Kluwer Arbitration Blog

# A Centennial Crossroads: Reimagining the U.S. Federal Arbitration Act in the Light of International Commercial Arbitration

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This year marks the 100th anniversary of the Federal Arbitration Act (FAA), a statute that has profoundly shaped arbitration not just in the United States, but around the world. As we pause to reflect on the FAA's global influence, it is also an opportunity to consider how global arbitration norms have circled back to reshape domestic U.S. arbitration law—sometimes in ways that weaken protections for vulnerable parties.

In our forthcoming article in the *UC Irvine Law Review*, titled *The Return of Context to the Federal Arbitration Act: How International Standards Eroded U.S. Arbitration Protections*, we explore this overlooked reversal. While much attention has focused on how the FAA has influenced international arbitration practices, the untold story may be the opposite: international commercial arbitration principles have reshaped the FAA since its inception, often undermining protections for consumers and employees.

**From Domestic Shield to Global Sword**

When Congress enacted the FAA in 1925, its primary aim was to enforce agreements to arbitrate between commercial entities—sophisticated parties on relatively equal footing. The statute was born out of a desire to provide a forum for efficient dispute resolution in commercial relationships, at a time when courts were skeptical of private arbitration.

For much of its early history, the U.S. Supreme Court interpreted the FAA through a contextual lens. The Court applied different principles depending on the context each case arose in. This approach recognized that different statutory regimes and social dynamics required tailored legal treatment, and developed three distinct arbitral regimes based on the different statutory and policy priorities at issue in labor arbitration, domestic arbitration, and international commercial arbitration.

But since the 1980s, the Court has shifted toward a one-size-fits-all approach. It began to borrow doctrines and justifications from the international and labor arbitration contexts and apply them to all arbitration agreements, including in employment and consumer contracts. This trend, which we term "inverse fertilization," has flattened distinctions that were once crucial and has allowed powerful parties to enforce arbitration clauses even in scenarios that Congress never envisioned.

The case of *McGee v. Armstrong* demonstrates the effect of this inverse fertilization. Kevin McGee, a public employee and National Guard officer, faced retaliation at work for fulfilling his military duties. McGee not only had statutory and constitutional claims, he also enjoyed statutory process protections and brought his claims under statutes specifically designed to provide a judicial forum. Nonetheless, he was barred from having his day in court by the arbitration clause in his employment contract. A series of precedents from the Supreme Court had forced the court to compel the case to arbitration.

**How Global Arbitration Standards Crept into Everyday Contracts**

*McGee* is the result of a decade of precedents where standards originally set out in international arbitration gradually ambled further and further than their original context. First, in *Scherk v. Alberto-Culver Co.*, the Court distinguished an earlier case where it held claims under the Securities Act of 1933 non-arbitrable because of the distinctly international nature of the contract in question. Such a different result was warranted because the international context of the contract in *Scherk* presented such new and different policy considerations, wholly inapplicable in the domestic context, that it demanded a different outcome. A decade later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the principles undergirding *Scherk* would be extended to a new statute applied to another international agreement. But by deemphasizing the unique nature of international arbitration that *Scherk* relied on, *Mitsubishi* would lay the groundwork for them to be taken one more step (then another, and another) further from their original context.

Soon these principles would find their way into domestic consumer contracts, and in 1991, the Supreme Court would draw an analogy between employment discrimination claims and disputes between international companies engaged in global commerce in *Gilmer v. Interstate/Johnson Lane Corp.* Per the Supreme Court's reasoning, if a car dealer could find an adequate arbitrator to resolve its disputes with a Japanese conglomerate, why can't employees arbitrate with their employers? After all, it was just another arbitration agreement protected by the FAA. This is the logic that would eventually come to bite Kevin McGee.

Kevin McGee's story is far from unique. It illustrates a growing problem in the United States: statutory rights that were designed to protect weaker parties are increasingly subject to mandatory arbitration and, due to the confidential nature of the proceedings, it is unclear whether they are being adequately adjudicated. Worse still, the legal reasoning that permits this often rests on precedents from international commercial arbitration—a field designed to facilitate dispute resolution between multinational corporations on relatively equal footing, not between employers and workers or businesses and consumers.

**Why the Logic of International Commercial Principles Helps to Undermine Domestic Justice**

Our article demonstrates that certain principles developed for international arbitration—such as a presumption in favor of arbitrability and deference to arbitral decisions—have been transplanted into domestic jurisprudence without sufficient scrutiny.

In international arbitration, these principles are justified by the need to protect cross-border commercial agreements and are often counterbalanced by mechanisms like Article V of the New York Convention, which post dates the FAA and allows courts to refuse to enforce an arbitral award if it puts public policies of the State in danger. This fact was mentioned by the Supreme Court in *Mitsubishi* as an ultimate safeguard if a foreign arbitral award would put in danger the

goals of the antitrust statutes in the U.S. Domestic arbitration under Chapter 1 of the FAA lacks these safeguards. In the context of domestic arbitration there are no textually permissible public policy grounds to refuse to enforce or annul awards. Yet U.S. courts have adopted international-style presumptions wholesale, making it nearly impossible for individuals to challenge arbitration clauses, even in cases involving fundamental rights.

As we point out in our article, this inverse fertilization has been facilitated by the Supreme Court's increasing reliance on broad generalizations about the FAA's purpose—namely, a "liberal federal policy favoring arbitration"—without paying attention to the specific context and policy goals of the statutes involved.

**Bringing Back Context: A Path Forward**

As we move ahead with the practice of arbitration, we advocate for returning to a context-based approach to interpreting the FAA—one that takes into account the nature of the contractual relationship, the substance of the claims, and the relative bargaining power of the parties. An approach that was well understood by the Supreme Court in the early decades of the FAA.

Such an approach would not mean abandoning arbitration. Rather, it would mean tailoring its application to fit the situation at hand, thereby ensuring that it advances rather than obstructs legislative objectives. For example, enforcing arbitration clauses in commercial contract disputes between sophisticated parties may make perfect sense, while enforcing them in statutory employment or consumer disputes—especially in those where there is no genuine consent—may subvert the very rights Congress sought to advance.

**Looking Ahead: Reinterpreting the FAA for the Next Century**

As we celebrate the 100th anniversary of the FAA, this post is both a tribute and a caution. The FAA's global influence is undeniable—its principles have shaped the laws of numerous countries and made the United States a preferred seat for international arbitration. But the domestic consequences of its modern interpretation demand urgent attention.

We urge courts, scholars, and lawmakers to reconsider how we apply the FAA. Arbitration jurisprudence must be anchored once again in the reality of how contracts are negotiated, the power dynamics between the parties, and the policies underlying intertwined statutes. This means recognizing that not all arbitration agreements are created equal—and that statutory protections must remain meaningful in practice, not just in theory.

In a world where private dispute resolution is increasingly the norm, ensuring fairness and accountability within arbitration is more critical than ever. A centennial is a milestone, but it can also be a turning point. Perhaps now is the moment to return context to the FAA—and justice to those who have lost their right to have their day in court.

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