi products to Soler and governed the terms and conditions of such sales. It also contained the following arbitration clause:

All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association. 97

Initially, Soler was quite successful in selling the Mitsubishi-manufactured vehicles, but trouble in meeting its sales quotas began in early 1981 when the new-car market slackened. By spring of 1981, Soler had to request that Mitsubishi delay or cancel shipment of several orders. Soler also attempted to ar-

94. Byrd was decided on March 4, 1985; Mitsubishi was decided on July 2, 1985.
96. 105 S. Ct. at 3349.
97. Id.
range for the transshipment of vehicles for sale in the continental United States and Latin America, which Mitsubishi and CISA refused to allow. Attempts to work out their difficulties failed and Mitsubishi eventually withheld shipment of 966 vehicles.

In March of 1982, Mitsubishi brought an action against Soler in the United States District Court for the District of Puerto Rico under the Arbitration Act, seeking an order to compel arbitration in accord with the arbitration agreement stated above. Shortly after filing the complaint, Mitsubishi filed a request for arbitration before the Japan Commercial Arbitration Association.

Soler denied the allegations and counterclaimed against both Mitsubishi and CISA, asserting causes of action under the Sherman Antitrust Act and other federal and Puerto Rico statutes. Regarding the alleged antitrust violation, Soler claimed that Mitsubishi and CISA had conspired to divide markets in restraint of trade.

After a hearing, the district court ordered Mitsubishi and Soler to arbitrate their dispute, including the antitrust matter. The district court, while acknowledging the precedent of *American Safety*, relied on *Scherk* in holding "that the international character of the Mitsubishi-Soler undertaking required enforcement

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98. The reasons for refusing the transshipment included that such a diversion would interfere with the Japanese trade policy of voluntarily limiting imports to the United States; the Soler-ordered vehicles would be unsuitable for use in certain proposed destinations because of their manufacture, with use in Puerto Rico in mind, without heaters and defoggers; the vehicles would be unsuitable for use in Latin America because of the unavailability there of the unleaded, high-octane fuel they required; adequate warranty service could not be ensured; and diversion of the vehicles would violate contractual obligations between CISA and Mitsubishi. 99. These vehicles represented orders placed for May, June, and July of 1981. 100. This action was brought pursuant to 9 U.S.C. §§ 4 & 201. 101. 105 S. Ct. at 3350. 102. 15 U.S.C. §§ 1, et seq. 103. The federal Automobile Dealers' Day in Court Act, 70 Stat. 1125, as amended, 15 U.S.C. §§ 1221, et seq.; the Puerto Rico competition statute, P.R. LAWS ANN. tit. 10 §§ 257 et seq. (1978); and the Puerto Rico Dealers' Contracts Act, P.R. LAWS ANN. tit. 10, §§ 278, et seq. (1978 & Supp. 1983). 104. Soler alleged that Mitsubishi refused to allow Soler to resell the vehicles outside of Puerto Rico; that Mitsubishi refused to ship heaters and defoggers; and that Mitsubishi had coercively attempted to replace Soler and its other Puerto Rico distributors with a wholly owned subsidiary that would serve as the exclusive Mitsubishi distributor in Puerto Rico.
of the agreement to arbitrate even as to the antitrust claims." 105 The United States Court of Appeals for the First Circuit reversed the judgment of the district court insofar as it had ordered submission of Soler's antitrust claims to arbitration. 106 The court of appeals endorsed the doctrine of American Safety, precluding arbitration of antitrust claims, and adopted its rationale. The United States Supreme Court granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction. 107 In view of its importance, amicus curiae briefs were filed by the International Chamber of Commerce Court of Arbitration and the American Arbitration Association, which both supported Mitsubishi's claim for arbitrability of the antitrust claim and by the United States government, which opposed it. 108

In its certiorari petition, Mitsubishi posed two questions to the Court: (1) whether arbitration of claims asserted under the Sherman Antitrust Act may be compelled under the 1925 Act; and (2) whether arbitration of claims raised under the Sherman Antitrust Act may be compelled under the 1958 Convention. Soler, in its cross-petition, questioned whether a party can be compelled to arbitrate claims based upon statutes designed for that party's protection when it has not expressly agreed to do so. 109

The Court first found that the broad arbitration agreement encompassed all disputes, including those raised on statutory grounds. The Court stated that the basis of the 1925 Act is "a policy guaranteeing the enforcement of private contractual arrangements" 110 and that "the Act was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which the American Courts had borrowed from English common law." 111 The Court pointed out that "[b]y agreeing to arbitrate a

105. 105 S. Ct. at 3351.
106. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 723 F.2d 155 (1st Cir. 1983).
109. Id.
110. 105 S. Ct. at 3353.
111. Id. at 3354 n.14.
statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[112] "[U]nless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," the parties are bound by their agreement to arbitrate.[113] The Court found no such Congressional intention regarding the antitrust statutes.

Finding the parties' agreement to arbitrate reached the statutory issues, the Court next considered whether legal constraints external to the agreement foreclosed the arbitration of those claims. In ruling Soler's antitrust claims arbitrable, the Court relied heavily on Scherk and Zapata. In line with those decisions, the court recognized "the utility of forum-selection clauses in international transactions" in that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."[114] The Court felt the policy considerations that governed the Court's decision in Scherk were applicable to this case. "[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" required the Court to enforce the parties' agreement to arbitrate.[115] The Court also rejected the arguments raised in American Safety as inapplicable to international arbitration.[116]

Finally, the Court indicated that a party will always be able to assert its claims in a judicial forum, ultimately, in the enforcement stage of the process. "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that

112. Id.
113. Id.
114. Id. at 3355-56.
115. Id. at 3355.
116. Id. at 3355-60. The Court dismissed the rationale of American Safety as follows: [T]he factor of potential complexity alone does not persuade us that an arbitration tribunal could not properly handle an antitrust matter.... We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.... It follows that, at least where the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution, the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies.
the legitimate interest in the enforcement of the antitrust laws has been addressed. The [1958] Convention reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to the public policy of that country.' 117

Justice Stevens dissented118 on the grounds that: (1) a fair construction of the language in the arbitration clause did not encompass an antitrust claim; (2) an arbitration clause should not normally be construed to cover a statutory remedy that it does not expressly identify; (3) Congress did not intend Section 2 of the 1925 Act119 to apply to antitrust claims; and (4) Congress did not intend the 1958 Convention to apply to disputes that are not covered by the federal Arbitration Act.120

III. IMPACT OF Mitsubishiri

Mitsubishiri is a landmark decision in the development of international commercial arbitration. It has been stated that Mitsubishiri "indicates the outmost liberalism and absence of 'parochial' inhibitions in the policy of the U.S. Supreme Court, when dealing with international arbitration, and also a shift of the judicial center of gravity from the substantive law to that of the enforcement of the arbitral award."121 The decision is clearly a policy decision. "It takes notice of the worldwide expansion of American business and does not wish the anti-trust laws, which were intended to create a free home market economy, to act as a brake on the international development of American business."122

The consequences of the Mitsubishiri decision for the future of international commercial arbitration are considerable. The Court affirmed the policy of holding parties to their arbitration agreements, and on a broader scope, it held that the arbitral process is capable of deciding statutory claims, subject only to ultimate judicial review. This extension of arbitral jurisdiction to statutory claims makes unnecessary the splitting of disputes in two forums,
which can defeat the advantages of arbitration. A more important consequence may be that it will no longer be possible for a party to a valid arbitration agreement to avoid or delay the process of arbitration by merely asserting antitrust claims. Cases have demonstrated that such threshold litigation has seriously delayed the arbitration process.

Although the Mitsubishi Court did not directly address the domestic issue, it did express considerable "skepticism of certain aspects of the American Safety doctrine." The question of whether antitrust disputes in purely domestic cases will be subject to arbitration, under a broad arbitration clause, is still technically open. However, the rationale of American Safety has been severely cut down by the Court in Mitsubishi, even as it applies to a domestic case. In fact, the line of recent Supreme Court opinions on arbitrability indicates that the defense of nonarbitrable subject matter has lost much of its value. Also, the recent legislation permitting arbitration of patent validity infringement and interference disputes may adversely affect the arguments raised in American Safety since the same antitrust and monopoly arguments apply to patents as to antitrust disputes—in fact, most of the cases cited are the same.

The recent Supreme Court cases, such as Mitsubishi and Byrd, herald a pro-arbitration era. Because of this increased acceptance of arbitration, it has become essential for anyone engaged in commercial transactions to be well acquainted with the arbitral process. This is especially true in the international commercial setting.

In international commercial contracts, arbitration clauses not only predominate but are nowadays almost universal.

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124. Id.
125. See concurrence of Von Der Heydt, C.J., in Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473, 1483 (9th Cir. 1984).
126. 105 S. Ct. at 3357.
Arbitration clauses are used in these contracts because jurisdictional problems are bound to arise in the event of a dispute without such clauses. Foreign companies are generally adverse to litigation or unfamiliar and uncertain about jury trials.\textsuperscript{131} Chief Justice Burger has observed that jury trials are virtually unknown in Europe; that there is wide-spread use of private arbitration in England and on the Continent; and that European business people, lawyers, and judges cannot understand the failure to use arbitration more widely in the United States.\textsuperscript{132}

Several institutions have been instrumental in the development and facilitation of international commercial arbitration. Such agencies as the American Arbitration Association, the Court of Arbitration of the International Chamber of Commerce, the London Court of Arbitration, and the Stockholm Chamber of Commerce have been used increasingly in order to obtain impartial administrative services, an established panel of arbitrators with requisite expertise, and the benefit of orderly rules for the conduct of arbitration proceedings.\textsuperscript{133}

The Court of Arbitration of the International Chamber of Commerce (ICC) is located in Paris.\textsuperscript{134} The ICC will only accept arbitrations that are both international and commercial.\textsuperscript{135} The flexible ICC Rules of Arbitration accommodate either the adversary trial procedures associated with common-law countries or the inquisitorial procedures associated with the codified-law systems.\textsuperscript{136} The ICC does not act as the arbitrator in the actual dispute, but only administers the proceedings, reviews the final award from a formal point of view, and decides the fees for the arbitrators.\textsuperscript{137} London has traditionally been a center for arbitration, particularly for many trade associations like commodities,

\textsuperscript{133} Hoellering, supra note 27, at 20.
\textsuperscript{135} Wetter, supra note 11, at 145, 188.
shipping, and insurance.\textsuperscript{138} The London Court of Arbitration adopted the New International Arbitration Rules, effective January 1, 1981.\textsuperscript{139} The Arbitration Institute of the Stockholm Chamber of Commerce was established in 1917.\textsuperscript{140} The American Arbitration Association (AAA) has been active since 1926 and is headquartered in New York City. International commercial cases have been increasing in number but are still a very small proportion of the total matters administered by AAA.\textsuperscript{141} The AAA administers international commercial cases under various arbitration rules that include AAA's Commercial Arbitration rules, Construction Arbitration Rules, and specialized rules in various other fields. The AAA has evolved procedures to facilitate the unique procedural problems that are presented in international arbitration cases.\textsuperscript{142}

Due to the increased demand for international arbitration, competition has developed among various arbitration venues, most notably among the traditional ones such as England, France, Sweden, and Switzerland.\textsuperscript{143} An effect of \textit{Mitsubishi} is that given the now recognized broad scope of arbitrable issues in international commercial relations, United States arbitration law, like that of a number of other countries,\textsuperscript{144} is presently among the most progressive in the world.\textsuperscript{145} This makes the United States a desirable venue in which to enter into agreements to arbitrate and conduct international arbitration proceedings. In 1983, AAA established the World Arbitration Institute to encourage the use of international commercial arbitration and to draw international attention to the favorable arbitration climate and facilities in the United States.\textsuperscript{146}

\begin{footnotesize}

\textsuperscript{138} Bagner, supra note 134, at 582.
\textsuperscript{139} London Court of Arbitration, \textit{International Arbitration Rules}, reprinted in 2 \textsc{International Commercial Arbitration Doc. IV O(H) 4, 5} (Schmitthoff ed. 1982).
\textsuperscript{140} Bagner, supra note 134, at 584; Stockholm Chamber of Commerce, Arbitration in Sweden 9 (1977).
\textsuperscript{141} deVries, supra note 5, at 45.
\textsuperscript{143} Hoellering, supra note 27, at 21.
\textsuperscript{144} The following countries allow the arbitration of antitrust disputes: Australia, Austria, Canada, Denmark, Federal Republic of Germany, France, Italy, Netherlands, Pakistan, Peru, and Switzerland. Hoellering, supra note 108, at 2 n.18.
\textsuperscript{145} Id. at 2.
\textsuperscript{146} Hoellering, supra note 27, at 21. The Institute publishes a quarterly newsletter,
\end{footnotesize}
Other countries as well have taken steps toward improving their status as arbitration venues. The London Court of Arbitration has improved as an arbitration forum with the passage of the English Arbitration Act of 1979.\textsuperscript{147} This Act restricts the rights to a judicial appeal, enabling parties in arbitration proceedings to get the benefit of the assistance of the court without being able to use it as an instrument of abuse. More importantly, the Act enables a non-British party to exclude, by contract terms, judicial review by English courts.\textsuperscript{148} In 1976, the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce were revised to make them better suited to the administration of international arbitration proceedings in Sweden.\textsuperscript{149} At the same time, the Swedish Arbitration Act was amended to allow "any question on the nature of a civil matter" to be arbitrable.\textsuperscript{150} There is no doubt that Stockholm is an important arbitration forum in the context of international trade as evidenced by its use in agreements between various countries.\textsuperscript{151}

Another important institution is the United Nations Commission on International Trade Law (UNCITRAL), a worldwide organization that includes representatives from various legal, economic, and social systems and geographic regions. In 1976, the General Assembly of the United Nations recommended use


\textsuperscript{148} Bagner, \textit{supra} note 134, at 583; 5 \textsc{Wetter, The International Arbitral Process: Public and Private} 533 (1979). Comparing the U.K. Arbitration Act of 1979 with the \textit{Mitsubishi} decision, the Act has been said to look paltry in comparison with the liberal attitude of the United States Supreme Court. See Schmitthoff, \textit{supra} note 121, at 365.

\textsuperscript{149} Bagner, \textit{supra} note 134, at 583.

\textsuperscript{150} Stockholm Chamber of Commerce, \textit{supra} note 140, at 192; Bagner, \textit{supra} note 134, at 585. This is important because the scope of what is arbitrable may be governed by the laws of the place where the arbitration is held.

\textsuperscript{151} The 1977 agreement between the AAA and the USSR Chamber of Commerce and Industry provides that all trade disputes that may arise between the United States and the Union of Soviet Socialist Republics shall be arbitrated in Stockholm. 3 \textsc{Wetter, The International Arbitral Process: Public and Private} 465 (1979). Reference to the Stockholm Arbitration Institute has also been made in trade agreements between the People's Republic of China and various Western countries. Stockholm Chamber of Commerce, \textit{supra} note 140, at 183; Bagner, \textit{supra} note 134, at 585.
of the UNCITRAL Arbitrational Rules for inclusion in international commercial contracts.\footnote{152} UNCITRAL has recently completed a Model Law on International Commercial Arbitration\footnote{153} designed to achieve an even greater unity of national laws. UNCITRAL has also provided Conciliation Rules for those parties seeking an amicable settlement of disputes rather than the more adversarial proceedings, such as arbitration or litigation.\footnote{154}

Given the increased acceptance and importance of arbitration, anyone having international commercial transactions should be aware of the advantages and disadvantages of arbitration. The main advantage of arbitration has been said to be the measure of certainty provided by an assured channel of dispute resolution agreed upon in advance. It also avoids the possibility of facing a potentially biased or unfamiliar forum or law, and eliminates forum-shopping costs and uncertainties.\footnote{155} Another advantage is that arbitration is meant to be conducted in such a way that business relationships can be preserved since the proceedings can be confidential and compromise decisions are more likely to result than from litigation.\footnote{156} Also, parties can select the arbitrators by agreement, and they can be selected on the basis of special experience and knowledge of the subject matter. This produces a much more efficient and less time-consuming proceeding.\footnote{157} An important advantage that international arbitration has over litigation is the greater possibility of having the award enforced in various jurisdictions.\footnote{158} Other advantages include relative speed and economy,\footnote{159} although these are not advantages in international arbitration to the degree that they are in domestic arbitration.

\footnote{152}{Thirty-first session of the United Nations General Assembly, December 15, 1976.}
\footnote{153}{The UNCITRAL Model Law was considered extensively at the Interim Meeting of the International Council for Commercial Arbitration (ICCA) in Lausanne, Switzerland in May 1984. See ICCA Congress Series No. 2 (Deventer, The Netherlands: Klumer Law & Taxation Publishers, 1984); See also Hoellering, supra note 27, at 20 n.7.}
\footnote{154}{The UNCITRAL Conciliation Rules were adopted by the General Assembly of the United Nations on December 4, 1980. See deVries, supra note 5, at 77.}
\footnote{156}{Lutz & Mosk, supra note 155, at 58; Hoellering, supra note 27, at 26; Burger, supra note 132, at 6.}
\footnote{157}{Burger, supra note 132, at 6; Bagner, supra note 134, at 573.}
\footnote{158}{Hoellering, supra note 27, at 574.}
\footnote{159}{Hoellering, supra note 27, at 26; Bagner, supra note 134, at 573-74.
Disadvantages include delays caused by distance and difficulties of communication and language; expenses of administration and arbitrators' fees, although these costs are normally less than litigation costs; additional costs for added counsel, translators, interpreters, and transportation; limitations on discovery that may inhibit the development of facts in some cases; lack of substantive review of an erroneous arbitral decision; and, in some cases, difficulty in commencing the arbitration or obtaining an enforceable award. However, with a little foresight and careful planning, these problems can be anticipated and their severity reduced.

The strengths and weaknesses of international arbitration will depend upon the choices available at different stages of the life of the contract. At the drafting stage, the arbitration clause is normally viewed as a convenient means of retaining good business relations. When a dispute arises, one of the parties may prefer to litigate in a national court if jurisdiction is obtainable. If interim measures are sought by either party, such as attachment or some form of discovery, recourse to a court may be required. At the enforcement of an arbitral award stage, the assistance of a court may be necessary, as was stated in *Mitsubishi*. In each of these different stages, the relative advantages of arbitration and litigation will shift. The draftsman of an arbitration clause in an international contract must foresee the range of possible disputes and the predictable behavior of the parties in each of the various stages mentioned.

The best time for deciding whether and how to use arbitration is not after a dispute arises. The same careful consideration that is given to other aspects of a business relationship should be given to the resolution of disputes that may arise. Parties should tailor the arbitration procedures to their particular needs. The nature of the contract, the nationality of the participants, the type of transaction, and the preferences of the parties will all be determinative.

The arbitration agreement should include the place of arbitration, mode of composition of the arbitral tribunal, language, and

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161. 105 S. Ct. at 3360.
162. deVries, *supra* note 5, at 62.
procedure. A fair agreement may provide for arbitration in a neutral country and for the parties to be bound by contract provisions and rules of law not subject to unilateral amendment or abrogation. U.S. lawyers may prefer to draft complete arbitration clauses that provide for use of the English language, an agreed-upon applicable law, judicial enforcement procedures, and mutual selection of the arbitrators. In practice, it may be difficult to obtain the agreement of foreign parties on such issues and difficult to persuade domestic parties that a preferred clause will save time and money when arbitration occurs. This is due to the fact that the arbitration clause is seldom a top negotiating priority.

In drafting arbitration agreements, Chief Justice Burger recommends the use of the tested clauses the American Arbitration Association has developed to fit particular needs. The AAA provides certain services under arbitration clauses that specify the UNCITRAL Arbitration Rules. The UNCITRAL Rules include the following model arbitration clause:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note - Parties may wish to consider adding:

(a) The appointing authority shall be ... (name of institution or person);

(b) The number of arbitrators shall be ... (one or three);

(c) The place of arbitration shall be ... (town or country);

(d) The language(s) to be used in the arbitral proceedings shall be...

164. For a more detailed discussion of drafting the agreement to arbitrate see deVries, supra note 5, at 64-77; see also Bagner, supra note 134, at 576-80.
166. Burger, supra note 132, at 6.
A broad arbitration clause, such as the one above, is desirable in view of the ruling in *Mitsubishi* that the arbitration agreement in that case was broad enough to encompass all disputes, including those raised on statutory grounds.\(^{168}\)

Besides providing a means of dispute resolution, arbitration is creating a body of arbitral decision-making that is defining the standards of conduct of international business.\(^{169}\) A party in international commercial arbitration must be aware of the developing precedential trends. Although it is difficult to discern clear patterns, certain decisional trends have begun to appear. These trends are generally followed by arbitrators, regardless of an occasional and isolated contradictory decision.\(^{170}\)

There are seven major trends in international commercial arbitration, which are listed below.\(^{171}\)

1. **The Critical Role of Good Faith Behavior in International Contracting.** Good faith is a basic principle of international law. Arbitral decision-making has developed good faith as an overriding rule of international contracting. Good faith is a regulatory norm through which arbitrators apply equitable principles as the supreme rule of contractual interpretation.

2. **Contractual and Financial Equilibrium Can Only Be Altered with the Parties’ Assent.** As a rule, arbitrators tend to respect faithfully the intent of the parties and to restrain themselves from modifying the original contract. Arbitrators will only deviate from this approach when the parties have so provided in the contract.

3. **Arbitration Has Been an Important Mechanism for Defining the Rights and Obligations Flowing from New Contractual Forms.** Arbitration serves as a testing ground for the reliability of new contractual forms that are created by the international business community. Arbitration awards also continue to refine those contractual forms that have already gained widespread recognition.

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168. 105 S. Ct. 3353-55.
170. Id.
171. Id. These trends are taken from Cremades, *supra* note 169, where they are more fully discussed. They are stated at some length in this comment because of their increased importance in view of the *Mitsubishi* decision.
4. Arbitral Decision-Making Has Played a Particularly Important Role in the Determination and Valuation of Damages. Arbitrators, often referring to the indemnification clauses found in contracts of particular trade organizations, have introduced an element of fairness into their calculations that is often lacking in many national legal systems.

5. The Extent of an Arbitrator's Jurisdiction is Not Necessarily Determined by Formal Definitions of Legal Personality. Arbitral decision-making emphasizes substance over form where contractual responsibility is concerned. It has looked to the true will of the parties to define the extent of its jurisdiction.

6. The Survival of Certain Contractual Obligations Despite Failure of the Remainder. An arbitrator must often determine the validity of the contract in which the arbitration clause is contained. A clear trend in international commercial arbitration is to grant the arbitration clause a contractual status independent of the contract in which it is bound.

7. The Importance of Arbitration in Contracting with Government Agencies. Many governments and their agents are now participating in international arbitration. It has become a recognized and valued principle of the international arbitration community that once a state participates in international commerce it must play by the same rules as all the other participants.

The most significant impact of international commercial arbitration may be its contribution to world peace and stability. "It is largely through commerce that modern nations maintain their day-to-day relations. Even between countries with antagonistic policies, trade continues. International commerce may not directly avoid all war, but it certainly creates interdependence and balance."\(^{172}\) In present times, it is in world trade, not politics, that arbitration is making its greatest contribution to world peace.\(^{173}\) The significance of international commercial arbitration as a stimulus to world trade and peace has been summed up simply as bringing prosperity, security, freedom, and justice.\(^{174}\) In view of this worldwide impact, it was indeed with great consideration

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173. Id. at 19. The main activity of the Iran-United States Claims Tribunal, established in the Hague in 1981 following the hostage crisis, was to decide commercial claims.
that the Court in *Mitsubishi* gave to "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the ... international commercial system...."\(^{175}\) The decision of the *Mitsubishi* Court will not hinder the on-going development of arbitration nor will it hinder the possible effects arbitration may have on achieving some economic order in the world.

**CONCLUSION**

International commercial arbitration has obtained worldwide recognition. Arbitration provides the appropriate forum for disputes arising out of international commercial transactions. The Supreme Court’s decision in *Mitsubishi* demonstrates the policy favoring arbitration is on extremely firm ground. The effect of *Mitsubishi* is that parties will be bound to their agreement to arbitrate. A party will no longer be able to avoid or delay arbitration in relation to an international commercial contract by merely asserting antitrust violations.

The *Mitsubishi* decision increases, even more, the importance of a well-drafted arbitration agreement. The agreement should be broad enough to encompass all claims that may arise out of the commercial relationship, much like the Mitsubishi-Soler agreement was broad enough to encompass statutory claims. A party must be aware of the opportunities and pitfalls of arbitration as well as the current trends. A party should take full advantage of the assistance that can be provided by the various arbitration associations and institutions.

The Supreme Court made the correct decision in *Mitsubishi* by giving great weight to the policy considerations accorded to the stability and growth of the international commercial system. A contrary decision, which would prevent an agreed-upon arbitration proceeding from going forward, would do nothing but harm to the international trade of the United States. The Court points out that all claims are protected by the opportunity to assert them in court at the enforcement stage of the proceedings. The impact of *Mitsubishi* on international commerce can only be positive.

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175. 105 S. Ct. at 3355.
I. THE FACTS AND THE DECISION

In *Batson v. Kentucky*,¹ the Supreme Court of the United States reviewed the conviction of a black man by an all-white Kentucky jury on charges of second-degree burglary and receipt of stolen goods. The all-white jury had resulted from the prosecutor's use of peremptory challenges to remove, without explanation, all of the four remaining blacks from the jury panel.²

The petitioner Batson complained that the prosecutor's exercise of the challenges in this manner violated both his right of equal protection under the fourteenth amendment³ and his right to a jury drawn from a representative cross section of the community under the sixth amendment.⁴ The Court, however, elected to decide the case on the basis of the equal protection issue alone and expressed no view on the merits of Batson's sixth amendment arguments.⁵

This was an unexpected development⁶ because Batson's equal protection claim was defective in terms of the Court's 1965 holding in *Swain v. Alabama*.⁷ This holding made clear that discriminatory purpose could not sufficiently be demonstrated on the basis of state action impacting upon any one particular defendant in any one particular case.⁸ Even the dissenter in *Swain* had agreed on this point.⁹ According to the *Swain* Court, a prima facie case of discriminatory state action could be established only by a showing that the prosecutor had systematically

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¹ 106 S. Ct. 1712 (1986).
² Id. at 1715.
³ U.S. Const. amend. XIV, § 1.
⁴ U.S. Const. amend. VI.
⁵ 106 S. Ct. at 1716 n.4.
⁶ Id. at 1731 (Burger, C.J., dissenting).
⁸ Id. at 222.
⁹ Id. at 245 (Goldberg, J., dissenting).
and purposefully exercised peremptory challenges to exclude black jurors "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be." 10 Batson, however, offered merely to prove that the prosecutor's exercise of peremptory challenges in his case alone had been discriminatory. 11 He offered no proof that the prosecutor had established any pattern of discrimination by his actions in previous cases.

On this ground, therefore, the lower court denied Batson's motion to offer his proof 12 and the Supreme Court of Kentucky affirmed in an undetailed, one-paragraph opinion that simply asserted the court's reliance on the Swain precedent. 13

The Swain holding had excited considerable controversy in the period since the case was decided in 1965. 14 It had been criticized as out of step with other Court decisions both prior to and after Swain, particularly in that it permitted the peremptory challenge of black jurors in cases involving black defendants upon the mere assumption that blacks, as a class, would be more likely to be partial toward a black defendant than would jurors of other races. 15 The Swain Court had, in large part, justified this apparently racial generalization with the explanation that "Negro and White, Protestant and Catholic, are alike subject to being challenged without cause." 16 In contrast, both the 1964 Anderson v. Martin 17 and the 1967 Loving v. Virginia 18 holdings expressly rejected this form of justification.

The criticism of Swain had frequently taken on angry overtones 19 and had escalated into a public issue. 20 It had been

10. Id. at 223.
11. 106 S. Ct. at 1715.
12. Id.
13. Id. at 1715-16.
15. Swain, 380 U.S. at 222.
16. Id. at 221.
17. Anderson v. Martin, 375 U.S. 399 (1964) (rejecting an argument that a state law requiring a candidate's race to be on the ballot was not a violation of equal protection because it applied to white as well as black candidates).
18. Loving v. Virginia, 388 U.S. 1 (1967) (rejecting argument that anti-miscegenation law was valid because it applied to blacks and whites equally).
of special concern to critics that Swain seemed to doom black defendants to the prejudices of all-white juries, at least in circumstances where the prosecutor had been discreet enough to avoid any pattern of exclusion of blacks in previous cases. The critics had argued that it was virtually impossible for a black defendant to successfully prove a prosecutor's discriminatory purpose under the Swain criteria and, indeed, no defendant ever had done so. What made this situation particularly objectionable was that evidence seemed to be abundant that prosecutors were not only continuing to discriminate against blacks in applying peremptory challenges, but were doing so openly and flagrantly.

For example, prosecutors had peremptorily struck 405 out of 467 eligible black jurors in Dallas County, Texas in 100 felony trials during the 1983-1984 period alone. Some influential lower courts had also expressed dissatisfaction with the Swain holding. They had circumvented Swain by extending the logic of the Supreme Court's 1975 holding in Taylor v. Louisiana to attack the state's exercise of peremptory challenges based upon racial criteria from another direction. The Taylor Court held that a jury venire must be comprised of a representative cross section of the community even after the state had exercised its right to disqualify or to exempt individual jurors. The Court reasoned that a venire must be broadly representative in order that defendants might be assured of "a diffused impartiality" and because "sharing in the administration of justice is a phase of civic responsibility" in which black jurors ought to participate.

24. Batson, 106 S. Ct. at 1726 (Marshall, J., concurring). The extent to which Justice Marshall's statistics are representative of a nationwide trend was not explained by the dissenters; see also studies detailed in Johnson, supra note 21; Comment, supra note 14, at 1157; and J. VAN DYKE, JURY SELECTION PROCEDURES 154-156 (1977).
26. 419 U.S. 522, 523 (1975) (The requirement that a petit jury be selected from a representative cross section of the community is violated by the systematic exclusion of women from jury panels by means of a state constitutional provision providing that a woman would not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to selection.) Id. at 523.
27. Id. at 538.
28. Id. at 530-31 (citing Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).
Using this reasoning, the California Supreme Court later concluded in *People v. Wheeler*\(^{29}\) that the exercise of peremptories by a prosecutor on the basis of expected self-race bias in favor of the accused violated the state constitutional guarantee of trial by an impartial jury. The *Wheeler* Court held that the purpose of peremptory challenges was to remove only those individual jurors identified as having specific biases related to the case at bar, and not to remove an entire class of jurors who were merely assumed to have generalized biases for or against a particular racial group.\(^{30}\)

One year later, in its 1979 decision in *Commonwealth v. Soares*,\(^ {31}\) the Supreme Judicial Court of Massachusetts also condemned the state's use of a peremptory challenge to exclude a juror "solely on the basis of bias presumed to derive from that individual's membership in the group,"\(^ {32}\) again relying on the *Taylor* reasoning.\(^ {33}\) The *Soares* Court found such a generalized basis for a peremptory challenge unacceptable even if its underlying contention could be shown to be true. That is, even if statistical evidence were introduced to demonstrate that blacks were in fact more apt to favor a black defendant than would a white, a challenge on this basis would nevertheless be unacceptable.\(^ {34}\)

Critics of the *Wheeler* and *Soares* rationale, however, pointed out that interpreting the sixth amendment to require a full spectrum of opinion to be available on all juries might "allow veniremen with strong and obvious biases toward or against [a defendant] to be seated on a jury merely because they represent part of the community."\(^ {35}\) The traditional two-step challenge system works well, they argued. The first step allows obviously biased jurors to be removed for cause since they are by definition partial. The second step recognizes that all bias cannot be proven and that "the challenge for cause cannot adequately eliminate all partiality."\(^ {36}\) As a consequence, it employs the peremptory chal-

\(^{29}\) 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).
\(^{30}\) Id. at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.
\(^{32}\) Id. at 488, 387 N.E.2d at 516.
\(^{33}\) Id. at 480, 387 N.E.2d at 512.
\(^{34}\) Id. at 486, 387 N.E.2d at 515.
\(^{35}\) Saltzburg & Powers, supra note 22, at 357.
\(^{36}\) Id. See also, Tapp, *Opinion and Law in the 1980s*, in *Law and Opinion in a Cynical Society* 277 (1985). The *Swain* Court had reasoned that peremptory challenges were
lenge to eliminate unprovable, yet intuitively recognizable, bias.\textsuperscript{37} It was admitted, nevertheless, that in the second step "it may be difficult to distinguish bias, which the system wishes to eliminate, from cultural diversity which the cross section requirement seeks to preserve."\textsuperscript{38}

As a result of the controversy following the Swain decision, the Batson Court was confronted with the choice of whether to readdress its holding in that case, to reaffirm it, or to consider the sixth amendment argument accepted in Wheeler and Soares. The Court chose to reconsider its holding in Swain and look again at the equal protection implications raised by the use of prosecutorial-peremptory challenges.\textsuperscript{39} After review, the Court remanded the Batson case for further proceedings with instructions that if the prosecutor could not provide racially neutral reasons for his challenges of the last four blacks from the jury, Batson's conviction was to be reversed.\textsuperscript{40} In so deciding, the Court overruled the two most objectionable aspects of its Swain holdings. In requiring the prosecutor to rebut, the Court recognized that a prima facie case of discrimination could be established solely with reference to the prosecutor's actions in a particular case. In requiring the prosecutor to provide a racially neutral justification for his challenges, the Court rejected its Swain holding that black jurors properly could be challenged on the basis of assumed group bias in favor of a black defendant.

II. COUNTERARGUMENTS OF THE DISSENT

The Batson dissenters insisted that the majority's holdings were premised on a revised version of equal-protection analysis, one that ignored the traditional requirement for proof of discriminatory purpose.\textsuperscript{41} They also argued that the holding had emasculated the peremptory-challenge procedure itself, thus exposing criminal defendants to new forms of jeopardy at the hands of

\textsuperscript{37} Swain, 380 U.S. at 220.
\textsuperscript{38} Saltzburg & Powers, supra note 22, at 387.
\textsuperscript{39} Batson, 106 S. Ct. at 1716 n.4.
\textsuperscript{40} Id. at 1725.
\textsuperscript{41} Id. at 1737 (Burger, C.J., joined by Rehnquist, J., dissenting).
juries from which unprovable, yet intuitively recognizable biases could no longer be effectively removed.\textsuperscript{42}

The majority sidestepped the latter argument altogether, "express[ing] no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel."\textsuperscript{43} It justified its equal protection analysis on the basis of decisions since the 1965 \textit{Swain} case that had established first that "the totality of the relevant facts [can give rise] to an inference of discriminatory purpose"\textsuperscript{44} and secondly that "a consistent pattern of official racial discrimination is not a necessary predicate to a violation of the Equal Protection Clause."\textsuperscript{45} In a footnote that turned out to be more confusing than helpful, the Court pointed out that the burden of proof rules employed in its decision were similar to those that had been applied by unanimous courts in cases addressing employment discrimination under Title VII of the 1964 Civil Rights Act.\textsuperscript{46}

The dissenters argued that the application of Title VII rules to peremptory challenges were "curiously out of place" since such application would result in "the peremptory challenge ... collapsing into the challenge for cause," thus defeating its very purpose.\textsuperscript{47} Such a departure from conventional equal-protection principles, reasoned the dissenters, threatened to allow women, the aged, religious groups and other members of distinct community groups to object to a peremptory challenge on the sole basis that it excluded a juror of the same persuasion or affiliation as the defendant from participation in the case.\textsuperscript{48}

The door was opened to this possibility as a logical extension of the majority's reasoning, they argued, even though the majority had expressly limited the application of its holdings to cases involving "allegations of impermissible challenge on the basis of

\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id. at 1718 n.12.}
\textsuperscript{44} \textit{Id. at 1721 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)).}
\textsuperscript{45} \textit{Id. at 1721 (citing Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n.14 (1977)).}
\textsuperscript{46} \textit{Id. at 1721 n.18 (citing McDonnel Douglas Corp. v. Green, 441 U.S. 792, 794 (1973), which involved the company's discharge of, and subsequent refusal to rehire, a black civil rights activist, and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 250-51 (1981), involving the termination of a female state employee).}
\textsuperscript{47} \textit{Id. at 1739.}
\textsuperscript{48} \textit{Id. at 1737.}
Such a broad interpretation of equal protection rights, they concluded, would render meaningless the peremptory-challenge procedure, one which had played an important role in American law and in the earlier English common law for centuries. The majority, however, had not adopted the Title VII rules as applicable to equal-protection cases. In its well-intentioned footnote, the Court had only remarked that the cited Title VII cases "explained the operation of prima facie burden of proof rules." The rules actually relied on by the Court were based on well-established equal-protection principles. This becomes apparent upon further examination of the Court's reasoning later in this note.

It is important at this juncture to identify the beneficiary of the dissenters' concern. Since the majority specifically "express[ed] no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel," it seems clear that the dissenters were primarily concerned with insuring a jury free of any prejudice against the state's prosecution of the defendant. The dissenters cited the 1887 case of Hayes v. Missouri for the proposition that peremptory challenges should be available to prosecutors as well as to defendants because "the system should guarantee not only freedom from bias against the accused, but also from any prejudice against his prosecution."

The major underlying issue addressed by the dissenters, therefore, emerged as one concerned with majoritarian control of the judicial process. The dissenters, as had the Court in Swain, presented their argument in a manner suggesting that two essential rights, each designed to protect criminal defendants, were in conflict. The thrust of this argument was that, in attempting to insure against possible prosecutorial abuse of the peremptory challenge procedure, the majority was succeeding only in destroy-

49. Id.
50. Id. at 1735-36.
51. Id. at 1721 n.18.
52. Id. at 1718 n.12.
53. 120 U.S. 68 (1887).
54. Batson, 106 S. Ct. at 1738 (citing Hayes, 120 U.S. at 70).
55. Swain, 380 U.S. at 219-220.
ing the peremptory challenge procedure. The mere possibility of prosecutorial abuse in applying peremptory challenges, they reasoned, did not justify this result. Since the majority did not limit the use of peremptory challenges by the defense, however, the possibility of such consequences was not at issue.

The true issue was addressed by the majority: Did the Hayes proposition that "[b]etween [the defendant] and the State the scales are to be evenly held"57 mean the State could peremptorily preclude the participation of any juror who, simply by virtue of shared race, might give a defendant of the same race more of a benefit of the doubt than would other jurors? The Batson majority held Hayes meant no such thing.58

Viewed in these terms, it seemed apparent, at least from a black criminal defendant's standpoint, that a prosecutor's use of peremptory challenges to eliminate black jurors from his case in no way promised impartiality. It promised only that he would be subjected to the recognized biases of an all-white jury toward a black defendant.59 From this perspective, the underlying reason for such challenges was seen not to be the state's pursuit of impartiality but rather the state's concern that a nonmajoritarian (racially or otherwise distinct) value system might be otherwise allowed to gain expression.60 Thus, the dissenters were seen not to have "distinguish[ed] bias which the jury system wish[ed] to eliminate, from cultural diversity which the cross section requirement [sought] to preserve."61

Long before the Court set out the representative cross section requirement in Taylor v. Louisiana, however, it had decided in Strauder v. West Virginia62 that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race."63 It had explained later in Akins v. Texas64 that "[t]he number of our races and nationalities stands in the way of evolution of such a conception [of equal protection]."65

57. Hayes, 120 U.S. at 70.
58. Batson, 106 S. Ct. at 1723.
60. Id. at 377.
61. Id. at 358.
62. 100 U.S. 303 (1880).
63. Id. at 305.
64. 325 U.S. 398 (1945).
65. Id. at 403.
The Taylor Court directly addressed the reconciliation of the two principles. It held that a defendant's right to be tried by a cross section of his peers was limited to his right to object to any attempt by the state to control the racial composition of his jury. The cross section right did not preclude the state from "prescrib[ing] relevant qualifications for ... jurors and [providing] reasonable exemptions so long as it [might] fairly be said that the [resulting] jury lists or panels are representative of the community." Thus, Taylor specified only that venires, not petit juries themselves, must be representative of major community segments. Its lesson was that the state cannot control the composition of petit juries indirectly by controlling the composition of venires through the process of venire qualification. Taylor imposed no requirement, therefore, that any "petit jur[y] actually chosen must mirror the community and reflect the various distinct groups in the population." Individual defendants were not entitled to a jury of any particular composition.

The difference between the Taylor formulation and the equal-protection cases, which had also held that the state would not be allowed to control the racial composition of juries by means of the application of discriminatory selection criteria, is that Taylor insisted that the jury lists or panels must still be representative of the community after the State applied its disqualifications and exemptions, whereas the equal protection cases did not. In Taylor, the Court overruled its 1961 decision in Hoyt v. Florida in which it had upheld a jury exemption system providing for the automatic excusal of women from jury service unless they registered their desire to be placed on jury venires because the system was founded upon the sufficiently rational assumption that "[women are] still regarded as the center of home and family life." The rationale operative in Hoyt was that since courts were empowered to excuse jurors on the basis of

66. Taylor, 419 U.S. at 538.
67. Id. (citing Fay v. New York, 332 U.S. 261, 284 (1947)).
68. Id.
69. Id.
71. Taylor, 419 U.S. at 538.
73. Id. at 58.
74. Id. at 62.
pressing personal or business requirements and since a woman's work in caring for home and children would always be considered pressing enough to justify excusing her, the courts were justified in simply skipping an unnecessary step and placing only those women on venires who had expressly requested to be included. The Hoyt Court had also found it rational, on the grounds of administrative convenience, for the state to extend the same rule to women who had no family responsibilities.\(^75\)

The problem the Taylor Court found with the Hoyt rationale was that it resulted in venires from which women were virtually excluded.\(^76\) In the Taylor case itself, no women at all were represented on a jury venire of 175 drawn in April 1972.\(^77\) In the period from December 1971 until November 1972, only twelve women were among the 1800 persons drawn to fill petit-jury venires in the jurisdiction.\(^78\) The Court concluded that such a result was unacceptable because “the [defendant’s] right to a proper jury cannot be overcome on merely rational grounds.”\(^79\) A proper jury, in the view of the Taylor Court, was one drawn from a venire that was broadly representative of the “identifiable segments playing major roles in the community”\(^80\) and this included women. The defendant was entitled to the “diffused impartiality” that such representation promised.\(^81\) As the Court had observed in Ballard v. United States,\(^82\) “a community made up exclusively of [men] is different from a community composed of both [men and women]; the subtle interplay of influence is among the imponderables.”\(^83\)

Although the Taylor Court found that the lack of a representative cross section “could not be overcome on merely rational grounds,”\(^84\) it left the door open for argument when the principle was applied to the facts of Batson. “There must be weightier reasons,” elaborated the Taylor Court, “if a distinctive class

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75. Id. at 62-63.
76. Taylor, 419 U.S. at 537.
77. Id. at 524.
78. Id.
79. Id. at 534.
80. Id. at 530.
81. Id.
82. 329 U.S. 187 (1946).
83. Id. at 193-194.
84. Taylor, 419 U.S. at 534.
representing fifty-three per cent of the eligible jurors is for all practical purposes to be excluded from jury service.” Accordingly, had the Batson majority argued that the peremptory-challenge procedure in that case resulted in a petit jury lacking representative cross section qualities, the dissenters could have distinguished Taylor on two grounds.

First, they could have contended that the merits of the peremptory-challenge procedure, even as these applied to the state’s interest involved, constituted sufficiently weighty reasons to justify this result. Since the Taylor Court had not provided any guidance as to what might constitute “weightier reasons” to justify a jury lacking representative cross section qualities, and since such guidance, if provided, would have been dicta only, the Batson Court would have been required to rule directly on the relative weight of peremptory challenges in this situation. A holding favorable to the defendant would have opened up the possibility of follow-on litigation by defendants claiming membership in “identifiable segments playing major roles in the community,” a possibility that would suffer all of the disadvantages described by the Batson dissenters. A holding favorable to the state, on the other hand, would have failed to correct the flagrant abuses of the challenge procedure that had been enabled by the Swain precedent.

Secondly, the dissenters could have argued that Taylor addressed only the requirement for representative venires, not petit juries. Since juries consist of only twelve members at most and a venire may have more than 100 potential jurors, a convincing argument could be made that the two situations are not equally susceptible to apportionment among groups. For example, a five percent representation on a venire of 100 would translate to a fraction of a person on a petit jury of twelve. The Court, therefore, sidestepped this dilemma by electing to decide the case on the basis of an equal-protection argument alone and to express no views on the merits of Batson’s sixth amendment claims.

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85. Id.
86. Id. at 530.
88. Id. at 1726 (Marshall, J., concurring).
89. Id. at 1716 n.4.
III. THE MAJORITARIAN CONTROL ASPECT

There was no issue in Batson as to whether the defendant was entitled to have blacks on his jury in all circumstances because under equal-protection analysis, he clearly had no right to a jury of any particular racial composition. The issue was, rather, whether the state had controlled that result by means of any discriminatory application of peremptory challenges against blacks.

In Swain, the Court had ruled that the state could freely control the racial composition of juries for purposes of achieving impartiality as this requirement was viewed from the state's perspective. Impartiality from this perspective meant a jury must be free of bias against the state's prosecution of the defendant. The implications of such a rule seem clear enough. Clearest of all is the implication that, under such a rule, the state need not tolerate any application of its laws by a jury that might be contrary to the application favored by the majority that enacted the laws. Under the Swain rule, the state could assure this result by means of the peremptory challenge even in cases where the "[minority jurors [might] be helpful in interpreting events in the context in which they occurred." This use of peremptories is possible because "there are so many more whites on the jury venire than blacks."

The implications of such control are vast. For example, a white juror's interpretation of the fact that a black youth ran from the police near the scene of a crime would almost certainly be different from the interpretation given to that fact by a black juror. The black youth might be entirely innocent of any wrongdoing and still be justifiably wary of confrontations with police. Yet, if a white administration favored a tough crime program and only whites were allowed to participate on a jury deciding his guilt or innocence, the black youth's chances of being

90. Id. at 1713 (citing Strauder, 100 U.S. at 305).
91. Swain, 380 U.S. at 222.
92. Id. at 220.
93. Id.
95. Id. at 369.
96. Johnson, supra note 21, at 1668 n.309. See also Swain, 380 U.S. at 211-212 n.8 (Goldberg, J., dissenting).
given any appropriate benefit of the doubt in a close case would be minimal.\textsuperscript{98}

This is a completely different proposition from the case in which the black youth's friend or brother might be challenged for cause from his jury on the basis that they would be less likely than others to be impartial.\textsuperscript{99} It is also arguably different from the case in which a black juror is challenged on the grounds that he has a son the same age as the defendant and may have personal opinions gained through his son as to the character of a black youth's confrontations with police.\textsuperscript{100} These two latter examples seem clearly to constitute "affiliations in the context of the case to be tried"\textsuperscript{101} and are distinct from a purely racial generalization that could apply to any case.

IV. THE NEED FOR TRIAL COURT DISCRETION

Recognizing these distinctions, the \textit{Batson} Court logically determined that the legitimacy of a prosecutor's peremptory challenge of a black juror could turn on the particular fact situation in a case. The Court, therefore, left it to trial judges "to decide if the circumstances surrounding the prosecutor's use of peremptory challenges raises a prima facie case of discrimination in favor of the defendant," or, indeed, in favor of the black jurors affected. Similarly, the Court left it to trial judges to evaluate the prosecutor's justification of his challenges in rebuttal.\textsuperscript{102}

The Court instructed that the trial judge could determine whether a prima facie case had been raised in a case either with reference to the "pattern" of challenges that the prosecutor had applied against blacks or with reference to other indications, such as the manner in which the prosecutor questioned jurors during voir dire examination.\textsuperscript{103} The Court made clear that the prosecutor would only be required to explain his peremptory challenges if

\textsuperscript{98} Johnson, supra note 21, at 1625 (detailing studies demonstrating that racial bias affects the determination of guilt by jurors, particularly in capital cases, cases where the victim is white and defendant black, and close cases where a benefit of the doubt comes into play).
\textsuperscript{99} Swain, 380 U.S. at 221.
\textsuperscript{100} \textit{Batson}, 106 S. Ct. at 1728 (Marshall, J., concurring).
\textsuperscript{101} Swain, 380 U.S. at 221.
\textsuperscript{102} \textit{Batson}, 106 S. Ct. at 1723-24.
\textsuperscript{103} Id.
the judge determined that a prima facie case had been raised.\textsuperscript{104} It would not suffice for the accused to simply assert that the prosecutor had discriminated in some demonstrable way.

Thus, the \textit{Batson} Court held that the prosecutor who challenged the last four blacks from Batson's venire had established a discriminatory pattern of strikes. On remand, the prosecutor will be given the opportunity, in rebuttal, to justify his challenges on the basis of racially neutral reasons \textit{specifically relating to the case to be tried}.\textsuperscript{105} If the prosecutor is able to do so, Batson's conviction will be affirmed. The trial judge will determine whether the reasons provided by the prosecutor are sufficient. Moreover, the reviewing court has been instructed by the \textit{Batson} Court to “give [the trial judge's] findings [in this regard] great deference.”\textsuperscript{106} The reason that deference is merited is that the trial judge's findings will largely turn on his evaluation of the prosecutor's justifications for his challenges in the context of other facts of the case. Since the facts of a case may be disputed, the trial judge’s determination “largely will turn on [his] evaluation of credibility.”\textsuperscript{107}

Justice Marshall expressed concern that this procedure would leave too much discretion in the hands of trial judges. He cited cases in which trial judges in states that had already adopted similar procedures had accepted “easily generated explanations [as] sufficient to discharge the prosecutor’s obligation to justify his strikes on nonracial grounds.”\textsuperscript{108} In one of these cases, the prosecutor's explanation that a black juror “had seemed uncommunicative” had been accepted by the trial judge as sufficient explanation.\textsuperscript{109}

In Justice Marshall’s view, only the elimination of peremptory challenges altogether would “end the racial discrimination that they tended to inject into the jury selection process.”\textsuperscript{110} Such a solution, however, would leave no procedure available to remove jurors whose “affiliations ... in the context of the case to be

\textsuperscript{104} Id.
\textsuperscript{105} \textit{Batson}, 106 S. Ct. at 1723, 1725; \textit{Swain}, 380 U.S. at 221 (emphasis added).
\textsuperscript{106} \textit{Batson}, 106 S. Ct. at 1724 n.21.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 1728 (Marshall, J., concurring).
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 1726.
tried" were legally insufficient to constitute a basis for challenge for cause. An example would be the case of a black businessman whose affiliations strongly suggested, but did not legally establish, that he might be connected with narcotics trafficking. It would seem that his challenge from a jury hearing the case of a black narcotics runner would be justified, even if no direct relationship could be established between him and the defendant.

The Batson Court declined to go as far as Justice Marshall suggested, commenting that it did not think the peremptory challenge should be abolished entirely "because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution."

V. WHAT "PATTERN" WILL SUFFICE?

To assist the trial judge in determining whether a prosecutor's use of strikes in a particular case might raise a presumption of state discrimination, the Batson Court provided that "the defendant is entitled to rely on the fact ... that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate,'" citing Avery v. Georgia for this proposition.

In Avery, the Court overturned the conviction of a black man sentenced to death for rape by an all-white jury on the grounds that a discriminatory procedure had been employed by jury commissioners in their selection of the jury venire from tax returns. The procedure found to be discriminatory was one in which the names of blacks taken from the tax list had been written on yellow tickets in contrast to the names of whites that had been written on white tickets. A superior court judge then purportedly had drawn at random the names of those who would constitute the venire. Given the number of black names on the tax list as compared to the number of white names, the statistical probability that the judge, in fact, randomly drew sixty white

\[111.\text{ Swain, 380 U.S. at 221.}\]
\[112.\text{ Batson, 106 S. Ct. at 1724 n.22.}\]
\[113.\text{ 345 U.S. 559, 562 (1953).}\]
\[114.\text{ Batson, 106 S. Ct. at 1723.}\]
\[115.\text{ Avery, 345 U.S. at 560-61.}\]
\[116.\text{ Id.}\]
names to produce an all-white jury was later calculated to be 4.6 percent in 100.117 The Court, however, declined to base its decision upon the improbable result. “Even if the white and yellow tickets were drawn from the jury box without discrimination,” said the Court, the “opportunity was available to resort to [discrimination] at other stages in the selection process.”118 Thus, the procedure had made it easier “for those to discriminate who are of a mind to discriminate,” and on this basis, it was found to violate the defendant’s right of equal protection.119

The significance of the Batson Court’s Avery provision, therefore, is that a trial judge need not base his determination of discrimination on whether its presence is statistically probable. He is free to decide this question intuitively. For example, he may decide that the prosecutor’s challenge of the last two black jurors from a jury is presumptively discriminatory on the sole basis that the prosecutor had an “opportunity to discriminate” and had apparently availed himself of such opportunity in order to insure an all-white jury.

Conversely, the prosecutor’s challenge of four black jurors in a situation where five others have already been seated on the jury could be determined by the trial judge not to raise any presumption of discrimination. This is because his determination would not depend upon relative numbers of black and white jurors, but rather upon his intuitive judgment that the situation itself did not suggest any opportunity for discrimination.

The employment of this procedure by the Batson Court not only made it unnecessary for it to depend upon the burden of proof rules developed in its Title VII cases,120 but also enabled it to find a convenient route around the pitfalls and complexities of that form of equal protection analysis termed “conventional” by the dissenters.121 This form of analysis emphasizes the proposition that disproportionate racial impact alone does not prove discrimination and insists that discriminatory purpose must also be proven. Its origin was the 1976 case of Washington v. Davis122

118. Avery, 345 U.S. at 562.
119. Id.
120. Batson, 106 S. Ct. at 1721 n.18.
121. Id. at 1738 (Burger, C.J., dissenting).
in which the issue was whether a police admissions examination was discriminatory because it disqualified many more black than white applicants. The problem with this form of analysis in addressing jury selection cases was recognized by the Davis Court itself. In jury selection cases, the result of a particular draw from a jury wheel, the fact of total exclusion of blacks from a venire, or the fact of underrepresentation of blacks on a venire is often the only available evidence from which a claim of discrimination can be made. The Davis Court conceded that in these circumstances, discriminatory purpose may be inferred from the "totality of the relevant facts," that is, from a grossly disproportionate racial impact that is inexplicable in the absence of discrimination. In such cases, "the result bespeaks discrimination." The Court later instructed in its Arlington Heights decision that in these cases, "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" must be undertaken.

The Court's reluctance, prior to Davis, to find discriminatory purpose from disproportionate racial impact alone was apparent in its Whitus v. Georgia and Sims v. Georgia decisions. The pitfalls involved in its attempt to do so following Davis was illustrated by its decision in Castaneda v. Partida.

In Whitus, a case decided in 1967 just two years after Swain, the defendant, a black convicted of murder, attacked the composition of the petit jury that had convicted him. Forty-five

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123. Id. at 234-35.
124. Id. at 240-42.
125. E.g., Norris v. Alabama, 294 U.S. 587, 598 (1935) (a defendant can establish a prima facie case of discriminatory purpose by showing (1) the existence of a substantial number of blacks in the community and (2) their total exclusion from jury service. When the defendant has shown these facts, the burden of proof shifts to the state to prove that the exclusion did not flow from discrimination.)
126. Castaneda v. Partida, 430 U.S. 482, 495-96 (1977) (a prima facie case of discrimination is made out where the population is 79.1% Mexican American but only 39% of those summoned for grand jury service over an eleven-year period were Mexican Americans).
129. Id. at 1722 (quoting Hernandez v. Texas, 347 U.S. 475, 482 (1954)).
130. Arlington Heights, 429 U.S. at 266.
133. See supra note 126.
134. Whitus, 385 U.S. at 546.
percent of the population in the county was black, yet no black had served on a jury within the memory of available witnesses.\textsuperscript{135} It was conceded by the state that jurors were selected from tax lists and that 27.1 percent of the names on the tax list were blacks. Yet, only seven blacks had been selected to the venire of ninety from which defendant's jury was drawn.\textsuperscript{136} In a footnote to the case, the Court calculated that the statistical probability that the venire could have been drawn randomly and include only seven blacks, given that they comprised 27.1 per cent of the tax lists, was six in one million.\textsuperscript{137} Thus, the Court could have based its decision on this virtually conclusive evidence of discriminatory purpose.

The Court instead chose to base its decision on the fact that the tax lists from which the venire was selected were segregated by race\textsuperscript{138} and held that the makeup of the tax list itself raised a prima facie case of purposeful discrimination.\textsuperscript{139} "[T]he opportunity for discrimination was present," said the Court, "and we cannot say on this record that it was not resorted to by the commissioners".\textsuperscript{140} The Court noted, however, that the gross statistical disparity strongly pointed to the conclusion that the opportunity had, in fact, been taken advantage of.\textsuperscript{141}

The principal reason why the Court was reluctant to rely on statistical disparity alone to supply sufficient proof of discriminatory purpose was that the Court was not certain how to take into account the fact that states remained free "to prescribe relevant qualifications for their jurors and to provide reasonable exemptions...."\textsuperscript{142}

The Court has never adopted a presumption that the proportion of blacks disqualified for jury service should approximately equal the proportion of whites, absent some discriminatory component in the system. Consequently, the earlier cases found a prima facie case of discrimination only when the total exclusion of blacks from jury service was shown in a situation where blacks made

\textsuperscript{135} Id. at 548.
\textsuperscript{136} Id. at 550.
\textsuperscript{137} Id. at 552 n.2 (citing Finkelstein, supra note 117, at 338).
\textsuperscript{138} Id. at 549-51.
\textsuperscript{139} Id. at 551.
\textsuperscript{140} Id. at 552.
\textsuperscript{141} Id.
\textsuperscript{142} Taylor, 419 U.S. at 538.
up a substantial percentage of the population.\textsuperscript{143} The state was not permitted to take the position that \textit{all} blacks were unqualified to serve as jurors.\textsuperscript{144} Later cases made clear that the mere token inclusion of blacks on venires would not be allowed to circumvent this holding.\textsuperscript{145}

In his dissent in \textit{Castaneda}, Justice Powell suggested that the “severe limitation of a minority’s participation” might constitute token inclusion\textsuperscript{146} and the Chief Justice appeared to agree.\textsuperscript{147} In no case, however, has the Court clearly defined what might constitute a severe limitation or in what circumstances such a limitation might raise a prima facie case of discrimination. As a consequence, the Chief Justice was still able to argue in \textit{Castaneda} that although petitioner's raw figures showed underrepresentation of Mexican-Americans on grand jury venires, he had “offered no evidence whatever with respect to other basic qualifications for grand jury service.”\textsuperscript{148} For example, the Chief Justice noted that “[s]ince one requirement of grand jurors in Texas is literacy in the English language, approximately 20 [percent] of adult-age Mexican-Americans are very likely disqualified on that ground alone.”\textsuperscript{149}

The \textit{Castaneda} Court responded to Chief Justice Burger’s argument with further statistical analysis that attempted to demonstrate the untenability of his position. The probability that disqualification disparities between whites and Mexican-Americans were in fact as great as alleged by the Chief Justice, they argued, were one in ten to the fiftieth power, absent some condition of discrimination.\textsuperscript{150}

In contrast, the \textit{Whitus} Court avoided this complex form of argument by simply identifying a discriminatory component in the jury selection process and invalidating the selection on the basis that the discriminatory component presented an opportu-
nity for discrimination. Similarly, in *Sims v. Georgia*, the facts showed that blacks constituted 24.4 percent of the names on another tax list from which a jury venire had been drawn but that only 9.8 percent of the persons selected were blacks. As in *Whitus*, the Court decided the case on the basis that the tax lists were segregated.

The lawyer-statistician, Finkelstein, had gained the attention of the *Whitus* Court by his 1966 calculations of probabilities of discrimination in jury venire cases. For example, he calculated that the statistical probability that the venire selection in *Swain* had been legitimately random had been "one in more than one hundred million trillion," given the population figures involved. This must have been embarrassing in view of the Court's assertion in *Swain* that it did "not think that the burden of proof [as to discriminatory purpose] was carried by petitioner in [the] case." In his article, Finkelstein pointed out that disparities of this magnitude are not always intuitively apparent and he urged the Court to use probability theory to disclose the true dimensions of decisions involving proof of discriminatory purpose. He argued that a gross statistical disparity of the dimensions shown in *Swain* and *Whitus*, for example, would justify a court's finding of discrimination per se or at least of a presumption of discriminatory purpose.

In *Castaneda*, however, the limitations of statistical probability theory in assisting the Court's determination of discriminatory purpose were revealed, at least to Justice Powell, who later became the author of the majority opinion in *Batson*. In *Castaneda*, a Mexican-American defendant alleged a denial of equal protection on the basis of the gross underrepresentation of his race on county grand juries. The statistics accepted by the majority indicated that the county population was 79.1 per cent Mexican-American, but that over an eleven-year period, only 39

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152. 389 U.S. 404 (1967).
153. Id. at 407.
154. Id. at 407-408.
155. See *Whitus*, 385 U.S. at 552 n.2; Finkelstein, *supra* note 117, *passim*.
158. Finkelstein, 80 HARV. L. REV. at 365.
percent of those called for grand jury service had been Mexican-Americans.\textsuperscript{160} Citing Finklestein and other proponents of probability theory,\textsuperscript{161} the Court calculated that the likelihood of such results, absent the exercise of discrimination somewhere in the system and taking standard deviations into account, were less than one in ten to the 140th power.\textsuperscript{162} This disparity was of the magnitude calculated by Finklestein with respect to the Swain venire,\textsuperscript{163} and on this basis, the Court held that a prima facie case had been shown.\textsuperscript{164} The Court held the state's factual rebuttal was insufficient to overcome the inference of discrimination;\textsuperscript{165} that is, the judge who had appointed the jury commissioners and who later presided over defendant's trial was Mexican-American, as were three of the five jury commissioners and five of the twelve grand jurors who had indicted the defendant Partida.\textsuperscript{166} Moreover, Mexican-Americans in the county constituted the "majoritarian political element of the community, with demonstrated capability to elect and protect their own."\textsuperscript{167}

In his dissent, Justice Powell asserted he would hold Partida's "statistical evidence, without more, as insufficient to prove a claim of discrimination in this case."\textsuperscript{168} He found it inappropriate to conclude that those Mexican-Americans who had ascended to power in the majoritarian political element of the county had "adopted the majority's negative attitudes toward the [true] minority[,]" that is, the politically powerless elements of the community.\textsuperscript{169}

He observed further that the Court had "lightly concluded that the grand jury commissioners ... [had] disregarded not only their sworn duty but also their likely inclination to assure fairness to Mexican-Americans."\textsuperscript{170} His interpretation of Arlington Heights and Davis pointed out that those precedents required statistical

\begin{thebibliography}{99}
\item 160. Id. at 495.
\item 161. Id. at 496 n.17.
\item 162. Id.
\item 163. Id.
\item 164. Id. at 501.
\item 165. Id. at 497-98.
\item 166. Id. at 514 (Powell, J., dissenting).
\item 167. Id. at 515 n.6.
\item 168. Id. at 516 n.7.
\item 169. Id.
\item 170. Id. at 516.
\end{thebibliography}
evidence of venire underrepresentation to be evaluated in light of "such [other] circumstantial and direct evidence of intent as may be available."171 He acknowledged, however, that the statistical underrepresentation of a minority group, combined with an identification of a discriminatory component in the selection system, would be sufficient to raise a prima facie case of discrimination."172 Avery, Sims, Whitus and Alexander all had been decided on the basis of the presence of such a combination of factors. In Swain, there was also underrepresentation of blacks on the venire,173 but the Court refused to identify the prosecutor's extra-statutory agreements with defense counsels to remove blacks from selection eligibility as a discriminatory component.174 The logic in Swain had been that such consensual agreements did not constitute the same kind of mechanism affording the State an opportunity to discriminate against defendants as had the different colored tickets in Avery. This conclusion implicitly rejected any notion that the counsels for defendants might have been participants in the discriminatory scheme.175 The Swain Court also rejected the petitioner's contention that the very exercise of discretionary elements in the selection of the venire constituted a discriminatory component.176 The Court had taken the position that these discretionary judgments were equivalent to a permissible exercise of judgment in the disqualification process.177 The Court had adopted a similar view of discretionary challenges absent proof that the discretion had been abused.178

The Castaneda Court, however, identified as a discriminatory component the fact that the Texas system of selecting grand jurors was highly subjective, noting it was "susceptible of abuse as applied."179 In his concurrence, Justice Marshall commented

171. Id. at 514 (quoting Arlington Heights, 429 U.S. at 266).
172. Id. at 512-513 (citing Alexander v. Louisiana, 405 U.S. 625, 630 (1971) (holding that a racial designation on a questionnaire and information card was a discriminatory component because it presented an opportunity to discriminate; the Court emphasized that it did not rest its decision in the case on statistical improbability alone and that "factual inquiry is necessary in each case that takes into account all possible explanatory factors.")
173. Swain, 380 U.S. at 205.
174. Id. at 224-25.
175. Id. at 225-26.
176. Id. at 206-07.
177. Id. at 207 n.3.
178. Id. at 227.
179. Castaneda, 430 U.S. at 497.
"[i]n every other case of which [he was] aware where the evidence showed both statistical disparity and discretionary selection procedures, [the] Court [had] found that a prima facie case of discrimination was established, and ... required the State to explain how ostensibly neutral selection procedures had produced such nonneutral results."\(^{180}\)

In his dissent, Justice Powell did not disagree with this analysis as it applied to selections to petit juries, noting, however, that "[c]onsidered together, Davis, Arlington Heights, and Alexander make clear that statistical evidence showing underrepresentation ... should be considered in light of 'such [other] circumstantial and direct evidence of intent as may be available.'"\(^{181}\) In explaining the operation of this principle, he distinguished the facts of Castaneda from those in Turner v. Foche.\(^{182}\) In Turner, statistical evidence had established a substantial underrepresentation of blacks on grand jury lists.\(^{183}\) Unlike Castaneda, however, a white circuit judge had appointed white jury commissioners, who in turn had selected a predominately white grand jury. The grand jury had then selected an all-white board of education. "At every level of this system white citizens were in total control."\(^{184}\) Justice Powell did not directly identify these facts as having disclosed a discriminatory component in the system, preferring to label them as "other circumstantial and direct evidence of intent."\(^{185}\) Nevertheless, he recognized that the presence of discretion in circumstances where it was being exercised by a majority, together with the fact of disproportionate impact upon an oppressed minority, would raise a prima facie case of discrimination.\(^{186}\)

Justice Powell and Chief Justice Burger joined in each other's dissenting opinions in Castaneda, but each viewed the right of a state to disqualify jurors in a different way. The Chief Justice plainly viewed the state's right to disqualify jurors as paramount: "It will not do to produce patently overinclusive figures and thereby seek to shift the burden to the State."\(^{187}\) In contrast,

\(^{180}\) Id. at 502 (Marshall, J., concurring).
\(^{181}\) Id. at 513-14 (Powell, J., dissenting)(quoting Arlington Heights, 429 U.S. at 266).
\(^{183}\) Id. at 359.
\(^{184}\) Castaneda, 430 U.S. at 511 n.3.
\(^{185}\) Id. at 514.
\(^{186}\) Id. at 511-12 n.3.
\(^{187}\) Id. at 506 n.1 (Burger, C.J., dissenting).
Justice Powell viewed the facts surrounding the exercise of the state's right to disqualify as controlling: "In my view, the circumstances of this unique case fully support the District Court's finding that the statistical disparity ... is more likely to have stemmed from neutral causes than from any intent to discriminate against Mexican-Americans."\textsuperscript{188}

Justice Powell's view would later prevail in the \textit{Batson} decision.

\section*{VI. THE \textit{BATSON} HOLDING IN CONTEXT}

The \textit{Batson} holdings simply provide that to "establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial,"\textsuperscript{189} the defendant need only prove three elements.

First, he must establish "that he is a member of a cognizable racial group ... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."\textsuperscript{190} Thus, the very challenge of a juror of the same race as defendant from defendant's jury tends to establish a disproportionate impact provided the defendant is a member of a cognizable racial group,\textsuperscript{191} "because there are so many more whites on the jury venire than blacks."\textsuperscript{192} There are many more whites on jury venires not only because blacks constitute a minority population group, but also because blacks have been historically underrepresented on jury venires.\textsuperscript{193} The same is true for other cognizable racial groups.\textsuperscript{194}

Secondly, "the defendant is entitled to rely on the fact that ... peremptory challenges constitute a jury selection practice that permits 'those [to] discriminate ... [who] are of a mind to discriminate.'"\textsuperscript{195} Thus, as he had in \textit{Castaneda}, Justice Powell also

\textsuperscript{188.} \textit{Id.} at 508 (Powell, J., dissenting).
\textsuperscript{189.} \textit{Batson}, 106 S. Ct. at 1722-1723.
\textsuperscript{190.} \textit{Id.} at 1723.
\textsuperscript{191.} A cognizable racial group has been defined by the Court as one recognized as having suffered from widespread community prejudices and thus entitled to heightened judicial scrutiny with respect to state actions adversely affecting the group. Hernandez v. Texas, 347 U.S. 475 (1954).
\textsuperscript{192.} Johnson, supra note 21, at 1668 n.309.
\textsuperscript{193.} \textit{See, e.g.}, \textit{Swain}, 380 U.S. at 232.
\textsuperscript{194.} \textit{Castaneda}, 430 U.S. at 495.
\textsuperscript{195.} \textit{Batson}, 106 S. Ct. at 1723 (citing \textit{Avery v. Georgia}, 345 U.S. at 562).
recognized in *Batson* that the fact that a disadvantaged group was underrepresented, combined with the identification of a discretionary component enabling "those to discriminate who are of a mind to discriminate," provided sufficient basis to establish discriminatory purpose. The peremptory challenge procedure is not only discretionary, but admittedly *capricious*.

Thirdly, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.... In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances". This final, intuitive-review step, derived from the *Davis* and *Arlington Heights* decisions, was the step that Justice Powell found to be lacking in the majority's opinion in *Castaneda*. This final step reinforces the latitude of the *Avery* rule. It stresses that the rule should not be applied at all unless a bona fide opportunity for "those to discriminate who are of a mind to discriminate" is, in fact, disclosed in the light of all relevant circumstances.

Once the prima facie case has been established, "the burden shifts to the State to come forward with a neutral explanation for challenging black [or other cognizable racial group] jurors." The racially neutral explanation must be "related to the particular case to be tried." The trial judge will determine whether the rebuttal is sufficient to overcome the presumption of discrimination by relating the rebuttal to the facts of the case.

In his dissent in *Batson*, Chief Justice Burger argued that "under conventional equal protection principles some uses of peremptories would be reviewed under 'strict scrutiny and ... sustained only if ... suitably tailored to serve a compelling state interest.'" Accordingly, he argued that by requiring the prosecutor to provide only a "clear and reasonably specific explanation of his legitimate reasons for exercising the challenges," the ma-

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198. *Id.* at 1723.
201. *Id.* at 1723-24.
202. *Id.* at 1737-38 (Burger, C.J., dissenting).
majority had applied "a curious hybrid" of equal protection analysis in its holdings.203

The answer is that the rebuttal facts provided by the prosecutor do not seek to justify discrimination, but rather to deny that discriminatory action was taken. A fact in rebuttal does not have to constitute a compelling state interest. For example, the challenge of four black jurors from a venire in a case where the defendant is also black may raise a presumption of discrimination, but the prosecutor's rebuttal that the four played golf every Saturday with the defendant would have the effect of denying rather than attempting to justify racial discrimination.

VII. HOW IMPORTANT IS AN UNMODIFIED PEREMPTORY CHALLENGE PROCEDURE?

The contention of the Batson dissenters that the peremptory challenge procedure cannot or should not be modified, seems clearly unsupportable.

The operation of the challenge, over time, has varied among the states and between state and federal courts. For example, the Kentucky Rules of Criminal Procedure at the time of the Batson trial, authorized six prosecutorial peremptory challenges and nine defense challenges (since the offense was a felony and an alternate juror had been called).204 In contrast, the 1892 Federal Rules of Criminal Procedure authorized the defendant ten challenges in noncapital felony cases and the government only three.205 At the time of the Swain trial, the Federal Rules allowed the defendant ten and the government six.206 If the offense charged was punishable by death, the rules allowed each side twenty peremptory challenges.207 Moreover, at the time of the Swain trial, Alabama had entirely substituted a system of strikes for the common law method of peremptory challenges.208 "There [was] no statute of the United States which prescribe[d] the method of procedure in empanelling jurors in criminal cases" at the time of the Lewis v. United States decision in 1892, a decision

203. Id. at 1738.
204. Id. at 1715 n.2.
206. Id. at 215 n.15.
207. Id.
208. Id. at 211.
reviewing a conviction in a federal court. It was customary at the time for United States courts to "conform to the methods prescribed by the statutes of the States." In the Hayes v. Missouri decision, the Court upheld a state statute that provided the prosecutor fifteen peremptory challenges in cases tried in large cities but only eight when the trial was in small communities.

In Swain, the majority asserted that the right of peremptory challenge that is essentially "arbitrary and capricious ... must be exercised with full freedom, or it fails of its full purpose," and cited Lewis for this proposition. In this cited passage, however, the Lewis Court had been commenting on a procedure that had denied the defendant the opportunity to be "brought face to face with the jury [before] the challenges had been made and the selected jurors ... brought into the box to be sworn." This procedure had caused the challenges to fail of their full purpose in the view of the Lewis Court because it had afforded the defendant "no opportunity for comparison and choice between jurors, and little opportunity for observance of each juror." This seems to be slender precedent for the proposition that a prosecutor ought not be held to account for apparently discriminatory challenges of black jurors. Conversely, it seems clear that if a defendant is to be allowed peremptory challenges premised solely on his "intuitive judgment," he ought to at least see a juror before he challenges him. Thus, the Lewis Court never held that the peremptory challenge procedure would fail in its essential purpose if modified in any way. It merely held that if the state statute provides for peremptory challenges of jurors on the basis of a defendant's intuitive judgment of them, the state must insure that the defendant has an opportunity to observe the jurors to form such a judgment before he is required to exercise his challenges.

209. 146 U.S. 370, 376-77 (1892).
210. Id. at 377.
211. Hayes, 120 U.S. 72.
212. Swain, 380 U.S. at 219 (citing Lewis, 146 U.S. at 378); see also Batson, 106 S. Ct. at 1744 (Rehnquist, J., dissenting).
213. Lewis, 146 U.S. 375-76.
214. Id. at 378.
The correct rule was clearly enunciated by the Court in Stilson v. United States. In Stilson, the Court held that "[t]he privilege must be taken with the limitations placed upon the manner of its exercise" by the legislative authority.

In this context, the Swain Court's interpretation of Lewis for the proposition that "impairment of the right [of peremptory challenge] is reversible error without a showing of prejudice," an interpretation repeated by the Batson dissenters, is clearly misleading. The State of Arkansas was reversed in Lewis only because it had failed to follow the logic of its own statute. In the same sense, the dissenters' reference to Hayes v. Missouri for the proposition that "[b]etween [the defendant] and the state the scales are to be evenly held" is misleading. In holding that the state was free to provide its prosecutors more peremptory challenges in cities than it provided for small communities, the Court in no way suggested that the state's right of peremptory challenge was inviolable. On the contrary, it clearly indicated that the right was one that could be freely adjusted by statute.

Moreover, the Hayes case involved only administrative discrimination, not racial prejudice. The Court specifically observed that "[t]he accused cannot complain if he is still tried by an impartial jury. He can demand nothing more ... in this case it is not even suggested that the jury by which the accused was tried was not [an]...impartial one." The Batson case, in contrast, dealt with a specific complaint that the jury was not racially impartial because it was discriminatorily selected. Additionally, there is no indication in Hayes that the petitioner was a member of any racial minority meriting heightened scrutiny.

As a consequence, the rule that applied in Hayes was that the state statute could not be successfully attacked as discriminatory as long as there was some rational relation between the means

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216. 250 U.S. 583 (1919).
217. Id. at 587.
220. Lewis, 146 U.S. at 377.
222. Hayes, 120 U.S. at 70.
223. Id. at 71.
selected by the legislature and a legitimate legislative objective.\textsuperscript{225} The merely rational explanation provided by the state in \textit{Hayes} was that the additional peremptory challenges available to the prosecutors in cities made it easier for them to select competent and impartial juries in an environment to which more criminals were attracted and where businessmen had an "unfortunate disposition" to escape jury duty.\textsuperscript{226} In sum, the holdings of \textit{Hayes} do not relate to a case addressing racial discrimination in jury selection. As a corollary, there is no requirement that "the scales...be evenly held" between the state and the subjects of discrimination. It seems obvious that if there were such a requirement, prosecutors and defendants would not have a different number of peremptory challenges in the first place.\textsuperscript{227}

That is not to say, however, that there can be no rational basis upon which the state can seek through its statutes to select juries free of bias against the state's prosecution of criminal defendants. \textit{Hayes} established that the state can do so.\textsuperscript{228} \textit{Strauder}, however, established that this could not be accomplished by means of racially discriminatory jury selection criteria.\textsuperscript{229} For these reasons, the \textit{Batson} Court limited its holdings to apply only to the state's peremptory challenges of cognizable racial group jurors in cases involving defendants of the same race\textsuperscript{230} and rejected Justice Marshall's view that the procedure should be abolished altogether.\textsuperscript{231}

In light of the foregoing, Chief Justice Burger's assertion in his dissent in \textit{Batson} that the state's right of peremptory challenge might be compelling enough to justify its discriminatory application\textsuperscript{232} seems clearly unsupportable. First, it has already been shown that the right has been repeatedly modified and has, even today, substantially different weight in the various state and federal jurisdictions. Secondly, the Court has only once in

\begin{itemize}
  \item \textsuperscript{225} See, e.g., Kotch v. Board of Riverport Pilot Comm'rs, 330 U.S. 552 (1947) (upholding a closed system of apprenticeship for Louisiana river pilots on the basis that the system promoted morale and family unity; no racial classifications were involved).
  \item \textsuperscript{226} \textit{Hayes}, 120 U.S. at 71.
  \item \textsuperscript{227} See, e.g., \textit{Batson}, 106 S. Ct. at 1715 n.2.
  \item \textsuperscript{228} \textit{Hayes}, 120 U.S. at 70.
  \item \textsuperscript{229} \textit{Strauder}, 100 U.S. at 308.
  \item \textsuperscript{230} \textit{Batson}, 106 S. Ct. at 1723.
  \item \textsuperscript{231} \textit{Id.} at 1726 (Marshall, J., concurring).
  \item \textsuperscript{232} \textit{Id.} at 1738 (Burger, J., dissenting).
\end{itemize}
its history found any state interest compelling enough to justify a racial classification and that was in circumstances of perceived national emergency following the bombing of Pearl Harbor by the Japanese during World War II. Even that case has been the subject of great criticism.

In one of its more recent decisions on the subject, the Court held that even the peer pressures and social stigmatization visited upon the white child of a white woman remarried to a black were insufficient justification for a state agency to transfer the child's custody to the white father. "Whatever problems racially-mixed households may pose for children in 1984," said the Court, "they can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917."

VIII. SUMMARY AND PROSPECTS

It was thirty-one years ago that the Supreme Court first held that black children were constitutionally entitled to attend the same public schools as white children. Twenty-three years ago, the Court affirmed the right of blacks to sit in courtroom seats reserved by state law for whites. It has been nineteen years since it held that state law could not constitutionally make criminal the marriage of a white to a black. Only four years ago, in April 1984, Chief Justice Burger wrote the opinion of the Court deciding that the equal-protection rights of a white mother had been violated when a Florida trial court transferred custody of her child to her former white husband after she remarried a black. All of this occurred eighty-seven years after the fourteenth amendment denied the states the right to make or enforce any law which would deny to blacks the equal protection of the law. Moreover, it all occurred seventy-five years after the Court

236. Id. at 1882.
240. Palmore, 104 S. Ct. at 1882.
ruled, in the *Strauder* decision, that the state denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposely excluded. 241

With this background, it took little judicial acumen to suspect that prosecutors in 1986 might be using peremptory challenges to exclude or limit black participation on petit juries for unconstitutional reasons. Psychological studies indicate that prosecutors might even be doing so without consciously attributing discriminatory motives to their actions. 242 If any doubt existed at the time of the *Batson* decision that blacks were not enjoying the same protection as were whites from the procedural right of peremptory challenge, ample evidence existed to prove it.

Studies were available to the *Batson* Court 243 that had established causation between prosecutors' exercise of peremptory challenges and disproportionate conviction rates for blacks. One such study showed that when the city of Baltimore, Maryland, changed to a jury selection method in 1969 that raised black representation on petit juries from 30 percent to between 34 to 47 percent, the jury trial conviction rate dropped from almost 84 percent to less than 70 percent. 244 A similar change in Los Angeles County, California, in 1969 caused conviction rates to fall from 67 percent in 1969 to slightly over 47 percent in 1971. 245 When Los Angeles County reinstated the old system, the rate immediately rose again to its original level in 1972. 246

Empirical investigations, as well as observations of judicial proceedings described in the studies, disclosed the overwhelmingly frequent use of peremptory challenges by prosecutors to rid the jury of black jurors whenever the defendant is black. 247 "[A] study of all persons indicted for first degree murder in twenty-one Florida counties between 1972 and 1978 revealed that black defendants were significantly more likely to be found guilty than were white defendants." 248

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241. *Strauder*, 100 U.S. at 305.
242. Johnson, supra note 21, at 1638.
244. Johnson, supra note 21, at 1621.
245. Id.
246. Id. at 1622.
248. Johnson, supra note 21, at 1623.
The holding of the *Batson* Court, therefore, that a black or other cognizable racial group defendant was "entitled to rely on the fact ... that peremptory challenges [by the prosecutor] constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate,'"249 stood on a firm foundation of fact. The rest followed logically. The Court went on to provide that a prima facie case of discrimination would arise when the defendant was a member of a cognizable racial group, when members of his race were peremptorily challenged by a prosecutor, and when all relevant circumstances indicated that the prosecutor had availed himself of the opportunity to discriminate.250 The Court held that the prosecutor may rebut the prima facie case only with racially neutral reasons for his challenges, reasons related to the particular case being tried.251 Thus, he was not allowed to justify his challenges on the sole basis of any assumption that jurors of defendant's race would be partial in his behalf.252

The effects of the *Batson* decision will inevitably be to seat more cognizable-race jurors on juries deciding the fate of defendants of the same race. The studies indicate that this may initially result in a lower conviction rate of such defendants253 that, in turn, may excite majoritarian pressure to correct the situation, as occurred in Los Angeles County in 1972.254 This pressure may be intensified by the fact that, whereas the *Swain* decision had at least allowed the states the latitude to control jury composition in selected high-visibility cases, the *Batson* decision does not. Blocked by the *Batson* decision, therefore, the majority may turn to other devices to minimize cognizable racial group influence in verdicts. One way to do this would be to revise the state statutes requiring a unanimous verdict from a jury of twelve in criminal cases, a tactic enabled by the Court's decision in *Apodaca v. Oregon*.255 Such revision would attempt to counter the fact that

250. *Id.*
251. *Id.*
252. *Id.*
253. *Johnson*, supra note 21, at 1621.
254. *Id.* at 1621-22.
255. 406 U.S. 404 (1972) (upholding an Oregon statute providing for conviction in a criminal case by a vote of ten persons out of a jury of twelve); see also *Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that the constitutionally minimum jury size for nonpetty criminal offenses was six).
the presence of a single black on a jury requiring a unanimous verdict would, in effect, provide an insurmountable veto. The black juror could, theoretically at least, prevent conviction of any black defendant in cases dealing with any majoritarian standard of criminal justice disproportionately affecting or otherwise objectionable to blacks. If such a statutory revision were challenged constitutionally, the Court would be faced with a more difficult issue than it was in the *Batson* decision, since the real issue before the Court would be whether the protection of disadvantaged minorities required such veto power. Complicating such a determination is jury dynamics research indicating that a single dissenting juror virtually never succeeds in hanging a jury, let alone reversing its predisposition,\(^\text{256}\) and that at least three minority jurors would be required to overcome the group pressure involved.\(^\text{257}\)

If such research is valid, the majority’s task in controlling jury outcomes is made simpler—it need only preclude this minimum representation. In addition, such research, if valid, would necessarily affect a trial judge’s determination as to whether a prima facie case of discrimination had been established in any particular instance by a prosecutor’s peremptory challenges of minority jurors. Would a prima facie case be raised, for example, by the prosecutor’s peremptory challenge of the third minority juror remaining?

The Court could head off such tactics and unanswered questions, however, by reaffirming the statistics-based logic employed in *Castaneda*.\(^\text{258}\) The easiest way to do this would be to establish a presumption that any underrepresentation of a cognizable racial group on a jury venire exceeding standard probability deviations establishes a prima facie case of discrimination. Stated in another way, the presumption would be that the disqualification rate for minorities should equal that of whites within standard deviations, absent discrimination. Such a presumption could be justified, analogously to the *Batson* procedure, on the basis that the disqualification process itself affords an opportunity for “those to

\(^{256}\) Johnson, *supra* note 21, at 1698 (citing H. Kalven & H. Zeisel, *The American Jury* 463 (1966)).

\(^{257}\) Id. (citing M. Saks, *Jury Verdicts* 16-18 (1977)).

\(^{258}\) *Castaneda*, 430 U.S. at 496-97 n.17.
discriminate who are of a mind to discriminate." The result of such a presumption should be jury venires approximately balanced to reflect cognizable group representation in the population, a result reflecting the spirit, if not the limitations, of *Taylor*. Balanced venires should, in turn, assist in forcing the selection of greater numbers of cognizable racial group members onto juries using the *Batson* rules. This effect could be achieved without adjustment to the *Batson* holdings. It would require only an interpretation of the *Avery* element to find "an opportunity to discriminate" whenever peremptory challenges threatened to nullify the minority voice in the jury verdict. For example, an opportunity to discriminate would be found to exist when challenges reduced the minority voice to fewer than two for a jury empowered to reach a verdict by a majority vote of ten out of twelve (or three out of ten if the jury dynamics studies are accepted as valid). This would not apply in a small rural county, in Minnesota for example, where the total black population eligible for a jury venire is so small that there could not be any realistic expectation that each jury would include black representation. In this situation, the "total relevant circumstances" rules of *Davis* would control, dictating the conclusion that discrimination was not responsible for the jury composition. In the presence of facts disclosing strong prejudices against the small minority population in such a community, a motion for change of venue should solve the problem in most cases. This might require yet another court decision, however. Changes of venue have been held not to be required by due process unless a defendant can prove "a pattern of deep and bitter prejudice ... throughout the community."*Irwin v. Dodd*, 366 U.S. 717, 728 (1961)(the trial court's refusal to grant a change of venue in circumstances where a pattern of deep and bitter prejudice was present throughout the community in which the defendant was tried denies him due process; in this case, the Court gave weight to local newspaper reports on the jury-selection process).

In addition, a change of venue to a neighboring county, even if granted, might not be useful unless the neighboring county had a large enough minority population to change the racial composition of the jury. There would be little reason to believe that a change of venue from one rural Georgia county to a

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261. *Irwin v. Dodd*, 366 U.S. 717, 728 (1961)(the trial court's refusal to grant a change of venue in circumstances where a pattern of deep and bitter prejudice was present throughout the community in which the defendant was tried denies him due process; in this case, the Court gave weight to local newspaper reports on the jury-selection process).
neighboring county would otherwise relieve the defendant’s plight.

The liberalization of change of venue law to permit removal of a case to a county that has a minority population large enough to permit adequate representation on the jury, however, may be administratively impractical. As it stands, therefore, Batson’s effectiveness is heavily influenced by the environment in which the minority defendant is tried. If he is tried in an area of minority population concentration, he may be assisted by the decision. If he is tried elsewhere, the decision may have little or no effect upon his plight. It seems unfortunate that a series of decisions designed to aid minorities should have the perverse effect of forcing them into enclaves to protect themselves.262

However, as has been the result of other forced desegregation plans, the greater participation of blacks and other cognizable racial groups in the jury process will not only reform it but will socialize the minority participants. The preservation of the jury process and jury service is fundamental to the democratic institution “not merely for the sake of justice and symbolism, but for the sake of having a vehicle to socialize more principled legal reasoning and law-abidingness in [all participants].”263

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262. E.g., approximately 71% of the black population of the United States is concentrated in urban areas. U.S. Bureau of the Census of Population 1-12, table 74.
CRIMINAL PROCEDURE: SEARCH AND SEIZURE – LESSENED PROTECTION OF THE CURTILAGE – CALIFORNIA V. CIRALO

INTRODUCTION

In search and seizure cases, the United States Supreme Court has consistently applied the two-prong analysis of Katz v. United States1 to determine whether a person has a constitutionally protected expectation of privacy under the fourth amendment.2 The Katz inquiry requires “that a person have exhibited an actual (subjective) expectation of privacy, and ... that the expectation be one which society is prepared to recognize as ‘reasonable.’”3 In pursuing this inquiry, the courts have distinguished between two areas of private property: “open fields,” where expectations of privacy are not reasonable, and “the curtilage,” where a person may reasonably expect privacy.4

On May 19, 1986, the United States Supreme Court decided California v. Ciraolo.5 In its 5-4 decision, the Court blurred the line between its established rules regarding open fields and the curtilage. According to the majority, although a backyard falls within the traditionally protected curtilage and cannot be searched

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2. U.S. Const. amend. IV. The fourth amendment reads:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
4. Oliver v. United States, 466 U.S. 170 (1984); United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978) (The Court stated that although it no longer used an expectation test since Katz, “the distinction between open fields and curtilage is still helpful in determining the existence or not of reasonable privacy expectations.”), cert. denied, 440 U.S. 972 (1979); United States v. Van Dyke, 643 F.2d 992 (4th Cir. 1981).
5. 106 S. Ct. 1809 (1986). On the same day the Supreme Court decided Ciraolo, it also decided the case of Dow Chemical Co. v. United States, 106 S. Ct. 1819 (1986). In that case, the Court held that the taking of aerial photographs of an industrial plant complex from navigable airspace was not a search made in violation of the fourth amendment. Id. at 1827.
at ground level without a warrant, an individual has no expectation of privacy from aerial observations of the same property.\(^6\) This note examines the traditional distinctions between the two areas, the reasons for those distinctions, the \textit{Ciraolo} opinion, and its future impact.

**II. BACKGROUND**

The fourth amendment protects persons from unreasonable searches and seizures by requiring that a warrant first be issued and that the warrant be based upon probable cause.\(^7\) Probable cause is to be determined by a neutral and detached magistrate,\(^8\) rather than by the officers who are "engaged in the often competitive enterprise of ferreting out crime."\(^9\) Searches made without a warrant have been held to be illegal,\(^10\) subject to certain specifically established exceptions.\(^11\) The fourth amendment has not applied when items or activities are in plain view,\(^12\) when searches are made under exigent circumstances,\(^13\) when the property is abandoned,\(^14\) or where the search is conducted in open fields.\(^15\)

In \textit{Hester v. United States},\(^16\) the Supreme Court held that the protection afforded to persons, houses, papers, and effects by the

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\(^7\) U.S. CONSTIT. amend. IV.
\(^8\) Johnson v. United States, 333 U.S. 10, 14 (1948); United States v. United States District Court, 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967) (searches made without prior approval of judge or magistrate are \textit{per se} unreasonable under fourth amendment, subject to specific exceptions).
\(^9\) Johnson, 333 U.S. at 14.
\(^16\) \textit{Hester}, 265 U.S. at 57.
fourth amendment did not extend to open fields. In *Hester*, revenue officers concealed themselves fifty to one hundred yards from the defendant's home. There, they observed the defendant give a man a quart bottle of what they suspected was moonshine. After his arrest, the defendant moved to suppress the evidence on the ground that the search had been made in violation of the fourth amendment. The Supreme Court held that the evidence was admissible even though the observations were made on the defendant's land and the search was made without a warrant. Establishing the doctrine of open fields, the Court said that the distinction between the house and open fields was as old as the common law, but failed to supply a definition of what constituted "open fields."

Three years after *Hester*, the Court in *Olmstead v. United States* broadly defined open fields as any area outside the curtilage. In *Olmstead*, the defendant claimed a fourth amendment violation as a result of warrantless wiretaps by federal officers. The Court found no violation since no actual physical invasion of the defendant's house or curtilage had occurred. In the cases following *Olmstead*, the curtilage test was used to determine fourth amendment questions even though no formal definition was provided by *Olmstead*.

In *Katz v. United States*, the Court overruled *Olmstead*, abandoning the requirement that a physical invasion of the curtilage must occur for fourth amendment violations. In *Katz*, FBI agents attached an electronic listening and recording device to the outside of a telephone booth where the defendant regularly made

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17. Id. at 59.
18. Id. at 58.
19. Id.
20. Id. at 57-58.
21. Id. at 58.
22. Id. at 59.
25. Id. at 455.
26. Id. at 466.
29. Id. at 351-33.
calls. Based upon conversations overheard by the officers, the defendant was convicted of transmitting wagering information across state lines, a federal crime. The court of appeals affirmed the conviction, finding, in accordance with Olmstead, that no fourth amendment violation had occurred since the telephone booth had not been physically entered by the officers. The Supreme Court reversed, holding that the fourth amendment "protects people, not places," and adopted the "expectation of privacy" test. In applying this test, courts have used the two-part analysis set forth in Justice Harlan's concurring opinion. That analysis requires first, that the individual have a subjective expectation of privacy, and second, that the expectation be one society is prepared to recognize as "reasonable."

The Katz majority cautioned that situations may exist where an individual's activities are conducted in public, but because he seeks to preserve them as private, they remain constitutionally protected. By this language and the fact that the physical invasion requirement had been abandoned, the Katz court implied that an individual may have a reasonable expectation of privacy in areas accessible to the public, such as open fields.

Thereafter, in United States v. Allen, the Ninth Circuit Court of Appeals applied the open fields doctrine, holding that a warrantless aerial surveillance of the defendant's farm was lawful. The court agreed that "a person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy regarding the activities occurring there," but held that the defendant had no reasonable expectancy of privacy from aerial surveillance of his barn, vehicles, and tracks leading to the barn even though "No Trespassing" signs had

30. Id. at 348.
31. Id.
32. Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966).
34. Id. at 351-53.
37. Id. at 351-52.
been posted. Conversely, some state courts held that searches of open fields were unreasonable.

The uncertainty surrounding the status of the open fields doctrine was resolved by the Supreme Court in *Oliver v. United States.* Applying the second prong of Justice Harlan's test, the Court determined that privacy in an open field was not recognized by society as being reasonable. The Court examined several factors to determine the degree to which a search interferes with an individual's privacy: the intention of the framers of the fourth amendment, the uses to which the individual has put a location, and the understanding by society that certain areas deserve special protection from governmental invasion. These factors, the Court decided, warranted differential treatment of the areas known as the curtilage and open fields. However, the Court failed to make a clear distinction between the two areas, except by saying that the curtilage was "the land immediately surrounding and associated with the home" and was to be accorded the same protection as the home.

The *Oliver* decision has been criticized for returning to a protection of "places" and not "people" standard by adopting a per se rule that no reasonable expectation of privacy exists in an open field. This rule is contrary to the *Katz* analysis, which considered the steps taken by an individual to preserve his privacy. Furthermore, application of such a per se rule would appear impossible since the terms curtilage and open fields were not defined.

40. *Allen,* 675 F.2d at 1381.
42. 466 U.S. 170.
43. *Id.* at 179.
44. *Id.*
48. *E.g.,* *Oliver,* 466 U.S. at 180.
49. *Id.*
51. *Id.* at 263.
52. *Id.*
III. CALIFORNIA V. CIRAOLO

A. Facts

On September 2, 1982, the Santa Clara Police received an anonymous telephone tip that marijuana was growing in the defendant's backyard. The backyard was enclosed by a six-foot outer fence and a ten-foot inner fence and could not be observed at ground level. The two officers assigned to investigate the tip secured a private airplane and flew over the house and yard at an altitude of 1,000 feet. Both officers were trained to identify marijuana and made an identification of marijuana plants growing in the yard. Six days later, the officers obtained a search warrant for the premises based upon an affidavit that described the tip and the officers' observations; a photograph of the premises taken from the air was also attached to the affidavit. The police executed the warrant the next day and confiscated seventy-three marijuana plants.

Upon denial of the defendant's motion to suppress the evidence obtained in the search, the defendant entered a plea of guilty to the charge of cultivation of marijuana. The California Court of Appeal reversed on the ground that the aerial observation, without a warrant, violated the fourth amendment. The California Supreme Court denied the state's petition for review. The United States Supreme Court then granted the state's petition

53. Ciraolo, 106 S. Ct. 1810.
54. Id.
55. Id.
56. Id. The officers identified plants growing in a 15 x 25 foot plot, 8 to 10 feet in height.
57. Id. at 1811.
58. Id.
59. Id.
60. Id. The California Court of Appeal held that the respondent's marijuana plants were located within the "curtilage" of his home. The court concluded that "the height and existence of the two fences constituted 'objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard.'" 161 Cal. App. 3d 1081, 1089, 208 Cal. Rptr. 93, 97 (1984).

The California Court of Appeal found it significant that the flyover was not part of a routine patrol conducted for any other "legitimate law enforcement or public safety objective," but was made solely to observe the respondent's enclosure. It held that the "focused observation" was a "direct and unauthorized intrusion into the sanctity of the home." Id. at 1089-90.
61. Ciraolo, 106 S. Ct. 1811.
for certiorari$^{62}$ to determine whether warrantless aerial observation of the backyard within the curtilage of a home violated the fourth amendment.$^{63}$ In reversing the state court's decision, the Supreme Court applied the *Katz* analysis and held that the respondent's expectation of privacy from aerial observation of his backyard was an unreasonable expectation which society would not be willing to recognize.$^{64}$

**B. The Court's Reasoning**

In *Ciraolo*, the Supreme Court applied the *Katz* two-part inquiry to determine whether the defendant had a "constitutionally protected reasonable expectation of privacy."$^{65}$ As to the first consideration, whether the individual has exhibited a subjective expectation of privacy in the area, the Court found that the defendant had clearly manifested his subjective desire to maintain his privacy by erecting fences around the yard.$^{66}$ However, the Court questioned whether the defendant's precautions were sufficient to prevent all observations of his backyard, since the plants could be observed, despite the ten-foot fence, by a citizen or policeman riding on the top of a truck or bus.$^{67}$

The Court said the second inquiry under the *Katz* analysis, reasonableness, is to be determined by whether the government's intrusion violates the personal and societal values that the fourth amendment protects.$^{68}$ The Court accepted the assertion that the defendant's backyard and his crop were a part of the curtilage and acknowledged the protection the curtilage has historically received by virtue of its physical and psychological link to the home.$^{69}$ But, in a marked departure from its historical treatment, the Court said the fact the area was within the curtilage did not mean it could not be observed by law enforcement officials.$^{70}$ The Court found that because the backyard was observable from a "public vantage point" or "public thoroughfare" or "public navig-
able airspace," the activities conducted therein were exposed to the public.\textsuperscript{71} Hence, such knowingly public exposure could not be subject to fourth amendment protection.\textsuperscript{72}

In addition to being in public view, the Court noted that the observations were conducted without physical intrusion onto the property.\textsuperscript{73} The Court felt it was irrelevant that the aerial search had been directed toward identifying marijuana plants, since the observation was necessary to provide the basis for a warrant.\textsuperscript{74} The majority found that the same observations made by the officers could easily have been made by anyone flying in the airspace who happened to glance down at the yard.\textsuperscript{75}

The dissent viewed the majority's holding as having been based upon the fact that airspace is generally open to the public for travel in planes, and therefore, the landowner bears the risk that his activities may be observed from the air.\textsuperscript{76} However, the dissent said the majority failed to explain why that fact was of such significance as to deprive citizens of their privacy within the curtilage.\textsuperscript{77} The dissent felt that the actual risk to privacy from commercial or pleasure aircraft was almost nonexistent since the view of passengers on these flights would be short and any observations made would be impossible to connect to a particular landowner.\textsuperscript{78} The dissent compared the risks of observation by commercial or pleasure flights to a flight by officers conducted solely for the purpose of locating criminal activity and concluded that society would not force an individual to accept the latter risk.\textsuperscript{79} The dissent would have found a fourth amendment violation because the officers discovered evidence they would not have been able to discover at ground level without a warrant.\textsuperscript{80}

Further, the Court's reaffirmation of the curtilage doctrine was viewed by the dissent as being inconsistent with its rejection of

\textsuperscript{71} Id.
\textsuperscript{72} Id. (citing \textit{Katz}, 389 U.S. at 351).
\textsuperscript{73} \textit{Ciraolo}, 106 S. Ct. at 1813.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 1814, 1818.
\textsuperscript{77} Id. at 1814.
\textsuperscript{78} Id. at 1818.
\textsuperscript{79} Id. at 1818-19.
\textsuperscript{80} Id. at 1818.
defendant's fourth amendment claim.\textsuperscript{81} Because the majority relied upon the manner of surveillance (absence of physical invasion), the dissent found the decision at odds with the \textit{Katz} standard of reasonableness.\textsuperscript{82} The dissent said that the \textit{Katz} standard required searches to be judged by whether society would recognize an asserted privacy interest as reasonable and not by whether the police had committed a physical trespass.\textsuperscript{83} They felt the defendant's expectation of privacy was reasonable since it is common practice for persons to build fences around their backyards, but not to build roofs over them.\textsuperscript{84} The dissent emphasized that the essence of the fourth amendment violation was "not the breaking of [a person's] doors, and the rummaging of his drawers.... [but] the invasion of his indefeasible right of personal security, personal liberty and private property."\textsuperscript{85} The dissent would not have permitted the invasion of privacy interests in the home and connected curtilage simply because technology has now made it possible to observe activities in those areas without physical invasion.\textsuperscript{86}

IV. Analysis

In \textit{Ciraolo}, the United States Supreme Court eroded its established rules for determining when a fourth amendment violation of an individual's privacy interest has occurred. Traditionally, the Court granted protection from warrantless searches to the home and curtilage areas, but allowed warrantless searches of open fields. The distinction between the curtilage and open fields centered upon their relative proximity to the home, where privacy interests are most heightened. With its decision in \textit{Katz}, the Court established a test that did not focus on the area or place where the activity occurred.\textsuperscript{87} Rather, the focus was on an individual's expectations and whether society recognized those expectations as reasonable,\textsuperscript{88} with the location of the area only a factor to be considered.

\textsuperscript{81} \textit{Id.} at 1816.
\textsuperscript{82} \textit{Id.} at 1817.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} at 1818.
\textsuperscript{85} \textit{Id.} at 1819 (quoting \textit{Boyd}, 116 U.S. 616, 630 (1886)).
\textsuperscript{86} \textit{Ciraolo}, 106 S. Ct. at 1819.
\textsuperscript{87} \textit{Katz}, 389 U.S. at 347.
\textsuperscript{88} \textit{Id.}
In Ciraolo, protection of the curtilage was limited to prohibiting warrantless searches from the ground to the height of fences surrounding the area. The ramifications of Ciraolo are alarming. The determination of probable cause, which is a prerequisite to obtaining a search warrant, may now be circumvented by law enforcement officials when they choose to make observations from the “public” airspace. The majority’s analogy to the view from commercial or pleasure overlights is not persuasive. As the dissent noted, even when flying at low altitudes, passengers on those flights are simply unable to clearly observe and identify specific items or pinpoint the exact backyard in which they saw the items. The only possible rationale for such a holding is that the right to privacy presented by the possibility a private airline passenger will view activities on the ground is equal to the risk of official observation from the air. This rationale is unpersuasive since the two views of the same property are fleeting and anonymous for the airline passenger while concentrated and intensive for the law enforcement officials.

The Supreme Court also ignored the Katz decision when it disregarded the steps Ciraolo took to preserve his backyard as a private area. Ciraolo had protected his backyard from observation in a common manner. He erected a six-foot outer fence reinforced by a ten-foot inner fence and believed the fences would completely shield his activities from public view. Under the Katz analysis, which protects people, not places, and affords a reasonable expectation of privacy, Ciraolo clearly took all of the steps necessary to insure that the premises would not be viewed by uninvited observers. By finding that privacy from aerial observations of the curtilage is not an interest society recognizes as reasonable, the Court essentially decided that the benefits of such privacy are slight when compared to the needs of law enforcement.

After the Ciraolo decision, it is questionable what protection the Court will grant under the fourth amendment to the home and surrounding curtilage. For example, would aerial observations be allowed of the open-air courtyard or atrium of a home,

89. Ciraolo, 106 S. Ct. at 1818.
90. Id.
91. Id.
92. Id.
or maybe even of window-boxes or flower gardens surrounding the home? Although one may have a reasonable expectation of privacy in these areas, the Court's decision in *Ciraolo* has the potential of nullifying that expectation.

V. CONCLUSION

The Supreme Court in *Ciraolo* held that an individual has no reasonable expectation of privacy from aerial observations of the curtilage and, therefore, is not entitled to fourth amendment protection.93 This decision purports to apply the *Katz* test for determining when an expectation of privacy is reasonable. The Supreme Court in *Katz* rejected the approach that the fourth amendment protects people and not places.94

In cases following *Katz*, the Court considered the area in which the search was conducted only as a factor bearing on the privacy interest. With its decision in *Ciraolo*, the Supreme Court limited protection of the curtilage by allowing activities to be observed by devices of modern technology. The traditional distinctions between the curtilage and open fields were based upon valid concerns and sound reasoning. The home and curtilage have been and should continue to be protected areas for private activity since the expectation of privacy in these areas will always be legitimate. In the future, the Court must be careful to refrain from allowing the use of technology to destroy the fourth amendment protections so fundamental to our free society.

Kimberly K. Baston

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93. *Id.* at 1813.
YOUNG V. COMMUNITY NUTRITION INSTITUTE—
THE SCOPE OF JUDICIAL REVIEW OF
ADMINISTRATIVE DETERMINATIONS OF LAW
FOLLOWING CHEVRON V. NRDC

It is emphatically the province and duty of the judicial department
to say what the law is.

—Chief Justice John Marshall

Just as early judicial decisions thrust this full “province and
duty” on the judiciary, modern judicial decisions in federal
administrative law seem to be pulling it away.

Traditionally, when actions were brought before the courts to
review determinations of law made by administrative agencies,
courts were willing to give some deference to the agencies'
interpretations of the statutes they administered but reserved
the decisive interpretive power for themselves. In 1984, the
courts’ traditional discretion to accept or reject an agency inter-
pretation was replaced by a mandatory duty to accept it under
certain circumstances. In Chevron U.S.A. Inc. v. Natural Re-
sources Defense Council, Inc., the United States Supreme Court
announced that “a court may not substitute its own construction
of a statutory provision for a reasonable interpretation made by
the administrator of an agency.”

Chevron arose amid a blur of Supreme Court decisions review-
ing administrative actions. It did not claim to make any changes

3. This paper attempts only to deal with the scope of judicial review of questions of
law in federal administrative cases as it has developed through recent United States
Supreme Court decisions. It does not comment on corresponding state doctrines.
9. Id. at 844.
10. The Supreme Court, 1988 Term—Leading Cases of the 1988 Term, supra note 4, at
255.
in the law of judicial review.\textsuperscript{11} Therefore, it was unclear whether \textit{Chevron} set forth the new mandatory standard of review or was just one of a series of erratic opinions.\textsuperscript{12}

In the two years since \textit{Chevron} was decided, its test has evolved as the standard that must be followed by courts reviewing federal agency statutory interpretations.\textsuperscript{13} In a recent case, \textit{Young v. Community Nutrition Institute},\textsuperscript{14} the Court applied the \textit{Chevron} set forth a new mandatory standard of review or was interpretation of section 346 of the Federal Food, Drug and Cosmetic Act (FFDCA).\textsuperscript{15} Notably, Justice Stevens, who authored the \textit{Chevron} opinion, dissented in \textit{Young}.\textsuperscript{17}

This note will analyze the majority and dissenting opinions in \textit{Young} as they apply the \textit{Chevron} test. The difference in these analyses will illustrate the evolution of the test from that originally anticipated by Justice Stevens to the one currently embraced by the majority of the Court. Further, this note will comment on the political consequences of this new judicial restraint and will suggest a need for heightened congressional awareness of the administrative power that results from such restraint.

\section{I. Legal History}

Throughout the history of administrative law, courts have been required to exercise independent judgment in reviewing determinations of law made by administrative agencies.\textsuperscript{18} Early cases

\begin{footnotes}
\item[11.] \textit{Chevron}, 467 U.S. at 844-845. See The Supreme Court, 1983 Term—Leading Cases of the 1983 Term, supra note 4, at 255.
\item[12.] The Supreme Court, 1983 Term—Leading Cases of the 1983 Term, supra note 4, at 255.
\item[14.] 106 S. Ct. 2360(1986).
\item[15.] 467 U.S. at 842-44.
\item[17.] 106 S. Ct. at 2366-68 (Stevens, J., dissenting).
\item[18.] B. Schwartz, \textit{Administrative Law} 592, 593, 596 (2d ed. 1984).
\end{footnotes}
involving judicial review of legal interpretations made by administrative agencies established the standard of review to be analogous to that used by higher courts when reviewing legal interpretations made by lower courts. This practice of promoting independent judicial determination of questions of law arose from the belief that judges, who are fluent in the language of the law, will interpret it more correctly than administrators. Courts have accepted this responsibility as part of their traditional function.

In the actual interpretation process, courts generally looked first to the words in issue and then searched further into the structure, purpose, and history of the entire statute to determine what meaning Congress intended those words to have. “In the past, courts have emphasized their responsibility to scrutinize the statutory mandate to ensure that Congress’ objectives are not undermined by the political preferences of either the incumbent administration or agency personnel.”

Courts were permitted to take advantage of an administrator’s working knowledge of his or her statute and to defer to that knowledge when appropriate. The degree of deference usually differed depending on the nature of the questioned provision. If Congress was determined to have given the administrator broad discretion in interpreting the provision, courts would give greater deference to the administrator’s views. In granting this deference, the courts did not interfere with Congress’ political choice.

This was the general framework for review until the Chevron decision. Courts employed traditional methods of statutory interpretation, viewing the entire statute and its history and purpose, then granted only limited deference to administrative interpretations, where these interpretations were found to further the congressional intent.

19. Id. at 593.
20. Id.
21. Edwards, supra note 6, at 256.
23. Id.
26. Id.
Chevron did not propose to revolutionize this standard of review. However, the test it set forth did substantially narrow the scope of review. The test had two parts. First, it required reviewing courts to determine only if Congress had spoken to the precise question in issue. If Congress had made its intent clear on this particular point, courts must give full effect to that unambiguous intent; the inquiry goes no further. The second prong of the test was to be invoked when Congress had not spoken to the precise question, or had spoken ambiguously. When this is the case, courts are required to defer to a reasonable administrative interpretation.

This two-pronged test is the current standard of review for an administrative interpretation of a federal statute. The Young opinion illustrates the Court's willingness to embrace this highly deferential standard.

II. THE FACTS AND PROCEEDINGS BELOW

The suit was brought by two public interest groups and a consumer to challenge the FDA's interpretation of section 346 of the FFDCA. This section establishes the requirements for the

29. Chevron, 467 U.S. at 842. In Chevron, the precise question in issue was the meaning of the term "stationary source" as it was used in certain sections of the Clean Air Act. The Environmental Protection Agency had interpreted the term to allow a plantwide definition. This would mean an industrial plant that contained more than one source of pollution emission could be considered as a single "stationary source," with all its pollution-emitting devices encased within the same "bubble." The Natural Resources Defense Council contended that "stationary source" referred to each pollution-emitting device and that Congress did not intend a plantwide definition for the term. The Court upheld the EPA's interpretation. Id. at 839-42. See generally Stukane, EPA's Bubble Concept After Chevron v. NRDC: Who Is to Guard the Guards Themselves?, 17 NAT. RESOURCES LAW. 647 (1985).
30. Chevron, 467 U.S. at 842.
31. Id. at 843.
32. Some of the factors the Court seems to view as indicia of reasonableness are discussed infra in this text.
33. Chevron, 467 U.S. at 844. See B. SCHWARTZ, supra note 18, at ("In other words, the principle of deference to administrative interpretations is fully applicable where Congress did not have any intent on the precise question at issue.")
34. See Young, 106 S. Ct. 2360; Chemical Manufacturers Association, 470 U.S. 116.
35. Young, 106 S. Ct. 2360.
FDA's regulation of poisonous and deleterious substances that are unavoidably added to food. The controversy centered around the following phrase from section 346, which directs the making of regulations: "The Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health."37

The FDA has interpreted the words "to such extent as he finds necessary for the protection of public health" to modify the verb "shall."38 The Agency therefore viewed section 346 as giving it discretion over whether to establish a regulatory standard, which it calls a "tolerance level,"39 to protect the public health or to protect it in some other way.40

36. The full text of the section follows:

Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title; but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title. While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of clause (1) of section 342(a) of this title. In determining the quantity of such added substance to be tolerated in or on different articles of food the Secretary shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article, and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances.


38. Young, 106 S. Ct. at 2364.
39. "Tolerance level" is the term given to the quantity of a § 346 substance that the FDA has determined to be allowable in or on food. 21 U.S.C. § 346(1982); Unavoidable Contaminants in Food for Human Consumption and Food-Packaging Material, 21 C.F.R. § 109.4, 109.6 (1986).
40. Generally, the "other way" the FDA protects the public health is to issue an "action level" for a substance meeting the § 346 definition, rather than establishing a tolerance level. This action level defines the quantity of the substance in or on food, which will cause the food to be considered adulterated. It is the level at which the FDA will take action to keep the adulterated food from the public. An action level is set rather than a tolerance level when changes (including technological changes) are foreseen that may affect the tolerance originally determined. 21 C.F.R. §§ 109.4, 109.6. See Young, 106 S. Ct. at 2365. The dispute in Young arose when the FDA set an action level rather than a tolerance level for aflatoxins in a particular harvest of corn. Id. at 2361. Aflatoxins are
The respondents, collectively referred to as Community Nutrition Institute, viewed the section as imposing a mandatory duty on the FDA to set a tolerance level for each substance meeting the section 346 definition. Respondents saw the phrase "to such extent as he finds necessary for the protection of public health" as modifying the phrase "the quantity therein or thereon," rather than the word "shall." The district court granted the FDA's motion for summary judgment, deferring to the FDA's interpretation of the provision. The court of appeals reversed the decision of the district court. Applying the first prong of the Chevron test, the court of appeals found that Congress had spoken directly and unambiguously in section 346. The court stated that "the presence of the critical word 'shall' plainly suggests a directive to the Secretary to establish a tolerance...."

III. SUPREME COURT'S ANALYSIS

A. Majority

Writing for the Court, Justice O'Connor stated: "Our analysis must begin with Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. The Court interpreted section 346 as imposing a mandatory duty on the FDA to set a tolerance level for substances meeting the section 346 definition. The court concluded that Congress had spoken directly and unambiguously in section 346. The court stated that "the presence of the critical word 'shall' plainly suggests a directive to the Secretary to establish a tolerance...."

41. Young, 106 S. Ct. at 2363.
42. Id. at 2364.
43. Community Nutrition Institute v. Novitch, No. 80-3110, memo. op. (D.D.C. 1984) (order granting summary judgment), rev'd sub nom., Community Nutrition Institute v. Young, 757 F.2d 345 (D.C. Cir. 1985), cert. granted, 106 S. Ct. 565 (1985), rev'd, 106 S. Ct. 2360 (1986). Two issues other than that before the Supreme Court were presented to the district court. First, plaintiffs argued that the FDA's promulgation of action levels was not carried out in accordance with the rulemaking requirement of the Administrative Procedure Act. Second, plaintiffs argued that the FDA's practice of granting exemptions to its prohibition against blending contaminated products violated the FFDCA. The district court rejected both arguments. Community Nutrition Institute v. Novitch, No. 80-3110, memo. op. (D.D.C. 1984).
44. Community Nutrition Institute v. Young, 757 F.2d 354 (D.C. 1985), rev'd, 106 S. Ct. 2360 (1986). The appeals court considered all issues before the district court. It reversed the district court's decision upholding the FDA's interpretation of the statute. It vacated as moot the district court's decision regarding rulemaking procedures, and vacated and remanded the issue of exemptions for blending contaminated foods.
45. Young, 757 F.2d at 357.
46. Id.
47. Young, 106 S. Ct. at 2362.
Therefore, in accord with that analysis, the Court looked first to determine if Congress had unambiguously spoken to the question of whether setting tolerance levels is mandatory or discretionary.  

The Court concluded Congress had addressed this precise issue, but had phrased its address ambiguously. Justice O'Connor stated that although some view the Community Nutrition Institute's interpretation to be the more natural reading of the phrase, it actually admitted to neither that reading nor the FDA's. She said, "[a]s enemies of the dangling participle well know, the English language does not always force a writer to specify which of two possible objects is the one to which a modifying phrase relates."  

In its opinion, the Court did not specifically address respondents' arguments that supported the clarity of the phrase. Respondents had referenced the use of similar language throughout the FFDCA, pointing out that throughout the statute the term "shall" is used as a directive to the Secretary rather than as a mere grant of authority to her. They stated further that the customary legislative meaning of the term "shall" is that of a mandate. They drew the attention of the Court to a section of the FFDCA that grants discretionary powers to the Secretary rather than imposing mandatory duties. This provision begins: "Whenever in the judgment of the Secretary ..." Respondents suggested that the clearly permissive language employed in this provision indicated that Congress would have employed similarly permissive language in section 346 if it had intended that section to be read as granting discretionary powers.  

48. Id. at 2364; Chevron, 104 S. Ct. at 2778 (1984).  
49. Id.  
50. Id. at 2365.  
51. Id. at 2364.  
52. Id.  
54. Id. at 18.  
55. Id. at 19-20.  
56. 21 U.S.C. § 341 (1982). The pertinent part of this section is set out below:  
 Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container ...  
Despite these arguments, the Court, having rested its conclusion on a dangling participle, now applied the second prong of the *Chevron* test to determine whether the FDA's interpretation was reasonable. Justice O'Connor quickly concluded that "to read [section] 346 as does the FDA is hardly to endorse an absurd result."

In the paragraphs following this statement, the Court offered support for its decision. It was not clear from the type of support offered whether it was presented to satisfy the first or second prong of the test or was offered only as general support for the deference given to the FDA in both parts. However, the physical positioning of these supportive statements in the opinion immediately after the decision of the second prong of the test indicated they were offered to demonstrate the reasonableness of the FDA's interpretation. These same findings could be used to support the Court's determination of ambiguity in its application of the first prong of the test.

The first such support offered by the Supreme Court was in refutation of the court of appeals' argument that the Act provided no adequate alternative for regulation of substances fitting the section 346 definition. The court of appeals found this to mean that the section was intended to be mandatory. The Supreme Court answered this argument by advancing a section of the Act, which it opined could be used as an alternative, and dismissed the appeals court's reasoning as faulty.

Next, the Court stated that the legislative history shed little light on Congress' intent in writing section 346. Although Congress had revised the language of section 346 from "the Secretary is authorized to promulgate regulations" to "the Secretary shall promulgate regulations," its report gave no reasons for the change. Apparently, Congress' failure to explain the change was

58. *Young*, 106 S. Ct. at 2365.
59. *Id.*
60. *Id.* at 2365-66.
61. *Id.*
62. *Id.*
63. *Young*, 757 F.2d at 358.
64. *Young*, 106 S. Ct. at 2365.
65. *Id.*
66. *Id.* at 2365-66.
enough to convince the Court that the change from a permissive term to a directory term was inadvertent.

The Court did infer some indication of congressional intent from Congress' failure to change section 346 when other sections of the Act were revised in 1954.67 The FDA had established its discretionary employment of section 346 prior to this congressional review of the Act, yet Congress did not revise section 346 to read more firmly as a directive.68 The Court saw this as significant support for the FDA's interpretation.69

Finally, the Court provided that the FDA's interpretation of section 346 does not render that section superfluous within the context of the Act.70 Although conceding that section 371(a) of the FFDCA gives the FDA authority to promulgate rules to enforce the Act71 (conceivably this authority even extends to tolerance levels of section 346 substances),72 the Court apparently saw Congress as intending section 346 to give the FDA a choice of the type of rule it may promulgate.73

It is important to note that the Court did not require any statistical or scientific evidence in support of the FDA's interpretation. Only the legal theories posited above were given to support the finding of reasonableness.

67. Id. at 2366.
68. Id.
69. Id.
70. Id. at 2365-66.
71. Id. at 2365.
72. § 371(a) states: "The authority to promulgate regulations for the efficient enforcement of this chapter, except as otherwise provided in this section, is vested in the Secretary." 21 U.S.C. § 371(a) (1982).
73. Young, 106 S. Ct. at 2366. The Court apparently viewed the statute as giving the FDA a choice of regulating poisonous or deleterious substances under § 346 or under § 342(a). § 342(a) reads in pertinent part:

[A food shall be deemed to be adulterated]

(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2)(A) if it bears or contains any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; (iii) a color additive; or (iv) a new animal drug which is unsafe within the meaning of section 346 of this title, or (B) if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 346a(a) of this title, or (C) if it is, or if it bears or contains, any food additive which is unsafe within the meaning of section 348 of this title ...

B. Dissent

Justice Stevens agreed with the Court majority that *Chevron* was the appropriate standard of review, but vigorously objected to its method of applying that test. In his application of the first step of the *Chevron* analysis, Justice Stevens immediately concluded that there was no need to proceed to the second step. He found the disputed phrase to be clear on its face, stating matter of factly, “*to* one versed in the English language, the meaning of this provision is readily apparent.”

In his own grammatical analysis, he rebutted the majority’s finding of a “dangling participle,” and agreed with the interpretation the appeals court had called a “common-sense reading.” This common-sense reading was, of course, that proposed by the Community Nutrition Institute. He stated that to construct the provision as the FDA does is to render one of its phrases, “limiting the quantity therein or thereon,” totally meaningless.

He supported his position further by directly contradicting the majority’s conclusion that a discretionary reading of section 346 does not render it superfluous. He suggested that a discretionary reading of section 346 would give no duties or powers to the Secretary other than those already given in the general rule-making power of section 371(a). As he stated, “if Congress intended the Secretary to have unbridled authority to proceed with action levels, instead of with formal regulations, there was no need to enact this part of [section] 346 at all.”

Justice Stevens concluded the majority’s analysis was less than judicious. He ended his dissent with a cryptic statement of dissatisfaction with the majority’s reasoning: “The Court, correctly self-conscious of the limits of the judicial role, employs a
reasoning so formulaic that it trivializes the art of judging." 86

IV. DISCUSSION

Was the majority’s reasoning actually “formulaic” or was it simply extending the deferential spirit of Chevron? Justice Stevens’ dissent seemed to indicate that his Chevron opinion had anticipated a purely independent judicial analysis in determining whether Congress had spoken. 87 This first prong of the test was to be uninfluenced by the Agency’s viewpoint.

Paradoxically, in Chevron, Justice Stevens’ apparent call for traditional judicial independence in seeking Congress’ intent was accompanied by a call for narrowing the Court’s scope of investigation. 88 Justice Stevens limited the scope to a determination of whether Congress had spoken to the “precise question in issue.” 89 Prior to Chevron, the Court would generally have scoured the statute to determine Congress’ intent, whether or not it had actually spoken to the precise question. 90

Therefore, even if applied as Justice Stevens seemingly intended, the first prong of Chevron increased the likelihood of finding no clear congressional intent and ultimately the likelihood of deference to an Agency’s interpretation. 91

The Court majority did not seem as focused on independent judicial determination of Congress’ intent. Or, as Justice Stevens put it, the Court “invent[ed] an ambiguity and invok[ed] administrative deference.” 92 The majority’s resort to a pedantic rule of grammar to justify its finding of ambiguity, coupled with its failure to address respondents’ arguments that clarifying language was present throughout the statute, leads to an inference that a deferential rather than independent judicial analysis was performed.

Although apparent from its approach, the Court did not articulate that it was deferring to the Agency during its application

86. Id.
87. Id.
88. The Supreme Court, 1983 Term—Leading Cases of the 1983 Term, supra note 4, at 250-51.
89. Chevron, 467 U.S. at 842.
90. The Supreme Court, 1983 Term—Leading Cases of the 1983 Term, supra note 4, at 251.
91. Id. at 250-51.
92. Young, 106 S. Ct. at 2366 (Stevens, J., dissenting).
of the first prong of the *Chevron* test. Therefore, one may only predict whether this current mood of deference will come to be the announced rule. However, acquiescence in this mood by eight members of the *Young* Court provides a good foundation for this prediction.

Deference such as this to an agency's finding of ambiguity or silence in applying the first prong of the test essentially guarantees the agency's interpretation will be upheld. *Chevron* mandates this as long as the agency's view is "reasonable." The Court will determine reasonableness by considering many of the same factors it considered in its search for congressional intent. Primarily, it will judge the fit of the agency's interpretation to the purpose of the provision and to its position within the statute. Therefore, a finding of a reasonableness in the agency's arguments at the first stage of the analysis ultimately is a finding of reasonableness that satisfies the second stage of the analysis.

The political implications of this increased deference are enormous. The interpretation of legislation, the written expression of

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93. *Young*, 106 S. Ct. at 2360.
94. *Chevron* dealt with congressional silence on a particular issue within a statute. 467 U.S. 845. It was a unanimous decision by six members of the Court. The three nonparticipating members were Justices Marshall, Rehnquist, and O'Connor. *Id.* One year later, the Court followed the *Chevron* rule in a case involving an ambiguity in a section of the Clean Water Act. *Chemical Manufacturers Association*, 105 S. Ct. at 1102. The Court upheld the Environmental Protection Agency's interpretation by only a five-to-four margin. Justice White's opinion read similarly to Justice O'Connor's in *Young*. He seemed to defer to the Agency's finding of ambiguity throughout the first stage of the analysis rather than exercising purely independent judgment. 105 S. Ct. 1102 *passim*. However, Justice O'Connor, along with Justices Marshall, Blackmun, and Stevens, dissented. 105 S. Ct. 1113-1126. They seemed to have performed an independent analysis and concluded no ambiguity existed. *Id.* The swing of three of these four dissenters to embrace the deferential application of the first prong of the *Chevron* analysis in *Young* may indicate that this will become the announced standard of review. *Young*, 106 S. Ct. at 2360.
95. *Young*, 106 S.Ct. at 2360.
96. 467 U.S. at 844.
97. The Court has not required any factual support to uphold the agencies' assertions of reasonableness. It has accepted statements by administrators that congressional purpose will be effected if their interpretations are upheld and has required no scientific data from them as back-up. See *Young*, 106 S. Ct. at 2365; *Chemical Manufacturers Association*, 105 S. Ct. at 1110-1112; *Chevron*, 467 U.S. at 865. See also *The Supreme Court, 1985 Term — Leading Cases of the 1985 Term*, supra note 4, at 252-53, which states: "By accepting speculation as a rational basis for the EPA's action, rather than demanding factual support or an explanation for the lack of it, the Court allowed the EPA to shape environmental policy based on unsubstantiated political preferences."
98. *Young*, 106 S. Ct. at 2366 (Stevens, J., dissenting).
the political will of Congress,\textsuperscript{99} is now subject to the political will of the incumbent administration, elected and non-elected administrators, rather than guarded by the apolitical judiciary.\textsuperscript{100} Decisions constitutionally delegated to Congress\textsuperscript{101} will be deferred to the administration unless the expression by Congress is impecably precise. The Young decision has demonstrated the degree of precision Congress must achieve to ensure that its will is enforced.\textsuperscript{102}

V. CONCLUSION

Young illustrates the retreat of the judiciary from its traditional role in reviewing administrative determinations of law. This retreat places tremendous political power in the modern administrative agency. It is a power that forces Congress to express its political choices with absolute clarity or forfeit those choices to the political will of the agency.\textsuperscript{103}

Jeanne Dodd

\textsuperscript{100} \textit{The Supreme Court, 1985 Term—Leading Cases of the 1985 Term}, supra note 4, at 250-255.
\textsuperscript{101} Krauss, supra note 104, at 2-14.
\textsuperscript{102} Young, 106 S.Ct. 2360 passim.
\textsuperscript{103} See \textit{The Supreme Court, 1988 Term—Leading Cases of the 1988 Term}, supra note 4, at 250-255.

I. INTRODUCTION

Arbitrability, a concept found in the realm of labor-management relations, involves a challenge to the scope of authority or jurisdiction of the neutral third party chosen by the parties to a collective-bargaining agreement. The jurisdiction of the arbitrator may be challenged to determine whether the dispute sought to be arbitrated falls within the ambit of the collective-bargaining agreement. The arbitration clause in the agreement describes the specific motive and types of disputes that are subject to arbitration under the agreement.

Other factors determining arbitrability are 1) whether or not the parties have an agreement, 2) if such an agreement exists, whether it commits the parties to arbitrate a particular dispute, and 3) whether all grievance procedures under the contract have been exhausted prior to arbitration. Who precisely determines questions of arbitrability depends upon statutes in force, on rules of procedure that may apply, or on court decisions.

The function of the collective bargaining agreement is essentially that of industrial self-government. A grievance procedure that culminates in arbitration typically is the administrative mechanism selected by the parties to resolve all differences as to the meaning or application of that agreement. Their contract should, whenever consistent with its language, be conceived as a flexible body of principles designed to govern the labor relations between the company and the members of the bargaining unit for which it was negotiated.

2. Id.
3. Id.
4. Id.
6. Id.
II. TYPES OF ARBITRABILITY

There are two distinct issues of arbitrability: procedural and substantive. Procedural arbitrability addresses whether the grievance has been properly processed by the parties. For example, often a union may miss an appeal deadline in the early stages of the grievance process. Arbitrators approach procedural arbitrability questions rather flexibly and will be inclined to give full consideration to any reasonable explanation for tardiness.

Where extenuating circumstances exist, the arbitrator will generally conclude that while, technically, a procedural violation has occurred, to deny a hearing to the grievant on such narrow, technical grounds would be inconsistent with the goals of labor arbitration. If the arbitrator ruled the grievance procedurally defective, the grievant would never receive a hearing on the merits.

A claim of substantive arbitrability means that the grievance in question is not properly before the arbitrator because the substance of the grievance is not covered by, or is excluded from, the collective bargaining agreement. An example of this would be a labor union seeking to have a supervisor disciplined for some allegedly improper act. The employer would argue that under the language of the contract, management has the option to pursue or not to pursue a grievance concerning a supervisor, and thus determine that it is not subject to the grievance procedure, and therefore not arbitrable. The arbitrator draws authority from the parties under the collective bargaining agreement, and if he or she lacks the authority to hear a certain type of dispute under that agreement, then the grievance is substantively inarbitrable and the arbitrator may not pass on the merits of the case.

8. E.g., the contract provides that the union has five working days to appeal a denial from the previous step and the union takes six.
9. COLOSI AND BERKELEY, supra note 7, at 176.
10. Id.
11. Id.
12. Id.
13. E.g., someone who is not a member of the bargaining unit pursuant to the collective bargaining agreement.
14. COLOSI AND BERKELEY, supra note 7, at 176.
15. Id. at 177.
III. HISTORICAL BACKGROUND

On June 20, 1960, the United States Supreme Court handed down three decisions, commonly known as the Steelworkers Trilogy,16 which provided great stability for the arbitration process. These three cases involved the United Steelworkers of America, and collectively they demonstrate that the system of private arbitration in the United States has the full support of the highest court in our judicial system.

A. United Steelworkers of America v. Warrior and Gulf Navigation Co.17

The Warrior and Gulf Navigation Company employed forty-two men at its dock terminal for maintenance and repair work. After the company had subcontracted out portions of the work, the number of employees was reduced to twenty-three. The union argued that this action violated the labor agreement. The company claimed that the issue of subcontracting was strictly a function provided for under the management’s rights clause in the contract.18

The Court, in determining whether “contracting out” violated the agreement, stated in pertinent part:

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into a contractual relationship, they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.19

18. Id. at 580.
19. Id. at 581.
The Court in *Warrior and Gulf* went on to say that, "[a]rbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solutions in a way which will generally accord with the variant needs and desires of the parties." 20

"The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." 21 The grievance procedure can be construed as part of the continuous collective bargaining process. 22

In making a decision, the labor arbitrator is not confined to the express provisions of the contract. The industrial common law 23 is equally a part of the collective bargaining agreement, although not expressed in the agreement. 24 The parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement and to make the agreement serve their specialized needs. 25 Arbitration is consensual and the scope of the arbitrator's jurisdiction is determined by the collective bargaining agreement. 26

In *Warrior and Gulf*, the Court went on to hold that, "arbitration 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." 27 An order to arbitrate the particular grievance should not be denied unless it may be shown with positive assurance that the arbitration clause does not cover the asserted dispute. 28 "Doubts should be resolved in favor of coverage." 29


In the second case, *American Manufacturing*, the issue of arbitrability was also involved, but in a somewhat different way.

20. Id.
21. Id.
22. Id. at 581-82.
23. Industrial common law is created from the practices of the industry and the shop.
24. 363 U.S. at 581-82.
25. Id.
26. Id. See also United Mineworkers v. Chris-Craft Corp., 385 F.2d 946 (6th Cir. 1967).
27. 363 U.S. at 582.
28. Id. at 583. See also Gateway Coal Co. v. Mineworkers, 414 U.S. 368, 377-78(1974).
29. Id.
30. 363 U.S. at 564.
than in *Warrior and Gulf Navigation*. *American Manufacturing* involved a dispute regarding the reinstatement of an employee to his job after it was determined that the employee was twenty-five percent disabled and was drawing workmen's compensation.\(^{31}\)

The union alleged that the employee was entitled to return to his job by virtue of the seniority provision of the collective bargaining agreement. The employer argued that the determination of such an issue was not arbitrable under the collective bargaining agreement in question.\(^{32}\) In considering whether workmen's compensation matters fell under the realm of the collective bargaining agreement, the Supreme Court rejected the doctrine established in *Machinists Local 402 v. Cutler-Hammer, Inc.*\(^ {33}\) In rejecting the *Cutler-Hammer* doctrine, the Supreme Court stated:

> The courts have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic value [of] which those who are not a part of the plant environment may be quite unaware.\(^ {34}\)

A collective bargaining agreement may require arbitration of claims that courts are unwilling to entertain.\(^ {35}\) In the context of the plant or industry, the grievance may assume proportions of which judges are ignorant.\(^ {36}\) Arbitration, in contrast, is a stabilizing influence because it serves as a vehicle for handling any and all disputes that arise under the agreement.\(^ {37}\) The function of the courts becomes very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator.\(^ {38}\)

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31. *Id.* at 566-67.
32. *Id.* at 565.
33. 74 N.E.2d 464, 67 N.Y.S.2d 318 (1974). This New York case that has since been readjudicated said, in pertinent part, "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."
34. 363 U.S. at 568.
35. *Id.* at 567.
36. *Id.*
37. *Id.*
38. *Id.* at 568.
Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances, the moving party should not be deprived of the arbitrator’s judgment, for which the party has bargained, and all that it connotes.

Essentially, this means that the courts may not hold a grievance to be “nonarbitrable” even if the judge believes that the grievance is completely frivolous. The private arbitrator will decide the merits of the particular case and may dismiss the grievance as being without merit, but this duty rests exclusively with him and not with the courts.

C. United Steelworkers of America v. Enterprise Wheel & Car Corp.

In the third and final case of the Trilogy, the Court was faced with a situation involving the discharge of several employees. The discharges were arbitrated after the agreement had expired. The arbitrator found that the employer was in violation of the collective bargaining agreement and that the grievants were entitled to reinstatement with back pay, minus pay for a ten-day suspension. The company refused to comply with the arbitrator’s ruling, and the union petitioned for enforcement of the award.

In reversing the lower court’s holding that the arbitrator’s award was unenforceable because the contract had expired, the Supreme Court said in pertinent part:

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

The refusal of the courts to review the merits of an arbitration award constitutes the proper approach to arbitration under the collective bargaining agreement. The arbitrators under these

39. Id.
40. Id.
41. 363 U.S. at 593.
42. Id. at 595.
43. Id.
44. Id. at 597.
45. Id. at 596.
collective bargaining agreements are indispensable agencies in a continuous collective bargaining process. The arbitrators sit to settle disputes at the plant level, disputes that require knowledge of the customs and practices of a particular factory or of a certain industry as reflected in particular agreements.

Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, although his award is legitimate only as long as it draws its essence from the collective bargaining agreement.

As the Court emphasized in American Manufacturing, the interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction that was bargained for. To the extent that the arbitrator's decision concerns construction of the contract, the courts have no authority to overrule him on the basis that its interpretation of the contract is different from his. This serves to preserve the integrity of the arbitrator's award.

D. The Trilogy in Sum

The cases in the Steelworkers Trilogy demonstrate that private arbitration systems have been strengthened by a judiciary that recognizes the integrity of the arbitration process. The Trilogy cases, which were issued by the United States Supreme Court in June of 1960, remain as landmark decisions and the law set forth in those cases endures as the prevailing precedents in labor relations today.

IV. APPLICABLE FEDERAL DOCTRINE

By and large, the federal law has played a relatively limited role in labor-management arbitration in the private sector of the

46. 363 U.S. at 581.
48. 363 U.S. at 597.
49. Id.
50. 363 U.S. at 571.
51. Id.
52. Id.
53. Id.
United States.\textsuperscript{54} Fundamentally, such arbitration has been, and still is, a product of private contract between labor and management,\textsuperscript{55} although in a significant sense, arbitration in the private sector has become "federalized as to legal status."\textsuperscript{56}

Federal statutes of significance to arbitration in the private sector are the United States Arbitration Act,\textsuperscript{57} the Labor Management Relations Act,\textsuperscript{58} and the Railway Labor Act.\textsuperscript{59} While the United States Arbitration Act provides significant support for arbitration,\textsuperscript{60} this Act made certain agreements valid and specifically enforceable for the arbitration of disputes arising out of wartime transactions, contracts relating to commerce among states or territories, and with foreign nations.\textsuperscript{61}

The Labor Management Relations Act of 1947\textsuperscript{62} lends policy support to arbitration by declaring in Section 203 that final adjustment by a method agreed upon by the parties is the most desirable way to settle disputes concerning the interpretation and application of collective agreements.\textsuperscript{63}

Moreover, in the landmark case of \textit{Textile Workers v. Lincoln Mills},\textsuperscript{64} the United States Supreme Court held that the Labor Management Relations Act provides enforceable support for labor arbitration.\textsuperscript{65} Section 301 of the Act\textsuperscript{66} authorizes suits in the federal courts for the breach of collective agreements in industries affecting interstate commerce.

In \textit{Lincoln Mills}, the Court held that Section 301 authorizes the federal courts to fashion a body of federal law for the enforcement of collective agreement provisions for arbitration.\textsuperscript{67} The Court declared that Congress clearly adopted a policy that placed sanctions upon agreements to arbitrate grievance disputes,

\begin{thebibliography}{99}
\bibitem{55} \textit{Id}.
\bibitem{56} \textit{Id}.
\bibitem{57} United States Arbitration Act § 1-14, 9 U.S.C. § 1-14 (1947).
\bibitem{60} 9 U.S.C. § 1-14 (1947).
\bibitem{61} \textit{Id}.
\bibitem{63} \textit{Id}.
\bibitem{64} 353 U.S. 448 (1957).
\bibitem{65} \textit{Id} at 454.
\bibitem{67} 353 U.S. at 453.
\end{thebibliography}
by implication, in rejecting the common-law rule against enforcement of executory agreements to arbitrate. 68

As to the substantive law to be applied in Section 301 suits, the Court stated:

The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will be in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. 69

The range of judicial inventiveness will be determined by the nature of the problems. 70 The interpretation of the federal law will govern, not state law. 71 State law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate the federal policy. 72 However, any state law applied will be absorbed as federal law and will not be an independent source of private rights. 73

Accordingly, federal policy favors arbitration. This federal presumption of arbitrability of labor disputes is readily seen in the case of Gateway Coal Co. v. United Mine Workers, 74 where the Court said "[a]n order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation which covers the asserted dispute, and all doubts should be resolved in favor of coverage." 75 Further, because arbitration is favored under federal labor law, a court should order the reluctant party to submit the dispute to arbitration. 76 The favored status of arbitration derives from Congress' declared policy of promoting industrial peace through the collective bargaining process rather than through the courts. 77

68. Id.
69. Id. at 455.
70. Id.
71. Id.
72. Id.
73. Id.
75. Id. at 375.
76. 363 U.S. at 582-83.
The fundamental reason for requiring courts to abstain from preempting arbitration, except in the clearest cases, is the permanent necessity to avoid external tampering with the machinery of industrial self-government.° Vital to the success of that machinery is the need for rapid resolution of labor disputes by an individual to whose judgment the parties have chosen to submit their issues.9

The Supreme Court’s consistent rationale has been that courts should refrain from adjudicating contractual issues more properly resolvable by arbitrators.°° This is because the arbitrator’s informed judgment is different from that of a judge.°°

The compelling conclusion is that the only question that a court must answer on the issue of substantive arbitrability is whether the parties have manifested an intention that the grievance in question shall be submitted for resolution by arbitration.°°° A court, confronted with the refusal by one party to arbitrate, is called upon only to determine whether there is a contractual obligation to arbitrate the dispute at issue.°°°

It is with this final note, on the court’s role in the arbitration process, that we turn to the case of A.T.&T. Technologies v. Communication Workers of America.°°

V. ANALYSIS, DISCUSSION, AND IMPACT OF A.T.&T. TECHNOLOGIES V. COMMUNICATION WORKERS OF AMERICA°°

In the recent Supreme Court case of A.T.&T. Technologies v. Communication Workers of America, the Court vacated a decision of the Court of Appeals and unanimously ruled that the question of arbitrability is undeniably a question for judicial determination.°°°

A.T.&T. Technologies involved a petitioner employer and respondent union, both of whom were parties to a collective bar-

79. Id.
80. Id. at 880.
81. Id.
82. Id. at 881.
83. Id.
85. Id.
86. 106 S. Ct. at 1420.
gaining agreement covering telephone equipment installation workers. Article 8 provided for arbitration of differences over interpretation of the agreement.\textsuperscript{87}

The union filed a grievance challenging the petitioner's decision to lay off seventy-nine installers from its Chicago location, claiming that there was no lack of work at the location and, therefore, the layoffs were in violation of the collective bargaining agreement. The petitioner proceeded anyway to lay off the installers and refused to submit the grievance to arbitration on the ground that under the contract the layoffs were not arbitrable.\textsuperscript{88}

The union then sought to compel arbitration by filing suit in federal district court. The court, after finding that the union's interpretation of Article 20 was at least "arguable," held that it was for the arbitrator, not the court, to decide whether that interpretation had merit, and, accordingly, ordered petitioner to arbitrate. The Court of Appeals affirmed.\textsuperscript{89}

The issue presented in the case was whether the court, asked to order arbitration of a grievance filed under a collective bargaining agreement, must first determine that the parties intended to arbitrate the dispute or whether even that determination is properly left to the arbitrator.\textsuperscript{90} A careful reading of the opinion indicates that, rather than creating new law, the Court relied upon and reaffirmed its decisions in the Steelworker's Trilogy.\textsuperscript{91}

The concepts developed by the Steelworker's Trilogy have served the industrial relations community well and have led to continued reliance on arbitration as the preferred method of resolving disputes arising during the term of a collective bargaining agreement.\textsuperscript{92}

The first principle gleaned from the Trilogy is that arbitration is a matter of contract; therefore, a party cannot be required to arbitrate any dispute that he has not agreed to submit.\textsuperscript{93} This

\textsuperscript{87.} Id. at 1415.  
\textsuperscript{88.} Id.  
\textsuperscript{89.} Id. at 1416.  
\textsuperscript{90.} Id.  
\textsuperscript{92.} 106 S. Ct. at 1418.  
\textsuperscript{93.} 363 U.S. at 582.
axiom recognizes that arbitrators have authority to resolve industrial disputes only when the parties have agreed in advance to submit such disputes to arbitration. 94

The second rule, which follows inexorably from the first, is that the question of arbitrability, i.e., whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance, is undeniably an issue for judicial determination. 95 Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not by the arbitrator. 96 Since the duty to arbitrate is of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. 97

The third principle derived from the cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. 98 The courts have no authority to weigh the merits of the grievance to consider whether there is equity in a particular claim or to determine whether particular language in the written instrument supports the claim. 99 The contract provides that all grievances shall be submitted to arbitration, not only those that the court deems meritorious. 100

Finally, it has been established that where the contract contains an arbitration clause, a presumption of arbitrability exists in that

[an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.] 101 Such a presumption is particularly applicable where the clause is as broad as the one employed in this case. 102

The presumption of arbitrability of labor disputes acknowledges the greater competence of arbitrators in interpreting collective bargaining agreements. This concept reaffirms the national labor policy of peaceful resolution of labor disputes and best accords with the parties' objectives in collective bargaining.

The willingness of parties to enter into agreements that provide for arbitration would be drastically reduced if a labor arbitrator had the "power to determine his own jurisdiction." This would undercut the longstanding federal policy of promoting industrial peace through the use of collective-bargaining agreements and is antithetical to the purpose of a collective bargaining agreement's role in establishing the rights and duties of the parties.

With those principles in mind, the Supreme Court held that it was evident that the Seventh Circuit erred in determining that the parties must arbitrate the arbitrability question. "It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the company." If it is so determined, then it is for the arbitrator to decide the relative merits of the parties' substantive interpretations of the agreement. "It [is] for the court, not the arbitrator, to decide in the first instance whether the dispute [is] to be resolved through arbitration."

With this unanimous decision, the Court reaffirmed its decisions in the Steelworker's Trilogy. The impact A.T.&T. Technologies has left upon the labor-management community is that it reaffirmed already established law dictating the roles of the court and the arbitrator in the arbitration process and the proper criteria for determining the scope and authority given to the arbitrator through the collective bargaining agreement.

103. Id. (citing Schneider, 466 U.S. at 371-72).
104. Id.
105. Id.
106. Id.
108. 106 S. Ct. at 1420.
110. Id. at 543.
In its reasoning, the Court stressed the differences between substantive and procedural arbitrability in deciding to vacate the court of appeals ruling. Substantive arbitrability, said the court, is concerned with the question of whether the parties have contractually agreed to submit a particular dispute to arbitration.\footnote{Id. at 545-46; see also Atkinson, 370 U.S. at 241.} The courts decide this question because a party has no obligation to arbitrate a dispute unless that party has consented to do so.\footnote{Id. at 558-59.} Procedural arbitrability on the other hand, concerns such issues as whether grievance procedures, or some part of them, apply to a particular dispute and whether such procedures have been followed or waived.\footnote{Id. at 558.}

In *John Wiley & Sons v. Livingston*,\footnote{Id. at 558.} the Court was faced with a situation in which a respondent union brought an action to compel arbitration with an employer who had become subject to the contractual obligation of a collective bargaining agreement because of merger.\footnote{376 U.S. 543 (1964).} The Court held that the procedural questions should be addressed by the arbitrator since they are often inextricably bound with the merits.\footnote{Id. at 545-46.} The Court also determined that the adjudication of procedural questions raised by the courts would needlessly delay the resolution of the dispute.\footnote{Id. at 557.}

The question in *A.T.&T. Technologies* hinged on the determination of whether the arbitrator commissioned to hear the particular matter had obtained the authority or jurisdiction to decide whether the layoff of certain employees by the company was arbitrable. The Supreme Court properly reversed the decision of the Seventh Circuit that had held the matter arbitrable under the parties' collective bargaining agreement. The Court stated that "it is the district court's duty to interpret the collective bargaining agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs."\footnote{106 S. Ct. at 1416.}

The Court relied on Article 8 of the collective bargaining agreement to analyze the issue of whether the layoffs were
arbitrable under the collective bargaining agreement. Article 8 of the collective bargaining agreement provided in pertinent part:

If the National and the Company failed to settle by negotiations any differences arising with respect to the interpretation of this contract, or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedure as to such disputes has been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties.119

The court also decided that when lack of work necessitates layoff, Article 20 prescribes the order in which employees are to be laid off. Article 20 reads in pertinent part as follows:

[When lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Terms of Employment and by Layoff groups as set forth. Article 1.11 defines the term Layoff to mean "a termination of employment arising out of a reduction in the force due to lack of work."120

The union argued, and the Court agreed, that Article 20 would allow it to take to arbitration the threshold issue of whether the layoffs were justified by lack of work. As the record showed, some seventy-nine employees had been laid off for lack of work and replaced by installers from the Wisconsin and Indiana divisions of the company.121 The Court said that the union's interpretation was at least "arguable;" but ultimately held that this determination was for the district court and not the arbitrator to decide.

The Supreme Court vacated the ruling of the court of appeals on the grounds that whether Article 20 of the agreement allowed such layoffs would be a question subject to the arbitration clause of the agreement and would clearly be a question of substance.122 That issue should have been decided by the district court and reviewed by the court of appeals. It should not have been referred to the arbitrator.123 Once this arbitrability issue has been ruled upon, the following analysis will be applied. If the actions taken

119. Id. at 1416, n.1.
120. Id. at 1417, n.3.
121. Id.
122. Id.
123. Id.
by the company under Article 20 are subject to the arbitration clause, then the resolution thereof is a matter for arbitration. Once the district court determines that the matter is arbitrable, the responsibility shifts to the arbitrator to rule on the merits of the case.\textsuperscript{124}

VI. CONCLUSION

The United States Supreme Court correctly vacated the decision of the Seventh Circuit in \textit{A.T.\&T. Technologies} and has enhanced the collective bargaining process by reaffirming its long-standing position on the question of arbitrability. This interpretation has been supported by case law and federal policy involving labor-management relations.

The Supreme Court’s interpretation has merit in that it suggests to all counsel the need for explicit language in collective bargaining agreements to facilitate the expedient resolution of labor-management disputes.

It is for the courts to determine the issue of arbitrability, and once this is accomplished, the arbitrator is called upon to hear the merits of the case.

\textit{David W. Stanton}

\textsuperscript{124} \textit{Id.}