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Globalization and Developments in the Apportionment of Jurisdiction between Arbitrators and Courts Concerning International Commercial Arbitration

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"…Man can only be understood by dealing with all the provinces of his activity simultaneously and comparatively, and avoiding the mistake of trying to elucidate some problem, say, or his politics or his religion or his art, solely in terms of particular sides of his being, in the belief that, this done, there is no more to be said."

Man and Technics,
Oswald Spengler

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I. Introduction: Globalization, the State, and International Dispute Resolution

The juridic theme of the twenty–first century a.d. is defined by the fissure between the homogeneous nature of economic globalization and the current state of a fragmented international law that is limited in its efficacy and application by its very genesis in such concepts as

nationalism and *national sovereignty.* While humanity as a whole has suffered and agonized as a result of such shared crises as international terrorism, transnational security needs, global poverty, environmental threats that threaten the very survival of mankind as we now know it and that likely shall lead to the displacement of hundreds of millions of persons, poverty, regional genocide, political corruption, unworkable judiciaries, sexual exploitation, the vertical and horizontal proliferation of nuclear weapons and similar armaments of mass destruction, and unprecedented shortages in food and vital resources, these common "problems" have assumed a protagonistic role within the prevailing rubric of economic globalization. It is not a pessimistic statement but rather a commitment to phenomenological integrity to conclude that these crises define and redefine the very unique, and never again to be experienced, moment in which we now live. In turn, economic globalization has spawned a virtual borderless world with respect to the placement of manufacturing manpower, research and development, and the novel paradigm pursuant to which cross–border commerce is effectuated in cyberspace, i.e. everywhere and nowhere in particular. In this same vein, advances in communications technology has contributed to never before experienced speed in transnational, national, regional, and local information flow.

At one point seemingly omnipotent in its capacity to absorb territorial and global challenges, the rudimentary precepts set by the founders of the modern contemporary state, Jean Bodin, in *Les six livres de la République* (1576), and to some extent, Thomas Hobbes in *The Leviathan* (1651) and John Locke in *The Second Treaties of Government* (1690), the *state* has proven to be not only inadequate, but harmful to the requisite reforms for purposes of addressing global problems common to the citizens of all nations. Indeed, the jurisprudence endemic to principles of sovereignty, nationalism, and statehood in the sense of the modern state first enunciated in the sixteenth century and transformed by the French revolution, has demonstrated a progressive inability to address global problems using rules applicable to the relationships between sovereign states. In turn this anomaly has rendered increasingly more taxing, and in some instances impossible, to distinguish between public and private spheres, identifying the normative foundation for jurisprudence and positive law, and a virtual want of any predictive value that would be consonant with the most reasonable and fundamental expectations forming part of any legal framework.

Irrespective of the formation and transformation of the modern state into paragons that may resemble the European Union, we need

not explore the unchartered waters of the future to glean that globalization, in all of its manifestations, shall require the modern state to change. This transformation shall entail a systematic yielding of sovereignty. Here, the European Union does indeed present a helpful paradigm. In tracing the contours of this benchmark, it is rather poignant that perhaps the most critical badge or indicia of sovereignty is the element that first must evolve and transform itself: the judiciary. Put simply, globalization, and economic globalization in particular, cannot reach its perfect workings so long as a parallel "judicial globalization" is not established. The need for transnational courts of civil procedure with jurisdiction over private disputes arising in cross–border contexts certainly cannot address the perils that humanity now faces, but they appear to be the logical response to economic globalization. Recourse to multiple foreign jurisdictions (here "foreign" refers to non–citizens of jurisdictions where judicial procedures are to be had) is not viable. Venture capitalists, captains of industry, practitioners, and academics are all of a single voice in underscoring the need for a judicial methodology concerning the equitable administration of justice that is emblematic of a confluence of legal cultures so as to further the precepts of party–autonomy, predictability, transparency, and uniformity. It is precisely at this critical historical and judicial juncture that international commercial arbitration serves it most universal purpose that far transcends the resolution of private individual disputes.

International commercial arbitration is but a temporizing measure, perhaps unbeknownst to its vast constituency in the world of commerce, law, and the academy, that is serving as a historical temporal bridge until such time as transnational courts of civil procedure vested with authority to adjudicate private disputes arising from cross–border controversy, or the courts of "superestates" , such as perhaps the European Court of Justice with respect to the European Union are capable of exercising jurisdiction over such conflicts. Indeed, here international commercial arbitration, whether in the context of free trade agreements or ICSID, shall serve as the fertile petri dish for the right proportions of different legal systems that ultimately shall create a confluence of legal cultures capable of satisfying the well reasoned expectations of parties to an arbitral proceeding. Moreover, the transfer of dispute resolution from the public to the private arena also constitutes a gradual exercise in the ceding of sovereignty pursuant to the reallocation of dispute resolution together with a new role for the judiciary as subservient to arbitrations. This new space for judicial activism, which admittedly is confining in nature, represents

a first step in the demise of traditional paradigms of sovereignty, the modern state, and nationhood.

Here we shall attempt to focus on a very narrow, almost microscopic, doctrinal development illustrative of this transformation that certainly may be used, to some extent, as a guidepost that may lead those interested in tracing virtually imperceptible changes that are constant and so persistent in essence so as to be otherwise oblivious to the ordinary observer as in the case of Darwin's initial and unalloyed proposition. Indeed, first a fleeting glance at *party–autonomy* shall be exercised. Second, analysis of caselaw, in particular *Prima Paint Corp. v. Flood and Conklin Mfg.* (1967), will be undertaken. Third, the normative foundation for the Federal Arbitration Act must be explored so as to fathom the depths of the precepts actually providing for arbitration to serve its dispute resolution aspirations in a federal system. Finally, the trilogy of authority comprised by *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (1983), *Southland Corporation v. Keating, et al.* (1994), and *Buckeye Check Cashing v. Cardegna* (2006), shall be studied in considerable detail so as to understand the doctrinal movement or development that came in to being with the rigorous majesty of the common law throughout a twenty–three year timeframe. It will be argued that in leading to greater jurisdictional scope for arbitral proceedings, the finest interest of commerce at international levels and those of economic globalization–in its most productive and benign expression– shall be served.

II. A Return to Party–Autonomy as a New Form of Non–State Sovereignty, The Arbitration Clause

1. A Review of Prima Paint Corp. v. Flood and Konklin Mfg. *(1967)*

The doctrinal development of arbitration in the United States in large measure constitutes the rediscovery and renaissance of the venerable principle of *party–autonomy*[1]. This precept, in turn, certainly cannot be conceptually severed from the juridic dignity accorded to

[1] For purposes of this analysis it is assumed that the "demise" of judicial intervention in arbitral proceedings is tantamount to *party–autonomy* in conformance with basic premises upon which the adversarial system rests. In fact, in tracing the borders of this development, it become clear that "intervention" itself is transformed into "assistance" and "cooperation". Such that instead of assuming a protagonist's role in arbitration proceedings, courts shall undertake the more modest subordinated tasks of supporting arbitration proceedings with enforcement of arbitral awards.

contractual agreements. It followed from the four historical propositions that deemed arbitration to be a second tier dispute resolution methodology[2] that an arbitration clause was (i) neither a "free standing" contract separate and distinct from the underlying agreement embodying it, nor (ii) an agreement enjoying equal dignity with commercial contracts of whatsoever ilk.

The doctrinal development of arbitration in the United States in large measure has sought to place arbitration at the same level as judicial proceedings. This effort, however, has been undertaken parallel to the transformation of arbitration agreements from the status of a second genre of a "binding"[3] contract to one equal in all respects to enforceable commercial contracts. This transformation required sustained analysis of four rudimentary questions.

First, as a matter of substantive federal arbitration law, is an arbitration provision severable from the remaining contract? Second, is a challenge to a contract containing an arbitration clause to be adjudicated by a judge or an arbitrator? Third, is there a federal substantive law created by the FAA? Fourth, is such a law applicable in state as well as federal courts? These four inquiries found final resolution on February 21, 2006,[4] but only after first having been identified, albeit embryonically, on June 12, 1967.[5]

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[2] These badges of prejudice have been identified as: (i) the contention that arbitration ousts jurisdiction of otherwise courts having competent jurisdiction over parties and subject matter, (ii) the proposition that arbitration is ill–suited as a disputer resolution methodology for certain classes of federally enacted statutory causes of action aimed at protecting specific classes of prospective victims, (iii) the assertion that arbitration must be conducted under the auspices of courts, and (iv) the perception that arbitration lack the requisite training and skill set to adjudicate justice equitably with respect to complex and specialized subject matters.

[3] The many exceptions to which arbitration agreements were submitted by judicial fiat by dint of the four propositions identified in the immediately proceeding footnote alone, rendered it a euphemism to use the word "binding" in an arbitral context as it is used when discussing commercial contracts or judicial decrees. Because of the historical legacies of prejudice that nourished judicial skepticism for and rejection of arbitration as an alternative dispute resolution methodology, irrespective of any finding of wrongdoing or illicit activity attendant to an arbitration agreement, a court may simply render the arbitration clause unenforceable as a matter of "policy", without more. This status identifies a quite unique space that provided judges with virtually unbridle discretion in adjudicating the propriety of an arbitration clause. Mere recourse to any of the four referenced propositions generated by historical prejudice and ignorance would have sufficed for voiding an otherwise perfectly enforceable arbitration contract.

[4] On this date the Supreme Court issued its landmark opinion in *Buckeye Check Cashing, Inc. v. Cardegna,* 545 U.S. 440 (2006).

[5] On this date the Supreme Court issued its opinion in *Prima Paint Corp. v. Flood & Conklin Mfg, Co.,* 388 U.S. 395 (1967).

Their answers will in turn resolve the issue of "whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality." Precisely inquiries of this ilk highlight the virtually imperceptible cessation of sovereignty in minute but material transformation capable of finding a conceptual framework able to accommodate faster, and encourage permutations of this ilk. Unbeknownst to court, jurists, and practitioner at the time, this "evaluation" is an endemic part of the process conducive to a reconfiguration, if not altogether the evisceration of the "modern state" It is only after resolving this final issue that the answers to these four questions shall find their perfect working. Moreover, in addition to addressing systematically these four questions, the precept of *party–autonomy* implicitly, if not explicitly, had to play an important role if the doctrinal development is to be internally consistent as well as harmonious with the common law framework predicated on an individualistic adversarial party paradigm. In this same vein, *party–autonomy* would be best integrated into any analysis, in party, by minimizing or redefining the role of judicial intervention in arbitral proceedings."

With respect to this last proposition, it has been assumed that without some degree of judicial *cooperation* or *assistance,* in contrast with "intervention", arbitration proceedings simply would not be viable, *i.e.* could not exist. Accordingly, any doctrinal development of meaningful consequence to the elevation of arbitration to the same level as judicial proceedings and, consequently, or the rediscovery and reintroduction of the principle or *party–autonomy* as to the law and jurisprudence governing, configuring, and defining arbitration, would be conceptually necessary. Revisiting *Prima Paint v. Flood & Conklin Mfg. Co.* is an indispensable predicate to any analysis seeking to identify the doctrinal development that engrafts upon arbitration clauses–arbitration– contracts– the same status as commercial contracts as a matter of law.

2. Who decides the validity of a contract having an arbitration clause: judge or arbitrator?

The exact issue before the Court in *Prima Paint* was "whether the federal courts or an arbitration is to resolve a claim of 'fraud in the inducement,' under a contract governed by the United States Arbitration Act of 1925, where there is no evidence that the contracting parties intended to withhold that issue from arbitration."[6] The facts giving rise to this query are eloquent enough. Plaintiff, Prima Paint Co., filed an ac-

[6] *Prima Paint,* 388 U.S. at 396

tion in federal district court premised on a purchase agreement and a consulting agreement arising from its acquisition of defendant's business and retention of defendant's chairman in an advisory capacity. The complaint alleged, among other things, that defendant had "fraudulently represented that it was solvent and able to perform its contractual obligations, whereas it was in fact insolvent and intended to file a petition under Chap. XI of the Bankruptcy Act, 52 Stat. 905, 11 U.S.C.s. 701 et seq., shortly after execution of the consulting agreement"[7].

Simultaneously with the filing of its complaint, Prima Paint Co. moved the Court for issuance of an order enjoining defendant from proceeding with arbitration. Defendant cross–moved to stay the district court action pending conclusion of all arbitral labor under the theory that the issue presented, whether there (fraud in the inducement of the consulting agreement) was a question for the arbitrators and not the district court.[8] Defendant's motion to stay the legal proceeding pending arbitration was granted, and the Court held "that a charge of fraud in the inducement of a contract containing an arbitration clause as broad as this one[9] was a question for the arbitrators and not for the court."[10] An appeal ensued to the Second Circuit, which dismissed Prima Paint's petition holding that "the contract in question evinced a transaction involving interstate commerce; that under the controlling *Robert Lawrence Co.* decision a claim of fraud in the inducement of the contract generally– as opposed to the arbitration clause itself–is for the arbitrators and not for the courts; and that this rule– one of "national substantive law"– governs even in the face of a contrary rule."[11] The Supreme Court affirmed the Second Circuit's ruling.

At the outset of a three–prong analysis, the Supreme Court held that the consulting agreement between plaintiff, Prima Paint, Co., and defendant squarely fell within the realm of contracts specified in Sections 1 and 2 of the FAA and, therefore, provided a legal foundation for invoking the stay provision of Section 3[12]. The Court further un-

[7] *Id.* at 398

[8] *Id.* at 399.

[9] The clause at issue read: any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association... *Id.* at 398.

[10] *Id.* at 399. The district court found analytical support for this proposition in *Robert Lawrence Co. v. Devonshire Fabric, Inc.,* 271 F.2d 402 (2d Cir. 1959), *cert. granted,* 362 U.S. 909, *appeal dismissed,* 364 U.S. 801 (1960).

[11] *Id.* at 400.

[12] *Id.* at 401. 9 U.S.C. §§1–3 read:

Chapter 1.–General Provisions [9 U.S.C. §§ 1–3]

derscored that plaintiff had "acquired a New Jersey paint business serving at least 175 wholesale clients in a number of states, and secure [defendant's] assistance in arranging the transfer or manufacturing and selling operations from New Jersey to Maryland."[13] Thus, it concluded that "[t]here could not be a clearer case of a contract evidencing a transaction in interstate commerce."[14]

Second, the Court resolved a split of authority among the circuits on the narrow and specific questions of whether a claim of fraud in the inducement of a contract containing an arbitration clause is to be adjudicated by a federal court or referred to arbitration.[15]

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§ 1. "Maritime transactions" and "Commerce" defined; exceptions to operations of title "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collision, or any other matter in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

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

§ 3. Stay of Proceedings Where Issue Therein Referrable to Arbitration. If any suit or proceeding be brought in any of the Courts of the United State upon any issue referable to arbitration under an agreement in writing for such arbitration, the Court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay in the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

[13] *Id.*

[14] *Id.*

[15] On this issue the Second Circuit Court of Appeals holds that pursuant to federal law arbitration clauses are "separable" from the contract of which they form a part and, consequently, absent a claim that the fraud at issue was specifically directed to the arbitration clause itself, a broad arbitration clause shall be found to encompass arbitration of the averment that the contract itself was induced by fraud. *See, e.g.,* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959); In Re Kinosita & Co., 287 F.2d 951 (2d Cir. 1961). In stark contrast, the First Circuit Court of Appeals had repeatedly held that the issue of "severability" must be governed by state law. The argument thus says that where a state deems such a clause as inseparable from the corpus of the contract, a claim for fraud in the inducement *must* be adjudicated by court of competent jurisdiction. *See*,

Even though the Supreme Court observed and stressed that, pursuant to a plain language analysis, the FAA's statutory language does not expressly and necessarily provide federal courts with authority to adjudicate fraud in the inducement claims, Section 4 plainly does not relate to or contemplate scenarios where a stay of a federal proceeding is petitioned in deference to an arbitral proceeding.[16] The Court, however, enunciated that it would be "inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, thereof, that in passing upon a Section 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate, in so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration

e.g., Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915, 923–924 (1st Cir.) *cert. denied,* 364 U.S. 911 (1960). Accordingly the issue of arbitration in federal court or stated otherwise , the standing of an arbitration agreement with respect to any other enforceable contract, remained less than clear.

[16] 9 U.S.C. § 4 provides:

§ 4. Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction for Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five day's notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not issue, the Courts shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the parties for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the Court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the Court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the Court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the Court shall make an order summarily directing the parties to proceed with the arbitration in accordance wit the terms thereof.

procedure, when selected by the parties to the contract, be speedy and not subject to delay and obstruction in the courts."[17]

The fourth and final tenet upon which the decision rests relates to the question of whether a federal court's issuance of a stay in deference of an arbitral proceeding, notwithstanding a contrary state rule, is constitutional. This inquiry was answered in the affirmative.[18] After reviewing the mandate in venerable chestnuts such as *Erie R. Co. v. Thompkins,*[19]and *Guaranty Trust Co. of New York v. New York,*[20] the Court predicated its affirmance of the rule's constitutionally on a thoughtful an eloquent exegesis of the legislative intent and jurisprudence construing the Act.[21]

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[17] *Id.* at 404. § 4 in pertinent part reads: The court shall hear the parties, and upon being satisfied that the making of the argument for arbitration for the failure to comply therewith is not an issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be an issue, the court shall proceed summarily to the trial thereof.

[18] *Id.* at 405.

[19] Erie R. Co. v. Thompkins, 304 U.S. 64 (1938).

[20] Guaranty Trust Co. of New York v. New York, 326 U.S. 99 (1945).

[21] This jurisprudential analysis compels citation in its entirety: It is true that the Arbitration Act was passed thirteen years before this Court's decision in *Erie R. Co. v. Thomkins, supra,* brought to an end the regime of *Swift v. Tyson,* 16 pet. 1, 10 L.E.d. 865 (1842), and that at the time of enactment Congress had reason to believe that it still had power to create federal rules to govern questions of "general law" arising in simple diversity case– at least–, absent any state statute to the contrary. If Congress relied at all on this "oft challenged" power, *see Erie R. Co.,* 304 U.S., at 69, 58 S.Ct., at 818, it was only supplementary to the admiralty and commerce powers, which formed the principle basis of the legislation. Indeed, Congressman Graham, the bill's sponsor in the House, told his colleagues that it "only affects contracts relating to interstate subjects and contracts in admiralty." 65 Cong. Rec. 1931 (1924). The Senate Report on this legislation similarly indicated that the bill "[relates] to maritime transactions and to contracts in interstate and foreign commerce." S.Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). Non–congressional sponsors of the legislation agreed. As Mr. Charles L. Bernheimer, chairman of the Arbitration Committee of the New York Chamber of Commerce, testified before the Senate subcommittee, the proposed legislation "follows the lines of the New York Arbitration Law, applying it to the filed wherein there is Federal Jurisdiction. These fields are in admiralty and in foreign and interstate commerce." Hearing on S.4213 and S.4214, before the Subcommittee of the Senate Committee on the judiciary, 67th Cong., 4th Sess., 2 (1923). In the joint House and Senate hearings, Mr. Bernheimer answered "Yes; entirely" to the statement of the Chairman, Senator Sterling, that "what you have in mind is that this proposed legislation relates to contracts arising in interstate commerce." Joint hearings on S.1005 and H.R.646 before the Subcommittee of the Committee on the Judiciary, 68th Cong., 1st Sess., 7 (1924). Mr. Julius Henry Cohen, draftsman for the American Bar Association of the proposed bill, said the sponsor's goals were: "[F]ist… to get a State statute, and then to get a federal law to cover interstate and Foreign commerce and admiralty, and, third, to get a treaty with Foreign countries." Joint Hearings, *supra,* at 16 (emphasis added). *See also* Joint Hearings, *supra*, at 27–28 (statement of Mr. Alexander Rose). Mr.

III. The Commerce Clause as the Normative Basis for the Federal Arbitration Act

1. Moses H. Cone Memorial Hospital v. Mercury Construction Corp. *(1983): Defining a Concept as a Predicate to the Normative Elevations of International Commercial Arbitration.*

While *Prima Paint* stands, in part, for the unquestioned proposition that in the Federal Arbitration Act finds its genesis and normative foundation in the Commerce Clause, the opinion only suggests that the substantive rules of the FAA are to apply in state as well as in federal proceedings. Consequently, despite implicitly asserting the extraordinary proposition that the Federal Arbitration Act gives rise to a *corpus* of federal substantive law applicable in state and federal fora, this doctrinal development did not attain "explicit status" until 1983, pursuant to the Supreme Court's command in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation.*[22]

The procedural configuration in *Moses H. Cone* is now eminently predicable. The district court stayed the proceeding pending resolution of a concurrent state court case pursuant to an order to compel arbitration, which initiated the entire proceeding. The Supreme Court held that the lower court indeed had abused its discretion because there was no indicia of exceptional circumstances warranting issuance of a stay. In furtherance of its ruling, the Court observed that "the presence of federal–law issues" pursuant to the Federal Arbitration Act was "a major consideration weighing against surrender [of federal jurisdiction]."[23] Consequently it construed the underlying issue of arbitrability as an inquiry of substantive federal law, "federal law in the terms of the Arbitration Act governs that issue in either state or federal court."[24]

Both *Prima Paint* and *Moses H. Cone* illustrate a material doctrinal development that is often undermined, if not altogether ignored, by

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Cohen did submit a brief to the Subcommittee urging a jurisdictional base broader than the commerce and admiralty powers, Joint Hearings, *supra*, a 37–38, but there is not indication in the statute or in the legislative history that this invitation to go beyond those powers was accepted, and his own testimony took a much narrower path. *Id.* at 405.

[22] Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1 (1983).

[23] *Id.* at 26.

[24] *Id.* at 24.

the broader issue concerning the elevation of arbitration to a state of equal status with judicial proceedings and the issue of arbitrability within federal purview. This predicate and essential transformation of arbitration agreements entails their theoretical development such that they may enjoy equal hierarchy with other forms of binding and enforceable contractual arrangements in the pantheon of U.S. jurisprudence. Hence, *Moses H. Cone,* decided sixteen years after *Prima Paint,* renders explicit what was contained only implicitly in the Court's earlier mandate, *i.e.* irrespective of state law considerations, a federal court is empowered to issue a stay in favor of having matters adjudicated pursuant to arbitration and not in the context of court proceedings because the Federal Arbitration Act governs the question of arbitrability in either state or federal fora.

To be sure, while the legislative history is far from being opaque, it is also less than clear on the issue of rendering arbitration agreements enforceable beyond just the federal arena. The House Report may be suggestive of more universal objectives:

The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in the federal courts.[25]

The Supreme Court itself has recognized that "[t]his broader purpose can also be inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce. The Arbitration Act sought to "overcome the rule of equity, that equity will not specifically enforce any arbitration agreement."[26] It is demonstrable that by 1984[27] it was finally meaningfully identified in the jurisprudence that part of the FAA's goal was to ensure parties to an arbitration agreement touching upon interstate commerce that neither federal courts, state courts, nor legislatures would frustrate their expectations. In addition, it also was rendered plain that Congress

[25] H.R. REP. No. 96 (1924).

[26] *See* Southland Corporation v. Keating, et al., 465 U.S. 1, 13 (1984) [citing *Hearing on S.4214 Before a Subcomm. of the Senate Comm. on the Judiciary,* 67th Cong. (1923)] ("Senate Hearing") (remarks of Sen. Walsh). The Court went on to cite the House Report attendant to the bill that stated: "[t]he need for the law arises from… the jealousy of the English courts for their own jurisdiction…this jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that precedent was too strongly fixed to be overturned without legislative enactment"…*Id.* [citing H.R. REP. No. 96 (1924)].

[27] *Southland Corporation,* 465 U.S. at 14.

had been struggling with three rudimentary and, therefore, obstinate problems in fostering the development of arbitration. First, the prejudicial historical legacy of English courts requiring that arbitration proceedings be conducted under the auspices of courts, and that arbitration generally, as a conceptual matter, was somehow against public policy because it "ousted" jurisdiction from courts that otherwise enjoyed competent jurisdiction, weighed heavily on the national collective judicial consciousness. Historical baggage, like old habits, apparently is proverbially hard to abandon.

Second, nationally grown prejudices directed at arbitral proceedings were no less pernicious. The unchallenged precepts that arbitration was ill–suited for the administration of justice arising from certain statutorily created rights as well as the view that arbitrators (together with the arbitral process itself) lacked competence to process complex commercial disputes of a domestic or international nature, certainly hampered legislative efforts to accord arbitration iTs rightful place as an alternative dispute resolution methodology.

Third, Congress had to identify and then confront the problem arising from state arbitration statutes that fail to mandate enforcement of arbitral agreements. The result of these three sectors of influence was a restricted and restrictive reading of the Act that necessarily would limit the Act's scope to arbitrations only sought to be enforced in federal tribunals. Such a reading "would frustrate Congressional intent."

While *Prima Paint* does resolve the inquiry as to whether a federal court or an arbitrator is to adjudicate a claim of fraud in the inducement directed at a contract governed by the FAA absent evidence that the contracting parties intended to segregate that issue from arbitration, it leaves open the question of whether the FAA preempts state legislation that directly and explicitly conflicts with FAA strictures by directing parties to the statutory causes of action in state court. The resolution of this federal preemption issue is an essential condition precedent to the juridic elevation of arbitration agreements to the same level as that enjoyed by commercial contracts. In addition, the resolution of this issue in favor of federal preemption highlight and underscores anew the critical role of the precepts of *party–autonomy,* event thought this principle is not explicitly referenced in *any* of the Supreme Court authority that ultimately answer the four questions[28] addressed by the *Prima Paint, Southland Corporation,*

[28] The four questions are the following: (i) as a matter of substantive federal arbitration law, is an arbitration provision severable from the remaining contract? (ii) is a challenged

and *Buckeye Check Cashing, Inc.,* trilogy. It is asserted that the *de facto* consequence of this tripartite development constitutes an extraordinary juridic evolution that, when analyzed through the prism of globalization generally, and economic globalization in particular is compounded and multiplied as it represents a meaningful contribution to the redefining of the classical paradigm of the judiciary and, therefore, of traditional statehood sovereignty.

2. Southland Corporation v. Keating, et al *(1984).*

The FAA's preemption over state legislation rendering judicially impossible for parties to an arbitration agreement to arbitrate state statutory claims where the statute at issue prescribes judicial resolution to disputes based on the specific statutory rubric, was the Supreme Court addressed this concern in *Southland Corporation v. Keating*[29].

There the Supreme Court observed that it has "probable jurisdiction to consider (a) whether the California Franchise Investment Law, which invalidates certain arbitration agreements covered by the Federal Arbitration Act, violated the Supremacy Clause and (b) whether arbitration under the Federal Act is impaired when a class action structure is imposed on the process by the state courts."[30] The case reached the Court pursuant to a ruling from the California Supreme Court by a vote of 4–2 that reversed a holding that claims asserted under the Franchise Investment Law are indeed arbitrable. The California Supreme Court construed the Franchise Investment Law as requiring "judicial consideration of claims brought under the statute and concluded that the California statute did not contravene the Federal Act."[31] The Supreme Court held that Section 31512 of the California Franchise Investment Law violates the Supreme Clause.[32] Moreover, it also held that "[t]he judgment of the California Supreme Court denying enforcement of the arbitration agreement is reversed".[33] The reversal was predicated on four fundamental proposition.

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to a contract containing a n arbitration clause to be adjudicated by a judge or an arbitrator? (iii) is there a federal substantive law created by the FAA? (iv) is such a law applicable in state as well as federal courts?

[29] *Southland Corporation,* 465 U.S. 1.

[30] *Id.* at 3.

[31] *Id.* at 3–4

[32] *Id.* at 9.

[33] *Id.*

First, it was observed that the California Court's judgment had the plain effect of nullifying a valid and enforceable contract requiring arbitration. Therefore, the ruling explicitly conflicts with the FAA providing "parties to an arbitrable dispute [to move] out of court and into arbitration as quickly and easily as possible."[34] In this regard, it was emphasized that "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts." Further adding that "[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate"[35]. Significantly, analytical support for this rationale is plainly grounded on the precept of *party–autonomy*. The parties' will in electing to resolve disputes pursuant to an arbitral proceeding as clearly embodied in an arbitration clause negotiated at arm's–length is particularly highlighted in the Court's analysis. In fact, direct reference is made to the *Bremen v. Zapata* analysis where, as discussed, the Court observed "that [a] contract fixing a particular forum for resolution of all disputes" was made in an arm's–length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the Courts."[36] The emphasis on party initiative and the deemphasized role of courts in an arbitral context marks an analytical turning point.

Second, the California Supreme Court's construction of the Franchise Investment Law[37] placed that legislation in direct and explicit conflict with Section 2 of the Federal Arbitration Act. Thus, the Court found that the Franchise Investment Law "violate[d] the supremacy

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[34] *Id.* at 5–6 [citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 104 460 U.S. 1 (1983)].

[35] *Id.*

[36] *Id.* (citing *The Bremen,* 407 U.S. at 14). Here the Supreme Court also stressed that in *Zapata* it deemed an arbitration clause to be a special kind of forum selection clause. While this proposition is plagued with conceptual difficulties that distort the nature of both arbitration and judicial proceedings, those issues do not detract from the Court's explicit, although not articulated, return to *party–autonomy* as a conceptual fulcrum to be used in according arbitration the same hierarchy as judicial proceedings and arbitration contracts the same judicial integrity as commercial contract. It is also important to note that by 1984, one year before its seminal decision in *Mitsubishi,* the Court no longer finds it necessary to engage in a protracted recitation of the four badges of prejudice that nourished judicial contempt for arbitration, even though it does not refer to the "old common law hostility toward arbitration". *Id.* at 860.

[37] The California Franchise Investment Law states:

Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void. Cal. Corp. Code § 31512 (West 1977).

clause."[38] After asserting that in enacting Section 2 of the FAA Congress was instituting a national policy favoring arbitration and divesting states from legislatively requiring dispute resolution pursuant to judicial proceeding,[39] the Court discerned only two limitation governing the enforceability of arbitration pursuant to the Federal Arbitration Act. First, the provisions of the FAA "must be part of the written maritime contract or a contract 'evidencing a transaction involving commerce'"[40] Second, such a clause only may be revoked upon "grounds as exist at law or in equity for the revocation of any con-

[38] *Southland Corporation,* 465 U.S. at 10.

[39] This proposition has elicited has elicited as much controversy as Justice Burger's majority opinion holding that the FAA was intended to apply to state court proceedings as well as federal cases. Justice Thomas and O'Connor have vigorously criticized the opinion and perhaps it is precise to state that most scholars agree that the FAA's legislative history does not contain any explicit language supporting this proposition. In fact, some scholars argue that "[t]he structure of the [FAA] reveals an unquestionably integrated, unitary statute, consisting of core provisions and provisions supplementing them." Ian R. MacNeil, *America Arbitration Law: Reformation,* 105–06 (1992). Professor MacNeil also asserts that the FAA was designated to apply only to federal courts, *i.e.* one jurisdiction, based upon his own exegesis drawn from the historical fact that the FAA was patterned after the New York arbitration law. In a very thoughtful article by Christopher R. Drahozal entitled *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act,* Mr. Draozal disagree with Professor MacNeil's conclusion that "[a]ny reading of the ... [FAA] leading to substantive and procedural parts with difference applicability creates a monstrosity found nowhere else in the world of American arbitration." Ian R. MacNeil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 107 (1992). Mr. Drahozal argues that:

As the above description of the FAA demonstrates, the language of the Act supports construing § 2 to apply more broadly that the rest of the Act. § 2 alone by its terms applies to maritime transactions and transaction in interstate commerce, which could cover proceedings, in federal and state court. The rest of the Act creates procedures applicable only in federal court, I do not suggest that the language of the Act requires this interpretation, but it certainly is a plausible one.

Moreover, the facts that the FAA is based on New York arbitration law –which does not bind courts other than New York courts– does not show that the FAA likewise applies only in a single jurisdiction. MacNeil disregards a key distinction between the New York arbitration law and the FAA: the drafters of the FAA inserted the phrase "maritime transactions and contracts evidencing a transaction involving commerce" into § 2. Obviously, no jurisdictional nexus was present in the original New York law. Plainly, the drafters of the FAA knew that they were crafting a statue for a federal system in which federal law is supreme over state law. Their use of the New York model does not demonstrate that § 2 is limited to a single jurisdiction, *i.e.* federal court. Finally, it is not surprising that there is no similar statute elsewhere in American arbitration law, since the FAA was designated to be enacted by the national government in a federal system, while other arbitration laws are enacted by the states. Ch. Draozal, "In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act", 78 *Notre Dame L. Rev.* 101, 112 (2002).

[40] *Southland Corporation,* 465 U.S. at 10.

tract."[41] Obviously, neither limitation proscribes applicability to state courts, so the argument says.

Third, borrowing from its *Prima Paint* opinion entered seventeen years earlier –1967– the Court observed that its prior construction of the FAA's legislative history led it to conclude that the statute "is bases upon...the incontestable federal foundations of "control over interstate commerce and over admiralty."[42] Thus, the Court amplifies its reasoning by observing that Congressional authority as to the commerce clause has a long–standing juridic history of having been deemed plenary[43]. After establishing, at least to its satisfaction, this minor premise, the majority concludes that it follows that because the Arbitration Act "was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts"[44].

Thus, at this juncture, in reversing the California Supreme Court's ruling, the Court has construed the FAA (i) as having substantive *and* procedural provisions[45], (ii) where the substantive provisions apply to *both* federal and state courts, and (iii) as encompassing only two limitations on the enforceability provisions: (a) the provision must be part of a written maritime contract or a contract concerning a transaction that touches and concerns commerce, (b) the clause would be susceptible to revocation based on extant legal principles or equitable principles applicable to all contracts.

The opinion candidly acknowledges that "[a]lthough the legislative history is not without ambiguities, there are strong indications that Congress had in mind more than making arbitration agreements enforceable only in the federal courts". The House Report plainly suggests the more comprehensive objectives:

The purpose of this bill is to make valid and enforceable agreements for arbitration contained in *contracts involving interstate*

[41] *Id.*

[42] *Id.* [citing Prima Paint Corp. v. Flood & Conklin Mfg. Corp., 87 S.Ct. at 1806 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)]

[43] *Id.* at 12 [referencing Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. 1 (1824)].

[44] *Id.*

[45] Based on this analysis federal courts, for example, on the issue of punitive damages, hold that an arbitral tribunal's award granting punitive damages preempts state law or policy otherwise proscribing such awards. *See e.g.,* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Raytehon Co. v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989) (holding that arbitration award entered pursuant to AAA rules allowing for punitive damages was proper); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1062 (9th Cir. 1991) (same).

commerce or within the jurisdiction of admiralty, *or* which may be the subject of litigation in the federal courts.[46]

Critical to the majority opinion is the ability to broaden the Act's scope and purpose, which it derives from the proposition "that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce"[47]. Thus, the Court added that "[t]he Arbitration Act sought to overcome the rule of equity, that equity will not specifically enforce any arbitration agreement"[48]. The struggle to find a predicate on which to ground Congressional intent justifying a broader scope and purpose for application of the Act is certainly a debility that pervades the opinion and that has spawned the referenced criticism. Indeed, perhaps too much ink has been spilled on this issue. Although academically intriguing, it hardly warrants a probing or cunning analysis aspiring to questioning the need for the amplified construction. To be sure while the majority is not persuasive in its analysis it is devastatingly so in its conclusion. [49] Put simply, the "broader purpose" of the Act that the majority gleans from the legislative history

[46] *Id.* at 12 [citing H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)] (emphasis supplied).

[47] *Id.*

[48] *Id.* [citing Hearing on S.4214 before a Sub Comm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 6 (1923)] ("Senate Hearing") (remarks of Sen. Walsh). Also citing to the House Reporting accompanying the Bill: "[T]he need for the law arises from…the jealousy of the English courts for their own jurisdiction…this jealousy survived for so lon[g] a period that the principle because firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment…" H.R. Rep. No. 96, *supra*, 1–2 (1924).

[49] This opinion is well articulated by Mr. Drahozal. He eloquently states: I agree that the Chief justice's opinion failed persuasively to make the case that the FAA applies in state court. But the Chief Justice nonetheless reached the correct conclusion…a reexamination of the FAA's legislative history reveals that while the "primary purpose" of the FAA was to make arbitration agreements enforceable in federal courts, a secondary purpose was to make arbitration agreements enforceable in state court [citation omitted]. A contemporaneous commentator, overlooked by the critics, sums it up well: "[t]he Act is broad enough to apply to actions commenced in state courts as well as to those instituted in federal courts, and it was so intended by those who drafted it." [citation omitted]. While ambiguities in the legislative history remain, this interpretation of the legislative history remain, this interpretation of the legislative history results in fewer ambiguities than the prevailing interpretation . Chirstopher R. Drahozal, *In Defense of Southland: Reexamining the legislative History of the Federal Arbitration Act,* 78 Notre Dame Law Review 33 (2002). Eventhough it far from clarifies any ambiguity in the legislative history, there is merit in the Court's observation that Congress faced two problems: "the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements." *Southland Corporation,* 465 U.S. at 14.

and statutory constructions that lead to greater coherence and uniformity in both analysis and application, merits serious consideration.

Fifth, Justice O'Connor's quite viable contention that Congress understood the FAA "as a procedural statute applicable only in federal courts"[50], is frontally addressed by referencing the opinion's ever present war horse, contracts "involving commerce," as an express limitation to be read together with the limitation that would arise had Congress called on the Commerce Clause to evidence the Act's state court application but then find itself limited only to transactions involving interstate commerce[51].

The Court reasoned that the anomaly in Justice O'Connor's construction of the Act causing claims brought pursuant to the California Franchise Investment Law in state court to be non–arbitrable cannot be reconciled with the proposition that were such a claim brought in a federal district court with subject matter premised on diversity jurisdiction, under such scenario, "the arbitration clause would have been enforceable"[52].

Perhaps most persuasive is the proposition that it would be odd, if not altogether ill–conceived, to ascribe to Congress "the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a *right* to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted"[53]. This argument is bolstered, particularly when considering the Act's presumably broader scope, by the perplexing statistics establishing that the overwhelming number of civil litigation cases filed in the United States rest in state courts. Here are the Court, naturally limited to the date on which the opinion issued in 1984, identified rather astonishing statistics. Only two percent (2%) of all civil litigation in the United States is filed in federal courts.[54] Two hundred and six thousand (265,000) filing were recorded during a twelve month window ending on June 30, 1982, excluding traffic cases, in state courts[55].

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[50] *Id.*

[51] *Id.*

[52] *id.* The Court found the arbitration clause to encompass claims under the California Franchise Investment Law. The clause, in pertinent part, reads: "Any controversy or claim arising out of or relating to this Agreement or the breach hereof," appears broad and general enough to include the statutory cause of action.

[53] *Id.*

[54] *Id.* at 16, n. 8 [citing to Administrative Office of the United States Court, Annual Report of the Director 3 (1982)].

[55] *Id.*

The most salient single proposition in *Southland* is the assertion that in fashioning substantive provisions forming part of the FAA, these provisions are applicable both to state and federal courts, and, therefore, wrest from state legislatures the ability to undermine or otherwise circumvent the Federal Arbitration Act. While even today the debates arising from the Act's legislative history remain as relevant as ever, and similarly as never ending rich material for scholastic analyses, the conclusion is powerful and compelling. It is a tortured reading of the FAA to limit its application only to the realm of federal jurisdiction. Such a construction surely would carve out from the Act its effectiveness, particularly in light of the staggering state court filings when compared to federal court proceedings initiated during a comparable time frame. It would also, as the Court to some extent articulated or tried to articulate, condition a right on the forum on which it is filed. Lastly, the hypothetical that the majority opinion crafted concerning a federal court sitting in diversity where the parties have executed an arbitration agreement that constitutes the subject matter of the federal court filing is certainly illustrative and represents an aberration to the precepts that Justice O'Connor proposed.

Prima Paint and *Southland Corp*. answer the four questions posed. First, as a matter of substantive federal arbitration law an arbitration provision is severable from the remaining contract. Second, a challenge to a contract containing an arbitration clause at first instance is to be adjudicated by an arbitrator so long as the challenge is not directed at the arbitration clause itself. Third, the FAA does create a substantive federal law having a normative basis in the Commerce Clause. Fourth, the substantive law provisions of the FAA are applicable to both state and federal fora.

Incident to this time frame was virtually a vertical increase in international commercial arbitration.[56] Thus, the stage was poised for the Court to sharpen and amplify the doctrinal development that it had initiated with *Prima Paint* and continued in *Southland Corporation*. An important permutation of the issues addressed in those two cases is "whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality"[57]. The Court's analysis and opinion highlight a conceptual refinement of the issues first addressed in *Prima Paint* and redefines the role of judicial intervention in arbitral proceedings as well as the

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[56] Catherine A. Rogers, *Emerging Dilemmas in International Economic Arbitration: The Vocation of the International Arbitrator,* 20 AM. U. INT'L L. REV. 9957, 965 (2005).

[57] Cardegna v. Buckeye Check Cashing, Inc.,, 546 U.S. 440 (2006).

meaningful return to *party–autonomy* as a guiding principle in common law jurisprudence as well as the law of arbitration. It is precisely this return to party–autonomy, to the private sphere of the individual and not the state, that should be understood as the very embryonic development leading to the transformation of the role of the judiciary in international affairs and, ultimately to a radical change in the traditional meaning and rise of the principle of national sovereignty. *Buckeye Check Cashing Inc., v. Cardegna* has drawn praise and criticism from judges, practitioners, and commentators.

3. Relinquishing Sovereignty in Favor of Arbitration: Cardegna v. Buckeye Check Cashing, Inc. *(2006)*

Buckeye Check Cashingi is a procedural rosary of reversals. Here respondent (plaintiff) filed a putative class action in Florida circuit court averring that petitioner (defendant) "charged usurious interest rated and, that the Agreement violated various Florida lending and consumer–protection laws, rendering it criminal on its faces."[58] The trial court denied petitioner's subsequent motion to stay or dismiss the state court proceeding in favor or arbitration.[59] In denying petitioner's motion, the court held that a judicial tribunal rather than an arbitration panel as a matter of law should adjudicate the specific and narrow issue of whether the contract is illegal and void *ab initio*.

Florida's Fourth District Court of Appeal reversed the trial court ruling on the theory that respondents failed to challenge the arbitration provision itself at the trial court level and instead elected to aver that the contract in its entirety was void, the agreement to arbitrate was enforceable, and the issue concerning the contract's legal viability should be determined by an arbitrator.[60]

On appeal the Florida Supreme Court, which reversed the Fourth District Court of Appeal, embraced the premise that enforcement of

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[58] *Id.* at 443

[59] The contract at issue contained an arbitration clause providing that: "2. *Arbitration Provisions*. Any plain, dispute, or controversy...arising from or relating to this Agreement....or the validity, enforceability, or scope of this Arbitration Provisions or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or us or said third–parties, by binding arbitration... this arbitration Agreement is made pursuant to a transaction involving intrastate commerce, and shall be governed by the Federal Arbitration Act ("F.A.A.") 9 U.S.C. § 1–16. The arbitrator shall apply applicable substantive law consistent *[sic]* with the F.A.A. and applicable statu[t]es of limitations and shall honor claims of privilege recognized by law..." *Id.*

[60] *Id.*

an arbitral agreement in a contract challenged as unlawful "could breathe life into a contract that not only violates state law, but also is criminal in nature..."[61]

The two reversals (the Fourth District Court of Appeals revising the trial court, and the Florida Supreme Court reversing the Fourth District Court of Appeal) were followed by the Supreme Court's reversal of the Florida Supreme Court on the narrow question of "whether a court or an arbitrator should consider the claim and that a contract containing an arbitration provision is void for illegality."[62]

Providing an arbitration agreement, *i.e.,* an arbitration clause, with the *same* juridic hierarchy as a commercial contract is a predicate for discerning between two different challenges requiring disparate analyses and attendant conclusions. First, the Court adjudicated a challenge to the validity of the arbitration clause or the agreement to arbitrate, as was the case in *Southland Corp*[63]. The second challenge concerns testing the legality of the underlying contract memorializing the commercial transaction and issue that also contains an arbitration clause. Here, the argument says, the entire agreement would be rendered unenforceable because, by way of example, it could have been fraudulently induced, the agreement may be illegal because it seeks to realize an objective that is against public policy, or the very illegality of one of the contract's clauses may render the whole contract invalid.[64] Upon review of the complaint, the Court underscored that it is the second, *i.e.,* a challenge to the contract as a whole and not specifically to the arbitration clause, that brings before it the issue concerning whether court or arbitrator should adjudicate the validity of the contract.

Four critical premises were analyzed in highlighting the primacy of the arbitral process, the precept of *party–autonomy,* and the new role of judicial intervention in arbitral proceedings. First, the Florida Supreme Court had placed considerable weight on the distinction

[61] *"Buckeye Check Cashing,* 894 So.2d at 8623 [quoting Party Yards v. Templeton, 751 So.2d 121, 123 (Fla. App. 2000)]"

[62] *Id.* at 442.

[63] The Supreme Court characterized the issue in *Southland Corp.* as "challenging the agreement to arbitrate as void under California law and so far as it purported to cover claims brought under the State Franchise Investment Law." *Id.* at 444.

[64] *Id.* The opinion emphasizes that because "[t]he issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and oblige was ever concluded, [o]ur opinion today addresses only the former, and does not speak to the issue decided in the case cited by respondent (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract [citations omitted]."

arising between "void" and "voidable" contracts. Indeed, it asserted that "Florida public policy and contract law," permit "no severable, or salvageable, parts of a contract found illegal and void under Florida Law."[65] The Court rejected this proposition based upon its understanding of *Prima Paint*. Specifically, the Supreme Court observed how "[t]hat case rejected application of state severability rules to the arbitration agreement *without discussing* whether the challenge at issue would have rendered the contract void or voidable."[66] In addition, further analytic support was drawn form *Southland Corp*. where the Court deliberately and explicitly rejected *not* to consider whether the legal and factual averments in the underlying complaint rendered the contract at issue either void or voidable. Instead, it disavowed the assertion that the enforceability of an arbitration agreement is contingent upon a state legislature's determination as to the applicable forum for enforcement of a state law statutory cause of action.[67] Likewise, the Court held that it "cannot accept the Florida Supreme Court's conclusion that the enforceability of the arbitration agreement should turn on 'Florida public policy and contract law'".[68]

Second, the FAA's "substantive" command in Section 2 was emphasized in the context of the Court's prior ruling in *Prima Paint*. Not surprisingly, respondents had argued that *Prima Paint's* stricture only was predicated on Sections 3 and 4 of the FAA's "procedural" provisions, further asserting that both these sections exclusively applied to the Federal Court, while Section 2 is the only provision that the Supreme Court had applied to state courts. This contention was rejected in what is, in effect, a scholarly critique of the Court's own analysis in *Prima Paint*. Specifically, the Supreme Court observed that while "Section 4, in particular, had much to do with *Prima Paint's* understanding of the Rule of Severability [citation omitted]", the Court explained that the severability doctrine has it genesis in Section 2 of the FAA. Therefore, "[r]espondent's reading of the *Prima Paint* as establishing nothing more than a Federal–Court rule of procedure *also* runs contrary to *Southland's* understanding of that case."[69] Not to place epicycles upon epicycles in a ptolomaic effort "to save the appearance", *Southland's* own application of Section 2 is for

[65] *Buckeye Check Cashing*, 894 So.2d at 864.
[66] *Id.* at 446 (citing to *Prima Paint,* 388, U.S. at 400–404).
[67] *Id.*
[68] *Id.* (citing *Buckeye Check Cashing,* 894 So.2d at 864).
[69] *Id.* at 447. It is worth reiterating for completeness' and clarity's sake that the "substantive directive of § 2 of the FAA is that Arbitration agreements are to be accorded the *same* juridic hierarchy as any other contract." (emphasis supplied)

[its holding] on Congress' broad power to fashion substantive rules under the Commerce Clause"[70]

Consequently, the Court in *Buckeye* held that the Severability Doctrine is applicable to the case at bar because of an inquiry finding that the 1967 ruling in *Prima Paint* addressing Sections 3 and 4 of the FAA and thus developing the *Severability Doctrine* from the 1953 single sentence ruling in *Wilko,* is applicable to state courts proceedings and found to be such in *Southland* in 1984 because of the Doctrine's foundation on Section 2 of the FAA, which in turn rests on judicial acknowledgement of Congress' broad powers to craft substantive rules pursuant to the Commerce Clause. The normative sequence is the following:

(1) *Prima Paint* in deciding whether a federal court or arbitrator is to adjudicate fraud in the inducement and misrepresentation claims of the underlying contract containing the arbitration clause, crafts the Severability Doctrine but only in the context of interpreting Sections 3 and 4 of the FAA;

(2) *Southland* applies Section 2 of the FAA to a state court proceeding concerning the prosecution of state legislation (the California Franchise Investment Law) based upon its reading of *Prima paint* as resting on Congressional authority to fashion substantive rules pursuant to the Commerce Clause;

(3) The Supreme Court in *Southland* concludes that that Section 2 of the FAA is the substantive provision based upon the Commerce Clause upon which *Prima Paint's* analysis of Section 3 and 4 of the FAA can only ultimately be predicated;

(4) Thus, the Supreme Court in *Buckeye* finds a normative basis in rejecting the Florida Supreme Court's public policy contention that enforceability of the contract should rest on Florida public policy and contract law.

Third, respondents advanced the remarkably circular sophistical pronouncement that because the underlying contract containing the arbitration agreement was void *ab initio* under Florida Law, and Section 2 of the FAA only applies to contracts that are "valid, irrevocable and enforceable", there is no conceivable contract or agreement to

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[70] *Id.* [citing *Southland,* 465 U.S. at 11, *and Prima Paint* 388 U.S. at 407 (Black, J., dissenting)] ("[t]he Court here hold that the [FAA] as a matter of *Federal Substantive Law…") (*emphasis added). In this connection, the Court stressed that in *Southland* it had refused to "believe Congress intended to limit the Arbitration Act to disputes subject only to *Federal –Court* jurisdictions." *Id.* (citing to 465 U.S. at 15).

which Section 2 can possibly apply.[71] The Supreme Court analyzed this issue by scrutinizing Section 2 of the FAA so as to glean a broader understanding of the word "contract" within the meaning of Section 2[72].

Finally, even though under the *Prima Paint* rubric a court and not an arbitrator, conceivably may enforce an arbitration clause that an arbitrator later finds to be void, as respondents suggest, "it is equally true that respondent's approach permits a court to deny effect to an arbitration provision in a contract that the Court later finds to be perfectly enforceable"[73]. This *apparent* anomaly is reconciled by the *Prima Paint* doctrine providing for separate enforcement of the underlying contract and the arbitration agreement, *i.e.* the Severability Doctrine.

In addition to refining the doctrinal framework establishes in *Prima Paint* and *Southland Corp.,* which answered the four queries here identified, *Buckeye* serves as a guile to interpreting both *Prima Paint* and *Southland Corp's. together* as part of a doctrinal and conceptual development seeking to emphasize

(i) the FAA's federal preemption so as to render conceptually possible the proposition,

(ii) the FAA has substantive provisions,

(iii) these substantive provisions apply both to federal and state fora,

(iv) that Section 2 is the basis for the FAA's substantive directives, and

(v) the substantive command contained in Section 2, which pervades Sections 3 and 4, is ultimately grounded on Congress' broad powers to craft substantive rules based upon the Commerce Clause.

Certainly, as Justice Thomas' rather abbreviated dissent seeks to emphasize, concerns have not been dispelled or otherwise even allayed with respect to the very fundamental issue of whether the FAA applies to state courts. The Act's legislative history is ambiguous and extremely difficult to construe in any definitive manner. As already

[71] *Id.* at 447.

[72] The Court stated: We do not read "contract" so narrowly, the word appears four times in § 2. its last appearance is in the final clause which allows a challenge to an arbitration provision "upon such grounds as exists at law or in equity for the revocation of any "contract". (Emphasis added). There can be no doubt that "contract" as used this last time must include contracts that later prove to be void. Otherwise, the grounds for revocation would be limited to those that rendered a contract voidable–which would mean (implausibly) that an arbitration agreement could be challenged as voidable but not as void. *Id.* at 448.

[73] *Id.*

referenced, the analysis in *Prima Paint* on the issue is far from overwhelmingly compelling. *Prima Paint, Southland Corp.,* and *Buckeye* do constitute an important trilogy that enriches the doctrinal development of arbitration in the United States and, therefore, in the world. All three cases, decided during a thirty–nine year time frame, seek to place arbitration contracts at the same juridic level as commercial contracts. The trilogy also bolsters arbitration's juridic integrity and standing by redefining the relationship between arbitration and judicial proceedings.

IV. Conclusion

These judicial efforts are susceptible to meaningful and material critique with respect to technical matters of statutory construction and *tour de force* arguments that do bring to mind the proliferation of epicycles identified in Ptolemy's *Almagest* so as to reconcile recurring discrepancies that challenged a rubric that sought to "save appearances" where the underlying premise was predicated on the proposition that the sun revolved around the earth. Irrespective of the intellectual and conceptual debilities that rendered possible the Severability Doctrine, judicial tenets rendering Section 2 of the FAA's application to state courts, the importance of the principle of *party–autonomy*, and the doctrine of limited judicial intervention in arbitral proceeding, were significantly advanced. These developments simultaneously enhanced arbitration's standing while diminishing even further the last vestiges of historical prejudice that fueled judicial contempt and skepticism for arbitration.

Hegel's aphorism here finds a quite suitable home; "the owl of Minerva flies at dusk." Indeed, perhaps it is certain that wisdom is attained with the passage of time and the passing of events, and only then is a comprehensive attainment of knowledge at all possible. If so, *today* it would appear to be quite a myopic reading to construct and interpret the redefined role of the judiciary, the primacy of arbitration agreements, in part based upon the new normative standing ascribed to international contracts, and the protagonistic role of the precept of *party–autonomy* as just mere refinements of the jurisdictional workings of both domestic and international arbitral proceedings. Instead, as "children of our times" we are witnessing the development of a judicial framework that slowly but steadily is diminishing the state's role in the equitable administration of justice. It follows that any such transformation also cannot be severed from a significant modification

of the of most rudimentary elements of classical sovereignty and statehood: the judiciary. This transformation could not have been predicted with any greater apodictic certainly than our musings concerning its final development in time. Yet there is rigorous predictive value in the proposition that economic globalization, and globalization generally, has affected, and will continue to affect, the configuration of traditional notions of sovereignty, the State, nationhood, nationalism, and international law. These particular details characterizing the subject material transformations are as challenging to predict as the predictive value that we can now engraft unto the movement of tropisms themselves: absolutely none. How international law will change or give way to a global law no person can detail. We live in interesting times. But then again, so too said Homer.