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The Exercise of Contract Freedom in the Making of Arbitration Agreements

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The Exercise of Contract Freedom in the Making of Arbitration Agreements

Thomas E. Carbonneau*

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I. INTRODUCTION: CONTRACT'S EMPIRE IN ARBITRATION

A universal principle of contemporary arbitration law is that contract plays a vital role in the governance of arbitration.¹ The

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1. The U.S. Supreme Court has explained:

We have previously held that the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties. . . . [I]f contracting

vitality of that role can vary by legal system, court, statute, or treaty.² Nonetheless, party agreement often provides the most

parties agree . . . , the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration.

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57-58 (1995). And even earlier:

There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate . . . [T]he FAA does not require parties to arbitrate when they have not agreed to do so . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.

Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 476-78 (1989).

2. In terms of legal systems, it is clear that different systems have contrasting assessments of the role of contract in the regulation of arbitration. For example, despite its prominence in the international marketplace, Japan has never been an enthusiastic proponent of international commercial arbitration. The current Japanese law on arbitration is borrowed from nineteenth-century German law, and efforts to modernize it have been stymied for decades. The strong Japanese cultural preference for mediation and the determination of disputes through social hierarchies even affects the manner in which transborder and maritime arbitrations are conducted in Japan. Arbitral proceedings resemble mediation sessions in their length and in the number of meetings. See generally *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975); THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 1187 (3d ed. 2002). The enactment of a new Japanese law on arbitration, which has been in draft form since 1989, was passed by the Diet on July 25, 2003. It becomes effective in May 2004. See *JAPAN SHIPPING AND EXCHANGE BULL.* Mar. 2003, at 1 and Aug. 2003, at 1.

The U.S. Supreme Court doctrine on arbitration represents the most absolute statement of the vigor of contract freedom in arbitration. See *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 496 (1989); accord *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (appearing to hold that party provisions will be followed and implemented as long as they validate the initial reference to arbitrate). Justice Thomas is absolutely correct when he underscores the inconsistency between the holding in these two cases in his dissent in *Mastrobuono*. *Mastrobuono*, 514 U.S. at 67. The inconsistency, however, has not disturbed the direction of the evolving doctrine; in fact, it was largely ignored and is now essentially forgotten. *Volt* and *Mastrobuono* are seen as expressing the same support for the role of contract freedom in arbitration.

The French law on arbitration is a sophisticated statement of legal policy and rules on arbitration. In its day (*circa* 1980), it represented the most liberal statutory framework on arbitration. The legal system and the rules of law did not function as obstacles to the reference to arbitration or to the enforcement of arbitral awards. See generally JEAN ROBERT, *L'ARBITRAGE—DROIT INTERNE, DROIT INTERNATIONAL PRIVÉ* (6th ed. 1993); see also Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 *TUL. L. REV.* 1, 2 (1980); Thomas E. Carbonneau, *The Reform of the French Procedural Law on Arbitration: An Analytical Commentary on the Decree of May 14, 1980*, 4 *HASTINGS INT'L & COMP. L. REV.* 273, 275 (1981). The play of contract freedom, even in such a favorable regime to arbitration, is far from absolute, however.

significant rules for regulating arbitrations and conducting arbitral proceedings.³ This is especially true in international commercial arbitration. There, the lack of a functional transborder legislative and adjudicatory process made contract the principal source of law for international commercial transactions and arbitrations. Although law-making is more possible within individual national legal systems, the rule of contract freedom is also firmly established in matters of domestic arbitration.⁴ Within legal systems, contract's empire is

For example, the French law on arbitration still gives meaningful recognition to the subject-matter inarbitrability defense—bankruptcy disputes are not arbitrable because they implicate the rights of nonarbitrating third-parties—and establishes mandatory rules of arbitral procedure, such as that awards must be rendered with reasons. N.C.P.C. art. 1471. The regulation of arbitration in the name of the public interest still takes place in France. In a recent case, the French Court of Cassation held that a contract provision permitting the arbitrators to extend the statutory time limit for rendering the award was not enforceable. To modify the statutory time limit rules, either the arbitrators or the parties had to file an action before a court of law. See *Busquet v. Peyre*, Cass. 2e civ., Nov. 7, 2002. This holding confirms that some aspects of the statutory law on arbitration cannot be modified by contract. The French rule on contract freedom, therefore, differs in some significant respects from its counterpart in U.S. law.

The English statutory law on arbitration, which was enacted in June 1996, also makes its own, unique imprint on the regulation of arbitration. Arbitration Act, 1996, Commencement No. 1 (Eng.). While the statute incorporates the principle of freedom of contract and also acknowledges the need for mandatory provisions of law on arbitration, it represents—in the main—a pragmatic view of the law and practice of arbitration. It seeks primarily to make arbitration workable and fair in those areas of activity in which arbitration makes the most sense. The pragmatism and practicality of the statute is in evidence in its inaugural provision. It states:

General Principles.

1. The provisions of this Part are founded on the following principles, and shall be construed accordingly—
 - (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
 - (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
 - (c) in matters governed by this Part the court should not intervene except as provided by this Part.

Id. For an analysis of the law, see generally BRUCE HARRIS, ROWAN PLANTEROSÉ & JONATHAN TECKS, *THE ARBITRATION ACT 1996: A COMMENTARY* (2d ed. 2000); J.M. HUNTER & T. LANDAU, *THE ENGLISH ARBITRATION ACT 1996: TEXT AND NOTES* (1998); ROBERT MERKIN, *THE ARBITRATION ACT 1996* (2d ed. 2000).

CIETAC arbitration represents perhaps the most unstable form of arbitration in transborder commercial relations. While there have been numerous CIETAC arbitral proceedings, the numbers recently have declined and there have been complaints about the independence and impartiality of the tribunals. See CARBONNEAU, *CASES AND MATERIALS*, *supra*, at 1189; see also WANG SHENGCHANG, *Practical Aspects of Foreign-Related Arbitration in China*, [1997] SWEDISH & INT'L ARB. 45, 47.

3. See CARBONNEAU, *CASES AND MATERIALS*, *supra* note 2, at 14-16.
4. See *supra* note 1 and accompanying text.

founded upon a different rationale: in court doctrine, it serves to legitimate the privatization of adjudication by underscoring arbitration's ostensibly voluntary character.⁵ Freedom of contract,

5. The U.S. Supreme Court has not hesitated to enforce contracts of arbitration that are manifestly unilateral and which provide for some one-sided advantages. This is true in both the employment and consumer settings. For example, in the majority opinion in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, Justice Kennedy barely acknowledged the argument that the contract for arbitration imposed by the brokerage upon securities investors was unfair under the language of Section 2 of the Federal Arbitration Act (FAA), *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989). The latter provides that arbitration agreements are subject to the ordinary rules of contract formation and the usual defenses to contract enforcement for reasons of contract invalidity. Federal Arbitration Act, 9 U.S.C. § 1 (2003). The agreement in *Rodriguez*, as in many consumer areas then and since, was drafted by the brokerage and was non-negotiable. *Rodriguez*, 490 U.S. at 478. No brokerage firm would do business with an investor unless the latter agreed to arbitrate disputes pursuant to the standard contract. *Id.* The agreement to arbitrate, here and elsewhere, was undeniably one-sided and unilateral; it did not reflect a "meeting of the minds." Justice Kennedy cryptically stated that: "Although petitioners suggest that the agreement to arbitrate here was adhesive in nature, the record contains no factual showing sufficient to support that suggestion." *Id.* at 484.

Arguments that contract formation problems should invalidate allegedly flawed arbitration agreements are more likely to succeed in California. This result will obtain at both the state and federal court levels. The exchange between the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit in *Circuit City Stores, Inc. v. Adams* illustrates the point. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). In *Adams*, the Court considered the existence and scope of the so-called employment contract exclusion in Section 1 of the FAA. *Id.* at 109. The Ninth Circuit had ruled that the language of FAA Section 1 exempted all employment contracts from the jurisdiction of the FAA. *Id.* The Court disagreed and ruled that the employment contract exclusion only applied to the employment contracts of interstate transportation workers. *Id.* Employers, therefore, could require all other employees to arbitrate workplace disputes. *Id.* On remand, the Ninth Circuit found that the motion to compel arbitration should still be rejected, but upon a more doctrinally acceptable basis. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 896 (9th Cir. 2002). The federal appellate court, applying California contract law, ruled that Circuit City's arbitration agreement was an unconscionable contract and, therefore, unenforceable. *Id.* at 892. In the court's view, the federal policy favoring arbitration did not prevent the invalidation of arbitration agreements under the governing state law. *Id.* Moreover, the California state contract law on unconscionable contracts did not single out arbitration agreements for non-enforcement and, therefore, constituted a valid basis for refusing to enforce an arbitration agreement under the FAA. *Id.* at 893.

The California Supreme Court also has been active in policing the contractual validity of arbitration agreements. In the landmark case, *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 679 (Cal. 2000), the court established minimal standards of mutuality for the validity of arbitration contracts in the consumer and other settings. *See also Engalla v. Permanente Medical Group, Inc.*, 938 P.2d 903, 924 (Cal. 1997). For an evaluation of the *Engalla* opinion, *see generally* Edward Dauer, *Engalla's Legacy to Arbitration: Why Independent Administration Is Important*, 2-3 ADR CURRENTS 1 (1997).

While the prospect of invalidating an arbitration agreement on a contract basis is strongest in California, courts in other jurisdictions have begun to emulate this stance, at least to some extent. *See, e.g., In re Thicklin v. Fantasy Mobile Homes, Inc.*, 824 So. 2d 723, 733 (Ala. 2002) (holding that the provision in an arbitral clause prohibiting the

therefore, is at the very core of how the law regulates arbitration. What the contracting parties provide in their agreement generally becomes the controlling law.

Courts can interpose their authority in arbitration.⁶ They could assert their power by policing the formation and the content of arbitration agreements. But, from a practical standpoint, if courts were to become more active in the supervision of arbitration, they would more than likely focus their attention upon awards rather than agreements. Arbitral awards finalize the results of adjudication and represent one of the last steps in the process of the coercive imposition of legal liability. If there were to be a fight between national interests and the transborder commitment to arbitration, or if the policy of rights protection were to prevail over the functionality of adjudication, the contest would take place at the award-enforcement stage of the process. By comparison, arbitration agreements are more virtual instruments. Agreements have a symbolic standing: they represent a gateway to private adjudication and they codify the parties' intent regarding dispute resolution. Blocking their enforcement would signify opposition to the fundamental consensus surrounding arbitration rather than the implementation of a narrower strategy for the periodic defense of national interests through the vacatur of awards.

The support for and commitment to arbitration vary within the world community.⁷ Judicial *laissez-faire* as to arbitration is especially characteristic of courts in developed Western nations.⁸ In other

award of punitive damages was unconscionable and, therefore, void); Cavalier Mfg., Inc. v. Jackson, 2001 Ala. LEXIS 373, *12 (Oct. 5, 2001), *cert. denied*, 122 S. Ct. 1536 (2002) (holding that an arbitral clause prohibiting an arbitrator from awarding punitive damages violated public policy); Hayes v. County Bank, 713 N.Y.S.2d 267, 270 (N.Y. Sup. Ct. 2000) (holding that an arbitral clause in a pay-day loan scheme was unconscionable and unenforceable); *see also* Powertel, Inc. v. Bexley, 743 So. 2d 570, 574 (Fla. Dist. Ct. App. 1999); Ting v. AT&T, 182 F. Supp. 2d 902, 935 (N.D. Cal. 2002); Ting v. AT&T, 319 F. 3d 1126, 1149 (9th Cir. 2003) (*certiorari* applied for).

6. Most, perhaps all, modern arbitration statutes allow courts to supervise the arbitral process on the basis of the enforceability of the arbitral agreement and award. The supervision that is allowed ordinarily is quite restricted and narrow; it generally results in the enforcement of the award unless there has been a fundamental breach of adjudicatory legitimacy or the blatant use of excessive powers by the arbitrators. The FAA is characteristic of other statutes on this point. *See* CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 48-54.

7. For an account of national policies on arbitration, *see generally* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION: NATIONAL REPORTS, BASIC LEGAL TEXTS (Pieter Sanders ed., 1984); HANS SMIT & VRATISLAV PECHOTA, THE WORLD ARBITRATION REPORTER (1987 to the present).

8. On the question of deregulation, *see generally* CLIVE M. SCHMITHOFF, INTERNATIONAL COMMERCIAL ARBITRATION (1975); Ulrich Drobnig, *Assessing Arbitral Autonomy in European Statutory Law*, in LEX MERCATORIA AND ARBITRATION: A

countries and regions of the world, the protection of local enterprises can sometimes become more compelling, and political, religious, or cultural attitudes can disfavor arbitration, or at least some forms or aspects of it.⁹ Protectionism and parochialism, however, are short-sighted and are likely to be counterproductive in the long run. They foster an isolationism based upon fear and insecurity and prevent the state of origin and outside countries from developing any real confidence in the local culture and its legal and economic institutions.

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.¹⁰ In the international arena, judicial

DISCUSSION OF THE NEW LAW MERCHANT 195 (Thomas E. Carbonneau ed., rev. ed. 1998).

9. The protection of local interests and entities was clearly evident in the decision of the Cairo Court of Appeal in the *Chromalloy* case. *Chromalloy Aeroservices v. Egypt*, 939 F. Supp. 907 (D.D.C. 1996) (granting *Chromalloy's* petition to enforce the arbitral award and declining to grant *res judicata* effect to the decision of the Cairo Court of Appeal). There, a Houston-based company had gained an award against the Egyptian Air Force for breach of contract. *Id.* at 908. The ICC administered the arbitration; it took place in Egypt, and the arbitrators applied Egyptian law. *Id.* The court nonetheless set aside the award under Article V(1)(e) of the New York Arbitration Convention because the arbitrators' application of Egyptian law allegedly violated Egyptian public policy. *Id.* The true rationale for the decision appears to have been that the imposition of liability through the international arbitral process upon the Egyptian Air Force was simply unacceptable for both juridical and political reasons. *Id.*

Under traditional Islamic law, it may not be permissible to have a woman serve as an arbitrator. See CARBONNEAU, *CASES AND MATERIALS*, *supra* note 2, at 1199. If an award is rendered by a female arbitrator or by a tribunal including a woman arbitrator, the award may not be enforceable in Islamic countries. *Id.* Also, under traditional Islamic law, a dispute involving a Muslim person or entity cannot be resolved by an arbitral tribunal with a non-Muslim arbitrator. *Id.*

On the idiosyncratic Japanese view of arbitration, see *supra* note 2 and accompanying text. For the particularities of arbitration law and practice in China and India, see CARBONNEAU, *CASES AND MATERIALS*, *supra* note 2, at 1189, 1195.

In this regard, the decision of the Supreme Court of Panama on December 13, 2001 was particularly disturbing. See CARBONNEAU, *CASES AND MATERIALS*, *supra* note 2, at 1200. The court ruled that, under Panamanian law, the arbitral doctrine of *kompentz-kompentz* was unconstitutional. *Id.* The decision has chilled enthusiasm and support for international commercial arbitration; despite the analytical rectitude of the reasoning, it represents a parochial and dated attitude toward arbitration. *Id.*

10. The goal of reducing judicial intervention in matters of arbitration has been the central objective of modern legislation on arbitration. See generally S. BULL, *THE ARBITRATION PROCESS AND THE COURTS* (1983); G. MOSS CORDERO, *INTERNATIONAL COMMERCIAL ARBITRATION: PARTY AUTONOMY AND MANDATORY RULES* (1999); L.Y. Fortier, *The Never-Ending Struggle Between Arbitrators and Judges in International Commercial Arbitration*, in *LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY: LIBER AMICORUM KARL-HEINZ BÖCKSTIEGEL* 177 (R. Briner, L.Y. Fortier, K.P. Berger, & J. Bredow, eds., 2001); HANS SMIT & VRATISLAV PECHOTA, *INTERNATIONAL COMMERCIAL ARBITRATION AND THE COURTS* (3d ed. 2002); Ronald Bernstein, *Arbitration and the Courts*, 59 *ARBITRATION* 4 (1993); Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 *AM. J. INT'L L.* 784 (1983); Honorable Lord Justice Donaldson, *Relationship Between the Courts and Arbitration Under the*

interference with arbitration, therefore, thwarts the pursuit of international business itself. Merchants will not conduct business across national boundaries if there is no guarantee of either basic contractual accountability or the provision of remedies for material breach of contract.¹¹ Arbitration civilizes the international marketplace and thereby makes it accessible to commercial parties. Arbitration may not be able to right the geo-political and socio-economic disparities in the world community, but it can provide a workable form of world adjudicatory and transactional justice. It makes the risks of transborder commerce palatable.¹²

In domestic U.S. matters, hindering the recourse to arbitration through judicial supervision lessens the parties' access to an adjudicatory remedy that actually works. In arbitration, disputing parties have a forum. They are heard and can respond to the allegations made against them. The ruling of the tribunal is usually fair and final. Undoing the effectiveness of this process through judicial supervision could eventually result in a society-wide denial of justice.

The freedom-of-contract reasoning that underlies the legal doctrine on arbitration in transborder practice and national law aligns itself with a conservative U.S. domestic political ideology. The law of arbitration ostensibly emphasizes individual responsibility and accountability when it provides that arbitration agreements will be enforced as written.¹³ It thereby reduces the role of the state and the prospect of state regulation.¹⁴ The marketplace becomes the central purveyor of norms. In contradistinction to international arbitral practice, freedom of contract, however, plays a qualified role in judicial opinions involving domestic arbitrations.¹⁵ In many cases, courts are bent on the enforcement of agreements rather than giving effect to the parties' freedom of contract.¹⁶ The domestic bargains for arbitration generally do not arise from the free operation of market forces. In most instances, arbitration agreements, in fact, reflect the

European Common Law Systems, 47 ARB. 72 (1981); Sir Anthony Evans, *Court Intervention in Maritime Arbitration*, [1999] ARB. & DISP. RES. L. J. 40; Peter Schlosser, *The Competence of Arbitrators and of Courts*, 8 ARB. INT'L 189 (1992).

11. See John Goldring, *Consumer Protection, Globalization and Democracy*, 6 CARDOZO J. INT'L & COMP. L. 1, 13 (1998).

12. See generally Thomas E. Carbonneau, *The Ballad of Trans-border Arbitration*, 56 U. MIAMI L. REV. 773 (2002).

13. See *Volt Info. Sciences v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 500 (1989).

14. See *supra* note 10 and accompanying text.

15. See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) (holding that the arbitral award should have been enforced as within the scope of the contract between the parties).

16. *Id.* at 62 ("Ambiguities as to the scope of the arbitration clause itself [are] resolved in favor of the arbitration").

position of the economically dominant party.¹⁷ In affirming these agreements, courts often turn a blind eye to their unilateral and adhesiory character.¹⁸ In domestic consumer and employment contracts, the recourse to arbitration is a non-negotiable precondition to contracting.¹⁹ Companies benefit because they can avoid the courts. There are no public proceedings or civil juries in arbitration, and the availability of class action relief and punitive damages is at least less certain.²⁰

The political undercurrents of the legal doctrine on arbitration do not appear to have had much, if any, impact upon the U.S. Supreme Court.²¹ In the main, the Court has exhibited an apolitical demeanor.²² It has, however, been steadfast in its objective of achieving a substantively uniform and uniformly applied law of arbitration.²³ The Court has also been intolerant of allowing exceptions to the general proposition of the enforceability of arbitral agreements and awards.²⁴ Arbitration for the Court is a means for securing civil justice within the U.S. legal system.²⁵

A final preliminary point needs to be made in regard to the law of arbitration. The decisions in *Scherk*²⁶ and *Mitsubishi*²⁷ confirmed what legal science had asserted all along: there was a recognizable and meaningful distinction between the international and domestic aspects of law. Accordingly, the Court could establish rules in the international context that were completely inapposite for incorporation into the domestic regulation applying to the same

17. See *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180-81 (3d Cir. 1999) (holding that mutuality is not required to bind parties to an agreement to arbitrate).

18. See, e.g., *id.* at 81; *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 227-28 (3d Cir. 1997), *cert. denied*, 522 U.S. 915 (1997); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991).

19. See, e.g., *Gilmer*, 500 U.S. at 23 (involving an employer's requirement that an employee register as a securities representative with the New York Stock Exchange, which includes an arbitration agreement).

20. See CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 466-70.

21. See Michael R. Holden, *Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law*, 80 CORNELL L. REV. 1695, 1742 (1995) (stating that the "Supreme Court's recent FAA decisions make the 'federal policy favoring arbitration' nearly dispositive").

22. *Id.*

23. *Id.*

24. See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

25. See Thomas E. Carbonneau, *Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration*, 6 AM. REV. INT'L ARB. 1, 4 (1995).

26. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 534 (1974), *reh'g denied*, 419 U.S. 885 (1974).

27. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

subject matter.²⁸ The needs of international business and transborder adjudication may have required the arbitrability of securities and antitrust disputes, but such statutory and regulatory conflicts remained outside the purview of arbitration in domestic transactions.²⁹ There was, therefore, an international and domestic law of arbitration—fully distinguishable in terms of underlying interests and dynamics, as well as on major issues of doctrine.³⁰

The Court, however, eventually eliminated the boundary between these two branches of arbitration law. It began to integrate the holdings of international arbitration cases into the domestic law of arbitration and to sever the rules elaborated in the holdings from the specialty of transborder circumstances.³¹ Statements asserting that statutory disputes were arbitrable in international business transactions for reasons of conflicts avoidance were transformed into propositions declaring that the governing domestic arbitration law (the Federal Arbitration Act, or FAA) contained no prohibition against the arbitrability of statutory disputes.³² Moreover, the legal

28. The *Bremen* and *Scherk* decisions establish a strong presumption in favor of the enforcement of freely negotiated contractual choice-of-forum provisions. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15; *Scherk*, 417 U.S. at 519. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. See *Mitsubishi*, 473 U.S. at 631; *Scherk*, 417 U.S. at 519. "At least since this Nation's accession in 1970 to the [New York Arbitration] Convention, . . . that federal policy applies with special force in the field of international commercial disputes." *Mitsubishi*, 473 U.S. at 631.

29. "[E]ven assuming that a contrary result would be forthcoming in a domestic context." *Mitsubishi*, 473 U.S. at 629.

30. See *id.* at 629-31; see also CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 877-92.

31. In *Mitsubishi* . . . , we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. . . . The suitability of arbitration as a means of enforcing Exchange Act rights is evident from our decision in *Scherk*. Although the holding in that case was limited to international agreements, the competence of arbitral tribunals to resolve §10(b) claims is the same in both settings.

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987).

32. The Arbitration Act thus establishes a 'federal policy favoring arbitration.' . . . This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights. As we observed in *Mitsubishi*, . . . 'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the Act 'in controversies based on statutes.' . . . Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds "for the revocation of any contract," . . . the Arbitration Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise

system's preoccupation with conflicts or choice-of-law considerations, in evidence since the end of WW II,³³ was on the wane. It was being replaced by an aspiration for the unity of law. Many states adopted the UNCITRAL Model Law³⁴ as their domestic law of arbitration.

hospitable inquiry into arbitrability.' . . . The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims.

Id. at 226.

33. That preoccupation is reflected in and accounts for the title of the New York Arbitration Convention—the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Since it was opened for signature in June 1958, the New York Arbitration Convention, 21 U.S.T. 2517, 330 U.N.T.S. 3, *codified* 9 U.S.C.A. §§ 201-08 (1970), has embodied the international consensus on international commercial arbitration. On the Convention, see generally G. GAJA, *THE NEW YORK CONVENTION* (1979); A. JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981); Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961). Drafted in the post-WWII period during the apogee of the choice-of-law and conflicts school of thought, the Convention paid the necessary reverence to the application of national law in the regulation of arbitration. Quigley, *supra* at 1059. It also established a nearly irrebuttable presumption of enforceability for arbitral agreements and awards. *Id.* at 1061. It eventually acted as the conduit for giving expression to the “a-national” view of arbitration and of its regulation. The Convention's objective was not so much to promote party choice as the rule of law in arbitration, but rather to establish a self-regulating transborder process for conducting international arbitrations. Giving full effect to state laws and conflict rules would have rendered the procedure of arbitration less workable and less effective; international commerce would have been compromised and globalization might never have taken place.

The conflicts or choice-of-law approach that dominated legal thinking at this time emphasized the determination of the nationality of awards and distinguishing between national and foreign awards. See generally Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358, 568 (1981). Given the uniformly favorable provisions of most national laws on arbitration, the distinction between national and foreign awards lost its significance. *Id.* at 363-64. Foreign or non-domestic awards are now considered international or transborder awards. For more information on this topic, see generally V.S. Deshpande, *'Foreign Award' in the 1958 New York Convention*, J. INT'L ARB., Dec. 1992, at 51; Mark B. Feldman, *An Award Made in New York Can Be a Foreign Arbitration Award*, ARB. J., March 1984, at 14; Julian Lew, *Nationality of International Commercial Arbitration*, 5 BUS. L. REV. 318 (1984); Mauro Rubino-Sammartano, *International and Foreign Arbitration*, J. INT'L ARB., Sept. 1988, at 85 (1988); Albert Jan van den Berg, *Non-Domestic Arbitral Awards under the 1958 New York Convention*, 2 ARB. INT'L 191 (1986).

34. The UNCITRAL Model Law on International Commercial Arbitration, adopted June 21, 1985, codifies the modern trans-border consensus on international commercial arbitration. U.N. Doc. A/40/17/Annex 1 (1985). It adopts and incorporates into its provisions the liberalist approach to the regulation of arbitration. *Id.* It also acknowledges the central significance of party autonomy in the process of international commercial arbitration. *Id.* For example, in providing a definition of international arbitration, Article 1(3)(c) of the Model Law states that an “arbitration is international if . . . the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.” *Id.* The Model Law has served as the basis for statutory enactments on arbitration in a number of states (among them,

The legal regime on arbitration was being substantially liberalized in all its aspects. In some cases, the internal law on arbitration was less restrictive of arbitration than the highly accommodating international framework.³⁵

It is, therefore, difficult—if not inaccurate—to refer separately to the international and domestic dimension of arbitration law, at least in terms of U.S. arbitration law. The U.S. Supreme Court no longer makes the distinction and is articulating rules of arbitration law that are of general application and not fitted to any special circumstances.³⁶ The analysis that follows incorporates that feature of the case law. It focuses upon general principles and concepts of the law of arbitration without underscoring any allegiance to the international or the domestic setting. The discussion, however, does emphasize the difference in rationale that might accompany the application of the rule in these different settings. As the title of this article indicates, it addresses generically the topic of the making of arbitration agreements.

California, Connecticut, Illinois, Oregon, and Texas) and in a multitude of foreign countries (for example, Canada, Germany, Iran, Japan, Singapore, Spain, and Venezuela). On the Model Law, see generally ISSAK I. DORE, *THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE* (1993); HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY* (1989); Aron Broches, *Commentary on the UNCITRAL Model Law*, in *INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (Peter Sanders & A. Jan van den Berg eds., 1984 & Supp. Jan. 11, 1990); Gerold Herrmann, *UNCITRAL Adopts Model Law on International Commercial Arbitration*, 2 *ARB. INT'L* 2 (1986); Sigvard Jarvin, *La loi-type de la C.N.U.D.C.I. sur l'arbitrage commercial international*, 1986 *REV. ARB.* 509. On the experience with the Model Law in individual countries, see, e.g., Emmanuel Gaillard, *The UNCITRAL Model Law and Recent Statutes on International Arbitration in Europe and North America*, 2 *FOR. INV. L. J.* 424 (1987); Hamid G. Gharavi, *The 1997 Iranian International Commercial Arbitration Law: The UNCITRAL Model Law à L'Iranienne*, 15 *ARB. INT'L* 85 (1999); Sami Kallel, *The Tunisian Draft Law on International Arbitration*, *J. INT'L ARB.*, Dec. 1992, at 71; Neil Koplan, *The Model Law in Hong Kong—Two Years On*, 8 *ARB. INT'L* 223 (1992); Robert K. Paterson, *Implementing the UNCITRAL Model Law—The Canadian Experience*, *J. INT'L ARB.*, June 1993, at 29; Andrew Rogers, *The UNCITRAL Model Law: An Australian Perspective*, 5 *ARB. INT'L* 348 (1989); M. Sornarajah, *The UNCITRAL Model Law: A Third World Viewpoint*, *J. INT'L ARB.*, Dec. 1989, at 7; Frank-Bernd Weigand, *The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden*, 11 *ARB. INT'L* 397 (1995); and Zhang Yulin, *Towards the UNCITRAL Model Law—A Chinese Perspective*, *J. INT'L ARB.*, March 1994, at 87.

35. This is the case when Article V of the New York Arbitration is compared to FAA Section 10. The latter contains neither a public policy exception nor a subject-matter inarbitrability defense to enforcement.

36. See Eric J. Fuglsang, *The Arbitrability of Domestic Antitrust Disputes: Where Does the Law Stand?* 46 *DEPAUL L. REV.* 779, 801-07 (1997).

II. THE EFFECT AND DEVELOPMENT OF ARBITRATION AGREEMENTS

The content of an arbitration agreement can have an enormous impact upon the rights of contracting parties. First, an agreement to arbitrate eliminates the parties' right to have recourse to courts.³⁷ Parties thereby forego the protection of judicial procedures. The surrender of judicial relief is a more critical consideration in domestic matters. National courts and laws are ill-suited for international commercial litigation.³⁸ The transacting parties' interests are actually furthered by not referring their disputes to courts. Relinquishing judicial recourse in domestic matters can have a negative impact upon rights protection. Even in this setting, however, the judicial safeguarding of rights may be more theoretical than real. Arbitration has achieved prominence domestically in large measure because courts are inaccessible to prospective litigants. Delays and costs make judicial litigation remote and unattractive.³⁹ In any event, the bargain for arbitration generally represents a diminution of (theoretical) rights protection to achieve greater functionality in the adjudicatory mechanism.

Second, the agreement to arbitrate delegates the determination of individual rights to a private and basically unregulated arbitration services industry.⁴⁰ More particularly, the reference to arbitration authorizes private people to function as judges. The arbitrators decide the parties' disputes. Marketplace factors (the need for service providers to secure business and the arbitrators' desire for

37. "[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute . . . [W]here the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

38. See, e.g., CARBONNEAU, *CASES AND MATERIALS*, *supra* note 2, at 765-67.

39. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 439 (1953) (Frankfurter, J., dissenting); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 409-10 (2d Cir. 1959).

40. On this topic, see generally HANS SMIT & VRATISLAV PECHOTA, *ARBITRATION RULES—NATIONAL INSTITUTIONS* (1998). The basic service providers include: The American Arbitration Association (AAA), The International Chamber of Commerce (ICC), The London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce, the Zurich Chamber of Commerce, the Geneva Chamber of Commerce, the National Arbitration Forum (NAF), the International Center for the Settlement of Investment Disputes (ICSID), the National Association of Securities Dealers (NASD), the China International Economic and Trade Arbitration Commission (CIETAC), and the Singapore Center for International Arbitration. For a description of these various institutions, see generally RONALD BERNSTEIN, *HANDBOOK OF ARBITRATION PRACTICE* (1993); J. GILLIS WETTER, *THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE* (1979); Phillippe Fouchard, *Typologie des institutions d'arbitrage*, 1990 REV. ARB. 281; I-IV.

reappointment) and institutional regulations⁴¹ are the only limits placed upon the industry and its players. Moreover, both arbitrators and arbitral institutions are immune from suit for their professional conduct relating to the arbitration.⁴² For example, while stipulations in the arbitration agreement must be followed, the consequence of a failure by the arbitrators or the arbitral institution to respect such stipulations affects only the arbitral award.⁴³ The problematic professional conduct giving rise to the defective award is itself insulated from accountability.

Third, as the law of arbitration develops, there is a need to consider engaging in more complex arbitration agreements.⁴⁴ The

41. Each of the administering institutions has its own set of arbitration rules. See generally JOHN J. KERR & HANS SMIT, *COMPARISON OF INTERNATIONAL ARBITRATION RULES* (2d ed. 2002); HANS SMIT & VRATISLAV PECHOTA, *A CHART COMPARING INTERNATIONAL COMMERCIAL ARBITRATION RULES* (1998).

42. See *THE IMMUNITY OF ARBITRATORS* (Julian D.M. Lew ed., 1990); David Bristow, *The Gathering Storm of Mediator and Arbitrator Liability*, 55 *DISP. RES. J.* 15 (2000); Philippe Fouchard, *Le statut de l'arbitre dans la jurisprudence française*, 1996 *REV. ARB.* 325; C. Mulcahy, *Arbitrator's Immunity Under the New Arbitration Act*, 62 *ARB.* 202 (1996).

43. See Bristow, *supra* note 42, at 16 (“[T]he view of arbitrators as possessing a level of arbitral immunity is so well-established in tort law that it is rarely challenged”).

44. Given the importance of the topic, it is surprising not to find more extensive writing on it. In addition, the existing literature is mostly practical in nature and shuns the theoretical issues that give rise to the problems of practice. Also, these treatments avoid giving actual professional advice on writing arbitration agreements. Overall, the best source is probably Paul Friedland's book. PAUL FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* (2000). The classic article is Eisemann's piece in which he coins the phrase “pathological arbitral clause.” Frédéric Eisemann, *La Clause d'Arbitrage Pathologique*, in *A.I.A., ESSAYS IN MEMORIAM EUGENIO MINOLI* 129 (1974).

For other books on the topic, see also R. BUDIN, *LES CLAUSES ARBITRALES INTERNATIONALES BIPARTITES, MULTIPARTITES ET SPECIALES DE L'ARBITRAGE “AD HOC” ET INSTITUTIONNEL* (1993); JAN PAULSSON, ET AL., *THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR: CLAUSES IN INTERNATIONAL CONTRACTS* (2d rev. ed. 1999).

For book chapters treating the issue, see Guido Alpa, *La Clausola Arbitrale Nei Contratti Dei Consumatori*, in 7 *REVISTA DELL'ARBITRATO* 657 (1997); Giuseppe Franchi, *Le Contenu Necessaire De La Clause Compromissoire Selon Le Droit Italien*, in *A.I.A., ESSAYS IN MEMORIAM EUGENIO MINOLI* 179 (1974); Philippe Fouchard, *La Rédaction Des Conventions D'Arbitrage*, in *CENTRE D'ETUDES, DE RECHERCHES ET DE PUBLICATIONS, LES ENTREPRISES TUNISIENNES ET L'ARBITRAGE* 97 (1983); Paul A. Gélinas, *Arbitration Clauses: Achieving Effectiveness*, in *IMPROVING THE EFFECTIVENESS OF ARBITRATION AGREEMENTS AND AWARDS* 47 (A. Jan van den Berg ed., 1999); Gerold Herrmann, *The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts*, in *INTERNATIONAL ARBITRATION IN A CHANGING WORLD* 41 (A. Jan van den Berg ed., 1994); Julian D.M. Lew, *Arbitration Agreements: Form and Character*, in *ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION* 51 (Petar Sarcevic ed., 1989); Christoph Pestalozzi, *The Validity of Arbitration Clauses under N.Y. UCC § 2-207 (The Battle of Forms)*, in *DR. LEE JAECHUL, IN CELEBRATION OF HIS 60TH BIRTHDAY, 2 STUDIES ON MODERN CIVIL & COMMERCIAL LAW* 615 (1984).

standard clauses are well recognized and highly economical statements of party intent as to arbitration, usually to the effect that “any dispute arising under this contract shall be submitted to arbitration under the rules of [an arbitration institution].”⁴⁵ Because the standard clause is simple, straightforward, and well known, there

For articles, see Sam Aaron, *International Arbitration: Drafting an Arbitration Clause for International Commercial Contracts*, 107 SOUTH AFR. L.J. 633 (1990); C.F. Amerasinghe, *How to Use the International Centre for Settlement of Investment Disputes By Reference To Its Model Clauses*, 13 INDIAN J. INT'L L. 530 (1973); Markham Ball, *Just Do It—Drafting the Arbitration Clause in an International Agreement*, J. INT'L ARB., Dec. 1993, at 29; Piero Bernardini, *The Arbitration Clause of an International Contract*, J. INT'L ARB., June 1992, at 45; André Beyly, *The Manager and Arbitration*, J. INT'L ARB., Mar. 1986, at 7; Bienvenu, *Guide de rédaction des clauses d'arbitrage et de droit applicable dans les contrats commerciaux internationaux*, 56 REV. DU BARREAU 39 (1996); Marc Blessing, *Drafting Arbitration Clauses*, 5 AM. REV. INT'L ARB. 54 (1994); Stephen R. Bond, *How To Draft An Arbitration Clause*, J. INT'L ARB., June 1989, at 65; Xavier Boucobza, *La Clause Compromissoire Par Référence En Matière D'Arbitrage Commercial International*, 1998 REV. ARB. 495; Edgar H. Brenner, *International Arbitration: There Is No Standard Clause*, 49 ARB. 20 (1983); Benjamin G. Davis, *Pathological Clauses: Frédéric Eisemann's Still Vital Criteria*, 7 ARB. J. 365 (1991); Andrew B. Derman, *Nationalization and the Protective Arbitration Clause*, J. INT'L ARB., Dec. 1998, at 131; Robert Donald Fisher & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941 (1996); Dana H. Freyer, *Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts: A U.S. Perspective*, J. INT'L ARB., Dec. 1998, at 7; Emmanuel Gaillard, *Some Notes on the Drafting of ICSID Arbitration Clauses*, 3 FOREIGN INV. L.J. 136 (1988); Peter Koh, *The Incorporation and Effect of Arbitration Clauses in Maritime/Shipping Contracts*, 29 BULL. JAPAN SHIP. EXCH. 19 (1994); Richard H. Kreindler, *Practical Issues in Drafting International Arbitration Clauses*, 63 ARB. 47 (1997); J. Stewart McClendon, *Arbitration Clauses in International Contracts*, [1994] ARB. & DISP. RES. L.J. 251; Jay G. Martin, *Checklist for Drafting Arbitration Clauses in International Commercial Contracts*, 16 CORP. COUNSEL Q. 65 (2000); Sandra Obuljen, *Joint Venture Agreements: Drafting Arbitration Clauses*, 6 CROATIAN ARB. Y.B. 141 (1999); William Park & Jan Paulsson, *Arbitrage commercial et contrats internationaux*, 45 REV. DU BARREAU 215 (1985); Michael Pryles, *Drafting Arbitration Agreements*, AUS. L.J., July 1993, at 503; Alan Scott Rau & Catherine Pedamon, *La contractualisation de l'arbitrage: le modèle américain*, 2001 REV. ARB. 451; Moishe Reiter & Richard Carleton, *Arbitration clauses and submissions*, 3 INT'L CONSTRUCTION L. REV. 181 (1986); James M. Rhodes & Lisa Sloan, *The Pitfalls of International Commercial Arbitration*, 17 VAND. J. TRANS. L. 19 (1984); Hughes Scalbert & Laurent Marville, *Les clauses compromissoires pathologiques*, 1988 REV. ARB. 117; Karin A. Schlösser, *Arbitration Clauses in Maritime Contracts and their Binding Effect on Groups of Companies*, J. INT'L ARB., Dec. 1994, at 127; Clive M. Schmitthoff, *Defective Arbitration Clauses*, [1975] J. BUS. L. 9; Bijan Sohrabi, *Jurisdiction At Bay – The Validity of Foreign Arbitration Clauses in Maritime Bills of Lading Under Section 3(8) of COGSA: A Comment on Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 7 AM. REV. INT'L ARB. 71 (1996); William Tetley, *Arbitration Clauses In Ocean Bills Of Lading*, 2 Y.B. MAR. L. 51 (1985-1986); John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58-1 DISP. RES. J. 28 (2003); Nicholas C. Ulmer, *Drafting the International Arbitration Clause*, 20 INT'L LAWYER 1335 (1986); Vera Van Houtte, *Consent to Arbitration Through Agreement to Printed Contracts: The Continental Experience*, 16 ARB. INT'L 1 (2000).

45. See generally Ulmer, *supra* note 44.

is an understandable reluctance among legal practitioners and business parties to deviate from its established pattern. The greater sophistication of the law of arbitration, however, is undeniable and should inform contemporary arbitration agreements in some fashion. Expanded agreements, in fact, may allow lawyers who participate in the arbitral process to avoid professional malpractice.⁴⁶ A modern arbitration agreement should make clear the parties' intent to arbitrate disputes, but it should also reflect an appreciation of the development of the law. Educating clients on these matters is necessary. Custom fitting arbitration to the parties and the transaction, while maintaining the functionality of the process, is the cardinal objective.

The need for more complex arbitration agreements can be illustrated by the use of the term "dispute." It may have been sufficient previously simply to refer, in the arbitral clause, to "all disputes arising." The case law, however, has made the choice of terminology more difficult. Because the U.S. Supreme Court ruled that the FAA contained no restriction as to the arbitrability of statutory rights,⁴⁷ "all disputes arising" could include both contract and statutory causes of action arising between the parties. To make the reference to arbitration more effective, following the holding in *Mitsubishi*,⁴⁸ the federal case law elaborated a presumption that the term "dispute" referred both to contract and to statutory disputes.⁴⁹ The presumption can be rebutted by express stipulation to the contrary in the contract at the outset of the transaction.⁵⁰ Finally, the ruling in *First Options of Chicago, Inc. v. Kaplan*⁵¹ added even more content to the traditional usage of "dispute." In *Kaplan*, the U.S. Supreme Court determined that, under U.S. law, contracting parties could agree to submit jurisdictional challenges to the arbitrators

46. The failure to inform clients of the consequences of including or omitting language from an agreement to arbitrate can entail the professional liability of legal counsel. *Id.*

47. See *supra* note 34 and accompanying text.

48. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

49. See *id.* at 626-27 ("[A]s with any other contract, the parties' intentions [in an arbitration agreement] control, but those intentions are generously construed as to issues of arbitrability. There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights").

50. This is the sense of the Court's statement that "nothing . . . prevents a party from excluding statutory claims from the scope of an agreement to arbitrate. *Id.* at 628.

51. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

rather than having a court of law decide them.⁵² Clients and their counsel then could attempt to integrate *kompetenz-kompetenz* powers into the arbitration contract.⁵³

Accordingly, under U.S. arbitration law, the wording of an arbitration agreement can become a highly meaningful enterprise. At a minimum, clients must be advised of the possible ramifications of the language. In the U.S. context, a clause that accounts for the current state of the law on the scope of the reference to arbitration might read as follows: "Any dispute arising under or pursuant to this agreement—whether it is contractual, statutory, regulatory, or jurisdictional in character, and regardless of whether it arises under state or federal law or pursuant to an international treaty—shall be submitted to arbitration."⁵⁴

Fourth, more customized and elaborate agreements can take into account a wider variety of circumstantial configurations. These agreements can address such factors as the place of arbitration and its impact on the proceedings; the number and qualifications of arbitrators; the selective or mixed recourse to institutional rules of arbitration; the use of discovery mechanisms, experts, and cross-examination in the arbitration proceedings; the form and content of the award; the law governing the contract and the arbitration; and the standard of judicial review applicable to the arbitral award.

III. THE QUESTIONS PRESENTED

The initial and primary inquiry is whether the "contract freedom approach" to the making of arbitration agreements is desirable and whether it remains beneficial to legal counsel and the contracting parties. What are the advantages and drawbacks to deregulation in arbitral practice? Does efficiency or effectiveness always and everywhere win out over the protection of rights and the public interest that are implicated by the arbitral process? A judicial process that is only capable of prosecuting crimes provides only part of the social civilization that should proceed from the law. For different reasons, arbitration provides the necessary civil component to the

52. The Court wrote:

[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate.

Id.

53. *Mitsubishi*, 473 U.S. at 642-47.

54. See CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 749.

justice equation in both domestic and international matters. It is also clear that the full integration of democratic and due process values into the arbitration process would significantly compromise the operation of arbitral proceedings and—perhaps—the very *raison d'être* for having recourse to the arbitral mechanism.

Despite its provision of efficiency and functionality, should the deregulation of arbitration be absolute? Must the enacted law on arbitration always have a secondary, default status in all circumstances and in every transaction? Are some limits (perhaps pertaining to the arbitrability of disputes) feasible, warranted, or essential as to various aspects of arbitration's scope of application? What type of restraints should be considered and how extensive should they be? Should they proceed from public interest considerations, a rights-protection rationale, or only from issues pertaining specifically to the operation of the arbitral process? From whose authority might such limits proceed?

IV. THE CONTENT OF "MODERN" ARBITRATION AGREEMENTS

Given the likelihood of enforcement of the contractual reference to arbitration in national legal systems and transborder legal practice, what advice should legal counsel give to clients in terms of submitting disputes to arbitration? Should the basic practice be to use the standard clause with only minor modifications for truly exceptional circumstances? What content is or should be essential to all arbitration agreements? Are peripheral elements equally necessary? How can the best use be made of the parties' freedom of contract? Can rights and interests be sufficiently safeguarded? Will the process continue to be effective when practice is more particularized?

A. The Recourse to Arbitration: Voluntary, Necessary, or Coerced?

Whether recourse should be had to arbitration is an initial question that must be considered in nearly all circumstances. In transborder commercial matters, choosing to arbitrate goes almost without saying, because international arbitration is instrumental to neutrality, the provision of the necessary expertise, effective dispute resolution, and the enforcement of awards.⁵⁵ In these circumstances, the more critical and difficult question centers upon the type of reference made to arbitration. If the avoidance of national courts is a prerequisite to effective international transacting, should recourse to

55. *Id.* at 765.

arbitral adjudication be preceded by direct negotiation or an attempt to mediate the dispute? The existence of remedial precursors to arbitration raises the problem of the coordination and implementation of agreed-upon remedies. Time limits are usually effective devices in such settings. The contracting parties need to understand their dispute resolution needs and preferences in order to choose effectively.

Finality and enforceability are central to any dispute resolution process. Functionality—in terms of economy, efficiency, and effectiveness—is another highly prized objective. Additionally, parties may want to provide for greater rights protection or may seek to preserve their business relationship no matter how difficult a particular transaction may become. Different or adapted remedies can achieve these ends.

In the domestic arena, the necessity of arbitration was not the result of a general consensus within the affected professional community.⁵⁶ The need for arbitral recourse was propounded by the U.S. Supreme Court.⁵⁷ In fact, the Court reduced the rigor of the law of contract to achieve the legal validity of questionable agreements to arbitrate.⁵⁸ As a result, unilaterally imposed agreements to arbitrate which altered or limited or even eliminated the rights of the weaker party generally became enforceable under FAA Section Two.⁵⁹ Under the Court's strained doctrine, recourse to arbitration—as a matter of law—did not affect substantive rights and was always in the parties' best interest.⁶⁰ Arbitration was nothing more or less than another type of trial process. The law, therefore, validates non-negotiated arbitration agreements and allows the superior party to select a procedure that favors its interests.⁶¹ Mutuality has not been the hallmark of arbitration agreements in the domestic employment and consumer contexts.⁶²

56. *Id.* at 466.

57. *Id.*

58. *See, e.g.,* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479-84 (1989) (“[T]he old judiciary hostility to arbitration . . . has been steadily eroded over the years”).

59. *See, e.g.,* *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-51 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997).

60. “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

61. *See* CARBONNEAU, *CASES AND MATERIALS*, *supra* note 2, at 375, 466.

62. *Id.*

B. Institutional Arbitration

Parties should decide whether they will engage in institutional or ad hoc arbitration. This particular issue is not difficult because most parties are likely to choose institutional arbitration even though it involves greater threshold costs. Ad hoc arbitration—usually done through the application of the UNCITRAL Model Rules on Arbitration⁶³—requires that the parties establish and manage, as well as participate in, the arbitration. Such an approach places a substantial burden upon the parties to cooperate in the circumstances of dispute. The expectation of cooperation is likely to be unrealistic. Moreover, arbitral institutions have a good professional track record and have significant experience in the administrative aspects of arbitrations.⁶⁴ Unless the parties themselves have substantial expertise in the arbitration process, institutional arbitration becomes a virtual necessity. Also, an award rendered under the auspices of a recognized arbitral institution may have a greater likelihood of enforcement for reasons of institutional reputation. The real question involves choosing among the arbitral institutions.

In transborder arbitrations, the critical considerations governing the choice of an arbitral institution include: availability, costs, and the value of the institutional service rendered.⁶⁵ The number of institutional choices has increased. In addition to the standard bearers—the ICC and the LCIA, parties can also have recourse to CIETAC arbitration and to the AAA Center for International Dispute Resolution (in New York City or in Dublin, Ireland).⁶⁶ Other traditional forms of transborder arbitration include World Bank or ICSID Arbitration, Inter-American Commission Arbitration, or NAFTA Arbitration.⁶⁷

There are a number of distinctions between the various institutions. The ICC, for example, charges a percentage of the amount in dispute, whereas the LCIA administers arbitrations on the

63. See ISSAK I. DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS* 182, 213 (1986); Vratislav Pechota, *UNCITRAL Arbitration Rules*, in 3 *WORLD ARBITRATION REPORTER* 3083 (HANS SMIT & VRATISLAV PECHOTA eds., 1987); Gerold Herrmann, *UNCITRAL Conciliation and Arbitration Rules*, 55 *ARB.* 85 (1989).

64. See generally B.W. Vigrass, *The Rule of Institutions in Arbitration*, in RONALD BERNSTEIN, *HANDBOOK OF ARBITRATION PRACTICE* (1987).

65. CARBONNEAU, *CASES AND MATERIALS*, *supra* note 2, at 796-801.

66. See Ivan Szasz, *Arbitration Rules and Practices of Institutions*, in ICCA, *TENTH INTERNATIONAL ARBITRATION CONGRESS: PROCEEDINGS* 38 (1990).

67. *Id.*

basis of an hourly fee.⁶⁸ According to recent statistics, the amount in controversy in ICC arbitration exceeds \$10 million in only twenty percent of the submitted cases.⁶⁹ Moreover, the ICC Court of Arbitration exercises a quality control function over ICC awards that can require ICC arbitrators to reconsider any award or part of a ruling that appears dubious or ill-conceived to a majority of the 113-member ICC Court of Arbitration.⁷⁰ Arbitrators nonetheless remain sovereign in reaching a final ruling.⁷¹ Finally, since the early 1920s when it was founded to promote peace through prosperity, the ICC has administered more than 12,500 arbitrations.⁷² Its awards are recognized throughout the world, and the parties benefit from the ICC's long-standing reputation.

The expense of an international arbitration can be considerable, especially when U.S.-style trial techniques become part of the process.⁷³ Accordingly, a cost-benefit analysis should accompany the choice of arbitral institution. The received wisdom is that ICC arbitration is the most expensive form of transborder arbitration.⁷⁴ The ICC, however, contests that characterization,⁷⁵ arguing that a lump sum paid at the outset of the proceeding is ultimately less costly to the parties than the payment of an hourly rate,⁷⁶ as proceedings often tend to last longer than is initially anticipated.⁷⁷

Also, institutional rules should be studied and compared to determine which set of rules might better accommodate the needs of the parties.⁷⁸ Rules can be modified, adjusted, or combined to achieve the best possible framework for the arbitration. Extensive customization, however, can engender administrative difficulties. Most arbitral institutions will apply the UNCITRAL Model Rules of

68. See WILLIAM LAWRENCE CRAIG, WILLIAM PARK, & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (3d ed. 1999); Kenneth Rokison, *The London Court of International Arbitration*, 55 ARB. 96 (1989); Adrian W. Winstanley, *The New Rules of the London Court of International Arbitration (LCIA)*, 8 AM. REV. INT'L ARB. 59 (1998).

69. 14-2 WORLD ARB. & MED. REP. 36 (2003).

70. *Id.*

71. *Id.*

72. CRAIG ET AL., *supra* note 68, at 4-5.

73. See *Drafting International Arbitration Clauses*, NEW JERSEY LAWYER, Feb. 1999, at 34.

74. CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 797. In July 2003, the ICC revised its rules relating to administrative expenses and arbitrator fees. Both fee and expense rates were slightly increased. See 14-10 WORLD ARB. & MED. REP. 301 (2003).

75. Lorraine Brennan, Esq., Director, Arbitration and ADR, North America, ICC International Court of Arbitration, Lecture at Penn State The Dickinson School of Law (Apr. 23, 2003).

76. *Id.*

77. *Id.*

78. See KERR & SMIT, *supra* note 41.

Arbitration or administer a “fast-track” arbitration process.⁷⁹ The more complicated the reference to institutional arbitration, however, the more difficult it is to negotiate or implement that part of the agreement. Parties may prefer to make a simple choice and to trust in the arbitral institution’s professionalism and its ability to make pragmatic adjustments when difficulties arise in the proceedings.

The allocation of costs and the provision for external administration are vital to the legitimacy of domestic arbitration in the employment, HMO, and consumer areas. Under the *Cole*⁸⁰ and *Shankle*⁸¹ holdings, the cost to the weaker, imposed-upon party cannot act as a barrier or significant disincentive to have recourse to arbitration. The U.S. Supreme Court, in its opinion in *Green Tree*,⁸² appeared to place less of a premium on the effect of costs. In any event, it placed the burden of proof in such instances squarely on the complaining party’s shoulders.⁸³ In addition, pursuant to the holding in the landmark *Engalla* opinion,⁸⁴ hiring an external administrator can insulate the arbitration from accusations of self-dealing conduct. Such a practice is now requisite to avoid reversals or procedural reformations by courts.

C. Selecting Arbitrators and the Question of Impartiality

The selection of arbitrators⁸⁵ is perhaps the most critical aspect of any arbitration. Choosing the “right” arbitrators is instrumental to the efficiency and effectiveness of the arbitration. The standard agreement to arbitrate usually establishes a variety of mechanical requirements in regard to the arbitrators: their number, the procedure for appointing them, and how to select a presiding

79. See generally Hans Smit, *Fast-Track Arbitration*, 2 AM. REV. INT’L ARB. 138 (1991) (for an explanation of “fast-track” arbitration).

80. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1482-83 (D.C. Cir. 1997).

81. *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233-35 (10th Cir. 1999).

82. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 82 (2000).

83. *Id.* at 91-92.

84. *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 909 (Cal. 1997).

85. See generally Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT’L 395 (1998); James H. Carter, *The Selection of Arbitrators*, 5 AM. REV. INT’L ARB. 84 (1994); Eric Robine, *Le choix des arbitres*, 1990 REV. ARB. 315; Murray L. Smith, *Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment*, 8 ARB. INT’L 17 (1992); Thomas H. Webster, *Selection of Arbitrators in a Nutshell*, 19 J. INT’L ARB. 261 (2002).

arbitrator if a tribunal is designated.⁸⁶ The contracting parties can agree on other stipulations regarding the arbitrators.⁸⁷

The level of compensation is usually a matter to be negotiated between the prospective arbitrator and the appointing party. The administering arbitral institution can provide some supervision of this aspect of the arbitration, especially if it has reason to believe that the agreed upon arrangements might compromise the integrity or legitimacy of the process.⁸⁸ In fact, the recently revised Rules of the Swedish Arbitration Institute authorize the Institute to set the fees for the arbitrators in accordance with the amount in dispute.⁸⁹ The purpose of the provision is to keep the fees within a reasonable compensatory range and to prevent the process from being undermined by unquestionable private agreements and greed.

Parties could also agree upon minimum qualifications for all prospective arbitrators.⁹⁰ In an agreement for international arbitration, the parties could provide that any arbitrator appointed by the parties, the administering arbitral institution, or a court must speak and read English or be trained in some fashion in U.S. law or trial procedures. Party-designated arbitrators could be finally confirmed by the administering institutions only if they meet the agreed upon threshold requirements. The purpose of such requirements would be to foster and increase the functionality of the arbitral proceedings. Obviously, parties are free to agree to requirements that might hamper the efficacy of proceedings but foster some other design. These other requirements could reflect a cultural or religious disposition that is fundamental to the appointing party. A Muslim party, for example, might insist that all arbitrators be male because an arbitral award rendered by a tribunal including a female arbitrator is generally not enforceable in a Muslim country.⁹¹ In a domestic arbitration, the requirement that at least one arbitrator have legal training and expertise in civil rights litigation may be essential to the legality of an employment arbitration proceeding involving claims of unlawful discrimination.⁹²

86. Carter, *supra* note 85, at 84-85.

87. Webster, *supra* note 85 at 268-69 (for example, an arbitrator's technical or legal expertise).

88. J. Gillis Wetter, *The Internationalization of International Arbitration: Looking Ahead to the Next Ten Years*, 11 ARB. INT'L 117, 124 (1995).

89. See CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 1181.

90. See generally L.C. Bülow, *The Professional Qualifications of the Arbitrator*, 6 INDIAN COUNCIL ARB. Q. 3 (1971); Ronald Fitch, *Professionalism and Ethics of the Arbitrator*, 2 ARB. 97 (1983); Ulfk Nordenson, *The Arbitral Tribunal*, [1990] Y.B. SWEDISH & INT'L ARB. 19; Frank J. Shelton, *The Expertise of the Arbitrator*, 3 ARB. 5 (1984); B.W. Vigrass, *Arbitrators—Selection and Training*, 47 ARB. 112 (1981).

91. See *supra* note 9 and accompanying text.

92. See CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 558.

A clearly controversial matter that has arisen recently in arbitral practice relates directly to the selection of arbitrators and to their qualifications. The major arbitral institutions, supported by a dated U.S. Supreme Court ruling⁹³ and professional lawyers associations (*i.e.*, the IBA),⁹⁴ have taken the position that all arbitrators should be impartial.⁹⁵ The tradition in prior practice had been to require only that the presiding arbitrator (the “neutral” arbitrator) be fully impartial. There was an expectation that party-designated arbitrators would be sympathetic to the position of the appointing party and would favor that position in the deliberations. This practice often created “arbitrations within arbitrations,” in which the neutral arbitrator resolved the disagreement between the two party-appointed arbitrators.⁹⁶ Some prominent international lawyers, who specialize in transborder commercial litigation and arbitration, argued that this *quid pro quo* was generally not in effect.⁹⁷ In their view, international arbitrators are people of high integrity and

93. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968).

94. See IBA ETHICS FOR INTERNATIONAL ARBITRATORS, rule 4 (2000).

95. See Pierre Bellet, *Des arbitres neutres et non-neutres*, in CHRISTIAN DOMINICE & PIERRE LALIRE, *ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE* 399 (1993); MARC HENRY, *LE DEVOIR D'INDEPENDENCE DE L'ARBITRE* (2001); INTERNATIONAL CHAMBER OF COMMERCE, *THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS* (1991); INTERNATIONAL CHAMBER OF COMMERCE, *THE STATUS OF THE ARBITRATOR: SPECIAL SUPPLEMENT* (1995); Hamid Andaloussi, *The Arbitrator's Independence*, 3 ICC INT'L CT. ARB. BULL. 43, 43-44 (1992); J. Loni Bader, *Arbitrator Disclosure—Probing the Issues*, J. INT'L ARB. 39, Sept. 1995, at 39, 42; Aldo Berlinguer, *Impartiality and Independence of Arbitrators in International Practice*, 6 AM. REV. INT'L ARB. 339, 339 (1995); Stephen R. Bond, *The Selection of ICC Arbitrators and the Requirement of Independence*, 4 ARB. INT'L 300, 301 (1988); James T. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for 'Nonneutrals'*, 11 AM. REV. INT'L ARB. 295, 299 (2000); Donald E. Zubrod, *Evident Partiality and Misconduct of Arbitrators*, J. INT'L ARB., June 1994, at 115, 117-18. See also Laurence Shore, *Disclosure and Impartiality*, 57 DISP. RES. J., Feb.-April 2002, at 32, 34.

96. See Martin Domke, *The Arbitrator's Duty to Disclose*, [1969] J. BUS. L. 162, 163 (1969); see generally Frédéric Eisemann, *The Arbitrator's Independence*, 6 INDIAN COUNCIL ARB. Q. 5 (1971); Frédéric Eisemann, *The Partisan Arbitrator*, 4 INDIAN COUNCIL ARB. Q. 3 (1969).

97. LAWRENCE NEWMAN, *A Practitioner's Observations on the Resolution of International Commercial Disputes*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 5-6 (Thomas E. Carbonneau, ed., rev. ed. 1998). See also de Fina, *The Party Appointed Arbitrator in International Arbitration—Role and Selection*, 15 ARB. INT'L 381, 386 (1999). The revised ABA Code of Ethics for Arbitrators in Domestic and Commercial Disputes mandates that all arbitrators, even those appointed by a party to the dispute, act with impartiality. See http://www.abanet.org/dispute/commercial_disputes.pdf. For a different perspective, see JCI Communications, Inc. v. Int'l Broth. of Elec. Workers, Local 103, 324 F.3d 42 (1st Cir. 2003); Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617 (7th Cir.), cert. denied, 123 S. Ct. 1754 (2003).

accomplishment and rule in an independent manner.⁹⁸ Nevertheless, the received wisdom was that each party wanted "their man or person" on the tribunal.⁹⁹

Prominent players in the arbitral community now advocate for complete impartiality in all the arbitrators who are seated on a panel.¹⁰⁰ A failure to comply with this standard could result in the forced recusal of a party-appointed arbitrator, an action for the disqualification of the arbitrator, having the arbitral institution or a court appoint a substitute arbitrator, or the bringing of a challenge to the legitimacy of the arbitration or of the arbitral award.¹⁰¹ Parties, however, may want to have the more traditional type of party-appointed arbitrators in their arbitration. They could, therefore, provide in the arbitration agreement that each party shall have an unqualified right to name their own arbitrator and that party-designated arbitrators are subject to recusal or disqualification only if it is established that they engaged in corrupt behavior, *e.g.*, taking a bribe. A more ambitious stipulation might further provide that: "A special relationship can apply between an arbitrator and the designating party as long as that relationship is disclosed and does not denature the arbitrator's judgment or conduct in the actual proceedings." Such a stipulation would bring the parties' agreement directly into conflict with the practice recommended by major arbitral institutions and endorsed by some courts.¹⁰²

If the conflict is evident at the time of a demand for arbitration, the arbitral institution may either waive its right to object or refuse to administer the arbitration, especially if it believes it is not able to comply with the stipulations in the parties' agreement.¹⁰³ In the highly competitive business of providing arbitral services, a refusal to administer arbitrations on this basis may not be forthcoming. Further, it could place both the parties and the arbitral institution in untenable and impractical positions. The circumstances have the trappings of an irreconcilable conflict that demands a choice (perhaps a false one) between the legitimacy of the arbitral process and the exercise of party freedom of contract. Both factors are instrumental to arbitration and neither can be sacrificed without significantly undermining the process. A court could choose, but its decisional mission would be equally "impossible": it must rule either that the process has been suspect or corrupt all along or that the parties' right

98. NEWMANN, *supra* note 97, at 5.

99. *Id.*

100. *See supra* note 95 and accompanying text.

101. *Id.*

102. I have referred to these circumstances as conflicts among sovereign parties in the arbitral process. *See* Carbonneau, *supra* note 12, at 814 (discussing conflicts between sovereign parties).

103. *Id.*

to configure the manner of their arbitration is nonexistent in these circumstances.

Moreover, what happens if the courts are divided on the “right” outcome? Does the prior practice of appointing partisan or sympathetic arbitrators reflect corruption or common sense? Will arbitration be undermined by a less than absolute form of impartiality? Why is the neutral’s decisive neutrality not sufficient? If complete, tribunal-wide impartiality is the rule, why should the parties designate arbitrators? Should not the arbitral institution or a court perform this function as another means of guaranteeing the impartiality of the tribunal? Would not party acquiescence be sufficient to ward off the taint of illegitimacy in more traditional circumstances? Why are disclosure, waiver, and party agreement not enough in this situation?

The failure of agreement between the institution and the parties on this matter can paralyze the recourse to arbitration in the specific transactional circumstance. A failure to address the problem or the institution’s acquiescence to the parties’ desires could imperil the enforceability of the award by the courts in a requested jurisdiction. The law of the jurisdiction could provide that the designation of party-appointed arbitrators violates the jurisdiction’s public policy because such arbitrations are not legitimate forms of adjudication. If the arbitral institution forces the appointment of neutral arbitrators, the deviation from the parties’ agreement could also threaten the enforceability of the award. On one hand, including the right to appoint party arbitrators in the agreement is one of the most effective ways to maintain the parties’ freedom of contract within arbitration. On the other hand, it can become a means of undermining the enforceability of the award and the practical operation of the process.

A dilemma is emerging. It has no clear or easy solution. It posits a truly impossible choice. It is difficult to advocate for the restriction of contract freedom when there is no demonstrated history of corrupt conduct by party-designated arbitrators. The arbitral institutions have thus far failed to show the need to revamp established practice. Rules of full disclosure and the acceptance of the *quid pro quo* by the arbitrating parties appear historically to have constituted sufficient protection against possible abuse. Unless there are special circumstances and needs, there would be little justification for three-member arbitral tribunals if all arbitrators were truly neutral. A rule of full neutrality would eventually eliminate the parties’ authority to appoint arbitrators and would shift it to an external and disinterested party. The new institutional practice may be aimed at the attainment of other objectives, namely, reinforcing the public perception that the arbitral process has integrity and operates in a flawless professional manner. In the light of public scrutiny, it would or might be difficult to defend the *quid pro quo* of past practice on the appointment of

party arbitrators. Allowing each party to weight the tribunal in its favor flies in the face of fairness and evenhandedness. The greater contemporary scope and range of arbitration may demand an alteration of past practices and the emergence of a (self-) regulatory predicate.

D. Arbitrator Accountability and Collegiality

There are at least two other matters that relate to the selection of arbitrators which can be addressed in the arbitration agreement. First, the parties could endeavor to set standards relating to arbitrators' professional accountability or malpractice.¹⁰⁴ The inclusion of such a provision is likely to be as unrealistic as it is unfortunate. Arbitrators under U.S. law, like judges, are held to be immune from suit for their adjudicatory conduct.¹⁰⁵ In other national jurisdictions generally, arbitrators can be held liable only for reckless professional conduct.¹⁰⁶ Attempts to modify these decisional and statutory rules by contract into a larger and more standard form of professional liability are likely to result in the impossibility of securing a person who is willing to serve as an arbitrator. Prospective arbitrators are extremely unlikely to surrender their immunity from professional liability.

Lack of arbitrator accountability,¹⁰⁷ however, continues to frustrate (and endanger) parties. For many commercial parties, the decisional and professional sovereignty of the arbitrator can readily transform the arbitrator into a dictator and the arbitration into an instrument of oppression. There are few, if any, external restraints on the arbitrator.¹⁰⁸ This factor, coupled with the general lack of vigorous judicial supervision, makes the arbitrator omnipotent and the parties completely subject to the arbitrator's exercise of judgment.¹⁰⁹ There seems to be little choice but to trust the arbitrator and to hope for the best (or at least to avoid the worst) or to place some type of (other) limitation upon the arbitrators—possibly providing for the return of fees in certain circumstances.

104. For information about arbitrator liability, see generally Bristow, *supra* note 42; Juan Antonio Cremades, *Should Arbitrators Be Immune from Liability?*, 10 INT'L FIN. L. REV. 32 (1991); Philippe Fouchard, *Le statut de l'arbitre dans la jurisprudence française*, 1996 REV. ARB. 325; Susan D. Franck, *Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1 (2000); Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279 (2000); Andrea Mettler, *Immunity v. Liability in Arbitral Adjudication*, 47 ARB. J. 24 (1992).

105. See generally THE IMMUNITY OF ARBITRATORS (Julian D.M. Lew ed., 1990).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

Second, contracting parties could focus upon the need for collegiality among the arbitrators. One of the objectives in appointing arbitrators is to achieve expertise in the decision making body that will rule on the parties' disputes.¹¹⁰ Parties may also want a panel that is representative of the differences among them or that creates some form of neutrality with respect to those differences.¹¹¹ Whatever the parties' other aims, appointing a group of decision-makers who can work well together may be the most critical objective of all. Arbitrators who can work as a "team" are likely to be able to resolve difficult problems that arise during the arbitration. The lack of a collegial disposition among the members of the tribunal will create delay and increase the cost of the proceedings and eventually could imperil the enforceability of the award. Misunderstandings and miscommunications are especially likely in transborder arbitrations where cultural, linguistic, and professional training differences can entail substantial conflicts in approach and disagreements as to the proper conduct and direction of the proceedings.¹¹² The dichotomy of training between U.S. common-law lawyers and continental European civil-law lawyers is only one illustration among many of the substantial differences that can exist between international lawyers.¹¹³ The U.S. trial format is relatively unique among national trial systems; in particular, it gives the parties a large and active role in creating the record of the matter through discovery and a right to cross-examine witnesses. The European civilian trial system attributes nearly autocratic power to judges in the conduct of the proceeding, the creation of a non-verbatim record, and the hearing of witnesses.¹¹⁴ The rules of evidence are few in number and generally afford presiding judges wide discretion.

110. Stephen K. Huber, *The Role of Arbitrator: Conflict of Interest*, 28 *FORDHAM URB. L.J.* 915, 917 (2001) ("Individuals are commonly chosen as arbitrators precisely because . . . they are the leading experts in the industry").

111. See, e.g., Giorgio Bernini, *Cultural Neutrality: A Prerequisite to Arbitral Justice*, 10 *MICH. J. INT'L L.* 39, 40 (1989); Gabriel M. Wilner, *Acceptance of Arbitration by Developing Countries*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 283, 283-91 (Thomas E. Carbonneau ed., 1984); see generally *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS* (Stefan N. Frommel & Barry A.K. Rider eds., 1999).

112. See Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 *TEX. INT'L L. J.* 33, 59 (1984); Steven J. Stein & Daniel R. Wetman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Systems and Rules*, 38 *BUS. LAW.* 1685, 1697 (1983). See also *INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION: NATIONAL REPORTS, BASIC LEGAL TEXTS* (Pieter Sanders & A. Jan van den Berg eds., 1984).

113. Carbonneau, *supra* note 112, at 59.

114. See generally H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (2000); HENRY P. DEVRIES, *CIVIL LAW FOR THE ANGLO-AMERICAN LAWYER* (1979).

As a consequence, transborder arbitrations often involve debates about the choice of trial procedure. Although the absence of a jury argues strongly for activist arbitrators and fewer rules of evidence, controversy generally emerges about the level of party participation in evidence gathering and whether the rules of procedure will include the right to name and to cross-examine witnesses.¹¹⁵ Disagreements about the proper approach to trial procedures can substantially complicate the negotiations that pertain to the arbitration agreement and could thereby undermine the transaction. Recently, civil-law lawyers have argued that some choices as to the arbitral trial cannot even be entertained if the fairness of the process is to be maintained.¹¹⁶ Because U.S. common-law lawyers are trained extensively in matters of cross-examination (as well as discovery), the inclusion of these devices in the arbitral trial places the Latin American, European, or Asian civil-law lawyer at an inherent and irreducible disadvantage.

Some of these considerations raise "imponderable" questions. There are few, if any, bridges between the divergent attributes of the various legal traditions.¹¹⁷ It is as difficult to reconcile these different approaches to law and procedural fairness as it is to develop full fluency in several different languages and cultures. The general practice is to leave the adjustment of such differences to the administering arbitral institution and primarily to the sitting arbitrators.¹¹⁸ The arbitrators, however, may not be able to reach suitable accommodations if they are not able to be collegial among themselves.

The domestic arbitration process raises another set of considerations on this matter. The relative homogeneity of national culture generates fewer conflicts as to basic approach. The composition, integrity, and collegiality of the arbitral tribunal become more significant when the domestic arbitral proceeding takes place

115. See, e.g., Marcus S. Jacobs, *The Adversarial v. Inquisitorial Principles of Dispute Resolution Within the Context of International Commercial Arbitration*, MEALEY'S INT'L ARB. REP., Dec. 2001, at 46.

116. *Id.*

117. See, e.g., GLENN, *supra* note 114, at 56-83.

118. National laws on arbitration and institutional arbitration rules, including the UNCITRAL model version of them, generally establish a hierarchy of authority in arbitration under which the parties have the first opportunity to decide, followed by the arbitrators and (perhaps) the arbitral institution. A court can resolve conflicts in the process directly or by confirming the decisions of the arbitrators or the administering institution. In certain exceptional circumstances (for instance, relating to the conduct of the arbitral proceedings or the establishment by the state of mandatory rules of arbitration law—as in the French Code of Civil Procedure provisions on arbitration or the 1996 U.K. law of arbitration), the arbitrators may have first authority to rule. See generally CARBONNEAU, *CASES AND MATERIALS*, *supra* note 2, ch.13.

between parties of different economic strength¹¹⁹ or when it involves rulings upon civil rights issues or other political matters.¹²⁰ Weighting the composition of the tribunal in one direction or the other compromises the integrity of the process. Appointing generally neutral arbitrators who can work together to achieve a fair hearing and produce an even-handed ruling may represent the best approach to such problems. Achieving that objective, however, is always easier said than done.

E. Controlling Authority in the Arbitration

Another, related dimension of the arbitration that should be addressed in the arbitration agreement is which entity should have controlling authority in the proceeding: the administering arbitral institution, the arbitrating parties, or the arbitrators. Traditionally, practice provides the basic guidance on this matter following the rule that “unless the parties provide otherwise, the arbitrators shall decide. . . .”¹²¹ This pragmatic balance between freedom of contract and the authority of the arbitrators has been, and may continue to be, a sufficient hierarchy of authority. In circumstances in which irreconcilable positions develop between the three principal players in the process, however, such as those pertaining to the matter of impartiality, the well-settled hierarchy may be inadequate to resolve the conflict.¹²² Party provisions in these circumstances would at least emphasize the importance and argue for the controlling authority of contract in the resolution of these conflicts. Courts may not support, and arbitral institutions may not yield, to that principle of determination.

A clash of authority between the sovereign players in the arbitration process can readily be illustrated by the facts of an actual case.¹²³ A ship-owner entered into a contract with the owner of a

119. The composition and appointment of the arbitral tribunal or the designation of the sole arbitrator are critical when there is a disparity of position among the parties. Such circumstances generally prevail in both employer and consumer arbitration. Weighting the tribunal can either offset or exacerbate the disparity. Establishing the evenhandedness of the process is instrumental to its legitimacy and the binding force of its determinations. See generally CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 374-424, 466-562.

120. This aspect of the process is best illustrated by the settlements that were reached in the Smith Barney and Merrill Lynch class action litigations. See CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 558.

121. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 891-92 (2000).

122. See Carbonneau, *supra* note 12, at 818.

123. I am grateful to Professor Cindy Galway Buys of South Illinois University School of Law for bringing this case to my attention and for supplying me with a description of the facts of the case. I have altered the facts slightly to maintain the confidentiality of the matter.

shipyard for the repair of a vessel. Unassisted by counsel, the parties adapted a variety of provisions from form contracts. They agreed to arbitrate disputes, and stipulated that the arbitrators would apply English maritime law. The reference to arbitration was essentially dictated by the customary practice in the trade, and the choice of English law reflected the parties' awareness that the English legal system has long-standing experience in maritime matters. The parties further provided that the arbitration would take place in Houston, Texas. The arbitrators would be both technical and legal experts. They would all be U.S. nationals.

After a dispute arose and the arbitration began, counsel for the shipyard owner argued that the arbitrators should apply U.S. federal maritime law, not English law. The arbitral tribunal heard arguments on the issue and eventually ruled that it would apply U.S. law. The tribunal reasoned that that law was more accessible to itself and the parties, its application obviated the need to appoint and hear experts, it would facilitate the ruling, and it had not been convincingly established that the choice of law was outcome-determinative. The case settled prior to the rendition of any award on the merits.

The circumstances indicate a clear decisional departure by the arbitrators from the express terms of the agreement. There was no mutuality of agreement between the parties that permitted the terms of the original agreement on this matter to be modified. The arbitrators, however, were vested with adjudicatory power. They appear to have decided that it was in the best interest of the arbitration that the provision for the governing law be altered. Their determination made practical sense and was the result of considered deliberations, although it manifestly contradicted the terms of the parties' initial bargain. Application of Article V(I)(d) of the New York Arbitration Convention, however, would likely result in the non-enforcement of any eventual award.¹²⁴

Can arbitrators adapt and adjust the terms of the arbitration agreement during the arbitration to achieve the ends of justice or to facilitate the process and make the proceedings more functional? Do not the arbitrators in fact have a professional duty¹²⁵ to make the proceedings work at optimal capacity? Should such modifications be admissible only if the parties agree in some fashion? Must the administering arbitral institution be consulted? Why should the arbitrators prevail in these circumstances and rule with absolute authority?

124. In particular, under Article V(1)(c) or (d) or, possibly, Article V(2)(b).

125. On the professional duties and obligations of the arbitrators, see generally D.J. Sharp, *The Arbitrator's Duty of Good Faith*, 66 ARB. 226 (2000); Murray L. Smith, *Contractual Obligations Owed by and to Arbitrator: Model Terms of Appointment*, 8 ARB. INT'L 17, 26 (1992).

F. Governing Law

A workable and contemporary arbitration agreement should also include a provision that clearly establishes the governing law¹²⁶ and the role it is to play as to the different facets of the transaction and the agreed upon process of dispute resolution. Such a provision could provide the parties and a supervising court with both clarity and direction in difficult circumstances. The parties could choose a law to govern the interpretation of the contract (including the arbitration agreement) and the merits of any dispute that might arise under the contract. They could also decide that the agreement to arbitrate is governed by a separate law. They could designate yet another law to regulate any subsequent arbitration and its proceedings. Such a designation should endeavor to accommodate the law designated to govern the arbitration and the law of the place of arbitration (the so-called *lex loci arbitri*).¹²⁷ It should also define the significance of the arbitration rules of the administering arbitral institution, especially as they relate to the chosen law and the law of the place of arbitration. The U.S. Supreme Court has attributed some type of legal standing to the rules of arbitral institutions.¹²⁸ As incredible as that position may seem, the parties need to address it and deal with it in a way that protects and even advances their interests.

Choice-of-law considerations may have greater relevance to transborder arbitrations. There, the problem of "lawlessness" is particularly acute. In this setting, distinguishing between the law of the contract, the adjudication, and the place of arbitration may be critical.¹²⁹ Obviously, in some jurisdictions, law may trump

126. See, e.g., OKEZIE CHUKWUMERJE, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 34-35 (1994); PETER NYGH, CHOICE OF FORUM AND LAWS IN INTERNATIONAL COMMERCIAL ARBITRATION 13 (1997); Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L L. BUS. 48, 69-70 (1948); Ole Lando, *The Law Applicable to the Merits of the Dispute*, 2 ARB. INT'L 104, 107 (1986). See generally Marc Blessing, *The Law Applicable to the Arbitration Clause and Arbitrability*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS 168 (A. Jan van den Berg ed., 1999); Julian D.M. Lew, *Applicable Law in Commercial Arbitration*, 47 ARB. 92 (1981); Michael Pryles, *Choice of Law Issues in International Arbitration*, 63 ARB. 200 (1997); Ian Rhidian, *Proper Law of Arbitration Agreements*, [1984] LLOYD'S MAR. & COM. L.Q. 304.

127. See generally William P. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983).

128. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (Thomas, J., dissenting).

129. The failure to do so could result in the application of an unexpected law by a court the jurisdictional authority of which was equally unanticipated. The outcome of the agreement to arbitrate could be equally surprising and could frustrate the parties' initial intent as to dispute resolution. It could also engender a paralysis of remedies through the conflict of jurisdiction and of judgments. See generally HORACIO A.

contract.¹³⁰ Therefore, party provision may not be controlling. Also, the distinctions may be too complicated and, as a result, may become unworkable or pathological. Their intricacy could overwhelm the possibility of practical implementation. Allowing arbitrators to decide these matters on an ad hoc basis may be a functional alternative to party provision. The reference to the application of a more universal, transborder law represents another possibility that can be combined with arbitrator discretion. The parties can select the *lex mercatoria*,¹³¹ the *lex mercatoria arbitralis*,¹³² the CISG,¹³³ the UNIDROIT *Principles*,¹³⁴ or the UNCITRAL frameworks¹³⁵ to govern the arbitration.

These considerations exemplify the conundrum associated with the attempt of the contracting parties to anticipate difficulties in the transaction and to establish the delegation of authority that occurs when problems arise. The contracting parties must make their choices at the outset of the transaction and in the abstract. Once a dispute arises, their ability to agree is more painstaking and can be significantly minimized. The arbitrators are in a better position to make determinations as problems arise, and it is their task to make the proceedings work. In addressing the problems, however, the

GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION (1992); Marie Garavaglia, *In Search of the Proper Law in Transnational Commercial Disputes*, 12 N.Y. L. SCH. J. INT'L & COMP. L. 29 (1991); Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629 (1989); Georgou Zekas, *Problems of Applicable Law in Commercial and Maritime Arbitration*, 16 J. INT'L ARB. 173 (1999); Barena van Niekerk, *Aspects of Proper Law, Curial Law and International Commercial Arbitration*, 2 SOUTH AFR. MERCANTILE L.J. 117 (1990).

130. See generally, e.g., GUIDITTA MOSS CORDERO, INTERNATIONAL COMMERCIAL ARBITRATION: PARTY AUTONOMY AND MANDATORY RULES (1999).

131. See, e.g., LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT, *supra* note 97; Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, 17 ARB. INT'L 59, 60 (2001); Ning Jin, *The Status of Lex Mercatoria in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 163, 164 (1996); Vanessa Wilkinson, *The New Lex Mercatoria—Reality or Academic Fantasy?*, J. INT'L ARB., June 1995, at 103, 106. See generally Michael Freeman, *Lex Mercatoria: Its Emergence and Acceptance As a Legal Basis for the Resolution of International Disputes*, [1997] ARB. & DISP. RES. L.J. 281.

132. See, e.g., Hans Smit, *Proper Choice of Law and the Lex Mercatoria Arbitralis*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT, *supra* note 97, at 93.

133. The United Nations Convention on Contracts for the International Sale of Goods (CISG), Apr. 11, 1980, U.N. Doc. A/Conf. 97/18, *reprinted in* 19 I.L.M. 671 (1980). See H. VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE ch. 4 (2d ed. 2002).

134. See, e.g., Michael J. Bonell, *UNIDROIT Principles and Lex Mercatoria*, in LEX MERCATORIA AND ARBITRATION, *supra* note 97, at 249.

135. See generally, Gerold Herrmann, *The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions*, in ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 3 (Peter Sarcevic ed., 1989); Michael F. Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, 20 INT'L LAW. 327, 329 (1986); Pieter Sanders, *Procedures and Practice under the UNCITRAL Rules*, 27 AM. J. COMP. L. 453, 453 (1979).

arbitrators may not decide the matter as the parties might have decided it prior to the finalization of the contract; they may not be able to follow the parties' instructions because of practical considerations; or they may have—or may believe they have—a better solution than the one provided for by the parties. The decision to act in accordance with any one of these variations could compromise either the functionality of the arbitral proceeding or its lawful character. The question centers upon how valuable the party right to decide may be, how much protection against arbitrator discretion is warranted for party rights, and what value is placed upon the practical effectiveness of the procedure.

G. *The Character of the Arbitral Trial*

The arbitration agreement can also establish the structure and content of the arbitral trial and the remedial and procedural powers of the arbitrators.¹³⁶ In either circumstance, party provision can act as either a substitute for, an amendment to, or a replacement of otherwise applicable institutional rules. As to matters of procedure, an extensive list of elements should be considered, including the use of discovery and other pre-hearing devices in the arbitration, rules for the gathering and assessment of evidence, the qualification and use of experts in the proceeding, the calling and questioning of witnesses, the powers and obligations of the parties during the proceeding, and a statement of who retains decisive authority in the procedure. The arbitrators' authority as to the issuance of interim relief, the conduct of the proceedings, the predicate of decision, and the type and amount of damages should be defined. Also, provision needs to be made for addressing procedural matters that arise in the "twilight" period that follows the demand for arbitration and the appointment of the arbitrators. Critical issues can surface at this stage of the process, having a direct bearing upon the effectiveness of the arbitration. The applicable institutional rules may already regulate these matters. The parties should determine whether these provisions are suitable for their arbitration.

136. See generally UNCITRAL NOTES ON ORGANIZING AN INTERNATIONAL ARBITRATION PROCEEDING. See generally Marc Blessing, *The ICC Arbitration Process. Part III: The Procedure Before the Arbitral Tribunal*, 3 ICC INT'L CT. ARB. BULL. 18 (1992); S. Goekjian, *The Conduct of International Arbitration*, 11 LAW. AM. 409 (1979); Sigrard Jarvin, *The Arbitral Proceeding*, 1999 STOCKHOLM ARB. REP. 43; Jacques Pellerin, *Les droits des parties dans l'instance arbitrale*, 1990 REV. ARB. 395; Hans Smit, *Managing an International Arbitration: An Arbitrator's View*, 5 AM. REV. INT'L ARB. 129 (1994).

H. *The Award*

In constructing their agreement, there are two elements that the parties should consider in regard to the award.¹³⁷ First, the parties should determine whether they want the arbitrators to rule in a summary manner or articulate reasons for their determinations. The reasons can be brief and grounded in technical expertise or can approximate the more elaborate content of a judicial decision. Summary rulings are seen as a disincentive to overly aggressive judicial supervision and as a means of preserving the economy of the process.¹³⁸ Giving reasons for the result, however, achieves a number of equally important objectives. For example, it demands that the arbitrators “think out” their conclusions by addressing the content of the applicable law, the arguments advanced by the parties, and possibly the principles that regulate the exercise of arbitrator authority.¹³⁹ The provision of reasons also gives the losing party an explanation for the result. Achieving these objectives may enhance the legitimacy of the specific determination and generally of the process. It may also enhance voluntary compliance with or the judicial enforcement of the award. Finally, it might contribute to the development of a substantive transborder law of commerce, contract, and arbitration.

I. *The Standard of Review*

Second, in some jurisdictions, the courts have recognized the contract authority of parties to prescribe the standard of judicial review that would apply to prospective awards.¹⁴⁰ This development emerged and has been debated in the U.S. federal circuits.¹⁴¹ It

137. See, e.g., Marcel Fontaine, *Drafting the Award: A Perspective from a Civil Law Jurist*, 5 ICC INT'L CT. ARB. BULL. 30, 31, 35 (1994); Humphrey Lloyd, *Writing Awards: A Common Lawyer's Perspective*, 5 ICC INT'L CT. ARB. BULL. 38 (1994); Michael O'Reilly & Eleni Sfakianaki, *Arbitral Awards: Contents, Requirements and Layout*, 66 ARB. 79, 80 (2000); Margaret P. Sullivan, *The Scope of Modern Arbitral Awards*, 62 TUL. L. REV. 1113, 1122 (1988).

138. Sullivan, *supra* note 137, at 1120.

139. *Id.*

140. See CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 24.

141. See *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 888-89 (9th Cir. 1997). *But see* *Kyocera v. Prudential Bache Trade Servs., Inc.*, 2003 WL 22025130 (9th Cir. Aug. 29, 2003) (reversing prior holding and ruling that the FAA controls judicial supervision of awards); see also *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995); *New England Utils. (NEU) v. Hydro-Québec*, 10 F. Supp. 2d 53, 60 (D. Mass. 1998); *Cook v. Hughes Training, Inc.*, 254 F.3d 588, 593 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 1196 (2002); *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 292-93 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 545 (2001); *Bowen v. Amoco Pipeline Corp.*, 254 F.3d 925, 921 (10th Cir. 2001). *But see* *Chicago*

received a mixed reception in those courts; some circuits enforce these “opt-in” provisions¹⁴² for judicial review, others do not. Through this use of the arbitration agreement, the statutory standard for effectuating the judicial supervision of arbitral awards becomes a default provision.¹⁴³ The controlling legal rule is the standard stated in the contract.¹⁴⁴ In the actual cases, the parties stipulate that the court at the place of enforcement must review the merits of any legal determination reached by the arbitrators. The practice demanded by the contract obviously contradicts the core objective of the statutory scheme, namely, to exclude any merits-based review of arbitral awards, and demands that regulation defer to the parties’ freedom of contract. It also strongly implies a distrust of the arbitrators’ decisional ability. Further, it reduces arbitration to a fact-finding function. Nevertheless, some courts—of both liberal and conservative political persuasions—find such stipulations enforceable for reasons of contract freedom.¹⁴⁵

To some extent, the emergence of this development in arbitral practice testifies to the growing sophistication of the arbitral process as a mechanism for domestic and transborder dispute resolution. It also demonstrates the fragility of a doctrine (“the strong judicial policy favoring arbitration”¹⁴⁶) that is founded more on achieving preordained and uniform results than it is on intellectually sustainable reasoning and principles. Whatever the larger doctrinal implications may be, the drafter of arbitration agreements has a new task: to decide whether to use such a provision and, if so, to determine where it is likely to be enforceable.

“Opt-in” provisions for judicial review also raise the question of whether the newly discovered authority of contract can be applied in reverse to achieve an opposite result. In other words, would courts hospitable to freedom of contract in arbitration uphold, favor, merely tolerate, or reject the parties’ elimination of any judicial supervision

Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991). See also Victoria Holstein, *Co-opting The Federal Judiciary: Contractual Expansion of Judicial Review of Arbitral Awards*, 1 J. AM. ARB. 127, 130 (2002); Alan S. Rau, “Arbitrability” And Judicial Review: A Brief Rejoinder, 1 J. AM. ARB 159, 160-61 (2002). The most recent pronouncement on this issue is *Schoch v. Infoura, Inc.*, 341 F.3d 785 (8th Cir. 2003). Refining its prior ruling in *UHC Management Co.*, the court states that the parties’ intent to have judicial de novo review must be clear and unmistakable. *Id.*

142. The phrase is from the Uniform Arbitration Act, available at <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm> (last visited Sept. 9, 2003).

143. *Id.*

144. *Id.*

145. See e.g., *Lapine Technology*, 130 F.3d at 889; *Cook*, 254 F.3d at 594. But see *Kyocera v. Prudential Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003).

146. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624-25 (1985) (finding a strong presumption favoring arbitration in international commerce).

of the awards emanating from their arbitration? In such circumstances, the parties would be seeking to establish the automatic enforcement of awards by the courts of any requested jurisdiction. Such an approach currently only applies to ICSID arbitral awards.¹⁴⁷ Instead of court scrutiny, the ICSID arbitral procedure provides access to a second ICSID arbitral tribunal through an annulment action. The procedure has been agreed upon by treaty.¹⁴⁸ The Dutch law on arbitration also forecloses the judicial supervision of awards if appellate reference is made to a second arbitral tribunal.¹⁴⁹

There are a host of legal and practical problems that attend the implementation and assessment of the "opt-in" judicial review provisions. Trumping the statute by contract raises a question of basic authority and legality. Also, contract is used to establish the principle and scope of judicial jurisdiction. Moreover, court supervision on the merits runs counter to the entire modern history of legislation on arbitration.¹⁵⁰ These threshold problems are followed by equally significant difficulties of implementation. What result if the designated or otherwise ruling court rejects the contract reference? Is review on the merits foreclosed or can another court undertake the task? What standards of review should a reviewing court apply? Does it apply arbitral or judicial standards, for instance? Can the court modify an award on the basis of its authority to review the merits? The best approach may be to allow for the judicial supervision of the merits of awards by another arbitral tribunal, as is done under the aforementioned Dutch law.¹⁵¹

J. *The Chromalloy Problem*

Another danger that arises in transborder arbitration results from the decision in *Chromalloy v. Egypt*.¹⁵² The parties, however, may be unable to lessen the consequences of that opinion in their agreement to arbitrate. *Chromalloy* achieved an enforcement result that favored recourse to arbitration.¹⁵³ The federal court held that the setting aside of an international arbitral award in the place of its rendition by local courts did not thwart the award's enforceability in another requested jurisdiction under the New York Arbitration

147. See CARBONNEAU, CASES AND MATERIALS, *supra* note 2, at 912, 924-25 (describing the ICSID arbitration procedure).

148. *Id.*

149. See Netherlands: New Statute on Arbitration, 26 I.L.M. 921, 940 (1987) (describing the Dutch law on arbitration).

150. See CARBONNEAU, CASES AND MATERIALS, *supra* note 2; see also list of cases discussed, *supra* note 141 (offering a modern history of judicial review).

151. Netherlands: New Statute on Arbitration, 26 I.L.M. at 940.

152. *Chromalloy v. Egypt*, 939 F. Supp. 907, 908 (D.D.C. 1996).

153. *Id.* at 913-14.

Convention.¹⁵⁴ In granting enforcement, the court held that the Article V grounds for assessing international arbitral awards were stated in conditional language and were, therefore, optional.¹⁵⁵ Also, international regimes for arbitration and award enforcement could not compromise domestic rights that prevailed in regard to arbitration.¹⁵⁶ The nullified award was enforceable under the first chapter of the FAA.

A subsequent federal court ruling (*Spier*¹⁵⁷) declined to follow *Chromalloy*. *Chromalloy*, however, is joined by French courts' decisions achieving the same result.¹⁵⁸ Despite its pro-arbitration result, *Chromalloy* makes the enforcement of international arbitral awards more difficult because it transforms the basis for the judicial evaluation of these awards into a matter of ad hoc court discretion. It appears that national courts can choose whatever criteria they deem appropriate for conducting their supervision, subject to the caveat that the criteria do not detract from the domestic arbitration rights of the parties.

Attributing complete discretion to the requested national courts and seeking protection from domestic provisions on arbitration can create a "legal no-man's land"¹⁵⁹ and a state of chaos in transborder practice. Ironically, the holding in *Chromalloy* seems to undercut the New York Arbitration Convention by giving its underlying policy absolute, unqualified expression. Enforcement in these circumstances disables the governing framework. Further, it is unclear how the parties might deal with this contingency in the arbitration agreement because it involves the rule of law for the enforcement of awards in foreign jurisdictions bound by a treaty regime.

K. Foreign Practice Rules

Contracting parties should be aware that national rules that pertain to the professional activity of foreign lawyers within the national jurisdiction could compromise their choice of legal representation in arbitration.¹⁶⁰ U.S. lawyers seeking to represent parties in China or in Tokyo might not be able to participate in arbitral proceedings that affects their clients.¹⁶¹ The parties could

154. *Id.* at 913.

155. *Id.* at 914.

156. *Id.*

157. *Spier v. Calzaturificio Tecnica*, 77 F. Supp. 2d 405, 407 (S.D.N.Y. 1999).

158. *See OTV v. Hilmarton*, 1997 REV. ARB. 376 (ruling that there were no public policy grounds to refuse enforcement of the arbitration award in another state).

159. *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 517 (1974).

160. *See infra* text accompanying notes 162, 173 for examples of national rules affecting legal representation in arbitration.

161. *Id.*

endeavor to overwhelm such local practice rules in their agreement, but it would likely be unsuccessful. Choosing a venue that is hospitable both to arbitration and transnational legal practice may be the best solution, although seeking to make that choice might add another layer of difficulty to the initial negotiations.

In China, for example, according to a State Council Regulation on Foreign Law Firms¹⁶² that went into effect on January 1, 2002, foreign lawyers who are part of an approved resident representative office in China may not involve themselves in “Chinese legal affairs.”¹⁶³ Such lawyers can engage in the rendition of only five types of legal services:

- (1) *Advising on Foreign and International Law.* Registered lawyers can give advice on the law of countries in which they are admitted to practice. They can also provide “advice on international conventions and international practices[.]”
- (2) *Provision of Legal Representation Abroad.* Upon the request of a client or a Chinese law firm, registered lawyers can “handle [] legal affairs in the countries” in which they are admitted to practice.
- (3) *Secure Chinese Legal Representation for a Foreign Client.* Registered lawyers can hire a Chinese law firm on behalf of a foreign client to provide legal representation in China on matters of Chinese law.
- (4) Foreign lawyers in a resident representative office can also “provide[] any legal services through a long term entrustment agreement with a Chinese law firm;” and
- (5) can “provide[] information relating to the impact on Chinese legal environment.”¹⁶⁴

Assuming that the last two categories indicate that registered foreign lawyers can provide advice to and through a Chinese law firm to foreign law firms, it seems clear that registered foreign lawyers are relegated to providing legal opinions and advice primarily, if not

162. See *State Council Issues Regulation on Foreign Law Firms*, INTERLINK CHINA, available at http://www.interlinkChina.com/laws_regulations.htm (last visited Oct. 22, 2003). The State Council Regulation consists of thirty-five articles; it is entitled “The Regulations on the Management of Representative Offices set up by Foreign Law Firms in China.” *Id.* It was endorsed by the State Council on December 19, 2001. *Id.* Approvals under the regulation are given by the judicial administrative department under the State Council. *Id.* Moreover, “Where approval is given to a foreign law firm to establish a resident representative office, the judicial administrative department under the State Council shall issue a practice licence to the foreign law firm and practice certificates to its representatives.” Regulations on the Management of Representative Offices set up by Foreign Law Firms in China, ch 1., art. 9 (2002). The regulation itself is available at http://www.info.gov.hk/justice/new/depart/doc/setup_law_firm_e2.pdf (last visited Sept. 9, 2003) [hereinafter STATE COUNCIL REGULATION]. On the legal profession in China, see generally Charles Chao Liu, Note and Comment, *China’s Lawyer System: Dawning Upon The World Through a Tortuous Process*, 23 WHITTIER L. REV. 1038 (2002).

163. STATE COUNCIL REGULATION, art. 15.

164. *Id.*

exclusively, upon matters of foreign and international law. They can also facilitate the establishment of a relationship between a foreign client and a Chinese law firm—in effect, acting as a conduit by which Chinese law firms cultivate business. They cannot hire certified Chinese lawyers nor have their Chinese paralegals perform legal services.¹⁶⁵

The State Council Regulation is hardly an “open door” policy on the provision of legal services in China by foreign law firms. Intended to evidence China’s admission to the WTO, it allows these firms to engage in a restricted form of consulting. It does not appear that a U.S. party involved in a CIETAC arbitral proceeding¹⁶⁶ could hire a U.S. or other foreign law firm with a representative office in China to provide it with legal representation before the arbitral tribunal. Such a proceeding probably constitutes “Chinese legal affairs.”¹⁶⁷ The U.S. law firm could only secure the services of a Chinese law firm for its client and play a role behind the scenes.

Moreover, the State Council Regulation could prevent North American, European, or Latin American attorneys from serving as CIETAC arbitrators.¹⁶⁸ The exercise of such functions can be seen as involvement in “Chinese legal affairs.”¹⁶⁹ While the CIETAC *Stipulations for the Appointment of Arbitrators*¹⁷⁰ appear to tolerate and even encourage the designation of foreign arbitrators—for example, “foreign arbitrators” are required to have “a good English level and a certain knowledge of Chinese, however, the terms can be softened appropriately to a small number of well known personages in the field of international arbitration”¹⁷¹—the flexibility of approach conflicts with the restrictiveness of the State Council Regulation. In the final analysis, U.S. and other foreign parties may not be able to choose the arbitrator they want in a CIETAC proceeding.

The State Council Regulation is circumspect, to say the least. It will not generate a wave of boundaryless commercial law practice in China. It is not likely to make China a more attractive venue for international business. In fact, the regulation is likely to increase the insecurity and uncertainty associated with foreign commercial transactions in China.

165. Art. 26.

166. See CARBONNEAU, *CASES AND MATERIALS*, *supra* note 2, at 1190 (discussing CIETAC Arbitration).

167. STATE COUNCIL REGULATION, art. 15.

168. *Id.*

169. *Id.*

170. *Stipulations For The Appointment of Arbitrators*, available at <http://www.cietac-sz.org/cn/cietac/English/arbitrators/index.htm> (last visited Sept. 9, 2003).

171. *Stipulations For The Appointment of Arbitrators*, art. I(2)(4).

The Japanese legal system seems to be more accepting of the presence and activity of foreign lawyers. Despite a distrust of things foreign and a preference for the nonadjudicatory settlement of disputes,¹⁷² Japan enacted a foreign lawyer law in 1986.¹⁷³ Law Number 66 of 1986, "Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers," allowed U.S. and other foreign lawyers to assist foreign company investment in Japan and Japanese companies to enter the international marketplace.¹⁷⁴ The law nonetheless imposed many restrictions upon the conduct of registered foreign lawyers—for example, they could not enter into partnerships with or hire Japanese attorneys and they could not use the name of their home state firm—only the senior partner's name—in their professional dealings in Japan.¹⁷⁵

The Japanese foreign lawyer law was amended in 1994, 1996, and 1998.¹⁷⁶ These amendments liberalized the law. For example, the law as amended now allows a special association between Japanese lawyers and the foreign firm known as a "specific joint enterprise."¹⁷⁷ In particular, the 1996 Special Measures Law permits foreign lawyers to act as arbitrators or represent clients in international arbitral proceedings held in Japan.¹⁷⁸ According to the Japan Commercial Arbitration Association, under Law Number 65 of June 12, 1996,

A foreign lawyer practicing outside of Japan may represent a party to the proceedings of an arbitration case in regard to civil affairs where the place of arbitration is located in Japan and all or part of the parties have [a] domicile... or principal place of business in a foreign country. A foreign law solicitor [] registered in Japan... may also represent a party in the above-mentioned case. The long pending issue of whether foreign lawyers may represent a party in international arbitral proceedings conducted in Japan in relation to conflicts with the Japan's [foreign] lawyer's law is considered to have been eventually settled.¹⁷⁹

As a consequence, party selection of counsel or of an arbitrator is more likely to be effective in Japan than China.

The lack of certainty on this question emphasizes the need for establishing an international regulatory framework for the transborder practice of law. It is difficult to argue with the view that "justice should no longer be sought and found solely in local courts

172. See CARBONNEAU, *CASES AND MATERIALS*, *supra* note 2, at 1187.

173. Leonardo Ciano & Drew Martin, *Japan's Foreign Lawyer Law: Disparate Views*; ALSB INT'L BUS. L.J. 101, 101, available at www.wsu.edu/~legal/ijrn/ciano-martin (last visited Sept. 9, 2003).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Foreign Lawyer's Representation in Arbitral Proceedings in Japan*, available at www.jcaa.or.jp/le/arbitration (last visited Sept. 9, 2003).

among fellow professionals with a same educational background and subject to the same rules of ethics, but in judicial bodies which assemble professionals with different education and training, governed by different practice rules.”¹⁸⁰ The multi-jurisdictional practice rules of the EU¹⁸¹ provide the best example for implementing such a system of transborder practice. With due deference paid to the uniqueness of matters involving property and succession laws and under the possible application of the local rules of ethics, lawyers from Member States can engage in transactional practice and litigation in any EU country. The regulation of the practice of law should reflect the global character of economic activity. Sectarian considerations should no longer prevail in the rendition of legal services. The visibly protectionist motivation does not enhance the public perception of lawyers or the stature of the profession. Other

180. Carl Bevernage, *Introduction—Symposium: Paris Forum on Transnational Practice for the Legal Profession Discussion Papers*, 18 DICK. J. INT’L L. 89, 92 (1999).

181. For an exceptionally able and lucid account of the comparative value of EU practice on this question, see Roger Goebel, *The Liberalization Of Interstate Legal Practice In The European Union: Lessons For The United States?*, 34 INT’L LAW. 307 (2000).

Qualified lawyers from any Member State are now able to provide all legal services of a transactional nature in any other European Union state (except if the host state restricts practice in the transfer of real estate interests or in the administration of decedents’ estates), while subject to the home state ethical rules in the execution of the transactional services. Qualified lawyers from any Member State may also litigate in courts in any other state, subject to the host state ethical rules, and in association with a local lawyer if the host state so requires. It is important to note that this high degree of liberalization has occurred without any evidence of significant functional problems or risks to clients and without any serious opposition from national bar associations—despite differences in substantive laws and procedural rules for greater among the Member States than they are among the states of the United States.

Id. at 344.

[A]n exception might be recognized when out-of-state lawyers come into a state to engage in a private arbitration proceeding. The leading arbitration bodies set their own procedures, with which arbitration law specialists are quite familiar. The arbitration clause in a contract frequently has a choice of law clause designating the substantive law of a jurisdiction other than the state that is the site of arbitration. Even when the substantive law of the state that is the site of the arbitration governs the arbitration, there are solid policy reasons for permitting clients to freely choose their customary counsel, who often represented the client in the transaction that gave rise to the arbitration, or to choose a law firm specializing in arbitration practice. In-state counsel can always provide advice or be associated with the out-of-state lawyers if the substantive law issues warrant this.

Id. at 343. See also Julian Lonbay, *Lawyer Ethics in the Twenty-first Century: The Global Practice Reconciling Regulatory and Deontological Differences The European Experience*, 34 VAND. J. TRANSNAT’L L. 907, 914-18 (2001) (discussing the practical and ethical implications of a multi-jurisdictional practice).

than instituting the equivalent of the German “four-eyes” doctrine¹⁸² to facilitate access to local courts, clients should have an unfettered right to choose their lawyer—no matter the venue of the negotiations or litigation.

Unfortunately, even in purely commercial and corporate in-house matters, the idea of a world bar with universal standing remains a distant vision. Until the vision becomes more of a reality, the venue and governing law of arbitration need to be chosen with care and deliberation. The retention of local counsel appears to be both prudent and necessary. Nonetheless, it adds to the cost of the venture and does not completely eliminate the fear and risks of the unknown. Proceeding with the “tried and true” should always be the first choice.

L. The “Universal” Jurisdiction of National Courts in Transborder Arbitration

In light of the ruling in *NIOC v. Israel*,¹⁸³ there is a further element to explore for possible inclusion in the agreement to arbitrate. In that case, the ruling French court asserted that it had jurisdiction in a litigation involving an oil pipeline venture between the National Iranian Oil Company and Israel.¹⁸⁴ When a dispute arose, the Israelis eventually (over a course of years) refused to appoint an arbitrator because Israeli judicial rulings, rendered after the project was instituted, made it illegal under Israeli law for the Israeli Government to deal with Iran.¹⁸⁵ Because the contract authorized the ICC in Paris to resolve intractable disputes that arose between the parties in regard to the effectuation of the arbitration, the French court asserted that it had jurisdiction in the matter and that, under French law, the court—once connected jurisdictionally—had a universal juridical duty to assist transborder arbitral tribunals.¹⁸⁶ It could, therefore, name an arbitrator on behalf of Israel in order to promote the effective operation of the arbitration.¹⁸⁷

The ruling is simultaneously creative, undisciplined, transparently biased, and controversial. The practical consequence is that a reference to ICC arbitration in an arbitration agreement raises the prospect, under French law, of vesting French courts with jurisdiction over a prospective arbitration. The arbitration can be as

182. See Stephen Kabera Karanja, *The Schengen Information System in Austria: An Essential Tool in Day to Day Police and Border Control Work?*, Commentary, [2002] J. INFO. L. & TECH. 1 available at <http://elj.warwick.ac.uk/jilt/02-1/karanja.html> (last visited Sept. 9, 2003) (providing an example of the “four-eyes-entry” principle at work).

183. *Nat'l Iranian Oil Co. (NIOC) v. Etat d'Israel*, 2002 REV. ARB. 427.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

unconnected to France as was the transaction and the arbitration in *NIOC v. Israel*. The French court could thereby usurp the parties' authority and its ruling could work mischief upon the arbitration and the parties' relationship, interests, and objectives. Accordingly, any reference to ICC arbitration should now be accompanied by a caveat stating that the reference in no way authorizes the French courts to rule in regard to the arbitration or that French law—either substantive or jurisdictional—does not apply to the arbitration. Further, the caveat could specifically disclaim that the French courts have universal authority over arbitral proceedings. Because this type of frontal rejection of the French judicial authority could incite the French courts to act and eventually to nullify the contract provision, it may be more politic to state simply that another law and courts are authorized by contract to regulate the arbitration (perhaps to the exclusion of all other courts, except for purposes of the enforcement of the award). The parties could also state indirectly that the choice of ICC arbitration does not have a bearing on any choice of law nor is it intended to trigger the jurisdiction of any national courts except those specifically designated in the parties' contract.

IV. CONCLUSIONS

The foregoing considerations require the parties to an arbitration agreement to weigh a variety of factors in constructing their agreement to arbitrate. In light of all these circumstances, the economy and consensus embodied in the standard arbitration clause appear more attractive than ever before. In a customized agreement, there are an endless number of factors to assess and endless variations on each of them. Customization requires negotiations and greater cost at the outset of the transaction. The additional expense and frustration could undermine the deal or compromise its implementation. It makes the reference to arbitration potentially less functional.

The idea of more elaborate arbitration agreements clearly is a "godsend" to practitioners who charge an hourly fee, and they satiate the law professor's thirst for speculative complexity. The purpose of the exercise of freedom of contract, however, is not to thwart the arbitral process by cluttering it with uselessly intricate provisions for arbitration. The design of modern agreements is to stimulate the development of a customary practice in the drafting of complex agreements that eventually achieves economy, efficiency, and effectiveness. Customization allows parties to anticipate risks, to protect and secure their rights, and to exercise greater control over the arbitral process, the arbitrators, and the arbitral procedure. The

basic task should be to identify and elaborate upon the issues that are imperative while maintaining the functionality of the process.

In the context of both domestic and international law, the agreement to arbitrate can represent a means of repelling undesirable consequences and results that have materialized in past practice. The agreement to arbitrate also can become a law code for the parties' arbitration. It can serve to allocate power within the arbitration and in its aftermath. It can emphasize the necessity of certain procedural rights and safeguards, as well as mandatory frames of reference. In addition, the contract for arbitration can become a code of conduct for arbitrators, establishing the perimeters of the relationship between the arbitrators and the appointing party and between the arbitrators themselves. The contract for arbitration thereby allows the contracting parties to assert their control over the process and rids their arbitration of most, if all not, of its systemic significance. Their arbitration functions in absolute individual isolation as a "one-off" transaction.

The privatization and contractualization of arbitration, while they empower parties and unburden public institutions, should not eliminate completely the basis for the public regulation of the process. The string of "one-off" arbitrations, gathered together, has consequences upon the public interest in the orderly administration of adjudicative relations in both domestic and international law. The use of arbitration does have a bearing upon the substantive content of legal rights. Judicial vigilance should not only ward off the flagrant abuses of process and procedure in arbitration, but it should also establish an "interests of justice" limitation upon the operation of the process and the rulings of arbitrators. The likelihood of exercising this judicial power should be as clear and unequivocal as it is restrained. It should, however, always remain meaningful. The public interest in adjudicatory order and fairness must receive an authoritative expression, not a perfunctory and empty nod.