Introduction

In the Museo del Prado there hangs a masterful work by Francisco de Goya entitled “Duelo a Garrotazos,” meaning “Duel with Clubs.”¹ This canvas is arresting and foreboding. Set in the context of a stark sunset, two men face one another, both buried knee high so as to preclude any hope of escape, armed with clubs that are being swung in each other’s direction. Their inability to dodge blows or otherwise flee from the deadly contest is underscored by the sense of rigidity arising from being “planted.” The menacing intuition in the spectator of lethal harm is eloquently spawned by the outstretched clubs that inevitably shall find their immovable, fixed targets.

Pursuant to this methodology, the underlying dispute shall somehow be settled and the particular conflict resolved by agreement of the parties, without State intervention or furtherance of national social policies incident to otherwise dispositive judicial recourse. Moreover, the parties will have achieved the desired goal based on having freely consented to this formula of dispute resolution. They took pains to agree to the terms of this dispute resolution methodology. The difficulties in reaching the perfect agreement were indeed significant. Both men opined that the subject matter of the underlying dispute was not fit for adjudication in mere judicial tribunals. After all, an affront to a person’s honor is a stain that only blood can cleanse. They also sought efficiency, expediency, and, most of all, finality. The nature of the dispute and its practical consequences could not be submitted to de novo review. In this scenario “the law’s delay” would find no space.

Domestic and international institutional arbitration in the United States, much like Goya’s “alternative dispute resolution” depicted in “Duel with Clubs,” was perceived by commentators, the judiciary, practitioners, and captains of industry as a blunt and imprecise methodology for dispute resolution.² In addition to finding

¹ Francisco de Goya, Duelo a Garrotazos, circa. 1820–1823, mural transposed to linen, 123 × 266 cm.; donation of Emile d’Erlanger.
² See, e.g., Wilko v. Swan, 346 U.S. 427, 438 (1953), overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (“[I]t has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.”); Am. Safety Equip. Corp. v. J.P. Maguire & Co., Inc., 391 F.2d 821, 828 (2d Cir. 1968) (“In some situations Congress has allowed parties to obtain the advantages of arbitration if they ‘are willing to accept less certainty of legally correct adjustment,’ but we do not think that this is one of them. In short, we conclude that the
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Arbitral proceedings bereft of the expertise and procedural safeguards endemic to judicial processes, arbitrators also were viewed as wanting in authority to award even liquidated damages, costs, punitive damages, or attorneys’ fees under most statutorily crafted causes of action, if not pursuant to all claims irrespective of normative foundation. In the United States, however, the pendulum now has swung, perhaps, to maximum apogee in the opposite direction.

Four specific factors have contributed to the recognition of arbitration as being in pari materia with judicial proceedings. First, the U.S. Supreme Court has interpreted the “international contract” as a normative basis for according special deference to arbitral proceedings in an international context. Regrettably, this development too often is overlooked.

Second, in poignant contrast to the orthodox view of arbitration as a blunt and imprecise instrument contrary to the equitable administration of justice in specialized complex judicial proceedings, a perceived need for specialization akin to the creation of unique subject matter tribunals has given rise to a plethora of uniquely tailored institutional arbitral proceedings in domestic arbitration.

Antitrust claims raised here are inappropriate for arbitration.” (citation omitted); Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 203 (1956) (“For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial.”); Barrentine v. Arkansas–Best Freight Sys., Inc., 450 U.S. 728, 744 (1981) (“Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA [Fair Labor Standard Act], thus depriving an employee of protected statutory rights.”); McDonald v. City of W. Branch, Mich., 466 U.S. 284, 291–92 (1984) (“Finally, arbitral fact finding is generally not equivalent to judicial fact finding. As we explained in Gardner–Denver, [the] record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.”) It is apparent, therefore, that in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial. Consequently, according preclusive effect to arbitration awards in § 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide.” (quoting Alexander v. Gardner–Denver Co., 415 U.S. 36, 57–58 (1974)) (citation omitted); and Gardner–Denver, 415 U.S. at 56–57 (“Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.”).


Third, the beginning of the new millennium emphasized a unique phenomenon in the history of private procedural international law. The absence of civil and commercial transnational courts is glaring. Parties engaged in transnational commerce may (i) submit to the jurisdiction of foreign courts, (ii) refrain from engaging in cross-border commercial activities, or (iii) avail themselves of arbitration as a preferred methodology for international dispute resolution. From a pragmatic standpoint, the first two options are not functional. Only international arbitration may serve as the conceptual historical dispute resolution bridge until, if ever, international civil and commercial tribunals come into being to administer justice equitably in transnational disputes of this ilk.

Finally, the most “recent” historic revolution of international transcendence is economic globalization. Porous borders in the ken of international commerce find no historical economic precedent. The international community now experiences the virtually instantaneous flow of funds as part of the ordinary course of business forming part of international commercial transactions. The complexities common to multiple jurisdictions, different judicial and cultural backgrounds among business persons, and increasingly intricate corporate and juridic entities serving diverse functions under the banner of “expediency and economic efficacy” all militate in favor of a methodology for dispute resolution that comports with the parties’ expectations concerning the fair administration of justice as well as the application of respective judicial cultures. Vestiges even of familiarity matter. Only arbitration is capable of satisfying both prongs.

Arbitration in the United States has experienced vertical and horizontal proliferation. The verticality resides in a unique and rather inordinate degree of specialization generated by the rigors of particular industry and professional needs. The horizontality has been generated by the practically universal acceptance in the United States of arbitration as a flexible, reliable, and predictable methodology for domestic and international dispute resolution that fosters party-autonomy, uniformity, transparency of standard, and predictability, while preserving the parties’ cultural and juridic expectations. The recognition of arbitration clauses as being in pari materia with ordinary contracts, let alone judicial proceedings, however, was a gradual and somewhat painstaking process. To be sure, it is yet to find its finest paradigm.

This discussion is divided into nine specific chapters. The first chapter focuses on the development, formation, and transformation of the status of arbitration (both domestic and international) in the United States. Here, emphasis is placed on what will be identified as the “historically conventional view of arbitration in the United States.” The second chapter consists of an analysis of shifting paradigms based on


Indeed, the American Law Institute has undertaken laudable efforts in the daunting task of developing transnational rules of civil procedure. The consultative group charged with this effort has generated very serious, coherent, and virtually viable work product. Despite these gains, however, the requisite “hybrid” and “cross fertilization” of multiple legal cultures across the entire globe remains both strategically and tactically quite distant.
critical exploration of the United States Supreme Court’s strictures in Wilko v. Swan,7 Scherk v. Alberto-Culver Co.,8 and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.9 While this particular story has been told and retold, rarely has it been historically contextualized. The third chapter reviews the development and current status of the doctrine of arbitrator immunity-liability.

Comparative models between the U.S. common law and civil law jurisdictions are discussed. The role of the Supreme Court’s post-Civil War Reconstruction Era opinions are re-examined as part of the effort of exploring the doctrine’s development. It is asserted that post-U.S. Civil War Supreme Court jurisdiction profoundly has influenced the U.S. common law on arbitrator immunity.

The fourth chapter discusses the role of 28 U.S.C. § 1782 in international commercial arbitration. Specifically, “the taking” or “gathering of evidence” is compared and contrasted to common law discovery. Emphasis is placed on the construction of a new paradigm asserting that when submitted to reasoned examination, the taking or the gathering of evidence has failed to generate sufficient timely transparency to contribute to creating appropriate settlement conditions. It is suggested that American common law discovery is configured and organized by many of the very fundamental tenets that international commercial arbitration seeks to preserve and to promote: most notably, party-autonomy and transparency.

It also is suggested that arbitral procedural law in the context of “evidence gathering” has undergone a revolutionary transformation such that it shall require continental law practitioners to appreciate narrow and limited fundamental principles of U.S. common law discovery. The “revolutionary trilogy” beginning with the U.S. Supreme Court’s directive in Intel Corp. v. Advanced Micro Devices, Inc.,10 In re Application of Roz Trading Ltd.,11 and In re Clerici,12 is identified in support of this proposition, without suggesting that even a partial importation of U.S. style discovery into international arbitration is desirable or possible.

Chapter 4 also focuses on the role of party-autonomy in the gathering of evidence, as well as the taking of discovery in international commercial arbitration.

The fifth chapter consists of a discussion of the International Bar Association (“IBA”) Rules on the Taking of Evidence in International Arbitration, with reference to the Rules of Arbitration of the International Chamber of Commerce, the Rules of the International Center for Dispute Resolution, and the Rules of the London Court of International Arbitration. This section culminates with a synthesis of international arbitration rules analyzed through the prism of party-autonomy and some of the more salient features comprising the very fabric of the common law. Chapter 5 also explores the “Prague Rules.”

7 346 U.S. 427 (1953); see also Rodríguez de Quijas, 490 U.S. at 484 (“We now conclude that Wilko was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions. Although we are normally and properly reluctant to overturn our decisions construing statutes, we have done so to achieve a uniform interpretation of similar statutory language, and to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation. Both purposes would be served here by overruling the Wilko decision.”) (citations omitted).
9 473 U.S. 614 (1985) (see also Appendix B).
12 481 F.3d 1324 (11th Cir. 2007).
Chapter 6 primarily focuses on the development and application of the common law doctrine of Manifest Disregard of the Law, and perhaps on its very disappearance. It undertakes this discussion, however, through paradigms exploring methodologies for possibly avoiding 28 U.S.C. § 1782.

Chapter 7 explores the issue of “perjury in arbitration.” It discusses the issue through the lenses of a comparative approach to “truth-telling” and “oath-taking” in non-U.S. jurisdictions, and judicial proceedings.

Chapter 8 discusses developments in the apportionment of jurisdiction between arbitrators and courts concerning the validity of contracts containing arbitration clauses, as well as developments pertaining to the severability doctrine and its connection to the U.S. common law on adjudicating challenges to the arbitral tribunal’s jurisdiction. The issue of orthodox and U.S. common law arbitrability as a gateway issue also is reviewed.

The ninth and final chapter analyzes U.S. arbitration doctrinal developments and their dialogue with the New York Convention (the “Convention”) (see Appendix A). Four discrete issues are reviewed: (i) the relationship between non-signatories to arbitration agreements and their obligation to arbitrate, (ii) jurisdiction over an arbitral award debtor as a predicate to enforcement, (iii) the interjection of forum non conveniens in arbitral enforcement proceedings, and (iv) the tensions between rendering states and secondary enforcing states with respect to annulled international arbitration awards.

These topics were selected because of their practical importance. Also, their doctrinal development was very much considered in the selection process. Certainly they are far from exhaustive in terms of major U.S. common law influences on international commercial arbitration.

The aspiration in exploring these doctrines is to examine transformative moments, both historical and conceptual, and their respective development so that the very workings of the common law may be examined, much like a histology of the common law, in order to learn the manner in which historical development affects these principles as they exist today. Notably, each topic shares the need to fashion doctrinal paradigms of development that promote the core arbitration tenets of uniformity, party-autonomy, certainty, and transparency of standard. Each also constitutes a part of a more comprehensive whole such that a single part cannot be modified without altering the entire construct.

This text does not assert that all of these developments are positive or necessarily at all favorable to international commercial arbitration. A number of them are not. The development of absolute arbitrator immunity, for example, certainly is not heralded as a paradigm to be followed by the international arbitration community. The scope of Fed. R. Civ. P. 26(b)(1) as to the definition of “relevance” never should find any space in arbitral evidence gathering rubric, nor are the Supreme Court’s more notable pronouncements on competence-competence at all worthy of replacing the understanding and practical workings of that doctrine as followed by a majority of jurisdictions globally. Similarly, U.S. courts have expanded the reach of § 1782 far beyond “pending” or “reasonably contemplated” matters. The application of the doctrine of forum non conveniens should be proscribed from arbitral award enforcement proceedings.
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But even with respect to these less “paradigmatic” U.S. common law doctrines, there is much that can be learned from the rigors of their development and the manner in which the common law itself often seems to engage in critical introspection. In most instances the common law corrects itself. In this sense, it teaches the international arbitration community that what matters most in doctrinal development, as with the adjudication of fact and law, is the genuineness of the process: even more so than the very results and conclusions themselves.

In an era of economic globalization and of a legitimate global market, a time when politicized international judicial tribunals are contemplated to replace treaty-based arbitration are only likely to lead to regional parochialism and cultural prejudices – the lingering vestiges of a twentieth-century nationalism that witnessed two world wars – the time has come for arbitration to save itself by embracing introspection. It is this introspection that best describes what still promises to be the U.S. common law’s most meaningful influence on international commercial arbitration. May it be embraced.