CLE Materials
4:00-5:30pm Session at New York Arbitration Week
Tuesday, November 15, 2022

Arbitration Is All About Autonomy—But, Is It?
Conventional wisdom tells us that the cornerstone of international arbitration is party autonomy. But, how far does this autonomy extend? Are parties absolutely free to agree on anything in the name of autonomy? Are there reasonable limits posed by other stakeholders outside the parties to a dispute?

Join leading academics in international arbitration, based in New York, to explore the scope of party autonomy and its limits.

Panelists:

- **Professor George A. Bermann**, Columbia Law School
- **Professor Pamela Bookman**, Fordham Law School
- **Professor Giuditta Cordero-Moss**, University of Oslo and Visiting Professor, NYU School of Law
- **Professor Franco Ferrari**, NYU School of Law

Moderator:

- **Dr. Kabir Duggal**, Columbia Law School

— Chapter 3 —

Limits to Party Autonomy in the Composition of the Arbitral Panel

George A. Bermann∗

INTRODUCTION

International arbitration is solidly based on a premise of party autonomy, and one of the most salient manifestations of that autonomy arises in the composition of the arbitral tribunal. At stake is the liberty of parties to choose their own judge or judges.[1] Party autonomy in determining the structure of an arbitral tribunal and in selecting arbitrators serves multiple purposes. It enables parties to ensure that those who will judge their dispute have qualifications that the parties deem proper and will conduct the proceedings with the requisite fairness and efficiency.[2] In addition, party-nomination enhances the parties' trust in the arbitration as a dispute resolution mechanism, if only because they have participated in the panel's composition as well as the arbitration ground rules.[3] This should enhance the prospects of compliance with the final award.

Party autonomy in composition of the arbitral tribunal is among the first exercises of that autonomy in the life cycle of an arbitration, Parties may well embed in their arbitration agreement their understandings about how an eventual arbitral tribunal is to be constituted. The present discussion proceeds on the assumption that the parties did in fact agree on the matter. But the parties may also postpone that decision, in whole or in part, until after a dispute has arisen, in which case the choice of

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[1] Brook v. Peak Int'l, Ltd., 294 F.3d 668, 672 (5th Cir. 2002); Bulko v. Morgan Stanley DW Inc., 450 F.3d 622, 625; LEW, MISTELIS & KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003), § 10-1.

[2] BORN, Ch. 12 p. 1809.

[3] LEW, MISTELIS & KRÖLL, § 11-47; de Fina, *The Party Appointed Arbitrator in International Arbitrations – Role and Selection,* 15 ARB. INT'L 381, 381-382 (1999).

each party-nominated arbitrator will typically be made unilaterally by the nominating party, while the choice of panel president may typically be made in a number of different ways, for example, by agreement between the parties, by agreement between the two party-appointed arbitrators, by an arbitral institution or, if need be, a court. Although it is commonly said that party-appointed arbitrators have the task of ensuring that the panel understands the party's position and the basis for it, international arbitrators – panel president and party-appointed arbitrators alike – are expected to approach the merits with neutrality.[4] That is not necessarily a feature attributed to national courts of either party.

The principle of party autonomy in selection of an arbitral tribunal is made explicit in many arbitration laws around the world.[5] Most rules of arbitral procedure, posit the principle, both with respect to the manner of selecting arbitrators[6] and the selection of arbitrators themselves [7] and, at

[4] In domestic arbitration in the U.S., neutrality might not be expected of party-appointed arbitrators. *See* Americo Life, Inc. v. Myer, 440 S.W.3d 18, 22 (Tex. 2014) (The parties in this case agreed to "tripartite arbitration," through which each party would directly appoint an arbitrator, and the two party-appointed arbitrators would agree on a third panelist. … In a tripartite arbitration, each party-appointed arbitrator ordinarily advocates for the appointing party, and only the third arbitrator is considered neutral."); Winfrey v. Simmons Foods, Inc*.,* 495 F.3d 549, 552 (8th Cir.2007) ("industry custom that party arbitrators are frequently not required or expected to be neutral for ruling on disputes").

[5] Art. 11 (3) UNCITRAL Model Law (*see also* 2012 UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, p.59 §1, 3); § 1035(3) Code of Civil Procedure (Germany); Art. 1452, 1508 French Code of Civil Procedure; Art. 179(2) PILA (Switzerland); Art. 361(2) code of Civil Procedure (Switzerland); Art. 31 Chinese Arbitration Law; Art. 17(2) Japanese Arbitration Law; Egyptian Arbitration Law, Art. 17(1); BORN, Ch. 12, p. 1654; including the pre-designation of the arbitrators before a dispute arises: Westinghouse Elec. Corp. v. N.Y.C. Transit Auth., 82 N.Y.2d 47, 53-54 (N.Y. 1993); Judgment of 26 May 1994, XXIII YBCA 754, 762 (Affoltern am Albis Bezirksgericht, Switzerland); Aviall, Inc. v. Ryder Sys., 913 F.Supp. 826, 833 (S.D.N.Y. 1996): *see also* Borst v. Allstate Ins. Co., 291 Wis.2d 361, 380 (Wis. 2006).

[6] Art. 11 (2) UNCITRAL Model Law; § 1035(1) Code of Civil Procedure (Germany); § 5 FAA (USA); Art. 179(1) PILA (Switzerland); Art. 361(1) Code of Civil Procedure (Switzerland); Art. 1452, 1508 Code of Civil Procedure (France); § 1035(1) German Code of Civil Procedure; Art. 1685(2) Belgian Judicial Code; Art. 1027(1) Netherlands Code of Civil Procedure; Art. 809(2) Italian Code of Civil Procedure*;* Art. 32 Chinese Arbitration Law*;* Art. 17(1) Japanese Arbitration Law; Egyptian Arbitration Law, Art. 17(1)*; see also* BORN*,*

least implicitly by the New York Convention itself, notably in Article II(1) in relation to arbitration agreements[8] and Article V(1)(d) in relation to arbitral awards.[9]

This is not to suggest that parties must address the composition of their eventual arbitral tribunal in their agreement to arbitrate. Most national arbitration laws contain no requirement that parties specify any particular mode of arbitrator selection when they agree to arbitrate.[10]

Ch. 12, p. 1657 (note 107, 108).

[7] Art. 11 (3) UNCITRAL Model Law (*see also* 2012 UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, p.59 §1, 3); § 1035(3) Code of Civil Procedure (Germany); Art. 1452, 1508 French Code of Civil Procedure; Art. 179(2) PILA (Switzerland); Art. 361(2) code of Civil Procedure (Switzerland); Art. 31 Chinese Arbitration Law; Art. 17(2) Japanese Arbitration Law; Egyptian Arbitration Law, Art. 17(1); BORN, Ch. 12, p. 1654; including the pre-designation of the arbitrators before a dispute arises: Westinghouse Elec. Corp. v. N.Y.C. Transit Auth., 82 N.Y.2d 47, 53-54 (N.Y. 1993); Judgment of 26 May 1994, XXIII YBCA 754, 762 (Affoltern am Albis Bezirksgericht, Switzerland); Aviall, Inc. v. Ryder 913 F. Supp. 826 (S.D.N.Y. 1996).

[8] In requiring courts of contracting States to refer parties to arbitration, Article II assumes it will do so pursuant to the parties' "agreement."

[9] Article V(1)(d) permits a court to deny recognition or enforcement of an award if it can be shown that "[T]he composition of the arbitral authority … was not in accordance with the agreement of the parties."

[10] LEW, MISTELIS & KRÖLL, § 10-45; see also, *e.g.*, Italy, Corte di appello Genoa, 3 February 1990, Delia Sanara Kustvaart – Bevrachting & Overslagbedrijf BV v Fallimento Cap Giovanni Coppola srl, XVII YBCA 542, 543 (1992) (applying English law instead of Italian law and not giving effect to Art. 809 of the Italian Code of Civil Procedure which in the current version at that time invalidated arbitral agreements that lacked any provision regarding the constitution of the tribunal).

An exception can be found in Art. 176 of the Code of Civil and Commercial Procedure of Kuwait, which requires the parties to name the arbitrator(s) in the arbitration agreement if they want him/them to act as amiable compositor. *See* SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST (2012), 125 with Fn. 32 (courts held that this requirement does not apply in other cases, i.e. in "ordinary" arbitration). If the parties fail to do so, the arbitration fails as there is neither any provision regarding default procedures nor any provision providing for judicial intervention. *See* SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST (2012), 126. A similar rule applies under Islamic law (as laid down in the Medjella, a (partial) codification of the Shari'a). *See* HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES

And yet, party autonomy in composition of the arbitral tribunal, as in any other exercise of that autonomy is not unlimited. States assert an interest in ensuring the integrity of the entire process, one aspect of which is of course tribunal composition.[11] In enacting laws of arbitration, legislatures are in principle free to lay down mandatory rules on the composition of tribunals. Statutory limitations on party autonomy in composing arbitral tribunals understandably vary from jurisdiction to jurisdiction. That will become evident as this article proceeds.

Courts have several opportunities to enforce statutory limitations on party autonomy in the composition of arbitral tribunals, typically at the moment of enforcing an agreement to arbitrate or entertaining a challenge to the resulting award.[12] The norms they enforce may be those found in pertinent arbitration legislation, including of course the *lex arbitri*. But they may be norms that the courts themselves have elaborated in the interest of ensuring fairness and integrity in the arbitral process.

This article proposes to examine various compositions of arbitral panels that, even though agreed upon by the parties, are potentially problematic, and possibly even contrary to law.

(2011), IA-190, and can be found in Art. 234(2) of the Bahrain Civil and Commercial Procedures Act, which applies to all arbitrations and requires the parties to name the arbitrators by name in the arbitration agreement or a separate agreement when submitting their dispute to arbitration. However, the failure to do so is not sanctioned by nullity of the arbitration agreement, but either party may apply to the court generally competent to hear the case for appointment of the arbitrators. *See* SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST (2012), 231-32; HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2011), BH-091. A similar situation can be found in Algeria, where Art. 1008(2) requires for domestic arbitration that the arbitrators or the method for their appointment is stipulated in the agreement under penalty of nullity, but Art. 1009(2) allows for a declaration of the appointment by the President of the competent court.

[11] *See generally* HENRY, LE DEVOIR D'INDÉPENDENCE DE L'ARBITRAGE, (LGDJ 2001) 9 *et seq.*

[12] *See* LEW, MISTELIS & KRÖLL, § 11-1; Judgment of 26 May 1994, XXIII YBCA 754, 762 (Affoltern am Albis Bezirksgericht, Switzerland).

LIMITS TO PARTY AUTONOMY IN THE COMPOSITION OF THE ARBITRAL PANEL

I. TYPES OF LIMITATIONS ON PARTY AUTONOMY IN PANEL COMPOSITION

A. Structural Limitations

Some limitations on party autonomy in panel composition have nothing to do with characteristics of the individual arbitrator, but rather with the structure of the tribunal itself.

1. Number of Arbitrators

Parties enjoy near-total party autonomy in determining the number of arbitrators. Virtually all national laws today accord wide freedom in that regard, positing at most a "default rule" to be applied absent party agreement otherwise. The UNCITRAL Model Law, in Article 10(1) expressly stipulates that the parties may freely choose the number of arbitrators.[13] Occasionally, however, one encounters a *lex arbitri* that proscribes having an even number of arbitrators.[14]

[13] *See, e.g.*, English Arbitration Act, 1996, §15(1); Swiss Law on Private International Law, Art. 179(1); German ZPO, §1034(1); Netherlands Code of Civil Procedure, Art. 1026(2); Austrian Code of Civil Procedure, §586(1); Swedish Arbitration Act, §12 (1); Danish Arbitration Act, §10(1); Spanish Arbitration Act, 2011, Art. 12; Japanese Arbitration Law, Art. 16(1); Korean Arbitration Act, Art. 11(1); Indian Arbitration and Conciliation Act, Art. 10(1); Russian Arbitration Law, Art. 10(1). *See also*, UNCITRAL, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 57; Electra Air Conditioning B.V. v. Seeley International Pty. Ltd., Federal Court, Australia, 8 October 2008, [2008] FCAFC 169, § 35, available at http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/169.html; Gordian Runoff Ltd. (formerly Gio Insurance Ltd.) v. The Underwriting Members of Lloyd's Syndicates, Supreme Court of New South Wales (Equity Division), Australia, 19 December 2002 (revised 5 February 2003), [2002] NSWSC 1260, § 5, available at http://www.austlii.edu.au/au/cases/nsw/NSWSC/2002/1260.html.

[14] France (Code of Civil Procedure, art. 1451) (for domestic arbitration), the Netherlands (Code of Civil Procedure, art. 1026(1)), Belgium (Judicial Code, art. 1684), Italy (Code of Civil Procedure, art. 809), Portugal (Law on Voluntary Arbitration (2011), art. 8(1)), Egypt (Arbitration Law, art. 15(2)), India (Arbitration and Conciliation Act, 1996, sec. 10(1)); Qatar (Qatari Code of Civil and Commercial Procedure, art. 193(1)); Spain (Spanish Arbitration Act, 2011, art. 12; Tunisia (Arbitration Code, arts. 18(1), 55(1)); Colombian Law 1563 of

These laws may provide that, if the parties have agreed on an even number of arbitrators, a court shall appoint an additional arbitrator[15] or umpire,[16] or they may invalidate the arbitration agreement altogether.[17] The former represents a much less drastic sanction insofar as it solution at least upholds the parties' decision in favor of arbitration.[18] An award rendered by a panel consisting of a number of arbitrators other than that

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2012, art. 7 (for domestic arbitration only); Kuwait Code of Civil and Commercial Procedure, art. 174(2); Bahrain Civil and Commercial Procedures Act, art. 234(1) (for domestic arbitration).

[15] The English Arbitration Act, art. 15(1) provides that "[u]nless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal." *See also* France (Code of Civil Procedure, art. 1451); (France); Belgium (Judicial Code, art. 1681(2)); Netherlands (Code of Civil Procedure, art. 1026(3)); Italy (Code of Civil Procedure, art. 809(3)); (Italy); New Zealand Arbitration Act (1996), sec. 11(6)(a); Algerian Code of Civil and Administrative Procedure, art. 1017 (with respect to domestic arbitration, no restriction applies in international arbitration. *See* HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2011), DZ-088). Much the same approach is taken by the Indian courts, see Supreme Court of India, Nov. 18, 1996, MMTC Ltd. v. Sterlite Industries (India) Ltd., 1997 BULL. ASA 136, 137; FOUCHARD, GAILLARD & GOLDMAN, sec. 771.

[16] Victoria (Australia), Commercial Arbitration Act 1984 § 12(1) ("Unless otherwise agreed in writing by the parties to the arbitration agreement, where an arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators may appoint an umpire"). The same solution was upheld by a French court with respect to an award made under Tunisian arbitration law, Cour d'appel Paris, 24 February 1994, Ministry of Public Works (Tunisia) v Société Bec Frères (France), XXII YBCA 682 (1997) paras 14-16.

[17] Art. 15(2) Arbitration Law (Egypt) (the wording "on penalty of nullity of the arbitration" is interpreted as invalidation of the arbitration agreement providing for an even number of arbitrators, see LEW, MISTELIS & KRÖLL, § 10-25; or alternatively as irregularity of the constitution of the tribunal resulting in annulment of an award (if the proceedings already began and an award was made), *see* HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2011), EG-100, citing Cairo Court of Appeals, Case 97/119, commercial circuit 91, 27/7/2003); Art. 15(2) Omani Arbitration Law ("the arbitration shall be treated as invalid"); Qatari Code of Civil and Commercial Procedure, Art. 193(1) ("the arbitration is void"); Bahrain Civil and Commercial Procedures Act, Art. 234(1) ("otherwise the arbitration is invalid").

[18] LEW, MISTELIS & KRÖLL, sec.10-26.

agreed to by the parties may be denied recognition or enforcement under Article V(1)(d) of the New York Convention.[19]

One should not forget that, even the law allows the parties complete freedom in determining the number of arbitrators, the arbitral institution that the parties have chosen may not. The International Chamber of Commerce itself provides a prominent example. The ICC Rules prescribe panels of one or three members;[20] the ICC will not administer any arbitration where any other number, even any other odd number, has been selected.

Thus while parties regularly prescribe the number of arbitrators directly in their agreement to arbitrate, occasions for challenging that choice are rare. The next section presents a different picture. Parties most often do not state in their arbitration agreement that arbitrators deciding their disputes, but requirements of that sort may very well run into trouble.

2. Asymmetric Arbitral Tribunals

Equality of arms is a fundamental premise of the international arbitration system. From that, the importance of equality in composition of the tribunal necessarily follows. The requirement that parties be treated equally in composing the tribunal is expressly stated in the UNCITRAL Model Law,[21] as well as in numerous national laws and

[19] BORN, Ch. 12 p.1667 *et seq*.; *See, e.g.,* Judgment of 21 May 2008, III ZB 14/07 (German Bundesgerichtshof), para. 10 (denying recognition of award made by two arbitrators when arbitration agreement provided for three); *similarly,* Judgment of 13 April 1978, Rederi Aktiebolaget Sally v. Srl Termarea, IV YBCA 294, 295 (Florence Corte d'Appello) (1979); First Investment Corp. (Marshall Island), Judgment of 27 February 2008, Supreme People's Court, Fujian Providence, China, XXXV YBCA 349 (2010), § 34. *But*: Judgment of 24 February 1994, Ministry of Public Works v. Société Bec Frères, XXII Y.B. Comm. Arb. 682 (Paris Cour d'appel) (1997) (recognizing award made by three arbitrators though agreement provided for only two, as uneven number was mandatory under the applicable Tunisian law); *see also* Al Haddad Bros. Enter. Inc. v. MS Agapi, 635 F.Supp. 205, 210(D. Del. 1986) (recognizing award made by sole arbitrator pursuant to English Arbitration Act, though agreement provided for three arbitrators, because one party failed to make appointment).

[20] ICC Rules, art. 12(1).

[21] UNCITRAL Model Law on International Commercial Arbitration, art. 18: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

institutional rules. It has been widely read into the New York Convention as an aspect of the right to a fair hearing.[22]

The courts in many jurisdictions accordingly refuse to give effect to agreements providing that arbitral tribunals shall be structured in such a way as to give one party – typically the stronger of the two – an unfair advantage in the proceedings.[23] Alternatively, some national laws provide that, in the case of an impermissibly one-sided agreement, the non-privileged party may request the local court to appoint the arbitrators instead of making use of the procedure laid down in the agreement.[24]

An obvious example of an impermissibly asymmetric arrangement would one according to which the tripartite tribunal to be constituted in the event of a dispute between the parties shall consist of two persons appointed by one party and only person appointed by the other. There appear to be no reported decisions on requirements of this kind. But variations can be found, and courts have proven largely unsympathetic to them.

Perhaps most obvious is an agreement according to which disputes between the parties will be resolved before a sole arbitrator named unilaterally by one of the parties.[25] As one court put it, "such an arbitration clause as would exclude one of the parties from any voice in the selection of arbitrators cannot be enforced." It added that "[s]uch a clause conflicts with our fundamental notions of fairness, and tends to defeat arbitration's ostensible goals of expeditious and equitable dispute resolution."[26] Another court rejected an arbitration agreement according

[22] New York Convention, art. V(1)(b).

[23] *See e.g*. Judgment of 17 April 1978, IV Y.B. Comm. Arb. 282, 283 (Italian Corte di Cassazione) (1979) ("an arbitral clause which provides that a sole arbitrator shall be appointed by one of the parties only is invalid"). Judgment of 7 October 1999, Société Russanglia v. Société Delom, 2000 Rev. arb. 288, 290-291 (Paris Cour d'appel); Murray v. United Food & Commercial Workers Int'l Union, 289 F.3d 297, 303 (4th Cir. 2002); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 948-940 (4th Cir. 1999); Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler, 825 So.2d 779, 783-85 (Ala. 2002).

[24] Art. 1028 Netherlands Code of Civil Procedure; German ZPO, sec. 1034(2); Estonian Code of Civil Procedure, sec. 721(2).

[25] *Born*, Ch. 12 p. 1819.

[26] Ditto v. RE/MAX Preferred Properties, Inc., 1993 OK CIV APP 151, 861 P.2d 1000, 1004. The court cited the case of Board of Education of Berkeley County v. W. Harley Miller, Inc., 160 W.Va. 473, 236 S.E.2d 439. 443 (1977),

to which any dispute between the parties would be resolved by a tribunal consisting of the Board of Directors of the corporate party to the contract. "We brush aside any metaphysical subtleties about corporate personality and view the agreement as one in which one of the parties is named as arbitrator. Unless we close our eyes to realities, the agreement here becomes, not a contract to arbitrate, but an engagement to capitulate."[27]

Somewhat more common is the scenario is which one party names directly the entire tribunal, but establishes the pool from which both parties may exclusively draw their nominee. In one case, an employment agreement provided that, in the event of a dispute between the company and an employee, the company could freely nominate an arbitrator, but both the arbitrator nominated by the employee and the eventual tribunal president were required to be selected from a list of arbitrators drawn up exclusively by the company. The court found that, notwithstanding the parties' apparent agreement to it, the arrangement in such an arbitration clause was so one-sided as to establish "a sham system unworthy even of the name of arbitration."[28]

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in which the West Virginia Supreme Court of Appeals used what the *Ditto* court termed "an Aesopian metaphor":

> Let us assume for a minute that for some reason all the rabbits and all the foxes decided to enter into a contract for mutual security, one provision of which were [sic] that any disputes arising out of the contract would be arbitrated by a panel of foxes. Somehow that shocks our consciences, and it doesn't help the rabbits very much either.

[27] Cross & Brown Co. v. Nelson, 4 A.D.2d 501, 502, 167 N.Y.S.2d 573, 575-76 (1957).

[28] Hooters of America, Inc. v. Phillips*,* 173 F.3d 933, 940 (4th Cir. 1999). For a similar case, *see* McMullen v. Meijer, Inc*.,* 211 F.3d 306 (6th Cir. 2000). There, the arbitration agreement provided that in the event of a dispute, the employer would identify the arbitrator pool, from which all the arbitrators were to be chosen by the parties. The court rejected the employer's argument that the employee bore the burden of proving bias that any particular arbitrator chosen lacked impartiality or independence. *See also* Murray v. United Food & Commercial Workers Int'l Union, 289 F.3d 297, 303 (4th Cir. 2002): Floss v. Ryan's Family Steak Houses, Inc 211 F.3d 306, 314. (6th Cir. 2000). On cases such as these, *see* Lewis Maltby, *Paradise Lost – How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights,* 12 N.Y.L. SCH. J. HUM. RTS. 1, 3 (1994); Janna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts,* 50 WILLAMETTE L. REV. 269 (2013-2014).

In some situations, whether or not an asymmetry is permissible may be open to some doubt. Thus, one court has upheld an agreement whereby one party alone was given the choice among several potential appointing authorities.[29] On the other hand, agreements providing arbitration conducted by an institution of which only one party is a member are controversial.[30]

The only recurring circumstance in which the unilateral naming of the tribunal might be permitted is one entailing complete default by the other party. This procedure may be provided for in the parties' arbitration agreement[31] and on occasion in the arbitration law of a particular jurisdiction.[32]

While the practice has been permitted in the United States,[33] its status elsewhere is in doubt,[34] which is not to say that it is so disfavored

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[29] Judgment of 19 February 2004, 2 Sch 04/03 (Oberlandesgericht Koblenz); see also UNCITRAL Digest, p.59 §4.

[30] Upheld by J&K Cement Constr., Inc. v. Montalbano Builders, Inc., 119 Ill. App. 3d 663, 683-684 (Ill. App. 1983) (one party's membership in institution does not lead to substantial unfairness of the proceedings, where counter-party was aware of this issue); Judgment of 18 June 2010, V CSK 434/09 (Polish S.Ct.) (no violation of principle of party equality where arbitration agreement provided for arbitration before Court of Arbitration at Polish Bank Association and one party (but not the other) was member of Association); Invalidated by Graham v. Scissors-Tail, Inc., 28 Cal.3d 807, 821-27 (Cal. 1981) (the agreement at issue was an adhesion contract); Judgment of 16 December 2004, Case No. KG-A40-10867-04 (Russian Moscow Dist. Fed. Arb. Ct.) (setting aside award when arbitral institution was founded by one of parties to dispute and arbitrators were employees of that party) – this case could not be retrieved.

[31] *See, for example*, cases in which the arbitration agreement expressly provides that if either party fails to appoint an arbitrator within a certain period after receiving the other party's nomination of an arbitrator, the one arbitrator nominated may act as sole arbitrator or the other party may nominate an arbitrator for its opponent. *See* Universal Reinsurance Corp. v. Allstate Ins. Co., 16 F.3d 125 (7th Cir. 1993); Kentucky River Mills v. Jackson, 206 F.2d 111, 47 A.L.R.2d 1331 (6th Cir. 1953); Employers Ins. of Wausau v. Jackson, 190 Wis. 2d 597, 527 N.W.2d 681, 75 A.L.R.5th 753 (1995). *See generally* Thomas H. Oehmke with Joan M. Brovins, *Nature of an umpire—Unilateral arbitrator appointment,* 3 COMMERCIAL ARBITRATION § 67:3.

[32] Art. 17 English Arbitration Act (1996): the counter party may select to treat its arbitrator as the sole arbitrator.

[33] *See, e.g.,* Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 500 F.3d 571 (7th Cir. 2007) (the unequal influence of the parties on the composition of the tribunal as a result of the default procedure stipulated in the

as to support a challenge to the resulting award.[35] The preferred practice in the case of a party's default in naming an arbitrator is recourse to a court or an arbitral institution (or some other neutral entity or individual),[36] whether or not the *lex arbitri* [37] or the rules adopted by the parties so provide.[38]

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arbitration clause was not seen as an issue throughout the discussion as well as in the district court proceedings, rather court emphasized the parties' autonomy to agree on whatever default rule they like). *See also* Universal Reins. Corp. v. Allstate Ins. Co., 16 F.3d 125, 129 (7th Cir. 1994) (here, the court expressly mentioned that the parties' agreement prevails over any concerns regarding the party in delay's interest in influencing the composition of the tribunal and any concerns related to the unilateral appointment of all arbitrators). Hitex Plastering Ltd v. Santa Barbara Homes Ltd, [2002] 3 NZLR 695 (N.Z. High Ct.).

[34] Even absent an express provision, *see* FOUCHARD, GAILLARD & GOLDMAN, § 787, 791, CA Paris, May 25, 1990, Fougerolle v. Procofrance, 1990 REV. ARB. 892, 896(equal treatment as part of French public policy)

Award made on the basis of unilateral arbitrator selection invalid and unenforceable. *See, e.g.*, Judgment of 18 October 1999, XXIX Y.B. Comm. Arb. 700, 704 (Oberlandesgericht Stuttgart) (2004) ("the fact that the arbitral award was eventually rendered by the arbitrator appointed by the claimant is at odds with the requirement of impartiality and neutrality of foreign arbitrators, a requirement that also applies to international arbitrations governed by foreign substantive and procedural law"); with similar argumentation, *In re Utility Oil Corp.*, 10 F.Supp. 678, 681 (S.D.N.Y. 1934) (limiting the application of such a default rule to cases in which one party "*unreasonably* neglected or refused to appoint its arbitrator" (emphasis added)).

[35] *See* Corte di Cassazione, Mar. 14, 1995, SODIME v. Schuurmans & Van Ginnegen BV, XXI Y.B. Com Arb. 607, 608 (1996) (here based on failure of the same number of arbitrators signing the award than were initially appointed and agreed on), *see also* FOUCHARD, GAILLARD & GOLDMAN, § 792 (citing an unpublished French decision: TGI Paris, Feb. 3, 1997, Delom v. Russanglia Ltd., No.66545/97).

[36] Art. 11(3) and (4) UNCITRAL Model Law, § 5 FAA, Art. 1452(2), 1453 Code of Civil Procedure (France); Art. 179(2) PILA; Art. 6(1) Arbitration Law (Russia): appointment by the President of the Russian Federation Chamber of Commerce; see also Art. IV(2) and (3) of the European Convention (appointment by the President of the Chamber of Commerce of the defaulting party's home country, or, in case of a single arbitrator or the presiding arbitrator and the inability of the parties to reach an agreement, the Chamber of Commerce at the seat of arbitration or the other party's home country). *See also* BORN, Ch. 12, p. 1734.

There is an element of asymmetry in the event of multiple parties on a single side.[39] The prevailing view, however, is that the principle of party equality only requires that all parties have equal rights regarding the arbitrator selection, not that each party can itself designate "its own" arbitrator.[40]

B. Protection of Parties Presumed to Be Weaker

We have assumed that the arbitrator requirements inscribed in the parties' arbitration agreement were freely and fairly arrived at in the course of contract negotiations. But legislatures and courts may treat certain contractual requirements in the composition of tribunals as unenforceable, out of solicitude for the party deemed to be the "weak" one in the relationship.

Jurisdictions differ widely in their inclination to do so. As is well known, some jurisdictions go so far as to declare non-arbitrable whole categories of disputes, such as consumer disputes, in which one party is regularly deemed sufficiently weak to shield from arbitration altogether. If States may prohibit the arbitration of whole categories of disputes on these grounds, clearly they may also permit arbitration of such disputes

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[37] For example, Section 1034(2) of the German Code of Civil Procedure enables a party to apply for court appointment of the arbitrators instead of relying on the arbitration agreement and the proceedings named therein if these proceedings would place that party at a disadvantage and give the other party disproportionate influence on the composition of the tribunal. A similar approach is taken in Art. 1028 of the Netherlands' Code of Civil Procedure.

[38] Among rules that expressly so provide are 2012 ICC Rules, Arts. 11-13; 2010 UNCITRAL Rules, Art. 8; ICDR Rules, Arts. 5-11; LCIA Rules, Arts. 5-9; 2012 Swiss Rules, Art. 7; 2011 ACICA Rules, Arts. 9-10; 2013 HKIAC Rules, Arts. 7-8; see also UNCITRAL Model Law, Art. 11(2); § 5 FAA; French Code of Civil Procedure, Art. 1508; Singapore International Arbitration Act, 2012, §3(1)(adopting UNCITRAL Model Law).

[39] LEW, MISTELIS & KRÖLL, § 10-100;

[40] *See* FOUCHARD, GAILLARD & GOLDMAN, § 792. The French decision in the Dutco case (Cass. 1e civ., Jan. 7, 1992, B.K.M.I. v. Dutco, 1992 REV. ARB. 470, 472) played a large role in this development. The French Cour de Cassation held in that case that the principle of equality is part of French public policy and that the parties can only waive their protection by this principle after the dispute has arisen. The decision has come, however, to be construed narrowly.

only under certain conditions, among them rules governing the composition of tribunals. They may also decide on a case by case basis that a unilaterally imposed requirement that is detrimental to the weaker party should not be enforced.[41]

C. Individual Arbitrator Characteristics

More common than numerical limitations on arbitral tribunals are requirements in the Parties' agreement that members of the tribunal have a certain stated characteristic. Both such requirements and their rationales vary dramatically among themselves.

1. State-imposed Requirements versus Requirements through Party Agreement

It is important at the outset to distinguish between arbitrator qualifications required by the State, on the one hand, and those to which the parties agreed, on the other.

On occasion, the *lex arbitri* of a given jurisdiction will require that, in order to serve on an arbitral tribunal an individual must possess certain characteristics. A good example is Jordanian law which requires arbitrators to have the same qualifications that judges are required to have.[42] An extreme, but rare, example would be an arbitration law requiring that arbitrators be drawn from a fixed list.[43]

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[41] LEW, MISTELIS & KRÖLL, § 10-44; Oberlandesgericht Dresden, 20 October 1998, 11 Sch 0004/98.

[42] ABDUL HAMID EL AHDAB, *La nouvelle loi jordanienne sur l'arbitrage,* REVUE DE L'ARBITRAGE, COMITÉ FRANÇAIS DE L'ARBITRAGE 2002, Volume 2002 Issue 2, pp. 301 - 328

[43] Article 26 of the 2015 Rules of Arbitration of the China International Economic and Trade Arbitration Commission (CIETAC) provides that "[t]he parties shall nominate arbitrators from the Panel of Arbitrators provided by CIETAC. However, it goes on to state that "[w]here the parties have agreed to nominate arbitrators from outside CIETAC's Panel of Arbitrators, an arbitrator so nominated by the parties or nominated according to the agreement of the parties may act as arbitrator subject to the confirmation by the Chairman of CIETAC." On the other hand, arbitral institutions may restrict arbitrator appointments to persons whose names are on a particular list. *See* note 71 *infra*, and accompanying text.

Assuming such provisions are mandatory in character, they are meant to, and do, place limits on party autonomy. A party who names, or parties who agree on, an arbitrator who lacks a required characteristic will have exceeded the scope of party autonomy, at least in the view of courts of the enacting State. Whether other States will give effect to a particular State-imposed requirement is another matter.

The more usual circumstance is one in which it is not the State that has imposed a certain requirement, but rather the parties through their arbitration agreement that have done so. There is, generally speaking, a strong presumption in favor of party autonomy in the establishment of specific arbitrator qualifications, if any. Most arbitrator qualifications prescribed by the parties will be deemed perfectly unobjectionable and will be respected. The only common limitation is that the rules must not be in contradiction with arbitration's basic nature as a quasi-judicial dispute resolution method or otherwise frustrate or impede its functioning. U.S. courts have colorfully depicted the extent of party autonomy in determining dispute resolution methods, and that freedom extends broadly to composition of the tribunal as well. According to one U.S. court:

> [S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."[44]

In the sections that follow, the importance of the distinction between State-impose and party-imposed restrictions will become evident.

[44] Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994). One judge described in even more colorful terms the parties' freedom to determine the standards by which courts may conduct judicial review of arbitral awards. According to him, the parties have extreme latitude in prescribing those standards, but even so are subject to some constraints. Thus, they may not validly provide that the reviewing court will make its ruling "by flipping a coin or studying the entrails of a dead fowl." LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, Judge, concurring).

2. Nationality Requirements

Nationality requirements are a good example. Whether or not arbitration laws expressly so provide, and some do,[45] parties may confine appointment of arbitrators to one or more designated nationalities. Similarly, parties may validly adopt rules of arbitral procedure (whether institutional or not) that limit the nationality of arbitrators; the parties are deemed, by virtue of having adopted those rules, have exercised their rightful autonomy in this regard.[46] (By contrast, it is widely assumed that a State law may not require that arbitrators have, or not have, a certain nationality. Some national laws go so far as to guarantee expressly the freedom of the parties to choose their arbitrators irrespective of nationality limitations,[47] as do certain international arbitration conventions.[48] This does not mean that national laws restricting the nationality of arbitrators are altogether unknown.[49] Indeed, even courts in countries that impose no formal nationality requirements may, under exceptional circumstances, decide that limiting an arbitrator to a certain nationality or domicile is appropriate for reasons of procedural efficiency or in light of the nature of the dispute.[50] Whether and how other States may give effect to their opposition to such restrictions is another matter, and dealt with later.[51])

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[45] *See, for example*, the Jordanian Arbitration Law, art. 15(b) (2001): "Unless otherwise agreed by the two arbitrating parties or provided for by the law, an arbitrator must not be of a specific gender or nationality." *See also* Egyptian Arbitration Law, art. 16(b) (1994). According to the UNCITRAL Model Law, art. 11(1), "(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties."

[46] BORN, Ch. 12 p. 1736 *et seq*.

[47] Art. 11(1) UNCITRAL Model Law; *See, e.g.*, Netherlands Code of Civil Procedure, Art. 1023; Italian Code of Civil Procedure, Art. 812; Russian Arbitration Law, Art. 11(1); Spanish Arbitration Act, 2011, Art. 13; Bahraini International Arbitration Act, Art. 11 (*see* HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2011), BH-098). Most national laws that formerly contained nationality requirements have removed that requirement in recent years.

[48] *See* European Convention on Arbitration, art. III; Inter-American Convention, art. 2.

[49] Colombian Arbitration Act, Art. 7(2) (for domestic arbitration).

[50] Quintette Coal Ltd. v. Nippon Steel Corp., Supreme Court of British Columbia, Canada, 24 March 1988, [1988] BCJ No. 492, unpublished, for description *see* UNCITRAL Digest, p. 62 §23: the court decided that conducting

Institutions may have rules that limit arbitrator nationality, but do so solely in order to ensure neutrality in the panel. Thus Article 6 of the LCIA Rules provides , while Article 15 of the AA Rules provides, upon request of a party, that arbitrators have a nationality different from that of any of the parties.[52] Though Art. 13(1) ICC Rules and Art. 13(6) SCC Rules provide for consideration of the arbitrator's nationality, the nationality is no strict requirement or limitation on the parties' autonomy.[53] It should be mentioned in this context that, if parties may ordinarily prescribe in their arbitration agreement a particular nationality of arbitrators, they assuredly may prescribe language qualifications. There are many good reasons why the parties might stipulate proficiency in a given language, and they not uncommonly do. There is reason to require language proficiency where an arbitration agreement specifies the language in which the arbitral proceedings are to be conducted or where it can be anticipated that the vast majority of documentary or testimonial evidence language will be in a particular language. To bar a limitation based on those grounds would be antithetical to the notion that among arbitration's key advantages is allowing parties to pick arbitrators best equipped to hear and decide their disputes.

3. Capacity Requirements

Many national laws expressly require that an arbitrator must be a natural person[54] and/or have legal capacity.[55] By way of great exception,

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the lengthy proceedings would be too burdensome for any arbitrator not domiciled in Canada. I-D Foods Corporation v. Hain-Celestial Group Inc., Superior Court of Quebec, Canada, 6 July 2006, [2006] QCCS 3889, §12: The court upheld and decision inferring from the parties' choice of the arbitration law of Quebec that the arbitrators had to be from Quebec, too.

[51] *See* Section Conclusion, infra.

[52] Other institutional rules contain no formal prohibitions but do expressly allow the institution to take nationality into account in making appointments. *See, for example*, ICC Rules (art. 13(1)); SCC Rules (art. 13(6)).

[53] Article 6(4) IAR allows the administrator, upon his or her own initiative, to appoint an arbitrator with a different nationality than any party.

[54] Art. 1450 Code of Civil Procedure (France) (for domestic arbitration); Netherlands Code of Civil Procedure, Art. 1023; Estonian Code of Civil Procedure, §722(1); Lebanese New Code of Civil Procedure, Art. 768(1); though not expressly named in the law, the requirement is inferred from the

in some jurisdictions a legal person is allowed to serve as arbitrator.[56] Moreover, some national laws require that an arbitrator not have been criminally convicted or bankrupt.[57] It is doubtful that other jurisdictions would find requirements of capacity (or a minimum age) or exclusion of persons with criminal convictions or in bankruptcy to be objectionable. As for party agreements, none can be found that expressly imposed requirements of this sort.

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explicitly regulated capacity requirements under Bahrain law, *see* SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST (2012), 230.

[55] *See, e.g.*, French Code of Civil Procedure, Art. 1450; Netherlands Code of Civil Procedure, Art. 1023; Belgian Judicial Code, Art. 1680; Estonian Code of Civil Procedure, §722(1); Latvian Civil Procedures Law, Art. 497(2); Italian Code of Civil Procedure, Art. 812; Polish Code of Civil Procedure, Art. 1170 §1; Jordanian Arbitration Law No. 31 of 2001, Art. 15(a); Kuwait Code of Civil and Commercial Procedure, Art. 174(1); Bahrain Civil and Commercial Procedures Act, Art. 234(1); Egyptian Arbitration Law, Art. 16(1); see also Lebanese New Code of Civil Procedure, Art. 768(2).

[56] A Spanish court has upheld the designation of a legal person as arbitrator under the UNCITRAL Model Law. Judgment of 29 July 2005, Sogecable SA v. Auna Telecomunicaciones SA, SAP M 9531/2005 (Madrid Audiencia Provincial). However, the legal entity appointed as arbitrator in that case was the "Comision del Mercado de las Telecomunicaciones," which was established by Statute and Royal Decree and to which the function of serving as arbitrator in telecommunications cases was expressly attributed. More generally, however, Spanish law specifically recognizes the possibility for a corporation to act as arbitrator. Spanish Arbitration Act, 2011, Art. 13; Algerian law also allows the appointment of a legal person as arbitrator, for both international and domestic arbitration, but provides that in domestic arbitration the appointment of a legal person shall result in the appointment of members of this entity serving (individually) as arbitrators. Algerian Code of Civil and Administrative Procedure, Art. 1014(2); *see also* HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2011), DZ-104-06.

[57] *See, e.g.*, Lebanese New Code of Civil Procedure, Art. 768(2); Jordanian Arbitration Law No. 31 of 2001, Art. 15(a); Polish Code of Civil Procedure, Art. 1170; Colombian Arbitration Act, Art. 7(1);; Italian Code of Civil Procedure, Art. 812; Taiwanese Arbitration Act, Art. 7(1)-(5); Argentine National Code of Civil and Commercial Procedure, Art. 743(2); Peruvian Arbitration Law, Art. 20; Egyptian Arbitration Law, Art. 16(1); Libyan Code of Civil and Commercial Procedure, Art. 741; Omani Arbitration Law, Art. 16(1); Tunisian Arbitration Code, Art. 10(1); Qatari Code of Civil and Commercial Procedure, Art. 193(1); Yemeni Draft Arbitration Act (2010), Art. 20(1); Kuwait Code of Civil and Commercial Procedure, Art. 174(1).

Although one might imagine a jurisdiction subjecting arbitrators to an age limitation, only one such jurisdiction could be found, and this is imposed neither by the State nor directly by the parties themselves, but rather by institutional rules. The Rules of Arbitration of the Bangladesh Council of Arbitration specify an age limit of 75. Although an arbitrator on the Council's roster of arbitrators "cease[s] to be a member of [it]" when he or she reaches 75 years of age, sensibly an arbitrator who happens to reach the age of 75 years during the proceedings remains on the roster until issuance of a final award in the case.[58]

4. Religion Requirements

Religious requirements have been viewed somewhat differently. Once again, it is vital to distinguish between requirements imposed by law and those imposed by the parties on themselves. On the one hand, it is subject to doubt whether restrictions of the former type (i.e., restrictions that are imposed by the law of the arbitral seat), of which we have examples,[59] will be respected.[60] Moreover, the law in this regard is in many jurisdictions evolving. When Saudi Arabia, the most prominent *Shari'a* law country, adopted new legislation on arbitration in 2012, it eliminated the requirement that arbitrators be male and Muslim.[61] (The possibility is not to be excluded that a Saudi court might regard the rule that only a Muslim may judge a Muslim as a matter of public policy and deny recognition or enforcement to an award that offends that rule.)[62]

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[58] SIMON GREENBERG, CHRISTOPHER KEE, J. ROMESH WEERAMANTR, International Commercial Arbitration: An Asia-Pacific Perspective, CUP, 2010, p. 258 (§ 6.45).

[59] *See generally* SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST (2012), 369, reporting that in some jurisdictions being Muslim is a mandatory requirement for an arbitrator, except if the arbitration is conducted outside of any Islamic country. *See also* ZEGERS, NATIONAL REPORT FOR SAUDI ARABIA (2013), J. PAULSSON (ED.), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 24 (2013); HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 194-95, 204 (2011).

[60] BORN, Ch. 12 p. 1743.

[61] J. P. Harb and A. G. Leventhal, *The New Saudi Arbitration Law: Modernization to the Tune of Shari'a,* 30 JOURNAL OF INTERNATIONAL ARBITRATION,113-130, (2013).

[62] "Conceivably, a Saudi judge could also reject an application for enforcement if the arbitral tribunal included a female arbitrator or failed to include one or more Muslim arbitrators, on the grounds that under *Shari'a* law,

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The situation, once again, appears to be different when the religious restriction stems from an agreement between the parties. The U.K. Supreme Court recently sustained a provision of that sort.[63] In that case, the question turned specifically on the applicability of an EU Regulation prohibiting employment discrimination on religious grounds. The Court ruled that the Regulation was inapplicable in the arbitration context because the arbitrators and parties do not stand in an employer-employee situation. (It also opined, in dictum, that even if the Regulation were applicable, the requirement in the case at hand could stand as falling within the Regulation's exception for genuine occupational requirements.) That case arose notably in a religious (and in that circumstance, specification of a religion could not be regarded as arbitrary. Many courts have likewise respected foreign awards based on an arbitration agreement that required arbitrators to be of a certain religion, where there was good reason for the parties to have so agreed.[64] One circumstance in which a religion-based limitation will

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as practiced in Saudi Arabia, arbitrators must have the same qualifications as judges, including being male and Muslim, or on the grounds that only a Muslim can judge another Muslim by applying *Shari'a* law.

In practice, however, there is no certainty as to what constitutes a ground for refusal of enforcement and often decisions are arbitrary. As a result, refusals to enforce foreign arbitral awards are the norm, because public policy in Saudi Arabia covers a vast area of practice that might be unknown to foreign arbitrators sitting abroad and applying non-Saudi *lex arbitri,"* J.-B. Zegers*, National Report for Saudi Arabia (2013), in* JAN PAULSSON AND LISE BOSMAN (EDS), ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, (Kluwer Law International 1984, Suppl. No. 75, July 2013), 49; *See also* P. Harb and A. G..Leventhal, *The New Saudi Arbitration Law: Modernization to the Tune of Shari'a,* 30 JOURNAL OF INTERNATIONAL ARBITRATION 127 (2013), citing Article 55, (b), Law of 16 April 2012.

[63] Jivraj v. Hashwani [2011] UKSC 40 (U.K. S.Ct.) (at 41-42, 77-78) (denying the application of anti-discrimination provisions of employment law to arbitrators).

[64] *See* BORN, Ch. 12, p. 1755, footnote 677 and 678: For the US: Berg v. Berg, 85 A.D.3d 950, 951-52 (N.Y. App. Div. 2011) (enforcement of an award made by three rabbis in an arbitration regarding the dissolution of a marriage under religious laws); Dial 800 v. Fesbinder, 118 Cal.App.4th 32, 47-50 (Cal. Ct. App. 2004) (confirming an award made by three rabbis – like any other foreign arbitral award under the New York Convention). But whether an arbitrator meets a certain religious requirement is not justiciable under the U.S. Constitution and thus an arbitration agreement providing for such qualification

almost certainly be upheld is one in which the parties had selected the law of the chosen religion as the governing law.

5. Qualifications of Gender, Race, or Sexual Orientation?

As best as can be determined, parties have not sought in their arbitration agreements to exclude persons of a certain gender, race or sexual orientation. The question of whether the principle of party autonomy establishes a right to do so has not arisen.[65] It does seem likely that courts in many countries would refuse, as a matter of public policy, to enforce agreements of that sort.

The laws of some countries do however contain, or are read to contain, such prohibitions. Thus, even though the current Saudi Arabian law eliminates any formal prohibition on women serving as arbitrators, women still may be prohibited from serving as arbitrators based on the norm that the conduct of arbitration must comply with *Shari'a* rules.[66]

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of the arbitrator is not enforceable, however the provision as such and the voluntary compliance by the parties is to be recognized: In re Ismailoff, 836 N.Y.S.2d 493, at *2 (N.Y. Surrogate's Ct. 2007). English courts generally recognize and enforce awards decided by "religious" tribunals (but the validity of the application of "religious laws" under English public policy is another question which must be distinguished from the question of the formation of the tribunal according to religion requirements), *see* Bhatti v. Bhatti [2009] EWHC 3506 (Ch) (English High Ct.) (upholding an award made by the quasi-judicial body of the Muslim Ahmadiyya Community through arbitral proceedings under English law).

[65] A provision that on its face may appear to restrict arbitral activity to men may well be interpreted to include women. A good example is treatment in the U.K. of old arbitration agreements excluding arbitrators other than "commercial men." That language has been interpreted to require commercial training only and to have no regard to gender. *See* BORN. Ch. 12, p. 1756, though the case cited here (Pando Compania Naviera SA v. Filmo SAS [1975] Q.B. 742, 746-47 (English High Ct.)) does not expressly address the gender issue but merely interprets the aspect "commercial" as "commercial experience," a definition which could be equally applied to men and women.

"Commercial men" has been interpreted by the U.S. Maritime Law Association (the U.S. maritime bar) as meaning "commercial persons," regardless of gender." (*see* http://www.smany.org/doc7-maritimeGuideNY.html#6).

[66] *See* SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST (2012), 371. *See also* HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION

Some jurisdictions specifically entitle parties to select arbitrators without regard to gender, but then add that the parties may, if they wish, validly renounce that freedom.[67]

It is by no means clear that limitations based on gender in those countries imposing or permitting them will be considered valid in other jurisdictions; they may well be viewed as contrary to public policy. The same may be true of restrictions based on race or sexual orientation, but there appear to be no cases.

6. Professional Requirements

The requirement of a law degree is a good example of one that both the State[68] and the parties themselves[69] are fully at liberty to impose, and

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WITH THE ARAB COUNTRIES (2011), IA-202 (with respect to Islamic law in general; otherwise the award is void).

[67] Art. 15(b) of the Jordanian Arbitration Law expressly provides that the parties are free to choose the arbitrators without regard to gender "unless otherwise agreed by the two arbitrating parties." Article 16(2) of the Egyptian Arbitration Law is to the same effect.

[68] *See, e.g.*, Chinese Arbitration Law, Art. 13; Arbitration Regulation of Saudi Arabia (2012), Art. 14(3) (degree in Shari'a or legal science); Taiwanese Arbitration Act, Art. 5(1); Colombian Arbitration Act, Art. 7(2) (If the award is to be made according to law, the arbitrator or arbitrators must be lawyers.); the same is true for Argentina (on the basis of case law): Le Pera, *"International Commercial Arbitration in Argentina," in* THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, SPECIAL SUPPLEMENT: INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA (JEAN-FRANCOIS BOURQUE ED., 1997) 6, 8; Whittinghill, *The Role and Regulation of International Commercial Arbitration in Argentina,* 38 TEX. INT'L L.J. 795, 801 (2003). *See also* HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2011), IA-203 regarding the rule under Islamic law.

Spanish law (Art. 15, 1) establishes a link between the legal qualification of the arbitrator and the rules deciding the case. Art. 15, 1, mandates that: "Unless otherwise agreed by the parties, in arbitrations that are not to be decided in equity, when the arbitration is submitted to a sole arbitrator, the arbitrator that acts as such shall be a jurist." Taiwanese law requires that an arbitrator have a certain minimum professional experience, whether as a legal professional or otherwise. Taiwanese Arbitration Act, Art. 6.

[69] BORN, Ch. 12 p. 1754 *et seq*.; Final Award in ICC Case No. 9797, 18 ASA Bull. 514, 517 (2000) (the arbitration agreement required that the arbitrator is a lawyer; the clause was not seen as problematic in any way). For respective

is one that will be respected. This is not to say that legal education or a law degree is a legal requirement everywhere, for it is not. Many jurisdictions act on the belief that, at least for some cases, persons with non-legal backgrounds – economists or engineers, for example – might make more suitable decision-makers.

It might seem unlikely that the parties would actually preclude legal professionals from serving as arbitrators, but the issue arose in one German case, in which a company's general contractual terms and conditions excluded the possibility of its contracting party engaging a legal professional as arbitrator. The court held such a restriction, at least in those circumstances, to be an unenforceable limitation on that party's right to effective legal protection.[70] The result might be otherwise in the context of arbitrations conducted under the aegis of a trade association. The rules of some such associations expressly prohibit the selection of lawyers as arbitrators.[71] Given the trade association context, such a restriction is likely to be respected. It is certainly common for trade or professional associations to restrict to members of the trade or profession (and possibly to members of the association or members of a limitative list of potential arbitrators)[72] the possibility of serving as arbitrator in a proceeding under that association's aegis.

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institutional rules *see, e.g.*, DIS Rules, §2(2) (sole or presiding arbitrator); *see also* Art. 14(1) ICSID Rules ("Competence in the field of law should be of particular importance in the case of persons on the Panel of arbitrators.").

[70] Judgment of 10 October *1991*, XIX YBCA 200 (German Bundesgerichtshof) (1994), §§ 8-11; *see also* BORN, Ch. 12, p. 1753-54.

[71] *See, for example*, the institutional rules of the Vancouver Maritime Arbitrators Association. VMAA Rules (2013), art. 6 ("Arbitrators shall be commercial persons and not practising lawyers, except where two arbitrators by these rules are to appoint a third, that third arbitrator may be a practicing lawyer."). *See also* the Arbitration Rules of the Federation of Oils, Seeds and Fats Associations (FOSFA), art. 12 ("Only Trading Members, Full Broker Members and Full Non-Trading Members or their nominated representative/s to the Federation, with the exception of persons of the legal profession wholly or principally engaged in legal practice, shall have the right to act as arbitrators").

[72] Such requirements are common in arbitration rules designed for dispute resolution in a certain industry field, *see e.g.* ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, Rule 6.2 (" the arbitrators and umpire shall be persons who are current or former officer or executives of an insurer or reinsurer"); Maritime Arbitration Association of the United States Arbitration Rules, Rule 7(g) ("Arbitrators must comply with the

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In the majority of jurisdictions, there is no formal prohibition on national court judges serving as arbitrators.[73] However, some national laws do prohibit national court judges from serving as arbitrators[74] or at least condition their right to do so on the grant of special permission,[75]

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experience, training, educational, and other requirements established by the MAA."); VMAA Rules, Art. 6 ("Arbitrators shall be commercial persons and not practicing lawyers"); National Grain and Feed Association (NGFA) Rules, Rule 5 (C) ("To qualify as an arbitrator an individual must be … an employee or active partner, principal, officer or director of a NGF member"); Multilateral Investment Guarantee Agency, Rules of Arbitration for Disputes Under Contracts of Guarantee, Art. 9.1 ("Arbitrators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance").

[73] *See, for example*, Mexico (De Cossío, *National Report on Mexico (2011),* in J. PAULSSON (ED.), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 16., Norway (Ryssdal & Myrbakk, *National Report on Norway (2009),* in J. PAULSSON (ED.), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 12); Ukraine (Pobirchenko, *National Report on Ukraine (2008),"* in J. PAULSSON (ED.), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 7.); Sweden (Franke, *"National Report on Sweden (2011),* in J. PAULSSON (ED.), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 8.); and Belgium (Keutgen & Dal, *National Report on Belgium (2007),* in J. PAULSSON (ED.), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 12. Art. 298 of the Judicial Code). Belgian judges only perform as arbitrators if they do so without remuneration beyond reimbursement for travel costs and the like.

[74] *See* Yemeni Draft Arbitration Act (2010), Art. 21; Zuleta Jaramillo, *"National Report for Colombia (2010),"* in J. PAULSSON (ED.), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, 1, 15. ABA Code of Judicial Conduct (2011), Rule 3.9.

[75] English Arbitration Act, 1996, §93 (2), (3); Tunisian Arbitration Code, Art. 10(3); French Decree 93-21 of 7 January 1993, modified by Decree 94-314 of 20 April 1994, Art. 37; German Richtergesetz, § 40 (no authorization if judge is presently concerned or might in the future be concerned with the matter as a judge); Japanese Court Act, Art. 52(ii) ("Judges may not […] hold another position with remuneration without obtaining the permission of the Supreme Court"); with a similar formulation Art. 195(1) no.5 of the Bulgarian Law on the Judiciary ("A judge, prosecutor or an investigating magistrate, while in office, may not […] 5. Exercise a liberal profession or another remunerate professional activity"), but whether this provision applies to the service as arbitrator is subject to debate, *see* Alexiev, *"National Report for Bulgaria (2010"),* in J. PAULSSON (ED.), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1,

limit their right to do so to particular sectors,[76] or impose special procedures in such circumstances.[77] The restriction obviously has nothing to do with judges' professional capacity to sit as arbitrators, and everything to do with protecting the integrity of the national judicial process.

D. The Requirement of Impartiality and Independence

Impartiality and independence are qualities that States are obviously free to impose on arbitrators conducting arbitral activity on their territory. These are qualities that States generally must impose if awards rendered under their *lex arbitri* are to withstand challenge. The only question that may conceivably be left open is whether parties, in their exercise of party autonomy, may contract for arbitrators who lack either independence or impartiality.

Virtually all national legislation mandates impartiality and independence on the part of arbitrators, at least in international arbitration.[78] Those qualities are so intrinsic to the practice of international arbitration that national law is regarded as requiring them

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17. Under Jordanian Law the possibility of a judge serving as arbitrator is limited to disputes involving the government/a public entity or international disputes and the judge must (1) (as every arbitrator) be appointed as arbitrator by the Judicial Council and (2) obtain the approval by the Council of Ministers, *see* SALEH, ARBITRATION IN THE ARAB MIDDLE EAST (2012), 26.

[76] In Argentina, judges are allowed to serve as arbitrators in mercantile and corporate matters. Whittinghill, *The Role and Regulation of International Commercial Arbitration in Argentina,* 38 TEX. INT'L L.J. 795, 801 (2003).

[77] The law of Kuwait provides for a special procedure called "judicial arbitration." *See* Law No.11 and the Implementing Decree No. 43; *see also* SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST (2012), 124. The tribunal for judicial arbitration mandatorily consists of three judges and two party-appointed arbitrators. The parties cannot agree on a different number of arbitrators and must choose the arbitrators primarily from a list provided by the court. Law No. 11, Art. 1(1). *See* SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST (2012), 127.1(1).

[78] *See, for example,* UNCITRAL Model Law of International Commercial Arbitration, art. 12. *See also* France (Code of Civil Procedure, art. 1456(2)); Switzerland (PILA, art. 180(1)(c)), Code of Civil Procedure, arts. 363(1), 367(1)(c); Germany (Code of Civil Procedure, art. 1036); Jordan (Arbitration Law No.31 of 2001, art. 15(c)).

even if they do not so state.[79] Similarly, virtually every set of institutional arbitration rules imposes requirements of impartiality and independence,[80] and the New York Convention authorizes courts to deny recognition and enforcement of an award made by a tribunal lacking impartiality and independence.[81] The rationale for this requirement is that arbitrators perform judicial functions and produce awards that are binding at law and, in principle, entitled to recognition and enforcement by public authorities.[82]

Though the requirement of impartiality and independence is almost universally known, its interpretation and application vary from jurisdiction to jurisdiction.[83] Even within jurisdictions, its meanings can depend on the stage at which the issue is raised, as well of course as on the precise circumstances of each case.

Arbitrator impartiality and independence is the subject of a voluminous literature, a voluminous case law, and voluminous amounts of soft law, none of which can be recount3ed here. Suffice it to say that, subject to innumerable variations, the currently prevailing view is that the presence or absence of these conditions is to be determined on a fundamentally objective basis, measured by what an objective observer would conclude. Moreover, finding a lack of impartiality or independence does not require proof of actual bias, but rather justifiable

[79] Evidently, the arbitration laws of Bahrain and Kuwait contain no such express requirement.

[80] *See, for example*, ICC Rules. Arts. Art 11(2), 13(2). ICC Rules. Though the ICC Court is not bound by such objections, it will take them into consideration. Thus, the counter party has the possibility to prevent the appointment of a certain arbitrator in the first place instead of challenging him later during the proceedings. *See also* LEW, MISTELIS & KRÖLL, § 10-83 et seq. (with respect to Art. 7 of the former ICC Rules).

[81] New York Convention, art. V(2)(b).

[82] BORN, 2014, Ch. 12 p. 1762; Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 430 A.2d 214, 218 (N.J. 1981); Desbois v. Industries A.C. Davie Inc., Court of Appeal of Quebec, Canada, 26 April 1990, [1990] CanLII 3619 (QC CA); Judgment of 6 October 2008, 27 ASA Bull. 789, 790 (Swiss Federal Tribunal) (2009); Judgment of 2 June 1989, Société Gemanco v. Société Arabe des engrais phosphates et azotes, 1991 Rev. arb. 87, 87 (Paris Cour d'appel). *See also* Revised Uniform Arbitration Act, § 12, comment 1 (2000) ("The notion of decision making by independent neutrals is central to the arbitration process").

[83] BORN, Ch. 12 p. 1762

doubts as to an arbitrator's impartiality or independence.[84] Many national laws are generally to that effect.[85]

This is not the place to go into the vexing question of whether party-appointed arbitrators are held to the same standards of impartiality and independence as apply to chairs or presidents of tribunals. Here too there is a prevailing view, namely that, while co-arbitrators must maintain their full impartiality and independence (hence their capacity to view the case in an open-minded manner, deciding it solely on the facts and the law),[86] each may and indeed should seek to ensure that the tribunal appreciates the appointing party's argumentation.[87] That said, empirical studies reveal that co-arbitrators not infrequently dissent from awards disfavoring the party appointing them, but invariably support awards that

[84] *See, e.g.*, UNCITRAL Model Law of International Commercial Arbitration, art.12(2); IBA Guidelines on Conflicts of Interest, General Standard 2(b) ("if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence").

[85] *E.g.* Art. 180(1)(c) PILA with Judgment of 6 October 2008, 27 ASA Bull. 789, 790 *et seq*. (Swiss Federal Tribunal) (2009); Canadian Commercial Arbitration Act, Art. 12(2); Australian International Arbitration Act, 2011, §§16, 18(A) (specifying "justifiable doubts" as "real danger of bias"); Indian Arbitration and Conciliation Act, Art. 12(3)(a); New Zealand Arbitration Act, Art. 12(2). *See also* in Hong Kong: JE Taylor Co. v. Paul Brown, Judgment of October 31, 1990, [1990] 1 HKLR 285, 290 (Hong Kong High Court-Court of First Instance.), §§ 33, 34 and Jung Science Information Technology Co. Ltd. v. Zte. Corporation, High Court - Court of First Instance, Hong Kong, 22 July 2008, [2008] HKCFI 606, §§ 52 et seqq. ("reasonable outsider" would find a risk of partiality).

[86] *See, e.g.*, UNCITRAL Model Law, art. 12; Switzerland (PILA, art. 180(1)(c)); U.K. (English Arbitration Act, 1996, secs. 4(1), 24(1)(a), 33(1)); Germany Civil Procedure Code, sec. 1036(2); Belgium (Judicial Code, art. 1690(1)); Netherlands (Code of Civil Procedure, art. 1033(1)); India (Indian Arbitration and Conciliation Act, art. 12(3)(a)); Tunisia (Arbitration Code, arts. 22, 57. *See also* Judgment of 29 October 2010, Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano, 29 ASA Bull. 80, 92 (Swiss Federal Tribunal) (2011) (the requirements of impartiality and independence apply in the same way to the party-appointed arbitrators as to the presiding arbitrator); FOUCHARD, GAILLARD & GOLDMAN, § 778.

[87] BORN, Ch. 12 p. 1811; *see also* LEW, MISTELIS & KRÖLL, § 11-50.

favor them.[88] Where national laws do differ is on the question whether parties may validly agree that their respective appointees may approach the case with less than full impartiality and independence, with U.S. law in principle permitting that degree of party autonomy,[89] but most other systems not, either expressly[90] or impliedly.[91] The situation under the UNCITRAL Model Law remains unclear. [92]

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[88] *See* Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in* MAHNOUSH ARSANJANI ET AL., LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 832 (2011).

[89] AAA/ABA Code of Ethics Canon X; Rules 13(b), 18(b) 2013 AAA Commercial Arbitration Rules; RUAA § 11(b) and § 12 with comment 4; AAA International Arbitration Rules (ICDR Rules); AAA domestic arbitration rules, 2013 AAA Rules, Rules 13(b), 18(a);Art. 7(1); AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes ("AAA/ABA Code of Ethics"), Note on Neutrality, Canon IX A.;; some courts followed the trend, *see* Borst v. Allstate Ins. Co., 291 Wis.2d 361, 366, 373-376 (Wis. 2006) (presumption of impartiality for all arbitrators, including party-appointed arbitrators); *see also* Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 430 A.2d 214, 218 (N.J. 1981). This policy in favor of the parties' agreement seems to be even stronger, if the parties directly agreed on a certain arbitrator in their agreement (prior to the dispute in question) and this arbitrator happens to be partial or affiliated with one party. Aviall, Inc. v. Ryder Sys., 913 F.Supp. 826, 833 (S.D.N.Y. 1996); Westinghouse Elec. Corp. v. N.Y.C. Transit Auth., 82 N.Y.2d 47, 53-54 (N.Y. 1993) (upholding the agreement on an employee of one party as arbitrator, as long as this agreement is the result of an informed negotiation).

[90] English Arbitration Act, 1996, sec. 33(1)(a) with sec. 4(1) (declares mandatory character of all provisions included in Schedule 1); Chinese Arbitration Law, art. 34 (potentially impartial arbitrator "must withdraw"); Hungarian Arbitration Act, sec. 11("[t]he arbitrators are independent and impartial, they are not the representatives of the parties"); Brazilian Arbitration Law, art. 14 ("Individuals somehow linked to the parties or to the submitted dispute, by any of the relationships resulting in the impediment or suspicion of Court members, are prevented from acting as arbitrators…").

[91] *See, e.g.*, French Code of Civil Procedure, art. 1456(2); German ZPO, sec. 1036(2); Austrian ZPO, sec. 588(2; Swedish Arbitration Act, sec. 8; these laws lack any particular language regarding the issue; *see also* BORN, Ch. 12 p. 1816.

[91] According to BORN, Ch. 12 p. 1815 *et seq*. there is no authority dealing with the issue. However, according to the UNCITRAL Digest, p. 65, sec. 5, the impartiality requirement is mandatory. The Digest cites a Canadian judgment in which the court decided that a person which is somehow involved in the contract at issue/the dispute, cannot be appointed as arbitrator (Desbois v. Industries A.C.

II. JURISDICTION AND CHOICE OF LAW IN LIMITS ON PARTY AUTONOMY IN PANEL COMPOSITION

Far more confounding than the panoply of respects in which parties lack autonomy in composition of an arbitral tribunal is identification of the jurisdictions that find themselves in a position to impose such limitations. As the previous discussion illustrates, there are a variety of jurisdictions that may seek to impose limitations on party autonomy in panel composition, even in respect of a single proceeding. These include the jurisdictions (a) in which an arbitral proceeding is sited, (b) whose law is the law of the arbitration agreement or of the contract as a whole, (c) where the arbitrator is domiciled, (d) that are asked to enforce the agreement to arbitrate, and (e) where recognition or enforcement of the resulting award is sought. Each of these jurisdictions has some claim to address the qualification question and to impose its requirements[93].

A. Referring the Parties to Arbitration

The jurisdiction in which the issue is apt first to arise is the one that is asked to refer the parties to arbitration.[94] Under Article II(3) of the New York Convention, a court of a signatory State may decline to refer the parties to arbitration only if it finds the agreement to be "null and void, inoperative or incapable of being performed." The "null and void, inoperative or incapable of being performed" exception is ordinarily associated with either substantive aspects of an arbitration agreement (such as whether a dispute is arbitrable by law, or whether enforcement of the agreement would violate mandatory law or public policy) or

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Davie Inc., Court of Appeal of Quebec, Canada, 26 April 1990, [1990] CanLII 3619 (QC CA)).

[92] According to BORN, Ch. 12 p. 1815 *et seq*. there is no authority dealing with the issue. However, according to the UNCITRAL Digest, p. 65, sec. 5, the impartiality requirement is mandatory. The Digest cites a Canadian judgment in which the court decided that a person who is somehow involved in the contract at issue/the dispute, cannot be appointed as arbitrator (Desbois v. Industries A.C. Davie Inc., Court of Appeal of Quebec, Canada, 26 April 1990, [1990] CanLII 3619 (QC CA)).

[93] G. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 2014, p. 1757.

[94] Request for the Enforcement of an Arbitration Agreement, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES, International Council for Commercial Arbitration 2011, p. 51.

procedural ones (such as whether the agreement was obtained by coercion or duress).[95]

But it is entirely conceivable that an arbitration agreement would be found "null and void, inoperative or incapable of being performed" for reasons having to do with the panel composition contemplated. Agreements that exclude persons from being selected as arbitrator if they have a certain gender, race, religion, sexual orientation, or the like, may likely so offend fundamental rights as to be unenforceable by State authorities. A court might either be strike that restriction (while otherwise enforcing the agreement) or deny enforcement of the agreement because it feels that it cannot sever the provision (as when it concludes that the parties would not have agreed to arbitrate absent the requirement). Similarly, a Saudi court might readily withhold enforcement of an arbitration agreement if it specified qualifications inconsistent with *Shari'a* law.[96]

A question immediately arises as to the law to be applied in determining whether and in what respect party autonomy in panel composition is curtailed. It is commonly assumed that the court where enforcement of the agreement is sought will apply its own law, and only its own law, to the question of arbitrator qualifications. By way of illustration, the French *Cour de Cassation* in a succession case enforced an arbitration agreement, despite the fact that it would apparently be unenforceable under Saudi law.[97] The premise of this assumption is that most restrictions are expressions of public policy and courts give effect only to the public policy norms of their own jurisdiction.

Even so, a good case may be made for a court in this circumstance to turn, in giving content to the restriction (whether imposed by law or by a party), to the law of another jurisdiction. It is not at all unusual for the forum's choice of law rule to contain an element – possibly a core element – that turns on the law of another jurisdiction. For a simple

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[95] *See* J. Kleinheisterkamp, *The impact of internationally mandatory laws on the enforceability of arbitration agreements,* 3 WORLD ARB. & MED. REV. 91 (2009).

[96] M. Khatchadourian, *La Nouvelle loi Saoudienne sur l'arbitrage,* 2012 REVUE DE L'ARBITRAGE 686.

[97] Cass. 1e civ. (fr), Arrêt n° 1055 du 26 octobre 2011 (10-15.968), Comm. S. HOTTE, JOURNAL DU DROIT INTERNATIONAL (CLUNET), Oct. 2012-4. The commentary has not been pulled out, but may be requested from the library if necessary.

example, the forum may look to its own law to determine that incapacity is a ground for denying enforcement of a contract; it may nevertheless look to another jurisdiction's law to determine whether incapacity is established. Thus, in our setting, while the forum where enforcement of the arbitration agreement is sought may deny enforcement of the agreement because "null and void, inoperative or incapable of being performed," it may look to another jurisdiction's law to determine whether the agreement is in fact "null and void, inoperative or incapable of being performed." If so, that other law will likely be the law of the arbitral seat, in the view that it has the greatest interest in the regularity of proceedings conducted on its territory. If making such a reference to a law other than the one to which the forum's choice of law rule principally points represents a standard practice under the general conflict of law practices at the forum, there is no reason not to follow that practice in this circumstance.

One might envisage enforcement of an arbitration agreement being withheld if the institutional rules chosen by the parties impose certain restrictions that the parties seek to contract around in their agreement.[98] This seems unlikely, however. The parties chose institutional rules as an exercise of party autonomy; that being the case, they should be entitled to override those rules by a further exercise of party autonomy. It is still less likely that the court that is asked to enforce the arbitration agreement would consult the law of the State or States where a prevailing party is

[98] Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure,* available at http://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf: "Other restrictions on party autonomy might arise where the parties select institutional arbitration but attempt to alter the rules of the administering body in a way which is unworkable or is not accepted by the administering body. Thus, *for instance*, if the parties provided for arbitration in accordance with the ICC Rules of Arbitration (ICC Rules) but provide that article 27 of the ICC Rules (which deals with scrutiny of awards by the ICC Court) will not apply, it is probable that the ICC Court would not accept the case as an ICC case. Court scrutiny of awards is an important feature of ICC arbitrations and the administering body is unlikely to agree to waive it." The author cites CRAIG, PARK AND PAULSSON to the effect that "[t]he ICC Court will refuse to administer an arbitration with party agreed modifications to the Rules only when a fundamental characteristic of ICC arbitration (such as Court scrutiny of the award) is omitted." CRAIG, PARK & PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (3rd ed, 2000), 295.

"likely" to seek recognition and enforcement of the resulting award, assuming that State or those States could already be identified.

B. Challenges to the Tribunal's Composition

With a tribunal's constitution, there arises a second main opportunity to question the exercise of party autonomy in tribunal composition, typically in the form of a challenge to the empanelment of one or more arbitrators. At this stage, a party voices objections to its adversary's choice of arbitrator, potentially because that arbitrator does not meet the description provided for in the parties' agreement, but more due to a complaint about the arbitrator's impartiality or independence. [99] Depending on the *lex arbitri* and/or applicable rules of procedure, the challenge may come initially before the tribunal itself, before the administering institution, or before a court of the place of arbitration.

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[99] *See* Article 180 of the Swiss rules: "(1)An arbitrator may be challenged:
(a) if he does not meet the qualifications agreed upon by the parties;
(b) if a ground for challenge exists under the rules of arbitration agreed upon by the parties;
(c) if circumstances exist that give rise to justifiable doubts as to his independence.
(2) No party may challenge an arbitrator nominated by it, or whom it was instrumental in appointing, except on a ground which came to that party's attention after such appointment. The ground for challenge must be notified to the arbitral tribunal and the other party without delay.
(3) To the extent that the parties have not made provisions for this challenge procedure, the judge at the seat of the arbitral tribunal shall make the final decision."

M. ORELLI, Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 180 [Arbitral tribunal: challenge to an arbitrator], *in* M. ARROYO (ED), ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE, (Kluwer Law International, 2013), 87: "According to Art. 180(1)(b) PILA, the parties may challenge an arbitrator based on the applicable arbitration rules. In line with the principle of party autonomy, the parties may submit their dispute to a set of arbitration rules and by doing so declare binding the latter's grounds for challenge. On the other hand, the grounds for challenge specified in the Swiss Code of Civil Procedure (Arts. 367 and 368 ZPO) or the ones set forth in the procedural rules elected by the parties pursuant to Art. 182 PILS should only be binding if the parties have not just globally referred to these procedural rules, but either explicitly declared their grounds for challenge applicable in the sense of Art. 180(1)(a) PILA or opted out of the application of Chapter 12 PILA pursuant to Art. 176(2) PILA."

When it comes to individual challenges of this sort, timing may be of the essence. A party who knows, or should have known, of the lack of qualification of an arbitrator or the basis for challenging an arbitrator's impartiality or independence, may be deemed to have waived the objection, provided of course the requirement is waivable. Thus, the UNCITRAL Model Law allows a party fifteen days after becoming aware of the circumstance in which to bring a challenge.[100] A requirement of a specific characteristic – e.g., a requirement that all three arbitrators be certified civil engineers -- may also be waived.

Here, too, a question of law may arise. The question of applicable law is in many instances of no practical importance. The presence or absence of a qualification will in many cases be entirely straightforward, entailing no reference to a body of law. A good example is the requirement that an arbitrator hold a specific, readily-identifiable degree or not have reached a specified age.[101] On the other hand, the satisfaction or non-satisfaction of a qualification may require looking at a particular jurisdiction's law. A good example would be a stipulation in an arbitration agreement that requires or excludes a certain nationality. In that case, it is naturally the law of the jurisdiction whose nationality is in question that will determine whether the nationality or non-nationality requirement is met. If the relevant issue is arbitrator independence and impartiality, the standards are likely to derive from the law of the seat, the *lex arbitri*.[102]

C. Tribunal Composition as an Annulment Issue

Issuance of the award in which the arbitration culminates may also produce a challenge, this time directed at the award rather than directly at an arbitrator. Annulment in principle being available only in a court of the situs, the law governing the challenge will be the *lex arbitri.* The *lex arbitri* might, for example, be the UNCITRAL Model Law, in which

[100] Article 13(2): "[A] party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance [justifying a challenge]."

[101] *See*, for example, for such a requirement (common in maritime law): U.S. Ship Mgmt., Inc. v. Maersk Line, Ltd., 188 F. Supp. 2d 358, 369 (S.D.N.Y.).

[102] *See* G. BORN, 2014, p. 1776.

case Article 34 of the Law will supply the annulment standards.[103] As we have seen, that law may, in articulating one of its own grounds for an annulment, identify a circumstance or other factor best determined under a specific body of law, whether forum law or some other law. That is precisely what the Model Law does in our circumstance, providing for annulment if "((a) (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law." It thus expressly designates (a) the party's agreement and (b) forum law.

This choice of law rule (subparagraph (a) (iv)) is obviously applicable when it is the parties' agreement that imposed the requirement at issue. Deviation from that requirement, assuming it to be a valid and enforceable one, would be the basis for annulment. It is also applicable when the requirement or prohibition is imposed by law. However, if the

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[103] "An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State."

requirement imposed by the parties is itself an invalid one, another provision of the Model Law (subparagraph (a) (i)) might apply, namely the provision authorizing annulment if "(i) the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State." Under this provision, it is the law governing the arbitration agreement that would determine the validity question. If the two provisions point to different laws (and of course they may not), I would argue that the first of these (paragraph (a) (iv)) should govern, as it is the one that specifically addresses issues of panel composition. A final possibility would be to consider the award in light of the public policy of the forum under subparagraph (b)(ii) of the Model Law, in which case the forum, by the terms of that provision, would apply its own public policy and none other.[104]

D. Panel Composition as a Defense to Recognition or Enforcement

The final occasion on which panel composition is likely to become an issue is recognition or enforcement of the award resulting from the arbitration. May a State deny recognition or enforcement of an award due to a failure to comply with the requirements of the parties' agreement or failure to comply with the law? (Of course a court of the seat may already have annulled the award on that basis, in which case the fact of the annulment itself is sufficient under Article V(1)(e) of the New York Convention to justify a refusal to recognize or enforce the award.[105])

The New York Convention, whose principal purpose is to establish the grounds on which a foreign award may be denied recognition or enforcement, is of course the starting point of analysis. Much like Article 34 of the UNCITRAL Model Law, governing annulment of awards,[106] the Convention provides (in Article V(1)(d)) that a court may decline to recognize or enforce an award if it is shown that "the composition of the

[104] Article 34 (b) (ii) provides that an award may be set aside if the court finds that "the award is in conflict with the public policy of this State."

[105] P. Nacimiento, *Article V(1)(d), in* H. KRONKE , P. NACIMIENTO, ET AL., RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, (Kluwer Law International, 2010), 285.

[106] *See* note 103 *supra* and accompanying text.

arbitral authority … was not in accordance with the agreement of the parties, or, failing such agreement, with the law of the country where the arbitration took place." Article V(1)(d) of the New York Convention appears to give precedence to the agreement of the parties, though whether it prevails over the law of the seat when the latter is mandatory is open to debate.[107] (As in the case of UNCITRAL Article 34, the law might be chosen under the provision (art. V(1)(a)) allowing an award to be denied enforcement if invalid under the law to which the parties have subjected it, or failing any indication, under the law of the country where the award was made or under the public policy of the jurisdiction where recognition or enforcement is sought.)

III. SANCTIONS FOR EXCEEDING THE LIMITS ON PARTY AUTONOMY

The previous section surveyed the occasions on which a court of tribunal may be asked to determine whether a tribunal has been constituted in ways that exceed the limits on party autonomy and the law it will in principle consult in making that determination. A next challenge – and even more difficult one – is to determine the appropriate sanction in the event those limits are exceeded.

A. Is the Arbitration Agreement Ipso Facto Null and Void?

A first question is whether a finding that an arbitration agreement contains provisions exceeding the autonomy of the parties necessarily leads to the invalidity of the agreement. The short answer is that it does not.[108] Not uncommonly, a court can and will sever the defective

[107] For one view, *see* P. Nacimiento, *Article V(1)(d), in* H. KRONKE, P. NACIMIENTO, ET AL., RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, (Kluwer Law International, 2010), 285: "So long as the award has not been set aside in the country in which, or under the law of which, that award was made, recognition in a Contracting State may not be refused simply because the arbitral tribunal observed party-selected rules that violate mandatory local law at the place of arbitration. [internal citations omitted] This view is persuasive and is supported by the fact that Article V(1)(d) explicitly grants priority to the will of the parties over the law of the country where the arbitration took place."

[108] LEW, MISTELIS & KRÖLL, § 10-45; *see also*, *e.g.*, Italy, Corte di appello Genoa, 3 February 1990, Delia Sanara Kustvaart – Bevrachting &

provision of the agreement and enforce the rest. For example, German law disallows agreements giving one party greater influence over panel composition than another.[109] Nevertheless, Section 1034(2) of the German Code of Civil Procedure entitles the aggrieved party as a general rule to bring the matter before a court and request the appointment of the arbitrator or arbitrators by the court.[110] This is not an uncommon feature. Arbitration laws frequently provide that a court may, upon request, directly appoint an arbitrator or assist in enforcing default appointment provision, though the court is expected to comply with any agreement between the parties regarding qualifications of the arbitrators.[111]

B. Amending the Arbitration Agreement or Ratifying Deviations

Ordinarily, the parties to an arbitration agreement may amend the agreement – expressly or impliedly – to avoid restrictions on the appointment of arbitrators upon which they had previously agreed. Thus, when both parties to an agreement disregarded a provision requiring them to appoint as arbitrators only members of the local chamber of commerce, a German court held that they had tacitly modified their

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Overslagbedrijf BV v Fallimento Cap Giovanni Coppola srl, XVII YBCA 542, 543 (1992) (applying English law instead of Italian law and not giving effect to Art. 809 of the Italian Code of Civil Procedure which in the current version at that time invalidated arbitral agreements that lacked any provision regarding the constitution of the tribunal).

[109] *See* ZÖLLER/GEIMER, § 1034 ZPO, no. 2-9; PRÜTTING/PRÜTTING, § 1034 ZPO, no.3-4.

[110] By way of exception, case law holds that an arbitration clause in a shareholder agreement in a limited liability must, *ex ante*, provide for all shareholders to have an equal opportunity to influence the composition of the panel, under penalty of nullity of the entire agreement. German Federal Court of Justice, decision of June 4, 2009 – II ZR 255/08.

[111] Expressly stated in Art. 11(5) UNCITRAL Model Law ("due regard to any qualifications required of the arbitrator by the agreement of the parties"); English Arbitration Act § 19; Egyptian Arbitration Law, Art. 17(3); Jordanian Arbitration Law No.31 of 2001, Art. 16(c); German Code of Civil Procedure §1035(5). Oberlandesgericht München, Germany, 34 SchH 11/09, 29 January 2010, § II.3. *See also* UNCITRAL Digest, p.62 §21; LEW, MISTELIS & KRÖLL, § 10-64 *et seq*.; FOUCHARD, GAILLARD & GOLDMAN, § 779. Unclear under Bahraini law due to the silence of the law on the issue, *see* SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST (2012), 232 (with Fn.44).

agreement to eliminate that restriction.[112] Even if it is the disadvantaged party that fails to object to the appointment of an arbitrator in disregard of a restriction, that party will ordinarily be deemed to have ratified the appointment.[113] Clearly, the panel itself has no authority to ratify deviations from the parties' agreement on the requirements for appointment. In many circumstances, recourse to a court will not however be necessary. For example, an arbitration law requiring an uneven number of arbitrators may expressly provide for an institution to appoint an additional arbitrator if the parties' agreement specifies an even number.[114]

C. Challenge of Arbitrators for Failure to Meet Qualifications

If a party-appointed arbitrator does not meet the specified qualifications, most national laws enable the aggrieved party to challenge the appointment.[115] Challenges may be based upon violation of the agreed upon specifications or upon violation of legal requirements to serve as arbitrator. Such challenges are commonly based on a contention that the arbitrator in question lacks impartiality and independence.[116]

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[112] OLG Dresden (decided Feb. 20, 2001), YCA XXVIII (2003), 261 (Dresden Court of Appeal, Germany).

[113] Nacimiento, *Commentary on Art. V(1)(d), in* KRONKE, NACIMIENTO ET AL., RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, (2010), 289.

[114] France (Code of Civil Procedure, art. 1451; Belgium (Judicial Code, art. 1681(2)); Netherlands (Code of Civil Procedure, art. 1026(3); (Netherlands); Italy Code of Civil Procedure, art. 809(3)); New Zealand (Arbitration Act (1996), sec. 11(6)(a)); Algeria (Code of Civil and Administrative Procedure, art. 1017) (with respect to domestic arbitration, no restriction applies in international arbitration, *see* HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2011), DZ-088); the same approach is taken by the Indian courts, *see* Supreme Court of India, Nov. 18, 1996, MMTC Ltd. v. Sterlite Industries (India) Ltd., 1997 BULL. ASA 136, 137; FOUCHARD, GAILLARD & GOLDMAN, § 771.

[115] *See e.g.* Art. 12, 13 UNCITRAL Model Law; § 1036(2); English Arbitration Act, Art. 24; Art. 180 PILA (Switzerland).

[116] Legislation in some Arab countries specifically states that a failure of impartiality or independence on an arbitrator's part shall lead to nullity of the resulting award, and the objection, because predicated on public policy, is not waivable. *See* Arbitration Law of Bahrain, art. 184. *See generally* HAMID

The procedure for entertaining the challenge may vary according to the terms of the arbitration agreement, the *lex arbitri* or the arbitration rules chosen by the parties. U.S. courts have required the objecting party to initially bring the issue to the tribunal's attention.[117]

In most jurisdictions, a party may not validly waive in advance its right to challenge an arbitrator, although it is free, of course, to refrain from mounting a challenge.[118] However, a party that knowingly appoints an ineligible arbitrator will be estopped from challenging the appointment.[119]

D. Annulment of the Award at the Seat of Arbitration

As already noted, Art. 34(2)(a)(iv) of the UNCITRAL Model Law authorizes a court at the seat of arbitration to set aside an award at the request of a party who is able to show that "the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law." Analogous provisions may be found in non-Model-Law jurisdictions.[120] However, annulment on this ground will likely be denied if the objecting party failed to take appropriate action to express its objection during the arbitral proceeding.[121]

EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2011), BH-109.

[117] Cook Indus., Inc. v. C. Itoh & Co. (Am.) Inc., 449 F.2d 106, 107-08 (2d Cir. 1971); The Island Territory of Curacao v. Solitron Devices Inc, 356 F Supp 1, 12 (SDNY 1973) (but note this decision is not exactly on point as the law governing the arbitration was not US law and the question arose only at the enforcement stage); LEW, MISTELIS & KRÖLL, 13-35.

[118] LEW, MISTELIS & KRÖLL, 13-19; Bezirksgericht, Affoltern am Albis, 26 May 1994, XXIII YBCA 754 (1998) para 27; Oberlandesgericht, Cologne, 10 June 1976, IV YBCA 258 (1979) para 6.

[119] LEW, MISTELIS & KRÖLL, 13-23.

[120] *See, for example*, French Code of Civil Procedure, art. 1492 (2).

[121] *For example*, under the UNCITRAL Model Law, a party will be expected to have brought a challenge to the appointment under Article 13 of that Law. *See generally* LEW, MISTELIS & KRÖLL, 13-21, -43,-44; Oberlandesgericht, Cologne, 14 September 2000, 9 SchH 30/00, available athttp://www.dis-arb.de/en/47/ datenbanken/rspr/olg-k%C3%B6ln-az-9-schh-30-00-datum-2000-09-14-id131.

A court also may, in its discretion, overlook the fact that the panel composition was not in accord with the parties' agreement if it regards the departure as truly trivial or as having no possible effect on the outcome of the case.[122] It should be recalled in this connection that annulment in many jurisdictions is permissive; a court may annul an award if one of the grounds for annulment is established, but it is not obligated to do so.[123] In other words, the grounds are not mandatory.

E. Refusal of Recognition or Enforcement of the Award

Under the New York Convention, a violation of national arbitration law at the seat of arbitration does not necessarily put the enforceability of the award at risk. Under Article V(1)(d) the parties' agreement appears to prevail over any requirements in the *lex arbitri* (see above), although an exception might conceivably be made for the mandatory law of the seat. The only reason to disregard the departure from the parties' agreement would be if the restriction in question is in itself, for any reason, unenforceable – for example, because it renders the entire agreement to arbitrate invalid (art. V(1)(a)) or because enforcement of the award, on account of the restriction, would be contrary to public policy. In addition, objection to the departure from the agreement may be deemed waived if the disadvantaged party failed to make use of available remedies during the arbitral proceedings.[124] It is more debatable whether waiver should be inferred from the fact that that party did not seek to have the award annulled at the seat on account of the departure.

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[122] *See* Nacimiento, *Commentary on Art. V(1)(d), in* KRONKE, NACIMIENTO ET. AL., RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, 2010, 297-98 (with further details and citations).

[123] Under Article 34(2) of the UNCITRAL Model Law, "[a]n arbitral award *may* be set aside by the court specified in article 6 only if …." (emphasis added).

[124] *Id*., at 298-99; OLG Stuttgart (Stuttgart Court of Appeal, Germany), decision of Oct. 14, 2003 (case 1 Sch 16/02) under B. II. 2. a) and b), available at http://www.dis-arb.de/en/47/datenbanken/rspr/olg-stuttgart-case-no-1-sch-16-02-und-1-sch-06-03-date-2003-10-14-id430; China Nanhai Oil Joint Service Corp., Shenzhen Branch v. Gee Tai Holdings Co. (decided 1994), *YCA* XX, (1995), 671 (High Court, Hong Kong), in particular no.18; Avraham v. Shigur Express Ltd., No. 91 Civ. 1238 (SWK), 1991 WL 177633 (at 5) (decided 1991) (US District Court for the Southern District of New York, US).

As in the case of annulment,[125] denial of recognition or enforcement is not mandatory, but rather permissive. This would allow a court, in its discretion, to overlook the fact that the panel composition was not in accord with the parties' agreement and proceed to recognize or enforce the award, for example, if it regards the defect as truly trivial or as having no possible effect on the outcome of the case.[126] It should be recalled in this connection that annulment in many jurisdictions is permissive; a court may annul an award if one of the grounds for annulment is established, but it is not obligated to do so.[127] In other words, the grounds are not mandatory.

F. Effect of a Change in Circumstances

Most arbitration laws understandably do not address the scenario question in which, during the course of an arbitral proceeding, a situation arises in which a panel that was properly composed initially ceases to be properly composed.[128] It has been suggested that if Islamic law as interpreted requires an arbitrator to be a Muslim, an arbitrator's leaving Islam during the proceedings will bar the tribunal from continuing under that circumstance.[129] (How the defect is dealt with is another matter. Presumably the arbitrator may simply be replaced, but very likely a new arbitration will be required.) In one case, an Egyptian court went so far as to annul an award because Egyptian law required an odd number of arbitrators, and one member of the panel withdrew or was removed,

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[125] *See* note 123 *supra*, and accompanying text.

[126] *See* Nacimiento*, Commentary on Art. V(1)(d), in* KRONKE, NACIMIENTO ET. AL., RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, 2010, p.297-98 (with further details and citations).

[127] Under Article 34(2) of the UNCITRAL Model Law, "[a]n arbitral award *may* be set aside by the court specified in article 6 only if …." (emphasis added).

[128] Some laws expressly provide for a party's right to request such termination if the arbitrator becomes unable to or fails to carry out his functions (*see* Art. 14 UNCITRAL Model Law) while other laws deem this aspect to be included in the possibility to challenge an arbitrator (*see* English Arbitration Act section 24), *see in general* LEW, MISTELIS & KRÖLL, 13-48.

[129] *See* HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2011), IA-197. Theoretically, a further question arises if the arbitrator subsequently returns. The original panel almost certainly will not be resurrected. *Id.*

reducing the panel to an even number.[130] The rules of arbitration of the Bangladesh Council of Arbitration specify certain requirements that, should they arise during the proceedings, will at that point disqualify the arbitrator. These include, among others, insolvency and imposition of a criminal sentence. As noted earlier,[131] this will decidedly not be the case merely because an arbitrator reaches the age limit imposed by law. In Bangladesh, the appointed arbitrator who reaches 75 years old during the proceedings remains on the panel and continues to serve until issuance of a final award.[132]

Generally speaking, it would be preferable to remedy the defect at the point in time in the arbitration in which it arises, if it possible legally to do so, which may or may not be the case. This is certainly true where the restriction is imposed by law and non-respect for it may lead to the award's annulment. Where the restriction is imposed by the parties' agreement only, it may in most cases be waived. A party may choose to overlook a departure from the agreed composition by its adversary if it considers that replacement of an arbitrator would cause an unacceptable delay or unacceptable expense.[133]

G. Effect of Prior Determinations on the Enforceability of Limits on Panel Composition

Obviously the question whether restrictions on party autonomy in the composition of arbitral tribunals are valid and enforceable, and whether they have been respected, may arise on successive occasions over the course of a single arbitration's life cycle. These might include issues ranging from nationality to independence and impartiality. This presents the question of whether and to what extent a court before which such an issue is raised should show deference to determinations on that issue made at an earlier stage of the arbitration. The matter is too unsettled

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[130] *See* HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2011), EG-100 (citing Cairo Court of Appeals, 29/1/2003, commercial circuit 91; Cairo Court of Appeals, 21/4/1999, commercial circuit 63, case no. 43/1996).

[131] *See* note 58 *supra*, and accompanying text.

[132] SIMON GREENBERG, CHRISTOPHER KEE, J. ROMESH WEERAMANTR, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE, CUP, 2010, 258 (§ 6.45).

[133] *See* LEW, MISTELIS & KRÖLL, 13-59 – 13-66.

within jurisdictions and settled disparately across jurisdictions as to allow any safe generalizations. Suffice it to say that a legal system's position in this matter will likely depend on its general attitude toward and policy on the practice of issue preclusion. It lies beyond the scope of this article.

CONCLUSION

Because the choice of arbitrator is such an important and distinctive feature of international arbitration, it remains among the aspects of arbitration over which party-autonomy is most prized.

Some restrictions on party autonomy come from the parties themselves, as when an arbitration agreement specifies certain characteristics that arbitrators must have, may have or may not have. Party autonomy is not dramatically at issue in these cases, since the parties presumably agreed at one time on the required qualification and the question is whether courts will treat them as binding and enforceable when a party seeks to avoid them. The question then is whether the law allows those requirements to be enforced, for example, as against provisions of the *lex arbitri* or notions of assertions of public policy. Much the same may be said about restrictions imposed by arbitral institutions. These too do not, at least in theory, restrict party autonomy, since the parties themselves will have chosen the institution and thereby its rules. But once again, the State might possibly regard the institutional restriction at issue as an unenforceable one. Party autonomy may also, however, be limited directly through State prescriptions as to how an arbitral tribunal may or may not be composed. In this circumstance, State regulation does directly threaten party autonomy, when the parties have agreed on the restriction.

This article thus considers limitations on party autonomy in panel composition, whatever the source of those limitations may be.

In fact, it is much easier to catalogue the possible restrictions, as this article seeks to do, than tom determine how those restrictions are made operational. At what moment in the arbitration life-cycle is the issue of party autonomy in panel composition apt to arise? Who, at that moment, is the decisionmaker and what standards will he or she apply in determining the extent to which party autonomy is limited. Assuming a permissible restriction has been disrespected or an impermissible restriction has been given effect, what remedies are available to correct the situation? Finally, since any given question of arbitrator qualification

may arise at successive moments in a single arbitration, what weight does a prior determination question have when the question resurfaces later? The answers to these questions are in the main elusive.

Still, it is important not to overstate the limitations that the law imposes on the parties' autonomy in composing their arbitral tribunal. The strong presumption is that party autonomy in this regard prevails, with law neither imposing requirements nor forbidding those requirements imposed by the parties on themselves. Most restrictions are self-imposed and deserving of enforcement if necessary.

— Chapter 10 —

EU Overriding Mandatory Provisions and the Law Applicable to the Merits

*Giuditta Cordero-Moss**

INTRODUCTION

Overriding mandatory rules, also known as *lois de police* or directly applicable rules, are mandatory rules that require application even though they do not belong to the law applicable to the merits of the dispute. As the name suggests, these rules override the choice of law that was made by the parties or that followed the application of the conflict rules that had identified the law governing the legal relationship.

Mostly, overriding mandatory rules aim to protect public interests, such as the proper functioning of securities markets. However, it is not only regulatory norms of a public law nature that may qualify as overriding mandatory rules. Private law rules may also do so. For example, in the EU the rules protecting commercial agents, contained in the law of the country where the agency is carried out, are deemed to apply even though the agency contract is subject to a different law. [1] In EU law, the applicability of overriding mandatory rules is regulated in article 9 of the Rome I Regulation on the law applicable to contractual obligations,[2] and in article 16 of the Rome II Regulation on the law applicable to non-contractual obligations.[3]

While the notion of overriding mandatory rules is well known in the context of private international law and application of the law by the courts, there may still be unclear aspects regarding its relevance in the context of international arbitration. This is mainly due to the widespread

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[1] *See* Council Directive 1986, 86/653/EEC, art. 5, 1986 O.J.(L 382/17) *See also* Case C-381/98, *Ingmar GB Ltd. v Eaton Leonard Tech. Inc.*, 2000 E.C.R. I-09305. *See also* Case C-184/12, Unamar v. Navigation Maritime Bulgare, 2013 E.C.R.

[2] *See* Council Regulation 593/2008, 2008 O.J. (L 177/6) 1 (EC).

[3] *See* Council Regulation 864/2007, 2007 O.J. (L 199/40) 1, 2 (EC).

(though not uncontroversial, and not supported here) opinion that international arbitration, unlike national courts, is not subject to rules of private international law. As the applicability of overriding mandatory rules is usually explained in terms of private international law, negating the relevance of private international law necessitates development of alternative bases for justifying the applicability of these rules in arbitration, including the conditions for applicability and its limitations. Recognising the relevance of private international law to arbitration, to the contrary, permits reliance on known concepts to explain the relationship between the choice of law made by the parties and the powers of an arbitrator with regard to the applicable law. While this latter approach may seem old fashioned, it permits a more predictable or, at least, a less unpredictable, regime.

I. BRIEFLY ON OVERRIDING MANDATORY RULES

Much has been written on overriding mandatory rules. In addition to the uncertainty relating to which rules qualify as overriding,[4] a much discussed topic has been which law's rules are relevant. While the applicability of overriding mandatory rules belonging to the law of the court, the *lex fori*, seems to be uncontroversial, there has been an evolution with regard to overriding mandatory rules belonging to third laws. The predecessor of the Rome I Regulation, the Rome Convention,[5] in the first paragraph of article 7 used to leave open the possibility to give effect to overriding mandatory rules belonging to third laws, though a number of states made use of the possibility to reserve against this provision. Under the Rome I Regulation, the possibility to give effect to third countries' rules has been significantly restricted and applies only to the overriding mandatory rules belonging to the law of the state where the performance is to be made, and only where the effect of these rules is to render the performance illegal. This, however, does not mean that overriding mandatory rules of other systems are completely irrelevant. The possibility to take into consideration overriding mandatory rules from third countries is a principle of private international law that

[4] Not all mandatory rules are so important that they override other conflict rules; which rules are so important is mainly ascertained on the basis of a functional analysis. *See* Giuditta Cordero-Moss, *International Commercial Contracts* 191 (Cambridge University Press) (2014).

[5] *See* Council Convention 80/934/ECC, 1980 O.J. (L 266/1) 1.

pre-existed the Rome Convention,[6] and seems to be acknowledged as a principle of private international law beyond the Rome Convention and the Rome Regulation.[7] Furthermore, there may be other bases to give third countries' overriding mandatory rules some effect. For example, the applicable substantive law may have a rule on agreements against good morals; this rule may apply when the parties aim at circumventing a foreign rule protecting public interests and those interests are deemed worthy of protection also under the applicable law. Section 138 of The German *Bürgerliches Gesetztbuch* has a rule like this, called *Sittenwidrigkeit.*[8] Also, the applicable substantive law may consider the effects of the foreign overriding mandatory rule as an impediment that excuses non-compliance with a contract violating that rule.[9]

II. BRIEFLY ON INTERNATIONAL COMMERCIAL ARBITRATION

The matter of interest here is to what extent overriding mandatory rules have relevance in the field of international arbitration. The effects of mandatory rules may be different in arbitration than in courts. To begin with, the legal framework is different: Civil procedure law regulates court proceedings, whereas arbitration law regulates arbitration proceedings. Furthermore, there are strong theories on the relationship between international arbitration and national law that emphasize the role of the will of the parties in international arbitration and restrict the relevance of national law. Arbitration has been said to be "the archetypical realm of party autonomy."[10] The ability of overriding mandatory rules to override the will of the parties, therefore, may need particular justification.

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[6] *See* F. A. Mann, *Sonderanknüpfung und zwingendes Recht im internationalem Privatrecht*, *in* Festsschrift für Günther Beitzke zum 70. Geburtstag 608 (De Grutyer) (1979); L. Pålsson, Romkonventionen.Tillämping lag för avtalsförpliktelser 123 (Norstedts Juridik) (1998); K. Siehr, *Ausländische Eingriffsnormen im inländischen Wirschaftskollisionsrecht* 52 RabelsZ 1988, at 78.

[7] Hague Conference on Private International Law, Principles on Choice of Law in International Commercial Contracts, March 19, 2015, art. 11(5).

[8] Cordero-Moss, *supra* note 4, at 200.

[9] *Id.* at 199.

[10] *See* Luca Radicati di Brozolo, *Mandatory Rules and International Arbitration* 23 AM. REV. INT'L ARB. 49,49 (2012).

This article will discuss mandatory rules regulating the substance of the disputed relationship – leaving aside procedural rules, and only incidentally touching on the general questions of whether international arbitration may be deemed to have a forum,[11] to what extent it is possible to apply non-national rules in arbitration,[12] and how accurately the arbitral tribunal is expected to apply the governing law.[13]

The legal framework of arbitration is the starting point of the analysis. Arbitration enjoys a relative autonomy from national laws thanks to the New York Convention:[14] Arbitration agreements shall be recognised and arbitral awards shall be enforced in the over 150 countries that have ratified it. The New York Convention contains in article V an exhaustive and restrictive list of exceptions to the enforceability of arbitral awards.

In addition to enforceability, it is important to ensure that an award is valid and, thus, not set aside by the courts in its country of origin. Although the validity of arbitral awards is not unified by a convention and is thus subject to national law, national law on the validity of arbitral awards is largely harmonised, among others on the basis of the UNCITRAL Model law on international commercial arbitration.[15] National law's grounds for invalidity, to a large extent, correspond to the grounds that article V of the New York Convention contemplates as the only grounds to refuse enforcement.[16]

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[11] *See* Cordero-Moss, *supra* note 4, at 219 (pointing out the importance of the law of the arbitration venue and answering positively); Luca Radicati di Brozolo, *Party autonomy and the rules governing the merits, in* Limits to Party Autonomy in International Arbitration §§ I(b) – II (Franco Ferrari ed., 2016) (answering negatively).

[12] *See* Cordero-Moss, *supra* note 4, at 152; *Id*. at 29; Radicati, *supra* note 11, at §§III (b)–(c).

[13] *See* Cordero-Moss, *supra* note 4, at 123 (pointing out that international arbitration shows a plurality of approaches); Radicati, *supra* note 11, at §§4 -5 (supporting a flexible application of the law).

[14] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, U.N.T.C. 4739.

[15] United Nations Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, UNCITRAL.

[16] *See id*. art. 34. On English law, which has additional grounds for annulment, *see* Gary Born, *International Commercial Arbitration* 3186 (Kluwer Law International, 2nd ed.) (2014); *Id*. at 3340; Cordero-Moss, *supra* note 4, at 224.

According to these sources, an arbitral award runs the risk of being unenforceable or invalid if: it is based on an arbitration agreement that was invalid or did not bind one of the parties; the principle of due process was violated during the proceedings; the arbitral tribunal exceeded its power; the composition of the arbitral tribunal or the procedure followed was irregular; the subject of the dispute was not arbitrable; or if the award violates fundamental principles (*ordre public*) in the legal system of the court. As this short overview shows, court control is not meant to be an appeal on the merits or on the application of law: court control is meant to ensure that fundamental principles, both procedural and substantial, are respected, as well as to avoid that arbitration takes place without consent by all parties. In other words, within the area where the grounds for setting aside or refusing enforcement of an award are not applicable, arbitration enjoys full autonomy and the wrongful application of rules or the application of the wrong rules will not affect the effectiveness of the award.

III. BRIEFLY ON OVERRIDING MANDATORY RULES AND INTERNATIONAL ARBITRATION

Within this legal framework, the question of overriding mandatory rules' relevance in arbitration may be answered by inquiring under what circumstances would the disregard or application of overriding mandatory rules not belonging to the applicable law affect the validity or enforceability of the award. As will be seen in section III.B below, disregarding or breaching overriding mandatory rules has, in itself, no automatic impact on the validity or enforceability of an award, but can have impact if the breach amounts to a violation of the *ordre public* – or the arbitrability rule.

This leads to the further question of whether arbitrators have an independent power to apply overriding mandatory rules, or whether they are bound by the will of the parties as expressed in the disputed contract, in the arbitration agreement, or in the pleadings. In other words: if the parties have chosen a given law to govern their relationship, and have not pleaded overriding mandatory rules belonging to a different law, does the arbitral tribunal have the power, or even the duty to apply the overriding mandatory rules in spite of the parties' different choice of law? Section III of this paper considers two bases for the arbitral tribunal's power to go beyond the parties' will. The approach preferred here is to see this power as a complement to party autonomy. This may be done if

principles of private international law are applied to determine the scope of the parties' choice of law. [17] An alternative approach is to assume that the arbitral tribunal is under an ethical duty to consider applicable overriding mandatory rules, also having regard to the necessity to preserve the credibility of arbitration as a method to resolve dispute.[18] As this paper will show, these approaches do not necessarily diverge in their result, although the path to the result may be different.

A. Relevance of a Classification?

As mentioned in the introduction, overriding mandatory rules are rules applied irrespective of which law governs the dispute.

The classification as overriding implies that there is another class of mandatory rules, which is not overriding. These non-overriding mandatory rules may not be derogated from by the parties' agreement, as long as they belong to the applicable law; however, their application may be excluded when a legal relationship is subject to another law (whether because the parties chose another law, or because conflict rules identified another law as governing).

The classification as mandatory rules (overriding and non-overriding) implies yet another category, that of non-mandatory rules or default rules. These rules may be derogated from by the parties' agreement, even when the legal relationship is subject to the law to which these rules belong.

The picture derived from the above is threefold: some rules (default rules) may be derogated from by simple agreement even in domestic contracts; some rules (mandatory rules) may not be derogated from by agreement, but may be excluded by choice of another law if the contract is international; and some rules (overriding mandatory rules) remain applicable even though the contract is international and is subject to another law. This is a classical distinction in private international law. The question is whether this division into three different classes of rules has relevance in international arbitration.

If the relevance of this classification must be measured against the impact that it possibly may have on the validity or enforceability of the award, it is necessary to enquire whether the distinction between default-, mandatory- and overriding mandatory rules is reflected in any of the

[17] *See* Cordero-Moss, *supra* note 4, at 281.
[18] *See* Radicati, *supra* note 10, at 65.

grounds for refusing enforcement of the award or for setting it aside as invalid. This line of thought will be followed in the next section.

B. Relevant Grounds for Setting Aside an Award or Refusing Enforcement

As will be seen below, three grounds for setting aside or refusing enforcement of an award may be relevant in this context. Under circumstances, an award that disregarded applicable rules may be deemed invalid or refused enforcement as a consequence of the violation of two rules: the *ordre public*- and the arbitrability rule. Furthermore, an award that considers rules different from the rules that were chosen by the parties may be deemed invalid or refused enforcement as a consequence of excess power. A further ground may become relevant from a procedural point of view: due process. This ground applies if, *i.a.,* one party was not given the possibility to comment on the applicability of rules that were applied by the arbitral tribunal even though they were not pleaded by the parties. As this latter ground is not directly and exclusively relevant to the classification of the rules in default-, mandatory- and overriding mandatory rules, it will not be dealt with here.[19]

It must be pointed out here that some national arbitration laws have a longer list of grounds for setting aside an award. For example, the English Arbitration Act permits, in section 69, an appeal on point of law, where the applicable law was English law. This provision may potentially be an additional ground for invalidity, not present in the UNCITRAL Model Law, and relevant to the question of the classification of rules. However, this provision does not seem to significantly increase the relevance of the classification, as it is applied very restrictively: the leave to appeal an award on point of law will be granted only if the matter is of general public importance and if the application of law made in the award was obviously wrong.[20] Also, the provision is rarely applied, as its application may be

[19] *See* Giuditta Cordero-Moss, *The arbitral tribunal's power in respect of the parties' pleadings as a limit to party autonomy (on jura novit curia and related issues), in* Limits to party autonomy in international arbitration, § 3.2 (Franco Ferrari ed., 2016).

[20] *See Arbitration Act*, 1996, c. 69 (Eng.). In 2016 the Lord Chief Justice of England and Wales, Lord Thomas, held a lecture in which he pointed out that, since many commercial parties choose arbitration to solve their disputes and appeal from arbitral awards is very restricted, courts are not participating to the desirable extent to the development of the law. Among the measures that could

excluded by the parties' agreement and arbitration rules of institutions that often administrate arbitration in England, such as the LCIA and the ICC, exclude applicability of § 69.

None of the relevant grounds for refusing enforcement or for setting aside an award make specific reference to the distinction between default-, mandatory- and overriding mandatory rules. From this it may be inferred that the classification, in itself, is not sufficient to have an impact on the effects of the award: assuming that an award violates applicable rules, it is not the qualification of these rules as default-, mandatory- or overriding mandatory rules that will determine the consequence for the validity or enforceability of the award.

The sections below will discuss under what circumstances disregard of applicable rules may affect the award, and will show that the qualification is not only irrelevant, but also not consistently followed: While disregarding default rules generally cannot be seen as basis for a ground for invalidity of an award or for refusing enforcement (unless the disregard is accompanied by a violation of the principle of due process or a serious procedural irregularity – which is outside of the scope of this paper)[21] situations may be envisaged where an award may be refused enforcement or set aside for not having considered "simple" mandatory rules. Additionally, situations may be envisaged where having disregarded overriding mandatory rules does not lead to invalidity or refusal of enforcement.

We will now turn to examining the applicability of the three mentioned grounds for invalidity and unenforceability in case an arbitral award has disregarded overriding mandatory rules.

1. Ordre Public

According to the so-called *ordre public* (public policy) principle, an award may be set aside as invalid or refused enforcement if it violates fundamental principles in the socio-economic system of the annulling or, respectively, of the enforcing court. It seems generally recognised that this defence is to be applied only in exceptional situations.[22]

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ensure more participation, he mentioned revising the criteria for appealing awards. *See* The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, Bailii Lecture: Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration (March 9, 2016).

[21] *See* Cordero-Moss, *supra* note 19, at § 3.

[22] *See* Born, *supra* note 16, at 3312; *Id*. at 3647.

a) Narrow scope

The scope of *ordre public* (or public policy) is very narrow, narrower than the body of overriding mandatory rules of a state. This narrow understanding is also called "negative *ordre public.*" The function of this narrow category is to prevent introducing into the court's legal system elements that can seriously violate the system's fundamental principles. The purpose is thus not to ensure an accurate application of the system's rules, but to protect its fundamental principles.

When dealing with domestic legal relationships, however, some jurisdictions use the terminology "*ordre public"* for their overriding mandatory rules. This expanded understanding is also known as "positive *ordre public,"* or "domestic public policy." The function of this expanded category is to permit application of rules having particular importance for society. The purpose is thus to ensure an accurate application of these rules.

In order to distinguish the positive *ordre public* (relevant only domestically) from the negative (relevant for international arbitration), in these jurisdictions the terminology used in the context of international enforceability of awards is "international *ordre public.*" What is international here is not the principles being protected, but the context in which the category is used. The scope of the international public policy is, in the jurisdictions that operate with the concept of positive *ordre public*, comparable to the narrow notion of public policy that is generally accepted under the New York Convention or the UNCITRAL Model Law, and that, as was seen above, may also be defined as negative *ordre public*.[23]

In order to avoid confusion with yet another term, that of "truly international public policy,"[24] this article will apply the terminology of *ordre public*, or public policy, in the narrow sense generally assumed in international arbitration and without the adjective "international." Public policy is, thus, a narrower category than the body of overriding mandatory rules in a given state.

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[23] *See* Cordero-Moss, *supra* note 4, at 243.

[24] This is an even narrower category that comprises only those fundamental principles that are common to a large number of states. This category has mainly academic relevance, as national courts can hardly be expected to disregard fundamental principles in their own systems, in case these are not shared by other states. *See* Cordero-Moss, *supra* note 4, at 245; Radicati, *supra* note 10, at 67.

Public policy is relevant not only in the context of annulment or enforcement of arbitral awards: it is also a limitation to the application of a foreign governing law, and to the enforcement of foreign court decisions. In EU law, the former is regulated, *i.a.*, in the Rome I and Rome II regulations, respectively in articles 21 and 26, and the latter in the Brussels I Regulation, [25] article 45. Under all these instruments, as well as under the New York Convention, the Model Law on arbitration and most national arbitration laws, public policy may be seen as an expression of the basic socio-economic principles of the society, and does not necessarily correspond to the positive content of specific provisions; it is the underlying principles that may constitute public policy, not the technicalities of the provisions.

Therefore, even though a certain provision may be deemed to protect fundamental principles of a given system, public policy will not necessarily be deemed violated if the specific, technical content of that provision has not been accurately followed – as long as the underlying principles have been safeguarded.[26] Public policy, in other words, is not meant to ensure an accurate application of the details of a provision (quite irrespective of whether the provision is based on fundamental principles), but to make sure that the interests protected by that rule are safeguarded. As a corollary, a violation of public policy may not be determined in the abstract, simply observing that a certain rule was not applied accurately. It will be necessary to evaluate case by case whether the violation of a certain provision entailed violation of public policy or not.[27]

The specific content of public policy is dynamic: principles that in the past were considered to constitute public policy, may have lost their paramount importance after a few years,[28] and vice versa.[29] In addition,

[25] Council Regulation 1215/2012, 2012 O.J. (L 351/1) 1 (EC). The EU has a convention with Iceland, Norway and Switzerland, the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is meant to be parallel to the Brussels I Regulation. The Lugano Convention corresponds to the text of the Brussels I Regulation 44/2001, as it was prior to the 2012 recast. In the Lugano Convention, the provision on public policy is in article 34, *see* Council Decision 2007/712/EC, 2007 O.J. (L. 339/1) 1.

[26] *See* Cordero-Moss, *supra* note 4, at 246; Radicati, *supra* note 10 at 56 - 60.

[27] *See* Cordero-Moss, *supra* note 4, at 247; Radicati, *supra* note 10, at 60.

[28] An illustration is the prohibition of gambling under Austrian and German law (so-called *Differenzeinwand*), that was successfully invoked during the 1980s to refuse enforcement of arbitral awards or recognition of arbitration

the content of this category varies geographically: Although it is desirable to avoid municipal differences, ultimately the national courts are called upon to give effect to the fundamental principles in their own legal system. Therefore, there may be differences in what each state evaluates to constitute a fundamental principle. Admittedly, where the defence of public policy is regulated in an international instrument, such as the New York Convention, the international character of the source will have to be considered in the interpretation of the defence's function, the conditions for its exercise and its effects; these, therefore, will have to be interpreted autonomously. However, the specific content, i.e. which principles are fundamental in a given legal system, will be determined by that national system. Thus, with respect to enforceability of awards the New York Convention sets the borders for how the defence may be used, along the lines of what was briefly described above. The same is done, with respect to invalidity of awards, by an internationally oriented application of national arbitration law – to which the countries who adopted the UNCITRAL Model Law are committed, and which is generally followed also by other countries. The determination of which principles are fundamental, on the contrary, is left to the national courts.

Member states of the European Union have to take into consideration, in addition to their own fundamental principles, principles that are deemed fundamental at the Union level. In a controversial decision, the Court of Justice of the European Union affirmed that European competition law has to be considered as European public policy.[30] The CJEU justified this qualification affirming that competition rules "are necessary for the achievement of the internal market."

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agreements concerning the first agreements on financial derivatives that appeared in the financial market – whereas it a few years later was not deemed to be an obstacle any more to the enforcement of an award concerning the same type of agreements, *see* Cordero-Moss, *supra* note 4, at 380.

[29] An illustration is the payment of bribes to obtain contracts in foreign countries: until recently these were considered as tax-deductible costs in many jurisdictions, whereas now anti-corruption legislation is increasingly passed and being considered as a matter of public policy, *see* Martine Millet-Einbinder, Writing of Tax Deductibility, OECD OBSERVER (Apr. 2000), http://www.oecdobserver.org/news/archivestory.php/aid/245/Writing_off_tax_deductibility_.html.

[30] Case C-126/97*, Eco Swiss China Time Ltd. v Benneton Int'l NV*, 1999 E.C.R. I-3079.

Given the narrow understanding of the defence of public policy (a narrow understanding that is shared by the EU instruments of private international law such as the Rome I and Rome II Regulations and the Brussels I Regulation), it is to be expected that the Court of Justice has a restrictive understanding of this formulation. As most EU rules have the purpose of achieving the internal market, emphasis should be placed on the adjective "necessary" – otherwise, a situation may arise where the majority of EU regulation is deemed to be public policy. This would run counter to the assumption that the public policy defence shall be used only in exceptional cases.

Moreover, the narrow use of the public policy defence, as described above, does not imply that any non-compliance with an EU rule automatically leads to violation of public policy, even when the rule is necessary for the achievement of the internal market. It is first when the underlying principles are violated, that public policy may become relevant.

Some national courts, as well as the Advocate General of the CJEU, seem to have, in respect of arbitrability, an expansive understanding of what is necessary to achieve the internal market (see the following subsection). Such an extensive understanding threatens to blur the line between overriding mandatory rules and public policy. It is not desirable development in the context of private international law in general, and is even less desirable in the context of international arbitration.

In recent case law, however, the CJEU confirmed the narrow understanding of public policy and stated that a violation of an EU rule, even violation of a rule that has an impact on the internal market, shall not automatically be deemed to qualify as a violation of public policy.[31]

b) Intensity of court control

A debated aspect of the exercise of the public policy defence is the intensity of the control that may be exercised by the court in case an award is challenged or enforcement is resisted on the basis that the award disregarded applicable rules and this may lead to violation of public policy.

There are two opposed views, defined as maximalist and minimalist.[32]

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[31] Case C-681/13, *Diageo Brands BV v. Simiramida,* 2016 ECLI:EU: C:2015:471, at ¶ 51.

[32] *See* Luca Radicati di Brozolo, *Arbitration and competition law: the position of the courts and of arbitrators* 27 ARB. INT'L 1 4 (2011).

The maximalist view is that the court may independently assess whether the award properly applied the rules and, thus, whether public policy was safeguarded or violated.

The minimalist view is that the court may not revise the application of law and the assessments made by the arbitral tribunal, but has to limit itself to verifying whether the arbitral tribunal has considered, with the due attention and competence, the rules that are deemed to be relevant to public policy.

Thus, the maximalist view assumes an independent review by the court of the application of law; the minimalist view assumes that the court owes deference to the application of law made by the arbitral tribunal. However, there seems to be a convergence between these two approaches on the principle that the defence of public policy shall not be used to re-judge the dispute: court control of arbitral awards is not meant as a tool to permit a review of the merits, neither in respect of the application of the law or of the assessment of the facts. Therefore, an error of law or a divergent opinion by the court is not sufficient to deem public policy violated.[33] It has been suggested that it should be possible to exercise court control by examining, in some detail, the reasoning of the award. Only in exceptional cases, such as when the award has no reasons, or the award did not consider applicability of public policy rules, the court may be allowed to go further than that and examine the parties' pleadings or the evidence produced in the arbitral proceeding – or, in extreme cases, to launch a full-fledged investigation.[34]

In my opinion, while it is desirable that courts exercise self-restraint and do not consider the public policy exception as an appeal on point of law, this restrictive approach should not go so far as to expect that a court delegates to the arbitral tribunal the evaluation of whether fundamental principles in the court's own system have been violated.

In the recent Genentech-case,[35] the Advocate General Wathelet pleaded for an extensive court control and criticised the minimalist approach, according to which court control may be exercised only in the case of manifest infringement of public policy, and only if the issue had not been examined in the arbitration proceeding. The requirement that only manifest infringements may trigger court control was criticised for making court control illusionary – because many restrictions of

[33] *See* Cordero-Moss, *supra* note 4, at 246; Radicati, *supra* note 10, at 62.
[34] Radicati, *supra* note 10, at 63.
[35] Case C-567/14, *Genetech Inc. v Hochest GmbH*, 2016 E.C.R.

competition that are forbidden in EU law by article 101 TFEU would escape review.[36] The requirement that the court owes deference to the decision made by the arbitral tribunal was criticised as being at odds with the system of review of compatibility with EU law: as arbitral tribunals have no competence to refer to the CJEU questions for preliminary rulings, in the view of the AG, the responsibility for reviewing compliance with EU law must be placed with the courts and not with arbitral tribunals.[37] On this basis, according to the AG opinion, the principle that a court may not review the substance of an award does not prevent the court from considering the issue of compliance with competition law independently, even though the issue has already been considered by the arbitral tribunal – given that article 101 TFEU is a provision of fundamental importance in the EU legal order.[38]

The AG seemed to assume that any and all violations of article 101 TFEU would amount to a violation of EU public policy; [39] as was mentioned above, this expansive understanding is at odds with the narrow category of public policy that is recognised in private international law generally, and in EU instruments of private international law as the Rome I, Rome II and Brussels I Regulations.

In its final judgement in the Genentech case, the CJEU ignored the matter and did not take a position on the scale from the AG's maximalist approach with automatic effects to the minimalist approach with deference to arbitral tribunal's evaluation. Therefore, there has not been a clarification on this point.

It should also be pointed out that the minimalist approach and the narrow understanding of public policy are not necessarily interlinked – it can be well envisaged that a court has independent competence to review the compatibility of the award with public policy (as the maximalist approach suggests), but that it will apply the public policy rule in a narrow way (as the above described consensus requires). This is the approach preferred here.

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[36] *Id*. Opinion of Advocate General Wathelet, ¶ 64-67 (March 17, 2016).

[37] *Id*. ¶ 59-62.

[38] *Id*. ¶ 70-72.

[39] In the specific case, the Advocate General concluded that article 101 TFEU was not violated. The CJEU confirmed that there is no automatic equivalence between violation of competition law and violation of public policy, *see Diageo*, *supra* note 31.

c) Fundamental principles

The foregoing shows that, as a starting point, there is no automatic correspondence between overriding mandatory rules and public policy. Even though overriding mandatory rules pursue public interests and may therefore have affinities with situations where fundamental rights are at stake, not all aspects of an overriding mandatory rule are necessarily of such importance that they may be relevant to public policy. The underlying principles may be safeguarded even if the technical content of the rule was not implemented accurately. Moreover, not all violations of such rules have necessarily so serious consequences that they shall be deemed to violate public policy. This should be true even for EU overriding mandatory rules – considering that any violation of EU overriding mandatory rules amounts to a violation of public policy, would be difficult to reconcile with the narrow scope of public policy supported in EU private international law.

On the other hand, fundamental principles may become relevant even in the absence of overriding mandatory rules. The disputed contract may affect interests in areas that a state regulates with the aim of protecting third party interests, and where therefore party autonomy is excluded. For example, company law and property law are areas with mandatory rules and where the applicable law is mandatorily chosen by conflict rules that do not contemplate the possibility for the parties to make a choice. Rules of company law and of property law, however, may not be considered overriding mandatory rules, because they do not *override* the applicable law: they *are* the applicable law as a consequence of the mentioned conflict rules.

An illustration may be useful: assume that a shareholder agreement regulates how the parties will instruct the directors to vote in the company bodies, or which decisions should be taken in which company body and according to which procedure. The regulation does not comply with the applicable company law, but the shareholders' agreement contains a choice of law in favour of a more liberal law. Assuming that one of the parties to the shareholders agreement refuses to perform these obligations because they violate the applicable law, and that the other party insists on their application and invokes the contract's choice of law; and assuming that the arbitral tribunal gives full effect to the contract's choice of law, the result may be an award that considers the non-performing party in default and orders it to pay reimbursement of damages for having complied with the applicable company law. The

contractual obligations between the parties are actually governed by the chosen law, while the company law aspects are subject to the applicable company law, among other reasons for the purpose of protecting the interests of minority shareholders. Depending on the circumstances, an award giving effect to a contract that violates these rules may be considered to violate fundamental principles.[40]

Similarly, a contract may create security interests that do not comply with the applicable law on pledge, and an award giving effect to the contract may, under circumstances, create a situation that deprives other creditors of the protection that the law on pledge grants them. Seen in the context of the principle of equality among the creditors in insolvency law, and assuming that the latter is deemed fundamental, there may be implications of public policy.[41]

The foregoing shows that the classification as overriding mandatory rules is neither sufficient nor necessary for a potential relevance of the defence of public policy. However, as the defence is to be applied very restrictively, it will be only under exceptional circumstances that an award will be set aside or refused enforcement for having infringed fundamental principles on the basis of disregard of applicable rules.

2. Arbitrability

The New York Convention and the Model Law contain another defence that may become relevant in respect of overriding mandatory rules: the defence that the subject-matter of the dispute was not capable of being subject to arbitration. The purpose of this defence is to ensure that the courts are the only venue for resolving disputes in areas where the legal system considers it essential to ensure an accurate application of the law.

Arbitrability is a defence that has undergone an interesting evolution: as legal systems became more arbitration-friendly during the second half of the XX century, the scope of the defence has been restricted accordingly.[42] However, as will be seen below, there are signs that it may be starting to expand again.

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[40] *See* Cordero-Moss, *supra* note 4, at 248. *But see* Radicati *supra* note 10, at 61 (affirming that an award that is merely deciding on damages does not breach public policy, even though damages are a consequence of the breach of a contract provision that did violate public policy).

[41] *See* Cordero-Moss, *supra* note 4, at 249.

[42] *See* Cordero-Moss, *supra* note 4, at 122.

Representative of the evolution towards a narrower application of the defence is the US Supreme Court decision in the Mitsubishi case,[43] which did not exclude the arbitrability of a dispute where anti-trust regulation was involved (traditionally considered inarbitrable). The court permitted arbitration and relied on the possibility to review the accurate application of competition law at the stage of enforcement (the so-called second look doctrine).

More recent case law, particularly of EU state courts, seems to reverse this trend and denies the arbitrability (or the recognition of a contractual choice of forum in favour of a court not located within the EU) in disputes regarding contracts of commercial agency.[44] Commercial agency is an area where EU law has overriding mandatory rules with the purpose in part to protect the agent, who is considered to be the weaker party in the relationship, in part to ensure free movement within the internal market and in part to ensure that all commercial activity carried out on the European territory is carried out under comparable circumstances. Permitting a principal to employ commercial agents at conditions more favourable to the principal than the conditions imposed by EU rules is deemed to have an impact on competition and on the internal market. For this reason, some courts have affirmed that disputes concerning commercial agency be decided by courts that belong to the EU: the choice of a court outside the EU, or the choice of arbitration, may endanger the effective enforcement of EU law. This approach seems to go further than necessary or advisable.

It is possible to see parallels with the abovementioned reasoning in Advocate General Wathelet's G's opinion in Case C-567/14 (Genentech). It should be reminded here, however, that the AG opinion in Genentech was completely disregarded by the CJEU in this regard: the Court did not discuss the matter. The opinion in Genentech regarded restrictions to the review of arbitral awards, in particular, the question whether an annulment court should be limited to examining flagrant

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[43] *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[44] *See e.g.* the Belgian Supreme Court: Cour de Cassation [Cass.] Nov. 16, 2006, PAS. 2006, I, No. 11; Cour de Cassation [Cass], Jan. 14, 2010, PAS. 2010, I, No. 12; Cour de Cassation [Cass.], Nov. 3, 2011 PAS. 2011, I, No. 11; a German Supreme Court decision: Bundesgerichtshof [BGH] Sept. 5 2012, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] (2012) (Ger.); *Accentuate Limited v Asigra Inc.* [2009] EWHC (QB) 2655.

infringements of public policy, or whether it has the power to independently evaluate the compatibility of the award with EU competition law. The AG argued that restrictions to the court's review are contrary to the principle of effectiveness of EU law[45] because they deprive the court of the possibility to ensure, by referring a question for preliminary ruling to the CJEU, compliance with EU law.[46] Moreover, the AG observed that, since arbitral tribunals (and, we can add, courts outside the EU) fall outside of the scope of application of the Brussels I Regulation, they also are excluded from the principle of mutual trust among the courts of Member States, established precisely by the Brussels I Regulation.[47]

A similar reasoning was at the basis of Advocate General Jääskinen's opinion in another case involving EU competition law.[48] Here, the AG argued that, as long as the chosen court is within the EU, the principle of mutual trust prevents invoking, as a ground to disregard the choice of forum agreement, the risk that the chosen court may not give effective enforcement of EU competition law.[49] The principle of mutual trust, however, does not apply to arbitration. Therefore, regarding arbitration agreements, the AG invoked the principle of effective enforcement of EU competition law. The AG recalled the above-mentioned CJEU decision on Eco Swiss, affirming that EU competition law may be regarded as a matter of public policy and that questions regarding the compatibility of an arbitral award with EU competition law should be open to examination by national courts.[50] The Eco Swiss reasoning was made in the context of the court's review of an arbitral award. The AG extended this reasoning by analogy to the issue of arbitrability.[51] On one hand, the AG recognised that an arbitration agreement does not necessarily deprive victims of an alleged violation of EU competition law of the possibility to obtain full compensation in

[45] Case C-567/14, *Genetech Inc. v Hochest GmbH*, 2016 E.C.R., Opinion of Advocate General Wathelet, ¶ 58(March 17, 2016).

[46] *Id*. ¶ 59.

[47] *Id*. ¶ 69.

[48] Case C-352/13, *CDC Hydrogen Peroxide*, 2015 E.C.R.

[49] *Id*. ¶ 116.

[50] Case C-567/14, *Genetech Inc. v Hochest GmbH*, 2016 E.C.R., Opinion of Advocate General Wathelet, ¶ 123(March 17, 2016).

[51] Case C-567/14, *Genetech Inc. v Hochest GmbH*, 2016 E.C.R., Opinion of Advocate General Wathelet, ¶ 124-26 (March 17, 2016).

arbitration. On the other hand, the AG described this as a theoretical possibility, and its implementation into practice as a "matter of some delicacy."[52] In respect to horizontal restriction of competition, as in the case at hand, the AG argued that an arbitration agreement would be compatible with the principle of effective enforcement only if the victims had expressly accepted arbitration and the arbitral tribunal was required to apply EU competition law as rules of public policy.

The CJEU decided only in respect to agreements choosing a court within an EU member state. The CJEU declined to answer in regards to arbitration agreements and forum agreements choosing a court outside the EU, affirming that it did not have sufficient information.[53] It is, therefore, left open whether the AG's arguments would be capable of restricting the arbitrability of a dispute concerning EU public policy. On the one hand, in respect to forum agreements choosing an EU court, the CJEU affirmed that the quality of the substantive rules applicable to the merits may not affect the validity of a jurisdiction clause.[54] Therefore, the requirement for effective enforcement of public policy may not prevent choosing a court within the EU. On the other hand, the CJEU emphasized that this is based on the principle of mutual trust established by the Brussels I Regulation.[55] As arbitration agreements fall outside the scope of the Brussels I Regulation, they are not part of the system of mutual trust. As the irrelevance of the requirement for effective enforcement is linked with the system of mutual trust, the CJEU reasoning may not be used to confirm arbitrability of disputes concerning EU-public policy.

The second look doctrine seems to be more compatible with the arbitration-friendly regime based on the New York Convention. Rather than excluding arbitration automatically and *a priori*, simply on the basis that the dispute is on an area regulated by laws that need being applied accurately,[56] it is better to permit arbitration and verify at the stage of

[52] *Id*. ¶ 126.

[53] Case C-567/14, *Genetech Inc. v Hochest GmbH*, 2016 E.C.R , at ¶ 58.

[54] *Id*. (referring to Case C-159/97 Castelletti v Trumpy, at ¶ 51. The AG supported the same view).

[55] *Id*. ¶ 63.

[56] *See* Radicati, *supra* note 10, at 58 (Casting doubt on the assumption that arbitration is not capable of an accurate application of the law).

challenge or enforcement whether the award is compatible with fundamental principles.[57]

C. Applying Overriding Mandatory Rules or Observing the Contract Terms?

That disregarding applicable (overriding) mandatory rules does not necessarily lead to an award being set aside or refused enforcement, does not automatically imply that an arbitral tribunal shall not take these rules into consideration.

Other than when disregard or breach of the applicable law results in a violation of fundamental principles, as was seen above, there seem to be no clear guidelines regarding the accuracy with which an arbitral tribunal is expected to apply the governing law. The issue becomes relevant particularly where the applicable law negatively affects the validity or enforceability of some of the terms contained in the contract – for example (without suggesting that these rules are overriding), where the contract contains a detailed mechanism for payment of penalties in case of delay in the performance and the governing law is US law, under which penalties are not enforceable.[58] In the dilemma between applying the governing law accurately (with the consequence that the penalty clause becomes unenforceable) and following the will of the parties as recorded in the contract (with the consequence that the prohibition of penalty clauses in the applicable law is disregarded), various approaches have been suggested. It seems difficult to give a general guidance, as the circumstances of the case and the quality of the relevant rules may have an influence on the approach taken by the arbitral tribunal.

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[57] Although situations may be envisaged, where the courts do not have the possibility to give a second look: where the arbitral tribunal had the seat outside the EU/EEA area, courts of EU/EEA states will not have jurisdiction on the validity of the award. Likewise, these courts will not have jurisdiction on the enforcement either, if the award is carried out voluntarily by the losing party, is sought enforced in a country outside the EU/EEA area, or is not sought enforced.

[58] A recent Supreme Court decision departed from the restrictions to contractual penalties traditional found in English law, see Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67*; see also* ParkingEye Ltd. v Beavis [2015] UKSC 67. US case law, to the contrary, still operates with the traditional restrictions, *see* Caudill v. Keller Williams Realty, Inc., Caudill v. Keller Williams Realty, Inc., 2016 WL 3680033 (7th Cir. July 6, 2016).

As a matter of principle, there are two opposite approaches. One approach gives prevalence to the will of the parties and emphasizes that the arbitral tribunal receives its mandate from the parties. This approach leads to the conclusion that the arbitral tribunal shall disregard the applicable law if it invalidates a term of the contract.[59] The other approach gives prevalence to the judicial function of arbitration, and points out that arbitral tribunals shall apply the law accurately.[60] As long as the award does not violate public policy, the arbitral tribunal is free to choose between these approaches.

Between these opposed extremes there are proposals of criteria that may add objectivity to the choice of approach. It has been suggested that, in a contract containing a choice of law clause in favour of a law that invalidates another term of the contract, the principle of *lex specialis* should be applied.[61] As the choice of law clause has a general character, the other term of the contract may be deemed to have derogated from it. This approach, however, does not seem to be a sufficient basis for disregarding overriding mandatory rules: as these rules, per definition, override any choice of law made by the parties, even more so will they override a diverging contract term.

It has also been suggested that the relationship between the chosen law and contract terms that may be affected by it should be informed by the expectations of the parties.[62]

It is certainly true that, in commercial transactions, objectivity and predictability in the construction of a contract are of paramount importance, as contracts often are scrutinized by third parties for the purpose of, for example, financing the project or determining the insurance premium. It seems, therefore, fair to assume that the parties' expectations are that a contract be read on the basis of its own terms, without interference from external sources (including also the applicable

[59] *See* Radicati, *supra* note 11, §§IV – V (supporting this approach).

[60] *See* Giuditta Cordero-Moss, "Detailed contract regulations and the UPICC: parallels with national law and potential for improvements – the example of Norwegian law", UNIDROIT (ed), *Eppur si muove: The Age of Uniform Law. Essays in Honour of Michael Joachim Bonell to Celebrate His 70th Birthday*, UNIDROIT 1302, § 3.4 (2016)*;* Joshua Karton, *The arbitral role in contractual interpretation*, 6 J. INT'L DISPUTE SETTLEMENT 2015, 4–41.

[61] *See* W. Park, *The Predictability Paradox, in The Application of Substantive Law by International Arbitration* 62 (F. Bortolotti & P. Mayer eds., 2014).

[62] Radicati, *supra* note 11, at §§ III a; IV.

law). This seems to be confirmed by the style in which commercial contracts usually are written: contracts are very detailed and have the ambition of regulating the legal relationship exhaustively. They even contain terms (so called boilerplate clauses) that regulate the interpretation and general operation of the contract, with the aim of substituting the applicable general contract law. All this seems to indicate that the parties' expectation is that the contract terms shall prevail, in case of conflict with the applicable law. Moreover, often a choice of law clause is inserted at the last minute, without the parties having taken particular care in ascertaining the content of the chosen law and its effects on the contract.[63]

However, not all terms are inserted into the contract with the specific intention that they shall prevail. Parts of the contract certainly are, for example the parts setting forth the specifications of the obligations. Other parts, on the contrary, are inserted out of a need to standardise internal documentation and on the basis of a cost-benefit analysis – particularly when the contract is entered into by a company with extensive international activity.[64] Tailoring each contract to the applicable law would assume an assessment of each of the applicable national laws, an adjustment of the contract model to the need of each law, as well as negotiating with the counterparty who may be used to the more standardised language. Also, it would not be possible to standardise contract management, as this would have to be tailored to each applicable law. All this has a cost that may exceed the costs connected with the potential risk of seeing a standardised contract term declared invalid because it conflicts with the applicable law. In short, the parties may assess and assume the legal risk connected with using terms that are not adapted to the applicable law. In a situation as this, an analysis of the parties' intentions may not lead to the conclusion that the parties

[63] See Giuditta Cordero-Moss, *Interpretation of contracts in international commercial arbitration: diversity on more than one level*, in 22 EUR. REV. PRIV. L., 13 (2014).

[64] Maria Celeste Vettese, *Multinational companies and national contracts, in* Boilerplate Clauses, International Commercial Contracts and the Applicable Law 20 (G. Cordero-Moss ed., 2011); Daniel Echenberg, *Negotiating international contracts: does the process invite a review of standard contracts from the point of view of national legal requirements?, in Boilerplate Clauses, International Commercial Contracts and the Applicable Law* 11 (G. Cordero-Moss ed., 2011).

expected the contract terms to prevail in case of conflict with the applicable law.[65]

In the following section, I suggest that the borders for the arbitral tribunal's powers are ultimately determined by the applicable arbitration law and by private international law. These may give guidance as to the arbitral tribunal's powers regarding the application of law.

D. Excess of Power if the Tribunal Overrides the Contract Terms?

The sections above showed that disregarding or breaching overriding mandatory rules has no direct impact on the validity or enforceability of an award, as these are affected only when the award violates the court's public policy or its arbitrability rule – and a breach of overriding mandatory rules does not automatically mean that public policy was violated. It remains to verify whether the arbitral tribunal has the power to take into consideration overriding mandatory rules, given that these do not belong to the law chosen by the parties or applicable according to conflict rules.

Following the logic set forth in this article, to answer this question it is necessary to inquire whether any of the grounds for setting aside an award or refusing its enforcement may be triggered as a consequence of the application by the arbitral tribunal of overriding mandatory rules that do not belong to the applicable law. There are many bases upon which the governing law may have been determined: the disputed contract or the arbitration agreement may have contained a choice of law clause; the parties may have agreed on which law to apply after the dispute arose; the arbitral tribunal may have selected the applicable law after having applied conflict of laws rules; or, where arbitration law or arbitration rules allow the arbitral tribunal to do so, the applicable law may have been selected simply because it seemed appropriate to apply that law (so-called *voie directe).* Where the arbitral tribunal finds that overriding mandatory rules not belonging to the applicable law should be given effect, various scenarios may be imagined: none of the parties invokes these rules, and the arbitral tribunal desires applying them *ex officio*; or, one party invokes them and the other party objects to their application because they do not belong to the chosen law. In a third scenario, where both parties agree on the applicability of these rules, the issues analysed here do not arise. In a

[65] *See* Cordero-Moss, *supra* note 4, at 14; Cordero-Moss, supra *note* 63, at 22.

fourth scenario, where both parties explicitly instruct the arbitral tribunal to disregard the overriding mandatory rules, it has been suggested that the arbitral tribunal should decline its mandate.[66]

Among the grounds for invalidity or unenforceability, which were quickly mentioned in subsection III.B above, one ground may be relevant here: excess of power, also known as *ultra petita.*

The main purpose of this ground is to ensure that the award is rendered within the borders set by the arbitration agreement and by the parties' pleadings. An award that goes beyond those borders is an award not based on the parties' consent to arbitrate, and is therefore invalid and unenforceable. Generally, this ground is considered to apply when the arbitral tribunal decides on matters that were not raised by the parties, or when it otherwise goes beyond the scope of power that was conferred on the arbitral tribunal. As an illustration may be mentioned an award ordering one party to set off its claims against claims that the other party has under a contract that was not subject to the arbitration agreement under which the arbitral tribunal was appointed. Often, the defence of excess of power is considered to be irrelevant to the question of the applicable law.[67]

However, the applicable law is certainly relevant to the scope of the dispute: the scope of the dispute is in part determined by the disputed contract, and the contract does not have legal effects simply in force of itself – it receives its legal effects from the governing law. The same contract wording may have dramatically different effects depending on which law governs it.[68] It may be argued, therefore, that the scope of the dispute is (in part) determined by the contract as construed under its applicable law. An arbitral tribunal that applies a different law may be equalled to a tribunal that applies a contract wording different from the wording contained in the disputed contract. Hence, the tribunal may be deemed to have gone beyond the powers that were conferred to it under the contract.[69]

Although it is not often recognised that application of a law different from the applicable law may constitute an excess of power, therefore, there is no conceptual obstacle to invoking this defence in such a situation.

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[66] Radicati, *supra* note 10, at 70.
[67] *See* Cordero-Moss, *supra* note 19, § 1 C 1.
[68] *See* Cordero-Moss, *supra* note 4, at 90.
[69] *Id*. at 282.

It is, therefore, necessary to verify whether the tribunal has the power to apply overriding mandatory rules when these do not belong to the applicable law, or whether this goes beyond the powers that the parties conferred on the tribunal. The sections below present two alternative approaches to answering this question, which have a different starting point, but seem to come to comparable results.

1. The Private International Law Route

The route preferred here is based on the revitalisation of an approach that many consider old fashioned.[70] In short, this approach applies the traditional legal method and looks for legal sources that may justify legal effects. The legal effect of interest here is the arbitral tribunal's power to apply overriding mandatory rules not belonging to the applicable law. If the parties chose the applicable law, the corresponding limitation to party autonomy must be justified. If the arbitral tribunal selected the applicable law, the exception to the rule under which the governing law was selected must be justified.

In both situations, it seems appropriate to assess first what is the legal source that permits the parties or the arbitral tribunal to choose the applicable law; on this basis, it will be possible to explain the restrictions or exceptions to this choice.

According to the traditional approach,[71] the parties' or the arbitral tribunal's choice of law is regulated by that branch of the law that goes under the name of private international law (also known as conflict of laws, or choice of law rules). As known, the private international law contains rules that give instructions as to how to select the applicable

[70] The role of private international law in arbitration has undergone an evolution, from being the classical framework for choice of law to being criticised by some for being a rigid and undesirable mechanism, *see* Giuditta Cordero-Moss, *Arbitration and Private International Law*, 11 *INT'L ARB. L. REV.* 153, 153 (2008); Radicati, *supra* note 10, § Ib. The criticism against private international law in arbitration, however, is not unanimously shared, *see* Giuditta Cordero-Moss, *Arbitration and Private International Law*, 11 *INT'L ARB. L. REV.* 153, 153 (2008); G. Cordero-Moss, *International commercial contracts, supra* note 4, at 203.

[71] *See* G. Cordero-Moss, *Regulation of International Commercial Contracts: a Dilemma of Philosophical Character?,* 62 SCANDINAVIAN STUD L. (2016).

law. Today, European Union Regulations or international conventions[72] harmonise part of the private international law, but national law still regulates some areas of the private international law.[73]

In the field of international arbitration, some specific private international law rules are codified in international conventions,[74] whereas others are regulated in national arbitration law. Of particular interest in the trans-national context may be the 2015 Principles of Choice of Law in International Contracts,[75] published by the Hague Conference and meant as a restatement of generally recognised principles of private international law.

Regarding the law applicable to the merits of the dispute, which is the relevant issue, national arbitration law is harmonised by the UNCITRAL Model Law and contains a choice of law rule giving the parties' the possibility to choose the applicable law.[76]In case the parties have not made use of their party autonomy, the UNCITRAL Model law directs the arbitral tribunal to apply the conflict rules that the tribunal "considers applicable".[77] The Model Law, thus, follows the traditional approach and applies the private international law mechanism. However, in the revision of 2006, the Model Law received a more flexible version and was emancipated from the automatic application of the private international law of the state where the tribunal has its venue. This was meant to cater to the situations where the venue of arbitration has no connection with the dispute, and where it may be appropriate to apply the conflict rules of states with closer connection. In practice, in many situations, arbitral tribunals may still consider the venue of the arbitration as a significant connecting factor and thus apply its conflict rules to determine the law applicable to the merits of the dispute.

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[72] Some conventions drafted by the Hague Conference have the purpose of harmonising choice of law rules, *see* https://www.hcch.net/en/instruments/conventions.

[73] For example, company law and property law.

[74] For example, the New York Convention contains choice of law rules regarding the law governing the capacity of the parties, the validity of the arbitration agreement, the arbitral procedure, arbitrability and public policy.

[75] *See* Hague Conference on Private International Law, Principles on Choice of Law in International Commercial Contracts, March 19, 2015, art. 11(5).

[76] *See* United Nations Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, UNCITRAL, art. 28(1).

[77] See *id*., at art. 28(2).

According to the Model Law, the venue is the proper connecting factor for a series of important aspects, such as the validity of the arbitration agreement, the arbitral procedure, the tribunal's power to issue interim measures, the validity of the award and the applicable public policy – it does not seem unreasonable to consider it as a proper connecting factor also for the conflict rules. Some jurisdictions have formalised these considerations and instruct the tribunal to apply the private international law of the law of the venue.[78]

However, not all jurisdictions have adopted the Model Law's reference to private international law (of the venue or otherwise): some jurisdictions provide a specific conflict rule for arbitration,[79] some contain no guidelines at all,[80] and some regulate the so-called *voie direct*,[81] that does not rely on private international law and gives no criteria for the selection of the applicable law. It cannot be excluded that arbitral tribunals will make use of private international law even when the arbitration is subject to an arbitration law that does not regulate the selection of law or provides for the *voie direct:* although not required to apply conflict rules, arbitral tribunals may find that the well-known mechanism of private international law permits to select the law more objectively and predictably than the mere discretion without guidelines. Even though conflict rules may be complicated and sometimes they may leave room for discretion, the abundant literature and case law on the area contribute to rendering its application quite predictable.

With the exception of the latter mentioned approach, the *voie directe*, (that is the starting point for the observations made in the section below), this short overview shows that the private international law has still a quite important role in arbitration.[82] Even those who deem it undesirable to apply a national system of private international law, can find the mechanism underlying private international law in generally

[78] *See* Arbitration Act, 2004, § 31(2) (Nor.).

[79] *See* SCHWEIZERISCHES ZIVILGESETZBUCH, [CC] CIVIL CODE, Dec. 18, 1987, art. 187 (Switz).

[80] For example, Swedish and Italian law.

[81] *See e.g.* CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE], art. 1511 (Fr.).

[82] *See* Cordero-Moss, *supra* note 70 (On the role of private international law in arbitration); *See also Conflict of laws in international arbitration* (Franco Ferrari & Stephan Kröll eds., 2010).

acknowledged principles such as the Hague Principles on Choice of Law.[83]

It is, therefore, justified to look at the private international law as the framework for determining the scope of the choice of law made by the parties and selected by the arbitral tribunal. As the choice of law is the exercise of a power based on private international law, any restrictions or exceptions that rely on principles or rules of private international law do not violate the choice of law; they simply implement the choice of law pursuant to its scope as determined in the legal sources upon which it is based.

Party autonomy in private international law generally applies only within the scope of contract law (and to a certain extent also tort law); if a dispute has implications of company law or property law, or if it is on areas where states exercise their regulatory powers, the court will apply the law chosen by the parties to the contractual aspects of the dispute, and to the other aspects it will apply the law selected according to the appropriate conflict rules (so-called *dépeçage*). In private international law, therefore, the parties' choice of law does not cover areas where there may be overriding mandatory rules – and even if there were overriding mandatory rules in the area of contract law, the system of private international law would justify that they override the choice made by the parties.

It has been suggested that party autonomy in arbitration has a wider scope than party autonomy in private international law.[84] Many choice of law rules contained in arbitration law permit the parties to choose the law applicable not only to the contract, but more generally to the *merits* of the dispute – for example, the UNCITRAL Model Law speaks of the law applicable to the substance of the dispute. This is interpreted as giving party autonomy a wider scope than the one party autonomy has in private international law as described above: if the dispute has implications that go beyond the mere contract law, according to this opinion party autonomy would cover also these aspects. According to this logic, therefore, the private international law would not be a sufficient basis to justify the arbitral tribunal's power to override the parties' choice of law: the parties' choice of law would not be restricted to the mere contract matters, but would extend to any issues within the scope of the dispute.

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[83] *See* Hague Conference on Private International Law, Principles on Choice of Law in International Commercial Contracts, March 19, 2015, art. 11(5).

[84] Radicati, *supra* note 11, § IIIa.

However, although the wording of the arbitration choice of law rule may seem wider than, for example, the wording of the Rome I Regulation – which applies not to the *merits* of the dispute, but only to *contractual obligations* – it may be questioned whether this can be taken as a basis for assuming that the parties in arbitration have the power to choose the law applicable to matters of company law, property law or regulatory matters. This is because the choice of law possible in arbitration relates to the merits of the *dispute.* Therefore, it must be interpreted within the scope of the dispute that may be decided by the arbitral tribunal. Generally, arbitration may decide disputes between the parties on rights and obligations that the parties may dispose of, and decides the dispute with effects for the parties. An arbitral tribunal may not render an award with effects for third parties: therefore, an arbitral award will not be empowered to decide that the resolution of a company body is invalid, or that a certain asset of the insolvent debtor is not available to the generality of the creditors. These aspects are outside of the dispute; hence, they are not covered by the broad language of the conflict rule for arbitration. The wording of the choice of law rule contained in the Model Law, therefore, does not seem to extend the scope of party autonomy in a significant manner.

In summary, a systematic interpretation of the sources applicable to arbitration, including also the private international law, seems to give justification for the arbitral tribunal's power to apply overriding mandatory rules not belonging to the governing law. If the governing law was chosen by the parties, the arbitral tribunal does not violate its mandate because the choice made by the parties does not extend beyond contract (and possibly tort) law. If the governing law was selected by the arbitral tribunal, and it was selected applying private international law mechanisms, it is the private international law itself that gives the power to override the governing law.

2. Assuming an Ethical Duty

Similar results may be obtained following an alternative route that assumes an understanding of arbitration quite opposed to the position taken in the previous section: the understanding of arbitration as detached from national laws. Starting from the observation that party autonomy is fundamental in arbitration, and relying on the modern mechanism of the *voie direct* in case the parties have not made a choice, this approach concludes that it is not correct to assume that a certain

national law constitutes the legal framework for arbitration – generally summarised with the statement that arbitration does not have a *forum*.[85] In this frame of mind, it is not useful to look at principles of private international law to find a basis for limitations to party autonomy. Party autonomy in the context of arbitration is not considered as a regular conflict rule based on private international law; applying overriding mandatory rules belonging to a law different from the chosen law, therefore, constitutes a limitation of party autonomy that has to be explained on another basis.

Following this logic to its extremes leads to considering national laws completely irrelevant and arbitral tribunals obliged to obey exclusively by the will of the parties. This was indeed a largely supported view in the past, although voices were raised against it, pointing out that this approach would be detrimental to arbitration's credibility.[86]

There has been an evolution in this approach, and nowadays there seems to be a consensus that arbitrators may not be deemed to be exclusively servants of the parties.[87] Although the arbitral tribunal is said to owe its primary allegiance to the parties, there is an "expectation, perhaps even a requirement that arbitrators apply mandatory rules." [88] This is based on the acknowledgement that arbitration needs to preserve its credibility, if it is to enjoy the states' continued recognition as an institution.

The arguments made to justify this position are largely similar to the arguments that supported the mentioned criticism against the delocalisation theory: States permit to arbitrate disputes, even in areas where there are mandatory rules, and lend their judiciary to ensure enforceability of the award; this extensive support of arbitration is premised on the assumption that mandatory rules will be applied competently in arbitration.[89] Also, arbitral tribunals are said to be under a

[85] Radicati, *supra* note 10, at 65.

[86] Giuditta Cordero Moss, International Commercial Arbitration. Party Autonomy and Mandatory Rules 410 (Tano Aschehoug) (1999).

[87] Radicati, *supra* note 10, at 72.

[88] *Id*. at 66.

[89] *Id.* at 66; *Id*. at 51. For the criticism against the delocalization theory, *see* Cordero Moss, *supra* note 86.

professional duty not to become accomplices of a violation or circumvention of the law.[90]

The inference taken from these arguments, however, differs from the above mentioned criticism against the theory of delocalisation: the basis for the application of overriding mandatory rules is said to be an ethical duty[91] which creates a power, possibly even a legal obligation[92] to apply those rules.

Since this approach is based on the assumption that arbitration has no *forum*, and that private international law is not applicable to arbitration, the question arises as to which overriding mandatory rules shall be applied. In international disputes, it is possible that rules from a variety of legal systems are potentially applicable. If the arbitral tribunal had applied a private international law (of the *forum* or otherwise identified as the most appropriate private international law), it would have had some criteria to guide the selection of the applicable mandatory rules. However, under this approach the arbitral tribunal does not follow the private international law method. Therefore, there is the theoretical possibility that it ends up applying all mandatory rules that are potentially applicable, thus having an even more expansive application of mandatory rules than what is to be expected when the dispute is decided by a court.

To avoid this result, this approach recommends that overriding mandatory rules be applied "with reason and pragmatism". [93] The arbitral tribunal should consider applying only those rules "having a genuine and reasonable title to be applied in light of the circumstance of the case", and also consider which courts would have had jurisdiction in the absence of an arbitration agreement, and which mandatory rules these courts would have applied.[94]

This latter observation seems to show a convergence with the private international law-based approach described in the previous section: as courts apply private international law to give effect to mandatory rules, some private international law considerations may become relevant after all – for the purpose of guiding a reasonable application of the arbitral tribunal's ethical duty to apply mandatory rules.

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[90] *Id.* at 68.
[91] Radicati, *supra* note 11, §V(c).
[92] Radicati, *supra* note 10 at 66.
[93] *Id.* at 69.
[94] *Id*.

CONCLUSION

As seen in subsection III.D, there are different explanations for when and how overriding mandatory rules may be applied in arbitration. The two approaches described above have different starting points:

The approach preferred here is to rely on the traditional legal method and give the private international law a central role in determining the scope of the choice of law made by the parties or the arbitral tribunal – having determined this scope, the private international law ensures that application of rules not belonging to the chosen law does not constitute a violation of the arbitral tribunal's mandate. Also, the private international provides the criteria for selecting which overriding mandatory rules to apply.

An alternative approach has the opposed starting point: it negates that private international has a role and assumes an ethical duty to apply overriding mandatory rules. This ethical duty is to be exercised reasonably, and considerations of private international may contribute to guiding this reasonable exercise. It seems, therefore, that, notwithstanding the diametrically opposed starting points, the two approaches may meet in the result.

The framework for the application of overriding mandatory rules not belonging to the chosen law is, in both approaches, based on the assumption that arbitral awards shall be considered final and binding unless there is a ground for setting them aside or refusing enforcement. The grounds that may be relevant are violation of public policy and lack of arbitrability.

That an award disregarded applicable overriding mandatory rules is in itself not sufficient to assume that the award violates public policy. It is necessary to assess whether the award actually and seriously violates the principles underlying these rules, and that these principles are fundamental.

Regarding the arbitrability rule, the general trend over the past decades has been to enlarge the scope of disputes that are arbitrable more and more, and the simple circumstance that some overriding mandatory rules are applicable is generally no longer considered a reason to exclude arbitration – certainly not if the dispute regards the private law aspects of these rules. However, there seem to be signs that some European states courts and the Advocate General of the CJEU may be reversing this arbitration-friendly trend for the purpose of ensuring that European rules necessary for the achievement of the internal market are accurately applied by courts in European states.

In summary, arbitral tribunals should be wary of an interventionist approach that gives effect to any mandatory rules without taking into any consideration the parties' expectations. At the same time, they should not lend themselves to circumvention of mandatory laws. Between these two extremes, arbitral tribunals may find guidance in the grounds for validity and enforceability of arbitral awards, as well as in private international law criteria (either because they deem private international law to be applicable, or because they find that it can contribute to a reasonable exercise of their ethical duty to apply mandatory law).

The principle of due process is a further caveat for arbitral tribunals that, *i.a.*, provides that each party has been given the possibility to present its case. This also includes the possibility to comment on the applicability of overriding mandatory rules that the arbitral tribunal may deem applicable. While the foregoing showed that arbitral tribunals may have the power to apply overriding mandatory rules that do not belong to the chosen law and that were not pleaded by the parties, it must be kept in mind that this power may not be exercised in a way that deprives the parties from their right to be heard. Therefore, it is important that the tribunal informs the parties of its intention to consider overriding mandatory rules that were not pleaded by the parties, and invites them to comment.[95]

[95] *See* Cordero-Moss, *supra* note 19, § 3.2.

ARTICLES

The Arbitration-Litigation Paradox

*Pamela K. Bookman**

The Supreme Court's interpretation of the Federal Arbitration Act is universally touted as favoring arbitration. Its arbitration cases and decisions in other areas are also viewed as supporting the Court's more general hostility to litigation. These pro-arbitration and anti-litigation policies can be mutually reinforcing. Moreover, they appear to be mutually consistent, in part because the Court describes the essential features of arbitration as being "informal," "speedy," "efficient"—in short, the categorical opposite of litigation.

This Article contends that the Court's approach is not as "pro-arbitration" as it appears. On the contrary, the Court's pro-arbitration and anti-litigation values sometimes conflict. When they do, hostility to litigation wins. For example, consider an arbitration clause that explicitly authorizes de novo judicial review. Pro-arbitration policies favoring party autonomy would enforce the clause and allow judicial review, but anti-litigation norms would require the opposite. In that factual context and others, the Supreme Court's hostility to litigation has overridden its support for arbitration. Such results are particularly problematic for international commercial arbitration.

This is the arbitration-litigation paradox: because courts play an important role in supporting arbitration, some litigation is needed to support arbitration. Efforts to limit litigation in U.S. courts and enforce distinctions between litigation and arbitration may in turn limit courts' ability to offer this support. Moreover, the Court's hostility to litigation—in arbitration cases and in other, seemingly unrelated contexts—weakens U.S. courts' ability to prioritize

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arbitration values such as party autonomy and procedural flexibility. This Article advocates prioritizing such values over hostility to litigation. It considers several avenues for pursuing this approach and sets the stage for further research into the competitive relationship between arbitration and litigation.

INTRODUCTION

It seems universally acknowledged that Supreme Court decisions demonstrate a "pro-arbitration" policy.[1] In 1983, the Court described the 1925 Federal Arbitration Act ("FAA") as having embraced a "liberal federal policy favoring arbitration agreements."[2] Since that

1. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995); Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1424 (2008); Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1719–20, 1720 n.166 (2010); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1638 (2005).

2. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); *see also, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) (noting that the Federal

time, the Court has enforced arbitration clauses in an ever-growing variety of contexts.[3] It has also read the FAA to require interpretations of arbitration clauses in a way that "favors arbitration."[4]

Supporters justify the Court's enthusiasm for arbitration as crucial to, inter alia, the success of domestic and international business; the provision of a fair, final forum "that actually works"; and the protection of contractual freedom.[5] Critics condemn the Court's affinity for arbitration for—again, inter alia—cutting off access to justice,[6] eroding substantive law,[7] and leading to enforcement of clauses that might otherwise be deemed unenforceable.[8]

Also since the 1980s, the Court has showcased a hostility to litigation in a number of procedural areas. Like the Court's pro-arbitration stance, its anti-litigation decisions have been widely acknowledged.[9] Such cases have addressed heightened pleading

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Arbitration Act "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts").

3. *See infra* Section II.B.

4. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1423 (2019); *see also id.* at 1418 (noting that "the FAA provides the default rule for resolving certain ambiguities in arbitration agreements . . . in favor of arbitration").

5. Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1195 (2003).

6. *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2809 (2015); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/JT2U-VR4N] ("[F]irst . . . in a three-part series examining how [arbitration] clauses buried in tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court.").

7. *See, e.g.*, J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3052 (2015) (arguing that "the Court's recent arbitration jurisprudence undermines the substantive law itself"); Chloe Smith, *Arbitration Hindering Development of Common Law – LCJ*, LAW SOC'Y GAZETTE (Mar. 21, 2016), https://www.lawgazette.co.uk/law/arbitration-hindering-development-of-common-law—lcj/5054358.article [https://perma.cc/AD2V-9J57] (warning that the widespread nature of arbitration clauses has been "a serious impediment to the development of common law").

8. Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 282 (2015); *see also, e.g.*, Resnik, *supra* note 6, at 2809 ("The recent Supreme Court FAA case law has garnered a good deal of criticism for cutting off the production of law, for undermining the role of Article III courts, for limiting associational rights, and for constricting access to law by enforcing bans on the collective pursuit of claims." (footnotes omitted)); Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 81 (2012) (observing that other countries do not apply pro-arbitration policies in consumer and employment contracts). *But cf., e.g.*, Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549, 589 (2008) (defending such arbitration).

9. As a shorthand, I will refer to the Court's attitudes as "pro-arbitration" and "anti-litigation," although these are simplistic characterizations. Indeed, much of this Article is devoted to unpacking the "pro-arbitration" label and revealing its inaccuracy. The meaning of "anti-litigation" is widely discussed in the literature. *See, e.g.*, Andrew M. Siegel, *The Court*

standards, efforts to spare defendants from the burdens of discovery, limits on class certification, and other methods of disparaging and diminishing "the power of courts to adjudicate run-of-the-mill civil disputes."[10]

Despite their differences, both supporters and critics of the Court's recent arbitration jurisprudence typically agree on three points. First, the paradigm case for enforcing arbitration clauses is when they appear in business-to-business contracts between sophisticated parties, especially in international commercial contracts.[11] The implied premise of critics' argument is that while pro-arbitration policies may be appropriate for international commercial contracts, they are not appropriate in other contexts.[12] Second, it is commonly assumed that the Court's pro-arbitration decisions are in fact favorable to arbitration, especially in the paradigm case.[13] Finally, both camps tend to view the Court's pro-arbitration and anti-litigation policies as mutually reinforcing.[14] Supporters consider one of arbitration's key virtues to be

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Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence, 84 TEX. L. REV. 1097, 1097 (2006) (examining "the contours of the Rehnquist Court's hostility toward litigation"); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1850–56 (2014) (arguing that amendments to the Federal Rules of Civil Procedure and the enforcement of arbitration clauses have contributed to a trend of "constricting access to courts, limiting discovery, and denying trials").

10. Siegel, *supra* note 9, at 1107.

11. Thomas O. Main, *Arbitration, What Is It Good For?*, 18 NEV. L.J. 457, 474 (2018) (suggesting that arbitration may be beneficial only in circumstances where parties knowingly and willingly opt to forego their right to go to court to resolve an international dispute).

12. *See, e.g.*, Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen*,* Rent-A-Center*,* Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 327 (2011):

> [W]hile the Court's largely unmitigated pro-arbitration stance resonates with general principles supporting arbitration as an alternative to court litigation in international commerce, it is fundamentally out of line with the broad run of national laws limiting or regulating the use of arbitration in the contracts for consumer goods and services, or in individual employment contracts.

Of course, some scholars consider private dispute resolution questionable in almost all contexts. *See* Gilles Cuniberti, *Beyond Contract – The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L.J. 417 (2009) (collecting arbitration critiques and arguing for arbitration as the default approach to resolution in international commercial disputes).

13. *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996) (describing the Supreme Court's approach to arbitration as "leading the revolutionary transition" from litigation to arbitration).

14. *See, e.g.*, Siegel, *supra* note 9, at 1109; *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1428 (2019) (Kagan, J., dissenting) (describing the "majority's belief that class arbitration 'undermine[s] the central benefits of arbitration itself ' " as "of a piece with the majority's ideas about class litigation").

allowing parties to avoid litigation;[15] other developments that avoid litigation are likewise welcome.[16] Critics, meanwhile, argue that the negative consequences of the Court's pro-arbitration decisions are also negative consequences for litigation and are further exacerbated when combined with the Court's anti-litigation decisions.

The consistency between the pro-arbitration and anti-litigation trends seems to make sense because arbitration and litigation are commonly understood to be not just alternatives but opposites.[17] On one hand, arbitration could be understood simply as a private, contract-based dispute resolution system in which decisionmakers render binding adjudication of parties' claims.[18] Litigation, on the other hand, refers to the process of resolving disputes in a public court system

15. *See, e.g.*, Brief for United States Council for International Business as Amicus Curiae in Support of Respondent at 2, Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008) (No. 06-989), 2007 WL 2707883; George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 1–2 (2012) (highlighting that "[p]articipants in international commercial arbitration have long recognized the need to maintain arbitration as an effective and therefore attractive alternative to litigation"); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 436 (2010) (noting that proponents argue "arbitration is a more efficient dispute resolution procedure than litigation"); WHITE & CASE, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 2 (2018), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-(2).pdf [https://perma.cc/7FEL-V86A] (noting that proponents perceive "avoiding specific legal systems/national courts" as one of "arbitration's most valuable characteristic[s]").

16. The website for the U.S. Chamber of Commerce Litigation Center, which describes itself as "the voice of business and free enterprise in the federal and state courts," lists "protecting the enforceability of pre-dispute arbitration agreements, including those that waive the availability of class actions" as "[a] critical piece of the Litigation Center's work." *Arbitration*, U.S. CHAMBER LITIG. CTR., https://www.chamberlitigation.com/arbitration (last visited Feb. 18, 2019) [https://perma.cc/2PZ2-D58Q]; *What We Do*, U.S. CHAMBER LITIG. CTR., https://www.chamberlitigation.com/what-we-do (last visited Feb. 18, 2019) [https://perma.cc/TNY2-FTVT]. The Chamber also actively files amicus briefs urging courts to cabin forum shopping and prevent what it considers to be "abuse of the class action mechanism." *Class Actions*, U.S. CHAMBER LITIG. CTR., https://www.chamberlitigation.com/class-actions (last visited Feb. 18, 2019) [https://perma.cc/MJ9X-2E33]; *Forum Shopping*, U.S. CHAMBER LITIG. CTR., https://www.chamberlitigation.com/forum-shopping (last visited Feb. 18, 2019) [https://perma.cc/CVW2-GSL4]. These are efforts to support what scholars have called the "anti-litigation" developments in the courts. *See* sources cited *supra* note 9. Of course, the Chamber is not opposed to litigation in all forms; the Litigation Center does initiate litigation in some circumstances. *See, e.g.*, *Government Litigation*, U.S. CHAMBER LITIG. CTR., https://www.chamberlitigation.com/government-overreach (last visited Feb. 18, 2019) [https://perma.cc/L63N-KPRS] (describing the Litigation Center as a routine challenger as "both a party and an amicus" to "regulatory overreach by federal, state, and local government agencies").

17. *See, e.g.*, Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 2994 (2015); Leslie, *supra* note 8, at 266; Imre S. Szalai, *Reconciling Fault Lines in Arbitration and Redefining Arbitration Through the Broader Lens of Procedure*, 18 NEV. L.J. 511 (2018).

18. David L. Noll, Response, *Public Litigation, Private Arbitration?*, 18 NEV. L.J. 477, 477–78 (2018).

according to procedures and institutions established by the state.[19] In theory, these alternatives could share some characteristics. Indeed, they are both binding forms of dispute resolution and in some ways have a lot in common.[20]

But the Supreme Court has stated that the "essence" of arbitration includes "its speed and simplicity and inexpensiveness,"[21] and the Court describes these traits as features that distinguish arbitration from litigation.[22] The FAA must safeguard these "virtues," the Court recently proclaimed, because arbitration would otherwise "wind up looking *like the litigation it was meant to displace*."[23] This essentialist vision sees arbitration as a substitute for litigation that is defined by its procedural differences from litigation.

That premise, however, is incorrect. Moreover, anti-litigation and pro-arbitration values are not always aligned. Indeed, pro-arbitration values are not monolithic. And the Court's FAA jurisprudence, while pro-arbitration in many respects, does not treat all arbitration values equally. This Article focuses on the paradigm case—international commercial arbitration—to reveal that the Court is not as pro-arbitration as it appears.

This is the arbitration-litigation paradox: while it is commonly assumed that pro-arbitration and anti-litigation values go hand-in-hand, supporting arbitration—particularly international commercial arbitration—in some ways requires valuing and supporting litigation.

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19. *Litigation*, WEX, https://www.law.cornell.edu/wex/litigation (last visited Mar. 23, 2019) [https://perma.cc/K6YS-3HWP].

20. *See generally* DONALD EARL CHILDRESS, MICHAEL D. RAMSEY & CHRISTOPHER A. WHYTOCK, TRANSNATIONAL LAW AND PRACTICE 545–48 (2015) (describing the similarities and differences between litigation, negotiation, mediation, and arbitration).

21. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018); *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (reemphasizing *Epic*'s view of arbitration).

22. Some scholars also adopt the essentialist view. *Compare, e.g.*, Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 393, 399 (2018), *and* Drahozal & Ware, *supra* note 15 (asserting an essentialist view), *with* Hiro N. Aragaki, *The Metaphysics of Arbitration: A Reply to Hensler and Khatam*, 18 NEV. L.J. 541, 559 (2018) (criticizing it). For examples of scholarship looking at the central characteristics of arbitration, see Jean R. Sternlight, *"Arbitration Schmarbitration": Examining the Benefits and Frustrations of Defining the Process*, 18 NEV. L.J. 371, 374 (2018), which notes that arbitration is difficult to define, and Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 51, which argues that arbitration's central defining feature is its flexibility.

23. *Epic Sys.*, 138 S. Ct. at 1623 (emphasis added). The Court recognizes that party autonomy ultimately governs arbitration clauses and "parties remain free to alter arbitration procedures to suit their tastes," including choosing "to arbitrate on a classwide basis." *Id.* But it insists that the "essential insight remains: courts may not allow a contract defense to reshape *traditional individualized arbitration* by mandating classwide arbitration procedures without the parties' consent." *Id.* (emphasis added); *see also Lamps Plus*, 139 S. Ct. at 1416 (reiterating the "fundamental" differences between litigation and arbitration and quoting *Epic*).

It may also require respecting the ways in which arbitration looks increasingly similar to litigation.[24] The Court's hostility to litigation and embrace of essentialist values can weaken courts' ability to support international commercial arbitration.

To be "arbitration-friendly," modern sources recommend that courts "supervise with a light touch but assist with a strong hand."[25] This means courts should enforce arbitration agreements, and when reviewing arbitration awards, they should "decline to set aside awards for error of law or fact, however gross"; "read awards generously"; and avoid finding procedural defects unless serious due process violations have "caused real prejudice."[26] An "arbitration-friendly" approach also involves "interven[ing] quickly in support of arbitration by issuing court orders enforcing tribunal decisions where judicial assistance is needed."[27]

Decisions on whether and how to follow this advice can reflect three broad sets of arbitration values: essentialist values, private law values, and international business values.[28] Essentialist values prize arbitration for the "essential virtues" that supposedly differentiate it from litigation—that arbitration is speedy, simple, and inexpensive, for example. The Court also sometimes refers to these traits as "fundamental attributes of arbitration."[29] These values embody a hostility to litigation and an appreciation of the ways arbitration reflects the opposite of litigation's shortcomings.[30] Arbitration's private law values include respect for party autonomy and adaptability. International commercial arbitration also serves a third set of values:

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24. Arbitrators may also face a reverse arbitration-litigation paradox when parties seek to make arbitration more like litigation. *See, e.g.*, Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 480–92 (Aug. 4, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf [https://perma.cc/MNW8-94CD] (evaluating the issue of mass claims in arbitration). Thank you to Jeff Dunoff for pointing out this reverse paradox, which is a topic for future research.

25. Michael Hwang, *Commercial Courts and International Arbitration—Competitors or Partners?*, 31 ARB. INT'L 193, 194 (2015).

26. *Id.*; *see also, e.g.*, Carbonneau, *supra* note 5, at 1194 ("The Western, developed-state (and commercially predominant) view is that, no matter its degree, judicial intervention, in matters of transborder or domestic arbitration, is antagonistic to the autonomy and functionality of arbitration.").

27. Hwang, *supra* note 25, at 194.

28. *See infra* notes 179–182 and accompanying text (discussing the complexity of defining what it means to be "pro-arbitration").

29. *Lamps Plus*, 139 S. Ct. at 1418; *Epic Sys.*, 138 S. Ct. at 1622; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

30. *See* Siegel, *supra* note 9. For the historical development of this attitude, see *infra* Section I.B.

promoting international trade and business, including U.S. companies' ability to operate on a global scale.[31]

These values reflect three overlapping visions of the relationship between arbitration and litigation. One vision, consistent with essentialist values, is that arbitration is a private substitute for litigation. A second vision sees courts as a support network for arbitration, recognizing and enforcing arbitration agreements and awards and otherwise complementing ongoing arbitration—for example, by helping direct the collection of evidence or appointing arbitrators where parties cannot agree. Under a third view, arbitration and litigation are competitors in the market for dispute resolution services, where the "customers" are international business entities. These three visions are not mutually exclusive. This Article will focus on the interaction between the first two—substitution and support—leaving consideration of the competitive relationship between arbitration and litigation for ongoing work.[32]

In the last fifteen years, the Supreme Court has had a hot arbitration docket, with a heavy focus on expanding arbitrability.[33] In many of these cases, the three sets of arbitration values have aligned.

But where essentialist values have conflicted with private law and international business values, the Court has prioritized the former over the latter pair. For example, a focus on private law values like autonomy and adaptability would permit parties to agree about the amount of judicial review over arbitration. But the Court has said that parties do not have the freedom to craft arbitration clauses that authorize de novo judicial review of arbitrators' decisions.[34] Likewise, a private-law-values approach would safeguard arbitrators' traditional control over arbitral procedure.[35] Instead, to thwart the possibility of

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31. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); M/S Bremen v. Zapata Off-Shore Co. (*The Bremen*), 407 U.S. 1, 9 (1972) ("The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.").

32. *See* Pamela K. Bookman, *The Adjudication Business*, YALE J. INT'L L. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338152 [https://perma.cc/LQ4R-VVWD] [hereinafter Bookman, *Adjudication Business*].

33. The Court considered three arbitration cases during the 2018 Term: *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

34. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 583–84 (2008).

35. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964) (" '[P]rocedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."); George Bermann & Alan Scott Rau, *Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau*, 43 PEPP. L. REV. 469, 470 (2016) ("American jurisprudence differs from other systems as to the conclusiveness of the arbitrator's jurisdictional determinations.").

class arbitration, the Court has overturned arbitrators' decisions[36] and required courts to disregard state law rules of contract interpretation.[37] Appreciation for courts' role supporting arbitration would protect U.S. courts' ability to enforce arbitral awards, but instead, doctrinal developments limiting access to U.S. courts can block enforcement proceedings.[38] In short, neither the Supreme Court's recent arbitration cases nor its decisions in other areas that impact arbitration suggest that the Court prioritizes supporting private law values over hostility to litigation in circumstances where the two may conflict. This practice has negative effects for international commercial arbitration.

When the Supreme Court began enforcing forum selection clauses, including arbitration clauses, in the 1970s,[39] the Court relied heavily on the contracts' international commercial context as justification. That is the original and arguably most legitimate context for supporting arbitration. It is therefore a natural testing ground for the effectiveness of a purportedly pro-arbitration policy. Of course, any of the arguments articulated here may apply equally in the domestic commercial arbitration context, but the possibility of arbitration is especially important where the parties are from different countries. Such circumstances increase the need for a neutral and predictable forum for potential disputes as well as the need for national courts' support.[40]

This Article will focus on international commercial arbitration for two additional reasons. The fate of international commercial arbitration involves incredibly high stakes.[41] A recent survey of leading international arbitration law firms revealed information about over one hundred active international commercial arbitration cases in which at least $500 million was "in controversy," including fifty-eight cases in which claims totaled more than $1 billion and nine with claims over

36. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671–72 (2010).

37. *See Lamps Plus*, 139 S. Ct. at 1415 (finding state law contract principles preempted by the FAA "to the extent [they] 'stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA").

38. *See infra* Part III.

39. *See infra* Section I.B.

40. *See generally* W. Michael Reisman & Brian Richardson, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, *in* INT'L COUNCIL FOR COMMERCIAL ARBITRATION, ARBITRATION – THE NEXT FIFTY YEARS 17 (Albert Jan van den Berg ed., 2012).

41. *See, e.g.*, ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 1–4 (2017); Walter Mattli & Thomas Dietz, *Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction*, *in* INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE 1 (2014).

$9 billion.[42] In the decade between 2004 and 2014, modest accounts estimated that "the total number of arbitrations . . . nearly doubled."[43]

Furthermore, international commercial arbitration presents a fairly well-defined set of agreements between international businesses who contract at arm's length.[44] Arbitration is not one coherent institution.[45] As David Noll points out, "[T]he term actually refers to several distinct systems, each with its own basis of authority, procedures, and external constraints."[46] It is therefore useful to focus on an identifiable type of arbitration. For the most part, the mainstream opposition to arbitration—that the parties have not meaningfully agreed to arbitration or that the parties have deeply uneven bargaining power—is not applicable in international commercial arbitration.[47] This Article seeks to interrogate the Court's approach to arbitration while bracketing those critiques. It also brackets international investment arbitration and state-to-state arbitration, which present different sets of issues.[48]

This Article continues my previous work considering U.S. courts' treatment of transnational litigation.[49] It contributes to several different lines of scholarship. It engages in conversations about

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42. SWEET & GRISEL, *supra* note 41, at 3–4 (citing Michael D. Goldhaber, *Arbitration Scorecard 2013: Contract Disputes*, AM. LAW. (July 1, 2013, 12:00 AM), https://www.law.com/americanlawyer/almID/1202607030865 [https://perma.cc/X9LQ-UM2V]).

43. CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 25 (2014).

44. *See* Mattli & Dietz, *supra* note 41, at 1–2 (defining international commercial arbitration).

45. Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 122, 132 (2015) (criticizing the Supreme Court's approach to arbitration as a "one-size-fits-all process" because it "ensures that virtually no ground exists to challenge an unfair arbitration clause").

46. David L. Noll, *Public Litigation, Private Arbitration?*, 18 NEV. L.J. 477, 478 (2018); *see also, e.g.*, Hensler & Khatam, *supra* note 22; Anthea Roberts & Christina Trahanas, *Judicial Review of Investment Treaty Awards:* BG Group v. Argentina, 108 AM. J. INT'L L. 750, 751–54 (2014) (criticizing the Supreme Court for using interpretive tools from contract and commercial arbitration contexts in evaluating a case about investor-state arbitration under the Argentina-U.K. investment treaty).

47. *Cf.* Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 343 (2007) ("Unlike judges, arbitrators only earn money if they are appointed by parties. Because one-shot players are unlikely to re-appoint an arbitrator in the future, the argument goes, arbitrators have an incentive to favor repeat players in the hopes that a favorable award will translate into future appointments.").

48. *See, e.g.*, Hensler & Khatam, *supra* note 22 (discussing the differences between domestic, international commercial, and international investment arbitration); *see also, e.g.*, Roberts & Trahanas, *supra* note 46, at 760 (criticizing the Supreme Court's essentialist view of arbitration in an investment arbitration case and contrasting commercial and investment arbitration).

49. *See* Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 AJIL UNBOUND 57 (2016) [hereinafter Bookman, *Doubling Down*]; Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) [hereinafter Bookman, *Litigation Isolationism*]; Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016) [hereinafter Bookman, *Unsung Virtues*].

international commercial arbitration in the Supreme Court,[50] the relationship between national courts and international commercial arbitration,[51] and rising barriers to access to U.S. courts.[52] Drawing these areas together, the Article adds to conversations about the unintended ramifications of these developments on U.S. courts' arbitration policies.[53] It also contributes to scholarly debates about what arbitration is[54] and how to promote it.[55] At least one author has documented ways in which the Court's supposedly pro-arbitration decisions in fact undermine international commercial arbitration—for example, by "incorrectly claim[ing] that arbitration is inappropriate and undesirable in high-stakes cases."[56] Another well-taken criticism of the effectiveness of the Court's efforts to support arbitration is that the Court's overenthusiasm for arbitration in unwarranted contexts gives

50. *See, e.g.*, Aragaki, *supra* note 22; Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21; Stipanowich, *supra* note 12.

51. *See, e.g.*, Margaret Moses, *Arbitration/Litigation Interface: The European Debate*, 35 NW. J. INT'L L. & BUS. 1, 17 (2014); Luca G. Radicati di Brozolo, *The Impact of National Law and Courts on International Commercial Arbitration: Mythology, Physiology, Pathology, Remedies and Trends*, 2011 PARIS INT'L ARB. J. 663; W. Michael Reisman & Heide Iravani, *Arbitration and National Courts: Conflict and Cooperation: The Changing Relation of National Courts and International Arbitration*, 21 AM. REV. INT'L ARB. 5, 34 (2010); S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 4.

52. *See generally* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLTUION AGAINST FEDERAL LITIGATION (2017); Bookman, *Litigation Isolationism*, *supra* note 49; Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995 (2015); David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41 (2014); Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501 (2016).

53. *See* Adam Raviv, *Too Darn Bad: How the Supreme Court's Class Arbitration Jurisprudence Has Undermined Arbitration*, 6 Y.B. ARB. & MEDIATION 220 (2014) (arguing that though recent cases *Concepcion* and *Italian Colors* ostensibly promoted arbitration, they may have undermined its adoption and utilization); Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath* Daimler *Wrought?*, 91 N.Y.U. L. REV. 344 (2016) (describing the impact of recent Supreme Court decisions on the enforcement of foreign judgments and arbitral awards).

54. *Cf.* Aragaki, *supra* note 22, at 542 (discussing the adaptation and evolution of arbitration); Hensler & Khatam, *supra* note 22, at 407 (stating that "arbitration looks a lot like litigation and adjudication in the United States"); Main, *supra* note 11, at 461 ("Arbitration is . . . not a competitor nor even an alternative to formal adjudication; rather it is a partner of formal adjudication."); Sternlight, *supra* note 22; Szalai, *supra* note 17, at 524 ("[A]rbitration serves as a competitive, contrasting foil to the traditional court system.").

55. *See* Raviv, *supra* note 53, at 221; *infra* notes 178–182 and accompanying text.

56. *Id.*; *see also* Alan Scott Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of Waiver*, 6 AM. REV. INT'L ARB. 223 (1995) (noting that the federal standard disfavoring "waiver" of the right to arbitrate is "pro-arbitration" insofar as it often sends litigants to arbitration, but not pro-arbitration insofar as the standard may discourage arbitration agreements in the first place).

arbitration in more legitimate contexts a bad name.[57] International commercial arbitration specialists often bemoan this stain on arbitration's reputation.[58] In that sense, as scholars have noted, the Supreme Court's approach to arbitration law writ large undermines what would otherwise be considered legitimate areas of arbitration, especially with respect to international commercial arbitration.[59]

To date, however, scholarship has not identified or unpacked the contradiction inherent in the Supreme Court's arbitration policy: that it single-mindedly prioritizes certain arbitral values—namely the essentialist values that seek to maintain distinctions between arbitration and litigation—over other values like autonomy and adaptability.[60] The Court seems more dedicated to enforcing its view that litigation and arbitration are and must be opposites than it is to considering the (sometimes messy) realities of arbitration practice and balancing the different values that arbitration can embody. This, I argue, reflects the triumph of hostility to litigation over any particular enthusiasm for arbitration.

This Article makes four main points. First, the Court is not as uniformly favorable to arbitration—especially international commercial arbitration—as conventional wisdom makes it out to be,[61] because its prioritization of essentialist values undermines private law and international business values that are vital to international commercial arbitration.

Second, the Court's essentialist thesis—that the essence of arbitration lies in characteristics that distinguish it from litigation—is faulty and disproven by the practical realities of international

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57. For a critique of the legitimacy of enforcing arbitration clauses in contracts of adhesion, see, for example, David Horton, *Arbitration As Delegation*, 86 N.Y.U. L. REV. 437, 455 (2011) (arguing that "Congress never intended the FAA to apply to adhesion contracts"). *See generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013).

58. *See* S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias, and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 U. ILL. L. REV. 533, 543–52 (discussing the legitimacy crisis within international arbitration).

59. Diego P. Fernandez Arroyo, *The Legitimacy and Public Accountability of Global Litigation: The Particular Case of Transnational Arbitration*, *in* THE TRANSFORMATION OF ENFORCEMENT: EUROPEAN ECONOMIC LAW IN A GLOBAL PERSPECTIVE 355, 365 (Hans W. Micklitz & Andrea Wechsler eds., 2016) (describing the broad array of stakeholders interested in the "manner and reasons that arbitral decisions are taken"); Cuniberti, *supra* note 12, at 419; Raviv, *supra* note 53, at 221.

60. *Cf.* Raviv, *supra* note 53, at 221 (arguing that the Court's supposedly "pro-arbitration" decisions undermine arbitration by depicting it negatively).

61. *See, e.g.*, Arciniaga v. Gen. Motors Corp., 460 F.3d 231, 234 (2d Cir. 2006) ("[I]t is difficult to overstate the strong federal policy in favor of arbitration . . . .").

arbitration.[62] Arbitration can have many characteristics traditionally associated with litigation. The essence of arbitration is not any particular procedural characteristic. Because it is "a creature of contract," arbitration's procedural specifics are left open to the parties and the arbitrators to determine.[63]

Third, this Article exposes the harm to international commercial arbitration from the Court's fealty to hostility to litigation and the essentialist thesis. The essentialist view yields not only wrong answers but also perverse approaches to arbitration law questions. For example, the question may arise whether a court may assist an arbitration tribunal in collecting evidence through discovery. The essentialist response would be a categorical "no": discovery is an infamous defining feature of *litigation* (and in particular, U.S. litigation), so it should not be available in arbitration.[64] But this analysis is too simplistic. It does not consider the relevant statutory authority[65] nor does it even try to consider the normative question of what role courts should play in assisting arbitral tribunals with discovery or the question of what the parties to the arbitration agreement intended.[66]

Finally, the Article contends that courts should understand the relationship between litigation and arbitration as complicated and threefold: they are substitutes, complements, and competitors of each other.[67] Understanding the relationship between litigation and arbitration in this way should enable courts and litigation to better support arbitration, balance competing arbitral values, and facilitate fruitful competition for international commercial dispute resolution. This Article focuses on the substitution and support models, leaving the competitive aspect of the relationship for future work.[68]

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62. In discussing this Article with me, a mediator referred to the idea that arbitration and litigation are opposites as "the narcissism of small differences."

63. *See infra* notes 286–305 and accompanying text.

64. *See, e.g.*, IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 34.1 (1994) ("Avoidance of the delay and expense associated with discovery is . . . one of the reasons parties choose to arbitrate."). *But cf. id.* § 34.3.1 ("[A]n agreement to arbitrate is not necessarily a wholesale renunciation of the right to discovery.").

65. *See* 9 U.S.C. § 7 (2012) (FAA); 28 U.S.C. § 1782 (2012) (permitting judges to order discovery to assist foreign tribunals).

66. *See* Kevin E. Davis et al., *Private Preference, Public Process: U.S. Discovery in Aid of Foreign and International Arbitration*, *in* THE LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION 233, 236 (Franco Ferrari ed., 2016); *see also* Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 FORDHAM L. REV. 3293, 3299 (2015) (differentiating between pretrial and post-judgment discovery).

67. *See* Aaron D. Simowitz, *Convergence and Foreign Judgments*, 92 S. CAL. L. REV. (forthcoming 2019) (manuscript at 118) (on file with author).

68. *See* Bookman, *Adjudication Business*, *supra* note 32; *infra* Section IV.C.

Part I sets forth the history of the 1925 Federal Arbitration Act and the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Part II describes the Supreme Court's hostility to litigation and enthusiasm for arbitration. It then demonstrates that in situations where arbitration's private law and international business values potentially conflict with essentialist values and the Court's hostility to litigation, hostility wins out. This understanding of arbitration is both mistaken and dangerous. Part III explores the effect of anti-litigation decisions—outside the arbitration context and especially in the area of transnational litigation—on courts' ability to support international commercial arbitration. Part IV recommends prioritizing private law and international business values over essentialist ones, especially in international commercial arbitration cases, and recognizing the supportive and competitive relationship between litigation and arbitration. This Part considers how several contested issues would be resolved under the essentialist view and advocates instead resolving them under this more nuanced understanding. It also considers which institutional actors should implement these changes, finding that state and lower federal courts should be at the forefront of these efforts. The Part concludes by setting the stage for further research into the competitive relationship between arbitration and litigation.

I. "PRO-ARBITRATION" ORIGINS

The history of modern U.S. arbitration law began over a century ago when New York business representatives organized to drive the adoption of state, federal, and international laws that supported commercial arbitration.[69] Today, these laws establish an international arbitration system that relies on the support of courts.

Indeed, the foundation of public arbitration laws rests on national courts.[70] Historically, courts treated arbitration clauses as

69. RESTATEMENT (THIRD) U.S. LAW OF INT'L COMM. ARBITRATION Reporters' Memorandum (AM. LAW INST., Tentative Draft No. 1, 2010) (discussing the international, federal, and state laws that make up the "legal landscape of international commercial arbitration in the U.S."); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 159 (1992).

70. *See, e.g.*, Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP. & INT'L L. 449, 471 (2008):

> Private enforcement may be possible on the basis of reputational sanctions, but only under particular circumstances which are not likely to exist except within relatively small and enduring communities. Therefore, . . . transnational arbitration generally

invalid agreements to "oust" courts of jurisdiction. Modern arbitration laws[71] require courts to recognize arbitration agreements on "equal footing" with other kinds of contractual provisions.[72] In addition to supporting arbitration at "the front end" by enforcing arbitration agreements, modern laws also require judicial support in the "middle" and at the "back end"[73]—for example, by helping parties select arbitrators or assisting arbitral tribunals with discovery and by requiring recognition and enforcement of arbitration awards.[74]

This Part examines the history of the FAA, the New York Convention, and the laws governing international commercial arbitration in the United States through the lens of the relationship between arbitration and litigation. It explains that one purpose of the FAA was to facilitate a private adjudication system for business disputes that was faster and fairer than what U.S. courts in the 1920s could provide. It shows that the New York Convention's regime of international commercial arbitration, like its domestic counterpart, the FAA, was built on the foundation of judicial support for an institution that was vital to international business interests. That support was needed to enforce parties' agreements and expectations.

A. Domestic Commercial Arbitration

The origin story of the FAA has been told many times.[75] The 1925 Act responded to the then-prevalent refusal of courts to specifically enforce arbitration agreements.[76] It instructed courts to put

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> continues to rely on domestic court enforcement, and to that extent, it retains an important public dimension.

(citation omitted).

71. *See* MACNEIL, *supra* note 69, at 55 (defining "modern" as the genre of post-1920s arbitration laws setting up this structure).

72. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); *cf.* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1945 (2014) (describing the contract model of arbitration).

73. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 242 (2013) (Kagan, J., dissenting) (discussing these three stages of arbitration).

74. *See* Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2157, 330 U.N.T.S. 38; MACNEIL, *supra* note 69, at 16 (discussing the features of modern arbitration laws).

75. *See, e.g.*, MACNEIL, *supra* note 69, at 34; IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 11 (2013); Aragaki, *supra* note 72, at 1942; *see also* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877, at 6 (2017) (describing the origins of the adversarial nature of arbitration through the rise of conciliation in the nineteenth century); Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2957 (2015) [hereinafter Kessler, *Arbitration and Americanization*].

76. David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 994 (2017).

arbitration clauses on an "equal footing" with other kinds of contract terms[77] and "set forth the procedures to be followed in federal court for litigation about arbitration."[78] The federal law followed in the footsteps of the 1920 New York arbitration statute and other similar statutes.[79]

According to scholars, the Act "was originally designed to cover contractual disputes between merchants of relatively co-equal bargaining power."[80] Its lead proponents, Julius Cohen and Charles Bernheimer, worked for the New York State Chamber of Commerce and appeared before Congress as representatives of dozens of "business men's organizations."[81] They sang arbitration's praises "as a way 'to make the disposition of business in the commercial world less expensive,' " faster, and more just.[82] Also appearing before Congress were Herbert Hoover, the Secretary of Commerce; W.H.H. Piatt, Chairman of the Committee on Commerce, Trade, and Commercial Law of the American Bar Association; and others advocating for "arbitration in commercial matters."[83] Indeed, in the proceedings leading up to the FAA's enactment, "every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants."[84] The cited examples discussed contracts between merchants, often involving international transactions.[85]

The business world had legitimate complaints about litigation. Civil procedure before the 1938 adoption of the Federal Rules of Civil Procedure was rigid and complex; it notoriously provided lawyers with

77. EEOC v. Waffle House, Inc., 534 U.S. 279, 293 (2002).

78. Aragaki, *supra* note 72, at 1987.

79. MACNEIL, *supra* note 69, at 84; MACNEIL ET AL., *supra* note 64, § 8.1.

80. Szalai, *supra* note 17, at 524–25; *see also* Leslie, *supra* note 8, at 305–06; Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106 (2006). *But compare* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001) ("[T]he FAA compels judicial enforcement of a wide range of written arbitration agreements."), *with id.* at 125 (Stevens, J., dissenting) ("The history of the Act, which is extensive and well documented, makes clear that the FAA was a response to the refusal of courts to enforce commercial arbitration agreements . . . ."). In a fascinating new work, Professor Amalia Kessler sheds important light on Progressive lawyers' influence on the FAA and their understanding of arbitration as part of "their program for urban civil justice." Kessler, *Arbitration and Americanization*, *supra* note 75, at 2962. But she does not purport to rebut the foundational assumption that the Act originally targeted arbitration clauses in commercial contracts. *Id.* at 2943–44.

81. Leslie, *supra* note 8, at 302.

82. *Id.*; *see also* Moses, *supra* note 80, at 103.

83. Leslie, *supra* note 8, at 303–04 (quoting Gray Silver, then-representative of the American Farm Bureau Federation).

84. *Id.* at 305.

85. *Id.* at 306.

incentives to "insist on procedural formalities for strategic gain"[86] and involved long delays.[87] Hiro Aragaki argues that the FAA was developed in the context of "[an] increasingly intolerable situation in the courts and the seeming stagnation of judicial reform efforts in Congress," by advocates who "saw privatization as the most effective vehicle for improving adjudicative dispute resolution."[88]

Arbitration provided significant advantages in these commercial contexts. An extensive literature has since explored how and why arbitration, the "creature of contract,"[89] can provide sophisticated parties with important opportunities to craft the fate of their disputes in the name of maintaining party autonomy, procedural flexibility, and other private law virtues.[90] The ability to choose arbitration can be an expression of contractual freedom.[91] These private law values of arbitration have particular force in combination with essentialist values—that is, in circumstances when litigation is viewed as "intolerable" and arbitration seems to offer a cure for litigation's ills.

The Supreme Court's version of the FAA's origin story is superficially consistent with the scholarly account just described. The Court cites two main reasons for the FAA's enactment: first, to "revers[e] centuries of judicial hostility to arbitration agreements" and "to place arbitration agreements 'upon the same footing as other contracts,' " and second, "to allow parties to avoid 'the costliness and delays of litigation.' "[92] The Court does not consider the business interests driving the arbitration reform movement to limit its interpretation of the statute.[93] Conversely, the Court has focused on the importance of arbitration *displacing* litigation.[94] As a result, while the Court recognizes the private law values of arbitration, it focuses its attention on safeguarding essentialist values. Scholars' historical accounts that the FAA sought to promote arbitration as a flexible alternative to litigation lends credence to the idea that businesses

86. Aragaki, *supra* note 72, at 1966.

87. *Id.* at 1968.

88. *Id.* at 1976.

89. *See* Hiro N. Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 Y.B. ARB. & MEDIATION 2, 3 (2016) (discussing the popularity of and problems with this term).

90. *See, e.g.*, Drahozal & Ware, *supra* note 15, at 451–52.

91. *See, e.g.*, EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 2 (2010) ("[A]utonomy and freedom are at the heart of [international arbitration].").

92. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974).

93. *Cf.* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1643 (2018) (Ginsburg, J., dissenting) ("In recent decades, this Court has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes.").

94. *See Epic Sys.*, 138 S. Ct. at 1623.

favored arbitration for its perceived speed, low cost, and efficiency. But the FAA was also a procedural reform effort that could proceed in parallel with reform efforts in the courts.[95] In other words, one can view the FAA as valuing better procedures in dispute resolution rather than simply (or only) valuing the avoidance of litigation.

At its most basic level, however, the FAA mandated judicial support for arbitration when parties chose it as their dispute resolution mechanism of choice.[96] It placed exceedingly few limits on what counts as arbitration. The statute does not define arbitration, vis-à-vis litigation or otherwise.

B. International Commercial Arbitration

As originally enacted in 1925, the FAA applied to international commercial arbitration as well as domestic arbitration.[97] To thrive as an institution, however, international commercial arbitration required a more direct international commitment to support arbitration. In 1970, the United States finally heeded the American Bar Association's call to ratify the New York Convention in order to "join in an international regime of commercial arbitration for the benefit of its own nationals who trade and invest throughout the world."[98] The Convention harnessed the cooperation of national judicial systems as a "control mechanism" for arbitration.[99] It also limited judicial control so that national courts would not gain too much power over arbitration and threaten to favor their own nationals over foreign counterparties.[100]

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95. *See* Aragaki, *supra* note 22, at 560 (noting that the FAA was intended to allow businesses "to avoid the problem that commercial cases were often incorrectly decided in court by untutored juries or because of procedural technicalities having nothing to do with the substantive merits"); Szalai, *supra* note 17, at 519 (describing the FAA as a procedural reform).

96. MACNEIL ET AL., *supra* note 64, § 4.1.2 ("[Legislation] created a comprehensive framework within which the agreement to arbitrate and the hearing could proceed and the award could be enforced or modified by the courts. This legislative framework contains a blend of facilitation and regulation supporting arbitration as a method of dispute resolution.").

97. Section 2 of the FAA requires courts to enforce arbitration agreements involving interstate and foreign commerce unless there is a ground for revocation of the contract. 9 U.S.C. § 2 (2012).

98. MACNEIL, *supra* note 69, at 162 (quoting *Part IV. Committee Reports of Comparative Law Division*, 1960 AM. BAR ASSOC. SEC. INT'L & COMP. LAW PROC., 147, 232 (specifically referencing the Report of the Committee on International Unification of Private Law)).

99. SWEET & GRISEL, *supra* note 41, at 2; Bermann, *supra* note 15, at 2 ("National courts play a potentially important policing role in this regard. Most jurisdictions have committed their courts to do all that is reasonably necessary to support the arbitral process."); Reisman & Richardson, *supra* note 40, at 21; Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of International Law*, 38 GA. J. INT'L & COMP. L. 25, 26 (2009).

100. Reisman & Richardson, *supra* note 40, at 23.

The Convention thus established a legal infrastructure wherein courts play a crucial role in supporting international commercial arbitration.[101] Litigation about arbitration is "as common as [it is] inevitable, given the growing complexity, significance, and adversarial nature of [international commercial arbitration]."[102] Courts perform an important "governance support function by making themselves available for enforcement of arbitration agreements and arbitral awards," even if they are never called upon to do so.[103] Arbitration also relies on national courts to develop substantive law since arbitral decisions interpreting law hold no formal precedential value.[104]

Some studies suggest that requests for judicial assistance for pending arbitration are rising[105] and that they are more prevalent in the United States than in other countries.[106] The argument that arbitration relies on national law and national courts, however, does not depend on the quantity of court interventions in arbitration[107] any

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101. Vera Korzun & Thomas H. Lee, *An Empirical Survey of International Commercial Arbitration Cases in the US District Court for the Southern District of New York, 1970-2014*, 39 FORDHAM INT'L L.J. 307, 313 (2015); *see also, e.g.*, SWEET & GRISEL, *supra* note 41, at 4; Main, *supra* note 11, at 459–60; Whytock, *supra* note 70, at 471.

102. SWEET & GRISEL, *supra* note 41, at 4; Korzun & Lee, *supra* note 101, at 317 (cataloging eleven types of judicial interventions in international commercial arbitration that correspond primarily to roles outlined for courts in the UNCITRAL Model Law on International Commercial Arbitration); Strong, *supra* note 51, at 2.

103. *See* Whytock, *supra* note 70, at 468; Christopher A. Whytock, *Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration*, 12 BUS. & POL. 19–20 (2010) [hereinafter Whytock, *Private-Public*]:

> [D]omestic courts mitigate enforcement problems by signaling to transnational commercial actors that they are likely to enforce arbitration agreements, arbitral awards, and the rules governing the transnational commercial arbitration system. Other things being equal, the higher the perceived probability of judicial enforcement, the higher the probability that transnational actors will comply before actual judicial enforcement is necessary. . . . Thus, perhaps even more important than judicial enforcement in particular cases is the *expectation* of judicial enforcement in potential future cases.

104. *See* Smith, *supra* note 7 (lamenting that arbitration's popularity stifles common law development); Bookman, *Adjudication Business*, *supra* note 32 (manuscript at 48); *cf.* SWEET & GRISEL, *supra* note 41, at 119–70 (discussing the role and form of precedent in the International Court of Arbitration).

105. Strong, *supra* note 51, at 7 (suggesting such litigation is on the rise in the United States and the UK); Christopher A. Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the Federal Courts*, 2 WORLD ARB. & MEDIATION REV. 39, 42 (2008) (empirical analysis finding that "[a]lthough some observers argue that it is generally unnecessary to seek judicial enforcement, the results suggest that there is actually considerable judicial involvement at the post-award stage of the transnational arbitration process"); *cf.* Korzun & Lee, *supra* note 101, at 348 (finding that these requests level off).

106. Strong, *supra* note 51, at 3–4.

107. The studies are informative but ultimately may underreport; requests for judicial interference may not be accompanied by a written opinion catalogued by Westlaw or Lexis Nexis.

more than the quantity of jury trials dictates the influence of the possibility of a jury trial on rules of procedure and evidence or settlement practices.[108] Arbitration relies on courts because it operates in the shadow of litigation.[109]

This dynamic plays out in U.S. law governing international commercial arbitration. After the United States ratified the New York Convention, Congress added a second chapter to the FAA that implemented the Convention. A third chapter was added in 1990 to codify the Inter-American, or "Panama," Convention, which contains provisions similar to those in the New York Convention and includes a different set of signatory nations.[110] International arbitration agreements and awards are thus governed both by treaty and by the relevant statutory provisions enacting the treaty. But they are also potentially governed by the FAA's original first chapter—that is, the chapter that regulates domestic arbitration, "to the extent it is not 'in conflict' with the Convention."[111] As a result, domestic U.S. arbitration law, which largely consists of judge-made interpretations of the FAA, functions as a "gap-filler" in U.S. law concerning international arbitration.[112]

In the United States, the work that the New York Convention requires of national courts is done primarily by state and lower federal court judges, as guided by the U.S. Supreme Court. The domestic provisions of the FAA instruct courts on how to support arbitration in a

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See David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681 (2007); Elizabeth Y. McCuskey, *Submerged Precedents*, 16 NEV. L.J. 515 (2016).

108. *See, e.g.*, Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071 (2019).

109. Korzun & Lee, *supra* note 101, at 309 ("The reality . . . is that international arbitration always operates in the shadow of national courts . . . ."); Whytock, *supra* note 70, at 471; Whytock, *Private-Public*, *supra* note 103, at 20 ("[P]erhaps even more important than judicial enforcement in particular cases is the *expectation* of judicial enforcement in potential future cases.").

110. I refer to the international regime as the New York Convention, although which convention applies will depend on the nations at issue. "There is no substantive difference" between the New York and Panama Inter-American Conventions: "both evince a 'pro-enforcement bias.' " Corporación Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción, 832 F.3d 92, 105 (2d Cir. 2016). Congress's "international" provisions overlap significantly with the "domestic" parts of the FAA, but they are not identical. *See* GARY BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 53 (2d ed. 2015); MACNEIL, *supra* note 69, at 162–63.

111. *See, e.g.*, GEA Grp. AG v. Flex-N-Gate Corp., 740 F.3d 411, 415 (7th Cir. 2014) ("Chapter 2 expressly preserves the applicability of Chapter 1 to foreign arbitration unless there is a conflict either with Chapter 2 or with the Convention (Chapter 2 implements the Convention—it is not the Convention itself). There is no conflict in this case.").

112. RESTATEMENT (THIRD) U.S. LAW OF INT'L COMM. ARBITRATION § 5-3 Reporters' Comments cmt. b (AM. LAW INST., Tentative Draft No. 1, 2010); *id.* cmt. d (adopting "the better view . . . that Article VII does not permit a foreign Convention award to be confirmed or vacated under FAA Chapter One").

rather "skeletal" manner.[113] It requires them to consider arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[114] (This "save upon . . ." language constitutes the so-called savings clause.) Courts are directed to stay and compel arbitration of proceedings that involve issues "referable to arbitration."[115] Other statutory sections require different kinds of judicial support in the middle of ongoing arbitration proceedings, like appointing arbitrators under certain circumstances[116] or issuing subpoenas for evidence.[117] At the back end, the FAA authorizes courts to confirm arbitral awards as U.S. judgments, with only a few exceptions.[118]

Arbitration agreements are governed by "background principles of state contract law," and the Court has stated that the FAA does not "purport[ ] to alter" such principles.[119] Nevertheless, the federal common law of arbitration also provides background default understandings of how arbitration works. Federal common law fleshes out the bones of the FAA's skeletal structure, addressing subjects like arbitrators' authority to adjudicate their own jurisdiction (the competence-competence doctrine), the interpretation and validity of international arbitration agreements, and the tribunal's procedural powers.[120] The Supreme Court has never addressed most of these issues, even though they raise many thorny questions about which lower federal and state courts disagree.[121]

Although the FAA was enacted in the 1920s, it was not until the 1970s—after the ratification of the New York Convention—that the Supreme Court stepped in to curb courts' aversion to forum selection clauses.[122] International commercial contracts provided the context for these first steps. The contracts in these early cases showcased two key characteristics: first, they were freely negotiated commercial contracts between sophisticated business entities, and second, the international

113. *Cf.* BORN, *supra* note 110, at 53.

114. Federal Arbitration Act, 9 U.S.C. § 2 (2012).

115. *Id.* §§ 3–4.

116. *Id.* § 5.

117. *Id.* § 7.

118. *Id.* §§ 9–11, 15.

119. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 (2009).

120. *See* BORN, *supra* note 110, at 54.

121. *See, e.g.*, CBF Indústria de Gusa S/A/ v. AMCI Holdings, Inc., 14 F. Supp. 3d 463, 480 (S.D.N.Y. 2014), *vacated and remanded*, 850 F.3d 58 (2d Cir. 2017); Brief of Amicus Curiae Professor George A. Bermann in Support of Respondent, Henry Schein, Inc. v. Archer & White Sales, Inc., 138 S. Ct. 1185 (2018) (No. 17-1272) (raising question of delegating arbitration jurisdiction to arbitrators by cross-references to arbitration center rules).

122. *See* Main, *supra* note 11, at 463.

nature of the transaction made the neutrality and certainty offered by forum selection particularly desirable.

The turning point came in *The Bremen v. Zapata Off-Shore Co.*[123] That case addressed the validity of a forum selection clause in an international towage contract that designated the London High Court of Admiralty as the chosen forum.[124] Bucking the traditional view that such clauses were unenforceable, the Court emphasized that "in international trade, commerce, and contracting," parties' ability to contractually bind themselves to an acceptable forum is vital to eliminating the uncertainty and inconvenience that would "arise if a suit could be maintained [anywhere] an accident might occur or . . . where [the parties] might happen to be found."[125] The Court noted that enforcing the clause both "accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world."[126] It was important to the Court that the forum selection clause appeared in a contract negotiated at arm's length between sophisticated international business parties who sought to gain neutrality and to "bring vital certainty to this international transaction."[127]

The Court soon extended this reasoning to enforce an arbitration clause in another international commercial contract, even though the Court presumed the clause would not have been enforced if the contract had been domestic.[128] In *Scherk v. Alberto-Culver Co.*, the Court again explained why forum selection clauses, including arbitration clauses, are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[129] Such provisions protect parties from the dangers of hostile fora or judges "unfamiliar" with the parties' interests.[130] The Court admonished that invalidating the arbitration clause "would . . . reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.' "[131]

123. 407 U.S. 1 (1972).

124. *Id.* at 2.

125. *Id.* at 13–14.

126. *Id.* at 11.

127. *Id.* at 14, 17. Presumably, the Court's comfort level was also enhanced by the regard it held for the London court that the parties had designated. *Id.*

128. *See* MACNEIL, *supra* note 69, at 163.

129. 417 U.S. 506, 516 (1974) .

130. *Id.*

131. *Id.* at 519.

In later years, the Court erased its distinction between domestic and international contracts and enforced arbitration clauses in domestic contracts that governed, for example, federal statutory rights.[132] These decisions have met with substantial criticism. But even arbitration skeptics typically acknowledge the validity of enforcing arbitration clauses in the context of valid international commercial contracts.[133]

II. LITIGATION VERSUS ARBITRATION

While courts provide important support for arbitration, many focus on the relationship between litigation and arbitration as characterized by substitution rather than support. Both the Supreme Court and commentators routinely depict litigation and arbitration not just as two different options for dispute resolution, but as opposites.[134] Scholars praise arbitration for offering "speed, economy, informality, technical expertise, and avoidance of national fora."[135] Implicit, and sometimes explicit, in this positive view of arbitration is a negative view of litigation—as slow, inefficient, overly formal, inexpert, and, particularly in the international context, potentially biased.[136] In a preeminent study of international arbitration stakeholders, the two most valuable characteristics of arbitration were found to be the easy international enforceability of awards (an attribute that court decisions

132. *See* Carbonneau, *supra* note 5, at 1203.

133. *See supra* note 11 and accompanying text.

134. *See, e.g.*, Helfand, *supra* note 17, at 3023.

135. Bermann, *supra* note 15, at 2; *see, e.g.*, Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL'Y ANALYSIS 1 (2002), https://object.cato.org/pubs/pas/pa433.pdf [https://perma.cc/CHG4-88DQ]:

> Arbitration is a private-sector alternative to the government court system. Compared with litigation, arbitration is typically quick, inexpensive, and confidential. It generally operates in a commonsense way, without all of the legal jargon and procedural maneuvering that go on in court. Unlike judges, arbitrators are chosen by the parties to the dispute. Cases are resolved by respected professionals with technical, as well as legal, expertise.

136. The concept is not new. When the London commercial arbitration tribunal was first inaugurated in 1892, one commenter wrote: "This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife." Hensler & Khatam, *supra* note 22, at 401 (quoting Edward Manson, *The City of London Chamber of Arbitration*, 9 LAW Q. REV. 86, 86 (1893)). Anecdotes about notorious cases of U.S. courts' biases against foreign parties drive these fears. *See, e.g.*, William S. Dodge, Loewen v. United States*: Trials and Errors Under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563, 563 (2002). But modern studies do not substantiate them. *See* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122–23 (1996) (survey showing that U.S. courts are not biased against foreign parties).

lack[137]) and the ability to avoid certain legal systems and national courts.[138]

The conclusion of many arbitration enthusiasts is that arbitration can and should displace litigation as a dispute resolution mechanism (at least in certain circumstances).[139] Seen in this light, the combination of a hostility to litigation and enthusiasm for arbitration seem perfectly consistent. Indeed, U.S. courts, especially the Supreme Court, have embraced both of these values.

This Part outlines the contours of the Supreme Court's hostility to litigation and enthusiasm for arbitration over the past few decades. It contends that pro-arbitration policies are not monolithic and can encompass different, sometimes competing, values. It demonstrates that in cases where the private law values of arbitration potentially conflict with the Court's hostility to litigation, the latter value wins out, in large part because of the Court's commitment to the characterization of arbitration as the opposite of litigation. It concludes by arguing that this approach is flawed because it mischaracterizes both the essence of arbitration and the relationship between arbitration and litigation.

A. Hostility to Litigation

Scholars have identified hostility to litigation as a signature feature in both the Rehnquist and the Roberts Courts. For example, Andrew Siegel has argued that the Rehnquist Court was driven by its "hostility towards the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for

137. The distinction between arbitration and litigation is a result of international agreement. Over 150 countries have signed onto the New York Convention, promising to enforce foreign arbitration awards, while only a handful have signed on to the Choice of Court Convention, promising to enforce foreign court awards where jurisdiction was based on an exclusive forum-selection clause. *Contracting States*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/countries (last visited Mar. 24, 2019) [https://perma.cc/XGP2-RKCW].

138. WHITE & CASE, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 6 (2015), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf [https://perma.cc/CL9E-MCRC].

139. *See* GILLES CUNIBERTI, RETHINKING INTERNATIONAL COMMERCIAL ARBITRATION: TOWARDS DEFAULT ARBITRATION (2017); Cuniberti, *supra* note 12; Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 433 (2010) (articulating, and criticizing, the "displacement thesis"). Several scholars, of course, have challenged the conception that arbitration and litigation are opposite sides of the same dispute resolution coin. *See, e.g.*, Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30–31 (1979) (contesting that litigation's only or even primary purpose is dispute resolution); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 445 (1982) (same); *see also* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017). And some scholars contest that dispute resolution is arbitration's only purpose, at least in some contexts. *See, e.g.*, Helfand, *supra* note 17, at 3029.

organizing social relations and collectively administering justice."[140] Siegel focused on several areas, including the Court's reluctance to afford remedies and the constitutionalizing of tort reform through regulation of punitive damages.[141] Other scholars noted the primacy of hostility to litigation in other substantive areas, such as employment law.[142]

The Roberts Court has stayed true to that mission.[143] In cases involving issues ranging from personal jurisdiction[144] and pleading standards[145] to class certification,[146] discovery,[147] and trials,[148] the Court has turned litigation into an obstacle course for civil plaintiffs. Litigation isolationism[149] is also in some ways a manifestation of this hostility. Litigation isolationism refers to the particularly strong judicial antagonism toward *transnational* litigation—i.e., cases involving foreign parties, foreign conduct, or events on foreign soil.[150] U.S. courts have raised barriers to transnational litigation, for example, by narrowing the bases for personal jurisdiction, especially over foreign

140. Siegel, *supra* note 9, at 1108; *see, e.g.*, Victor Marrero, *Mission to Dismiss: A Dismissal of Rule 12(b)(6) and the Retirement of* Twombly/Iqbal, 40 CARDOZO L. REV. 1, 52 (2018); Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 982 (2007) (noting "the Court's broader hostility to litigation as a tool of dispute resolution"); Dahlia Lithwick, *Humble Fie: Why Does John Roberts Hate Courts So Much?*, SLATE (Sept. 2, 2005, 1:25 PM), https://slate.com/news-and-politics/2005/09/humble-fie.html [https://perma.cc/BW9X-GVNU] (discussing John Roberts's writings and career and concluding that he "sees almost no role for courts as remedial institutions" and "has made it his work to try to hobble the courts").

141. Siegel, *supra* note 9, at 1118, 1146.

142. Moss, *supra* note 140, at 1002–03.

143. *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 325 (2013); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010); Sarah Staszak, *Procedural Change in the First Ten Years of the Roberts Court*, 38 CARDOZO L. REV. 691 (2016); Subrin & Main, *supra* note 9, at 1856.

144. *See generally* Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401 (2018).

145. Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 588 (2007) (Stevens, J., dissenting); *see also* Miller, *supra* note 143, at 325.

146. *See generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013). *But cf.* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971 (2017).

147. *See generally* Robert H. Klonoff, *Application of the New "Proportionality" Discovery Rule in Class Actions: Much Ado About Nothing*, 71 VAND. L. REV. 1949 (2018).

148. *See generally* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

149. *See generally* Bookman, *Litigation Isolationism*, *supra* note 49.

150. *Id.* at 1085.

defendants,[151] and expanding forum non conveniens far beyond a "limited exception."[152] These developments can make the barriers for plaintiffs in transnational cases even higher than the obstacles that other plaintiffs generally face.[153]

This negative view of U.S. litigation is consistent with what Thomas Subrin and Stephen Main have called the "Fourth Era in U.S. Civil Procedure"—an era in which "litigation is often perceived as a nuisance."[154] Steve Burbank and Sean Farhang have extensively documented the "counterrevolution against federal litigation," accomplished largely by Supreme Court procedural decisions clamping down on private enforcement of federal rights through federal litigation over the past several decades.[155]

As Burbank and Farhang have shown, this antagonism has developed largely in the area of private enforcement of federal rights, and it has occurred primarily through trans-substantive procedural reform.[156] Because procedural rules apply in all kinds of cases, they also impact other perhaps unintended areas of litigation. That is, while increased barriers to litigation may have initially been intended to thwart, for example, class actions or plaintiff forum shopping,[157] they can also raise barriers to other kinds of litigation, like government regulatory litigation,[158] or, as relevant here, arbitration enforcement proceedings.[159]

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151. *See generally* Daimler AG v. Bauman, 571 U.S. 117 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

152. *See, e.g.*, Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157 (2012). This development has largely taken place in the lower federal courts, although it has been facilitated by the Supreme Court's decision that forum non conveniens motions may be adjudicated before motions challenging a court's jurisdiction. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007).

153. *See generally* Bookman, *Litigation Isolationism*, *supra* note 49. This is not to say that hostility to litigation is the only driving force behind these developments but rather that it is likely a strong force, perhaps among others. *Cf.* Noll, *supra* note 52, at 82–83 (discussing the role of hostility to litigation as a driving force behind trends in interpretation of "jurisdictional statutes, procedural statutes, the Due Process Clause, and unwritten canons of statutory interpretation").

154. Subrin & Main, *supra* note 52, at 502.

155. *See generally* BURBANK & FARHANG, *supra* note 52; *see also* SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 7 (2015) (documenting forces within and beyond the Supreme Court driving these developments).

156. *See generally* BURBANK & FARHANG, *supra* note 52.

157. *See supra* note 16.

158. *See Government Litigation*, *supra* note 16.

159. There is some evidence that procedural limitations on court access have a substance-specific effect—cutting down on certain kinds of tort litigation or discrimination claims, for example, but preserving a path for contract disputes. *See* Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2146 tbl.3 (2015); Elizabeth M. Schneider,

For purposes of this Article, it is important to draw attention to one particular area in which the Court's hostility to litigation has played a starring role: arbitration cases. As Siegel argued, the Rehnquist Court "consistently enforced form arbitration agreements that shift cases from courts to alternative forums without regard for the practical consequences to potential plaintiffs."[160] Under the Roberts Court, this trend has continued on steroids. Maria Glover documents a "three-decade-long expansion of the use of private arbitration as an alternative to court adjudication in the resolution of disputes of virtually every type of justiciable claim,"[161] culminating in *American Express Co. v. Italian Colors Restaurant*.[162] In that case, the Court eschewed some of its previous statements made in dicta that expressed concern for parties' ability to actually bring claims.[163] The Court upheld an arbitration clause in restaurants' contracts with a credit card company even though it knew that doing so would render the restaurants' antitrust claims virtually impossible to bring.[164] This was an expression of enthusiasm for arbitration that exalts in its hostility to litigation. The next Section traces the role of hostility to litigation in the Court's approach to arbitration over time.

B. Enthusiasm for Arbitration

Litigation-avoidance values have driven the Court's love affair with arbitration since the 1970s. Scholars have noted that a likely motivator "was the Court's view that litigation had become excessive and needed to be curtailed."[165] Chief Justice Burger, who often expressed concern with judicial workload pressures, consistently criticized "litigiousness" and linked it to a "mass neurosis . . . [that]

The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. PA. L. REV. 517, 520 (2010). The empirical data, however, is difficult to assess. *See* William H. J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35, 37 (2013); *cf.* J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. PA. L. REV. 1625 (2017).

160. Siegel, *supra* note 9, at 1117–18.

161. Glover, *supra* note 7, at 3054.

162. 570 U.S. 228 (2013).

163. *Id.* at 235 & n.2 (declining to apply the " 'effective vindication' exception" and noting that it "originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies' " (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U. S. 614, 637, n.19 (1985)) (alterations in original)).

164. *Id.* at 234 ("The antitrust laws do not 'evinc[e] an intention to preclude a waiver' of class-action procedure." (quoting *Mitsubishi Motors*, 473 U.S. at 628) (alteration in original)).

165. Bruhl, *supra* note 1, at 1429.

leads people to think courts were created to solve all the problems of society."[166] At the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 1976, Burger's "chief message . . . was that the 'litigation explosion would have to be controlled.' "[167] This message was consonant with "the business community's growing dissatisfaction with the legal system."[168]

At the same time, the Court exalted arbitration. The Court has described the FAA as embodying "a national policy favoring arbitration"[169] that does not just put arbitration contracts on equal footing with other kinds of contracts but seems to affirmatively favor arbitration over litigation.[170] As an early draft of the Restatement of the U.S. Law of International Commercial Arbitration reports, "U.S. law has a now long-established history of providing strong support to both party autonomy in arbitration and to the enforceability of arbitral agreements and awards."[171]

The Court identifies the purpose of the FAA's pro-arbitration policies as twofold: first, to enforce arbitration agreements and preserve freedom of contract,[172] and second, to avoid or replace litigation.[173] An extensive literature examines arbitration as a manifestation of contractual freedom[174] and a hallmark of private law.[175] According to these private law values, the signature features of arbitration are the choice, autonomy, and flexibility that it affords parties. As Alan Rau argues, "[I]f there is any 'public policy' at all implicated in arbitration, it . . . lies in making a relatively inexpensive and efficient process of dispute resolution available to the parties if and to the extent they wish

166. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1588 n.157 (2014) (quoting *Chief Justice Urges Greater Use of Arbitration*, N.Y. TIMES, Aug. 22, 1985, at A21).

167. Bruhl, *supra* note 1, at 1429.

168. *Id.*

169. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

170. David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 698–703 (2018) (describing the FAA as a "super-statute"); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 104–07 (2012) (discussing Supreme Court cases).

171. RESTATEMENT (THIRD) U.S. LAW OF INT'L COMM. ARBITRATION Reporters' Memorandum at xvi (AM. LAW INST., Tentative Draft No. 1, 2010).

172. *See, e.g.*, Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 585 (2008) (calling arbitration a "creature of contract").

173. *See, e.g.*, *Epic Sys.* (describing arbitration as "meant to replace" litigation). *Cf. supra* note 92 (discussing reasons for the FAA's enactment).

174. *See generally* Aragaki, *supra* note 89, at 2 (citing scholarship on the contract-based theory of arbitration).

175. *See* Steven J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration,* 83 MINN. L. REV. 703, 707 (1999).

to take advantage of it."[176] In the 1980s, the Court cited arbitration's "adaptability" as one of its key virtues.[177]

The Court, however, rarely engages in the difficult work of considering what it means to be "pro-arbitration."[178] William Park has identified the goals of a pro-arbitration policy as ensuring accuracy, fairness, efficiency, and enforceability.[179] As George Bermann explains, however, the seemingly simple term "pro-arbitration" can have "a wide range of meanings."[180] It can include, for example, policies that render arbitration time- or cost-effective, that effectuate the parties' likely intentions, or that enable the arbitrator to exercise discretion and flexibility in matters of arbitral procedure.[181] "[T]rade-offs between among [sic] pro-arbitration considerations" are inevitable.[182]

In recent decades, the Court has focused intensely on one kind of pro-arbitration policy: the importance of arbitration's function as a substitute for litigation. Relying on the FAA's legislative history,[183] the Court often states that the FAA was intended "to allow parties to avoid 'the costliness and delays of litigation' "[184] because arbitration was supposed to "largely eliminate[ ]" that cost and delay.[185] The Court has now held in multiple contexts that this litigation-avoidance purpose prevails over Congress's intent in other statutes to provide claimants with their day in court[186] or to allow collective action[187] and over many

176. Alan Scott Rau, Hall Street Associates v. Mattel, Inc.*: Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 479 (2006) (emphasis omitted).

177. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985).

178. *See* George A. Bermann, *What Does It Mean To Be 'Pro-Arbitration'?*, 34 ARB. INT'L 341 (2018).

179. William W. Park, *Arbitration and Fine Dining: Two Faces of Efficiency*, *in* THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 251 (Patricia Shaughnessy & Sherlin Tung eds., 2017) (discussing trade-offs among these goals).

180. Bermann, *supra* note 178, at 342.

181. Park, *supra* note 179, at 343.

182. Bermann, *supra* note 178, at 342.

183. Commentators have noted that in the course of developing this robust FAA, "the Court's reading of legislative history [of the FAA] appears selective." Miller, *supra* note 143, at 327–28, 327 n.156; *see also* Aragaki, *supra* note 89, at 7 ("[T]he expression, 'arbitration is a creature of contract,' does not occur in the legislative history of the FAA . . . .").

184. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974) (quoting H.R. REP. No. 68-96, at 2 (1924)).

185. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985).

186. This policy "applies with special force in the field of international commerce." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

187. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018).

areas of state law.[188] The vision of arbitration as a substitute for litigation goes hand in hand with an understanding of arbitration's "essential" virtues as those that differentiate it from the litigation "it was meant to displace"—e.g., its speed, low cost, and efficiency.[189] The Court has accordingly seen the FAA's purpose as protecting those virtues.[190] As noted, these policies often align with developments that mark the Court's hostility to litigation.[191]

In international commercial cases, a third set of values is also at play: promoting trade, orderliness, and predictability in international commerce. Indeed, the argument in favor of arbitration is especially strong in the international commercial context.[192] Enforcement of arbitration agreements not only supports freedom of contract and avoiding litigation in potentially biased national courts (which international business operators seem justified in wanting to avoid).[193] At its best, it also enables parties from different nations to choose a neutral and expert arbiter for potential disputes and, if the arbitration clause will be enforced, to create some much-desired predictability.[194] In the international commercial context, the Supreme Court has sensibly acknowledged that the success of international trade and

188. *See* Southland Corp. v. Keating, 465 U.S. 1, 11 (1984); MACNEIL ET AL., *supra* note 64, § 8.6. *But see Southland*, 465 U.S. 1 at 25 (O'Connor, J., dissenting) (arguing that the legislative history plainly does not suggest that Congress intended the FAA to preempt state law).

189. *Epic Sys.*, 138 S. Ct. at 1623; *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (endorsing these "virtues").

190. *See infra* Section II.C.

191. *See* MACNEIL ET AL., *supra* note 64, § 8.6 ("Underlying this pro-arbitration stance appears to be the desire to help clear court dockets, not as a simple consequence of party choice to use arbitration, but as a policy in its own right."); *supra* notes 143–153 and accompanying text. Writing in 1994, MacNeil noted that *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), provided a potential exception to this trend because it permitted parties to direct that state law would govern their arbitration agreements. MACNEIL ET AL., *supra* note 64, § 8.6. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), which held that parties cannot avoid FAA preemption by choosing state law to govern their arbitration agreements, has undermined that possibility.

192. In the investment arbitration context, there is also a strong argument in favor of arbitration, but the calculus about judicial review is somewhat different. *See* Roberts & Trahanas, *supra* note 46.

193. *See supra* Section I.B (discussing *The Bremen* and *Scherk*).

194. *See, e.g.*, Bermann, *supra* note 15; Cuniberti, *supra* note 12; Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT'L ARB. 455, 460 (2007). There are also arguments in favor of arbitration that go beyond its role as a dispute resolution mechanism. *See* Helfand, *supra* note 17, at 3011 (questioning that dispute resolution is arbitration's only purpose); Markovits, *supra* note 139, at 433 (same). *But see* Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 34–35 (2008) (arguing that arbitration affords less predictable results because arbitrators want to provide a resolution that pleases both sides rather than following more predictable legal reasoning).

commerce requires the United States to recognize the validity of laws and dispute resolution outside of U.S. courts.[195]

It is no wonder that the Supreme Court's major shifts to enforcing arbitration and forum selection clauses occurred in cases involving international commercial contracts. In those cases, the Court explained that the international context weighed heavily in favor of enforcing the parties' choices in those contracts.[196] As discussed in Part I, *The Bremen* and *Scherk* explicitly relied on the particular circumstances in international business transactions to justify enforcement of such clauses.

In the 1980s, the Court acknowledged the important role that national courts play in supporting the institution of international commercial arbitration. The Court itself played that role by prioritizing private law and international business values over essentialist ones. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, the Court noted:

> If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.[197]

There, the Court asserted that arbitration's "hallmarks" were its "adaptability and access to expertise" rather than its contrasts to litigation.[198] Had the Court prioritized the differences between arbitration and litigation and sought to safeguard arbitration's "essential" characteristics, it might have reached a different result. The claimants had argued that the Court should not enforce the agreement to arbitrate antitrust claims because arbitration was less equipped than litigation to handle such complex disputes and important federal statutory rights.[199] The Court rejected this argument. Instead, it found

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195. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) (explaining that invalidating the arbitration clause "would . . . reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts' " because "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts" (quoting *The Bremen*, 407 U.S. 1, 9 (1972))).

196. *See id.* at 515 (finding it "significant" and "crucial" that the contract involved was a "truly international agreement"); *The Bremen*, 407 U.S. at 11–12 (enforcing forum selection clauses "accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world"); Main, *supra* note 11, at 463 (describing *The Bremen* as the "taproot of [the] kudzu vine" that is arbitration).

197. 473 U.S. 614, 638–39 (1985) (citation omitted) (quoting Kulukindis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).

198. *Id.* at 633.

199. *See id.* (responding to the notion that "potential complexity [of antitrust issues] should . . . suffice to ward off arbitration"). Notably, the Court in *Mitsubishi* was not as

that arbitration was up to the challenge and recognized the importance of courts' support for arbitration in the context of international trade.[200]

Key to the Court's decision in *Mitsubishi* was recognizing this conflict of values and then subordinating essentialist concerns to the more important considerations of private law values and supporting international business. As discussed in the remainder of this Part, the essentialist view has serious flaws—for example, not valuing arbitration's adaptability and capacity for complexity, in contrast to what the Court did in *Mitsubishi*.[201] In that case, the Court not only prioritized other arbitration values over essentialist ones but also acknowledged that the multiple values underlying arbitration can conflict, considered courts' important role in supporting the international commercial arbitration system, and balanced the different competing values.[202]

In the past few decades, however, the Court has shifted to prioritize arbitration's essentialist values over its private law or international business ones, either without recognizing the possibility of a conflict or by discounting its importance.[203] The next Section discusses the Court's recent embrace of arbitration's essentialist values and hostility to litigation to the exclusion of other values that are critically important to international commercial arbitration.

C. The Essentialist Values of Arbitration

This Section discusses more recent Supreme Court cases in order to illustrate how hostility to litigation has infiltrated the Court's enthusiasm for arbitration since *Mitsubishi*. The first pair of cases,

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enthusiastic about arbitration as it seemed. In dicta, *Mitsubishi* assumed that courts could invalidate an arbitral *award* as against public policy if they interpreted a foreign choice-of-law clause to preclude the effective vindication of federal statutory rights. *Id.* at 637 n.19 ("We . . . note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."). But subsequent Supreme Court decisions have all but eliminated the public policy defense in public cases, and this dictum has "proven to be largely an empty threat." Rogers, *supra* note 47, at 367 n.154. U.S. courts do not decline to enforce arbitral awards based on the public policy considerations from *Mitsubishi*. *See* SWEET & GRISEL, *supra* note 41, at 178 n.38 ("We are not aware of any . . . [U.S. court refusing] to enforce awards based on public policy considerations after *Mitsubishi*.").

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

201. *See id.* at 633

202. *See* Bermann, *supra* note 178, at 349–53 (discussing the policy considerations of arbitration and when such policies might conflict).

203. *Cf.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011) ("Contrary to the dissent's view, our cases place it beyond dispute that the FAA was designed to promote [the expeditious resolution of claims].").

AT&T Mobility v. Concepcion and *Epic Systems v. Lewis*, concern the enforceability of an individualized arbitration clause that prohibits aggregation of claims in a class action litigation or class arbitration. In these cases, the Court makes clear its embrace of the essentialist thesis and the substitution relationship between arbitration and litigation. A second pair, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* and *Lamps Plus v. Varela*, also concern class arbitration, but from a different angle: they consider arbitrators' and courts' authority to order class arbitration when an arbitration clause is silent or ambiguous as to whether such proceedings are permitted. In all four of these cases, essentialist values conflict with other arbitration values and the Court prioritizes the former. But the essentialist rhetoric is not limited to combatting the specter of class arbitration. A fifth case, *Hall Street Associates v. Mattel*, follows similar logic in a different context. In all these cases, the Court justifies this prioritization by the strength of the essentialist thesis—the importance of preserving the "essence" of arbitration. Of these five cases, four involved entirely domestic disputes, but they all raise concerns for both domestic and international arbitration.[204]

Concepcion and *Epic* confronted the validity of class action waivers in individualized arbitration clauses and whether such waivers could also preclude class arbitration. In both cases, the Court bristled at the possibility that arbitration could take on what it saw as a hallmark of litigation: collective treatment of mass claims. In both, it also concluded that the FAA protected arbitration's essential virtues and therefore prevented state law from rendering unenforceable arbitration clauses that required individualized treatment of claims.

Concepcion involved cell phone customers who contested the validity of the arbitration clause in their contracts with AT&T, which required parties to bring cases only in their individual capacity.[205] Following California law, the United States Court of Appeals for the Ninth Circuit struck down the clause as unconscionable because it failed to provide an "adequate[ ] substitute[ ] for the deterrent effects of class actions."[206]

The Supreme Court reversed. It ruled that the FAA preempted the Ninth Circuit's holding, which would have allowed the Concepcions to demand class treatment in arbitration, because it "disfavor[ed]" and

204. *See supra* Part I (discussing the trans-substantivity of most U.S. arbitration law).

205. *Concepcion*, 563 U.S. at 336–37.

206. *Id.* at 338 (quoting Laster v. T-Mobile USA, Inc., No. 05cv1167, 2008 WL 5216255, at *11–12 (S.D. Cal. Aug. 11, 2008), *rev'd sub nom. Concepcion*, 563 U.S. 333).

"interfer[ed] with" arbitration.[207] "[T]he informality of arbitral proceedings," the Supreme Court explained, "is itself desirable, reducing the cost and increasing the speed of dispute resolution."[208] The Court identified "[t]he overarching purpose of the FAA" as "ensur[ing] the enforcement of arbitration agreements according to their terms *so as to facilitate informal, streamlined proceedings*."[209] Requiring classwide arbitration was impermissible because that would "interfere[ ] with fundamental attributes of arbitration."[210]

Building on this analysis,[211] the Court in *Epic Systems Corp. v. Lewis* hammered home that it considered individualized proceedings as well as the "informal nature of arbitration"[212] to be some of "arbitration's fundamental attributes."[213] *Epic* concerned the possibility that a federal law protecting collective action—specifically, the Fair Labor Standards Act—could invalidate an arbitration clause calling for individualized arbitration.[214] The Court held that the FAA would not countenance such a result.[215] Congress enacted the FAA, the Court explained, to counter courts' "hostility" to arbitration.[216] The FAA therefore safeguards "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness."[217] The FAA must do this; otherwise, "arbitration would wind up looking *like the litigation it was meant to displace*."[218]

These two cases showcase the essentialist thesis. In both *Concepcion* and *Epic*, the majorities did not appear to consider

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207. *Id.* at 341 (describing the case as involving the application of unconscionability "in a fashion that *disfavors* arbitration." (emphasis added)); *id.* at 344 ("Requiring the availability of classwide arbitration *interferes with* the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (emphasis added)).

208. *Id.* at 345; *see also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009) ("[A]rbitration procedures are more streamlined than federal litigation . . . ; the relative informality of arbitration is one of the chief reasons that parties select arbitration.").

209. *Concepcion*, 563 U.S. at 344 (emphasis added); *see also id.* at 346 ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results' . . . ." (quoting Preston v. Ferrer, 552 U.S. 346, 357–58 (2008))).

210. *Id.* at 344.

211. Other Supreme Court cases also advance the essentialist thesis. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238 (2013) (relying on *Concepcion*, which "invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law 'interfere[d] with fundamental attributes of arbitration' " (alteration in original) (quoting *Concepcion*, 563 U.S. at 344)).

212. 138 S. Ct. 1612, 1623 (2018).

213. *Id.* at 1622.

214. *Id.* at 1620.

215. *Id.* at 1619.

216. *Id.* at 1621.

217. *Id.* at 1623.

218. *Id.* (emphasis added).

themselves to be compromising private law values when prioritizing essentialist ones, as they purported to enforce the plain terms of the arbitration clause before them. The Court in *Concepcion* considered the FAA's two goals—"enforcement of private agreements and encouragement of efficient and speedy dispute resolution"—and determined that its decision furthered both.[219] The dissent, however, thought its preferred outcome—upholding the lower court's ruling that the class action waiver in the arbitration clause was unenforceable—would protect the pro-arbitration value of respecting the law of the seat of arbitration, including the FAA's recognition that arbitration clauses would be enforced by state contract law rules of the arbitral seat, which here would include California's law of unconscionability.[220]

While the Court portrayed itself as "merely" enforcing the terms of the individual agreements, these cases presented a conflict of arbitration values. If efficiency is the goal, class arbitration can be more efficient than individualized arbitration in contexts that are likely to generate large numbers of claims.[221] An interesting illustration appeared in a recent report that twelve thousand Uber drivers alleged that the company was refusing to arbitrate their claims in part because of the excessive costs of arbitrating so many claims.[222] Class arbitration would offer a more efficient solution to this deluge of individual claims in arbitration, and efficiency is another pro-arbitration value.[223] Prioritizing those efficiency values over essentialist ones would advise in favor of class arbitration.

Other Supreme Court cases present the conflict between essentialist values and other arbitration values even more plainly. *Mitsubishi* is a case in point. There, the Court recognized the conflict and prioritized private law and international business values over essentialist ones. Rejecting protests that antitrust claims proceeding in

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219. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011). The dissent "cautioned against thinking that Congress' primary objective was to guarantee . . . particular procedural advantages" rather than "secur[ing] the 'enforcement' of agreements to arbitrate." *Id.* at 361 (Breyer, J., dissenting) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985)).

220. *Id.* at 359–62; *see also* Bermann, *supra* note 178, at 348.

221. *See* Raviv, *supra* note 53, at 229 ("If a goal of arbitrations is to promote efficiency, and class actions promote efficiency, then shouldn't class arbitration be extra-efficient?").

222. Graham Rapier, *12,000 Uber Drivers Say the Company Is Refusing To Honor the Arbitration Clause in Its Terms and Conditions*, BUS. INSIDER (Dec. 8, 2018, 9:27 AM), https://www.businessinsider.com/uber-drivers-say-company-avoiding-arbitration-lawsuit-2018-12 [https://perma.cc/5Z5A-Z85Y]. Recent reports indicate that Uber has settled many of these claims. Andrew Wallender, *Uber Settles 'Majority' of Arbitrations for at Least $146M*, BLOOMBERG NEWS (May 9, 2019, 12:56 PM), https://news.bloomberglaw.com/daily-labor-report/uber-sees-wage-suits-dropped-including-12-501-arbitration-claims [https://perma.cc/N5RV-QXXY].

223. *See* Bermann, *supra* note 178, at 348.

arbitration would make arbitration look too much like litigation, the Court instead focused on arbitration's "adaptability" as its hallmark feature.[224]

In the next pair of more recent cases, *Stolt-Nielsen* and *Lamps Plus*, however, the Court reached the opposite conclusion when faced with the same conflict. Once again, the Court confronted the possibility of class arbitration, but now in the face of arbitration clauses that did not specifically select individualized dispute resolution.

Stolt-Nielsen is the Court's only international commercial arbitration case of the last decade. There, the Court took the highly unusual step of overturning the decision of an arbitral panel on its merits.[225] Private law and international business values support limited bases for overturning arbitrators' merits decisions. Accordingly, the FAA limits judicial review of decisions that parties have entrusted to arbitration to events such as arbitrator "corruption," "fraud," "evident partiality," "misconduct," or "misbehavior"[226] or conduct by arbitrators that "exceeded their powers."[227] The Court had previously stated when applying the "exceeding power" standard that if an arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."[228]

The contract at issue in *Stolt-Nielsen* had an arbitration clause that the parties stipulated did not say anything about class arbitration.[229] After a Department of Justice investigation revealed Stolt-Nielsen had engaged in unlawful anticompetitive activities, many parties that had done business with the company filed a putative class action in federal court.[230] The Second Circuit found that the contracts required arbitration of any antitrust claims, and the plaintiffs then demanded class arbitration.[231] Stolt-Nielsen agreed to submit "that threshold dispute to a panel of arbitrators."[232] A distinguished panel decided unanimously that the arbitration clause permitted class arbitration, relying on public policy rationales and other published

224. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985).

225. *Stolt-Nielsen*, 559 U.S. at 676–77 ("In sum, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers.").

226. 9 U.S.C. § 10(a)(1)–(3) (2012).

227. *Id.* § 10(a)(4).

228. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

229. 559 U.S. at 668.

230. *Id.* at 667.

231. *Id.* at 688 (Ginsburg, J., dissenting).

232. *Id.* at 689.

clause construction awards issued under the American Arbitration Association's Supplementary Rules for Class Arbitrations ("AAA Rules") and discrediting Stolt-Nielsen's account of the history and context of the clause.[233]

Stolt-Nielsen petitioned the United States District Court for the Southern District of New York to vacate the clause construction award.[234] The District Court vacated it on the basis that "the arbitrators manifestly disregarded a well defined rule of governing maritime law that precluded class arbitration under the clauses here in issue."[235] The Second Circuit reversed, holding that "the demanding 'manifest disregard' standard ha[d] not been met."[236] In short, the lower courts examined the panel's legal analysis and disagreed about the quality of that analysis and its conclusions. The Second Circuit also rejected Stolt-Nielsen's argument that the arbitrators had "exceeded their powers" under FAA section 10(a)(4).[237] The parties had expressly agreed that the arbitration panel would follow the AAA Rules.[238] Those Rules authorize arbitrators to decide whether an arbitration clause "permits the arbitration to proceed on behalf of or against a class."[239]

The Supreme Court reversed. It did not address the manifest disregard standard or whether it was met in this case.[240] Rather, the Court held that the arbitrators had indeed "exceeded their powers" by considering public policy by interpreting the arbitration clause to permit class treatment when the parties had agreed that the clause was "silent" on the topic. Justice Alito explained that arbitrators cannot possibly infer an agreement to *class* arbitration from parties' consent to "submit their disputes to an arbitrator," because class arbitration

233. *Id.*; Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 89–90 (2d Cir. 2008), *rev'd*, 559 U.S. 662 (2010). Note that the Supreme Court's and the Second Circuit's accounts of the panel's award are inconsistent. The Second Circuit upheld the ruling because, inter alia, "Stolt-Nielsen's arguments regarding the negotiating history and context of the agreements did not establish that the parties intended to preclude class arbitration." *Stolt-Nielsen*, 548 F.3d at 90. The Supreme Court parsed the ruling to conclude that the arbitrators simply imposed their own policy preferences in interpreting the award. *Stolt-Nielsen*, 559 U.S. at 672.

234. *Stolt-Nielson*, 559 U.S. at 689 (Ginsburg, J., dissenting) (citing 9 U.S.C. § 10(a)(4) (2012) as the grounds for the petition).

235. Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 435 F. Supp. 2d 382, 386 (S.D.N.Y. 2006), *rev'd*, 548 F.3d 35 (2d Cir. 2008), *rev'd*, 559 U.S. 662 (2010).

236. *Stolt-Nielsen*, 548 F.3d at 87.

237. *Id.* at 101.

238. *Id.*

239. *Id.* (quoting *Supplementary Rules for Class Arbitrations*, AM. ARB. ASS'N 4 (Oct. 8, 2003), https://www.adr.org/sites/default/files/Supplementary Rules for Class Arbitrations.pdf [https://perma.cc/9DGL-2DAY]).

240. *Stolt-Nielsen*, 559 U.S. at 672 n.3.

makes arbitration too much like litigation.[241] Since arbitration clauses represent parties' choice that arbitration is superior to litigation, that choice cannot possibly include the agreement to be bound by an arbitration proceeding that looks so much like litigation—and arbitrators may not infer such an agreement from silence.[242] The Court again expounded the essentialist view that parties choose arbitration for "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," which would be "less assured" in class arbitration, "giving reason to doubt" that the parties consented to such arbitral procedures.[243] The whole point of arbitration, the Court stated, is to *opt out* of litigation. Expeditiousness be damned—the multitude of parties suing Stolt-Nielsen were left to proceed through arbitration on an individual basis.[244]

The Court's reasoning was driven in part by essentialist values: the Court assumed parties choosing arbitration are choosing a dispute mechanism that differs from litigation. But it is one thing to interpret an arbitration clause in that manner and quite another thing to hold that the arbitrators—to whom the parties have delegated decisionmaking authority over the interpretation question—have exceeded their authority in reaching the opposite conclusion. Private law and international business values typically favor stronger deference to arbitrators' merits decisions than that.[245]

The majority in *Stolt-Nielsen* thus prioritized essentialist values over private law values, including respecting the parties' assignment of the class-treatment decision to arbitrators, enforcing arbitrators' decisions, and upholding the flexibility and possible efficiencies of

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241. *Id.* at 685:

> An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. . . . [C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.

242. *Id.* at 685–86.

243. *Id.*

244. *See* Raviv, *supra* note 53, at 229 ("If a goal of arbitrations is to promote efficiency, and class actions promote efficiency, then shouldn't class arbitration be extra-efficient?").

245. Whether to annul an award on excess of authority grounds can present a classic situation where different pro-arbitration values can conflict. As Bermann explains, "A reviewing court might well consider that annulling the award on excess of authority grounds would give effect to the probable intentions of the parties, but . . . it may worry about appearing to inject itself into the merits of the dispute, which in principle is off-limits to a reviewing court." Bermann, *supra* note 178, at 347 (footnotes omitted). But "[i]f a policy or practice that is pro-arbitration when viewed in isolation is prejudicial enough to one or more other pro-arbitration values, then it may ultimately not be pro-arbitration at all, or at least a great deal less pro-arbitration than initially thought." *Id.* at 348.

allowing class arbitration in this case. A court concerned with private law values like autonomy and adaptability would ordinarily not second-guess arbitrators' determinations of arbitration clauses that they were tasked with interpreting. Nor would it take a closed view of the potential for arbitration to innovate with new mechanisms for efficiency. The Second Circuit's decision weighed these competing values and read the arbitrators' award with deference; the Supreme Court seemed to review it under something akin to a de novo standard.

Another overarching value behind a support-based theory of the relationship between litigation and arbitration (as opposed to a substitution theory) is the need for courts not only to support arbitrators' decisions but also to provide guidance for future courts addressing similar issues. Parties prize arbitration for the certainty and predictability it purportedly provides. But *Stolt-Nielsen* raised more questions than it answered. Questions left open include what it means for an arbitral panel to "exceed its authority" and whether and under what circumstances arbitral decisions can be set aside as being in "manifest disregard of the law." These gaps in the law perpetuate uncertainty and generate the inevitable litigation that accompanies such uncertainty.[246] Indeed, *Stolt-Nielsen* received considerable criticism from the international commercial arbitration community.[247]

This is not to say that the Court's opinion was naïve or unsophisticated. Rather, it reflects the Court's now fairly consistent opposition to the use of litigation and litigation-like procedures, such as class actions, to vindicate federal statutory rights.[248] The dissents in these decisions sometimes mention the essentialist fallacy, but the majorities continue to prioritize their commitment to essentialist values and hostility to litigation over consideration of other ways that courts can best support arbitration.

Nevertheless, perhaps recognizing the potential mayhem that *Stolt-Nielsen* could unleash, the Court walked its decision back in 2013.

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246. Rau, *supra* note 176, at 496 (noting that manifest disregard is " 'the argument of choice' for losing parties" in arbitration); Stipanowich, *supra* note 11, at 342–43; *Discussion of Restatement of the Law Third, The U.S. Law of International Commercial Arbitration*, 89 A.L.I. PROC. 143, 173 (2012) (statement of Mr. Elsen) ("[M]anifest disregard is a way that the deep pocket goes into court and wears out the other party and tries to knock out a settlement, even though they lost the point in arbitration . . . .").

247. The international commercial arbitration community includes several arbitrators and arbitration practitioners who are also academics or write academic literature. *See, e.g.*, Born & Salas, *supra* note 50; Thomas E. Carbonneau, *The Assault on Judicial Deference*, 23 AM. REV. INT'L ARB. 417 (2012); Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435 (2011); Stipanowich, *supra* note 11.

248. *See supra* Section II.A (discussing hostility to litigation and the work of Burbank and Farhang).

In *Oxford Health Plans LLC v. Sutter*, the Court approved an arbitrator's decision to permit class arbitration when interpreting an arbitration clause that did not speak to the question of class treatment.[249] The Court distinguished *Stolt-Nielsen* by explaining that in that case, the panel had interpreted the parties' stipulation that the contract was "silent" with respect to the availability of class arbitration, whereas in *Oxford Health*, the arbitrator interpreted the arbitration clause itself (which did not mention class treatment).[250] *Oxford Health* neutralized the effect of *Stolt-Nielsen* to some extent and may explain why there is little evidence of parties or courts pushing to extend its broader reading of FAA section 10(a)(4).[251]

In *Lamps Plus*, however, the Court resurrected *Stolt-Nielsen*. The Ninth Circuit interpreted an arbitration clause to permit class arbitration.[252] The arbitration clause did not address the availability of class treatment; the court found it was "ambiguous" on that issue.[253] To reach its conclusion, the Ninth Circuit applied *contra proferentem*,[254] following California's default rule of contract interpretation that interprets contract ambiguities against the drafter, who, in this case, opposed class treatment.[255]

The Supreme Court reversed. Extending *Stolt-Nielsen*, the Court announced that "the FAA . . . bars an order requiring class arbitration when the agreement is not silent [as it had been in *Stolt-Nielsen*], but rather 'ambiguous' about the availability of such arbitration."[256] Repeating a now familiar refrain, the Court rejected the

249. 569 U.S. 564 (2013); *see* Christopher R. Drahozal, *Error Correction and the Supreme Court's Arbitration Docket*, 29 OHIO ST. J. ON DISP. RESOL. 1, 16 (2014) ("After *Sutter*, *Stolt-Nielsen* has largely been limited to its facts.").

250. Justice Alito concurred, though he would have reversed had he reviewed the arbitrator's decision de novo, and he doubted whether the class arbitration would bind absent class members, which, he thought, should advise future arbitrators to find that similar clauses would not permit class arbitration. *Oxford Health*, 569 U.S. at 573 (Alito, J., concurring).

251. *See, e.g.*, Tucker v. Ernst & Young, LLP, 159 So. 3d 1263, 1275–76 (Ala. 2014) (relying on *Oxford Health* to limit the reading of *Stolt-Nielsen*); Alyssa S. King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031 (2017) (discussing class arbitration after *Stolt-Nielsen*).

252. Varela v. Lamps Plus, Inc., 701 F. App'x 670, 673 (9th Cir. 2017), *rev'd*, 139 S. Ct. 1407 (2019).

253. *Id.* at 671–72.

254. *See id.*

255. *Lamps Plus*, 139 S. Ct. at 1417.

256. *Id.* at 1412. Curiously, the Court misstated the holding of *Stolt-Nielsen*, which held that *arbitrators* may not compel class arbitration when an arbitration agreement is silent on that issue. *See id.* (describing *Stolt-Nielsen* as holding "that *a court* may not compel arbitration when an agreement is 'silent' " (emphasis added)). *Oxford Health*, by contrast, held that an arbitrator *may* interpret an arbitration clause to permit class proceedings. 569 U.S. at 573. Thank you to Alyssa King for pointing out this inconsistency.

possibility that an ambiguous clause could authorize compelling class arbitration because "[c]lass arbitration is not only markedly different from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration."[257] As Justice Kagan wrote in dissent, "The heart of the majority's opinion lies in its cataloging of class arbitration's many sins."[258]

Focusing on the principle that "arbitration is strictly a matter of consent,"[259] the Court identified courts' and arbitrators' tasks as "giv[ing] effect to the intent of the parties."[260] Repeating *Stolt-Nielsen*'s logic, the Court reasoned that the "crucial differences" between class and individualized arbitration create "reason to doubt" that parties agreed to class arbitration when they agreed to arbitrate their disputes.[261] In reaching this conclusion, the Court had to hold that this reasoning, apparently inherent in the FAA, preempts the state law contract interpretation rule of *contra proferentem*, even though that law did not discriminate against arbitration in the sense of invalidating an arbitration clause or requiring suits to proceed in court. Disparaging this well-established contract law principle as merely "based on public policy factors,"[262] the Court argued that the canon therefore does not reveal the parties' intent.[263]

The majority in *Lamps Plus* asserts that the decision "is consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration

257. *Lamps Plus*, 139 S. Ct. at 1415 (citing Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018); and Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010)); *see also id.* at 1416 (emphasizing the importance of "the fundamental difference between class arbitration and the individualized form of arbitration envisioned by the FAA"); *id.* (quoting passages from *Concepcion*, *Stolt-Nielsen*, and *Epic* discussed in this section).

258. *Id.* at 1435 (Kagan, J., dissenting).

259. *Id.* at 1415 (majority opinion) (quoting Granite Rock Co. v. Teamsters, 561 U.S. 287, 299 (2010)).

260. *Id.* at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 684).

261. *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 687, 685–86).

262. *Id.* at 1417.

263. *Id.* ("Like the contract rule preferring interpretations that favor the public interest, *contra proferentem* seeks ends other than the intent of the parties." (citation omitted)). The Court defended this move by likening it to its "refusal to infer consent when it comes to other fundamental arbitration questions," specifically, the gateway question of whether the parties have agreed to arbitrate at all. *Id.* at 1416–17. But as Ted Folkman aptly explains, those gateway questions concern "whether the party has assented to arbitrate in the first place," which is "quite different from questions about the procedure that will govern the arbitration the parties have agreed [to]." Ted Folkman, *Case of the Day:* Lamps Plus v. Varela, LETTERS BLOGATORY (Apr. 30, 2019), https://lettersblogatory.com/2019/04/30/case-of-the-day-lamps-plus-v-varela/ [https://perma.cc/KBF9-RJ3U].

agreements."[264] The decision was, of course, predictable. But the revolution came, as Justice Kagan noted in dissent, in "insisting that the FAA trumps . . . neutral state [contract interpretation] rule[s] whenever [their] application would result in" a particular disfavored procedure within arbitration, namely, class arbitration.[265]

This is *Lamps Plus*'s conflict between essentialist values and private law values: essentialist values reject arbitral procedures that start to resemble "the litigation [that arbitration] was meant to displace."[266] Enforcing this supposed distinction between litigation and arbitration, however, conflicts with private law values, including the fundamental value the Court lionizes in *Lamps Plus*: that arbitration is a creature of contract. *Lamps Plus* undermines parties' expectations that general contract principles apply to arbitration contracts and replaces those principles with a federal common law of arbitration contracts. It also takes away arbitrators' traditional power—the power delegated by the arbitration agreement—to control and innovate with arbitral procedure. If courts cannot order class arbitration based on state contract law rules of interpretation, it is hard to know what is left of the discretion *Oxford Health* purported to preserve for arbitrators.

Some may assume that the cases discussed so far simply reflect a strong version of the essentialist view as it applies to class proceedings: that arbitration should not involve class treatment without explicit authorization in the arbitration agreement. But *Stolt-Nielsen* also stands for broader positions about arbitrators' capacity to determine their own jurisdiction and the extent to which courts will police that jurisdiction. *Lamps Plus*, likewise, may stand for broader positions about courts' constraints on arbitral procedure. This is another area where private law arbitration values can butt heads with essentialist views of arbitration in ways that affect important issues in international commercial arbitration.

Finally, this discussion may give the impression that the Supreme Court's essentialist values come out only in response to the threat of class arbitration. *Hall Street v. Mattel*, however, brought the conflict between essentialist and private law values to bear in a different context.[267] *Hall Street* raised the question of whether parties could contractually expand the grounds for judicial review of an

264. *Lamps Plus*, 139 S. Ct. at 1418.

265. *Id.* at 1428 (Kagan, J., dissenting).

266. *Id.* at 1416 (majority opinion) (quoting Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018)).

267. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

arbitration award beyond those set forth in the FAA.[268] One might think that if arbitration were truly a "creature of contract," parties would be able to articulate the scope of the powers they were granting the arbitrators and specify which they were reserving for the courts.[269] Unlike *Stolt-Nielsen* or *Lamps Plus*, there was no contention that the arbitration agreement was "silent" or "ambiguous" as to what the parties intended.

In rejecting parties' ability to opt into more judicial review for arbitration, the Court justified its decision in terms of its pro-arbitration policy. Closer inspection, however, reveals that the decision is rooted in the Court's essentialist values over and possibly instead of other arbitration values.

The Court explained that for the FAA to further "a national policy favoring arbitration," it made more sense to limit review to what is "needed to maintain arbitration's *essential virtue of resolving disputes straightaway*."[270] Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.' "[271] In other words, allowing parties to choose more judicial review—even though it would validate party autonomy—would make arbitration too much like litigation. The Court reached this conclusion without further support for its contention that either lack of review or "resolving disputes straightaway" is actually arbitration's "essential virtue."[272] On the contrary, several major arbitration associations allow parties to opt into review,[273] and many arbitration proceedings, especially in international commercial arbitration, can be remarkably long.[274]

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268. For a scathing takedown of *Hall Street*, see Rau, *supra* note 176, at 485 ("The *Hall Street* opinion must, then, represent a new low in context-free, policy-free, abstract, non-functional decision-making.").

269. *See id.* at 472 (arguing that this would be a better framing of the question presented in *Hall Street*).

270. *Hall St. Assocs.*, 552 U.S. at 588 (emphasis added).

271. *Id.* (alteration in original) (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003)).

272. *Id.*

273. *See, e.g.*, *Optional Appellate Arbitration Rules*, AM. ARB. ASS'N 3 (Nov. 1, 2013), https://www.adr.org/sites/default/files/AAA ICDR Optional Appellate Arbitration Rules.pdf [https://perma.cc/WEC3-AREW] (providing for the option of appellate review consistent with the objectives of arbitration, defined as "a fair, fast and expert result that is achieved economically").

274. As Justice Stevens noted in dissent, the outcome in *Hall Street* "conflict[ed] with the primary purpose of the FAA": eliminating judicial hostility and requiring enforcement of arbitration agreements by their terms. 552 U.S. at 593 (Stevens, J., dissenting); *see also* Rau, *supra* note 176, at 478–79 (asserting that the analysis of the essentialist description of arbitration was "*beside the point*"); Wilson, *supra* note 170, at 106 ("Faced with this conflict between the

Hall Street resolved certain questions, but it raised others. Most significantly, perhaps, it did not address circuit splits about courts' ability to overturn arbitral awards when arbitrators manifestly disregard the law.[275] "Manifest disregard" is a controversial judge-made basis for vacatur adopted in some circuits. The controversy arises both because of the doctrine's origin—it does not appear in the text of the FAA—and because it permits "judicial review of the legal merits of arbitral awards, which modern arbitration law has long viewed as inimical to core process values such as efficiency and finality."[276] Some argue that the essentialist reading deployed in *Hall Street* also eliminates the possibility of manifest disregard as a basis for vacatur, but not all courts read it that way.[277]

There are different ways of reading *Hall Street*; other factors, such as the Court's reading of the statutory language, may have also driven the decision.[278] Nevertheless, through the lens of the arbitration-litigation paradox, *Hall Street* provides an example of a situation where the traditionally "pro-arbitration" stance of interpreting arbitration clauses by their terms and giving effect to party autonomy conflicts with the "essentialist" stance of differentiating arbitration from litigation based on the supposedly essential characteristic that arbitration resolves suits "straightaway." The Court's dedication to keeping arbitration and litigation distinct prevailed.

The significance of the battle between essentialist values and private law and international business values is not limited to the cases discussed in this Section. Even if these cases are outliers on their particular facts, many of the major arbitration issues looming on the horizon, which have been percolating in the lower courts, involve similar value conflicts. For example, there is the question of whether arbitrators may impose punitive damages awards. A recent, high-

congressional purpose of enforcing the contract as written, subject to contractual defenses, and the judicially created purpose of favoring arbitration, the Court opted for favoring arbitration." (footnote omitted)).

275. *See* Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1 (2009).

276. *Id.*

277. *See, e.g.*, Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 95 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 662 (2010) (acknowledging the Second Circuit's "conclusion that the 'manifest disregard' doctrine survives *Hall Street*"); *supra* note 240 and accompanying text (noting that *Stolt-Nielsen* again left open questions about validity of "manifest disregard" doctrine); *see also infra* text accompanying notes 337–338 (discussing the perception that manifest disregard presents a significant risk of vacating arbitral awards notwithstanding most experts' view that the doctrine is all but obsolete).

278. *See e.g.*, Aragaki, *supra* note 275 (explaining why *Hall Street* does not eliminate the availability of manifest disregard as a basis for vacatur); Rau, *supra* note 176, at 480–95 (speculating about the underlying rationales for the decision).

profile (domestic) arbitration provides a colorful example. There, an arbitrator held that Twentieth Century Fox and its related companies had "pocketed tens of millions of dollars that should have gone to" the actors, executive producer, and writer of the TV series *Bones*.[279] The arbitrator awarded $50 million in compensatory damages and an additional $128 million in punitive damages to the *Bones* team.[280] The arbitrator had determined that the arbitration clause did not forbid the award of punitive damages arising from fraud claims, which were covered by the arbitration agreement and which Fox had insisted on arbitrating.[281] Even if it had, California law prevented parties from contracting out of punitive damages liability for fraud.[282]

Fox sued to vacate the $128 million punitive damages award, arguing that the arbitrator exceeded his authority by awarding punitive damages.[283] The question potentially pits essentialist values against private law ones. One could argue that punitive damages are a characteristic (and potentially negative) feature of litigation, precisely the kind of litigation feature that parties seek to avoid by choosing arbitration. Private law values, on the other hand, would support enforcing the arbitrator's authority to decide the scope of his jurisdiction and the scope of damages within the confines of the powers delegated to him by the arbitration clause.[284] Part IV addresses additional controversial issues where this conflict comes into play.

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279. John Koblin & Edmund Lee, *Arbitrator Scolds Fox and Orders It To Pay $178 Million to 'Bones' Team*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/business/media/bones-fox-arbitration-award.html [https://perma.cc/8QC2-WTPZ].

280. *Id.*

281. Twentieth Century Fox Film Corp. v. Wark Entm't, Amended Final Award, No. 220052735 (Feb. 20, 2019), https://pmcdeadline2.files.wordpress.com/2019/02/final-amended-award-redactions.pdf [https://perma.cc/YB9X-RK3T].

282. *Id.* at 10.

283. Defendants' Notice of Motion And Motion For Order Vacating Or Correcting Arbitration Award; Memorandum Of Points And Authorities In Support Of Motion, Wark Entm't Inc. v. Temperance Brennan, L.P., No. BC602287 (Cal. Sup. Ct. Feb. 27, 2019) (contesting arbitrator's authority to award punitive damages as defying the express terms of the arbitration clause); *see also* Gene Maddaus, *Judge Overturns $128 Million 'Bones' Judgment in Huge Win for Fox*, VARIETY (May 3, 2019), https://www.msn.com/en-us/entertainment/tv/judge-overturns-dollar128-million-bones-judgment-in-huge-win-for-fox/ar-AAAODBv [https://perma.cc/GPH7-BG9L].

284. The arbitrator's award in the *Bones* case made strong arguments about why the arbitration clause's punitive damages limitations should not apply to the fraud claims, including an emphasis on Fox's insistence that the entire dispute be heard in arbitration. *See* Amended Final Award, *supra* note 281. The California Superior Court, however, vacated the punitive damages award, holding that the arbitrator exceeded his powers by interpreting the contract to permit such damages. Minute Order, Ruling on Submitted Matter, Wark Entm't, Inc. v. Twentieth Century Fox Film Corp., No. BC602287 (Cal. Super. Ct. May 2, 2019), https://pmcdeadline2.files.wordpress.com/2019/05/minute-order-bones-wm.pdf [https://perma.cc/JK53-XUNT]. The plaintiffs intend to appeal, emphasizing the limited standard of review over an arbitrators' interpretation of the parties' contract. See Dominic Patten, *'Bones' Stars & EPs Vow To Appeal Cleaving Of $179M*

D. The Flaws in the Essentialist View

Thus far, this Part has depicted the Supreme Court's anti-litigation and pro-arbitration jurisprudence and has demonstrated how the Court has relied on an essentialist definition of arbitration—as being the opposite of litigation in important, mostly procedural respects—when confronting situations where anti-litigation and essentialist values conflict with other arbitration values. In those circumstances, the Court has focused on sustaining distinctions between litigation and arbitration rather than balancing conflicting pro-arbitration values, such as the autonomy and flexibility that parties often seek when they choose arbitration or the international business values the Court originally identified as motivating its support for international commercial arbitration.[285] This Section unpacks flaws in the Court's essentialist vision of arbitration and argues that essentialist values should at least be weighed against other arbitration values and should usually be subordinated to them when the values conflict. This is especially true when the case involves international commercial arbitration, where the essentialist thesis is particularly weak.

There are three flaws with the essentialist thesis. First, the Court improperly characterizes the "essence" of arbitration. Second, the essentialist view undervalues courts' role in supporting arbitration. And third, at the intersection of the first two points, by positing that arbitration and litigation are opposites, the essentialist view logically results in the erroneous conclusion that the two are incapable of being viable alternative paths to similar goals.

First, there is the question of what arbitration is and what arbitral procedure can be. To be sure, the Court at times recognizes the value of flexibility in arbitration and of parties' ability to craft precisely the kind of dispute resolution system that suits their needs.[286] But it more often asserts that there are certain fundamental attributes of arbitration that, if abridged, make parties' choices and default

Profit Award By Judge – Update, DEADLINE (May 2, 2019, 4:27 PM), https://deadline.com/2019/05/bones-award-overturned-judge-fox-win-1202606584 [https://perma.cc/C7PT-MM3S].

285. In a rich account of the Court's arbitration cases, Maria Glover identifies *Italian Colors* as the turning point where the Court went from emphasizing the importance of arbitration as an efficient private dispute resolution mechanism to valuing arbitration instead, and exclusively, as a vindication of freedom of contract. Glover, *supra* note 7, at 3057. Glover's depiction parallels this Article's account to some extent, but it focuses on that case's effect of eliminating dispute resolution altogether and "erod[ing] substantive law," particularly with regard to potential disputes arising out of contracts of adhesion. *Id.* at 3054.

286. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) (recognizing limits of *Concepcion*); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985) (calling "adaptability" one of the "hallmarks of arbitration").

understandings lose the protection of the FAA and its pro-arbitration policy. For the most part, those forbidden characteristics are procedures that make arbitration look more like litigation.[287]

The practice of international commercial arbitration demonstrates that this narrow and inflexible understanding of arbitration is fundamentally mistaken. Dissenters in Supreme Court arbitration cases have made this point even apart from the international commercial context.[288]

Modern international commercial arbitration has grown exponentially since the enactment of the FAA, expanding in frequency and complexity.[289] It has acquired many attributes that make it similar to litigation. International arbitration today includes multiparty arbitration,[290] jurisdictional disputes, and controversies over evidence, discovery, and challenges to arbitrators.[291] It is high stakes.[292] It is expensive.[293] It can be far from speedy.[294] It can have appellate processes.[295] Parties in arbitration can opt for the application of the Federal Rules of Civil Procedure. Some arbitral tribunals publish

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287. *See supra* Part II.

288. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 362 (2011) (Breyer, J., dissenting):

> Where does the majority get its . . . idea—that individual, rather than class, arbitration is a "fundamental attribut[e]" of arbitration? The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.

(citation omitted) (quoting *id.* at 342 (majority opinion)) (alteration in original); *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1420 (2019) (Ginsburg, J., dissenting).

289. NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 27 (6th ed. 2015). While recognizing that the defining features of arbitration have not changed, Redfern and Hunter note that "[t]he modern arbitral process has lost its early simplicity. It has become more complex, more legalistic, more institutionali[z]ed, and more expensive." *Id.*; *see also, e.g.*, Rémy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration*, 25 AM. REV. INT'L ARB. 223, 227 (2014); Stipanowich, *supra* note 22, at 11 ("In order to grapple more effectively with a wide range of business disputes, including many large, complex cases, arbitration procedures have tended to become longer and more detailed.").

290. *Cf.* Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 551 (Aug. 4, 2011) (permitting class treatment within an International Centre for Settlement of Investment Disputes ("ICSID") case).

291. Gerbay, *supra* note 289, at 228.

292. *Compare Concepcion*, 563 U.S. at 350 ("Arbitration is poorly suited to the higher stakes of class litigation."), *with* Raviv, *supra* note 53, at 222–27 (discussing the attraction of high-stakes arbitration).

293. In contrast to government-subsidized courts, arbitrators and arbitral tribunals charge considerable fees that are often a percentage of the award. Gerbay, *supra* note 289, at 243 n.107.

294. *Id.* at 229.

295. Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 163.

lengthy articles of their own procedural rules.[296] Parties choosing arbitration have—and should have—tremendous flexibility about how to structure it.[297] When they do not, their arbitration clause delegates to the arbitrators (not courts) choices about dispute resolution procedure. That is not to say that there are no limits on what arbitrators can do—there are.[298] Rather, those limits do not come from inherent procedural distinctions between arbitration and litigation.

An extensive literature considers why international arbitration has developed to resemble litigation in certain ways, with many scholars identifying the influence of American lawyers and legal complexity on the judicialization of international arbitration.[299] Whatever the cause, the cost and length of at least some international commercial arbitration has increased greatly. In these and other respects, international commercial disputes—whether they proceed in arbitration or in courts—share many characteristics.[300] Indeed, many scholars attribute the success of international commercial arbitration to its judicialization and the ways in which it has grown to more closely resemble litigation.[301] On the other hand, judicialization is also a source of concern among some practitioners.[302]

Importantly, the practice of international commercial arbitration is not just any counterexample. Business-to-business arbitration generally and international commercial arbitration in particular are the paradigm, original context for the pro-arbitration policy.

International commercial arbitration thus reveals the fundamental error in the essentialist thesis. Arbitration turns out to be difficult to define. The "orthodox view" of arbitration as "a monolithic, one-dimensional concept with settled features," such as speed, privacy,

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296. Gerbay, *supra* note 289, at 236.

297. *Id.*

298. There are multiple sources of such constraints—for example, the parties' agreement and limitations on arbitrators' powers to issue injunctions.

299. *See, e.g.*, JOSHUA KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 23 (2013) (explaining that arbitrators tend to have "significant bonds of common experience" developed in "Anglo-American firms or major universities"); SWEET & GRISEL, *supra* note 41.

300. Gerbay, *supra* note 289, at 227–28 ("[A]rbitration increasingly resembles litigation before domestic courts.").

301. SWEET & GRISEL, *supra* note 41, at 5.

302. A survey of international arbitration practitioners that did not even ask about the topic received several responses reporting "concerns over the 'judiciali[z]ation' of arbitration, [citing] the increased formality of proceedings and their similarity with litigation, along with the associated costs and delays in proceedings." *Corporate Choices in International Arbitration: Industry Perspectives* 5, PWC (2013), https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf [https://perma.cc/QV77-XSQL].

and informal procedures,[303] grasps onto certain characteristics that are sometimes true of arbitration. But these are far from the immutable, or even the most common, characteristics of all arbitration—and, as noted, it depends on what kind of arbitration is at issue. Not all arbitration satisfies this description, and often it does not try to.[304] An accurate definition of "arbitration" is thus often fairly bare-bones, "such as 'a process in which a third party who is not acting as a judge renders a decision in a dispute.' "[305] These practical realities powerfully argue against prioritizing essentialist values over other arbitral values in cases where they conflict.

Second, the Court's prioritization of essentialist values is consistent with a view of arbitration as a substitute for litigation, but this understanding underappreciates the interdependent relationship between national courts and private arbitration. A focus on protecting arbitration from the encroachment of litigation-like (or, more specifically, U.S.-litigation-like) characteristics can obscure courts' important role of supporting arbitration, which includes respecting arbitration awards and providing clarity and guidance for future courts and arbitrators.[306]

In these cases, the Court rejected either arbitrators' or lower courts' interpretations of arbitration agreements, defined arbitration rigidly instead of safeguarding its "adaptability,"[307] and interfered with arbitration in ways that disrupt the stability, independence, and certainty for which the international commercial arbitration system strives. In doing so, the Court compromised the United States' role in supporting the institution of international commercial arbitration.

In *Stolt-Nielsen*, for example, the Court overturned an arbitral award on its merits because the arbitrators had insufficiently justified their legal conclusions.[308] The Court chided the arbitrators for relying

303. Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 40 (1999).

304. Sternlight, *supra* note 22, at 372 (arguing that arbitration sometimes "does not even aspire" to the attributes of speed and informality).

305. *Id.* (quoting CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 383 (2d ed. 2011)).

306. Born & Salas, *supra* note 50 , at 38:

> Appellate courts in other legal systems are able to produce consistent and predictable bodies of judicial authority on issues of arbitration—despite substantial diversities of opinion on the same sorts of issues that the U.S. Supreme Court faces. The U.S. legal regime for arbitration would benefit enormously if the Supreme Court were able to provide comparable consistency and clarity in this country.

(footnote omitted).

307. *Id.* (identifying "adaptability" as one of the "hallmarks of arbitration").

308. *See id.* at 34.

on public policy,[309] but it did not consider the ramifications for arbitrators working in areas where there are lacunae in the law.[310] Nor has it seen fit to grant certiorari in cases that might bring enhanced clarity to various areas of law relating to international commercial arbitration, such as when an arbitral decision may be overturned for "manifest disregard of the law,"[311] though the Court routinely and aggressively grants cert in cases relating to other aspects of arbitration.[312]

The Court takes seriously its role in policing the enforcement of arbitration *agreements*. It receives criticism for arbitration's extension into unwarranted spheres. These extensions are consistent with hostility to litigation in other areas and the effect of these decisions in curbing class actions[313] (to take one example) is no accident. But this overzealous enforcement of arbitration agreements can, in some cases, simply lead to less arbitration and less dispute settlement.[314] Moreover, the Court has come to equate "favoring arbitration" with favoring "traditional, individualized arbitration"—which is not the same thing.[315] The emphasis on essentialist distinctions insufficiently acknowledges, let alone balances, other arbitral values.

The third point appears at the intersection of the first two. Reflecting the essentialist view, the Court paints parties' choice of arbitration itself as a trade-off, a reflection of the parties' preference for speed and efficiency, for example, over heightened procedural

309. Justice Kagan rightfully criticized the majority for similarly relying on its policy preferences in *Lamps Plus*. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1435 (2019) (Kagan, J., dissenting).

310. *See* Alan Scott Rau, *Arbitrators and The Interpretation of Contracts*, 30 AM. REV. INT'L ARB. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3275810 [https://perma.cc/RSU6-MS38]. Ironically, the expansion of arbitrability is often faulted with curbing the growth of the common law. *See* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 409–10; Smith, *supra* note 7. This effect may lead to more holes in the law that arbitrators must fill, not fewer.

311. *See, e.g.*, Aragaki, *supra* note 22, at 163–64 (describing circuit split on manifest disregard splits after *Hall Street*); Reisman & Richardson, *supra* note 40, at 48.

312. *See* Beth Graham, *U.S. Supreme Court to Decide Three Arbitration Cases in Fall 2018 Term*, AM. BAR ASS'N (Nov. 16, 2018), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2018/supreme-court-decides-3-arbitration-cases-fall-2018 [https://perma.cc/TU4E-JLGS].

313. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 639 (2012).

314. *See Lamps Plus*, 139 S. Ct. at 1420–22 (Ginsburg, J., dissenting) (explaining how "[t]he Court has relied on the FAA . . . to deny to employees and consumers 'effective relief against powerful economic entities' ").

315. *See supra* notes 178–182 and accompanying text.

safeguards.[316] This conception shortchanges arbitration as a true alternative for providing a just and fair dispute resolution system. To support arbitration's legitimacy and promote it as an option for dispute resolution, courts should recognize that arbitration, just like litigation, seeks to balance fairness with speed and efficiency.[317] Instead, this conventional narrative of litigation and arbitration as opposites assumes, as Hiro Aragaki points out, a zero-sum game with respect to efficiency and procedural safeguards of justice.[318] The more efficient a dispute resolution system, like arbitration, the less fair or just the outcome might be; the more procedural safeguards, the more parties pay for justice in the slog and inefficiencies inherent in litigation. Aragaki convincingly demonstrates that this is a false dichotomy and a dangerous way of approaching arbitration for both courts and scholars because it devalues the importance of fairness in arbitration.[319]

These problems are not merely rhetorically prickly. As the Court has decided these cases, scholars, international arbitrators, and practitioners have noted these cases' muddying consequences for international commercial arbitration.[320] The Court's approach has undermined the perceived legitimacy of arbitration of all kinds. Moreover, as prominent international arbitration practitioners Gary Born and Claudio Salas put it, "[T]he Court's contradictory positions [in arbitration cases] seriously compromise the legal framework for arbitration in the U.S., leaving businesses, courts and others with little

316. *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685–86 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."); *see also Lamps Plus*, 139 S. Ct. at 1416 (quoting this passage).

317. *See, e.g.*, AM. ARB. ASS'N, *supra* note 273, at 3 ("The objective of arbitration is a fair, fast and expert result that is achieved economically.").

318. Aragaki, *supra* note 295, at 144.

319. Aragaki, *supra* note 72, at 1941–42.

320. *See, e.g.*, Born & Salas, *supra* note 50, at 21 ("Over the past decade, the U.S. Supreme Court has issued a series of confusing and, at times, confused opinions on class arbitration."); Rau, *supra* note 176, at 502–05 (considering whether, after *Hall Street*, contracting parties can still expressly exclude the application of the FAA to their arbitration clauses and instead opt for the application of state arbitration law); Stipanowich, *supra* note 12, at 423 ("[T]he nature and performance of arbitration procedures in different settings presents a very complex picture, making it impossible to 'draw confident conclusions about the effect of invalidating wide swaths of arbitration agreements.' " (quoting Peter B. Rutledge, *Arbitration Reform: What We Know and What We Need to Know*, 10 CARDOZO J. CONFLICT RESOL. 579, 584 (2009))); Charles H. Brower, II, Hall Street Assocs. v. Mattel, Inc.*: Supreme Court Denies Enforcement of Agreement to Expand the Grounds for Vacatur Under the Federal Arbitration Act*, AM. SOC'Y INT'L L. (May 27, 2008), https://www.asil.org/insights/volume/12/issue/11/hall-street-assocs-v-mattel-inc-supreme-court-denies-enforcement [https://perma.cc/F87Z-HRG7] ("However, in rendering its judgment, the Supreme Court left open a number of questions . . . .").

security about how arbitration agreements will be interpreted and enforced in the future."[321] The lingering uncertainty about the availability of vacatur on the basis of manifest disregard, for example, haunts international commercial arbitration in the United States—even though manifest disregard claims are rarely successful in practice.[322] Scholars and practitioners can only speculate about how far the reasoning in *Hall Street* may be extended in the international commercial arbitration realm to limit parties' ability to specify the procedures for arbitration.[323] Similarly, *Lamps Plus* raises questions about what aspects of contract law will in the future be dubbed as mere manifestations of "public policy" and cast aside to make room for FAA-required default rules.

To be sure, there are consistencies between hostility to litigation as expressed through essentialist enthusiasm for arbitration and support for international commercial arbitration. For example, both positions seem to favor corporate business interests, as businesses supposedly loathe litigation but adore arbitration.[324] Arbitration agreements are widely enforced. Few businesses are clamoring loudly for more class arbitration,[325] and so restrictions on that practice are supported by institutions like the U.S. Chamber of Commerce.[326] The Court's preference for arbitration itself can cut off court access.[327] Many

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321. Born & Salas, *supra* note 50, at 38.

322. *See* Brower, *supra* note 320 ("Despite the clear holding that parties may not contract to enlarge the FAA's grounds for vacatur, *Hall Street* leaves at least four open questions."); *supra* note 246 and accompanying text; *infra* note 337 and accompanying text.

323. *See, e.g.*, Stanley A. Leasure, *Arbitration Law in Tension After* Hall Street*: Accuracy or Finality?*, 39 U. ARK. LITTLE ROCK L. REV. 75, 103 (2016); Brower, *supra* note 320.

324. *See, e.g.*, Brief for United States Council for International Business As Amicus Curiae in Support of Respondent at 3, Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008) (No. 06-989), 2007 WL 2707883 ("Arbitration is attractive to the international business community because it provides finality and certainty while also achieving other goals such as speed and efficiency."); Ware, *supra* note 135, at 1 ("Compared with litigation, arbitration is typically quick, inexpensive, and confidential. It generally operates in a commonsense way . . . . Unlike judges, arbitrators are chosen by the parties to the dispute. Cases are resolved by respected professionals with technical, as well as legal, expertise."). *But see, e.g.*, Julian Nyarko, *We'll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT'L REV. L. & ECON. (forthcoming 2019) (manuscript at 7) ("[P]arties treat international arbitration as a second-best alternative to a well-functioning domestic court system that is used not in order to avoid foreign courts, but in an attempt to avoid supposedly dysfunctional court systems.").

325. Uber and Lyft may become prominent exceptions. *See supra* note 222–223 and accompanying text; *see also* Folkman, *supra* note 263.

326. *Cf.* King, *supra* note 251, at 1035 ("[C]ontract drafters did not affirmatively choose a class arbitration in any example. Rather, they faced class arbitration because they wrote contracts without class waivers and did not change the terms before the plaintiffs' claims accrued.").

327. *See, e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1420–22 (2019) (Ginsburg, J., dissenting); Gilles & Friedman, *supra* note 313, at 647; Glover, *supra* note 285, at 3054–55; Siegel, *supra* note 9, at 1142 ("The decisions boldly, repeatedly, and explicitly call for the courts to

scholars have noted the combined strength of pro-arbitration and anti-litigation forces in driving dispute resolution in a variety of contexts away from courts and toward arbitration (or just away from any resolution).[328] But this Article seeks to highlight the circumstances when the forces are opposed. In those circumstances, the prioritization of essentialist values to the exclusion of private law or international business values can harm the institution of international commercial arbitration.

One may object that the Court's misimpression of arbitration and litigation as opposites does not matter. One may think there is some truth to the description. Or one may believe that if presented with an international commercial arbitration case, the Court would likely enforce explicit arbitration clauses that specify particular procedures, even if they included litigation-like characteristics, and therefore party preferences will nonetheless be enforced.[329] These objections undervalue the role of courts in international commercial arbitration. The New York Convention establishes a system where courts exist in the background to enforce arbitration agreements, to recognize and enforce arbitration awards, and to support arbitral proceedings along the way. A large part of that support is deferring to the arbitrators' authority and assuming that arbitrators—not courts—determine arbitration's shape.[330] *Stolt-Nielsen* and *Lamps Plus* suggest U.S. courts might not do that.

More to the point, perhaps, courts' work is not necessarily in adjudicating any particular case but in providing "the perceived probability of judicial enforcement."[331] One might have confidence that if and when the appropriate case presents itself, the Supreme Court will reverse course and go back to prioritizing private law and international business values over formalistic, essentialist ones. In the meantime, however, in the absence of such a case since *Mitsubishi* in 1985 and in the presence of cases like *Concepcion, Epic*, and *Lamps Plus* promoting a primarily trans-substantive, essentialist vision of arbitration, U.S.

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shepherd more and more cases out their own courthouse doors and into the hands of arbitrators . . . ."); Stephanie Bornstein, Super-Hybrid Regulatory Enforcement (Feb. 15, 2019) (unpublished manuscript) (on file with author).

328. *See supra* Introduction.

329. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) (discussing the limits of *Concepcion*'s essentialist description of arbitration); *cf.* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 668–70 (2010) (deciding whether class arbitration was available, even though the parties had asked arbitrators to decide that issue).

330. *See* W. Laurence Craig, *Some Trends and Developments in the Law and Practice of International Commercial Arbitration*, 50 TEX. INT'L L.J. 699, 718 (2016).

331. Whytock, *Private-Public*, *supra* note 103, at 19–20.

law reflects a pro-arbitration-*clause* jurisprudence with a narrow view of what arbitration is and can be and with little regard for the effects on international commercial arbitration.

The essentialist view represents an assumption by national courts that arbitration is the opposite of litigation; this assumption creates default rules that fundamentally change the relationship between courts and arbitration. These default rules are incorporated into a special federal common law of contracts—traditionally the domain of state law—specifically for contracts that contain arbitration clauses.[332] Such developments cede considerable control over arbitral proceedings to courts. These unwarranted default rules could lead to courts' shirking their responsibilities to support arbitrators' authority, interfering in areas that parties agree or assume are subject to arbitrators' judgment, and accordingly undermining both parties' expectations and the institution of international commercial arbitration. In short, the effect of these decisions is not logically limited to cabining class arbitration.[333]

The flexibility of international arbitration practice enables it to adapt to Supreme Court decisions, and practitioners and academics alike have urged parties to be more explicit in their arbitration clauses[334] in response to the cases discussed here. That is not to say that practitioners do not care or that these decisions do not impose costs on parties and burdens on the system. Including greater specificity in international contracts imposes additional costs. The suggestions, moreover, are not guaranteed to be followed,[335] and their existence implies that, previously, at least some international contracts contained different background assumptions. Lingering uncertainty on issues like

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332. *See* Leslie, *supra* note 8, at 266–67; *see also supra* Section II.C (discussing *Lamps Plus*).

333. *See infra* Section IV.B.1 (discussing different outcomes for issues in international commercial arbitration depending on whether one focuses on essentialist values or private law values).

334. *See, e.g.*, Howard S. Zelbo & Jennifer L. Gorskie, *U.S. Supreme Court Limits the Ability of Arbitrators To Order Class Arbitration*, CLEARY GOTTLEIB 9 (Nov. 2010), https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/litigation-and-arbitration-report-november-2010.pdf [https://perma.cc/B4AH-AYFP].

335. Forum selection clauses and arbitration clauses are notoriously inserted at the eleventh hour and without extensive consideration. *See, e.g.*, Eric S. Sherby, *A Checklist for Drafting an International Arbitration Clause*, BUS. L. TODAY, Sept. 2010, at 1, https://apps.americanbar.org/buslaw/blt/content/articles/2010/09/0001.pdf [https://perma.cc/2BUC-UF2J]:

> [I]n many cases, the litigator or arbitration specialist receives an 11th-hour e-mail or phone call from a transactional lawyer, along the lines of "please send me your standard arbitration clause for an international transaction." At that late stage, there is no time for any lawyer involved to hit the "how-to" books.

Arbitration clauses are also often boilerplate provisions. *Cf.* Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1 (2017).

the judicial standard of review of arbitral awards is also a bogeyman for foreign clients considering international arbitration in the United States, which can make parties seek out other countries to host their arbitrations or enforce their awards.[336] Experts agree, for example, that manifest disregard is almost completely obsolete, and the New York Appellate Division recently affirmed its extremely narrow scope by reversing a trial court decision that had vacated an arbitral award on that ground.[337] But according to practitioners, clients still need to be reassured that "U.S. law, as applied by New York courts, is as favorable to the enforcement of international arbitration awards as the laws of other major international arbitration centers around the world."[338]

III. LITIGATION ISOLATIONISM AND INTERNATIONAL COMMERCIAL ARBITRATION

The previous Part demonstrated how the Supreme Court's arbitration decisions have in fact undermined U.S. courts' ability to support international commercial arbitration.[339] This Part investigates how other aspects of U.S. courts' hostility to litigation, which seem unrelated to arbitration, likewise negatively affect international commercial arbitration.[340]

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336. On the other hand, complications with enforcing foreign arbitral awards might encourage parties—if they are thinking about this issue far enough in advance—to seat their arbitrations in the United States to avoid enforcement problems. Thanks to Aaron Simowitz for this point.

337. *In re* Daesang Corp. v. NutraSweet Co., 85 N.Y.S.3d 6, 8 (N.Y. App. Div. 2018). New York Supreme Court Judge Charles Ramos, who is designated to hear all international arbitration disputes before the Commercial Division, had vacated the award for manifest disregard. As practitioners noted at the time, the case had potential to "affect New York's reputation as a seat for the reliable enforcement of international arbitral awards, and as a venue with courts that respect and support this alternative dispute resolution process." Claudia Salomon, *New York Vacates Arbitral Award with Manifest Disregard Doctrine*, N.Y.L.J. (Aug. 7, 2017), https://www.lw.com/thoughtLeadership/new-york-vacates-arbitral-award-with-manifest-disregard-doctrine [https://perma.cc/8S6S-XEUZ].

338. John V.H. Pierce et al., *NY Appellate Division Confirms Narrow Scope of the Manifest Disregard Doctrine*, WILMERHALE (Oct. 23, 2018), http://www.wilmerhale.com/en/insights/client-alerts/20181023-ny-appellate-division-confirms-narrow-scope-of-the-manifest-disregard-doctrine [https://perma.cc/QH56-9JCX]; *see also supra* note 246 and accompanying text; *cf.* COMM. ON INT'L COMMERCIAL DISPUTES, N.Y.C. BAR, THE "MANIFEST DISREGARD OF LAW" DOCTRINE AND INTERNATIONAL ARBITRATION IN NEW YORK 2 (Aug. 2012), https://www.nycbar.org/pdf/report/uploads/20072344-ManifestDisregardofLaw--DoctrineandInternationalArbitrationinNewYork.pdf [https://perma.cc/2SQR-FBBB] (attempting to dispel the belief that manifest disregard makes arbitration awards unusually difficult to enforce in New York).

339. *See also, e.g.*, Born & Salas, *supra* note 50, at 21 (contrasting the most recent arbitration trilogy, which made the United States distinctive for its poor arbitration stance, with the older trilogy, which put the United States at the forefront of international commercial arbitration).

340. As noted in the Introduction, similar effects may apply to domestic arbitration.

Most notably, rising barriers to transnational litigation can affect litigation over international arbitration.[341] The developments that make up "litigation isolationism" impose particularly heightened barriers on transnational litigation.[342] These developments also threaten to undermine U.S. courts' ability to support international commercial arbitration.

Litigation isolationism is characterized by the growth of areas of the law that limit access to U.S. courts in transnational cases. Four key examples are the narrowing of personal jurisdiction,[343] the expanded availability of forum non conveniens,[344] the growth of international comity as an independent basis for abstention,[345] and the strengthening of the presumption against the extraterritorial application of federal statutes.[346] Like other litigation-avoidance trends, litigation isolationism is made up of trans-substantive developments. Developments in these areas have made their mark on arbitration cases in unexpected ways.

The first example is personal jurisdiction. In *Daimler AG v. Bauman*, the Court held that Daimler was not subject to general personal jurisdiction in California because it was not "at home" there.[347] This holding cabined lower courts' prevailing understanding that general personal jurisdiction was available based on extensive business contacts.[348] The case limits plaintiffs' ability to sue foreign defendants in U.S. courts based on the defendants' conduct abroad. This is especially true because recent Supreme Court cases concerning specific personal jurisdiction also limit plaintiffs' ability to sue foreign defendants in U.S. courts.[349]

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341. *See* George A. Bermann, *'Domesticating' the New York Convention: The Impact of the Federal Arbitration Act*, 2 J. INT'L DISP. SETTLEMENT 317, 322 (2011) (noting that some civil procedure rules may "sit uncomfortably with the requirements of the [New York] Convention").

342. Bookman, *Litigation Isolationism*, *supra* note 49, at 1089.

343. *Id.* at 1091–93; Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 338–41 (2018).

344. Bookman, *Litigation Isolationism*, *supra* note 49, at 1093–96. *See generally* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390 (2017).

345. Bookman, *Litigation Isolationism*, *supra* note 49, at 1096–97.

346. *See* Bookman, *Doubling Down*, *supra* note 49, at 57; Bookman, *Litigation Isolationism*, *supra* note 49, at 1097–99.

347. 571 U.S. 117, 122 (2014).

348. *See* Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 503–04 (2015).

349. *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1781–83 (2017) (limiting specific personal jurisdiction over defendants with respect to nonresident plaintiffs' claims despite those claims' similarities to resident plaintiffs' claims for which defendants were subject to personal jurisdiction); Walden v. Fiore, 571 U.S. 277, 289 (2014) (holding that a defendant's actions do not create sufficient contacts simply because they are directed at the plaintiff whom the defendant knew to have connections with the forum state); J. McIntyre Machinery, Ltd. v.

These personal jurisdiction developments have an even broader reach. Personal jurisdiction may not limit much litigation supporting arbitration *clauses*. Parties to contracts with forum selection or arbitration clauses are typically thought to have waived personal jurisdiction objections to being sued in courts located at the seat of arbitration.[350] Litigation to enforce arbitration agreements brought outside the designated arbitral seat, however, may face personal jurisdiction problems.

Litigation over other aspects of arbitration is a different matter. The narrowing of personal jurisdiction threatens to undermine courts' jurisdiction over foreign entities in suits to recognize or enforce foreign arbitral awards[351] or to assist in the collection of evidence for international commercial arbitration.[352] The federal and state appellate courts in New York, for example, are divided on whether to entertain an arbitral award enforcement proceeding if the court lacks personal jurisdiction over the award debtor under *Daimler*'s "at home" test.[353] In *Sonera Holding B.V. v. Çukurova Holding A.S.,* the Second Circuit dismissed an action seeking recognition of a $932 million arbitral award for lack of jurisdiction over the debtor under this standard.[354] Linda Silberman and Aaron Simowitz warn that "[t]his export of jurisdictional rules from the realm of traditional adjudication to the very different landscape of recognition poses serious dangers to the routine

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Nicastro, 564 U.S. 873, 884 (2011) (finding no specific jurisdiction over a foreign manufacturer defendant); Bookman, *Litigation Isolationism*, *supra* note 49, at 1132; Pamela Bookman, *Supreme Court Decision on Specific Personal Jurisdiction a "SomethingBurger,"* TEMP. 10-Q: TEMP.'S BUS. L. MAG. (Aug. 14, 2017), https://www2.law.temple.edu/10q/supreme-court-decision-specific-personal-jurisdiction-somethingburger [https://perma.cc/A9A5-U7QH] (explaining how *Bristol-Myers* can limit litigation against foreign defendants).

350. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos, 553 F.2d 842, 844 (2d Cir. 1977).

351. *See* Sonera Holding B.V. v. Çukurova Holding A.S., 750 F.3d 221, 224–25 (2d Cir. 2014) (dismissing suit for enforcement of an arbitration award for lack of general personal jurisdiction under *Daimler*); Silberman & Simowitz, *supra* note 53, at 352 (explaining why this should not be the result of *Daimler*).

352. *See, e.g.*, Gucci Am., Inc. v. Weixing Li, 135 F. Supp. 3d 87, 92 (S.D.N.Y. 2015) (finding personal jurisdiction to compel a nonparty to comply with subpoenas).

353. *See Sonera*, 750 F.3d at 223; Silberman & Simowitz, *supra* note 53, at 352–53 (noting that "[n]umerous federal courts of appeal have held that either property or personal jurisdiction is necessary to support an action to confirm a foreign arbitral award" and that "[t]wo lower court New York state decisions have dispensed with any jurisdictional requirement for an action to enforce a foreign judgment").

354. 750 F.3d at 223; *see* Silberman & Simowitz, *supra* note 53, at 359–62 (discussing *Sonera* and *Daimler*); *cf.* First Inv. Corp. v. Fujian Mawei Shipbuilding, Ltd., 703 F.3d 742, 750 (5th Cir. 2012) (canvassing circuits' requiring personal jurisdiction requirements in arbitral award enforcement actions).

recognition of foreign judgments and awards."[355] Heeding their call for broader bases for jurisdiction, including property-based jurisdiction, over such lawsuits, a New York intermediate appellate court recently held that "*Daimler*'s restriction of general jurisdiction to states where a corporate defendant is 'at home' " does not apply in proceedings to recognize or enforce foreign judgments.[356] This split authority highlights that narrowing personal jurisdiction is another example of the anti-litigation canon that can throw sand on the tracks of the international commercial arbitration system.[357]

A second component of litigation isolationism is the widespread grant of forum non conveniens dismissals in U.S. courts.[358] Forum non conveniens is a "federal common-law venue rule"[359] that permits courts to dismiss a case if there is an available alternative forum and "despite the deference owed to the plaintiff's choice of forum, the balance of private and public interests favors dismissal."[360] The inquiry focuses on a number of public and private interest factors. Forum non conveniens can offer a basis for courts to decline jurisdiction over cases supporting international arbitration—in suits to enforce either arbitral awards or arbitration agreements.[361]

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355. Silberman & Simowitz, *supra* note 53, at 347–48.

356. AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A., 76 N.Y.S.3d. 1, 7 (N.Y. App. Div. 2018).

357. Courts likewise need personal jurisdiction in order to adjudicate other arbitration-supporting claims, such as suits to challenge the impartiality of an arbitrator. *See, e.g.*, AmTrust Fin. Servs., Inc. v. Lacchini, 260 F. Supp. 3d 316, 321 (S.D.N.Y. 2017) (dismissing such a suit for lack of personal jurisdiction). While the conclusion in *Lacchini* seems correct because the arbitrator in that case had *no* contacts with New York or the United States, the tightening of specific and general jurisdiction could create circumstances where U.S. courts lack personal jurisdiction over an arbitrator in an international commercial arbitration even if the arbitrator has extensive contacts with U.S. parties and may have greatly harmed those parties and their business interests.

358. *See* Bookman, *Litigation Isolationism*, *supra* note 49, at 1093–96 ("As a matter of practice, forum non conveniens often excludes transnational cases involving foreign plaintiffs and foreign conduct from U.S. courts."); Childress, *supra* note 152, at 168–70.

359. Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994).

360. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE U.S.: JURISDICTION § 424 (2018). In *Gulf Oil Corp. v. Gilbert*, the Court enumerated nonexclusive "public" and "private" interest factors to guide a forum non conveniens decision. 330 U.S. 501, 508 (1947). Public factors include court congestion, imposition of jury duty, "having localized controversies decided at home," and having a forum court that is at home with the law governing the case. *Id.* at 508–09. Private factors include "ease of access" to evidence and witnesses, and "other practical problems that make trial . . . easy, expeditious and inexpensive." *Id.* at 508.

361. Chris Whytock's empirical work suggests that "judges apply the forum non conveniens doctrine fairly well" based on "factors widely thought to be relevant to the appropriateness of a U.S. court" and are "more predictable, and less influenced by caseload and ideology than critics of the doctrine indicate." Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 528 (2011) (footnotes omitted). The rates of dismissal are twice as high when foreign plaintiffs are involved (which is doctrinally unsurprising). *Id.*

Defendants have invoked forum non conveniens when asking courts to stay or dismiss both motions to compel arbitration and actions seeking recognition or enforcement of an international arbitral award. The Second Circuit has twice dismissed arbitral recognition and enforcement requests on the basis of forum non conveniens.[362] Commenters condemn this development as "a dramatic step backward for the enforcement in the United States of international arbitration awards."[363]

The application of forum non conveniens in arbitration award enforcement cases seems plainly incorrect for a number of reasons—for example, that forum non conveniens is not named in the New York Convention as a basis for refusing to enforce an arbitral award; the doctrine concerns the convenience of trying a case, not enforcing judgments;[364] and the public policy concerns that the courts expressed through the forum non conveniens doctrines were not among the forum non conveniens "public interest" factors.[365] The improper use of forum non conveniens as a bar to enforcing international arbitral awards is particularly problematic because, as Judge Lynch explained in his dissent in *Figueiredo Ferraz v. Republic of Peru*, "arbitrators have no power to enforce their judgments, [so] international arbitration is viable only if the awards issued by arbitrators can be easily reduced to judgment in one country or another and thereby enforced against the assets of the losing party."[366] In addition, while the most recent draft of the Restatement on U.S. Law of International Commercial Arbitration recognizes that courts may stay or dismiss a motion to compel arbitration based on forum non conveniens, some scholars argue that the doctrine is not appropriate in this context either.[367]

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362. *See* Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384 (2d Cir. 2011); Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine, 311 F.3d 488 (2d Cir. 2002).

363. Matthew H. Adler, Figueiredo v. Peru*: A Step Backward for Arbitration Enforcement*, 32 NW. J. INT'L L. & BUS. 38A, 38A (2012).

364. *Id.*; Alan Scott Rau, *The Errors of Comity: Forum Non Conveniens Returns to the Second Circuit*, 23 AM. REV. INT'L ARB. 1, 2 (2012).

365. *Figueiredo*, 665 F.3d at 401, 407–08 (Lynch, J., dissenting); Adler, *supra* note 363, at 42A; Louis Del Duca & Nancy A. Welsh, *Enforcement of Foreign Arbitration Agreements and Awards: Application of the New York Convention in the United States*, 62 AM. J. COMP. L. 69, 93 (2014).

366. *Figueiredo*, 665 F.3d at 395 (Lynch, J., dissenting).

367. *Compare* RESTATEMENT (THIRD) OF U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 2-25 (AM. LAW INST., Tentative Draft No. 4, 2015) ("An action to compel arbitration pursuant to an international arbitration agreement may be subject to stay or dismissal on forum non conveniens grounds . . . ."), *with* Rau, *supra* note 364, at 35 (2012) (arguing that forum non conveniens should have only "the most marginal presence" when considering a motion to compel in light of the Convention's goals to "increase the currency of awards by limiting challenges and expediting

International comity abstention and the presumption against extraterritoriality can also affect U.S. litigation supporting international commercial arbitration. Like forum non conveniens, international comity abstention can give courts the opportunity to abstain from exercising jurisdiction in cases that seem "too foreign."[368] It permits a court, in its discretion, "to decline to exercise jurisdiction in a case properly adjudicated in a foreign state."[369] The doctrine itself is muddled and scholars have called for its clarification[370]—but that opens the possibility that courts may rely on it to decline to enforce a foreign arbitral award in uncomfortable situations. In a recent case, a party argued that international comity required U.S. courts to decline to enforce an arbitral award because a foreign court, located at the seat of the arbitration, had set the award aside.[371] The Second Circuit, however, rejected that argument on the basis that the foreign court judgment was not entitled to respect under international comity.[372]

The fourth leg of litigation isolationism is the presumption against extraterritoriality, a canon of statutory interpretation that directs courts to presume that statutes are intended to apply

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enforcement"). *See also* Gardner, *supra* note 344 (arguing that forum non conveniens should be rejected entirely).

368. *See* Bookman, *Litigation Isolationism*, *supra* note 49, at 1086, 1096; Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63 (2019) (examining the doctrinal trend of "international comity abstention" among lower courts).

369. *In re* Maxwell Commc'n Corp. v. Societe Generale, 93 F.3d 1036, 1047 (2d Cir. 1996); *see, e.g.*, Reino de España v. ABSG Consulting, Inc., 334 F. App'x 383, 384 (2d Cir. 2009) (articulating standard for abstention based on international comity); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1237–38 (11th Cir. 2004) (finding international comity abstention appropriate in light of U.S.-Germany agreement establishing mechanism for hearing claims similar to plaintiffs'); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994) (dismissing Ecaudorian plaintiffs' claims alleging pollution on the basis of "comity of nations"); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797–98 (1993) (concluding that "international comity would not counsel against exercising jurisdiction" in a case involving foreign conduct).

370. *See* Gardner, *supra* note 368.

371. Corporaciòn Mexicana de Mantenimiento Integral v. Pemex-Exploraciòn Y Producciòn, 832 F.3d 92 (2d Cir. 2016). In *Pemex*, a Mexican subsidiary of KBR, COMMISA, sought confirmation of an arbitral award that it had won against a state-owned Mexican enterprise, PEP. *Id.* at 97, 99. While the confirmation proceedings were pending in New York federal court, a Mexican court set aside the award on the basis that PEP could not be forced to arbitrate according to a recently enacted Mexican law. *Id.* at 99. PEP argued that international comity required the U.S. court to defer to the Mexican court judgment. *Id.* at 100. The Second Circuit upheld the district court's decision to confirm the award over the pull of recognizing the Mexican court's judgment as a matter of international comity. *Id.* at 107.

372. *Pemex*, 832 F.3d at 106. For a thorough analysis of the Second Circuit's reasoning, including an endorsement of its "enforcement of foreign judgments" approach and a criticism of its use of an abuse of discretion standard to review the district court's decision to confirm the award, see Linda Silberman & Nathan Yaffe, *The U.S. Approach to Recognition and Enforcement of Awards After Set-Asides: The Impact of the* Pemex *Decision*, 40 FORDHAM INT'L L.J. 799, 812 (2017).

domestically.[373] The Court has recently reinvigorated the doctrine, applying it to prevent U.S. securities laws from regulating fraud related to shares in foreign companies traded on foreign exchanges[374] and to prevent the European Community from suing U.S. companies under the civil Racketeer Influenced and Corrupt Organizations Act ("RICO").[375] The presumption, the Court has said, applies to statutes "across the board"[376] and "in all cases."[377]

If applied too broadly, the presumption could conceivably limit the application of the FAA to international arbitration or limit parties' and tribunals' ability to request evidence located abroad. Admittedly, it seems unlikely that the presumption would be marshaled to interpret the FAA not to apply extraterritorially, since the intent to codify the New York Convention is so clear. But one could imagine a reading of certain FAA provisions that would prevent application of the statute to foreign international arbitrations or that could suggest that the domestic sections of the FAA should not be used to fill certain gaps in other statutory sections that govern international arbitration.[378] The presumption against extraterritoriality could also hinder other aspects of judicial support for arbitration. For example, courts are divided on whether 28 U.S.C. § 1782, the statute that permits courts to order discovery to aid foreign tribunals (which can be understood to include arbitral tribunals[379]), applies to discovery located abroad.[380]

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373. *See* Bookman, *Litigation Isolationism*, *supra* note 49, at 1097.

374. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010); William J. Moon, *Regulating Offshore Finance*, 71 VAND L. REV. 1, 19–27 (2019) (detailing *Morrison*'s consequences for the regulation of international finance and insurance markets).

375. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016); Bookman, *Doubling Down*, *supra* note 49, at 58 (criticizing *RJR Nabisco*).

376. *RJR Nabisco*, 136 S. Ct. at 2100.

377. *Morrison*, 561 U.S. at 261.

378. *See* RESTATEMENT (THIRD) OF U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 4-3 cmt. d (AM. LAW INST., Tentative Draft No. 2, 2012) (arguing that a better reading of the FAA is to not allow such gap filling); George A. Bermann, *American Exceptionalism in International Arbitration, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2011, at 8–9 (Arthur W. Rovine ed., 2012) (explaining why Chapter 1 of the FAA would be needed as a gap filler for "foreign non-Convention awards").

379. *See infra* notes 398–402 and accompanying text.

380. Courts are divided on whether 28 U.S.C. § 1782 authorizes discovery of documents outside the United States. *Compare*, *e.g.*, Purolite Corp. v. Hitachi Am., Ltd., No. 17 Misc. 67 (PAE), 2017 WL 1906905, at *2 (S.D.N.Y. May 9, 2017), *In re* Godfrey, 526 F. Supp. 2d 417, 423 (S.D.N.Y. 2007), *and In re* Microsoft Corp., 428 F. Supp. 2d 188, 194 n.5 (S.D.N.Y. 2006) (rejecting the extraterritorial application of the statute), *with* Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194, 1199–200 (11th Cir. 2016), *In re* Accent Delight Int'l Ltd., No. 16-MC-125 (JMF), 2018 WL 2849724, at *4 (S.D.N.Y. June 11, 2018), *and In re* Gemeinschaftspraxis Dr. Med. Schottdorf, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006) (holding that the statute can apply extraterritorially). *See also* Simowitz, *supra* note 66, at 3324–25 (differentiating between

One might argue that to the extent personal jurisdiction, forum non conveniens, international comity abstention, or the presumption against extraterritoriality make it more difficult to support *foreign* arbitration, that development will drive parties to seat their arbitrations in the United States, anticipating easier enforcement in U.S. courts with access to U.S.-based assets.[381] That may be true for those with sufficient foresight,[382] but it does little for those who did not foresee this unusual and unexpected resistance to arbitral award recognition and enforcement. It could encourage hiding assets in the United States, where they could be protected from award creditors. And in any event, these developments still undermine courts' ability to carry out U.S. obligations under the New York Convention.[383]

Other aspects of the Court's hostility to litigation may also impact courts' ability to support international commercial arbitration in the long term. One might not think that developments such as heightened pleading standards or limitations on discovery would have any effect on courts' support of international commercial arbitration. And in many arbitration-support cases, these issues do not obstruct courts' ability to enforce arbitration clauses or awards. But the limitations on litigation generally can hamper litigation that supports arbitration. Heightened pleading standards, for example, may compound the difficulties in filing certain kinds of objections to arbitral awards, like those based on unethical conduct by arbitrators or opposing counsel, which can be difficult to prove before discovery.[384] By analogy, trends limiting discovery could likewise be used to limit discovery in support of arbitration, although that does not appear to be happening in practice.[385]

In sum, it should not be surprising that narrowing access to U.S. courts through trans-substantive procedural developments—especially those that have exacerbated effects in the transnational sphere—could limit courts' ability to play an active role in supporting international

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the majority position of a strong presumption in favor of extraterritorial enforcement discovery and the minority position that "treats merits and enforcement discovery as essentially similar").

381. *See supra* note 336; *see also* Silberman & Simowitz, *supra* note 53, at 345–47 (discussing the uncertainty regarding proper bases for jurisdiction for enforcement and recognition actions in light of *Daimler*).

382. Research suggests that arbitration clauses are typically inserted at the last minute. *See supra* note 335 and accompanying text.

383. *See* Whytock, *Private-Public*, *supra* note 103, at 20 (prioritizing importance of the expectation of judicial enforcement over actual enforcement in any given case).

384. *Cf.* Rogers, *supra* note 47, at 369–70 (discussing the difficulties of enforcement for U.S. courts in international litigation).

385. *See* Yanbai Andrea Wang, Exporting American Discovery (2019) (unpublished manuscript) (discussing the liberal grant of discovery under section 1782 petitions).

arbitration. This spillover has received extensive criticism,[386] and some may wonder whether cases like *Sonera* and *Figueireido* are simply outliers. They have admittedly not gained traction, but they nevertheless have precedential effect. Importantly, from the perspective of supporting international commercial arbitration, they create uncertainty—and litigation—that itself undermines international arbitration.

IV. VALUING INTERNATIONAL COMMERCIAL ARBITRATION

The previous two Parts explained the Supreme Court's hostility to litigation and enthusiasm for arbitration and explored the ways in which the former shapes the latter. They showed how focusing on essentialist values can compromise international commercial arbitration by prioritizing hostility to litigation—and the view that the essence of arbitration lies in its distinctions from litigation—over other arbitral values. Meanwhile, litigation isolationism and other manifestations of hostility to litigation can further weaken that regime by limiting access to court support of arbitration.

This Part discusses the importance of judicial support for arbitration and considers ways in which courts could prioritize private law and international business values when resolving contemporary arbitration issues. It also lays the groundwork for future work exploring the complex, competitive relationship between litigation and arbitration.[387]

A. Replacing the Essentialist View

The focus on the essentialist view of arbitration and the accompanying perception that hostility to litigation is beneficial to arbitration weaken courts' ability to support international commercial arbitration. As a result of cases like *Hall Street*, *Stolt-Nielsen*, and *Lamps Plus*, U.S. courts will not enforce certain kinds of arbitration agreements and parties may be less certain that courts will enforce their arbitrators' decisions and that courts will apply neutral contract principles to interpret their arbitration agreements. The narrowing of personal jurisdiction and the expanded reach of forum non conveniens

386. RESTATEMENT (THIRD) OF U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 4-29(a) cmt. a (AM. LAW INST., Tentative Draft No. 3, 2013) ("Actions for post-award relief are ordinarily summary in nature and do not entail significant fact-finding. Thus, they are generally poor candidates for forum non conveniens treatment." (citation omitted)).

387. *See* Bookman, *Adjudication Business*, *supra* note 32.

and other litigation-hostile developments likewise create uncertainty over when U.S. courts will enforce arbitration awards and otherwise support arbitration.

The prioritization of hostility to litigation and essentialist values is not inadvertent. This Article argues, however, that it is inappropriate for courts that seek to support arbitration. One potential antidote to the negative and misinforming consequences of the essentialist thesis[388] is reintroducing and reemphasizing other arbitral values. Courts, lawmakers, practitioners, and scholars should recognize the multifaceted and dynamic nature of arbitration. The practical realities of international commercial arbitration and its ability to become judicialized and resemble litigation refutes the essentialist thesis; such arbitration contrasts starkly with the Court's often simplified, idealized depiction of arbitration.

Any decision contemplating courts' interpretation of arbitration clauses, interaction with arbitrators, enforcement of arbitration awards, interference with pending arbitration, or the like should be informed not by a need to differentiate arbitration from litigation, but by an understanding of the role of courts in supporting arbitration and in valuing party autonomy, arbitral flexibility, and international business. This is not to say that the substitution theory is wrong; arbitration is in some ways a substitute for litigation. But it does not capture the entirety of that relationship. Likewise, there may be circumstances where all three kinds of arbitration values align in directing a single outcome. But where private law and international business values conflict with essentialist ones, the former should usually prevail, especially if one is concerned about effects for international commercial arbitration. Failure to view the relationship between courts and arbitration through this lens, as we have seen, can undermine U.S. courts' ability to play their important supporting roles in the international commercial arbitral order.

B. Providing Judicial Support

Having established that arbitration depends on courts—and that a robust pro-arbitration federal policy therefore should respect and protect the litigation that supports that arbitration—the question arises as to how to give effect to this theory.

This Section proceeds in four parts. It first addresses several currently contested issues in arbitration law where following the

388. *See supra* Part II.

essentialist view would undermine judicial support for arbitration. It argues against adopting that view. Second, it advocates reconsidering the Court's currently trans-substantive approach to arbitration law, in which the Court's FAA jurisprudence seems to apply equally to issues arising from employment, consumer, insurance, and international commercial arbitration contracts. Third, it discusses rolling back the litigation isolationism developments that have hampered the enforcement of arbitral awards and other kinds of judicial support. Finally, it considers which institutional actors should lead these efforts, reviewing the merits and demerits of relying on Congress, the Supreme Court, or state and lower federal courts.

1. Pro-Arbitration Policies

This Article thus far has identified *Hall Street*, *Stolt-Nielsen*, and *Lamps Plus* as prime examples of cases where a policy that prioritized arbitration's values differently would have yielded a different outcome. These cases and others that proclaim the essentialist view of arbitration reveal the Court's proclivity toward valuing essentialist distinctions and limits on litigation over other arbitral values like autonomy, adaptability, and promoting international trade.

There are many areas of arbitration law where adhering to the essentialist view would yield a result that would conflict with other values behind international commercial arbitration.[389] The split authority in state and lower federal courts on these issues demonstrate that these courts do not necessarily embrace the essentialist view with the fervor of the Supreme Court. Ironically, these differences of opinion themselves generate litigation.

In each of these contexts, the supportive role that courts afford arbitration under the international arbitration system should guide courts' analysis. I do not pretend that it is always easy to determine which stance best supports arbitration.[390] The focus of this Section is to advocate considering that question without concern for policing distinctions between arbitration and litigation,[391] instead prioritizing private law and international business values when they conflict with

389. This argument may also hold true for other kinds of arbitration. *See supra* note 40 and accompanying text.

390. *See* Bermann, *supra* note 178.

391. While the United States does not have a specialized arbitration court, one might aspire for an outlook similar to the one Alan Scott Rau attributed to the French Cour d'Appel de Paris: "[A] bench of arbitration mavens, fully at home with the interrelated pieces of the system, mindful of what is necessary to further the interests of users, and committed to doing so." Rau, *supra* note 176, at 478.

the essentialist vision. Courts should be sensitive to the possibility that policing essentialist distinctions between arbitration and litigation can interfere with arbitration's flexibility.

Let us consider three examples of issues where the essentialist view compromises courts' ability to support arbitration's other values.[392] My purpose here is not to resolve the questions raised in each of these areas—the questions are complex and have been the subject of entire articles in their own right. Rather, I aim to highlight areas where the essentialist view might seem to yield easy answers and to encourage more nuanced consideration.

First, the Court's recent decision in *Lamps Plus* leaves open questions about the extent to which courts can control arbitration procedures and what other "fundamental attributes" of arbitration will next be held to trump "plain vanilla" state contract law.[393] Punitive damages and discovery seem like potential contenders for features which, if used in arbitration, might be challenged as undermining the "essential virtues" of arbitration.[394]

A second hot-button topic is the extent to which courts can review the merits of arbitrators' decisions. As discussed in Part II, *Hall Street* and *Stolt-Nielsen* left the scope of judicial review uncertain, both in terms of what it means for arbitrators to "exceed" their authority under the FAA and whether vacatur is available under the manifest disregard standard.

Traditionally, private law and international business interests behind arbitration favor keeping judicial review of arbitral awards to a minimum.[395] International arbitration enthusiasts almost uniformly argue for narrowing and clarifying the standard for exceeding authority and against recognizing manifest disregard as a basis for vacatur. Parties to arbitration disputes are routinely afraid of reversals, particularly on the basis of manifest disregard, even though that argument is very rarely successful. Thus, one would imagine that a Supreme Court concerned with supporting international arbitration

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392. This list is not meant to be exhaustive. *See, e.g.*, Standard Chartered Bank Int'l (Ams.) Ltd. v. Calvo, 757 F. Supp. 2d 258, 259 (S.D.N.Y. 2010) (declining to enforce parties' confidentiality request and describing it as having "all the characteristics of an artificial construct in which major financial institutions seek to invoke the jurisdiction of this Court using their own set of rules"); Gary B. Born & Adam Raviv, *Arbitration and the Rule of Law: Lessons from Limitations Periods*, 27 AM. REV. INT'L ARB. 373, 375–76 (2016) (discussing state and federal court decisions holding that statutes of limitations do not apply in arbitration because "arbitration is . . . fundamentally different from litigation").

393. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1428–35 (2019) (Kagan, J., dissenting).

394 *See supra* notes 279–283 and accompanying text.

395. *See, e.g.*, Roberts & Trahanas, *supra* note 46, at 750.

would, at least, nip manifest disregard in the bud. That conclusion could even follow consistently from the essentialist thesis. *Hall Street*'s reasoning that arbitration, unlike litigation, must be resolved "straightaway"[396] is consistent with the conclusion that manifest disregard is not an available basis for vacatur. The Court's failure, time and again, to take up manifest disregard seems to demonstrate that even its cert grant practice reflects a prioritization of using arbitration to thwart litigation more than promoting the private law and international business values underlying international commercial arbitration.

Another scenario that puts tension on the "straightaway" nature of arbitration is whether U.S. courts will enforce awards rendered by arbitral tribunals seated in countries where more judicial review is allowed.[397] If the essence of arbitration is that disputes are resolved straightaway, that could suggest that an arbitration clause that calls for arbitration in a jurisdiction with more than cursory judicial review should not be enforced. But that would not be a permissible reason not to enforce under the New York Convention.

Finally, a third issue is whether 28 U.S.C. § 1782 permits courts to order discovery to support evidence collection by arbitral tribunals.[398] The essentialist view would suggest that such discovery is presumptively impermissible.[399] After all, discovery (like class treatment) seems like a characteristic that differentiates litigation from arbitration.[400] A more contractarian view might permit judicial assistance to aid discovery only if the arbitration agreement permits

396. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 588 (2008) (describing "arbitration's essential virtue" as "resolving disputes straightaway").

397. Reisman & Richardson, *supra* note 40, at 46.

398. *Compare In re* Kleimar N.V., 220 F. Supp. 3d 519, 521–22 (S.D.N.Y. 2016) (holding a Maritime arbitration association to be a "foreign tribunal" within the meaning of 28 U.S.C. § 1782), *with In re Application of Hanwei Guo*, No. 1:18-mc-00561 JMF, 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019) (finding a Chinese arbitration organization was not a "foreign or international tribunal"). *See also* Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT'L L. 127, 133–39 (2012) (describing split among lower courts on this issue after *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)); Davis et al., *supra* note 66, at 12–18 (same); Jonathan Blackman & Jessica Stiefler, *Discovery in Aid of Arbitration Under 28 USC 1782*, GLOBAL ARB. REV. (Aug. 29, 2017), https://globalarbitrationreview.com/chapter/1146894/discovery-in-aid-of-arbitration-under-28-usc-1782 [https://perma.cc/M7L5-RVSS] (same). On the question of whether arbitral tribunals count as courts in the European Union, see Alyssa King, The Agent, the Judge, and the Chancellor: Arbitral Authority and the EU Preliminary Reference Procedure (2018) (unpublished manuscript) (on file with author).

399. *See* Davis et al., *supra* note 66, at 23 (illustrating how the Second Circuit has barred discovery under 28 U.S.C. § 1782 using essentialist reasoning).

400. *Cf. id.* at 24.

it.[401] Neither of these views, however, incorporates public policy implications, understandings of parties' actual default assumptions, or other factors that focus on supporting international commercial arbitration.[402] Such considerations may lead to a more nuanced view of when discovery is appropriate to support arbitration—regardless of whether discovery seems too "litigation-like." The point is that there are other pro-arbitration values at stake, including private law and international business values, that should take precedence over maintaining essentialist distinctions between arbitration and litigation.

2. Beyond Trans-Substantivity

The Supreme Court's broad interpretation of the FAA has rendered U.S. arbitration law primarily trans-substantive. There are some distinctions in the ways that arbitration agreements and international and domestic awards are enforced.[403] But for the most part, the Court's statements with respect to arbitration arising out of consumer contracts, employment contracts, or domestic business contracts usually apply in the next arbitration case, even though it may involve an international commercial contract or some other distinguishable context.[404]

Scholars have documented trans-substantivity's shortcomings.[405] The FAA does not seem to have originally required

401. *Id.*

402. *See id.* at 25.

403. *See* Raviv, *supra* note 53, at 239–42 (exploring how the difference between the savings clauses for domestic and international arbitration could, but probably will not, yield different outcomes when considering unconscionable arbitration clauses); Elizabeth Edmondson & Gretchen Stertz, *'Nondomestic' Arbitrations: An Underrecognized Path to Federal Court Review*, N.Y.L.J. (Mar. 16, 2018, 3:10 PM), https://www.law.com/newyorklawjournal/2018/03/16/non domestic-arbitrations-an-underrecognized-path-to-federal-court-review [https://perma.cc/APB8-YPAL] (differentiating between international, domestic, and "nondomestic" award enforcement under the FAA).

404. *See* RESTATEMENT (THIRD) OF U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 4-3 cmt. d (AM. LAW INST., Tentative Draft No. 2, 2012) (discussing how FAA Chapter 1 can serve as a gap filler for Chapters 2 and 3).

405. *See, e.g.*, Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1159 (2006) ("[D]ifferent substantive policies sometimes justify different procedural choices . . . ."); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) (discussing the persistent and inevitable tension between procedure generalized across substantive lines and procedure applied to implement a particular substantive end); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547 (1986) (describing the trans-substantive premise of the Rules as "unworkable").

trans-substantive treatment of all arbitration.[406] Nevertheless, the Court has read away the substantive distinctions in the FAA,[407] narrowly interpreting the "savings clause" so that the statute requires enforcement of arbitration clauses in many contexts where state courts would have held the clauses violated state law.[408] The Court's FAA jurisprudence is widely criticized for its trans-substantivity and its extension of the statute into contexts in which the FAA was never meant to apply.[409] This trans-substantivity also deserves criticism for making arbitration decisions in other contexts apply to international commercial arbitration, often to the detriment of private law and international business values that are particularly important in international commercial arbitration.

The confluence of these two lines of criticism—that the courts improperly enforce arbitration clauses in certain contexts, like consumer contracts, and that they are insufficiently supportive of arbitration in other contexts, specifically international commercial litigation—seems like a clarion call to regulate arbitration in a subject-matter-specific way. While such line-drawing can be difficult, in many other countries, arbitration regulation differs depending on the nature of the contract—be it a consumer, employment, or commercial contract, for example.[410] This Article's modest aim in this regard is to flag "arbitration" as an overbroad category and to point out that differentiating among different kinds of arbitration is important not only because of negative effects in areas where critics argue arbitration should not be favored, like consumer contracts, but also because of

406. *See* Szalai, *supra* note 17, at 524 (arguing that while the FAA was originally substance specific, designed solely for commercial contract disputes, it is now—but should not be—trans-substantive).

407. For example, Section 1 of the FAA states that the rules for enforcing arbitration agreements "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2012). The Court has read this limitation narrowly. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

408. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011) (finding state court's rejection of arbitration clause on basis of unconscionability to violate the FAA, notwithstanding the savings clause).

409. *See, e.g.*, Gilles, *supra* note 310, at 394; Tal Kastner & Ethan Leib, *Contract Creep*, 107 GEO. L.J. 1277 (2019).

410. *See* Tony Cole et al., *Legal Instruments and Practice of Arbitration in the EU*, DIRECTORATE-GENERAL FOR INTERNAL POLICIES 118 (2014), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf [https://perma.cc/24D2-Z6WK] (noting that "[u]nder the Irish Arbitration Act of 2010, all commercial disputes can be referred to arbitration," but other "categories of disputes," such as "those relating to the remuneration or the terms or conditions of employment," cannot be arbitrated); Walter D. Kelley Jr., *Mandatory Arbitration in the United States and Europe*, HAUSFELD (Feb. 29, 2016), https://www.hausfeld.com/news-press/mandatory-arbitration-in-the-united-state-and-europe [https://perma.cc/6R2C-HXU7].

negative effects in areas where many believe arbitration should be favored, like international commercial arbitration.

3. Rolling Back Litigation Isolationism

Reform should also address litigation isolationist trends like narrowing personal jurisdiction and expanding use of forum non conveniens. When applied to arbitral award enforcement suits, these developments can have unintended consequences.[411]

I have argued elsewhere that litigation isolationism is dangerous and self-defeating and that it should be rolled back.[412] With respect to the damage that litigation isolationism has done in the realm of international commercial arbitration, potential fixes resemble a scalpel more than a sledgehammer. While one could dramatically alter personal jurisdiction, forum non conveniens, or international comity abstention, for these purposes, one could instead simply specify that in cases seeking the enforcement of foreign arbitral awards, none of these bases should be a barrier to enforcement. Silberman and Simowitz have explored other approaches to satisfying the constitutional standard of due process in enforcement cases.[413] Likewise, one could clarify that forum non conveniens and international comity abstention are not valid "procedural" defenses to an arbitral award enforcement proceeding under the FAA or the New York Convention.[414] A court could similarly conclude that the presumption against extraterritoriality is rebutted by the language and context of the FAA and 28 U.S.C. § 1782[415] without necessarily having to revamp the analysis under the presumption.

4. Institutional Actors

The previous Sections have identified a number of areas where legal change could smooth the road for litigation to support arbitration and arbitration's private law and international business values. Once the importance of courts' role in supporting arbitration eclipses essentialist values, certain paths forward become clear, or at least less

411. *See* Simowitz, *supra* note 343, at 328 (discussing effect of tightening scope of personal jurisdiction on the effectiveness of certain federal statutes).

412. *See* Bookman, *Litigation Isolationism*, *supra* note 49, at 1090; Bookman, *Unsung Virtues*, *supra* note 49, at 632.

413. *See* Silberman & Simowitz, *supra* note 53, at 344–47 (advocating for, among other things, the requirement of a jurisdictional nexus, but through the context of enforcement rather than a simple plenary action).

414. *See* Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 407–08 (2d Cir. 2011) (Lynch, J., dissenting).

415. *See, e.g.*, *In re* Hully Enters., Ltd., 358 F. Supp. 3d 331, 344–45 (S.D.N.Y. 2019).

muddied by the distraction of differentiating between arbitration and litigation.

The question then arises: Which institutional actor or actors should take on the task of implementing these changes? This Section considers the role of Congress, the Supreme Court, and state and lower federal courts.

Congress. One approach is to amend the FAA. Amendment could negate the essentialist view by offering a more flexible definition of arbitration. Chapter 2 of the FAA, which codifies the New York Convention, could be amended to address some of the legal reforms discussed above or distinguish between rules for domestic and international arbitration, providing more specific rules or cross-references to the underlying norms of the international commercial arbitration community.[416] It could direct an agency to take on the complicated task of dividing arbitration law into subcategories for substance-specific regulation.[417]

It is difficult to assess the likelihood of such reforms. On one hand, the quest for an Arbitration Fairness Act that would invalidate forced arbitration in consumer and employment contracts, long pushed by former Senator Al Franken, has floundered for over a decade.[418] On the other hand, there is bipartisan support for some kind of arbitration reform, particularly to end forced arbitration in cases of workplace sexual harassment.[419] But that legislation, too, seems to be stalled.[420]

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416. *See* Sussman, *supra* note 194, at 456 (criticizing the trans-substantive draft Arbitration Fairness Act for failing to differentiate between domestic and international arbitration); *see also* Bermann, *supra* note 378, at 8–9 (identifying gaps in the FAA, e.g., for handling the enforcement of arbitral awards rendered in countries that are not party to the New York or Panama Conventions); Carbonneau, *supra* note 5, at 1194–96 (discussing history of distinctions between international and domestic arbitration under U.S. law).

417. Such an approach was modeled when Congress, in creating the Consumer Financial Protection Board ("CFPB"), tasked that agency with investigating binding pre-dispute arbitration in consumer contracts, and the CFPB produced regulations that would have barred such arbitration. *See CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court*, CONSUMER FIN. PROTECTION BOARD (July 10, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court [https://perma.cc/B69H-LL74]. Of course, those regulations lost their legs under the Trump administration. *Id.*

418. The bill was originally introduced in 2007. H.R. 3010, 110th Cong. (2007); S. 1782, 110th Cong. (2007); *see also* Press Release, Rep. Hank Johnson, Sen. Al Franken and Rep. Hank Johnson Lead Fight to End Unfair Forced Arbitration Agreements (Mar. 7, 2017), https://hankjohnson.house.gov/media-center/press-releases/sen-al-franken-and-rep-hank-johnson-lead-fight-end-unfair-forced [https://perma.cc/6U6M-V2H2].

419. Lauren Davidson, *An Important, Bipartisan Bill Is Taking On Sexual Harassment*, WOMEN'S MEDIA CTR. (Feb. 2, 2018), http://www.womensmediacenter.com/fbomb/an-important-bipartisan-bill-is-taking-on-sexual-harassment [https://perma.cc/PC6C-5L7G].

420. Marina Fang, *Business Groups Might Be Quietly Killing A Bill That Would Bring Sexual Abuse Claims to Light*, HUFFINGTON POST (May 18, 2018), https://www.huffingtonpost.com/entry/

If arbitration reform succeeds, Congress should make sure that any such reform considers the potential impact on international commercial arbitration. Arbitration reform should present an opportunity to make the changes mentioned above that would benefit international commercial arbitration. Moreover, any statutory revisions should be mindful to preserve doctrines critical to U.S. courts' support of arbitration, including the recognition of arbitrators' competence to adjudicate their own jurisdiction ("competence-competence") and the doctrine of separability.[421]

The Supreme Court. The Supreme Court made much of this mess, and one could argue that it should be the one to clean it up. The Court's confusing and probably incorrect analysis that the FAA sets forth substantive law that preempts state arbitration law has a number of downsides,[422] but from the international commercial arbitration perspective, it at least gives the Court the potential to create national uniformity in an area of private international law.[423]

One possibility is for the Court to focus on clarifying arbitration issues specifically in the international commercial arbitration context and insulating international commercial arbitration from the essentialist rhetoric that the Court has used in the past. The Court could grant cert to resolve some of the many circuit splits on important issues in international commercial arbitration. The issues discussed above[424] are only the tip of the iceberg in terms of issues in international commercial arbitration that would benefit from clear Supreme Court guidance.[425] Many of these cases, moreover, would provide excellent vehicles for the Court to recant its essentialist view of arbitration. The context of international commercial arbitration itself provides much of the evidence as to why the Court should revise this position, because it

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forced-arbitration-sexual-harassment_us_5afda846e4b0a59b4e019e0a [https://perma.cc/7ZS3-BBAB].

421. Sussman, *supra* note 194, at 462.

422. *See* Szalai, *supra* note 17, at 515–19 (arguing that the way the Supreme Court interprets the FAA causes more confusion than necessary).

423. By contrast, other aspects of private international law, like enforcement of foreign judgments and choice of law, are controlled by state law. *Cf.* AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE 29–149 (2006) (arguing for national uniformity in enforcement law); BORN, *supra* note 110 (manuscript pt. 1 at 1) (noting that state law rules govern many important aspects of international law in U.S. courts).

424. *See supra* Section IV.B.1.

425. *See, e.g.*, Petition for Writ of Certiorari, AMCI Holdings, Inc. v. CBF Indústria de Gusa S/A (2017) (No. 17-481), 2017 WL 4404968 (raising issue of whether "a foreign arbitration award [may] be enforced directly against a non-party under the New York Convention"); CBF Indústria de Gusa S/A v. AMCI Holdings, Inc., 850 F.3d 58 (2d Cir.), *cert. denied*, 138 S. Ct. 557 (2017).

blurs the conventionally understood distinctions between arbitration and litigation.

How likely is the Court to reverse course? The cert grant practice is complicated and intentionally cryptic.[426] The Court grants cert on very few of the petitions filed.[427] But circuit splits are typically the surest drivers of cert grants, and there are several in this area.[428] The Court seems to have an interest in arbitration. It grants cert in an inordinate number of cases raising issues of domestic arbitration agreement enforcement,[429] particularly in the area of class arbitration.[430] So it is not outside the realm of possibility.

On the other hand, the Court has granted cert in far fewer cases in the areas of international arbitral award recognition and enforcement (the "back end" of arbitration) or international commercial arbitration practice (the "middle").[431] Indeed, this Article has revealed that the Court's interest in arbitration may be driven by hostility to litigation more than concerns about fostering international trade or supporting international commercial arbitration.[432] It therefore seems unlikely to expect a course correction from the Court,[433] although I

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426. *See* Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1399–402 (2018).

427. For example, the Court granted 75 out of 6,289 petitions considered in 2016. *The Supreme Court 2016 Term: The Statistics*, 131 HARV. L. REV. 403, 410 tbl.2(B) (2017).

428. *See* Brief for the Respondent in Opposition to the Petition for Writ of Certiorari, Dow AgroSciences, LLC v. Bayer CropScience A.G. (2017) (No. 17-372), 2017 U.S. S. Ct. Briefs LEXIS 4191 (raising questions about when courts may decline to enforce arbitral awards in light of public policy); Petition for Writ of Certiorari, Neusoft Med. Sys. Co. v. NeuIsys, (2016) (No. 15-1121), 2016 U.S. S. Ct. Briefs LEXIS 1091 (asking whether state courts can "stay state court proceedings pending international arbitration in China of claims arising from a contract containing a valid arbitration clause"); *see also supra* note 274 and accompanying text.

429. *See* Drahozal, *supra* note 249 (reviewing the Court's grants of arbitration cases).

430. Experts question whether these are the most pressing arbitration issues facing courts today. *See, e.g.*, Liz Kramer, *SCOTUS Adds Another Class Arbitration Case to Its Docket*, ARB. NATION (Apr. 30, 2018), https://www.arbitrationnation.com/scotus-adds-another-class-arbitration-case-docket [https://perma.cc/KU4C-4MWW]:

> If any Supreme Court clerk or justice had called me and asked "what are some of the really hot arbitration questions that this Court should resolve in order to ensure consistent decision-making around the country?," class arbitration would not have been on my list. I read every arbitration opinion that issues from the federal circuit courts and state high courts, and the issues I see courts struggling with most often include delegation clauses and issues relating to non-signatories.

431. *Cf.* BG Grp. PLC v. Republic of Arg., 572 U.S. 25, 34–46 (2014) (reviewing a suit filed as a petition to vacate or modify an arbitral award); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 699 (2010) (reviewing a suit filed to challenge arbitration award imposing class arbitration).

432. *See* Brooke D. Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307, 336–39 (2014) (noting the Court's tendency to prioritize its hostility to litigation over federalism values).

433. Justices Gorsuch and Kavanaugh seem likely to continue the trend signed onto by their predecessors. Each of them wrote early opinions in arbitration cases. Justice Kavanaugh, in his

would urge it to refocus on international commercial arbitration issues, where clarity itself—sometimes regardless of outcome—can have positive effects.

State and lower federal courts. The battlefield for these issues therefore lies in the state and lower federal courts. The Supreme Court of course wields much influence over U.S. arbitration law, but the bulk of the work is done by state and lower federal courts. Not surprisingly, these courts diverge on important issues relating to international commercial arbitration, as demonstrated by the numerous areas where authorities are split. They are in a much better position, however, to reject the essentialist view.

This is not as rebellious an approach as it might appear at first blush. The essentialist thesis informs a default worldview that the Supreme Court seems to embrace, but it arguably operates primarily in dicta. Since international commercial arbitration, on its face, so blatantly disproves the thesis, it would be unremarkable for a lower court to make fact-specific exceptions to those default background principles, particularly when facing an international commercial arbitration case.

As a guide to drive more consensus on these issues, the soon-to-be-finalized Restatement on U.S. Law of International Commercial Arbitration is well poised to provide a resource for parties, lawyers, and courts to consider current and thoughtful approaches to the multitude of arbitration-supporting issues that courts face today.

C. Competition Between Litigation and Arbitration

Courts are not merely a substitute or support for arbitration; those roles do not encompass the entirety of the relationship between litigation and arbitration. The two also compete for the business of international commercial adjudication.[434] This aspect of the relationship is more complicated than it first appears and deserves full treatment on its own. As a coda, this Section sets up the relevance of the competitive nature of the relationship and lays ground for further research.

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first ever opinion, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), showcased strong devotion to the Court's recent arbitration cases, which he seems to view as plainly correct as a matter of textual interpretation. In *Epic Systems Corp. v. Lewis*, Justice Gorsuch stated the essentialist thesis with startlingly clarity, warning against arbitration becoming too similar to "the litigation it was meant to replace." 138 S. Ct. 1612, 1632 (2018); *see also supra* notes 211–218 and accompanying text.

434. *See* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 85–86 (2009).

Among those who view courts and arbitral tribunals as competing to be designated as the chosen forum in international commercial contracts, many contend that arbitration is hands-down winning any such competition. It is widely stated that parties to international commercial contracts prefer resolving their contractual disputes through arbitration.[435] This view resonates with the essentialist idea that arbitration's merits are evident in the ways it is different from—and better than—litigation. The empirical research on party preferences, however, is far from conclusive; several studies suggest that arbitration is not "the predominant dispute settlement mechanism in either domestic or international commercial contracts."[436]

An emerging phenomenon—the proliferation of specialized, English-language-friendly, international commercial courts around the world—further belies the conventional understanding of the competition between arbitration and litigation. New York and London have offered internationally attractive commercial courts for over a century.[437] More recently, these specialized courts have been considered or established in the Netherlands, Germany, France, Belgium, China, Singapore, Qatar, Dubai, and beyond.[438]

In some respects, these courts seem to suggest that the competition between arbitration and litigation may be more fierce than commonly assumed. Although these courts are so new that their popularity is difficult to assess, the resources put into them suggest a demand for both litigation and arbitration to resolve international commercial disputes. These courts' designs take into consideration the traditional strengths and weaknesses of litigation and arbitration in an apparent attempt to make themselves more competitive with arbitration. They are state-backed tribunals but have adopted some arbitration-like characteristics. For example, their jurisdiction is often

435. *See, e.g.*, SWEET & GRISEL, *supra* note 41, at 1 (noting that international commercial parties "nearly universal[ly]" seek to "keep transnational commercial disputes out of the courts, and thereby beyond the reach of local laws"); Gary Born, *Integration and Dispute Resolution in Small States*, *in* INTEGRATION AND INTERNATIONAL DISPUTE RESOLUTION IN SMALL STATES 221, 221 (2018) ("Over the last century, international arbitration has become the preferred means for resolving international commercial disputes.").

436. Nyarko, *supra* note 324, at 13.

437. Bookman, *Adjudication Business*, *supra* note 32.

438. *Id.*; *see also, e.g.*, Xandra Kramer, *International Commercial Courts: Should the EU Be Next? – EP Study Building Competence in Commercial Law*, CONFLICTOFLAWS.NET (Sept. 23, 2018), http://conflictoflaws.net/2018/international-commercial-courts-should-the-eu-be-next-ep-study-building-competence-in-commercial-law [https://perma.cc/RGY7-JQXV].

created by consent rather than territorial contacts with the forum,[439] their procedural rules may be highly responsive to the parties' preferences,[440] and confidential proceedings are sometimes available.[441] At the same time, they can do things arbitration traditionally cannot, like allow joinder of third parties. These courts challenge the essentialist view because they do not fit neatly into the label of either courts or arbitral tribunals.[442] As hybrids, they pick and choose from the traditional characteristics of courts and arbitration.

In such an environment, productive competition between litigation and arbitration[443]—as both vie to be the designated forum in international commercial contracts—may have the potential to improve both institutions and increase the value of both systems to potential users.[444] Studies of law markets suggest that such competition can drive governments, courts, and arbitral centers to strive for positive reform of the law and legal services that they provide.[445] But as I discuss in a related work, *The Adjudication Business*, it is far from clear that these courts are primarily aimed at producing the best possible dispute resolution mechanism as opposed to, for example, a favorable option for

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439. *See* Bookman, *Adjudication Business*, *supra* note 32 (noting that much, but not all, of the jurisdiction of these courts is likely to be based on consent).

440. *See, e.g.*, Andrew Godwin, Ian Ramsay & Miranda Webster, *International Commercial Courts: The Singapore Experience*, 18 MELB. J. INT'L L. 219, 239 (2017).

441. *See, e.g.*, *id. at* 220.

442. Firew Tiba, *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia*, 14 LOY. U. CHI. INT'L L. REV. 31, 42–46 (2016) (discussing the hybrid approach both in the Gulf Region and Singapore); Wei Sun, *International Commercial Court in China: Innovations, Misunderstandings and Clarifications*, KLUWER ARB. BLOG (July 4, 2018), http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications [https://perma.cc/QC2H-4MSR] (describing the hybrid First and Second International Commercial Courts launched in China in June 2018).

443. O'HARA & RIBSTEIN, *supra* note 434, at 86 (remarking that courts being required to enforce arbitration provisions, including choice-of-law provisions, has led to competition among different forums for the most efficient commercial laws); Delphine Nougayrede, *Outsourcing Law in Post-Soviet Russia*, 6 J. EURASIAN L. 383, 436 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433771 [https://perma.cc/CA2R-RXA9]; *see also* Bookman, *Adjudication Business*, *supra* note 32.

444. Paul B. Stephan, *International Investment Law and Municipal Laws: Substitutes or Complements?*, 9 CAP. MKT. L. REV. 354, 368 (2014).

445. Studies that argue that courts competing for the business of adjudication drives courts into a "race to the bottom" competition tend to focus on torts and other cases where plaintiffs unilaterally choose the forum for dispute after the dispute has arisen. Positive competitive forces are thought to work in contexts where parties together choose a forum pre-dispute, for example through a forum selection or arbitration clause. *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 244 (2016) ("The potentially beneficial effect of competition when forum selection is consensual helps to explain the strong federal policies in favor of enforcement of forum selection clauses and arbitration." (footnote omitted)).

locals or a mechanism for attracting the business of adjudication itself.[446]

U.S. courts' allegiance to the essentialist thesis may thwart U.S. efforts to compete for the business of international commercial adjudication and to benefit from that competition. Interestingly, those efforts to compete are likely to proceed at the state and local levels, although federal courts play a role. Litigation isolationism may handicap states that seek to make their courts open to international litigation, and the arbitration-litigation paradox hinders states' ability to entice parties to select it as a seat of arbitration. The assumption that the FAA strictly differentiates between litigation and arbitration also stands in the way of state innovation with hybrid tribunals of the type that have been emerging internationally.

This tension between federal law's restriction of international dispute resolution and the desire of states, especially New York, to compete to be the go-to destination for international commercial dispute resolution is ripe for further exploration. This Article has set the stage for understanding the complex relationship between arbitration and litigation on the world stage of international commercial dispute resolution. Further work remains to understand the competition between arbitration and litigation as well as the competition among nations for the business of adjudication.

CONCLUSION

This Article has argued that while the Supreme Court's hostility to litigation and enthusiasm for arbitration seem to be in a symbiotic relationship, the former can cripple the latter. The Court's pro-arbitration policy prioritizes enforcing artificial distinctions between arbitration and litigation over other arbitral values, such as party autonomy, flexibility, and promoting international business. This focus on arbitration's "essential" characteristics reflects the Court's hostility to litigation, embodied in an enthusiasm for enforcing arbitration agreements and distinctions between arbitration and litigation. This approach is particularly problematic for international commercial arbitration, which relies on courts for its existence and success. The result is a U.S. law of arbitration that declines to enforce arbitration

446. Bookman, *Adjudication Business*, *supra* note 32; *see also* Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 59 VA. J. INT'L L. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333765 [https://perma.cc/5S2K-QMYA] (discussing the complicated history of different international commercial courts and dispute resolution centers).

agreements or awards when doing so conflicts with this essentialist vision of arbitration. This Article has offered several ways to correct these missteps. Most realistically, I urge state and lower federal courts to take up this call, following the direction of the forthcoming Restatement of the U.S. Law of International Commercial Arbitration.

The arbitration-litigation paradox is that some litigation, supposedly arbitration's antagonistic opposite, is needed to support arbitration and allow it to thrive, particularly in the international commercial arbitration context. The Court's prioritization of essentialist values also thwarts competition between litigation and arbitration and the ability of the United States to compete in the international market for international commercial dispute resolution. The state of this market and the United States' role in it is particularly ripe for reevaluation now that so many other countries are experimenting with international commercial courts, hospitality to arbitration, and hybrid tribunals.

3

Limitations to Party Autonomy in International Arbitration

FRANCO FERRARI AND FRIEDRICH ROSENFELD

3.1 Introduction

Arbitration is often referred to as 'a creature of contract'[1] and, therefore, 'an expression of party autonomy'.[2] Some commentators even consider party autonomy to be the 'backbone'[3] or 'bedrock' of international arbitration.[4] This liberalist thinking is based on the premise that arbitration is a dyadic process between two rational parties[5] that rests on the parties' delegation of adjudicatory authority to an arbitral tribunal through an exercise in party autonomy.[6] This party autonomy is not

[1] US Supreme Court, *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 25 March 2008, 552 U.S. 576, 128 S. Ct. 1396, 1399; US Supreme Court, *United Steelworkers of America* v. *American Manufacturing Co.*, 20 June 1960, 80 S. Ct. 1343, 1364.

[2] G. B. Born, 'Arbitration and the Freedom to Associate', *Georgia Journal of International and Comparative Law*, 38 (2009), 7, 15; M. D. Ginsberg, 'The Execution on an Arbitration Provision as a Condition Precedent to Medical Treatment: Legally Enforceable? Medically Ethical?', *Mitchell Hamline Law Review*, 42 (2016), 273, 278.

[3] S. Kröll, 'Arbitration', in J. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, 2nd ed. (Edward Elgar, 2012), 88, 93.

[4] *See*, for example, E. Brunet, 'The Values of Arbitration', in E. Brunet *et al.* (eds.), *International Arbitration Law in America: A Critical Assessment* (Cambridge University Press, 2006), 3; P. Shaughnessy, 'The Swedish Approach Towards Arbitration', in L. Heuman and S. Jarvin (eds.), *The Swedish Arbitration Act of 1999. Five Years On* (Juris, 2006), 293, 294; O. Spiermann, 'Applicable Law', in P. Muchlinski *et al.* (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 89, 99.

It is worth pointing out that the bedrock principle that arbitration is grounded in party autonomy has, at times, been questioned as being more rhetorical than real; *see*, for example, L. A. Cunningham, 'Rhetoric versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts', *Law & Contemporary Problems*, 75 (2012), 120.

[5] For an early reference to this characteristic, *see*, for example, J. Lorimer, 'The "Three Rules of Washington" Viewed in Their Relation to International Arbitration', *Journal of Jurisprudence*, 18 (1874), 621, 631 (stating that '[a]rbitration consequently is possible only between two parties, both of whom possess rational and, as such, consenting will. A totally unreasonable or unconscientious person may be called into a court of justice, and made a party to a suit, but he cannot be made a party to an arbitration.').

[6] *See* W. W. Park, 'Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law', *Nevada Law Journal*, 8 (2008), 135.

only the source of any arbitral tribunal's adjudicatory authority;[7] it also allows the parties to decide how that adjudicatory authority is to be exercised.[8] In other words, party autonomy allows the parties to shape the arbitration in a way that best fits given facts and circumstances.[9] And it is this autonomy 'and the promise that parties to international arbitration are free to control their process' that have contributed to the success of arbitration.[10] Without party autonomy, it appears, arbitration would not be what it is and much of its appeal would be lost.[11]

However, closer scrutiny shows a different picture. Neither are the actors who may potentially be involved in arbitration proceedings by definition rational agents,[12] nor is arbitration a process involving only the parties in dispute. Arbitration creates a web of relationships involving the parties, the arbitrators, arbitral institutions, and the public at large. While the interests of these different stakeholders[13] overlap in some cases, they diverge in others, thus creating tensions that at times are solved by limiting party autonomy. The present paper develops a taxonomy of these limitations to party autonomy that reflects the diverging interests of the various stakeholders affected by the arbitral procedure. It is submitted that there are limitations to party autonomy in the interest of the parties themselves (section 3.2), the public at large (section 3.3), the arbitrators (section 3.4), as well as the arbitral institutions (section 3.5). By acknowledging these limitations, which may also be imposed in the interest of more than one stakeholder at the same time, the authors do not wish to downplay the merits of party autonomy or depart from the liberalist tradition. Quite to the contrary, the authors' position is that a clear understanding of the limitations to party autonomy is necessary to protect

[7] *See*, for example, A. M. Steingruber, *Consent in Arbitration* (Oxford University Press, 2012), 1; *see also* E. Shackelford, 'Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration', *University of Pittsburgh Law Review*, 67 (2006), 897, 901 (stating that '[t]he fundamental principle that party autonomy underlies arbitration is recognized now by nearly all international arbitration laws, rules, and conventions').

[8] *See*, for example, R. Frankel, 'Concepcion and Mis-Concepcion: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence', *Journal of Dispute Resolution*, 17 (2014), 225, 228 (stating that '[t]he essence of arbitration, if there is one, is that parties can freely and fairly negotiate to adopt their own terms of dispute resolution').

See also Brunet, 'The Values of Arbitration' (2006), 3, stating that '[t]he parties own the dispute'.

[9] *See* V. Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge University Press, 2016), 183.

[10] M. L. Livingstone, 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?', *Journal of International Arbitration*, 25 (2008), 529.

[11] *See also* J. D. M. Lew *et al.*, *Comparative International Commercial Arbitration* (Kluwer, 2003), V (stating that 'party autonomy is a major reason why arbitration has achieved world-wide acceptance').

[12] F. Rosenfeld, 'Limits to Party Autonomy to Protect Weaker Parties in International Arbitration', in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration* (Juris, 2016), 419 *et seq*.

[13] For a different list of stakeholders in arbitration, *see*, for example, C. S. Gibson, 'Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Public Policy and the Public Policy Defense of Foreign Mandatory Public Law', *Penn State Law Review*, 113 (2009), 1227, 1265 (according to whom the stakeholders are 'the parties to a specific arbitration, members of the arbitration community generally, and . . . the state').

arbitration against legitimacy challenges and uphold its role as the primary instrument for resolving business disputes. Ultimately, the limitations to party autonomy hence also ensure that arbitration can persist as a viable system of dispute resolution (section 3.6).

3.2 Limitations to Party Autonomy in the Interest of the Parties

The first stakeholders that may benefit from limitations to party autonomy are the parties themselves. What appears to be counterintuitive and a fundamental departure from the liberalist ideal of upholding party autonomy has a simple reason: The parties do not always possess the degree of rationality, foresight, voluntariness, information, and capacities required for the law to uphold the choices they are apparently making in their own interest.[14] Certain parties, therefore, need protection. Legal systems offer this protection with the help of ex ante and ex post control mechanisms.

3.2.1 Ex Ante Control Mechanisms

The ex ante control mechanisms come into play up until the point in time when an arbitral tribunal has rendered its decision on jurisdiction. At this pre-award stage, state courts may be required to decide on the validity of an arbitration agreement either in separate proceedings on the admissibility of arbitration[15] or as an incidental question to establish their jurisdiction in other proceedings.[16]

In both scenarios, Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (New York

[14] J. Raz, *The Morality of Freedom* (Oxford University Press, 2003), 372 *et seq.* ('If a person is to be maker or author of his own life then he must have the mental abilities to form intentions of a sufficiently complex kind, and plan their execution. These include minimum rationality, the ability to comprehend the means required to realize his goals, the mental faculties necessary to plan actions, etc. For a person to enjoy an autonomous life he must actually use these faculties to choose what life to have. There must in other words be adequate options available for him to choose from. Finally, his choice must be free from coercion and manipulation by others, he must be independent. All three conditions, mental abilities, adequacy of options, and independence admit of degree.').

[15] *See*, for example, actions to refer parties to arbitration under Section 4 US Federal Arbitration Act. *See also* s. 1032 German Code of Civil Procedure ('Arbitration agreement and proceedings brought before the courts: (1) Should proceedings be brought before a court regarding a matter that is subject to an arbitration agreement, the court is to dismiss the complaint as inadmissible provided the defendant has raised the corresponding objection prior to the hearing on the merits of the case commencing, unless the court determines the arbitration agreement to be null and void, invalid, or impossible to implement. (2) Until the arbitral tribunal has been formed, a petition may be filed with the courts to have it determine the admissibility or inadmissibility of arbitration proceedings. (3) Where proceedings are pending in the sense as defined by subsection (1) or (2), arbitration proceedings may be initiated or continued notwithstanding that fact, and an arbitration award may be handed down.').

[16] S. Kröll, 'Party Autonomy in Relation to Competence-Competence', in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration* (Juris, 2016), 165, 167 *et seq.*

Convention) imposes upon state courts the obligation to 'recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration'.[17] While stated as a positive obligation to recognize arbitration agreements, the flipside of Article II of the New York Convention reveals five limitations to party autonomy: First, parties must not be 'under some incapacity' to conclude an arbitration agreement.[18] In other words, the parties must have the legal capacity to conclude arbitration agreements, a requirement mirroring a requirement of general contract law. For example, minors and mentally incapable persons are generally considered not to be in a position to exercise free judgment and govern themselves. State courts therefore have no obligation to recognize an arbitration agreement concluded by them.[19] And there is nothing the parties can do about this, not even by way of an exercise in party autonomy in the form of a choice of law, 'because the legal capacity of a party is subject not to the law chosen by the parties in the contract, but to the law of each of the parties'.[20]

Second, Article II of the New York Convention requires that the parties consent to arbitration. This requires an agreement, which is subject to certain rules to protect the parties from being bound by an agreement that lacks voluntariness[21] due to vices of consent, such as duress, fraud, mistake, and unconscionability. In this respect, the arbitration agreement does not differ from any other agreement.[22] However, the way

[17] Article II (1) New York Convention.

[18] Under Art. V (1) (a) New York Convention, an arbitral award may be denied recognition and enforcement, where the parties 'were, under the law applicable to them, under some incapacity'. Article II New York Convention must be construed consistent with this provision; *see* G. B. Born, *International Commercial Arbitration*, 3rd ed. (Kluwer, 2021), 766; *see also* Art. VI (2) European Convention on International Commercial Arbitration.

[19] *See* Born, *International Commercial Arbitration* (2021), 768.

[20] G. Cordero-Moss, 'Limits to Party Autonomy in International Commercial Arbitration', *Oslo Law Review*, 1 (2014), 47, 51; *see also* F. Ferrari and L. Silberman, 'Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong', in F. Ferrari and S. Kröll (eds.), *Conflict of Laws in International Commercial Arbitration*, 2nd ed. (Sellier, 2011, 2019), 371, 378, note 37; for a more detailed analysis of the issue at hand, *see* G. Cordero-Moss, 'Legal Capacity, Arbitration and Private International Law', in K. Boele-Woelki *et al.* (eds.), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven International, 2010), 619.

[21] A. Wertheimer, *Coercion* (Princeton University Press, 1987), 4 ('Our moral and legal responses to individual behavior are typically based on . . . the voluntariness principle. The general assumption is that promises are binding if, and only if the relevant actions are voluntary.'). *See also* R. E. Scott and W. J. Stuntz, 'Plea Bargaining as Contract', *Yale Law Journal*, 101 (1992), 1909, 1919 ('[F]acilitating the exercise of voluntary choice is the central normative justification for contractual enforcement.').

[22] *See* S. J. Ware, 'Employment Arbitration and Consent', *Hofstra Law Review*, 25 (1996), 83, 112, stating that 'the problem of determining consent in arbitration law is merely an application of that problem in contract law'; for a similar statement, *see also* S. J. Ware, 'Arbitration and Unconscionability After Doctor's Associates', *Wake Forest Law Review*, 31 (1996), 1001, 1006; for a more critical assessment of the claim that general contract law applies to arbitration agreements in light of US Supreme Court case law, *see* Cunningham, 'Rhetoric versus Reality in Arbitration Jurisprudence' (2012), 120.

to identify the law applicable to the issues of consent and, therefore, validity, of the arbitration agreement differs and creates difficulties, although less so at the post-award stage in recognition and enforcement proceedings to which the New York Convention applies, given that its Article V (1) (a) unmistakably directs state courts to apply the law chosen by the parties or, absent such choice, the law of the place of arbitration. The determination of the law applicable to the issues mentioned at the pre-award stage seems to be more problematic[23] and will depend, among others, on who will have to make such determination. The issue is far from being purely academic since the various laws may well protect the parties from involuntariness in different ways and to a different extent. By way of example, it may suffice to recall that the doctrine of unconscionability under US law and the standard terms analysis under German law differ from each other. They may have different effects on the validity of the arbitration agreement[24] and, thus, on party autonomy.[25] In the USA, although more recently the US Supreme Court[26] has – as a commentator observed – 'availed itself of the vastly malleable and expandable concept of federal arbitration law to dramatically limit lower courts' use of their most effective tool for policing overreaching in arbitration agreements, notably unconscionability',[27] the concept is considered by some courts as a reason to refuse recognition of unilateral arbitration clauses,[28] of arbitration clauses imposing excessive fees or

[23] But *see*, for a clear rule, Art. 178 (2) Swiss Federal Statute on Private International Law ('As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law.').

[24] *See*, for example, T. Niedermaier, 'Arbitration Agreements between Parties of Unequal Bargaining Power – Balancing Exercises on Either Side of the Atlantic', *Zeitschrift für Deutsches und Amerikanisches Recht* (2014), 12, 16 *et seq*.

[25] For further examples, *see* J. W. Stempel, 'Arbitration, Unconscionability and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism', *Ohio State Journal on Dispute Resolution*, 19 (2004), 757, 803 *et seq*.

[26] *See* US Supreme Court, *DIRECTV, Inc.* v. *Imburgia*, 14 December 2015, 136 S. Ct. 463; US Supreme Court, *AT&T Mobility LLC* v. *Concepcion*, 27 April 2011, 563 U.S. 333, 131 S. Ct. 1740; US Supreme Court, *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 27 April 2010, 559 U.S. 662, 683, 130 S. Ct. 1758, 1774.

[27] T. Stipanowich, 'Revelation and Reaction: The Struggle to Shape American Arbitration', in A. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation* (Nijhoff, 2011), 97, 139.

[28] *See* Supreme Court of North Carolina, *Tillman* v. *Commercial Credit Loans, Inc.*, 25 January 2008, 655 S.E.2d 362, 372–3 (holding unconscionable a clause requiring the borrower to arbitrate any claims against the lender, while allowing the lender to avoid to arbitrate claims); US Court of Appeals, Ninth Circuit, *Nagrampa* v. *Mailcoups, Inc.*, 4 December 2006, 469 F.3d 1257, 1285–6 (holding unconscionable a clause requiring the employee to arbitrate claims while allowing the employer to bring actions in court); but *see* Supreme Judicial Court of Massachusetts, *Hannon* v. *Original Gunite Aquatech Pools, Inc.*, 20 April 1982, 434 N.E.2d 611, 618 (holding that the inclusion of a clause in a contract allowing one party, but not the other, to demand arbitration is not per se unconscionable).

For papers on the topic, *see* L. A. Niddam, 'Unilateral Arbitration Clauses in Commercial Arbitration', *Arbitration and Dispute Resolution Law Journal*, 5 (1996), 147; H. Smit, 'The Unilateral Arbitration Clause – A Comparative Analysis', *American Review of International Arbitration*, 20 (2009), 391; B. van Zelst, 'Unilateral Option Arbitration Clauses in the EU: A Comparative Assessment of the Operation of Unilateral Option Arbitration Clauses in the European Context', *Journal of International Arbitration*, 33 (2016), 365.

fee-shifting,[29] and of arbitration clauses limiting damages or other types of remedy.[30] Other jurisdictions may endorse different views in this respect.[31] The conclusion to be drawn is that the law applicable to the validity of the arbitration agreement determines the scope of the consent-based limitations to party autonomy. The more liberal the applicable contract law is, the fewer limitations will apply to the assessment of the consent to arbitrate. By making a (valid) choice of law, the parties can to some extent influence which limitations to party autonomy apply. However, since all contract laws combat involuntariness to some degree, the parties' autonomy will always be subject to control in their own interest.

Third, the arbitration agreement must fulfil the applicable form requirements,[32] a requirement that also impacts on party autonomy in that it may invalidate an agreement between the parties where the applicable requirements are not met. Form requirements can be found in the New York Convention as well as in domestic arbitration laws. Under the New York Convention, the relevant provision is contained in Article II (1) of the New York Convention, which requires the arbitration agreements to be 'in writing' (as further defined in Article II (2)). One of the goals of this

[29] US Court of Appeals, Third Circuit, *Alexander* v. *Anthony Int'l, L.P.*, 19 August 2003, 341 F.3d 256, 263 (holding that an arbitration clause's imposition of the loser pays rule is substantively unconscionable); US Court of Appeals, Fourth Circuit, *Bradford* v. *Rockwell Semiconductor Sys., Inc.*, 22 January 2001, 238 F.3d 549, 559 (holding that the high expense of arbitration imposed on the adhering party made the clause unenforceable); US Court of Appeals, Tenth Circuit, *Shankle* v. *B-G Maint. Mgmt. of Colorado, Inc.*, 5 January 1999, 163 F.3d 1230, 1234–5 (holding that the shifting of arbitration fees and costs to the losing party made the agreement unenforceable).

[30] *See* US Court of Appeals, Eighth Circuit, *Larry's United Super, Inc.* v. *Werries*, 13 June 2001, 253 F.3d 1083 (holding that a punitive damages exclusion is unenforceable); Court of Appeal of California, First District, Division Two, *Stirlen* v. *Supercuts, Inc.*, 9 January 1997, 60 Cal. Rptr. 2d 138, 150–52 (holding an arbitration clause unconscionable for limiting a worker to only 'actual damages for breach of contract' in the event of wrongful discharge); but *see* US District Court, Northern District of California, *Farrell* v. *Convergent Communications, Inc.*, 29 October 1998, No. C98-2613 MJJ, 1998 U.S. Dist. LEXIS 17314, 14 (holding that 'limitations on the amount of damages alone does not render an agreement to arbitrate *per se* unconscionable, as parties are generally free to contract as they see fit').

[31] *See*, for example, German Supreme Court, judgment, 13 January 2005, Case no. III ZR 265/03; German Supreme Court, *Neue Juristische Wochenschrift*, 9 (1992), 575, 576 (for German case law on arbitration agreements in standard business terms).

[32] *See* R. Hill, 'The Writing Requirement of the New York Convention Revisited: Are There Black Holes in International Arbitration?', *Mealey's International Arbitration Report*, 13 (1998), 17; N. Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law out of Step with Commercial Practice?', *Arbitration International*, 12 (1996), 27; T. Landau, 'The Requirement of a Written Form for an Arbitration Agreement: When "Written" Means "Oral"', in A. J. van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer, 2003), 19; G. Cordero-Moss, 'Form of Arbitration Agreements: Current Developments with UNCITRAL and the Writing Requirement of the New York Convention', *ICC International Court of Arbitration Bulletin*, 18 (2007), 51; F. G. Mazzotta, 'The Written Form Requirement of an Arbitration Agreement in Light of New Means of Communication', in C. B. Andersen and U. Schroeter (eds.), *Sharing International Commercial Law Across National Boundaries – Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds and Hill, 2008), 326; J. Wang, 'International Judicial Practice and the Written Form Requirement for International Arbitration Agreements', *Pacific Rim Law and Policy Journal*, 10 (2001), 375.

provision is to make sure that the agreement does not go unnoticed,[33] which protects the parties.[34] Many domestic arbitration laws contain lower form requirements, which raises the question of whether the New York Convention replaces these requirements as well.[35] To help solve the issue, UNCITRAL recommended in 2006 that Article VII (1) of the New York Convention be also applied to allow any interested party to avail itself of rights it may have, under more favourable laws or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an agreement.[36] UNCITRAL further recommended to interpret Article II (2) of the New York Convention (referring to a signature requirement and, alternatively, to the need for the arbitration clause or agreement to be contained in an exchange of letters or telegrams) as being non-exhaustive, thus clearly favouring the liberalization of form requirements,[37] and excluding Article II (1) of the New York Convention's qualification as a 'minimum rule'.[38] Until, however, the moment that this

[33] *See* Lew *et al.*, *Comparative International Commercial Arbitration* (2003), 131; for a reference to the form requirement's warning function, *see also* R. Hausmann, in C. Reithmann and D. Martiny (eds.), *Internationales Vertragsrecht*, 8th ed. (Otto Schmidt, 2016), para. 8.291; various commentators consider this function to be anachronistic, even to the extent that it has been stated that 'the traditional view on the function of form requirements has failed to keep pace with the continuous relaxation of form requirements in modern arbitration laws', F. T. Schwarz and C. W. Konrad (eds.), *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer, 2009), 22; for a criticism of the warning function, *see also* R. Wolff, in R. Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (Beck/Hart/Nomos, 2019), Art. II, 117 *et seq*.

[34] *See also* Swiss Supreme Court, *Tradax* v. *Amoco*, 7 February 1984, A. J. van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XI (Kluwer, 1986), 532, stating that 'the requirement of writing prescribed in Article II of the Convention has the effect of protecting the parties concerned from entering into ill-thought-out commitments involving the renunciation of the right of access to normal courts and judges'.

[35] For reference to the state of the discussion in both case law and scholarly writing, *see* R. Wolff, in R. Wolff, *New York Convention – Commentary* (2019), Art. II, 115.

[36] *See* the Recommendation regarding the Interpretation of Art. II, para. 2, and Art. VII, para. 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, Adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its Thirty-Ninth Session.

[37] J. Graves, 'ICA and the Writing Requirement: Following Modern Trends Towards Liberalization or are we Stuck in 1958?', *Belgrade Law Review*, 3 (2009), 36.

[38] Born, *International Commercial Arbitration* (2021), 711; D. Di Pietro, 'Validity of Arbitration Clauses Incorporated by Reference', in E. Gaillard and D. Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008), 355, 371 *et seq*.; D. Di Pietro and M. Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, 2001), 81, note 37; S. I. Strong, 'What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act', *Stanford Journal of International Law*, 48 (2012), 47, 76; in case law, *see*, for example, Munich Court of Appeals, judgment, 12 October 2009, *Zeitschrift für Schiedsverfahren*, 8 (2010), 50.

Contra, *see* A. J. van den Berg, 'The New York Convention: Its Intended Effects, its Interpretation, Salient Problem Areas', in M. Blessing (ed.), *The New York Convention of 1958* (Kluwer, 1996), 25, 44 ('The uniform rule has as consequence that Article II (2) is a maximum and a minimum rule. A court may not impose more stringent requirements on the form of the arbitration agreement. Neither may a court go below the minimum.'); *see also* Wolff, in Wolff, *New York Convention* (2019), Article II, 115; *contra* in case law, *see* Schleswig Court of Appeals,

liberalization leads to all form requirements becoming superfluous, form requirements will have an impact on party autonomy.

Things look different for more demanding form requirements, which exist in some arbitration laws for groups of persons who typically suffer from information deficits, institutional weakness or cognitive bias.[39] In various legal systems, arbitration agreements involving consumers, for example, are subject to heightened (and non-derogable) form requirements. Under some laws, this may require a more prominent placement of the arbitration agreement in a separate agreement.[40] The applicability of these stricter requirements will depend on whether Article II of the New York Convention is at all applicable. If it is, the stricter requirements will not be relevant, given Article II's status of a 'maximum rule'[41] pursuant to which more demanding domestic law form requirements are replaced.[42]

Fourth, the subject matter must be capable of being resolved by arbitration.[43] While there are many fields in relation to which states reserve a monopoly of justice in the interest of the public at large,[44] some restrictions to (subject matter) arbitrability can also be considered as protecting individual parties. In legal relationships where there is typically a power asymmetry between the parties – as in employment relationships[45] or in respect of agreements for residential

judgment, 30 March 2000, A. J. van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XXXI (ICCA, 2006), 652, 656; Basel Court of Appeals, *DIETF Ltd.* v. *RF AG*, 5 July 1994, A. J. van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XXI (ICCA, 1996), 685, 688.

[39] *See also* G. A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism', *Quarterly Journal of Economics*, 84 (1970), 219, 224.

[40] *See* s. 1031 (5) German Code of Civil Procedure: 'Arbitration agreements in which a consumer is involved must be contained in a record or document signed by the parties in their own hands. The written form as set out in the first sentence may be replaced by the electronic form pursuant to section 126a of the Civil Code (Bürgerliches Gesetzbuch, BGB). The record or document, or the electronic document may not contain agreements other than those making reference to the arbitration proceedings; this shall not apply if the agreement is recorded by a notary.'

[41] Wolff, in Wolff, *New York Convention* (2019), Art. II, 115.

[42] *See also* Born, *International Commercial Arbitration* (2021), 710, stating that 'Article II(2)'s maximum form requirement supersedes national law rules of Contracting States requiring that international arbitration agreements satisfy particular form requirements. Examples of such form requirements are Germany's requirement that arbitration agreements in consumer transactions be in a separate, signed instrument, some U.S. states' requirements that arbitration agreements be in large typeface or capital letters, Greece's arguable requirement that arbitration agreements be separately approved by corporate boards, or some countries' requirements that particular agreements be hand-written, notarized, or signed by two corporate officers' (footnotes omitted).

[43] *See*, for example, L. A. Mistelis and S. L. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* (Kluwer, 2009); Lew *et al., Comparative International Commercial Arbitration* (2003), 187 *et seq*.

[44] *See* below the text accompanying notes 98 *et seq*.

[45] *See*, for example, Art. 10 (3) (2) (3) Federal Law no. 409-FZ dated 29 December 2015 'On Amendments to Certain Legislative Acts of the Russian Federation and Repealing Article 6 (1) (3) of the Federal Law on Self-Regulatory Organizations in connection with the adoption of the Federal Law on Arbitration in the Russian Federation', in force since 1 September 2016; Art. 614 (3) Greek Code of Civil Procedure, in force since 1 January 2016; Art. 5 (7) Latvian Arbitration Law dated 11 September 2014, in force since 1 January 2015; Art. 12 (2) (a) United Arab Emirates Arbitration Law dated 1 September 2008, in force since 15 December 2013; Art. 12 (2) Law on

tenancy[46] – claims may not be arbitrable in certain jurisdictions. According to Italian law,[47] to give another example, the issue of post-termination compensation in connection with a commercial agency agreement as defined by the domestic legislation implementing the Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents is not arbitrable,[48] thus restraining party autonomy from limiting the consequences of unequal bargaining power.[49] This reflects the understanding by the Italian courts that claims are not disposable if based on overriding mandatory norms – a proposition that has been challenged.[50] There are many more examples of limitations to party autonomy in the interest of the parties grounded in (subject matter) arbitrability, which reflect different degrees of paternalism.[51]

Finally, under Article II (3) of the New York Convention, courts have no obligation to refer parties to arbitration if the arbitration agreement is null and void, inoperative or incapable of being performed. While there is support for the proposition that the 'null and void' requirement does not substantially add anything to the aforementioned grounds of invalidity,[52] the requirement that an arbitration agreement not be inoperative or incapable of being performed constitutes a further limitation to party autonomy (mainly in the interest of the parties). More specifically, some courts have reached the conclusion that a party's impecuniosity[53] renders an arbitration agreement inoperative and/or incapable of being performed.[54] This

Commercial Arbitration of the Republic of Lithuania dated 2 April 1996, in force since 30 June 2012; Art. 101 German Labour Court Law dated 3 September 1953.

[46] Section 1030 (2) German Code of Civil Procedure ('An arbitration agreement regarding legal disputes arising in the context of a tenancy relationship for residential space in Germany is invalid. This shall not apply to the extent the residential premises concerned are of the type determined in section 549 subsection (2) numbers 1 to 3 of the Civil Code [Bürgerliches Gesetzbuch, BGB].').

[47] *See* Italian Supreme Court, judgment, 30 June 1999, no. 369, *Rivista di Diritto Internazionale Privato e Processuale*, 36 (2000), 741; for more recent decisions, *see* Italian Supreme Court, judgment, 27 December 2016, no. 27072 (*obiter dictum*) (unpublished); Civil Court of Genoa, judgment, 7 August 2006, *Rivista di Diritto Internazionale Privato e Processuale*, 42 (2006), 1089, and Civil Court of Modena, judgment, 11 March 2009, both in Pluris database.

[48] According to the case law mentioned in the previous note, the characterization of the indemnity rule as an overriding mandatory rule implies that the right to indemnity cannot be disposed of, so the related claim is incapable of being submitted to arbitration.

[49] *See* F. Ragno, 'Inarbitrability: A Ghost Hovering Over Europe?', in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration* (Juris, 2016), 127, 132 *et seq*.

[50] Ragno, 'Inarbitrability' (2016), 135.

[51] *See* Rosenfeld, 'Party Autonomy and Weaker Parties' (2016), 423 *et seq*.

[52] *See*, for example, Born, *International Commercial Arbitration* (2021), 902 ('The better view is that Article II (3)'s "null and void" formula is expansive and encompasses all claims that an agreement is not valid and binding, including claims that an agreement was not validly concluded by reason of defects in the validity of consent.').

[53] *See* D. Kühner, 'The Impact of Party Impecuniosity on Arbitration Agreements: The Example of France and Germany', *Journal of International Arbitration*, 31 (2014), 807; G. Wagner, 'Impecunious Parties and Arbitration Agreements', *Zeitschrift für Schiedsverfahren*, 1 (2003), 206.

[54] *See* German Supreme Court, judgment, 14 September 2000, *Neue Juristische Wochenschrift*, 53 (2000), 3720. *See also* US Supreme Court, *Green Tree Financial Corp. – Alabama et al.* v. *Randolph*, 11 December 2000, 531 U.S. 79 (2000) (ruling that 'a party seeking to invalidate an arbitration

constitutes a limitation to party autonomy, as the autonomous choice to arbitrate is disregarded in the interest of securing the impecunious party's right of access to justice.[55] However, not all courts have endorsed this limitation to party autonomy.[56] Some courts have ruled that the incapacity of a party to perform an arbitration agreement is not the same as an arbitration agreement being incapable of being performed.[57] This diverging case law shows, once again, the relativity of the limitations to party autonomy, which may differ across jurisdictions. One can make similar observations regarding other scenarios that may potentially render an arbitration agreement inoperative or incapable of being performed. Some courts have, for example, considered arbitration agreements to be incapable of being performed where the arbitration clause was not sufficiently clear or where it referred to a non-existent arbitral institution.[58] Pursuant to this approach, party autonomy is only protected to the extent that it is expressed clearly and precisely. Other courts have taken a more pro-arbitration approach and have even enforced arbitration agreements that referred to a non-existent arbitral institution.[59] The key consideration that guided these courts was the fact that the defective part of the arbitration agreement merely concerned the instrumentality through which arbitration should be effected and did not question the parties' general purpose to settle disputes by arbitration.[60]

agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs').

[55] *See* G. von Segesser and M. Grosz, 'Inoperability of Arbitration Agreements due to Lack of Funds? Revisiting Legal Aid in International Arbitration', *Kluwer Arbitration Blog* (17 January 2015), available at http://arbitrationblog.kluwerarbitration.com/2015/01/17/inoperability-of-arbitration-agreements-due-to-lack-of-funds-revisiting-legal-aid-in-international-arbitration/ (last accessed 27 January 2020).

[56] *See* UK Court of Appeal, *Paczy* v. *Haendler and Natermann GmbH*, 3 and 4 December 1980, *Lloyd's Law Reports*, 1 (1981), 302 (ruling that '[t]he incapacity of one party to [an arbitration] does not. . . render the agreement one which is incapable of performance'). *See also* High Court of Justice in Northern Ireland, *Trunk Flooring Ltd* v. *HSBC Asset Finance (UK) Ltd and Costa Rica SRL*, 8 January 2015, [2015] NIQB 23, WEA 9496 (endorsing the decision rendered in UK Court of Appeal, *Paczy* v. *Haendler and Natermann*, *Lloyd's Law Reports*, 1 (1981), 302). *See also* Paris Court of Appeal, judgment, 26 February 2013, Case no. 12/12953 (applying the principle of negative competence-competence also in a situation where the party Lola Fleurs invoked its impecuniosity).

[57] UK Court of Appeal, *Paczy* v. *Haendler and Natermann*, *Lloyd's Law Reports*, 1 (1981), 302.

[58] High Court of Guarat, India, *Swiss Singapore Overseas Enterprises Pvt Ltd* v. *M/African Trader*, 7 February 2005, Civil Application no. 23 of 2005; Swiss Supreme Court, judgment, 25 October 2010, Case no. 4A279/2010; Ninth Arbitrazh Court of Appeal, Russia, *ZAO UralEnergoGaz* v. *OOO ABB Electroengineering*, 24 June 2009, Case no. A40-27854/09-61-247.

[59] High Court of Hong Kong, *Lucky Goldstar International Limited* v. *Ng Moo Kee Engineering Limited*, 5 May 1993, A. J. van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XX (ICCA, 1995), 280. *See also* Berlin Court of Appeals, judgment, 15 October 1999, Case no. 27 Sch 17/99, A. J. van den Berg (ed.), *Yearbook Commercial Arbitration*, XXVI (ICCA, 2001), 328.

[60] *Contra*, *see* Tribunale di Padova, judgment, 11 January 2005, *Rivista di Diritto Internazionale Privato e Processuale*, 41 (2005), 791 (asserting jurisdiction given that the arbitral institution referred to was non-existent).

The above-mentioned ex ante control mechanisms operate differently across various jurisdictions. This is due to different notions of competence-competence.[61] The latter is a principle that allocates the responsibility for decisions on competence between state courts (from whom adjudicatory power is taken away) and arbitral tribunals (to whom adjudicatory power is conferred). Some jurisdictions merely acknowledge a so-called 'positive' dimension of competence-competence.[62] In these jurisdictions, arbitral tribunals are authorized to decide on their own competence,[63] Other jurisdictions take a different approach and also acknowledge a so-called 'negative' dimension of competence-competence, barring state courts from determining the jurisdiction of arbitrators as a mirroring effect of the positive competence-competence of arbitral tribunals at the pre-award stage.[64] In France, for example, courts merely assess (prior to the arbitral tribunal being constituted) whether an arbitration agreement is not manifestly void or inapplicable at the pre-award stage.[65] If it is not, arbitral tribunals are granted priority in making a full-fledged jurisdictional assessment which is then subject to ex post review.[66] Yet another approach prevails in the USA, where it is acknowledged that parties may

[61] *See*, for example, J. J. Barcelo III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective', *Vanderbilt Journal of Transnational Law*, 36 (2005), 1115 *et seq*.; M. Boucaron-Nardetto, *Le Principe Compétence-Compétence en Droit de l'Arbitrage* (Presses universitaires d'Aix-Marseille, 2013); Kröll, 'Party Autonomy and Competence-Competence' (2016), 165 *et seq*. *See* also, in this Compendium, S. Kröll and E. Keller, Chapter 26 – 'The Competence-Competence Principle's Positive Effect'; J. J. Barceló III, Chapter 27 – 'The Competence-Competence Principle's Negative Effect'.

[62] *See*, for example, s. 1032 German Code of Civil Procedure ('(1) Should proceedings be brought before a court regarding a matter that is subject to an arbitration agreement, the court is to dismiss the complaint as inadmissible provided the defendant has raised the corresponding objection prior to the hearing on the merits of the case commencing, unless the court determines the arbitration agreement to be null and void, invalid, or impossible to implement. (2) Until the arbitral tribunal has been formed, a petition may be filed with the courts to have it determine the admissibility or inadmissibility of arbitration proceedings. (3) Where proceedings are pending in the sense as defined by subjection (1) or (2), arbitration proceedings may be initiated or continued notwithstanding that fact, and an arbitration award may be handed down.').

[63] Barcelo III, 'Who Decides the Arbitrators' Jurisdiction?' (2005), 1124; *see also* J. A. E. Pottow *et al.*, 'A Presumptively Better Approach to Arbitrability', *Canadian Business Law Journal*, 53 (2013), 165, 183.

[64] *See* E. Gaillard and Y. Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators', in E. Gaillard and D. Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice* (Cameron May, 2008), 257; J. Graves, 'Court Litigation over Arbitration Agreements: Is it Time for a New Default Rule?', in D. Bray and H. L. Bray (eds.), *International Arbitration and the Courts* (Juris, 2015), 203, 204.

[65] Article 1448 French Code of Civil Procedure ('(1) When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. (2) A Court may not decline jurisdiction on its own motion'). It is worth pointing out that in a recent decision of 20 September 2020 (docket n. n° 18-19.241) the French Supreme Court carved out arbitration clauses in certain contracts with consumers from the scope of the negative competence-comptence principle referred to in the text.

[66] *See* F. De Ly and A. Sheppard, 'ILA Final Report on *Lis Pendens* and Arbitration', *Arbitration International*, 25 (2009), 3, 22 ('[T]he arbitral tribunal should be the first to make a determination as to jurisdiction, and national courts should defer to the tribunal, while retaining a right of review in any setting-aside application'); *see also* G. A. Bermann, 'Forum Shopping at the "Gateway" to

delegate binding competence-competence to the arbitral tribunal. However, this requires 'clear and unmistakable evidence' to do so.[67] 'Once an award on jurisdiction or a final award is issued, the US courts will merely conduct a deferential review of procedural arbitrability issues'.[68] In conclusion, the limits to party autonomy at the pre-award stage also depend on the notion of competence-competence.

3.2.2 Ex Post Control Mechanisms

At the post-award stage, state courts ensure the implementation of limitations to party autonomy in set-aside proceedings or proceedings for recognition and enforcement. Their scope of review is slightly broader than at the pre-award stage as it may also cover certain procedural flaws and limitations to party autonomy in the interest of the public at large. This is uncontroversial and directly follows from the applicable framework, which consists of arbitration laws and international conventions such as the New York Convention. What is less clear is the question of whether parties are entitled to modify the scope of review at the post-award stage autonomously. Are parties allowed to give up the limitations to party autonomy that were created in their interest? May they, vice versa, expand the scope of review so as to have more protection? As will be shown, different legal systems answer these questions differently.

3.2.2.1 Waiver of the Review at the Post-award Stage

As regards limitations of the right to take recourse against an arbitral award, a broad panoply of approaches can be identified.[69]

On one end of the spectrum, a number of jurisdictions acknowledge the parties' self-imposed limitations on the scope of review at the post-award stage. Under French law, for example, parties may at any time expressly declare a full waiver of the right to initiate set-aside proceedings.[70] De facto, this means that parties are

International Commercial Arbitration', in F. Ferrari (ed.), *Forum Shopping in the International Commercial Arbitration Context* (Sellier, 2013), 69, 86 *et seq.*

[67] US Supreme Court, *Karen Howsam* v. *Dean Witter Reynolds Inc.*, 10 December 2002, 537 U.S. 79, 123 S. Ct. 588 ('The question whether the parties have submitted a particular dispute to arbitration is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise"...'); *see also* US Supreme Court, *First Options of Chicago, Inc.* v. *Kaplan*, 22 May 1995, 514 U.S. 938, 943.

[68] O. Susler, 'The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative Effect of Competence', *Macquarie Journal of Business Law*, 6 (2009), 119, 139.

[69] *See* M. Scherer, 'The Fate of Parties' Agreements on Judicial Review of Awards: A Comparative and Normative Analysis of Party-Autonomy at the Post-Award Stage', *Arbitration International*, 32 (2016), 437; M. Scherer and L. Silberman, 'Limits to Party Autonomy at the Post-Award Stage', in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration* (Juris, 2016), 441, 443 *et seq.*

[70] Article 1522 Code Civil ('By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside'). Only full waivers are enforceable under French law and parties are not allowed to declare a partial waiver of review; *see* Scherer and Silberman, 'Limits to Party Autonomy at the Post-Award Stage' (2016), 449, with reference to E. Gaillard and P. de Lapasse, 'Commentaires Analytique du Décret du 13 Janvier 2011 Portant Réforme du Droit Francais de l' Arbitrage', *Paris Journal of International Arbitration* (2011), 263.

entitled to give up the protections offered in their interest under French law. The situation is similar in jurisdictions like Belgium, Peru, Russia, Sweden, Switzerland, and Tunisia. Yet, commentators have correctly observed that 'the conditions according to which waivers of the right to seek a set aside are possible and enforceable, and the effects thereof, vary across jurisdictions'.[71]

On the other end of the spectrum, some jurisdictions reject the possibility of a full advanced waiver of recourse against an arbitral award.[72] For example, the Supreme Court of India ruled that parties may not exclude any recourse against an arbitral award at all.[73] Similarly, jurisdictions like Brazil, Egypt, Germany, Panama, and the United Arab Emirates do not enforce full waiver agreements made at the pre-award stage.[74] This attitude reflects a more paternalistic approach vis-à-vis the parties, who are precluded from renouncing the protection granted to them.

Between these two extreme approaches, one finds various intermediary positions.[75] Some jurisdictions allow parties to waive the grounds for set aside contained in Article 34(2)(a) of the UNCITRAL Model Law, but prevent them from waiving the other grounds for set aside geared at protecting the public at large.[76] Others only allow waivers from parties that have no link with the place of arbitration.[77] According to yet another approach, waivers are only allowed to be declared *a posteriori* and not in advance.[78]

Many differences can also be discerned in respect of the answer to the question of whether the parties are allowed to restrict, rather than fully waive, the grounds of review.[79] The conclusion to be drawn is that states show different attitudes towards party autonomy aimed at affecting post-award review.

[71] Scherer, 'The Fate of Parties' Agreements on Judicial Review of Awards' (2016), 440 (footnotes omitted).

[72] *See* Scherer and Silberman, 'Limits to Party Autonomy at the Post-Award Stage' (2016), 448.

[73] Supreme Court of India, *Shin Satellite Public Co. Ltd* v. *Jain Studios Ltd*, 31 January 2006, [2006] 2 SCC 628.

[74] *See* Scherer, 'The Fate of Parties' Agreements on Judicial Review of Awards' (2016), 442 (footnotes omitted).

[75] For a more detailed overview, *see* Scherer and Silberman, 'Limits to Party Autonomy at the Post-Award Stage' (2016), 446 *et seq*.

[76] Ontario Court of Justice, *Noble China Inc.* v. *Lei Kat Cheong*, 13 November 1998, [1998] CanLII 147908 (ON SC), published in (1998) 42 O.R. (3d) 69; Wellington Court of Appeal, New Zealand, *Methanex Motunui Ltd* v. *Spellman*, 17 June 2004, *New Zealand Law Review*, 3 (2004), 454.

[77] Tunisian Supreme Court, judgment, 18 January 2007, Case no. 4674, quoted in *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012), 135. *See also* Art. 192(2) Swiss Private International Law Act ('Where none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may, by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph 2').

[78] This approach is defended by some scholars under German law. *See* J. Münch, in T. Rauscher and W. Krüger (eds.), *Münchener Kommentar zur Zivilprozessordnung*, 5th ed., vol. III (C.H. Beck, 2017), § 1059, 662; W. Voit, in H.-J. Musielak and W. Voit (eds.), *Zivilprozessordnung*, 15th ed. (C.H. Beck, 2018), § 1059, para. 39. *See*, however, Frankfurt Court of Appeals, judgment, 21 December 1983, *Neue Juristische Wochenschrift*, 37 (1984), 2768 (acknowledging the possibility of a waiver in advance).

[79] For a more detailed overview, *see* Scherer and Silberman, 'Limits to Party Autonomy at the Post-Award Stage' (2016), 449 *et seq*.

3.2.2.2 Expansions of the Scope of Review at the Post-award Stage

As regards the expansion of the scope of review at the post-award stage, similar differences can be observed. Some legal systems allow for such expansion by the parties, while others do not.[80] In a decision of 2007, for example, which led to the reversal of previous case law,[81] the German Supreme Court enforced an arbitration agreement allowing any party unsatisfied with the award to bring a claim in state court within one month from the award being rendered.[82] In support of its decision, the German Supreme Court held that '[b]ecause the binding nature of the awards is based on the parties' consent, the parties are also free to restrict the awards' binding nature and tie it to certain conditions', including 'an expanded review of the award by national courts'.[83]

Other courts have taken different positions.[84] In *Hall Street Associates* v. *Mattel*, for example, the US Supreme Court found that parties were not at liberty to add to the grounds for vacatur of domestic arbitral awards[85] under the Federal Arbitration Act.[86] In support of its decision, the US Supreme Court referred to a systemic necessity of maintaining arbitration as a system with a limited review when it referred to a 'national policy favouring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway'.[87] It indicated that the parties do not have the discretion to alter the legal order in which arbitral proceedings take place. In doing so, the US Supreme

[80] *See* Scherer, 'The Fate of Parties' Agreements on Judicial Review of Awards' (2016), 444 *et seq*.

[81] For pre-2007 case law, *see*, for example, German Supreme Court, judgment, 3 November 1983, *Zeitschrift für Wirtschafts- und Bankrecht Wertpapiermitteilungen*, 38 (1984), 380.

[82] German Supreme Court, judgment, 1 March 2007, *ASA Bulletin*, 25 (2007), 810; this decision has been criticized; *see*, for example, R. Wolff, 'Party Autonomy to Agree on a Non-Final Arbitration', *ASA Bulletin*, 26 (2008), 626–40.

[83] Scherer, 'The Fate of Parties' Agreements on Judicial Review of Awards' (2016), 446.

[84] *See* Supreme Court of India, *M/S Centrotrade Minerals & Metal. Inc.* v. *Hindustan Copper Ltd*, 9 May 2006, [2006] INSC 293; Wellington Court of Appeal, New Zealand, *Methanex Motunui* v. *Spellman*, *New Zealand Law Review*, 3 (2004), 454, para. 105; French Supreme Court, judgment, 6 April 1994, *Revue de l'arbitrage* (1994), 264. *See also* High Court of England and Wales (Commercial Court), *Guangzhou Dockyards Co.* v. *ENE Aegiali I*, 5 November 2010, [2010] EWHC 2826 (Comm).

[85] Although *Hall Street* concerns a domestic award rather than a New York Convention award, it has been argued that *Hall Street* also applies to Convention cases; *see* Scherer and Silberman, 'Limits to Party Autonomy at the Post-Award Stage' (2016), 453 *et seq*.; T. Tyler and A. A. Parasharami, 'Finality over Choice: *Hall Street Associates, L.L.C.* v. *Mattel, Inc.* (U.S. Supreme Court)', *Journal of International Arbitration*, 25 (2008), 613, 614 *et seq*.

[86] US Supreme Court, *Hall Street Associates* v. *Mattel*, 552 U.S. 576, 128 S. Ct. 1396; for comments on *Hall Street*, *see*, for example, C. Drahozal, 'Contracting Around *Hall Street*', *Lewis & Clark Law Review*, 14 (2010), 905; S. A. Leisure, 'Arbitration After *Hall Street* v. *Mattel*: What Happens Next', *University of Arkansas at Little Rock Law Review*, 31 (2009), 273; for an assessment of the pre-*Hall Street* situation, *see*, for example, L. Goldman, 'Contractually Expanded Review of Arbitration Awards', *Harvard Negotiation Law Review*, 8 (2003), 171; D. C. Hulea, 'Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective', *Brooklyn Journal of International Law*, 29 (2003), 313; C. Murray, 'Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the Federal Arbitration Act', *St. John's Law Review*, 76 (2002), 663.

[87] US Supreme Court, *Hall Street Associates* v. *Mattel*, 552 U.S. 576, 128 S. Ct. 1396.

Court referred to limitations to party autonomy in the interest of the public at large, which shall be examined in the following section.

3.3 Limitations of Party Autonomy in the Interest of the Public at Large

The limitations to party autonomy in the interest of the public at large concern the public element of international arbitration.[88] Arbitration can only operate in a legal system that recognizes international arbitration proceedings as producing legal effects. Parties may not freely dispose of the legal framework provided for by this legal system, which sets up certain requirements in the interest of the public at large. From a normative perspective, this is supported by the fact that certain grounds for denying recognition and enforcement are examined by state courts without corresponding submissions by the parties under Article V(2) of the New York Convention. Specifically, state courts are entitled to examine on their own initiative whether the form of dispute resolution agreed upon by the parties qualifies as arbitration (section 3.3.1), whether the subject matter is arbitrable (section 3.3.2), and whether recognition and enforcement would be contrary to public policy (section 3.3.3).

3.3.1 The Notion of Arbitration

The very notion of what constitutes international arbitration does not lie in the discretion of the parties. Instead, it is up to the applicable law (including applicable international conventions) to define which form of dispute resolution qualifies as arbitration.[89]

A decision of the German Supreme Court of 2004 illustrates the point to be made.[90] A member of a dog breeders association had initiated proceedings before an 'arbitral tribunal' constituted on the basis of the bylaws of said association. Having lost the proceedings, the applicant initiated set-aside proceedings against the 'arbitral award' that had been rendered by the 'arbitral tribunal' of the dog breeders association. The Supreme Court held that the dispute resolution body did not qualify as a genuine arbitral tribunal. According to the court's reasoning, this followed from the fact that the tribunal was set up to resolve internal administrative disputes between members of the association's organs. The bylaws of the association did neither ensure a fair and impartial procedure nor did they require that the decision be based on law or principles of equity. Moreover, the parties did not have an equal opportunity to participate in the constitution of the arbitral tribunal. For these reasons, the court held that the decision of what did not qualify as arbitral tribunal could not be considered an arbitral award. This shows that a dispute resolution

[88] D. J. Khambata, 'Tensions Between Party Autonomy and Diversity', in A. J. van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* (Kluwer, 2015), 612, 616 *et seq*.

[89] The goal to protect the parties and the public at large overlaps in this respect.

[90] *See* German Supreme Court, judgment, 27 May 2004, *Zeitschrift für Schiedsverfahren*, 2 (2004), 205.

mechanism must be capable of ensuring a minimum degree of due process in order to be recognized as arbitration.

Similar scenarios have also arisen at the pre-award stage. In the matter of *Cross Brown Co.* v. *Nelson*, the Supreme Court of New York had to examine the validity of a clause in an employment contract pursuant to which disputes should be settled by members of the board of directors of the employer.[91] The court found the agreement to be at odds with the fundamental principle that no one should be the judge in his own cause. According to the court, the agreement reached by the parties constituted 'not a contract to arbitrate, but an engagement to capitulate'.[92] The court reached this conclusion by examining not the form, but the substance of the agreement reached by the parties.[93]

In this line of cases, legal systems do not want to give their legal blessing to agreements or arbitral awards that breach fundamental notions of justice. The Supreme Court of Appeals of West Virginia attempted to capture this problem with the help of a hypothetical modelled after an Aesopian fable:[94]

> Let us assume for a minute that for some reason all the rabbits and all the foxes decided to enter into a contract for mutual security, one provision of which were [*sic*] that any disputes arising out of the contract would be arbitrated by a panel of foxes. Somehow that shocks our consciences, and it doesn't help the rabbits very much either.[95]

What was referred to by the court as a potentially shocking scenario marks the public element at stake. This is not to suggest that every flaw of an arbitration agreement renders the latter void. Many jurisdictions allow to sever the defective provision and uphold the remainder of the arbitration agreement.[96] This is an

[91] Appellate Division of the Supreme Court of New York, First Department, *Cross & Brown Co.* v. *Nelson*, 29 October 1957, 4 A.D.2d 501, 502, 167 N.Y.S.2d 573, 575–6 ('It is further agreed between the respective parties hereto that any dispute or difference as to any matter in this contract contained shall be settled by submitting the same to arbitration to the Board of Directors of the party of the first part [the employer], whose decision shall be final'). On these constellations, *see also* G. A. Bermann, 'Limits to Party Autonomy in the Composition of the Arbitral Panel', in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration* (Juris, 2016), 83 *et seq*.

[92] Appellate Division of the Supreme Court of New York, First Department, *Cross & Brown* v. *Nelson*, 4 A.D.2d 501, 502, 167 N.Y.S.2d 573, 575–6 ('We brush aside any metaphysical subtleties about corporate personality and view the agreement as one in which one of the parties is named as arbitrator. Unless we close our eyes to realities, the agreement here becomes, not a contract to arbitrate, but an engagement to capitulate').

[93] Appellate Division of the Supreme Court of New York, First Department, *Cross & Brown Co.* v. *Nelson*, 4 A.D.2d 501, 502, 167 N.Y.S.2d 573, 575–6 ('Apart from outraging public policy, such an agreement is illusory; for while in form it provides for arbitration, in substance it yields the power to an adverse party to decide disputes under the contract').

[94] Supreme Court of Appeals of West Virginia, *Board of Education of Berkeley County* v. *W. Harley Miller, Inc*., 5 July 1977, 160 W. Va. 473. The court addressed this issue under the doctrine of unconscionability.

[95] Supreme Court of Appeals of West Virginia, *Board of Education of Berkeley County* v. *W. Harley Miller*, 160 W. Va. 473, 478.

[96] *See* Bermann, 'Limits to Party Autonomy in the Composition of the Arbitral Panel' (2016), 117 *et seq*.

expression of a pro-arbitration policy, which, however, also acknowledges the limitations to party autonomy. Yet, the fact remains that some threshold criteria must be fulfilled for a given dispute resolution method to amount to arbitration, and these criteria are not subject to party autonomy.

3.3.2 Arbitrability

A further limitation to party autonomy in the interest of the public at large is arbitrability.[97] There are various fields in which most legislators have reserved for the judicial power a monopoly of the administration of justice in the public interest.[98] Examples include criminal matters,[99] status-related and capacity-related disputes,[100] matters involving family law,[101] insolvency laws or the grant of intellectual property rights.

Generally speaking, however, arbitration laws have become increasingly arbitration friendly in many parts of the world. The initial resistance towards arbitration that could be discerned in various jurisdictions in the past has given way to an

[97] As mentioned earlier at p. 54 *et seq.*, some restrictions to arbitrability may also be geared at protecting the parties.

[98] *See* generally Mistelis and Brekoulakis (eds.), *Arbitrability* (2009); A. S. Rau, 'Arbitrating "Arbitrability"', *World Arbitration and Mediation Review*, 7 (2013), 421; A. Belohlávek, 'The Law Applicable to the Arbitration Agreement and the Arbitrability of a Dispute', *Yearbook on International Arbitration*, 3 (2013), 27; M. B. Devine, 'The Arbitrability of US Antitrust and EU Competition Law Matters (With Special Reference to Lawyer-Client Privilege)', *Yearbook on International Arbitration*, 2 (2012), 209; I. Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration', *Australian Yearbook of International Law*, 27 (2008), 193; P. Bernardini, 'The Problem of Arbitrability in General', in E. Gaillard and D. Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008), 503; B. Hanotiau and O. Caprasse, 'Arbitrability, Due Process and Public Policy Under Article V of the New York Convention', *Journal of International Arbitration*, 25 (2008), 721; C. Petsimeris, 'The Scope of the Doctrine of Arbitrability and the Law Under Which it is Determined in the Context of International Commercial Arbitration', *Revue Hellenique de Droit International*, 58 (2005), 435; P. M. Baron and S. Liniger, 'A Second Look at Arbitrability – Approaches to Arbitration in the United States, Switzerland and Germany', *Arbitration International*, 19 (2003), 27; H. Raeschke-Kessler, 'Some Developments on Arbitrability and Related Issues', in A. J. van den Berg (ed.), *International Arbitration and National Courts – The Never Ending Story* (Kluwer, 2001), 44; A. Kirry, 'Arbitrability – Current Trends in Europe', *Arbitration International*, 12 (1996), 373; H. Arfazadeh, 'Arbitrability Under the New York Convention – The Lex Fori Revisited', *Arbitration International*, 17 (2001), 73.

[99] *See*, however, Bantekas, 'The Foundations of Arbitrability' (2008), 197 *et seq.* ('although the criminal legislation of some Muslim nations permits under their public policy rules the privatisation of particular aspects of criminal law through the payment of blood money, it does not, on the other hand, deem as arbitrable the perpetration of other offences, thus removing them from the public domain').

[100] *See*, for example, J. Mante, 'Arbitrability and Public Policy: An African Perspective' (2016), *Arbitration International*, 33 (2017), 1, 4, 11 *et seq.*

[101] But *see* Mante, 'Arbitrability and Public Policy' (2016), 12 *et seq.*, referring to the arbitration statutes of some African countries, which do allow for matters relating to marriage and divorce to be settled by arbitration.

acceptance of arbitration as a form of dispute resolution that offers protections comparable to that offered by state courts.[102] Legislators have also acknowledged that the private nature of arbitration does not necessarily put the implementation of public policy at risk. Accordingly, the arbitrability of disputes is not necessarily ruled out by the fact that the claims may raise questions of public policy.[103] The US Supreme Court confirmed this in the famous decision *Mitsubishi* v. *Soler Chrysler-Plymouth*.[104] It found antitrust claims to be arbitrable even though there was a pervasive public interest to enforce antitrust laws by way of a judicial process. The court reached this decision in view of the fact that state courts have the opportunity to examine the compatibility of an arbitral award with public policy at the set aside or enforcement stage. This means that there no longer needs to be a presumption that arbitral tribunals would fail to take into account public policy considerations, which is why they must not *a priori* be prevented from deciding matters that have public policy implications.[105]

The *Nordsee* decision of the Court of Justice of the European Union (CJEU) reflects a similar approach.[106] In this decision, the court found that EU law must be observed throughout the entire European Union. However, the court held that this does not rule out the arbitrability of disputes involving matters of EU law. Rather, it may suffice if the state courts, which exercise supervisory or assistance functions with respect to the arbitration proceedings, monitor the enforcement of EU law.[107]

[102] Bernardini, 'The Problem of Arbitrability' (2008), 509 (stating that the initial resistance towards arbitration has given way to an acceptance of arbitration as a form of dispute resolution that offers protections comparable to that offered by state courts); German Supreme Court, judgment, 19 July 2004, *Neue Zeitschrift für Gesellschaftsrecht*, 7 (2004), 905 ('Therefore, the legislator of the Redefining Act of Arbitral Proceedings has considered arbitration as a form of legal protection whose protection is comparable to that of State courts, so that it should only be excluded if a State has reserved itself a monopoly to decide disputes in the interest of legal rights particularly worthy of protection'). (Translation by the authors.) On the approaches towards public policy, *see also* F. Ghodoosi, *International Commercial Law: International Dispute Resolution and the Public Policy Exception* (Routledge, 2016), 61.

[103] Ragno, 'Inarbitrability' (2016), 130.

[104] US Supreme Court, *Mitsubishi* v. *Soler Chrysler-Plymouth*, 2 July 1985, 473 U.S. 614 ('Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the anti-trust laws has been addressed').

[105] Ragno, 'Inarbitrability' (2016), 145; *contra* High Court of England and Wales (Queen's Bench Division), *Accentuate Ltd* v. *Asigra Inc.*, 30 October 2009, [2009] EWHC 2655; Munich Court of Appeals, judgment, 17 May 2006, *Praxis des Internationalen Privat- und Verfahrensrechts* (2007), 322.

[106] CJEU, *Nordsee Deutsche Hochseefischerei GmbH* v. *Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, 23 March 1982, Case no. C-102/81.

[107] CJEU, *Nordsee Deutsche Hochseefischerei* v. *Reederei Mond Hochseefischerei Nordstern and Reederei Friedrich Busse Hochseefischerei Nordstern*, Case no. C-102/81, para. 14 ('As the Court has confirmed in its judgment of 6 October 1981 *Broekmeulen*, Case 246/80 [1981] ECR 2311, Community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it. In that context attention must be drawn to the fact that if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them

This was subsequently confirmed in the *Eco Swiss* decision of the CJEU, in which the CJEU held that a breach of certain mandatory provisions of EU competition law might amount to a breach of public policy.[108]

3.3.3 *Public Policy*

Unlike the law on subject matter arbitrability, which categorically exempts certain matters from arbitration,[109] the public policy analysis has a different effect upon arbitration proceedings. In effect, it merely subjects the outcome of the arbitral proceedings to a specific form of ex post control. The present paper will not enter into a thorough analysis of the concrete boundaries of this control, which have been discussed in detail elsewhere.[110] Instead, it will examine to what extent public policy considerations create a limitation to party autonomy.

In this respect, it is important to note that the gist of public policy analysis is geared at protecting the interests of the public at large[111] – these interests may refer to social and economic life, basic notions of morality and justice or fundamental principles of law.[112] Public policy is not a vehicle to positively implement all the

either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award – which may be more or less extensive depending on the circumstances – and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.').

[108] CJEU, *Eco Swiss China Time Ltd* v. *Benetton International NV*, 1 June 1999, Case no. C-126/97.

[109] D. Quinke, in Wolff, *New York Convention* (2019), Art. V, 418.

[110] *See*, for example, Born, *International Commercial Arbitration* (2021), 4000 *et seq.*; Ghodoosi, *Dispute Resolution and Public Policy* (2016); K.-H. Böckstiegel, 'Public Policy and Arbitrability', in P. Sanders *et al.* (eds.), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer, 1986), 177, 178; Wolff, in Wolff, *New York Convention* (2019), Art. V, 480 *et seq.*

[111] *See* J. Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013), 105 ('Some such limitations [to the freedom to establish private justice] are matters of fundamental law reflecting the basic values of a society – such as the right to a fair hearing, distaste for deceit or oppression, and the desire to eradicate abhorrent conduct, for example trafficking in drugs or slavery.').

[112] Ghodoosi, *Dispute Resolution and Public Policy* (2016), 63 *et seq*. *See also* US Court of Appeals, Second Circuit, *Parsons & Whittemore Overseas* v. *Société Générale de l'Industrie du Papier (RAKTA)*, 23 December 1974, 508 F.2d 969 ('Enforcement of foreign arbitral awards may be denied on [the basis of public policy] only where enforcement would violate the forum state's most basic notions of morality and justice.'); Federal Court, Australia, *Traxys Europe S. A.* v. *Balaji Coke Industry Pvt Ltd*, 23 March 2012, [2012] FCA 276 ('[I]t is only those aspects of public policy that go to the fundamental, core questions of morality and justice in [the] jurisdiction [where enforcement is sought] which enliven this particular statutory exception to enforcement'); Court of Final Appeal, Hong Kong, *Hebei Import & Export Corp.* v. *Polytek Engineering Co. Ltd*, 9 February 1999, [1999] 2 HKC 205 (acknowledging a breach of public policy if an award is 'so fundamentally offensive to [the enforcement jurisdiction]'s notions of justice that, despite its being party to the Convention, it cannot reasonably be expected to overlook the objection'); Swiss Supreme Court, judgment, 10 October 2011, Case no. 5A_427/2011 (acknowledging a breach of public policy 'if [the arbitral award] disregards essential and widely recognized values which, according to the conceptions prevailing in Switzerland, should form the basis of any legal order'); Paris Court of Appeals, *Agence pour la sécurité e la navigation*

interests of the public at large.[113] Instead, its focus is to prevent negative externalities for the public at large.[114] If, for example, an arbitral tribunal fails to apply rules of law that would be mandatory in court proceedings, this does not automatically constitute a breach of public policy.[115] This reflects the fact that an arbitral tribunal is a private actor whose misapplication of the law can generally be tolerated by legal systems. The assessment is different if the outcome breaches fundamental notions of justice – for example, because the dispositive of the award orders an act prohibited in the respective legal system. In the latter case, legal systems might not wish to recognize the award as producing legal effects. Public policy hence operates as a 'safety valve'.[116]

A further structural feature of the public policy analysis is that the notion of public policy may differ across various jurisdictions. While there have been attempts to define internationalized standards of public policy – leading to what has been defined as 'transnational public policy',[117] this does not adequately reflect the fact that Article V (2) of the New York Convention refers to the (international) public policy of the specific state in which enforcement is sought.[118] At its core, public

aérienne en Afrique et à Madagascar v. *M. N'Doye Issakha*, 16 October 1997, Case no. 96/84842 (defining public policy as 'the body of rules and values whose violation the French legal order cannot tolerate even in situations of an international character'), available at http://newyorkconvention1958.org/index.php?lvl=notice_display&id=149 (last accessed 27 January 2019).

[113] *See also* G. Cordero-Moss, 'Limitations on Party Autonomy in International Commercial Arbitration', *Recueil des Cours*, 372 (2014), 140, 175 *et seq.* (stating that, in the international context, '*ordre public* is negative and limited to those principles that are fundamental and that the judge cannot disregard even if the disputed matter has an international character' as opposed to 'ensuring the application of the legal system's overriding mandatory rules' being the function of a broader *ordre public*).

[114] M. Renner, 'Constitutionalization of International Commercial Arbitration', in W. Mattli and T. Dietz (eds.), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014), 118, 139.

[115] *See* D. Di Pietro, 'Forum Shopping and Enforcement of Foreign Arbitral Awards: Notes on Public Policy', in F. Ferrari (ed.), *Forum Shopping in the International Commercial Arbitration Context* (Sellier, 2013), 297, 301; E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer, 1999), 995.

[116] M. A. Garza, 'When Is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy', *Fordham International Law Journal*, 38 (2015), 1587, 1606; F. D. Strebel, 'The Enforcement of Foreign Judgments and Foreign Public Law', *Loyola of Los Angeles International and Comparative Law Review*, 21 (1999), 55, 66; K. J. Tolson, 'Punitive Damage Awards in International Arbitration: Does the Safety Valve of Public Policy Render Them Unenforceable in Foreign States', *Loyola of Los Angeles Law Review*, 20 (1987), 455; Wolff, in Wolff, *New York Convention* (2019), Art. V, 490.

[117] *See* F. Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy', *Arbitration International*, 20 (2004), 333; A. Redfern, 'Comments on Commercial Arbitration and Transnational Public Policy', in A. J. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (Kluwer, 2007), 871.

[118] *See* Di Pietro, 'Forum Shopping and Enforcement of Foreign Arbitral Awards: Notes on Public Policy' (2013), 300 ('[I]n identifying what constitutes public policy for the purpose of Article V(2)(b) of the New York Convention, reference should be made to the international public policy of the domestic law of the country where enforcement is sought. In other words, the core provisions of domestic public policy, to the exclusion of the provisions having a more domestic and less compelling character').

policy is a national concept. The New York Convention merely sets outer limits as to what states may define as public policy.[119] The conclusion to be drawn is hence that public policy imposes a limitation to party autonomy in the interest of the public at large. However, this interest is relative and may differ across jurisdictions.[120]

3.4 Limitations to Party Autonomy in the Interest of the Arbitrators

Leaving aside the limitations to party autonomy in the interest of the parties and the public at large, one can also discern limitations to party autonomy put in place to protect the interest of the arbitrators – even though the latter may only be legitimate if they are, in turn, linked to the larger goal of maintaining arbitration as a viable means of dispute resolution.[121] The limitations to party autonomy that exist in the relationship with arbitrators consist in the fact that parties neither have unlimited control over the delegation of adjudicatory powers to arbitrators (section 3.4.1) nor over the exercise of adjudicatory power through arbitrators (section 3.4.2).

3.4.1 Limited Control over the Delegation of Adjudicatory Powers

As regards the parties' control over the delegation of adjudicatory powers to arbitrators, the focus of textbooks is traditionally on the arbitration agreement and, thus, party autonomy being a foundation stone of arbitration.[122] However, this should not lead to the conclusion that every dimension of the adjudicatory powers exercised by arbitrators can be linked to an explicit articulation of the parties to delegate such powers.

To begin with, it must be recalled that the delegation of adjudicatory powers in the arbitration agreement would have no effect but for the existence of a legal system that recognizes the arbitration agreement as having effect.[123] The role of this legal

[119] Wolff, in Wolff, *New York Convention* (2019), Art. V, 502 *et seq.*, arguing that Art. V(2)(b) New York Convention prohibits a definition of national public policy in a way that entirely devalues the New York Convention or circumvents other provisions under the New York Convention; *see also* Di Pietro, 'Forum Shopping and Enforcement of Foreign Arbitral Awards: Notes on Public Policy' (2013), 301.

[120] For example, courts across different jurisdictions take different approaches as to whether the recognition and enforcement of an arbitral award that orders punitive damages would breach public policy. *See* M. Petsche, 'Punitive Damages in International Commercial Arbitration: Much Ado about Nothing?', *Journal of International Arbitration*, 29 (2013), 89.

[121] *See also* D. P. Fernández Arroyo, 'Arbitrators' Procedural Powers. The Last Frontier of Party Autonomy?', in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration* (Juris, 2016), 199; M. de Boisseson, 'New Tensions Between Arbitrators and Parties in the Conduct of the Arbitral Procedure', *Revista Brasileira de Arbitragem*, 4 (2007), 68; M. Pryles, 'Limits to Party Autonomy in Arbitral Procedure', *Journal of International Arbitration*, 24 (2007), 327; J. D. M. Lew, 'The Tribunal's Rights and Duties: Why They Should Be More Involved in the Arbitral Process', in *Dossiers of the ICC Institute of World Business Law: Players' Interaction in International Arbitration* (ICC, 2012), 47.

[122] *See*, for example, N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015), 71 *et seq.*

[123] *See* UK House of Lords, *Coppée Levalin NV* v. *Ken-Ren Fertilisers and Chemicals*, 5 May 1994, *Lloyd's Law Reports*, 2 (1994), 109 (referring to arbitration as a consensual dispute resolution

system is not limited to giving a blessing to the delegation of adjudicatory powers as articulated in the arbitration agreement. In some instances, this legal system is the exclusive source of certain adjudicatory powers exercised by the arbitrators. Thus, legal systems typically recognize that arbitral tribunals are entitled to decide on their own jurisdiction even in situations where the arbitration agreement turns out to be invalid. This follows from the above-mentioned principle of competence-competence pursuant to which arbitral tribunals enjoy the adjudicatory authority to decide on the jurisdiction also in situations in which one of the parties validly contests the arbitral tribunal's jurisdiction.[124] In situations in which one of the parties validly objects to the arbitral tribunal's jurisdiction on the grounds that there is no valid arbitration agreement, the principle of competence-competence is the only source of the arbitrator's adjudicatory powers to decide on their jurisdiction.[125] Hence, it is not the parties' autonomous conferral of jurisdiction to an arbitral tribunal that forms the basis of the arbitral tribunal's jurisdiction in these situations.

Apart from the special situation of jurisdictional decisions based on the principle of competence-competence, arbitral tribunals exercise a number of powers not explicitly articulated in the arbitration agreement. Most arbitration agreements are extremely short and do not address in detail which powers shall be exercised by arbitrators.[126] If at all, they do so indirectly by referring to a set of arbitration rules or a place of arbitration, which, in turn, triggers the application of specific arbitration law. These arbitration rules or the applicable arbitration law may expressly or impliedly provide for adjudicatory powers of arbitrators.[127] Very often, they contain broad provisions giving arbitrators the discretion to conduct the proceedings as they deem appropriate.[128] Beyond this, it is acknowledged that certain powers are inherent in the exercise of any adjudicatory function.[129] According to the Iran-United States Claims Tribunal, inherent powers include 'those powers that are not explicitly

process emancipated from the court system but nevertheless requires support from the courts: 'On the one hand, the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of . . . a municipal court. On the other side there is the plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.').

124 *See* above at p. 57 *et seq*.

125 *See also* Kröll, 'Party Autonomy and Competence-Competence' (2016), 165.

126 The ICC model arbitration clause, for example, reads: 'All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.'

127 On the powers of arbitrators, *see also* P. A. Karrer, 'Freedom of an Arbitral Tribunal to Conduct Proceedings', *ICC International Court of Arbitration Bulletin*, 10 (1999), 14; E. A. Schwartz, 'The Rights and Duties of ICC Arbitrators', *ICC International Court of Arbitration Bulletin Special Supplement 1995: The Status of the Arbitrator* (1995), 67.

128 *See*, for example, Arts. 19, 22 ICC Rules of Arbitration; Art. 17 UNCITRAL Arbitration Rules (2010); Art. 19 UNCITRAL Model Law on International Commercial Arbitration.

129 International Law Association, 'Report for the Biennial Conference in Washington D.C.' (2014), available at www.ila-hq.org/en/committees/index.cfm/cid/1034 (last accessed 27 January 2020). *See also* F. Ferrari and F. Rosenfeld (eds.), *Inherent Powers of Arbitrators* (Juris, 2018).

granted to the tribunal but must be seen as a necessary consequence of the party's fundamental intent to create an institution with judicial nature'.[130] Various decisions may be taken on the basis of these inherent powers. Examples from case law include decisions on the disclosure of third-party funders,[131] on measures to maintain the integrity of the proceedings[132] or the reconsideration of decisions.[133] In all these situations, arbitral tribunals exercise powers that were not explicitly granted to them by the parties. Certainly, parties may limit some of these powers by an explicit agreement. However, this 'negative consensus' not to grant certain powers to an arbitrator will often be difficult to achieve after a dispute has arisen as the parties' mutual interests typically differ significantly at that time. This shift from positive to negative consensus constitutes a limitation to party autonomy.

The parties' control over the delegation of adjudicatory authority to arbitrators is also limited by the simple fact that arbitrators only offer their services under certain conditions. In ad hoc arbitration proceedings, these conditions are often

[130] Iran-US Claims Tribunal, *Islamic Republic of Iran* v. *United States of America*, 1 July 2011, IUSCT Cases nos. A3, A8, A9, A14 and B61, Decision no. DEC 134-A3/A8/A9/A14/B61-FT, para. 59 (quoting D. D. Caron *et al.*, *The UNCITRAL Arbitration Rules – A Commentary* (Oxford University Press, 2006), 915 (internal quotation marks omitted)).

[131] ICSID Tribunal, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti.* v. *Turkmenistan*, Procedural Order no. 3, 12 June 2015, ICSID case no. ARB/12/6, para. 6 ('As stated at § 9 of Procedural Order No. 2 the Tribunal considers that it has inherent powers to make orders of the nature requested [i.e., to order the disclosure of third party funding] where necessary to preserve the rights of the parties and the integrity of the process').

[132] ICSID Tribunal, *ConocoPhilipps Petrozuata B.V., ConocoPhilipps Hamaca B.V. and ConocoPhillips Gulf of Paria B.V.* v. *Bolivarian Republic of Venezuela*, Decision on Respondent's Request for Reconsideration, Dissenting Opinion of Georges Abi Saab, 10 March 2014, ICSID Case no. ARB/07/30, para. 56 ('Thus, inherent jurisdiction accrues to any body or organ by the mere fact of it being possessed of the adjudicative function . . . It is precisely in fulfilling this task and discharging its duty of safeguarding the credibility and integrity of its adjudicative function, that lies the power of a tribunal to reconsider a prior decision, whether interlocutory or not, whether it is considered final or not, and whether such a reconsideration is provided for in its statute or not, i.e., regardless of all these distinctions; if the tribunal becomes aware that it had committed an error of law or of fact that led it astray in its conclusions, or in case of new evidence or changed circumstances having the same effect.'); ICSID Tribunal, *Libananco Holdings Co. Ltd* v. *Turkey*, Decision on Preliminary Issues, 23 June 2008, ICSID Case no. ARB/06/8, para. 78 ('Nor does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process').

[133] United Nations, *Reports of International Arbitral Awards*, vol. XXV (UN, 2006), 160, 189–90 ('Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.'); *Ad hoc* tribunal (UNCITRAL rules), *Biloune and Marine Drive Complex Ltd* v. *Ghana Investments Centre and the Government of Ghana*, Award, 27 October 1989 and 30 June 1990, *International Law Reports*, 95 (1990), 184 ('[A] court or tribunal, including this international arbitral tribunal, has an inherent power to take cognizance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents, or other egregious "fraud on the tribunal"... Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, this Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action').

documented in a written arbitrator contract.[134] In institutional arbitration, such contract is typically concluded tacitly.[135] Under these arbitrator contracts, arbitrators are entitled to receive remuneration for the services rendered and are usually only obliged to render their dispute resolution services in conformity with the stipulations contained in the arbitrator contract. Hence, parties cannot autonomously decide under which conditions they may benefit from the arbitrators' services. This rather depends on the contractual terms agreed upon with the arbitrators. Accordingly, parties do not have unlimited control over the delegation of authority to arbitrators.

3.4.2 Limited Control Over the Exercise of Adjudicatory Power

Similar observations can be made with respect to the parties' control over the exercise of adjudicatory powers by the arbitrators. While the parties can, to a considerable extent, tailor the conduct of the proceedings,[136] they do not enjoy unfettered control over the modalities of how arbitrators should perform their functions. This is largely uncontroversial for party agreements that are contrary to mandatory provisions in the public interest.[137] Thus, if the parties agree that only one of them shall have the right to appoint the arbitrators, the agreement might not be enforceable as it breaches the fundamental principle of equality among the parties.[138] Likewise, an agreement on the allocation of time for the examination of witnesses during the hearing may be invalid if it does not respect the principle of equal treatment.[139] In such cases, an arbitral tribunal may lawfully disregard the parties' agreement. The assessment is more difficult to make in cases where the parties' agreement does not breach mandatory norms. What happens, for example, in the situation in which the parties reach an agreement that the written submissions shall be made over a decade? Would an arbitral tribunal be bound to respect this agreement? What happens in the more realistic scenario that both parties want to

[134] *See* Lew *et al.*, *Comparative International Commercial Arbitration* (2003), 276.

[135] *See* Born, *International Commercial Arbitration* (2021), 2110. An additional agreement may exist between the arbitrators and the arbitral institution; *see* J. F. Poudret and S. Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2007), 370.

[136] As stated by one US Court, 'short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract'. US Court of Appeals, Seventh Circuit, *Ahmad Baravati* v. *Josephthal, Lyon & Ross, Incorporated, and Peter Sheib*, 1 July 1994, 28 F.3d 704.

[137] (2021) Pryles, 'Limits to Party Autonomy' (2007), 335.

[138] *See* German Supreme Court, decision, 24 September 1998, *Neue Juristische Wochenschrift*, 52 (1999), (2019).

[139] High Court of Hong Kong, *Brunswick Bowling & Billiards Corporation* v. *Shanghai Zhonglu Industrial Co. Ltd and Another*, 10 February 2009, [2009] HKCFI 94; [2011] 1 HKLRD 707; HCCT66/2007 ('It follows that there is no breach under Article 34(2)(a)(iv) because in this particular instance, the slavish application of the chess-clock arrangement is in conflict with Article 18 [enshrining the principle of equal treatment and the right to be heard], as such the Tribunal was obliged to depart from it').

hear a witness, which the arbitral tribunal considers to be irrelevant for the outcome of the case? Must an arbitral tribunal examine this witness?[140] Different views have been put forward in respect of these questions.

Some scholars and commentators argue that arbitrators may indeed disrespect party agreements in certain circumstances. Gary Born, for example, suggests that arbitral tribunals may, in exceptional circumstances, override the parties' agreement on the grounds that the envisaged procedures would be 'inefficient, unnecessary, less effective, less fair than an alternative approach'.[141] In support of this view, Born argues that parties cannot curtail the arbitrators' discretion to conduct the proceedings as they deem appropriate.[142] In a similar vein, Carter contends that arbitrators may enjoy implied powers to conduct proceedings expeditiously and fairly, even against the will of both parties.[143] He gives the example of situations where parties agree on inefficient and overly expensive evidentiary procedures. In these situations, he submits, the arbitral tribunal would be entitled to disregard the parties' choice.[144] Other scholars reach the same conclusion by pointing to the judicial elements of an arbitration clause. These judicial elements would come along with inherent powers of arbitrators that could not be curtailed by the parties.[145]

Proponents of the opposite approach argue that arbitrators are, in principle, bound to respect the parties' agreement unless it breaches mandatory rules.

[140] For further examples, *see* Fernández Arroyo, 'Arbitrators' Procedural Powers' (2016), 217 *et seq*.

[141] Born, *International Commercial Arbitration* (2021), 2316–2317.

[142] Born, *International Commercial Arbitration* (2021), 2316 ('[N]otwithstanding the parties' general procedural autonomy, where they exercised that autonomy by granting procedural authority to the arbitral tribunal, and then appointing a tribunal pursuant to that agreement, they may not subsequently alter their agreement, absent the arbitrators' consent').

[143] J. H. Carter, 'The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness', *ICC International Court of Arbitration Bulletin Special Supplement 1995: The Status of the Arbitrator* (1995), 30 *et seq.* ('It would seem prudent for the arbitrator to follow procedures to which both parties have agreed whenever possible, even when operating under more flexible provisions such as the AAA's International Rules. However, it seems implicit in those Rules that an arbitrator has the right, to be exercised prudently and presumably not frequently, to impose procedures in the interests of expedition and fairness, even when both parties (or, more likely, both sets of counsel) may wish some other procedures').

[144] Carter, 'The Rights and Duties of the Arbitrator' (1995), 24 *et seq*.

[145] C. Jarrosson, 'Note – Cour de cassation (1re Ch. Civile) 8 mars 1988 – *Sociétés Sofidif et autres* v. *O.I.A.E.T.I.*', *Revue de l'Arbitrage* (1989), 481, 486. ('L'autre limite est liée à la composante juridictionnelle de l'arbitrage: les parties peuvent dessiner les contours de la mission des arbitres, dans la mesure où, ce faisant, elles ne portent pas atteinte à la nécessaire liberté minimum dont tout juge doit disposer pour exercer sa fonction de juger'); Gaillard and Savage (eds.), *Fouchard Gaillard Goldman* (1999), 627 ('Although they must comply with the arbitration agreement and the applicable procedural rules, they are not subordinated to the parties in the conduct of the arbitral proceedings. Because their functions are judicial in nature, they enjoy a number of prerogatives in conducting the proceedings.'); Pryles, 'Limits to Party Autonomy' (2007), 332 ('The reason is that while article 19 confers a broad power on the parties to agree on the arbitral procedure, they must do so within assumptions reasonably held by the arbitrators at the time when they accept that mandate. Expressed in another way, there is an implied term that any agreement the parties may come to on matters of procedure will be within usual or come in parameters for commercial arbitration is of the type and nature of the arbitration before the arbitral tribunal.').

However, even these commentators acknowledge that arbitrators are entitled to resign from their office if confronted with an unforeseen procedural agreement that fundamentally deviates from what the arbitrators could expect at the time of concluding the arbitrator contract.[146] This position finds support in the preparatory works of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law). While there had been discussions to limit the arbitrators' obligation to respect party agreements under Article 19 UNCITRAL Model Law to situations in which the party agreement was reached prior to the constitution of the arbitral tribunal, this suggestion was ultimately rejected. The drafters supported their decision with the fact that arbitrators can always resign from their office as arbitrators.[147]

Even if one accepts the position that arbitrators are in principle bound by party agreement, this should not lead to the conclusion that the parties are the masters of the procedure unless the arbitrators resign from their office as arbitrators. This is because deviations from party agreements are not always effectively sanctioned. While Article V (1) (d) of the New York Convention provides that a failure to respect party agreement may justify the refusal of recognition and enforcement,[148] various state courts apply a threshold requirement when deciding whether to refuse recognition and enforcement or not.

Some courts, for example, examine whether there is a causal link between the failure to respect party agreement and the outcome of the case. This approach is reflected in a 2004 decision of the Bavarian Court of Appeals, in which the court refused to deny recognition and enforcement of an arbitral award, even though the arbitral tribunal had exceeded the time limit for rendering the award as agreed by the parties.[149]

[146] *See* E. A. Schwartz, 'Rights and Duties of ICC Arbitrators' (1995), 89. *See also* J. Fry *et al., The Secretariat's Guide to ICC Arbitration* (ICC, 2012), 210; Born, *International Commercial Arbitration* (2021), 2306 (where the author acknowledges, however, that arbitrators may exceptionally be entitled to disrespect the agreement of the parties).

[147] H. M. Holtzmann and J. E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1995), 556 *et seq.* ('One matter that was considered at some length during the drafting of article 19 was whether there should be a limitation on when the Parties could agree on a procedural point. The Secretariat suggested that the Working Group and draft article 19 so as to require that any agreement on the arbitral procedure be reached before the first or sole arbitrator was appointed. The rationale for the proposal was that the rules of procedure should be clear from the outset that any arbitrator should know from the beginning the rules under which he or she is expected to perform his or her functions. The Working Group rejected this idea, finding instead that the freedom of the parties to agree on a procedure "should be a continuing one"; the Working Group interpreted paragraph 1 to provide for such a continuing freedom . . . [I]t was noted that in any case the arbitrators could not be forced to accept any procedures with which they disagreed, since they could always resign rather than carry out the unwanted procedural stipulations. If the matter was of strong concern, the timing of any agreement of procedure could be regulated by agreement between the parties and the arbitrators.').

[148] On the interpretation of Art. V (1) (d) New York Convention, *see* Borris and Hennecke, in Wolff, *New York Convention* (2019), Art. V, 262 *et seq.*; F. Ferrari and F. Rosenfeld, 'The Interplay of Autonomous Concepts and Municipal Law under Article V(1)(d) of the New York Convention', in F. Ferrari and F. Rosenfeld (eds.), Autonomous Versus Domestic Concepts under the New York Convention (Kluwer, 2021), 273.

[149] Bavarian Court of Appeals, decision, 23 September 2004, (2009) BeckRS 21310.

According to the court, there was no evidence that the arbitral tribunal would have rendered a different decision five months earlier. Hence, there was no causal link between the failure to respect party agreements and the outcome of the award. The court further noted that the defendant had waived its right to invoke the deviation from party agreement as it had not raised an objection during the proceedings.

Other courts rather focus on the gravity of the deviation from party agreement and examine whether it caused substantial prejudice to the parties.[150] The decision in *China Agribusiness Development Corporation* v. *Balli Trading* reflects this approach.[151] In this case, the arbitral tribunal had applied a revised set of arbitration rules that differed from the one explicitly identified in the parties' agreement. According to the court in charge of the exequatur, this was not a relevant deviation from party agreement, as the original agreement reached by the parties could be construed as referring to the rules of the relevant institution in force at the time the arbitration was initiated.[152] Beyond this, the court indicated that the deviation from party agreement would only justify a denial of recognition and enforcement if the party suffered sufficient prejudice.[153] Some US courts have adopted a similar approach of examining whether a procedural violation caused substantial prejudice.[154]

Other courts, in contrast, have set aside arbitral awards for the mere fact that they violated the party agreement and have refrained from assessing the impact of gravity of the breach. In *Polimaster Ltd et al.* v. *RAE Systems, Inc.*, for example, the arbitral tribunal was confronted with an arbitration agreement concluded between the Belarus company Polimaster and the US company RAE, pursuant to which the place of arbitration should be the geographical location of the respective defendant's principal place of business.[155] When RAE raised counterclaims against a claim initiated by Polimaster in California, the latter asserted that the place of arbitration for the counterclaims would be Belarus. The arbitrator decided on both claims contending

[150] *See* Borris and Hennecke, in Wolff, *New York Convention* (2019), Art. V, 319 (where the authors criticize the gravity test).

[151] UK High Court of Justice, Queen's Bench Division (Commercial Court), *China Agribusiness Development Corporation* v. *Balli Trading*, 20 January 1997, ICCA, *Yearbook Commercial Arbitration*, vol. XXIV (Kluwer, 1999), 732.

[152] UK High Court of Justice, *China Agribusiness Development* v. *Balli*, ICCA, *Yearbook Commercial Arbitration*, vol. XXIV (Kluwer, 1999), para. 13.

[153] UK High Court of Justice, *China Agribusiness Development* v. *Balli*, ICCA, *Yearbook Commercial Arbitration*, vol. XXIV (Kluwer, 1999), para. 14 *et seq.*

[154] *See* US District Court, District of Columbia, *Compagnie des Bauxites de Guinee* v. *Hammermills Inc.*, 29 May 1992, ICCA, *Yearbook Commercial Arbitration*, vol. XVIII (Kluwer, 1993), 566, para. 11 ('The court does not believe that Article V(1)(d) was intended . . . to permit reviewing courts to police every procedural ruling made by the arbitrator and to set aside the award of any violation of the ICC procedures is found. Such an interpretation would directly conflict with the "pro-enforcement" bias of the Convention and its intention to remove obstacles to confirmation of arbitral award . . . Rather, the court believes that a more appropriate standard of review would be to set aside an award based on a procedural violation only such violation [caused] substantial prejudice to the complaining party.'). For a similar approach, *see* US District Court, Southern District of New York, *O.T. Reasuransi Umum Indonesia* v. *Evanston Insurance Company and others*, 21 December 1992, 92 Civ. 4623 (MGC), ICCA, *Yearbook Commercial Arbitration*, vol. XIX (Kluwer, 1994), 788, 790.

[155] US Court of Appeals, Ninth Circuit, *Polimaster Ltd; NA&SE Trading Co., Limited* v. *RAE Systems, Inc.*, 28 September 2010, No. 08-15708 D.C. No. 05-CV-01887-JF.

that it would be incompatible with 'notions of fairness, judicial economy and efficiency [to] [p]rosecut[e] a claim with affirmative defenses in one venue while simultaneously prosecuting counterclaims almost identical to the affirmative defenses in another [venue]'.[156] This decision was eventually set aside. The court in charge of the set-aside held that there was no reason to override agreements reached by the parties on the grounds that they were inefficient. It found that even an inefficient agreement would need to be respected.[157] The court also rejected the proposition that arbitral authority should be broadly interpreted so as to facilitate the enforcement of the arbitral award.[158] According to the court, the parties' agreement regarding the place of arbitration had effectively removed the adjudicatory authority from the arbitral tribunal with respect to this very specific question.[159] A French decision of 1995, in which the Paris Court of Appeals ruled that the failure to respect party agreement on time limits for rendering an award constitutes a breach of public policy, reflects a similarly high degree of deference to party agreement.[160]

However, the latter approach remains the exception in international arbitration. In most cases, courts examine whether a deviation from party agreement was serious, triggered significant prejudice or whether there was a causal link between the deviation from party agreement and the outcome of the arbitration. For this reason, not every deviation from party agreement is effectively sanctioned, which means that parties only have limited control over the exercise of adjudicatory authority by arbitrators.

3.5 Limitations of Party Autonomy in the Interest of the Arbitral Institutions

The final stakeholders and potential beneficiaries of limitations to party autonomy are arbitral institutions.[161] There is a multitude of arbitral institutions offering their

[156] US Court of Appeals, Ninth Circuit, *Polimaster* v. *RAE*, No. 08-15708 D.C. No. 05-CV-01887-JF, 16556 (quoting the arbitral tribunal).

[157] US Court of Appeals, Ninth Circuit, *Polimaster* v. *RAE*, No. 08-15708 D.C. No. 05-CV-01887-JF, 16565 ('[I]t is true that it may be inefficient to have multiple arbitrations regarding the parties' dealings in different fora before different arbitrators . . . But we cannot override the express terms of the party's agreement, because parties are free to agree to inefficient arbitration procedures.').

[158] US Court of Appeals, Ninth Circuit, *Polimaster* v. *RAE*, No. 08-15708 D.C. No. 05-CV-01887-JF, 16566 ('We cannot therefore, "overlook agreed-upon arbitral procedure" in favour of the enforcement of an arbitration award').

[159] US Court of Appeals, Ninth Circuit, *Polimaster* v. *RAE*, No. 08-15708 D.C. No. 05-CV-01887-JF, 16566 ('[T]he parties agreement effectively removed the decision regarding forum from the procedural decisions delegated to the arbitrator. The arbitrator could not override the parties' express agreement in favour of general procedural rules.').

[160] Paris Court of Appeals, *Société Dubois & Vanderwalle S.A.R.L.* v. *Société Boots Frites BV (Netherlands)*, 22 September 1995, Case no. 94.4957 ('Mais considérant que le principe selon lequel le délai directement fixé par les parties, dans lequel, comme en l'espèce, les arbitres doivent accomplir leur mission, ne peut être prorogé par les arbitres eux-mêmes, traduit une exigence de l'ordre public aussi bien interne qu' international en ce qu' il est inherent au caractère contractuel de l'arbitrage.'). *See also* Mantilla-Serrano, 'Transnational Procedural Public Policy' (2004), 347.

[161] *See also* H. A. Grigera Naón, 'The Powers of the ICC International Court of Arbitration vis-à-vis Parties and Arbitrators', *ICC International Court of Arbitration Bulletin Special*

dispute resolution services to parties. To ensure an efficient administration of the proceedings, these arbitral institutions have designed arbitration rules that set forth the basic framework for the arbitration proceedings. While the arbitration rules typically respect party autonomy and grant the parties a considerable degree of flexibility to tailor the proceedings as they deem appropriate,[162] there are limits to this. For instance, most arbitral institutions impose certain conditions, absent of which they will not administer the proceedings.[163]

Pursuant to Article 19 of the Rules of Arbitration of the International Chamber of Commerce in force as of 1 January 2021 (ICC Rules), for example, parties may only reach an agreement on the arbitration procedure 'where the rules are silent'.[164] While this requirement is interpreted rather permissively,[165] certain features of ICC arbitration are non-derogable.[166] This includes above all the involvement of the court, which is an administrative organ with certain powers related to the arbitration procedure.[167] For example, the court decides on the confirmation or appointment of arbitrators in order to ensure some form of quality control over the constitution of the arbitral tribunal, and the ICC 'has refused to administer cases where the parties intended to bypass such requirement',[168] a limitation to party autonomy in the interest of both the parties and the ICC itself. The court also has decision-making power on the time limits within which the arbitral tribunal has to render an arbitral award.[169] While the court seldom refuses to grant a time extension, it may occasionally impose shorter time limits than those sought by the arbitral tribunal.[170] The court thereby contributes to the efficiency of the proceedings. Also, the court will not administer cases in which the parties try to opt out of the 'core feature' of independence and impartiality of the arbitrators.[171] At the back end of the arbitration proceedings, the court is responsible for scrutinizing the draft award provided by the arbitral tribunal,[172] another feature the parties cannot opt out of, and imposed upon the parties both in their interest and that of the ICC itself.[173] This scrutiny is

Supplement 1999: Arbitration in the Next Decade – Proceedings of the International Court of Arbitration's Anniversary Conference (1999), 55; A. Carlevaris, 'Limits to Party Autonomy and Institutional Rules', in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration* (Juris, 2016), 1.

[162] *See* Carlevaris, 'Limits to Party Autonomy and Institutional Rules' (2016), 19.

[163] *See also* Y. Derains and F. Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer, 2005), 6–7; Fernández Arroyo, 'Arbitrators' Procedural Powers' (2016), 204; Fry *et al.*, *Guide to ICC Arbitration* (2012), 18.

[164] Article 19 ICC Rules.

[165] *See* Fry *et al.*, *Guide to ICC Arbitration* (2012), 209 *et seq.*

[166] *See* H. Smit, 'Mandatory ICC Arbitration Rules', in G. Aksen *et al.* (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (ICC, 2005), 845; Carlevaris, 'Limits to Party Autonomy and Institutional Rules' (2016), 19 *et seq*.

[167] Article 1 ICC Rules and Appendix I to the ICC Rules.

[168] Fernández Arroyo, 'Arbitrators' Procedural Powers' (2016), 205.

[169] Fernández Arroyo, 'Arbitrators' Procedural Powers' (2016), 205.

[170] Fry *et al.*, *Guide to ICC Arbitration* (2012), 315 *et seq.*

[171] Fry *et al.*, *Guide to ICC Arbitration* (2012), 18.

[172] *See* Smit, 'Mandatory ICC Arbitration Rules' (2005), 865.

[173] Carlevaris, 'Limits to Party Autonomy and Institutional Rules' (2016), 28 *et seq*.

geared at enhancing the legal effectiveness of arbitral awards and identifying any flaws that could potentially put the enforcement of the arbitral award at risk[174] (and tarnish the arbitrators' and institution's reputation). Beyond the involvement of the court, other aspects of ICC arbitration, such as its regime on administrative costs[175] or the requirement to sign Terms of Reference[176] at the outset of the arbitration, are regarded as mandatory.

The ICC is not the only institution whose arbitration rules contain such mandatory provisions. Similar limitations to party autonomy also feature in the rules of other arbitral institutions. The rules of the Singapore International Arbitration Centre in force as of 1 August 2016 (SIAC Rules), for example, provide for the possibility of expedited proceedings for certain cases with a lower amount in dispute or if the parties so agree or in cases of exceptional urgency.[177] Expedited proceedings have the effect that (i) the registrar may abbreviate time limits, (ii) in general course the case should be referred to a sole arbitrator, (iii) the tribunal may decide the dispute on the basis of documentary evidence only, (iv) the final award is to be made within six months from the date when the tribunal is constituted, and (v) the tribunal may state the reasons for its decision in summary form.[178] The provisions on expedited proceedings are mandatory. The SIAC Rules explicitly provide that the expedited procedures shall even apply in cases where the arbitration agreement contains contrary terms.[179]

Such mandatory provisions help the arbitral institutions to build up a 'brand'. Hence, the parties can trust in distinct features of the type of arbitration proceedings chosen – for example, their quality or efficiency – due to these mandatory provisions. The transaction costs of identifying a reputable arbitral institution are reduced for these market actors.[180]

Technically speaking, these mandatory provisions, however, only have a private nature.[181] They are not created by the state but by the respective arbitral institution, and their application results from the parties' decision to conduct arbitration proceedings.[182] By resorting to ICC arbitration or SIAC arbitration, parties accept the limitations to party autonomy that come with the respective set of arbitration rules.

[174] Fry *et al.*, *Guide to ICC Arbitration* (2012), 327 *et seq.*

[175] *See* Carlevaris, 'Limits to Party Autonomy and Institutional Rules' (2016), 22 *et seq.*; Smit, 'Mandatory ICC Arbitration Rules' (2005), 866.

[176] *See* Smit, 'Mandatory ICC Arbitration Rules' (2005), 862 *et seq.*, where the author questions the mandatory nature of the Terms of Reference.

[177] Article 5.2 of the SIAC Rules, available at http://siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule5 (last accessed 27 January 2020).

[178] Article 5.2 of the SIAC Rules.

[179] Article 5.3 of the SIAC Rules.

[180] *See* Fry *et al.*, *Guide to ICC Arbitration* (2012), 66 ('The value and benefits of ICC arbitration do not arise solely from the content of its rules, but also from the ICC's know-how in applying the Rules and administering arbitrations, the experience of the court and Secretariat, the quality of the staff, and trust placed in arbitration under the ICC banner').

[181] Fernández Arroyo, 'Arbitrators' Procedural Powers' (2016), 204 *et seq.*

[182] *See also* Carlevaris, 'Limits to Party Autonomy and Institutional Rules' (2016), 22 ('the notion of "mandatory" provisions of arbitration rules . . . is of course a misnomer, because, as mentioned, the rules are applicable by virtue of the parties' will and are not legal in nature').

Due to their private nature, these mandatory provisions are more difficult to enforce. A provision that is mandatory under a set of arbitration rules is not necessarily considered mandatory by a state court. The French courts confirmed this in the *Nykcool* decision, in which they had to decide on a set aside of an arbitral award rendered under the rules of the *Chambre Arbitrale Maritime de Paris*.[183] The rules of the said arbitral institution provided that challenges of an arbitrator had to be brought fifteen days after the initiation of the arbitral proceedings, irrespective of whether the respective party had obtained knowledge of the circumstances giving rise to the challenge by that date. The Court of Appeals found that such a fifteen-day deadline was invalid. In the last instance, the Court of Cassation confirmed the Court of Appeals' decision.[184]

The arbitral institutions' power to monitor and enforce their arbitration rules also reaches its limits when the parties agree to have a specific set of arbitration rules such as the ICC Rules administered by an arbitral institution other than the ICC.[185] What sounds like a hypothetical scenario has indeed occurred in practice. In a 2009 decision, the Court of Appeal of Singapore had to assess in the case *Insigma* v. *Alstom* an arbitration agreement pursuant to which the SIAC was tasked to administer an arbitration proceeding under the ICC Rules of Arbitration.[186] The arbitral tribunal had upheld the validity of the arbitration clause in view of the strong pro-arbitration bias. According to the arbitral tribunal, the arbitration agreement was not unlawful even though it was not in line with the ICC Rules of Arbitration. In support of this, the arbitral tribunal held that 'the rules of an arbitral institution can be legally divorced from the administration of an arbitration by that institution'. It further found that the arbitration agreement was not inoperable, as the SIAC had agreed to perform *mutatis mutandis* the functions of the ICC Secretariat, the ICC Secretary-General, and the ICC Court through the SIAC Secretariat, the SIAC Registrar, and the SIAC Board of Directors. The Court of Appeal of Singapore endorsed this reasoning. Invoking the principle of effective interpretation, the court showed its commitment for an interpretation that is 'commercially logical and sensible'.[187] The court found support for its reasoning in the 'inherently private

[183] Court of Appeal of Paris, *Chambre Arbitrale Maritime de Paris (CAMP) et Generali Iard* v. *Nykcool AB*, 30 October 2012, Case no. 11/08277, 8 Gaz Pal 15.

[184] French Supreme Court, decision, 31 March 2016, Case no. 14-20396, available at www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000032353128&fastReqId=1012119111&fastPos=1 (last accessed 27 January 2020).

[185] *See*, generally, A. C. Nicholls and C. Bloch, 'ICC Hybrid Arbitrations Here to Stay: Singapore Courts' Treatment of the ICC Rules Revisions in Article 1(2) and 6(2)', *Journal of International Arbitration*, 31 (2014), 393.

[186] Court of Appeal of Singapore, *Insigma Technology Co. Ltd* v. *Alstom Technology Ltd*, 2 June 2009, Case no. CA 155/2008, [2009] 3 SLR 936; [2009] SGCA 24 (The arbitration clause read: 'Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English').

[187] Court of Appeal of Singapore, *Insigma* v. *Alstom*, [2009] 3 SLR 936; [2009] SGCA 24, para. 33 ('[W]here the parties have evinced a clear intention to settle any dispute by arbitration, the court should give to such intention, even if certain aspects of the agreement may be ambiguous,

and consensual nature of arbitration', which would only find limits in public policy considerations.[188] The court rejected the applicant's argument that it would be unacceptable to deal with an inferior brand of arbitration. According to the court, there was no indication that the parties when drafting the arbitration agreement were not familiar with the respective brands of arbitration.[189] The court adopted the same pro-arbitration approach in a decision of 2013,[190] in which it upheld an arbitration clause pursuant to which disputes should be settled 'by the arbitration committee at Singapore under the rules of the International Chamber of Commerce of which awards shall be final and binding both parties'.[191] While the court noted that there was uncertainty as to which arbitral institution would administer the proceedings, it found that the parties could approach any arbitral institution in Singapore that would be in a position to administer the proceedings under the ICC Rules.[192]

The Supreme Court of New York took a similar position in an order of 2014.[193] In the underlying arbitration agreement, the parties had agreed that any arbitration be administered by the American Arbitration Association pursuant to the ICC Rules. The court compelled arbitration and indicated that the parties should seek the court's assistance if they were unable to agree on modifications of the ICC Rules for the purposes of having the dispute administered by the American Arbitration Association. If the American Arbitration Association did not agree to administer arbitration proceedings under the ICC Rules, the court held, this would not render the arbitration agreement inoperative in its entirety. Rather, the reference to the ICC Rules would need to be severed and stricken out. The remaining part of the arbitration clause could be upheld, and the parties could arbitrate pursuant to the rules designated by the American Arbitration Association.

Yet another example of such pro-arbitration policy is reflected in a French decision of 2010.[194] Two parties had entered into a licence and cross patent agreement that contained an ICC arbitration clause. However, the parties had reached an agreement to derogate from certain key features of ICC arbitration such as the involvement of the court, the constitution of the arbitral tribunal and the

inconsistent, incomplete or lacking in certain particulars . . . So long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party.').

188 Court of Appeal of Singapore, *Insigma* v. *Alstom*, [2009] 3 SLR 936; [2009] SGCA 24, para. 34.

189 Court of Appeal of Singapore, *Insigma* v. *Alstom*, [2009] 3 SLR 936; [2009] SGCA 24, para. 36.

190 High Court of Singapore, *HKL Group Co. Ltd* v. *Rizq International Holdings PTE Ltd*, 19 February 2013, Case no. 972 of 2012/P, [2013] SGHCR 5; for comments *see* J. Fry, '*HKL Group Ltd* v. *Rizq International Holdings Pte. Ltd*. and *HKL Group Co. Ltd*. v. *Rizq International Holdings Pte Ltd*.', *Journal of International Arbitration*, 30 (2013), 453.

191 High Court of Singapore, *HKL* v. *Rizq*, [2013] SGHCR 5, para. 1.

192 High Court of Singapore, *HKL* v. *Rizq*, [2013] SGHCR 5, para. 28.

193 Supreme Court of New York, *Exxon Neftegas Ltd* v. *WoleyParsons Ltd*, Counter-order, 14 March 2014, Index no. 654405/2013.

194 Tribunal de Grande Instance, France, *Samsung Electronics Co. Ltd* v. *M. Jaffe, Administrateur-liquidateur de la société Qimonda AG*, 22 January 2010.

scrutiny of arbitral awards and the ICC, therefore, declined to administer that case. While one could have expected the court to reach the decision that such arbitration clause becomes inoperative, the *Tribunal de Grande Instance* confirmed its competence to assist in the constitution of the arbitral tribunal and thereby facilitated the further conduct of the arbitration proceedings without the support of an arbitral institution.

Notwithstanding the aforesaid, parties should not be encouraged to derogate from core features of institutional arbitration rules and to agree on rules of one arbitral institution being administered by another arbitral institution.[195] Even where courts enforce arbitration agreements providing for the administration of certain arbitration rules by an extraneous arbitral institution, the conduct of the proceedings in such constellations is still likely to produce errors. In the aforementioned case of *Insigma* v. *Alstom*, for example, a Chinese court denied recognition and enforcement of the award on the grounds that the composition of the arbitral tribunal had not been in accordance with the agreement of the parties. The presiding arbitrator had been appointed by the two coarbitrators as foreseen in the SIAC Rules and not the ICC Court as provided for in the ICC Rules.[196] This constituted an error that – according to the Chinese court – justified non-recognition and non-enforcement.

The conclusion to be drawn is that there are limitations to party autonomy in the interest of arbitral institutions. While the rules of arbitral institutions are typically very flexible, certain elements may be non-derogable. These rules have a private nature, and the only way for arbitral institutions to enforce them consists in refusing to administer a case.

3.6 Conclusion

The aforementioned analysis has shown that party autonomy is subject to limitations. The authors acknowledge that one might find additional scenarios beyond those discussed in the present paper in which the parties' autonomy is subject to limitations. But what the authors intended to show is that limitations to party autonomy have different reasons and protect different stakeholders.

One may have different views as to which conclusions must be drawn from this. Scholarship traditionally distinguishes at least three representations of international arbitration: The contractual model, identifies the parties' consent as the sole source of arbitral power.[197] The judicial model, acknowledges that arbitrators are restrained in their decision-making by broader interests, including those of the

[195] *See also* Carlevaris, 'Limits to Party Autonomy and Institutional Rules' (2016), 22 *et seq*.

[196] Intermediate People's Court of Hangzhou, China, *Alstom Technology Ltd* v. *Insigma Technology Co. Ltd*, 6 February 2013, ICCA, *Yearbook Commercial Arbitration*, vol. XXXIX (Kluwer, 2014), 380*et seq*.

[197] A. S. Sweet and F. Grisel, 'The Evolution of International Arbitration: Delegation, Judicialization, Governance', in W. Mattli and T. Dietz (eds.), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014), 22, 31.

public at large.[198] The constitutionalized model takes a similar stance but proposes that arbitration has become part of an international economic framework.[199]

The authors of the present chapter acknowledge that a purely contractual representation of arbitration in which the parties' autonomous choices are sacrosanct does not properly reflect the existing limitations to party autonomy.[200] In a worst-case scenario, this model risks creating a legitimacy crisis for international arbitration. At the same time, however, a purely judicial or constitutionalized model of international arbitration risks breaking with the liberalist tradition and doing away with the key benefits that have allowed international arbitration to flourish. In a worst-case scenario, the latter models lead to unwanted assimilation of international arbitration with litigation in domestic legal systems.[201]

It hence appears that further research is necessary to solve the conundrum of adequately conceptualizing international arbitration. In the view of the authors, such a model must reflect not only the key role that party autonomy assumes in the arbitration framework but also the limitations thereto discussed in this paper. Acknowledging these limitations helps to protect arbitration against legitimacy challenges and uphold its role as the primary instrument for the resolution of international business disputes. Ultimately, the limitations to party autonomy also ensure that arbitration can persist as a viable method of dispute resolution.

[198] Stone Sweet and Grisel, 'The Evolution of International Arbitration' (2014), 22, 31.

[199] Stone Sweet and Grisel, 'The Evolution of International Arbitration' (2014), 34; *see also* M. Renner, 'Constitutionalization of International Commercial Arbitration' (2014), 133 ('The concept of transnational public policy can be considered the starting point of a constitutionalization of international commercial arbitration, and it is exactly the interplay between its negative and its positive functions which enables the process of constitutionalization . . . [T]he term shall be used in a functional way as referring to two distinct features of modern legal orders: (1) a hierarchy of norms, and (2) the "structural coupling" of law and politics').

[200] Ghodoosi, *Dispute Resolution and Public Policy* (2016), 57.

[201] *See* M. Renner, 'Constitutionalization of International Commercial Arbitration' (2014), 138 ('With regard to the governance function of international commercial arbitration, this assimilation of arbitral practice to domestic legal systems is of foremost importance').