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– A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
– A one-week site visit experience in San Juan, Puerto Rico, students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
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The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

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Document Production in International Arbitration: A Critique from 'Across the Pond'

Peter Ashford[†]

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I. Introduction

Discovery is an essential part of the procedural framework in the United States and other common law countries.[1] It encompasses document production but, in the United States, it also includes depositions, interrogatories, admissions, and much more. The essential feature of it is that it is a prelude to an adversarial contest before a judge whose role it is to see fair play and then determine (either himself or with a jury) the victor. The rationale for discovery proceeds on the premise that the adversarial contest can only be fair if both sides have access, as far as possible, to the same materials. Thus, a party must produce documents not only that it intends to rely upon but also those, which damage its own case. It is perceived that without this advance exchange of materials the fundamental basis of the adversarial fight is undermined.

The position is quite different in civil law jurisdictions. In such arenas, a judge enquires into the facts with the assistance of the parties producing those documents they wish to rely upon (but certainly not anything that would damage their own case).

It cannot be said that either the common law systems or civil law systems produce a better quality of justice. Does United States-style discovery result in a better standard or higher quality of justice? Is American justice better than, say, English or French? And, if so, is that due to the discovery process? Is justice to be judged by the volume of paperwork produced or the perceived fairness of the process—the fairness, unbiased nature, impartiality and independence of the determination—and the ability of potential users to have access to that system of justice?

Whilst undoubtedly different both in approach and procedure the fundamentals of each of the common law systems and of the civil law systems have survived the test of time and neither system has any meaningful calls for change, or likelihood of being changed, in their adopted countries. It follows that the users of

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[1] The nomenclature will vary however; in England, for example, it is termed 'disclosure.'

those systems are seemingly content with the process they adopt. Thus, neither system can be said to be inherently flawed.

It is from this background that the relatively modern concept of international arbitration emerged. It provides an alternative to litigation before domestic courts and is perceived as the forum of choice for international disputes—whether private disputes arising under a contract or public disputes arising under international treaties. Necessarily, these disputes will usually involve parties from different jurisdictions and indeed often with very different legal systems. International arbitration has to accommodate the private expectations of these parties—those expectations often being governed, or at least heavily influenced, by their own experience of domestic litigation in their own country.

How then should discovery be conducted in international arbitration? The simple answer is that it should not be. Discovery itself is an unhelpful term, especially because of the wider connotations it has in the United States and the international perception of the onerous obligations it brings. "Disclosure" is a better term but "document production" is what, in most cases, is truly being discussed and directed and does not carry the pejorative meaning of "discovery" and, to a lesser extent, "disclosure." Accordingly, this paper will use the term "document production."

II. Background

Document production cannot be considered in isolation. It serves as part of a process towards a final determination on the merits. That arbitral process will invariably start in earnest with some form of document setting out each party's case. Whatever that document is termed—be it statement of case, memorial, points or particulars of claim—they serve the same end: to clarify and define the issues between the parties and what the tribunal must decide. For the purposes of this paper I will use the term "memorial" to cover these documents.

Usually memorials will be confined to factual issues rather than advancing propositions of law, but sometimes these will be included at this stage (rather than in pre- or post-hearing briefs). For the purpose of this paper it is material only that the memorials will usually include the setting out of material facts that are to be relied upon in support of the claims made and defences advanced. Certainly, so far as English Court procedure is concerned, the function of "statements of case" (previously called "pleadings") has been clarified:

> The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is

> important is that the pleadings should make clear the general nature of the case of the pleader. . . . As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements pleadings frequently become of only historic interest. . .[2]

The key function of these statements is to set out the parameters and issues and identify the material facts supporting the cause of action or defence. The key documents relied upon will, at the very least, be identified and often annexed.

From these preliminary exchanges of memorials the parties are likely to then embark on the further stage of document production. That process can range from something akin to a civil law process where documents relied upon are produced to something that would be recognisable, in part, to a US trial lawyer preparing for discovery.

The fundamental proposition is that all forms of document production are there to assist in a fair resolution of the dispute without unnecessary delay or expense. Equally fundamental, however, are the propositions that: (a) a party has the burden of proving facts upon the affirmative of which he relies and that are in issue and must do so to the required standard, and (b) that forcing a party in a different sovereign state to undertake any act (e.g. disclosing documents contrary to its interests) is, to a degree, an exercise of sovereignty over a foreign subject that should always be exercised carefully.[3]

III. Discussion

Some form of document production is appropriate in the majority of cases but should not be put into the standard "one size fits all" category. What document production is required in a case of complex fraud might be quite different from a case seeking to determine the meaning of a word or phrase in a commercial agreement. This is the inherent advantage of the arbitral process—being able to craft a procedure around the dispute. Rarely will it be appropriate to impose the duties and costs of US-style discovery on a party.

More often than not it will be something much closer to the civil law regimes than the common law regimes. Indeed the documents relied upon are often the starting and ending point of document production. However, that is not normally the end of the matter. The parties will often have agreed to be governed or influenced by the International Bar Association Rules on the Taking of Evidence

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[2] The nomenclature will vary however; in England, for example, it is termed 'disclosure.'

[3] Cookney v. Anderson (1863) 1 De. G. J. & S. 365, 380–81. For example, in this English case, Lord Westbury LC said:

> The right of administering justice is the attribute of sovereignty, and all persons within the dominions of a sovereign are within his allegiance and under his protection. If, therefore, one sovereign causes process to be served in the territory of another, and summons a foreign subject to his court of justice, it is in fact an invasion of sovereignty, and would be unjustifiable, unless done with consent . . .

Id.

in International Arbitration (the "Rules").[4] These Rules provide for parties to produce documents relied upon.[5] The Rules also permit a limited and defined request for the production of documents or class of documents that is relevant and material to the outcome of the arbitration.[6] If such request is refused, the arbitral tribunal may consider it and order production of all or some of what was sought if it considers it appropriate. Such a process is usually accepted as meeting conflicting international norms.[7]

This limitation or reduction on extensive document production is a result of the perceived unnecessary time and cost incurred in wholesale US-style discovery.[8] It follows that the question posed at the outset of whether the common law and the US-style in particular produces a better standard or quality of justice has been, to an extent answered by the international arbitration community—and not in a manner that would please proponents of US-style discovery.

The Rules provide an internationally accepted code that serves most situations well.[9] It should be the starting point for most, if not all, questions on document production and in the majority of cases, will be sufficient in itself.

It is not only the arbitration community that has steered away from extensive document production. English court procedure has also seen a significant shift away from discovery. The Civil Procedure Rules[10] introduced in 1999 did away with the term "discovery" substituting "disclosure" in its place.[11] But it was not simply a change of terminology. The philosophy underlying the change was to do away with the time and cost involved in discovery.[12] The prevailing test until 1999 had been defined in 1882[13] as any document that one may reasonably suppose "contains information which may enable the party (applying for discovery)

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[4] Int'l Bar Ass'n [IBA], IBA Rules On The Taking Of Evidence In International Arbitration (2010), *available at* http://www.ibanet.org/Publications/publications_IBA_guides_-and_free_materials.aspx [hereinafter IBA Rules].

[5] *Id.* art. 3(1).

[6] *Id.* art. 3(3).

[7] Or in other words, balancing the conflicting expectations of the common law and civil law approach to the disclosure of documents.

[8] Although not mentioned expressly in the Rules the Commentary by the drafting committee makes it clear that conflicting views can arise from different legal backgrounds and cultures and that the Rules contain procedures developed from both common law and civil jurisdictions. It is implicit from this that neither the limit on the extent of disclosure obligations has been adopted and the US being one end of the spectrum, nor has the Committee plainly excluded the US style.

[9] IBA Rules, *supra* note 4. The Forward to the IBA Rules states:

> The IBA issued these Rules . . .to provide an efficient, economical and fair process . . .The IBA Rules . . . reflect procedures in use in many different legal systems and they may be particularly useful when the parties come from different legal systems. Since . . . 1999, the IBA Rules . . . have gained wide acceptance . . .

Id.

[10] Civil Procedure Rules, 1998, S.I. 1998/3132 (U.K.), *available at* http://www.justice.gov.uk/courts/procedure-rules/civil [hereinafter CPR].

[11] *Id.* pt. 31.

[12] The Right Honourable the Lord Woolf, Master of the Rolls, Access to Justice Final Report (1996) (U.K.).

[13] Compagnie Financiere du Pacifique v. Peruvian Guano, [1882] 11 Q.B.D. 55, 63 (Eng.).

either to advance his own case or to damage that of his adversary, [or] if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences" must be disclosed.[14]

Lord Woolf's final report in 1996[15] made the recommendations that resulted in the Civil Procedure Rules.[16] One of the key justifications in doing so was to enhance the international competitiveness of the English legal system. He said:

> . . . the process for discovery of documents (which I now recommend should be called 'disclosure'). . .had become disproportionate, especially in larger cases where large numbers of documents may have to be searched for and disclosed, though only a small number turn out to be significant. Nevertheless, I considered that disclosure contributes to the just resolution of disputes and should therefore be retained, but in a more limited form.[17]

He recommended a solution involving the identification of four categories of documents that may require disclosure. These were:

> (1) the parties' own documents, which they rely upon in support of their contentions in the proceedings;
> (2) adverse documents of which a party is aware and which to a material extent adversely affect his own case or support another party's case;
> (3) documents which do not fall within categories (1) or (2) but are part of the 'story' or background, including documents which, though relevant, may not be necessary for the fair disposal of the case;
> (4) train of inquiry documents: these are documents which may lead to a train of inquiry enabling a party to advance his own case or damage that of his opponent.[18]

In simple cases, the current practice in England provides for a basic duty of disclosure limited to categories (1) and (2) known as "standard disclosure."[19] In more complex cases, the initial obligation will similarly be to make standard disclosure only.

Subsequent, extra disclosure over and above standard disclosure is by court order only.[20] When ordering such extra disclosure, the court must be satisfied not only that it is necessary for justice, but that the cost of such disclosure would not be disproportionate to the benefit it provides and that a party's ability to continue the litigation would not be impaired by an order for specific disclosure against him.[21]

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[14] *Id.*

[15] WOOLF, *supra* note 12, ch. 12, ¶ 37.

[16] *See generally* CPR, *supra* note 10.

[17] WOOLF, *supra* note 12, ch. 12, ¶ 37.

[18] *Id.* ch. 12, ¶ 38.

[19] CPR, *supra* note 10, pt. 31.6.

[20] CPR, *supra* note 10, pt. 31.12.

[21] CPR, *supra* note 10, pt. 1.

IV. Analysis

It is no use limiting the categories of documents a party has to disclose if he still has to search through all his documents to identify those in categories (1) and (2). In fact, Lord Woolf recommended "that initial disclosure should apply only to relevant documents of which a party is aware at the time when the obligation to disclose arises."[22] The detailed rationale is outside the scope of this paper, but Lord Woolf acknowledged that discovery "depends on the honesty and diligence of the parties."[23] Withholding documents cannot necessarily be detected, so the temptation to do this had always existed (and still exists). Furthermore, he recognised that the "alternatives to [his] proposal would be to dispense with disclosure entirely (like the continental systems) or to limit initial disclosure to documents on which a party intended to rely."[24] Both of these, he felt, went too far:"[T]he latter would be inefficient because it would simply increase the volume of routine applications for disclosure."[25] Lord Woolf felt that his proposal:

> has the effect of preventing a party, if he acts reasonably honestly, from putting forward a case which he knows to be inconsistent with his own documents . . . [and it] offers not a perfect, but a realistic, balance between keeping the burden of disclosure in check while enabling it still to contribute to the achievement of justice.[26]

It follows that if the memorials have fulfilled their function and set out the material facts relevant to the issues to be determined, the documents that fall within the twin categories of (1) the parties' own documents which they rely upon in support of their contentions in the proceedings, and (2) adverse documents of which a party is aware and which to a material extent adversely affect his own case or support another party's case, should be readily identifiable and capable of being produced.

As we have seen, category (1) documents are normally not controversial.[27] Parties may themselves come to the conclusion by accident or design that they will produce documents relied upon. It is consistent with discharging the evidential burden and the default under the IBA Rules. Category (2) documents are not, however, routinely directed to be produced and nothing in the IBA Rules specifically addresses this category.

Lord Woolf recognized that his recommendations might not produce a perfect result in every case, but overall the justice across a spectrum of cases is fairer, or better, as justice is both an absolute and relative concept. If the starting point is that justice in international arbitration is to "obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense," then an imperfect

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[22] WOOLF, *supra* note 12, ch. 12, ¶ 41.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] IBA RULES, *supra* note 4, art. 7. Parties will wish to produce the documents that they rely upon to prove their own case. The IBA Rules Article 3(1) follows this procedure.

world might be appropriate.[28] Avoiding unnecessary delay and expense is arguably better justice than that achieved by extensive discovery, at potentially considerable delay and cost, that might identify a document or documents that change the result of an arbitral reference.

The further role of justice is to have an enforceable award.[29] This is an essential duty of the arbitral tribunal. The grounds under which an award can be refused recognition and enforcement is the following: (a) a party was unable to present his case[30] and (b) the procedure was not in accordance with the law of the country where the arbitration took place or was agreed by the parties.[31] The former generally encompasses 'due process' arguments. There are few reported examples[32] of successful due process challenges, but the prospect for an arbitral tribunal to add to the short list is unattractive. To avoid raising due process issues, arbitral tribunals will be wary in refusing disclosure but equally will be wary of the disclosure process taking over the entire process.

V. Proposal

This author suggests that the biggest challenge to document production in international arbitration is not the absence of US-style discovery but rather the fact that category (2) documents are not addressed. If parties have agreed to resolve their disputes by arbitration they must be presumed to have agreed to something akin to the aim identified in the English Arbitration Act. If that is so, the end goal must be to reconcile a fair process and a fair resolution with the failure to address category (2) documents. On what basis can it be fair to have a process where the parties can advance a case when they possess, but have not disclosed, documents inconsistent or detrimental to that case? One answer might be that ethical considerations prevent counsel from advancing a case they know to be false or wrong. That answer merely raises more questions. Has counsel seen the documents? Has counsel turned a "Nelsonian"[33] eye to the issues raised in the

[28] Arbitration Act, 1996, c. 23, §1 (U.K.); United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (1985). Although not a provision deriving from the Model Law (the English Act took a 'buffet' style approach to the Model Law – adopting parts and supplementing) it is probably a definition to which most in the arbitration community would subscribe. When it came to their own cases, however, they might take issue with the fairness as applied to themselves or their clients.

[29] *See*, *e.g.,* Article 41 of the ICC Rules: ". . .the arbitral tribunal shall . . . make every effort to make sure that the award is enforceable at law." INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION (2012); *see also* THE LONDON COURT OF INTERNATIONAL ARBITRATION RULES, art. 32.2 (1998) (having a similar effect as Article 41 of the ICC Rules).

[30] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(b), June 10, 1958, 9 U.S.C. .§ 201, 330 U.N.T.S. 3 [hereinafter New York Convention].

[31] *Id.* art. V(1)(d).

[32] Iran Aircraft Ind. v. Avco Corp., 980 F. 2d 141 (2nd Cir. 1992). This case is an example where a US corporation was told there was no need to submit detailed invoices only to have its claims dismissed for failure to submit detailed invoices. *Id.*

[33] Arbitration Act, 1996, c. 23, §1 (U.K.); United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (1985). During the Battle of Copenhagen on April 1, 1801, Sir Hyde Parker led the British fleet. The then Vice Admiral Horatio Nelson was ordered via flag signal to disengage and retreat due to the hopelessness of the situation. Realizing that

documents? What system of ethics binds counsel in any event (a substantial topic in itself)?

The solution could be simply to include a direction addressing category (2) documents or require some sort of certificate to be signed by parties and/or counsel to certify that based on a reasonable and proportionate search no documents within category (2) have been identified. The settlement rate for international arbitrations is far lower than that for English court actions.[34] Whether this is linked to the general absence of any direction relating to category (2) documents is beyond the purview of this article.

To further illustrate the scope of potentially undesirable consequences of US-style discovery, a look to 28 USC §1782 is instructive. The statute is often hailed as a useful tool to aid arbitration.[35] Essentially, it allows parties involved in disputes outside the US to obtain documents and oral evidence from companies and individuals within the US.[36] Does it make for better justice? This author suggests that it does not—if justice is viewed as obtaining a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense—for it undoubtedly incurs very considerable expense and delay and only potentially produces evidence that is determinative.

Parties agree upon international arbitration for a variety of reasons, but the exclusion of discovery is often a conscious decision—one far more likely than an agreement to arbitrate outside the US so as to import §1782. To impose "back-door" discovery via §1782, may well run contrary to the original intent of the parties, be contrary to or without the consent of all parties, and may not have tribunal approval.[37] It must be questioned whether unilateral steps towards §1782 are consistent with Article 19(1) of the Model Law: the freedom of parties to agree on procedure. The parties are quite unlikely to have applied their minds to the availability of §1782 when agreeing upon arbitration: it will be something that is suggested by counsel as part of the arbitral process.

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any attempt to retreat through the shallow waters would result in catastrophic loss, Nelson, famously, placed his telescope to his blind eye and remarked that he could see no such signal. He then continued the battle and destroyed numerous enemy ships, and was able to negotiate with the Danes thereby saving many lives by turning his blind eye to the reality. It is generally accepted to be dishonest to ignore the obvious or willfully put oneself in a position of not knowing.

[34] *See* CHRISTIAN BÜHRING-UHLE, LARS KIRCHOFF & GABRIELE SCHERER, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 112 (2nd ed. 2006) (estimating a settlement rate of 43% on average). This article estimates the settlement rate at approximately 50%.

[35] Jane Wessel & Peter J. Eyre, *US Discovery in Aid of Foreign or International Proceedings: Recent Developments Relating to Title 28 US Code Section 1782*, 75 ARB. 158 (2009).

[36] 28 U.S.C.A. § 1782 (West 1996). The section provides that: "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . ." *Id.*

[37] *Id.* The nature of §1782 is that the application can be made and relief granted without the consent (and indeed in the face of opposition from) of the other party or parties and without the consent of the tribunal, although it will often be desirable to have such consent.

VI. Conclusion

It is not to say that US discovery is of no assistance to the international arbitration community. Issues in discovery move on, and "e-disclosure" is still in nascent form in international arbitration and can take valuable lessons from the courts—both in the US and elsewhere. Much has been written and good practice is being distilled. US-style Electronically Stored Information rules will not be incorporated wholesale into international arbitration, but elements of good practice will emerge. For example, destruction (rather the prevention of destruction) should be addressed at an early stage and no later than the first procedural meeting. The IBA Rules provide for costs sanctions if destruction is not in good faith.[38] Spoliation will rarely result in the dismissal of a claim in international arbitration[39] and although financial sanctions beyond costs are currently not possible, there are other remedies in which an aggrieved party may seek recourse.

Finally, it is fundamental to any arbitral process that it results in an enforceable award. If substantial questions of due process stem from either the refusal of sufficient document production or excessively onerous document production, then questions will arise over the ability to enforce the award under the New York Convention.[40] Any process must be subservient to the ultimate aim of enforceability.

[38] IBA RULES, *supra* note 4, art. 4, 20.

[39] Although, if a fair hearing is rendered impossible, then it might be considered.

[40] *See, e.g.*, New York Convention, *supra* note 30.

Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project

Ronald A. Brand[†]

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I. Introduction

In 2010, the United Nations Commission on International Trade Law (UNCITRAL) directed its Working Group III "to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions."[1] The negotiations have produced a so-far incomplete draft set of procedural rules for

† Ronald A. Brand is a Chancellor Mark A. Nordenberg University Professor and Director of the Center for International Legal Education at the University of Pittsburgh School of Law. The author has attended the sessions of UNCITRAL Working Group III on online dispute resolution as a member of the Center for International Legal Education (CILE) delegation, invited by the UNCITRAL Secretariat as expert advisers, as well as meetings of the U.S. Secretary of State's Advisory Committee on Private International Law Working Group on Online Dispute Resolution. The author thanks Dr. Cristina Mariottini for her substantial advice and input in writing this paper. The opinions expressed in this paper are those of the author and do not represent the positions of any state, organization, or other person.

[1] Report of the 43rd Session of UNCITRAL (June 21-July 9, 2010), U.N. Doc. A/65/17, ¶ 257. Rep. of UNCITRAL, 43d Sess., Jun. 21, 2009-July 9, 2010, ¶ 257, U.N. Doc. A/65/17; GAOR, 65th Sess., Supp. No. 17 (2010) [hereinafter Rep. of the 43d Sess.].

online dispute resolution (ODR) in low-value high-volume electronic transactions.[2] It is anticipated that three other documents will be prepared—addressing substantive principles to be applied in ODR, guidelines and minimum requirements for ODR providers and neutrals, and a cross-border mechanism for enforcement of the resulting ODR decisions on a global basis.[3]

The most difficult issues in the ODR negotiations are centered on concepts raising important questions about the coordination of the ODR process with national rules of private international law (conflict of laws), national rules of consumer protection, and the international arbitration law framework. If any global system of ODR is to be successful, it must avoid difficult questions about the application of national mandatory rules of law, it must be considered to provide fair procedures and results for consumers, and the results obtained must be enforceable across borders. This will only happen if the system respects the ability of individual parties (regardless of category) to enter into binding ODR agreements at the time they form the basic contract for an online transaction.

Another key to the success of the ODR negotiations lies in the need for simplicity. In directing Working Group III to engage in the ODR project, UNCITRAL specifically acknowledged that "traditional judicial mechanisms for legal recourse [do] not offer an adequate solution for cross-border e-commerce disputes," in "small-value, high-volume business-to-business and business-to-consumer disputes."[4] Making national courts available for a dispute that involves, for example, an $80 pair of shoes purchased online in a cross-border transaction, simply does not serve as an adequate path to an effective remedy. Even if a local court can handle such a case in a manner that can justify the time and cost, obtaining recognition and enforcement in the judgment debtor's home state will remove the effort from any realm of practicality. The same is true for many larger transactions as well. Even preferential access to courts does not provide a feasible path to an effective remedy in low-value high-volume cross-border transactions.

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[2] This paper is current to August 2012, when it was written. The documents produced by and for the Working Group may be found at http://www.uncitral.org/uncitral/commission/working-_groups/3Online_Dispute_Resolution.html.

[3] Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011), ¶ 52, U.N. Doc. A/CN.9/721 (June 3, 2011). This Report explains the broad support, in ¶ 52, for a proposal to replace the current wording of ¶ 4 of Article 1 of the Draft Procedural Rules with the following:

> The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which are attached to these Rules as Annexes and form part of these Rules:
>
> (a) Substantive legal principles for deciding cases;
>
> (b) Guidelines for ODR providers and arbitrators;
>
> (c) Minimum requirements for ODR providers and arbitrators, including common communication standards and formats and also including accreditation and quality control; and
>
> (d) Cross-border enforcement mechanism.

Id. This proposed collection of instruments was carried forward in the November 2011 Working Group Session draft for the preamble of the draft procedural rules. *See* Note by the Secretariat, Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, ¶ 8, U.N. Doc. A/CN/WG.III/WP.112 (Feb. 28, 2012).

[4] Rep. of the 43d Sess., *supra* note 1, ¶ 257.

Simply stated, for consumers in such transactions, access to courts is not access to justice. An ODR system that is simple, efficient, effective, transparent, and fair offers the hope of real justice in such disputes. What is not yet clear is whether such a system can be created given existing national laws that restrict access to dispute resolution outside of the courts.

Creating a global system of ODR that is simple, efficient, effective, transparent, and fair, is not an easy task. The UNCITRAL negotiations have so far indicated, however, that states may be ready to engage in the effort and that there may be a path to workable results. That path will be closed off, however, if the resulting system requires reference to multiple national laws on matters such as consumer protection, applicable law, and arbitration limitations. The UNCITRAL ODR system must be built in a manner that results in a self-contained system that can and will operate efficiently and effectively.[5]

In this article I begin with a brief review of the history of current international efforts at constructing an acceptable system of ODR for low-value high-volume transactions.[6] I then consider the important role of party autonomy in the success of any resulting ODR system.[7] If either the ODR system or national legislation prevents parties from having the autonomy to opt into the resulting system, there can be no successful result. Party autonomy is key to the difficult issues of consumer protection, applicable law, and enforcement within the existing international litigation and arbitration regimes. It simply makes no sense to design a system states agree is fair to all and then, through rules that require reference to national or regional laws, prevent the use of that system. I conclude with some thoughts on how the UNCITRAL negotiations might best continue on the path to an ODR system that can revolutionize dispute resolution by creating real benefits for all participants (particularly for consumers) where little or no practical relief now exists.[8]

II. The History of the UNCITRAL Negotiations

In the summer of 2009, the United States proposed that the UNCITRAL Secretariat "be asked to prepare . . . a study on possible future work that UNCITRAL

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[5] While the United States has used the credit card charge-back system to provide buyers with a high level of protection in online transactions, including consumer transactions, that system is both limited and less than perfect. *See, e.g.*, Gail Hillebrand, *Before the Grand Rethinking: Five Things to do Today with Payments Law and Ten Principles to Guide New Payments Products and New Payments Law*, 83 CHI.-KENT L. REV. 769 (2008) (focusing on the need for protection beyond the credit card context, including in debit card and mobile payment systems).

It does not help buyers who do not have credit cards or wish to use other payment mechanisms. Nor is it as easily applicable in cross-border transactions on a global scale. Thus, any effort to close off the development of a comprehensive system of improved dispute settlement in the online environment may well have the effect of preventing consumer access to adequate remedies in the future. Joining a system that would "dumb-down" protections already available in the United States would, of course, be a mistake. But it would also be a mistake to refuse to work cooperatively toward a system that can spread some of the benefits of U.S. domestic consumer protection across the globe.

[6] *Infra* Part II.

[7] *Infra* Part III.

[8] *Infra* Part V.

might engage in on the subject of online dispute resolution in cross-border e-commerce transactions."[9] The Secretariat did prepare such a study,[10] and, at its Sixty-Fifth Session in June and July 2010, "the Commission agreed that a working group should be established to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions, including business-to-business and business-to-consumer transactions."[11]

Working Group III of UNCITRAL was assigned the ODR project, meeting first on December 13-17, 2010 in Vienna.[12] The discussion in Vienna focused on many issues, including the importance of cross-border ODR to consumers.[13] "It was pointed out that, at present in the case of most cross-border consumer transactions, consumers had, in practice, no rights and so the creation of an ODR standard could have the effect of creating such rights."[14] Issues discussed included the type of proceedings that might be available in ODR, whether there was need for binding dispute resolution, whether neutrals could correspond directly with separate parties, the need for confidentiality and data protection, how the ODR proceedings would fit with existing international rules for commercial arbitration, and concerns about applicable law, language, and costs of proceedings. Among other things, "[i]t was generally agreed that ODR arbitral decisions should be final and binding, with no appeals on the substance of the dispute, and carried out within a short time period after being rendered, and that further consideration of enforcement issues should be deferred until after issues of substantive and procedural rules had been addressed."[15] The Working Group requested that the UNCITRAL Secretariat,

> (a) Draft generic procedural rules for ODR, including taking into account: the types of claims with which ODR would deal (B2B and B2C cross-border low-value, high-volume transactions); initiation of the online procedure; alerting parties to any agreement with regard to dispute settlement that might be entered into at the time of contracting; stages in the dispute settlement process – including negotiation, conciliation and arbitration; describing substantive legal principles, including equitable principles, for deciding cases and making awards; addressing procedural matters such as representation and language of proceedings; the application of the New York Convention, as discussed; reference to rules of other ODR systems; setting out options, where appropriate.[16]

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[9] Possible future work on electronic commerce – Proposal of the United States of America on online dispute resolution, U.N. Doc. A/CN.9/681/Add.2 (June 18, 2009).

[10] Possible future work on online dispute resolution in cross-border electronic commerce transactions, U.N. Doc. A/CN.9/706 (Apr. 23, 2010).

[11] Rep. of the 43d Sess., *supra* note 1, ¶ 257.

[12] Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 Dec. 2010), U.N. Doc. A/CN.9/716 (Jan. 17, 2011).

[13] *Id.* ¶ 42.

[14] *Id.*

[15] *Id.* ¶ 99.

[16] *Id.* ¶ 115.

The Working Group met a second time on May 23-27, 2011 in New York,[17] where it considered the set of Draft Procedural Rules that had been prepared by the Secretariat.[18] Those rules focused on an initial negotiation phase, followed by facilitated settlement, and then binding arbitration.[19] The Working Group further discussed whether the second and third phases were to be separate or related.[20] At the end of the session, the Working Group requested that the Secretariat prepare a new working draft of the procedural rules, "taking into account the views expressed by the Working Group at the current session,"[21] and further requested that the Secretariat prepare documentation for its next session addressing:

(a) Guidelines for neutrals;
(b) Minimum standards for ODR providers;
(c) Substantive legal principles for resolving disputes; and
(d) A cross-border enforcement mechanism.[22]

The third session of negotiations was held on November 14-18, 2011 in Vienna.[23] Work continued to focus on a detailed review of the draft procedural rules.[24] The session again wrestled with details of process, as well as issues of consumer protection, coordination with existing UNCITRAL arbitration instruments, and the enforceability of results, with the hope expressed "that the generic procedural rules for ODR could be adopted on a provisional basis at the next Commission session" scheduled for summer 2012.[25]

While there was hope that the progress made in November 2011 could lead to provisional adoption of the procedural rules at the fourth Working Group session in New York on May 21-25, 2012, for consideration by the Commission at its June-July 2012 meeting, that did not occur. The May session covered a review of the procedural rules dealing with introductory rules, commencement of ODR, negotiation, appointment and authority of neutrals, the relationship between facilitated settlement and arbitration, and the impact of the Working Group deliberations on consumer protection.[26]

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[17] Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011), U.N. Doc. A/CN.9/721 (June 3, 2011) [hereinafter Rep. of WGIII 23d Sess.].

[18] Note by the Secretariat, Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, U.N. Doc. A/CN.9/WG.III/WP.107 (Mar. 17, 2011).

[19] *Id.*

[20] *Id*. ¶ 7.

[21] Rep. of WGIII 23d Sess., *supra* note 17, ¶ 141.

[22] *Id.* ¶ 140.

[23] Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (Vienna, 14-18 Nov. 2011), U.N. Doc. A/CN.9/739 (Nov. 21, 2011) [hereinafter Rep. of WGIII 24d Sess.].

[24] Note by the Secretariat, Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, U.N. Doc. A/CN.9/WG.III/WP.109 (Sept. 27, 2011).

[25] Rep. of WGIII 24d Sess., *supra* note 23, ¶ 14.

[26] Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session (New York, 21-25 May 2012), U.N. Doc. A/CN.9/744 (June 7, 2012).

As this article is written in late summer 2012, the next Working Group III session is scheduled for November 5-9, 2012, in Vienna. If no final set of procedural rules is completed at that meeting, it may well be time to declare the process at a standstill. If that happens, it still may not signal the end of the development of a global ODR process. Because all of the instruments being considered in Working Group III are soft law instruments, and no treaty is proposed, it remains possible for the private sector to undertake and implement much of the same work. This may well be one of those instances where the market will move forward when governments fail to do so.

III. Key Issues as the Negotiations Continue

A. The Fundamental Role of Party Autonomy and the Need to Ensure it in the UNCITRAL ODR System

Because the documents being created by Working Group III are not treaties, but are all soft law instruments, they cannot create default rules that will apply absent party consent. This means that the system created by those instruments will work only if parties have the autonomy to opt into the ODR system. This makes good sense in a global framework in which national rules may differ significantly. If the system is to work effectively, it must work through the consent of the parties and free of national law restrictions that would make it operate differently depending on where the parties are from. Merchants simply will not participate in a dispute resolution system that differs for each buyer based on the laws of that buyer's home state. The added cost of such a system will result in merchants opting out, with the net result being that consumers and other buyers will have decreased access to goods and services and will pay higher prices for those goods and services that are sold cross-border.[27]

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[27] *See* European Commission Staff, Commission Staff Working Document accompanying the proposal for a directive on consumer rights Impact Assessment Report, *available at* http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf (last visited Oct. 3, 2012). This has been demonstrated in Europe, where cross-border internet transactions have actually declined as a result of the regulatory barrier to operating on a pan-EU basis posed by fragmented national laws, including consumer protection laws, through the conflict of laws rules in the Rome I Regulation. The Commission Staff Working Document describes the empirical effect as follows:

> The cross-border potential of distance selling is not fully exploited by consumers, who could take more advantage of the considerable price differences between the Member States (see below). Cross-border Internet purchases were made by only 6% of consumers surveyed in 2005 (up from 3% in 2003). This compares with the 23% who bought goods or services via the Internet from domestic sellers. The scale of cross-border purchases, as well as its significance compared with domestic shopping is even lower for contracts concluded via phone or post (mail order). This trend is confirmed in 2008—while the number of consumers having used distance sales methods for domestic purchases has increased for all distance sales methods compared to 2005, this number has remained flat for cross-border distance purchases. This discrepancy between trends in cross-border and domestic sales is particularly significant for Internet sales. While the number of consumers using the Internet for domestic purchases increased by 7 percentage points in 2005-2008, from 23% to 30%, this increase was only 1 percentage point over the same period for cross-border Internet purchases, from 6% to 7%.

Id. at 9. The same document concludes that cross-border internet commerce problems are a result of fragmented Member State laws that are applicable through Community Regulations:

> The effects of the fragmentation are felt by business because of the conflict-of law rules, and in particular the Rome I Regulation ("Rome I"), which obliges traders not to go below the level of

This necessary focus on party autonomy at the core of the ODR system requires that national legal systems must accept private party ability to agree to ODR on a pre-dispute basis. Thus, it is useful at the outset to understand the extent to which national and regional legal systems currently respect or limit party autonomy to enter into dispute resolution alternatives. While a survey of all national legal system rules in this regard is beyond the scope of this exercise, the laws of the U.S. and EU serve as examples of approaches that must be reconciled with the final UNCITRAL ODR product.

An initial question is whether the UNCITRAL system will distinguish among different types of transactions for purposes of access to and application of the ODR procedures and rules. Private international law rules in many countries do rely on such distinctions, with special rules for what are determined to be weaker parties. Thus, both the Brussels I and Rome I Regulations of the European Union create special rules for consumer transactions, individual agreements of employment, and insurance contracts.[28]

If different types of parties are subject to different sets of rules in the ODR system, then there must first be definitions created that are capable of use in distinguishing which category a party falls within, someone must be designated to apply that definition, and procedures must exist for determining when and how that someone applies the applicable definition. All of this runs counter to the goals of simplicity, effectiveness, and efficiency. While it has been suggested that consumers should be subject to special rules in the ODR system, implementing such rules would ensure the failure of the UNCITRAL project. The cost—in both time and financial resources—of determining in each case whether one party is a consumer, would be prohibitive. Additionally, there is no reason to believe it would serve any useful purpose. If the system can be created to be transparent, effective, and fair to all parties, there is no need for special treatment based on whether one party is a consumer. This is demonstrated further in the discussion, below, of prohibitions on pre-dispute arbitration agreements.

The negotiations in Working Group III have recognized the need to avoid distinguishing special classes of parties in the ODR process from the outset, with the original Commission charge to the Working Group providing a mandate "to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions."[29] So far at least, the Working Group has not deviated from this charge. No special categories or party-based limitations on scope have been created in the draft procedural rules.

> protection afforded to foreign consumers in their country. As a result of the fragmentation and Rome I, a trader wishing to sell cross-border into another Member State will have to incur legal and other compliance costs to make sure that he is respecting the level of consumer protection in the country of destination. These costs reduce the incentive for businesses to sell cross-border, particularly to consumers in small Member States. Such costs are eventually passed on to consumers in the form of higher prices or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level.

Id. at 8.

[28] *Infra* Parts III.B.3, III.B.4.

[29] Rep. of the 43d Sess., *supra* note 1, ¶ 257.

B. Private International Law, Party Autonomy, and Consumer Protection in the United States and the European Union

Even without distinctions for consumers (or any other class of "weaker" party), legal systems take differing approaches to the general question of party autonomy. As already noted, the U.S. and EU approaches provide useful examples of the types of systems that must be reconciled in creating a global ODR system. Thus, it is worth considering those systems at this juncture.

1. U.S. Law on Choice of Forum

The latter half of the twentieth century saw a dismantling of prior restrictions on the exercise of party autonomy, allowing international trade to flourish on terms chosen by the parties. While the late Professor Peter Nygh's statement that "freedom of contract is an essential part of the market economy," and that "[n]o State can hope effectively to control international contracts,"[30] may tend to overstate the case, most legal systems have moved to a twenty-first century world in which parties—particularly in international transactions—have significant freedom to select both the forum in which their disputes will be settled and the law to be applied by the chosen tribunal.[31] While arbitration represents a special category, with its own international legal regime,[32] the movement toward respect for party autonomy has encompassed both choice of court and arbitration.[33]

In the United States, three Supreme Court decisions demonstrate the march to respect for party autonomy in choice of forum. In 1972, in *Bremen v. Zapata*, the Court enforced a choice of forum clause between U.S. and Italian parties choosing a London court for a large commercial transaction.[34] In 1985, the Court honored the Federal Arbitration Act and New York Convention as demonstrating a strong policy in favor of arbitration in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, enforcing an agreement to arbitrate U.S. antitrust issues in Japan.[35] And in 1991, in *Carnival Cruise Lines, Inc. v. Shute*,[36] the Court enforced a small print choice of forum clause on the back of a consumer cruise ticket, even though the consumer likely had never read the clause and certainly

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[30] PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 2 (1999).

[31] *See infra* notes 39-71 and accompanying text.

[32] *See generally* United Nations Conference on International and Enforcement of Foreign Arbitral Awards, July 6, 1988, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (explaining the core of the international arbitration regime is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which entered into force for the United States on December 29, 1970).

[33] *See generally* NYGH, *supra* note 30 (discussing further the development of party autonomy); *see also* Ronald A. Brand, *The Rome I Regulation Rules on Party Autonomy for Choice of Law: A U.S. Perspective*, THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (Univ. of Pittsburgh Sch. of Law Legal Studies Research Paper Series, Working Paper No. 2011-29, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973162.

[34] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15-19 (1972).

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

[36] Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 972 (1991).

had not participated in negotiating its terms. These cases are the core of a strong policy favoring the ability of parties, in all types of transactions, to choose the forum (whether in litigation or arbitration) in which their disputes are to be settled.

2. *U.S. Law on Choice of Law*

The *Restatement (Second) Conflict of Laws* clearly provides for party autonomy on choice of law. In section 186, it states that "[i]ssues in contract are determined by the law chosen by the parties," so long as that choice is consistent with sections 187 and 188.[37] Section 187 then provides that "[t]he law of the state chosen by the parties . . . will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."[38] Subsection (2) of section 187 goes further by providing that the parties' choice of law will govern, even when the issue is not one for which the parties could have written an explicit provision into their contract, unless either (a) there exists neither a "substantial relationship" between the parties, or their transaction, and the chosen state, nor another "reasonable basis" for their choice of law, or (b) application of the chosen law "would be contrary to a fundamental policy of a state which has a materially greater interest" in the dispute, and which would have been the applicable law under section 188 in the absence of an effective party choice.[39]

Like the *Restatement*, the Uniform Commercial Code (UCC) begins with a statement of respect for party autonomy, followed by limitations. The original UCC of 1956 contained section 1-105, which provided:

> When a transaction bears a reasonable relation to this state and also to another state or nation, parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties. Failing such agreement, this Act applies to transactions bearing an appropriate relation to this state.[40]

When Article I of the UCC was revised in 2001, this rule was replaced with a new section 1-301, which split the rule, providing complete freedom for choice of law in merchant-to-merchant contracts (deleting the "reasonable relation" requirement) and setting forth specific, expanded limitations on choice of law in consumer contracts.[41] The general rule of this provision was contained in paragraph (b), which read:

> (b) Except as otherwise provided in this section:
> (1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this

[37] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 186 ch. 8, topic 1, applicable law (1971).

[38] *Id.* § 187(1).

[39] *Id.* § 187(2)(A)-(B).

[40] U.C.C. § 1-105(1) (1956).

[41] U.C.C. § 1-301 (2001).

> State or of another State is effective, whether or not the transaction bears a relation to the State designated; and
> (2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.[42]

In paragraph (e), this rule of party autonomy became subject to a public policy limitation:

> (e) An agreement otherwise effective under subsection (b) is not effective to the extent that application of the law of the State or country designated would be contrary to a fundamental policy of the State or country whose law would govern in the absence of agreement under subsection (c).[43]

This 2001 UCC provision did not contain any general reference to mandatory rules—except to the extent those mandatory rules would rise to the level of public policy.[44] It did, however, contain a separate rule for consumer contracts that incorporated concepts of mandatory rules and followed the European model found in the Rome I Convention (now found in the Rome I Regulation).[45] Paragraph (d) of section 1-301 allowed a consumer to enter into a valid choice of law clause when the transaction bore a "reasonable relation" to the forum state, but would retain any mandatory rule protections of both the consumer's state of habitual residence and, in sale of goods contracts, the state of performance.[46]

The first thirty-three states to enact the revised Article 1 all declined to adopt the new section 1-301, and instead retained the substance of former section 1-105.[47] As a result of this clear rejection of the "uniform" rule, the National Conference of Commissioners on Uniform State Laws and the American Law Institute (ALI) amended the Official Text of section 1-301 in 2008 to revert substantially to the language of the former section 1-105, which had remained the *de facto* uniform rule.[48]

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[42] *Id.* § 1-301(c).

[43] *Id.* § 1-301(f).

[44] *Id.*

[45] *See infra* Part III.B.4 (discussing Rome I Regulation).

[46] U.C.C. § 1-301(d) (2001).

[47] *See* The American Law Institute, 85th Annual Meeting Program, 8-9 (2008), *available at* http://www.ali.org/_meetings/Program2008.pdf (the Virgin Islands was the only jurisdiction to enact the revised § 1-301); *see also* Keith A. Rowley, *The Often Imitated, But (Still) Not Yet Duplicated, Revised UCC Article 1*, NEV. L.J. 1, 19 (2011), *available at* http://www.law.unlv.edu/faculty/rowley/RA1.081511.pdf. The Virgin Islands was the only jurisdiction to enact the revised § 1-301.

[48] The American Law Institute, 85th Annual Meeting Program, *supra* note 47, annex 1; *see also* U.C.C. § 1-301(a)-(c) (Proposed Official Draft 2008).

> § 1-301. Territorial Applicability; Parties' Power to Choose Applicable Law
> (a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties,
> (b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), [the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state,

3. EU Law on Choice of Forum – The Brussels I Regulation

The system now developed within the European Union provides a civil law comparison with U.S. jurisdiction rules. That system is now codified in a Community Regulation commonly referred to as the Brussels I Regulation.[49] The jurisdictional rules found in Chapter II of the Brussels I Regulation begin with the rule of general jurisdiction found in Article 2: "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."[50] This is the foundation of jurisdiction under the Brussels system. The important personal nexus is domicile; a defendant may be sued in his state of domicile on any claim, no matter where that claim arose.[51]

While the general jurisdiction rule is found in Article 2, at the beginning of the Brussels Regulation, the hierarchy of jurisdictional rules cannot be understood by moving easily through the Convention. Rules found early in the Convention often can be trumped by rules occurring at a later point in the text. The general hierarchical structure of the convention is as follows:

1) Article 22 provides for exclusive jurisdiction in certain types of cases, usually dealing with property rights that are territorial in nature and creating jurisdiction in the state in which the property is located or created. If such exclusive jurisdiction exists, then no other rule need be consulted.
2) Articles 8-21 provide special rules designed to protect the party considered to be at a negotiation disadvantage in insurance (Arts. 8-14), consumer (Arts. 15-17), and employment (Arts. 18-21) contracts. These rules generally allow the "weaker" party to sue in its home court, and prohibit pre-dispute choice of court agreements.
3) Article 23 provides respect for party autonomy (except in insurance, consumer, and employment contracts) by stating that, when one or more of the parties is domiciled in a Member State, the court chosen by agreement of the parties shall have exclusive jurisdiction.
4) As noted above, if neither the exclusive jurisdiction rules of Article 22, nor the choice of court ("prorogation") rule of Article 23 applies, and the matter does not involve an insurance, consumer, or employment contract, then jurisdiction always exists under Article 2 in the courts of the state of domicile of the defendant.
5) Articles 5 through 7 then provide "special jurisdiction" rules that allow suit to be brought in a forum other than that of the defendant's state of domicile. Article 6 deals with jurisdiction over multiple defendants, and requires jurisdiction under another provision as to at

(c) [listing UCC provisions from which derogation is not allowed].

Id.

[49] *See generally* Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L012) 1-23 (EC) (amending Annex I and Annex II) [hereinafter Brussels I Regulation].

[50] *Id.* art. 2(1), § 1, ch. II.

[51] *Id.*

> least one defendant. Article 7 is limited to jurisdiction over claims involving the use or operation of a ship. This makes Article 5 the most important source of special jurisdiction rules that allow a measure of forum shopping. Article 5 provides rules for specific types of cases, with the most important being contract cases (Art. 5(1)) and tort cases (Art. 5(3)).[52]

In a discussion of party autonomy, Article 23 is the relevant provision, and provides for significant freedom in choice of forum:

> If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.[53]

The Brussels I Regulation provides special rules for consumers in provisions that include Articles 16 and 17.[54] Article 16 provides that a consumer "may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled," and that "[p]roceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled."[55] Article 17 prohibits pre-dispute choice of court agreements in consumer contracts, allowing a choice of court agreement only if it is "entered into after the dispute has arisen," unless it "allows the consumer to bring proceedings in courts other than those indicated in this Section," or if the consumer and the other party are both "at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and [the agreement] confers jurisdiction on the courts of that Member State."[56] Thus, consumers get the advantage of their home court as plaintiffs and as defendants. In prohibiting pre-dispute choice of court agreements in consumer contracts, Article 17 allows no discretion in determining whether a chosen court is good or bad, it is simply prohibited.[57]

4. EU Law on Choice of Law – The Rome I Regulation

The Rome I Regulation on law applicable to contractual obligations begins the party autonomy analysis with the same basic rule found in the *Second Restate-*

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[52] Brussels I Regulation, *supra* note 49, art. 5(1)-(3), § 2.

[53] *Id.* art. 23(1) § 7.

[54] *Id.* arts. 16-17 § 3.

[55] *Id.* art. 16(2) § 3.

[56] *Id.* art. 17(3) § 3.

[57] *Id.*

ment that is applied in the U.S.[58] The core rule is found in Article 3, titled "Freedom of Contract," and states clearly that parties' chosen law governs a contract.[59] There are, however, numerous limitations on party autonomy within the Rome I Regulation. The Article 3 rule allowing party autonomy is accompanied by limitations found in Articles 3, 5, 6, 7, 8, 9, 11, 13, and 21 and further elaboration of these limitations is provided in many of the 46 recitals preceding the Regulation text.[60]

The general structure of Articles 3 and 9 of the Rome I Regulation provide public policy limitations on party autonomy through the application of mandatory rules, with Articles 5, 6, 7, and 8 carving out specific exceptions to party autonomy based on categories of protected persons.[61] Article 6 creates special rules for consumer contracts.[62] In paragraph 1, it creates a presumption that the law of the country where the consumer has his habitual residence will govern a consumer contract, so long as the professional:

> (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
>
> (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.[63]

Paragraph 2 follows by permitting a choice of law clause in a consumer contract, but providing that the clause "may not . . . have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1." The result is a rather interesting conundrum for the "professional" in the consumer contract relationship. If there is no choice of law clause in the contract, the consumer will get the benefit of the provisions of law designed to protect consumers that are in effect in the country of the consumer's habitual residence. If a choice of law clause is inserted in the contract, then the consumer will get the benefit of the provisions of law designed to protect consumers that are in effect in both the country of the consumer's habitual residence and the country whose law is chosen in the clause. This creates a clear incentive for a merchant or professional *not* to place a choice of law clause in a consumer contract.

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[58] *See generally* Council Regulation 593/2008, of 17 June 2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) 6-16 (EC) [hereinafter Rome I Regulation].

[59] *Id.* art. 3(1), ch. II.

[60] *Id.* Some might also consider the Rome I rules on consent and material validity (art. 10), formal validity (art. 11), and incapacity (art. 13), to present limits on party autonomy.

[61] Rome I Regulation, *supra* note 58, arts. 3-9.

[62] *Id.* art. 6.

[63] *Id.* art 6(1) (a)-(b).

5. Other Consumer Protection Rules in the European Union: The Consumer Protection Directive, the Proposed ODR Regulation and the Proposed ADR Directive

The Brussels I and Rome I Regulations deal primarily with matters in the courts of the Member States of the European Union. The party autonomy rules of the Brussels I Regulation apply only to choice of court agreements, and not to arbitration agreements.[64] There is another instrument, however, that deals with arbitration agreements, albeit in a tangential manner. That instrument is Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.[65] Unlike EU Regulations, which have direct effect in Member States, EU Directives are to be implemented by Member State legislation.[66] The consumer contracts directive does not have blanket rules on choice of forum or choice of law. It is designed to promote legislation that prohibits unfair terms in consumer contracts. Articles 2, 3, and 6 contribute to this process with the following language:

> Article 2
>
> For the purposes of this Directive:
>
> (a) 'unfair terms' means the contractual terms defined in Article 3;
>
> (b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
>
> (c) 'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.
>
> Article 3
>
> 1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
>
> 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.
>
> The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

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[64] *See generally* Brussels I Regulation, *supra* note 48.

[65] Council Directive 93/13/EEC, of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 095) 29-34 (EC) [hereinafter Consumer Protection Directive].

[66] Consolidated Version of the Treaty on the Functioning of the European Union art. 288 (ex art. 249 TEC), Sept. 5, 2008, 2008 O.J. (C 115) 157-58 [hereinafter TFEU].

> Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.
>
> 3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.
>
> Article 6
>
> 1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.
>
> 2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.[67]

Most notably, the Annex includes the following language about arbitration agreements in consumer contracts:

> TERMS REFERRED TO IN ARTICLE 3 (3) 1. Terms which have the object or effect of: . . . .
>
> (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.[68]

Two cases interpreting this provision are of particular interest. In the 2006 *Mostaza Claro* case,[69] the European Court of Justice interpreted Article 6(1) of Directive 93/13 as a mandatory provision designed to re-establish equality between weaker consumers and stronger merchants.[70] Thus, "a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment."[71]

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[67] Consumer Protection Directive, *supra* note 65, arts. 2, 3, 6.

[68] Consumer Protection Directive, *supra* note 65, Annex.

[69] Case C-168/05, Mostaza Claro v. Centro Móvil Milenium SL, 2006 E.C.R. I-10421.

[70] *Id.* ¶ 36.

[71] *Id.* ¶ 39.

Mostaza Claro was followed in 2009 by the *Asturcom Telecomunicaciones* case,[72] in which the Court of Justice stated that Article 6 of the Consumer Protection Directive had equal standing with national rules of public policy.[73] Thus,

> It follows from this that, inasmuch as the national court or tribunal seised of an action for enforcement of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of that directive, where it has available to it the legal and factual elements necessary for that task.[74]

The hostility toward pre-dispute arbitration agreements in consumer contracts is apparent in Member State implementation of Directive 93/13.[75]

The provisions set out in Directive 93/13 were mirrored in the Commission's proposal for a Directive of the European Parliament and the Council on consumer rights.[76] Chapter V of the proposed Directive broadly reflected the provisions of Directive 93/13 and Annex II(c) mirrored Annex I(q) of Directive 93/13—but with an important distinction. While Annex I of Directive 93/13 referred to

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[72] Case C-40/08, Asturcom Telecomunicaciones SL v. Rodríguez Nogueira, 2009 E.C.R. I-09579.

[73] *Id.* ¶ 52.

[74] *Id.* ¶ 53.

[75] *Id.* In England, for example, an arbitration agreement is automatically unfair if it relates to a claim for a pecuniary remedy which does not exceed 5,000 GBP. Furthermore, even when the claim exceeds such a financial limit, compulsory arbitration in B2C contracts will generally be unenforceable by virtue of the 1999 Regulations implementing the Directive if they have the effect of excluding or hindering the consumer's right to take legal statutory action. Nevertheless, there are two situations under which an arbitration agreement is not regarded as "unfair":

> (i). if the agreement has been individually negotiated; (ii). if the arbitration clause provides for voluntary or non-binding arbitration.
>
> The Unfair Terms in Consumer Contracts Regulations 1999, 1999, S.I. 1999/2083, § 5 (U.K.).

In Germany and Austria the validity of the provisions is recognized only if the provisions are recorded in a separate arbitration agreement signed by the consumer. ZIVILPROZESSORDUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, as amended, § 1031, para. 5 (Ger.); ZIVILPROZESSORDUNG [ZPO] [CIVIL PROCEDURE STATUTE], as amended, art. 617, para. 2, (Austria).

French law historically imposed relatively strict statutory provisions on domestic arbitration clauses between persons involved in commercial activities and consumers. In 1996, however, the Paris Cour d'Appel has held that these domestic prohibitions do not apply in the context of international B2C contracts.

Swedish legislation provides for the invalidity of consumer arbitration agreements as to defined categories of future disputes, together with an express proviso that the exception is inapplicable where contrary to Sweden's international obligations (in particular, the New York Convention). Lag Om Skiljeförfarande [SFS] [THE SWEDISH ARBITRATION ACT OF 1999] 116:1, 6 (Swed.).

As for Italy, the relevant provision used to be Art. 1469-*bis* and -*ter* of the Civil Code, whose statutory provision was very similar to the ones provided in the Austrian and German ZPOs. However, Art. 36(2) of the Consumer Code now holds: "Terms shall be void, even if they have been individually negotiated, where they have the object or effect of: . . . (b) excluding or limiting the actions of the consumer vis-a-vis the professional or another party in the event of total or partial non-performance or inadequate performance by the professional." Codice del Consumo 6 settembre 2005, n. 206, art. 36(2) (It.).

[76] *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM (2008) 614 final (Oct. 8, 2008).

"terms which may be regarded as unfair," Annex II of the proposed Directive, apparently acknowledging the ECJ's opinion in *Mostazo Clara*, listed contract terms that "are considered unfair in all circumstances."[77] Accordingly, under Annex II(c) of the proposed Directive, contract terms which have the object or the effect of "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions" would have been be unfair in all circumstances.[78]

The Commission's stark changes to Directive 93/13 were not adopted, however. The resulting Directive 2011/83,[79] in its Article 32, provides the following resolution of the issue:

> Article 32. Amendment to Directive 93/13/EEC
>
> In Directive 93/13/EEC, the following Article is inserted:
>
> Article 8a
>
> 1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:
>
> – extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or,
>
> – contain lists of contractual terms which shall be considered as unfair,
>
> 2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.
>
> 3. The Commission shall forward the information referred to in paragraph 1 to the other Member States and the European Parliament. The Commission shall consult stakeholders on that information.

Thus, the resulting Directive continues the approach in Article 3 of Directive 93/13, focusing on the unfairness of particular contract term, but allowing each Member State to determine specific types of terms to be considered to be unfair. This may lead to Member State implementation of Directive 2011/83 that includes specific prohibition of pre-dispute agreement to arbitration in consumer contracts.

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[77] *Id.* art. 34.

[78] *Id.* Annex II(c).

[79] Council Directive 2011/83/EU, 2011 O.J. (L 304) 22.11.2011. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

IV. Comparing U.S. and EU Approaches in the Context of the UNCITRAL ODR Negotiations

A. Comparative Paternalism (Whose Parenting Style is Best?)

In the United States, the law has not developed such a head-on approach to private international law and other limitations on party autonomy in consumer contracts as has been the case in the European Union. The same rules that govern choice of law in contracts in general most often will govern choice of law in consumer contracts.[80] The failure of the 2001 revised version of UCC § 1-301, with its paragraph (e) rule on consumer contracts,[81] to be adopted anywhere but in the Virgin Islands indicates the difficulty of gaining legislative support for such a consumer protection rule in the United States.[82] In the realm of choice of forum, the *Bremen*, *Mitsubishi Motors*, and *Carnival Cruise Lines* trilogy of U.S. Supreme Court decisions underlines the similar deference to party choice of a dispute resolution forum.[83]

This does not mean, however, that the U.S. system has no limits on party autonomy in choice of forum or choice of law. Those limits in choice of law come in the form of mandatory rules that would apply in the absence of party agreement on choice of law and in the ultimate imposition of public policy. The *Second Restatement* allows only limited derogation from mandatory rules that would have been applicable in the absence of a choice of law provision and there is no reference to the substantive content of those rules.[84] It does this by beginning with the proposition that the chosen law will govern all matters that could have been resolved by explicit provision of the contract.[85] It then goes on to provide that the chosen law will also be applied in matters covered by mandatory laws unless there is no substantial relationship with the chosen state and there is no other reasonable basis for the choice or if the chosen law would be contrary "to a fundamental policy of a state which has a materially greater interest in determining the particular case."[86]

Nor does the rejection in the United States of conflicts rules for the protection of consumers indicate the lack of a public policy to protect consumers. The choice has been made, however, to accomplish this purpose outside the context of rules of private international law. While the law applicable to questions of

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[80] *See, e.g.*, America Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 710 (Cal. Ct. App. 2001) (rejecting an agreement choosing Virginia law because California law provided greater protection for consumers).

[81] *See supra* text accompanying note 45. The 2001 version of the UCC § 1-301(e) retained the reasonable relationship requirement for consumer contracts and prevented derogation from mandatory consumer protection rules.

[82] *See supra* text accompanying notes 47-48 (showing the Virgin Islands is the only place that has adopted the 2001 revised version of UCC § 1-301).

[83] *See supra* text accompanying notes 34-36 (discussing the *Bremen*, *Mitsubishi Motors*, and *Carnival Cruise Lines* cases).

[84] *Supra* text accompanying notes 37-39.

[85] CONFLICT OF LAWS § 187(1).

[86] *Id.* § 187(2).

jurisdiction can differ substantially from general rules on applicable law, cases in the United States have continued to provide similar analysis of the two matters on the issue of party autonomy. Thus, the U.S. Supreme Court decision in *Carnival Cruise Lines, Inc. v. Shute*,[87] while dealing with the question of choice of forum, is instructive generally on the question of party autonomy.

In *Carnival Cruise Lines*, the Court held reasonable a small print choice of court clause on the back of a cruise ticket that required litigation of all disputes in Florida, even for consumers from the state of Washington.[88] Justice Blackmun's opinion for the majority acknowledged that "[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line."[89]

The difference in bargaining power of the parties was not, however, the only interest considered by the Court.

> Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: first, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.[90]

What is interesting here is the Court's failure to consider any overriding public policy or mandatory rule that might protect a consumer. In part this may have been because no such rule existed.[91] Nonetheless, upholding the merchant-imposed choice of court clause against the consumer was justified on the basis of (1) the merchant's interest in litigating all similar disputes in a single forum, (2) joint interests of predictability, and (3) the general (public) interest of all con-

[87] Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

[88] *Id.* at 594-5.

[89] *Id.* at 593.

[90] *Id.* at 593-4 (citations omitted).

[91] The Court did consider the argument that the choice of court clause violated a federal statute prohibiting waiver of liability clauses in contracts for the carriage of persons, but found the statute was not applicable. *Id.* at 595-6.

sumers of such cruises in the lower price that is assumed to result from upholding such clauses on the basis of the first two interests.[92]

Applying the rationale of the *Carnival Cruise Lines* decision to questions of party autonomy, and in particular to issues of choice of forum and choice of law, we can discern two very different approaches to consumer protection. On the one hand, the use of private international law rules limiting choice of forum and law are founded on the belief that consumers are best protected if, when a dispute arises, they have the advantage of dispute settlement in their home courts, applying their home law. This is the approach found in the Brussels I and Rome I Regulations. It focuses on protection of the interests of those consumers who ultimately have disputes with the merchant. It does not, however, give due consideration to the interests of all consumers at the contract formation stage of the transaction. Even the Rapporteurs for the Rome I Regulation considered this a defect in this particular approach to using private international law for consumer protection, suggesting that the protection offered by the consumer provisions of the Rome I Regulation "is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings," and recommending "backing up" such rules with more accessible methods for alternative dispute resolution.[93]

On the other hand, the U.S. approach views the interests of all similarly situated consumers and begins with the (unstated) question of how the greatest number of consumers can be benefited. The court in *Carnival Cruise Lines* concluded that it is reasonable to assume that the general benefit to all similarly situated consumers of a lower price for the cruise ticket outweighs the detriment to the individual consumer who develops a dispute with the merchant and is then compelled to take the merchant's choice of law and forum.[94] Thus, the U.S. approach focused on the contract formation stage and the benefits to all similarly situated consumers, and gave less attention to the litigation stage interests that are the core of the European approach.

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[92] *Id.* at 593-4. This, of course, assumes that any savings to the merchant will be passed on to the consumer in the form of a lower price. In a competitive market this should occur, but there is no certainty that the Court's analysis in this regard was consistent with the reality of the specific market it was addressing.

[93] Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), at amend. 14, COM ((2005) 0650 – C6-0441/2005/0261) (Aug. 28, 2007). One report quotes the Rapporteurs as stating:

> With [. . .] reference to consumer contracts, recourse to the courts must be regarded as the last resort. Legal proceedings, especially where foreign law has to be applied, are expensive and slow. The introduction of a mechanism to deal with small claims in cross-border cases is a step forward. However, the protection afforded to consumers by conflict-of-laws provisions is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings. It is therefore considered that, particularly as regards electronic commerce, the conflicts rule should be backed up by easier and more widespread availability of appropriate online alternative dispute resolution (ADR) systems.

Giorgio Buono, *Rome I: EP Rapporteur's Compromise Amendments and Council's Working Text*, CONFLICT OF LAWS.NET (Sept. 16, 2007), http://conflictoflaws.net/2007/rome-i-ep-rapporteurs-compromise-amendments-and-councils-working-text/. This statement was repeated in Final Compromise Amendments. Final Compromise Amendments, EUR. PARL. DOC. 9/36 (2007).

[94] *Supra* notes 87-92 and accompanying text.

At first glance, there is logic to each of these approaches. But neither of them provides real party autonomy. Each is an exercise in governmental paternalism, dictating a specific path without real consumer choice. The Rome I approach leaves no room for a consumer who would prefer at the outset to receive a better price as a trade-off for accepting clauses in a contract that may be considered at the time of contract formation as unlikely to matter. If only one out of a thousand consumers in a similar transaction ends up with a dispute with the merchant that would result in litigation, then the U.S. approach results in a benefit to the 999 similarly situated consumers—each of which receives a lower price for the item purchased and none of which develops a dispute with the merchant. Is it a fair trade-off to make dispute resolution more difficult for one consumer in exchange for providing some, perhaps marginal, reduction in price to 999 other consumers? Or is it a fair(er) trade-off to make dispute resolution easier for one consumer in exchange for a marginally higher price charged to 999 other consumers? Either approach represents a policy choice that should be carefully considered by those creating the law. What should be considered, however, is reality, not just theory.

The U.S. Supreme Court did purport to consider this policy choice in *Carnival Cruise Lines*, with the majority of the Justices accepting the policy that would benefit more consumers in some small way while placing the limited number of consumers for whom a legal dispute results at a litigation disadvantage.[95] The Brussels I and Rome I Regulations represent the opposite choice in the consideration of the same trade-off. Under the EU Regulations, prices may be marginally higher for all consumers, but for those who end up with a dispute with a merchant, dispute resolution *should* be both more economical and on more favorable terms.

The problem with the EU approach is that, in most consumer transactions it is likely that the amount in controversy is simply too small to justify litigation in the first place (and certainly too small to justify the secondary litigation required to enforce the initial judgment in the judgment debtor's home jurisdiction). Thus, such private international law rules, which ostensibly protect consumers, most likely result in no real benefit while bringing with them the corresponding loss of the transaction stage possibility of lower prices and enhanced access to goods and services.

B. Considering the Alternatives in the Context of Cross-Border ODR

As noted earlier,[96] the UNCITRAL ODR negotiations presume that, for the type of low-value high-volume online transactions being considered, access to courts is of little practical value—and thus does not equate to access to justice. Thus, there really is no one who benefits from a system that ensures them the

[95] *Supra* notes 87-92 and accompanying text.

[96] *Supra* note 65.

ability to go to national courts. As the study by the European Parliament has stated, any such benefits are "largely illusory."[97]

It is not only the EU Parliament that has questioned this effect of the current combination of private international law and consumer protection laws in the EU. A Commission Staff Working Document on consumer protection noted the fragmentation of consumer protection laws within the EU, and the impact of Rome I as a result:

> The effects of the fragmentation are felt by business because of the conflict-of law rules, and in particular the Rome I Regulation ("Rome I"), which obliges traders not to go below the level of protection afforded to foreign consumers in their country.
> As a result of the fragmentation and Rome I, a trader wishing to sell cross-border into another Member State will have to incur legal and other compliance costs to make sure that he is respecting the level of consumer protection in the country of destination. These costs reduce the incentive for businesses to sell cross-border, particularly to consumers in small Member States. Such costs are eventually passed on to consumers in the form of higher prices or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level.[98]

This analysis mirrors that provided by Justice Blackmun in the *Carnival Cruise Lines* case in the U.S. Supreme Court.[99] But, while both legal systems have acknowledged the problem, neither has yet provided rules that grant both a lower price and product/services availability at the transaction stage *and* consistent protection of the consumer/buyer when a dispute arises. This is precisely the opportunity available in the UNCITRAL Working Group III negotiations.

C. Getting the Benefits of Both Systems

As noted above, the U.S. approach to party autonomy and consumer protection in cross-border transactions weighs in favor of enforcing choice of forum and choice of law provisions, even when those provisions are unilaterally dictated by the stronger party in the relationship. The EU approach, on the other hand, assumes that all relationships in which there is a weaker party (especially consumer contracts) will result in unconscionable conduct by the stronger party in dictating both choice of forum and choice of law. The result in Europe is a tendency towards complete prohibition of pre-dispute agreement on choice of forum.[100]

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[97] Commission Staff Working Document Accompanying the Proposal for Directive on Consumer Rights Impact Assessment Report, at 8 (2008), *available at* http://ec.europa.eu-/consumers/rights/docs/impact_assessment_report_en.pdf.

[98] *Id.*

[99] *Supra* notes 87-92 and accompanying text.

[100] It must be noted that, while the Brussels I Regulation effectively provides such a prohibition in the context of choice of court, the New York Convention (to which all EU Member States are parties) does not provide such a prohibition in the context of arbitration. The European Court of Justice has, however, applied the European Consumer Protection Directive to support national prohibitions of pre-dispute arbitration agreements in consumer contracts on a case-by-case basis. *Supra* Part III.B.5.

The problem with a complete prohibition on pre-dispute agreements to a choice of forum, and particularly a prohibition on pre-dispute agreement to arbitration at the conclusion of the ODR process being considered in UNCITRAL Working Group III, is that, while it may protect consumers from having bad dispute resolution mechanisms imposed on them, it also prevents consumers from entering into agreements to go to good dispute resolution mechanisms. The entire purpose of the UNCITRAL ODR project is to create a *good* dispute resolution mechanism. Moreover, it is to create a good dispute resolution mechanism where none currently exists as a practical matter. If the same process results in the application of rules that prevent parties, particularly consumers, from using the system being created, it will be a failure.[101]

It is not enough to say that consumers should have an option to use the dispute resolution system, while merchants should be bound to use it. That removes none of the unpredictability and risk currently faced by merchants. The response to that type of risk by merchants, particularly in Europe, has been either to raise prices or to opt out of cross-border transactions altogether.[102] That does not help consumers.

By creating a fair system, and at the same time making it self-contained so that there can be no reference to national or regional rules that will prevent its effective use, UNCITRAL Working Group III can get the best of both the current U.S. approach and the current EU approach while avoiding the disadvantages of either of them. Such a system can reduce the risk of multiple-forum and multiple-law litigation for merchants, thus enticing them to participate in cross-border online commerce. At the same time, the result should be lower prices and greater product and service availability for all buyers, including consumers. It will also mean that, when a dispute arises, the buyer/consumer is fully protected by having a simple, efficient, effective, transparent, and fair system for the resolution of that dispute—a system that can produce an enforceable, binding result. In other words, where access to courts has not provided access to justice, the UNCITRAL system can provide real access to justice.

It may be that unlimited respect for party autonomy runs the risk of the stronger party to a transaction imposing unfair choice of forum requirements on

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[101] *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221, art. 6. There is in consumer protection circles the belief that provisions such as Article 6 of the European Convention on Human Rights (ECHR) requires that certain parties, particularly consumers, always have access to their own national courts, thus preventing use of effective alternative dispute resolution. *Id.* Article 6 provides that, "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." *Id.* It is both nonsensical and contradictory to begin an UNCITRAL project with the foundational assumption that, for low-value high-volume online transactions, access to courts is not access to justice (which is the basic assumption underlying the entire negotiations), and then to block any progress towards real justice by inserting rules that require that certain parties (consumers in particular) *always* retain access to their home courts. If provisions like Article 6 of the ECHR mean anything, they must mean that states should provide access to real justice, even when that cannot be provided through traditional national judicial mechanisms. Thus, there can be no justice if states maintain prohibitions on pre-dispute agreement to arbitration or other alternative dispute mechanisms for disputes arising from low-value high-volume transactions.

[102] *See supra* notes 66-69 and accompanying text.

the weaker party. The logical response to this risk is not, however, to prohibit all pre-dispute choice of forum agreements. A complete prohibition is the equivalent of responding to the fact that some consumers get cheated when they buy a used car by prohibiting all consumers from buying used cars. Such a rule will prevent a consumer from being cheated by being a party to a bad used car deal, but it will also prevent a consumer from making a good deal on a used car. We should not be creating a good system for dispute resolution while denying the class of persons who can most benefit from it the right to use it.

The possibility exists for giving all parties both predictability at the transaction stage and an effective forum at the dispute settlement stage. This will remove the risk of uncertainty created by the potential for multiple-forum and multiple-law litigation for the merchant, and as a result should make products and services both more available and lower priced for the consumer. Because most online transactions are accomplished with up-front payment mechanisms, it will also provide consumers/buyers with an effective remedy where none now exists at the dispute settlement stage. It can only happen, however, if the issue of party autonomy is properly addressed and if the system can be designed to prevent the application of rules prohibiting binding pre-dispute choice of forum.

V. Concluding Thoughts – Guidelines for a Successful Conclusion in Working Group III

The work undertaken by UNCITRAL Working Group III has the possibility of significantly enhancing the benefits, availability, and safety of cross-border online transactions. If the project can result in the successful creation of a fair and effective set of generic procedural rules, a fair and effective set of guidelines and minimum requirements for online dispute resolution providers and neutrals, a relevant and self-contained, set of substantive legal principles for resolving disputes, and an effective cross-border enforcement mechanism, it will make a major contribution to both international commerce and consumer protection.

The system to be created by Working Group III must be simple, efficient, effective, transparent, and fair. Only a system that has these characteristics will invite the trust of both merchants and purchasers (including consumers) to enter into cross-border, low-value high-volume electronic transactions that otherwise create risks that keep both sellers and buyers from engaging in such transactions. The process of developing the system must recognize that both sellers and buyers require assurance that their interests will be protected in order to generate the proper level of trust in that system. If either sellers or buyers opt out of, or are inadequately protected by, the system, then it simply will not work.

The following guidelines will help insure that the instruments to be created by Working Group III result in a simple, efficient, effective, transparent, and fair ODR system:

1) The system must recognize that alternatives for efficient and effective dispute resolution do not currently exist for cross-border, low-value high-volume electronic transactions. This has already been accom-

plished but is not fully acknowledged when some insist on prohibitions on binding pre-dispute choice of forum agreements.

2) Simplicity and efficiency require as few exclusions from scope as possible. A system that begins with computer-based communication and analysis will not easily allow determinations that require human discretion or the application of difficult definitions designed to distinguish between types of parties to a dispute.
3) Efficiency and effectiveness require that the system be self-contained and avoid the need for reference to national rules of private international law. A uniform system that relies on the differences that exist in national rules of private international law will create disparate results depending on the location of parties and the need to "locate" the transaction. This would create difficulties that should not occur in the system. Stated more simply, efficiency and effective-ness require that the system avoid the trap of thinking that rules of private international law can be used to protect consumers in cross-border, low-value high-volume electronic transactions.
4) Efficiency, effectiveness, and transparency require that the system encourage dispute resolution that not only results in a binding decision, but provides an automatic method for the enforcement of that decision (*e.g.*, charge-back methods or automatic payment reversal).
5) Transparency and fairness require that a party to a cross-border, low-value high-volume electronic transaction receive clear notice of the dispute resolution option and a separate opportunity to choose not to engage in a transaction if that party decides to avoid the dispute resolution process that is offered
6) Fairness requires that the system be designed so that states may agree that the system itself is simple, efficient, effective, and transparent. Private international law rules that exist to protect weaker parties from unfair procedures are not necessary when states agree at the outset that the system of dispute resolution operates to provide adequate protection of the weaker party. Thus, the fairness of the system itself is the ultimate test of the simplicity, efficiency, effectiveness, and transparency required to replace protective rules of private international law. If states find the system to meet these tests, then the system itself will replace the need for "protective" rules of private international law, and will itself result in the type of consumer protection often sought by such rules of national law. This is an instance where a uniform system of law is much better than relying on national rules of private international law or national rules of consumer protection. Simplicity, efficiency, effectiveness, and transparency can only result if there is a single, self-contained system, with as few opportunities for divergence through national law as possible.
7) Simplicity requires that the substantive legal principles to be applied in the ODR process provide a focused and limited set of claims that may be brought and set out a focused and limited set of remedies that

> may be assessed. Existing ODR systems for online transactions have demonstrated that the vast majority of disputes in low-value high-volume online transactions lend themselves to a small, discrete set of claims and options for remedies. More complex issues (*e.g.*, product liability, personal injury, class actions, multiple party claims, etc.) need not be a part of a successful ODR system.

In the fall of 2012, the UNCITRAL Working Group III negotiations have reached a critical stage. The potential benefits of an effective cross-border ODR system are denied by none. The path to their creation, however, is currently blocked by those unable to see beyond existing national and regional laws described as accomplishing goals that, in the context of ODR at least, they serve to frustrate. Working Group III has the opportunity to combine the best of the elements of U.S. and EU private international law and consumer protection. What is required is a fresh approach to concerns created by recent technological developments. If the Working Group can get beyond theoretical ties to old rules created for past realities, and embrace new rules that provide positive practical results in the new internet environment, it can make a very significant contribution to both international trade and consumer protection.

Juridical Convergence in International Dispute Resolution: Developing a Substantive Principle of Transparency and Transnational Evidence Gathering

Pedro J. Martinez-Fraga†

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"La gente che per li sepolcri giace
potrebbesi veder? Già son levati
tutt'i coperchi, e nessun guardia face."[1]

Canto X, The Inferno
Dante Alighieri, The Divine Comedy

"Così com' io del suo raggio resplendo,
sì, riguardando ne la luce etterna,
li tuoi pensieri onde cagioni apprendo."[2]

Canto XI, Paradiso
Dante Alighieri, The Divine Comedy

I. Introduction

The need for juridical convergence in public and private international law has never been greater. Significant paradigm shifts concerning traditional notions of sovereignty based upon national territory and geopolitical subdivisions, generally referred to as "Westphalian,"[3] have yielded to transnational, non-territorially premised, expansive views of this foundational norm.[4] The modern conception of

[1] DANTE ALIGHIERI, DIVINE COMEDY 132-33 (John D. Sinclair, trans., rev. ed. 1961) (1472) (Canto X, The Inferno: "The people that lie within the sepulchres, may they be seen, for indeed all the covers are raised and no one keeps guard?").

[2] *Id.* at 162-3 (Canto XI, Paradiso: "Even as I reflect its beams, so, gazing into the Eternal Light, I perceive thy thoughts and the cause of them.").

[3] Westphalian sovereignty refers to the Peace Treaty between the Holy Roman Emperor and the King of France and their respective allies, October 24, 1648 (the "Treaty of Westphalia"). While the Treaty of Westphalia indeed brought an end to the Thirty-Year War, its most enduring legacy has been the treaty's general discussion on the nature of sovereignty, which provided the foundations for a territorially based conception that accorded a virtual monopoly in international law to sovereign States. The writings of Grotius and Leibniz together with the treaty's text provided a framework for a rigid and dogmatic conception of sovereignty that prevailed through the 20th century and is still accepted in some quarters today. *See, e.g.*, J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 7-14 (9th ed. 1984). It is this very static understanding of sovereignty as the absolute exercise of political will over a geopolitical subdivision that in turn is defined by territorial boundaries that Black's Law Dictionary defines as follows:

> Sovereignty: the supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of a constitution and frame of government; and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society or state, which is sovereign and independent.

BLACK'S LAW DICTIONARY 1396 (6th ed. 2009). Classical international law would thus concern the relationship between such "sovereign" states, always conducted with an understanding that such relationships could not impinge on the exercise of a political will within "sovereign" territorial boundaries.

[4] For a balanced and illustrative narrative of the shift from classical dogmatic territorial sovereignty, to a more flexible and less absolutist theory, *see* Alfred van Staden & Hans Vollaard, *The Erosion of State Sovereignty: Towards a Post-Territorial World?*, *in* STATE SOVEREIGNTY AND INTERNATIONAL GOVERNANCE (Gerard Kreijen ed., 7th ed. 2002). *See also* Richard N. Haass, Director, Policy Planning Staff, U.S. Department of State., Remarks at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, Washington, DC: *Sovereignty: Existing Rights, Evolving Responsibilities* (Jan. 14, 2003) (transcript *available at* http://2001-2009.state.gov/s/p/rem/2003/16648.htm) (emphasizing that Westphalian sovereignty, defined as the absolute right of the sovereign and

sovereignty radically adjusts for the absolutist elements of its dogmatic predecessor in large measure by no longer viewing the territorial boundaries of States as coinciding with the limits of political authority over the economy and society.[5]

A broader doctrinal conception of sovereignty compels international law to engage in a revision of its most rudimentary principles. Here the suggestion is that international law, as the jurisprudence governing the relationship between nations—itself based on a paradigm of *independence*—requires a juridical convergence transcending national boundaries that would represent a model of *interdependence*[6] rather than one of *independence*. Classical views of international law that find conceptual and analytical support in traditional Westphalian sovereignty are only concerned with the relationship between and among countries. They are proving to be incapable of addressing global problems pertaining to humanity, which far transcend the relationships between nations.[7]

The inability of international law to address the many shared crises of all citizens, such as: international terrorism, transnational security needs, global poverty, environmental threats that place in jeopardy the very survival of mankind and that likely shall lead to the displacement of millions of people, regional genocide, political corruption, unworkable judiciaries, sexual exploitation, the vertical and horizontal proliferation of nuclear weapons and similar armaments of mass destruction, and unprecedented food and water shortages—in short, human rights—brings the frailties and shortcomings of international law readily apparent. These common problems provide a normative foundation calling for a global law that addresses the needs of humanity that is configured as *transnational* and

analyzed on resting on four fundamental precepts, was never absolute). Mr. Haass explained therefore, the shift in models of sovereignty are all the more likely and credible:

> Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, other governments recognize it as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of these components – internal authority, border control, policy autonomy, and non-intervention – is being challenged in unprecedented ways.

Id. For related authority on this issue, *see also* JOHN AGNEW, GLOBALIZATION AND SOVEREIGNTY (2009); STEPHEN D. KRASNER, SOVEREIGNTY ORGANIZED HYPOCRISY (1999); JEAN BODIN, ON SOVEREIGNTY (Julian H. Franklin trans., 2007) (parenthetical).

[5] The late Professor Louis Henkin aptly noted that "[f]or legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era." LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 10 (1995). Indeed, Professor Henkin opined that it would be best to get rid of "that 'S' word." *See, e.g.*, Louis Henkin, *That "S" Word: Sovereignty and, Globalization, and Human Rights, et cetera*, 68 FORDHAM L. REV. 1 (1999).

[6] The pre-eminence that the WTO, the WHO, the ILO, the World Bank, and the IMF acquired is indicative of non-nationally based institutions that have increasing relevance in the national affairs of state. Their development into NGOs and their ascendency exemplify the need to have institutions of relevant consequences beyond the Westphalian paradigm. In this same vein, the United Nation's standing as a "neutral forum" for the community of nations has never been more present. Therefore, so too has the exigency "to democratize" it become an imperative to its continued legitimacy.

[7] *See, e.g.*, RAFAEL DOMINGO, THE NEW GLOBAL LAW 65, 73 (Mortimer N. S. Sellers et. al. eds., 2010).

not *inter-national*.[8] In addition to changes attendant to the doctrine of sovereignty, the need for juridical convergence has been underscored by economic and informational globalization.

The advent of unprecedented porous economic frameworks, product and service outsourcing, and a global economic standard of financial multilateralism has spawned a legal counterpart to economic globalization that is particularly evident in international trade law.[9] The jurisprudence of international dispute resolution and international investment protection, however, have hardly fared as well in developing a multicultural rubric. It is in this context that international commercial arbitration ("ICA") and to a lesser extent, investor-state arbitration ("ISA"), have emerged as temporizing measures perhaps unbeknownst to the vast constituency in the world of commerce, law, and academia.[10] ICA and ISA are serving as a bridge until a time comes when transnational courts of civil procedure vested with the authority to adjudicate private disputes arising from cross-border controversies are able to exercise jurisdiction over such conflicts. International arbitration, whether in the context of private international law or in the public international law investor-state matrix, shall serve as a Petri dish for the developing an ideal proportionality of different legal systems, which may ultimately create a confluence of legal cultures capable of satisfying the expectations of parties to transnational proceedings. It is to this new space, far beyond the ambit of a state's exercise of judicial sovereignty, that international dispute resolution must look to find its perfect workings.

Juridical convergence in international dispute resolution has perhaps met its most significant challenge in its efforts to reconcile civil law evidence gathering with U.S. common law discovery. The chasm dividing civil and common law traditions with respect to evidence gathering appears to be insurmountable and to some extent has proven that it may not be bridged. The most recent iteration of the International Bar Association Rules On The Taking Of Evidence in International Arbitration (the "IBA Rules") is emblematic of a significant effort to synthesize fundamental common and civil law concerns.[11] The differences

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[8] For two divergent analyses as to normative underpinnings while calling for a transnational law rubric that may best address cross-border challenges that belong to humanity and to no single nation but rather a community of nations, *compare* RUTI G. TEITEL, HUMANITY'S LAW (2011), *with* DOMINGO, *supra* note 7. As to Professor Domingo's work, *see* Pedro Martinez-Fraga, *Rafael Domingo's The New Global Law*, 56 MCGILL L.J. 767 (2011) (book review).

[9] *See, e.g.*, JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW (2006).

[10] *See, e.g.*, Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?* 25 COLUM. J. TRANSNAT'L L. 9 (1986-87). Professor Smit notes that the increase in international commercial arbitrations has also caused the proliferation of new arbitral institutions, and adds:

> The case for a new world-wide arbitration institution is overwhelming. On every count, its advantages far exceed those that can be offered by existing institutions. One might argue against a global institution on the ground that a similar case could be made for a world-wide judicial body, but that that body has found only very limited acceptance.

Id. at 34. Professor Smit cites as authority for his latter observation the "light caseload" of the International Court of Justice, noting that it provides "a telling demonstration of the limited measure of acceptance that body has found." *Id*. at n.135.

[11] On May 29, 2010, the IBA published a new edition of its Rules that aspires "to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, *particularly*

separating these traditions compel the identification and development of legal norms, such as the IBA rules, capable of vesting efforts with greater substantive foundational grounding if they are to continue developing and satisfy competing expectations arising from disparate legal systems.[12]

This article aspires to constitute a modest half step towards the identification and development of international norms that are necessary if convergence in evidence gathering is to be taken seriously as an objective of international dispute resolution. It shall be asserted that a "privative transparency norm" would help to develop substantive definitions of key terms that are central to evidence gathering such as those found in the IBA Rules that cry for doctrinal development.[13] Accordingly, the first section of this article focuses on making the case for why transparency (later to be termed "privative transparency norm") is an appropriate norm that conceptually galvanizes convergence in cross-border evidence taking. As part of that undertaking, this section concentrates on articulating the privacy/confidentiality cloud that has historically shrouded ICA and, to a lesser extent, ISA proceedings.[14] The second section examines the different applications and meanings that have been ascribed to transparency in international law documents, treaties, and select arbitral awards in order to limit the parameters of a future transparency norm and arrive at a single working understanding of the concept to be applied to evidence gathering. The third section identifies a "principle of uncertainty" endemic to the architecture and fundamental features of ICA and ISA. A fourth and final section of this writing applies a working transparency norm to foundational evidence gathering terms that form of part of the IBA Rules.

those between parties from different legal traditions." IBA RULES ON THE TAKING OF EVIDENCE IN INT'L ARBITRATION, pmbl. ¶ 1 (2010) (emphasis added) [hereinafter IBA 2010 RULES]. These new Rules benefit from twenty-seven years of experience arising from the practice and commentaries concerning the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration (May 28, 1983), and the IBA Rules On The Taking of Evidence in International Arbitration (June 1, 1999). *See* Pedro J. Martinez-Fraga, *Good Faith, Bad Faith, But not Losing Faith: A Commentary on the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 43 GEO. J. INT'L L. 387, 389 (2012).

[12] For present purposes, emphasis is placed on civil and common law legal traditions. If international dispute resolution is to be truly *international*, legal systems from the East and Middle East must be considered as part of the fashioning of transnational rules on evidence gathering.

[13] In an earlier writing, *Good Faith, Bad Faith, But Not Losing Faith: A Commentary on the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, I commented extensively on the IBA Rules and in so doing identified central terms on which the Rules' rubric places considerable weight. Martina-Fraga, *supra* note 11, at 389. That contribution, however, merely suggested that transparency as a substantive norm was necessary, but did not elaborate on the suggestion as being outside the scope of its subject matter. *See id.* at 426-30.

[14] It shall be asserted that a "privacy vestige" is eminently detectable in ISA as part of the structural legacy that international commercial arbitration bequeathed to it.

II. Making a Case for Transparency as a Governing Norm in Cross-Border Evidence Gathering

A. The Privacy-Confidentiality Cloud Cloaking International Commercial Arbitration

ICA has developed in a culture of privacy that is often misapprehended for absolute confidentiality and that has suffered in its acceptance based on the mercurial appetite and expectations of its consumers. The private nature of ICA arises from its distinct and unique space within private international law. In contrast with its judicial counterpart, ICA is wholly removed from judicial proceedings because it is not a manifestation of an exercise of sovereignty in furtherance of the purported equitable administration of justice. Private commercial dispute resolution, as a creature of contract, is exercised beyond the realm of the state's adjudicative framework and therefore forecloses any actual or perceived public entitlement to access or disclosure.[15] Indeed, it was this very administration of justice parallel to the state's exercise of sovereignty, as an alternative to the state's judicial system, that first spawned in both England and in the United States the judicial antagonism against arbitration that pervaded and delayed its development as a system of adjudication considered to be *in pari materia* with legal proceedings.[16]

The privacy and attendant perception of confidentiality that attached to ICA remains a compelling feature for its evolving consumer base.[17] Despite the absence of authority for the proposition that *confidentiality,* as opposed to *privacy,*[18] constitutes a salient feature of ICA, the principle "is seen as implicit or a corollary to an agreement to resolve a dispute by way of arbitration."[19]

Private international arbitration institutions were created with *private* disputes in mind. These institutions deliberately enshrined lack of transparency or privacy,

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[15] United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 570 (1960) ("arbitration is a creature of contract").

[16] *See* PEDRO J. MARTINEZ-FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION: DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS, 3 N.Y. DISPUTE RESOLUTION LAWYER 1-5 (2009) (discussing how historical aversion to arbitration in America eventually yielded to *in pari materia* litigation).

[17] In a 2010 survey of in-house counsel that the School of International Arbitration at Queen Mary University in London conducted, 84% of the persons surveyed expressed having elected arbitration, at minimum in part, "because of its '*confidentiality.*'" Rémy Gerbay, Deputy Registrar, London Court of International Arbitration, Oral Presentation Given at the University of Warsaw: *Confidentiality vs. Transparency in International Arbitration: The English Perspective,* (Feb. 9, 2011), *in* 9 TRANSNAT'L DISP. MGMT. 1 (2012). In these thoughtful remarks the author explains how "if arbitration is by definition private, it is not necessarily confidential." *Id.*

[18] The privacy-confidentiality dichotomy in international dispute resolution finds its apogee in the developing practice and "jurisprudence" of investor-state arbitration by dint of the introduction of genuine public standing compelling challenges to basic privacy assumptions that were only legacy driven.

[19] *See, e.g.*, Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT'L L. 213 (2001). It is not within the scope of this writing to address the confidentiality/privacy dichotomy in international commercial arbitration. On this point, suffice it to observe that generally any confidentiality is subordinated to the principle of party-autonomy, such that by agreement of the parties confidentiality under certain circumstances would never attach.

which in turn generated a "democratic deficit."[20] Even commentators who opine that ICA has achieved great gains with respect to transparency concede, without qualification, that "international commercial arbitration is not a wholly, or even mostly, transparent system."[21] They add that "[r]esearchers continuously lament about the difficulties in assembling information as a result of continued secrecy in international arbitration, and there remain concerns that insiders continue to enjoy unfair advantages because of the lack of transparency."[22] The most recent iteration of the principal arbitral rules suggests that there is no requirement for institutional publication of any information whatsoever concerning the conduct of an arbitral proceeding absent an agreement by the parties to the contrary.[23] Maupin observes "[t]hat not only the outcome but the very existence of an investor-state dispute may never be disclosed. Further, the confidentiality provisions of these rules prohibit tribunals from ordering the disclosure of the disputing parties' pleadings and evidence without the parties' consent."[24] The very institutional rules that procedurally structure ICAs and administer the proceedings themselves underscore the *privacy-confidentiality* dichotomy together with the attendant "democratic deficit." The more emblematic pronouncements certainly compel review.

B. The Privacy-Confidentiality Dichotomy that Arbitral Institutions Nurture: A "Conceptual Deficit"

As a general matter and in stark contrast with judicial proceedings, most arbitral institutions state outwardly that hearings are *private*, subject to agreement by the parties or as otherwise provided by applicable mandatory law.[25] The pre-

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[20] Daniel Barstow McGraw Jr. & Niranjali Manel Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J. INT'L & COMP. L. 337, 342 (2009)

> Indeed, one of the major draws of arbitration in the commercial field was (and still is) the lack of transparency due to the ability of the parties to decide most aspects of the process. Partly because these disputes were perceived as being purely private, public interest did not play a key role in setting procedures in these institutions. Nevertheless, given the permeation of public disputes into a typically private forum, there is a need for identifying democracy deficits within the system, whether on a private institutional level or an international level.

Id.

[21] Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1325 (2006).

[22] *See id.* at 1325-26.

[23] *See, e.g.*, INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION (2012) [hereinafter ICC Rules]; STOCKHOLM CHAMBER OF COMMERCE ARBITRATION RULES (2010) [hereinafter SCC Rules]; THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION ARBITRATION RULES (2010) [hereinafter ICDR Rules]; THE LONDON COURT OF INTERNATIONAL ARBITRATION RULES (1998) [hereinafter LCIA Rules]. As previously noted, the principle of party autonomy is accorded greater weight than principles of privacy or confidentiality. Julie A. Maupin, *Transparency in International Investment Law: The Good, The Bad, and The Murky*, *in* TRANSPARENCY IN INTERNATIONAL LAW 14, n.81 (Andrea Bianchi & Anne Peters eds., forthcoming 2013).

[24] Maupin, *supra* note 23, at 15 (citing SCC Rules, art. 46).

[25] *See* ICDR Rules, *supra* note 23, art. 4 (providing that "[h]earings are *private* unless the parties agree otherwise or, the law provides to the contrary."). Also providing that "[t]he tribunal may require any witness or witnesses *to retire* during the testimony of other witnesses" and "[t]he tribunal may determine the manner in which witnesses are examined." *Id.* The 2012 iteration of the ICC Rules is

sumption of privacy that attaches to ICA proceedings need not be stated in the various institutional rules because the very nature of the proceeding itself is private. Therefore, any statement concerning the private character of the process would be little more than aesthetic emphasis.[26]

None of the rules of the major arbitral institutions define "privacy" or "confidentiality." It is conceptually problematic that the two terms often appear to be used interchangeably.[27] Confidentiality, however, is accorded greater deference and is mostly addressed in the context of what may be confidential pursuant to applicable substantive law.[28] The paucity of any effort by these institutions to distinguish between privacy and confidentiality is disconcerting and further accentuates the culture of the ill-defined privacy-confidentiality status permeating ICA. The want of any attempt to define the terms beyond merely referring to confidentiality as a term of art to be given substance by applicable substantive law is equally unavailing. Thus, in addition to a democratic deficit, a normative *conceptual deficit* also appears to attach.

C. The Award and "Black-Box" Deliberations

The opaque culture defining the framework of ICA is also engrafted onto (i) the finding of facts and conclusions of law to be expected of any reasoned adjudication, (ii) the very publication of the award, and (iii) the deliberation process. The principal arbitral institutions shy away from classifying awards either as *private* or *confidential*. Instead, they emphasize non-disclosure or non-communication to third parties of material private terms.[29] All "decisions"—a term nowhere

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silent on *privacy* but cognizant as to *confidentiality*. ICC Rules, *supra* note 23, art. 22(3). This article provides:

> Upon the request of any party, the arbitral tribunal may make orders concerning the *confidentiality* of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and *confidential* information.

Id. Here party-autonomy is accorded greater weight than a general presumption of confidentiality or even of privacy.

[26] LCIA Rules, *supra* note 23, art. 19.4. This article, for example, flatly states that the hearings are *private* "unless the parties agree otherwise in writing or the arbitral tribunal directs otherwise." *Id.* (emphasis added).

[27] For a careful analysis of the two concepts in international arbitration, *see e.g.*, Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT'L L. J. 121 (1995).

[28] ICDR Rules, *supra* note 23, art. 20(6). This article provides:

> The tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered by any party. The tribunal shall take into account applicable principles of legal privilege, such as those involving *confidentiality* of communications between a lawyer and a client.

Id. With no additional reference to the meaning of confidentiality other than to the use of the term, Art. 34 of the ICDR Rules explicitly addresses control and disclosure of confidential information:

> Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Except as provided in Art. 27, unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.

ICDR Rules, *supra* note 23, art. 34.

[29] This non-disclosure is subordinated to party-autonomy (i.e., the agreement of the parties). *See* ICDR Rules, *supra* note 23, art. 27(2), stating "[t]he tribunal shall *state the reasons* upon which the award is based unless the parties have agreed that no reasons need be given." *Id.* (emphasis added). *See* ICDR Rules, *supra* note 23, art. 27(4) (providing that "[a]n award may be made public only with the consent of all parties or as required by law."). Later still, the ICDR Rules, *supra* note 23, art. 27(6)

explained or defined by the arbitral rules—share the same fate as awards.[30] Treated neither as *confidential* nor *private*, they simply are not to be disclosed without the consent of the parties.[31]

Providing "reasons" upon which an award is premised is poles apart from the issuance of a reasoned and thorough award that frames issues, provides a comprehensive factual narrative of material facts, enunciates applicable law, and sets forth the application of law to fact. A mere regurgitation of reasons in support of a finding renders arbitral awards synoptic and therefore likely to disappoint party expectations. Neither the LCIA nor the ICDR require a provision of "reasons" underlying consent awards.[32]

Privacy and confidentiality find their most robust pronouncement in ICA in the ambit of the arbitral tribunal's deliberations. The cultures of ICA and ISA accord considerable weight to a virtually unwritten doctrine of absolute deliberation confidentiality. The workings of deliberation confidentiality in international arbitration comports with the architecture of a dispute resolution methodology that emphasizes *enforceability* over *accountability*, or second-instance review.

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requires that the filing or registration of the award also is to be kept private or confidential (it is unclear) depending on governing law "if the arbitration law of the country where the award is made requires the award to be filed or registered, the tribunal shall comply with such requirement." The ICDR Rules address the partial publication of awards in Art. 27(8):

> Unless otherwise agreed by the parties, the administrator *may* publish or otherwise make publicly available selected awards, decisions and rulings *that have been edited to conceal the names of the parties or other identifying details* or that have been made publicly available in the course of enforcement or otherwise.

ICDR Rules, *supra* note 23, art. 27(8) (emphasis added). *See* ICC Rules, *supra* note 23, art. 34(2) (prescribing under the section entitled *Notification, Deposit and Enforceability of the Award*, that "[a]dditional copies certified true by the Secretary General shall be made available on request and at any time to the parties, *but to no one else*.")(emphasis added). *See also* LCIA Rules, *supra* note 23, art. 26.1 that in part provides "[t]he Arbitral Tribunal shall make its award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which its award is based."

[30] The term "decision" is commonly referred to in most arbitral institutional rules, but is never defined or even contextualized. *See, e.g.*, ICC Rules, *supra* note 23, art. 6(6), 29(2), 35, 37.

[31] *See*, *e.g.*, ICC Rules, *supra* note 23, art. 11(4) ("The decisions of the Court as to the appointment, confirmation, challenges; or replacement of such an arbitrator shall be final, and the reasons for such decisions shall not be communicated.") (emphasis added). More expansive than its ICC Rules counterpart, LCIA Rules, *supra* note 23, art. 29.1 reads:

> The Decisions of the LCIA courts with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal. Such decisions are to be treated as administrative in nature and the LCIA court shall not be required to give any reasons.

Id.

[32] *See* LCIA Rules, *supra* note 23, art. 26.8. This article states:

> In the event of a settlement of the parties' dispute the Arbitral Tribunal may render an award according to the settlement if the parties so request in writing (a "consent award"), provided always that such award contains an express statement that it is an award made by the parties' consent. *A consent award need not contain reasons*. . ..

Id. (emphasis added). Orders for costs also need not set forth underlying premises. *See* LCIA Rules, *supra* note 23, art. 28. *See also* ICDR Rules, *supra* note 23, art. 29(1) ("If the parties settle the dispute before an award is made, the tribunal shall terminate the arbitration, and, if requested by all parties, may record the settlement in the form of an award on agreed terms. *The tribunal is not obliged to give reasons for such an award.*") (emphasis added).

While considerable ink has been spilled regarding the confidentiality of tribunal deliberations,[33] scant actual normative juridical authority exists on the subject.[34]

In this sense arbitral decision-making remains an impenetrable "black box" process. Despite ably chronicled significant gains for transparency,[35] deliberations remain obscured by design and practice in order to minimize the scope of judicial intervention at the enforcement stage. Much-vaunted market forces, including competition among arbitral institutions, a more vibrant competitive environment with respect to arbitrators, greater awareness among consumers of arbitral rules and services, and an increase in the proliferation of voluntarily published arbitral awards[36] have not led to a restructuring of arbitral institutional frameworks so as to provide, by design or in *praxis,* greater transparency addressing the democratic deficit. To the extent that a discernable trend in disclosure can be documented, such descriptive-empirical analysis does not necessarily lead to the conclusion that transparency is being incorporated into the procedural rubric and juridical culture of ICA conceptually or, more particularly, as a norm of international law. The commentary that has been generated regarding the extent to which ICA suffers from want of transparency despite its formal private nature, has led to conclusions that may be supported by a phenomenology but that do not explain underlying principles responsible for the empirical data in the first instance.

Rather than concluding that ICA is reinventing itself based upon the systematic incorporation of principles that are conducive to greater transparency for present purposes of developing a privative transparency norm applicable to cross-border evidence gathering, this author asserts that the phenomenon is susceptible to a causal explanation that finds conceptual foundation in the very precepts that underlie ICA, and not in invisible market forces. Greater transparency in ICA has been achieved because the principle of party-autonomy has garnered greater structural and normative standing. This adjustment in the prominence of party-autonomy largely and most notably explains the proliferation of the publication

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[33] ILEANA B. SMEUREANU, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION (2011); *see, e.g*., Alan Redfern, *Dissenting Opinions in International Arbitration: The Good, The Bad, and The Ugly*, 20 ARB. INT'L 223 (2004).

[34] The LCIA is one of the few arbitral institutions that directly addresses the issue of confidentiality in the deliberations of the arbitral tribunal instead of relying on amorphous but sacrosanct principles of international commercial arbitration. Article 30.2 states:

> The deliberations of the Arbitral Tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, and 26.

LCIA Rules, *supra* note 23, art. 30.

[35] *See, e.g.*, Rogers, *supra* note 21, at 1314-19 (arguing that multiple forces, including material increases in trade and trade-related disputes, have galvanized and improved the international commercial arbitration system, thus making possible meaningful advances towards transparency).

[36] *Id*. at 1319, n.73 (citing Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform,* 41 COLUM. J. TRANSNAT'L L. 923, 959 (2003) ("Today, several arbitral institutions, as well as independent publishers, have started to regularly publish arbitral awards."). *But see* Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335, 1340 (2003) ("Although certain sources for arbitral decisions exist. . . they are but the tip of the iceberg of all the cases produced. . . and . . . the ICC awards are an explicitly biased sample as the ICC seeks to publish particularly interesting or unusual awards.").

of sanitized arbitral awards, greater disclosure of the grounds for arbitral challenges, and increased access to the reasons underlying arbitral decision-making generally.

While structural modifications to the rules certainly may be gleaned, they fall materially short from rising to the level of representing transformative modifications. ICA is private because of its very foundation—a private contractual agreement within the framework of private international law applying the substantive law of one jurisdiction and relating only to a microeconomic event that forecloses public access or standing.[37] Even though the length of arbitral awards in this field has increased materially,[38] a jurisprudence of such awards in private international law limited to persuasive authority has not developed, as is the case with ISAs. Rarely do ICA awards contain citation to other awards as authority or persuasive analytical grounding.

ICA can only shed its culture of privacy and confidentiality upon penalty of denaturalizing and transforming itself into an international dispute resolution methodology that as of yet does not exist and for which consumer demand cannot be meaningfully identified.[39] A transparency norm can find resonance in ICA and in ISA but only if it is developed as a substantive norm of private and public international law, and its application is limited to discrete aspects of international dispute resolution, such as in evidence gathering. This selective application of a recognized norm can be substantively harmonized and reconciled with the structural private characteristics of international dispute resolution without denaturalizing it or otherwise engaging in the hyperbolization of minor rule amendments that are conducive to greater public access or disclosure as somehow transformative.

D. Investor-State Arbitration Inherited a Culture of Privacy from International Commercial Arbitration

Even though the system of ICA primarily adjudicates disputes between private individuals based upon private legal causes of action within a framework that is severed from any geopolitical rubric and generally administered by a private in-

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[37] *See, e.g.*, Rogers, *supra* note 21, at 1308-09 (stating "At present, even cosmopolitan international legal theorists would have difficulty effectively arguing that the world's citizens are interested parties in all of its proceedings."). "Not surprisingly, therefore, ardent advocates of compulsory transparency reforms have conceded that transparency should not be insisted on in all cases because the public does not have an interest in all cases." *Id.*

[38] *See generally* YEARBOOK COMMERCIAL ARBITRATION Volume XXXVI 2011 (Albert. J. Van Den Berg ed., 2011) (and previous editions from 1992-2010) (displaying the growth in the average length of ICC arbitration awards). The average length of the awards published between 1992 and 2001 was 5,892 words. This nearly doubled to 10,881 words in the following decade (2002-2011). *Id.* It should be emphasized that this finding is limited by the selective publication of awards by the editors of the YEARBOOK COMMERCIAL ARBITRATION, in addition to the fact that some of the published awards are summarized. *Id.* Nevertheless, assuming other factors remained static, it is notable that the length of the published awards grew materially during that two-decade timeframe. *Id.*

[39] McGraw & Amerasinghe, *supra* note 20, at 342 ("Indeed, one of the major draws of arbitration in the commercial field was (and still is) the lack of transparency due to the ability of the parties to decide most aspects of the process.").

stitution, it has engrafted its model on ISA.[40] The standing configuration of the parties in ISA involves a private entity asserting claims against a sovereign. These treaty-based causes of action eminently fall within the domain of public international law.[41] Claims arise from bilateral or multilateral investment treaties and normally concern the interests of an investor-state and a host state. Consequently, the subject matter of the dispute is paradigmatically public in nature, despite the prosecution of claims by a private party.[42] ISA necessarily transcends the mere allocation of resources between private parties because, in part, it often entails challenging a sovereign's exercise of sovereignty through the imposition of regulatory imperatives. Moreover, as it is common for ISAs to focus on specific economic industry sectors, these proceedings give rise both to micro and macroeconomic issues.[43]

The international public policy addressing the protection accorded to investors among capital-exporting countries (industrialized states) and capital-importing countries (developing states) is directly formed and transformed by investor-state arbitral proceedings. ICA generally does not affect public economic or political policies.[44] ISA has spawned a culture of award writing and publication. Because

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[40] Statement by the OECD Investment Committee, Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, June 2005, *available at* http://www.oecd.org/investment/investmentpolicy/34786913.pdf. (explaining "[t]he system of investment dispute settlement has borrowed its main elements from the system of commercial arbitration").

[41] Even though the claims asserted are treaty-specific, ISAs generally concern claims arising out of alleged violations of (i) fair and equitable treatment, (ii) expropriation bereft of public purpose for which there was no prompt and adequate compensation, (iii) treatment insufficient to meet international minimum standards, (iv) actions undermining national treatment standard, (v) denial of justice, (vi) discriminatory and arbitrary conduct, (vii) substantive violations of principles made relevant to the dispute pursuant to a most favored nation (MFN) clause, and (viii) breach of compliance with obligations arising from other investments, which may be made relevant to a dispute pursuant to an "umbrella clause."

[42] It remains unclear in the "investor-state jurisprudence" whether a purely contractual claim may be asserted within the rubric of a treaty-based arbitration. *See, e.g.*, Karen Halverson Cross, *Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims against Argentina*, INSIGHTS (Am. Soc. of Int'l L., Washington, D.C.), Nov. 21, 2011, *available at* http://www.asil.org/pdfs/insights/insight111121.pdf.

[43] It has been meaningfully asserted that unlike WTO proceedings resulting in policy, rule, or legislative change on a prospective basis typically concerning tariffs, ISA is limited to microeconomic model analysis. In furtherance of this proposition it is contended that because ISAs address a single specific investment with relevant material timeframes pertaining to pre-entry and post-entry investment status, as well as remedial measures limited to compensatory damages in connection with the investment at issue, the economic scope of these arbitrations is micro only. *See generally* Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275 (1996-97).

[44] It is important to observe, however, that despite not being the norm, it is also not uncommon for private arbitral institutions to process investor claims against a sovereign within a framework of private international law rules that applies national and international law to substantive claims. Action based on the breach of contractual obligations allegedly attaching to concession statements do form part of the international arbitration firmament. In fact, it is not uncommon for such cases to entail choice of law disputes. Specifically, it is common for the parties to dispute the extent to which public international law takes precedence over the substantive law that the parties agreed to in the operative contract. *See generally* Gus Van Harten, *The Public—Private Distinction in the International Arbitration of Individual Claims against the State*, 56 INT'L AND COMP. L.Q. 371 (2007) (discussing the "grey areas" in the public-private distinction in the international arbitration).

of the *ad hoc* nature of the short-lived tribunals[45] and judicially segregated status of the process, these awards do not constitute binding precedent.[46] The arbitral awards that ISAs generate are used as normative persuasive authority by tribunals, and quite frequently give rise to elaborate dissenting opinions.[47] The culture of award writing is readily discernible and follows a structured configuration.[48]

Notwithstanding the rather arresting differences and contrasts between ICA and ISA, even under a surface analysis, it is apparent ISA has adopted ICA's privacy-confidentiality features. This structural influence is quite remarkable because of the public international law configuration that so defines ISA. In these proceedings public access and transparency are amply justified and even necessary in light of the very public nature of international investment law and the public policy consequences that immediately redound to the investor-state claimant, and often, to the regulatory sphere of the host state. Despite the prominence of these issues, however, privacy remains a point of contention from a structural perspective in ISA.

E. Grounds for Disclosure: Yet Another "Privacy Vestige"

Disclosure of facts that may lead to questions concerning an arbitrator's impartiality and independence is one issue that has garnered particular attention.[49] The standard governing arbitrator's duty to disclose set forth in the IBA Guide-

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[45] Of course, the term "short-lived" is relative. A number of ISAs, under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), recorded arbitrations lasting in excess of five years. The *expediency* and *efficiency* components of international arbitration, both commercial and investor-state are becoming museum-quality relics. The fact remains, nonetheless, that arbitrators serve as such on an *ad hoc* matter-specific basis.

[46] *See* Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 Fordham Int'l L. J. 1014, 1016 (2006-07) ("[A]lthough arbitrators in investment treaty arbitration are not formally bound by precedent in the same manner as common-law judges, there is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law.").

[47] Indeed, dissent writing in ISA has caused a robust dialogue among commentators, practitioners and arbitrators. *See, e.g.*, Pedro J. Martinez-Fraga & Harout Jack Samra, *A Defense of Dissents in Investment Arbitration*, 43 U. Miami. Inter-Am. L. Rev. (forthcoming 2012) (on file with author); Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 821-43 (M. Arsanjani, J. Katz Cogan, R. Sloane, & S. Wiessner eds., 2010); Alan Redfern, *The 2003 Freshfields Lecture - Dissenting Opinions in International Commercial Arbitration: The Good, the Bad, and the Ugly*, 20 Arb. Int'l 223, 224 (2004).

[48] Considerable effort is expended in providing for a comprehensive factual and procedural narrative. Also, the principal material arguments, claims, counterclaims, defenses and avoidances are appropriately designated and "summarized." The tribunal's position on critical issues typically follows a narrative of the opposing parties' respective positions. Despite the length of awards, often exceeding 200 pages, the legal analysis generally is not as comprehensive or rigorous as with second instance appellate opinions issued by U.S. appellate tribunals. As with their international commercial arbitration counterpart, ISA awards also are synoptic.

[49] *See, e.g.*, Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 Suffolk Transnat'l L. Rev. 341 (2008-09); Christopher Harris, *Arbitrator Challenges in International Investment Arbitration*, 4 Transnat'l Disp. Mgmt. 1 (2008) (noting that "[i]n international investment arbitration, the importance of the generally applicable twin qualifications demanded of all arbitrators – independence and impartiality – is even greater than in international commercial interest").

lines on Conflicts of Interest in International Arbitration (the "IBA Guidelines").[50] The IBA Guidelines adopt a subjective test that frames the inquiry of impartiality from the vantage point of the parties and not the subject arbitrator's personal subjective evaluation of whether particular facts indeed command disclosure: "Arbitrators shall disclose facts or circumstances which, in the eyes of the parties may give rise to doubts as to the arbitrator's impartiality or independence, and '[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.'"[51]

The lingering issue concerning privacy and disclosure here addressed is to be found in the "vestiges of privacy" that close scrutiny of the unchallenged arbitrator's opinions reflects in addressing challenges. The more helpful examples are those where, as in *SGS v. Pakistan*, the unchallenged arbitrators correctly decided the issue but regrettably failed to provide significant grounds in the opinion justifying their adjudication.[52] This want of analysis can best be understood as an ICA privacy vestige that found repose and a sphere of influence in ISA.

In *SGS v. Pakistan*, the claimant challenged the decision on the ground that counsel for respondent had presided over another tribunal that had issued an award favorable to the respondent in *Azinian v. United Mexican States*.[53] Moreover, one of the arbitrators in *SGS* had served as respondent's counsel of record in *Azinian* as well. The proposition underlying claimant's argument was that the challenged arbitrator would somehow encounter a moral imperative to reciprocate the favorable ruling that counsel in *SGS v. Pakistan* issued as a presiding member of the tribunal.

In rejecting the challenge pursuant to Articles 57 and 14(1) of the ICSID Convention, the unchallenged arbitrators observed that "[t]he party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made."[54] The core of the opinion's analysis serves as a paradigmatic example of a privacy vestige:

> It is commonplace knowledge that in the universe of international commercial arbitration, the community of active arbitrators and the community of active litigators are both small and that, not infrequently, the two communities may overlap, sequentially if not simultaneously. *It is widely*

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[50] *See* IBA Guidelines on Conflicts of Interest in International Arbitration (International Bar Association 2004), *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest.

[51] *See* Bottini, *supra* note 49, at 347 (citing the IBA Guidelines, Explanation to General Standard 3, ¶ (a)-(b)).

[52] SGS Société Genérale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (Dec. 19, 2002), 8 ICSID Rep. 398 (2005) [hereinafter *SGS v. Pakistan*].

[53] *Id.* at 398. See also Robert Azinian v. United Mexican States, ICSID Case No. ARB/AF/97/2, Award (Nov. 1, 1999).

[54] *See* Bottini, *supra* note 49, at 351.

> *accepted that such an overlap is not, by itself, sufficient ground for disqualifying an arbitrator*.[55]

Neither juridical rigor nor propriety of the actual finding is of consequence for purposes of this article. Rather, it is the quizzical opaque nature of so surface an analysis that compels scrutiny. The tribunal's exegesis purports to find normative foundation on an amorphous and somewhat banal principle divined out of whole cloth. The very notion of "commonplace knowledge" is, at best, suspect. While the intellectual history of epistemology indeed explored precepts and norms of cognition, in part or in whole based on experience described as being common to all persons, it is highly unlikely that the tribunal's reference attempted to seek conceptual support from these writings.[56] The tribunal's recourse to "commonplace knowledge" undermines its own legitimacy and grounds the conclusion on a hapless *tour de force*.

The reference to "the universe of ICA" is equally disconcerting. First, the proceeding *sub judice* was an investor-state dispute based upon the bilateral investment treaty ("BIT") executed between the Islamic Republic of Pakistan and Switzerland. Therefore, even within the tribunal's flawed conceptual categories, the appropriate reference should have been to "the universe of *ISA*"—not *ICA*. This observation aside, placing a serious construction on the tribunal's plain language, the cornerstone ruling is premised on little more than industry hearsay or, less technically stated, industry gossip. A rigorous canvassing of authority construing Articles 57 and 14 of the ICSID Convention would have been warranted worthy of an award that touches or concerns public policy and must satisfy public expectation beyond that of the parties. Reliance on the novel concept of "commonplace knowledge" pertaining to "the universe of international commercial arbitration" bespeaks privacy in referring to a universe that cannot be discerned, premised on an imputed knowledge base seemingly unworthy of an oral tradition, let alone written source materials. Worse still, even assuming that both "commonplace knowledge" and the "universe of ICA" existed with sufficient rigor and clarity from which cultural premises may be inferred and enshrined with the status of legal norms, the tribunal's opinion does little more than state that the status quo of industry practice is more than reason enough to avoid sustained analysis.

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[55] *See* Bottini, *supra* note 49, at 351 (emphasis added).

[56] In the *Discourse on Method*, Rene Descartes discusses common sense (*le bon sen*) somewhat ironically in his famous first sentence "Le bon sens est la chose du monde la mieux partagée" ("Good sense is the most evenly distributed thing in the world"). RENE DESCARTES, A DISCOURSE ON THE METHOD 5 (Ian Maclean trans., 2006) (1637). IMMANUEL KANT, THE CRITIQUE OF PURE REASON (J.M.D. Meiklejohn trans., 2010) (1781) (exploring whether an *a priori* synthetic judgment is possible) (emphasis added). In so doing, Kant, to some extent universalizes some sort of "common knowledge" in a doctrinal pronouncement, asserting that "[w]hile not all knowledge comes from experience, without experience there can be no knowledge." *Id.* In a different but related vein, Blaise Pascal in his Pensées fashions a distinction between intuition and cognitive syllogistic knowledge. *Id.* Intuitive knowledge, according to Pascal, appears to be a form of common knowledge or a common cognitive instrument pursuant to which knowledge is attained without intermediary cognitive steps. *Id.* It does not appear, however, that the tribunal had these theories in mind in fashioning a "common knowledge" arbitrator disclosure standard. *Id.*

F. The "Privacy Vestige" in Award-Crafting

Privacy in award crafting, as a legacy from ICA, refers to a reluctance to engage in a protracted juridical analysis upon which a conclusion is premised. Such approach is particularly unwelcome in the case of ISA, where public standing is obvious and the arbitral jurisprudence is frequently used as persuasive authority and a doctrinal repository of juridical positions that in turn may enhance the basic tenets upon which both ICA and ISA are premised: uniformity, predictability, transparency of standard, and party autonomy.

While it would be consonant with the formal mechanisms and structure of ICA for awards to be abbreviated, in part because of the institutionally contemplated limited merits review (accountability) for purposes of second instance recourse, the same cannot be said of ISA where public policy and public issues are paramount. The exportation of ICA's culture of privacy explains the abbreviated legal analyses and lack of juridical rigor as to the operation of public international law doctrines in support of the tribunal's conclusion, despite the proliferation of lengthy and often prolix awards engaging in factual narratives and recitations of the parties' position on different points.[57]

III. Investor-States' Quest for Transparency but not a Transparency Norm

ICA's privacy vestige is evident in ISA's efforts to incorporate different forms of transparency in addressing a gamut of issues including public access to proceedings,[58] publication of awards,[59] standing of amicus petitions,[60] amicus participation[61] and public access to work-product.[62] ICSID faced the challenge of having to meet justified public demands for access and transparency. Meeting this demand was particularly arduous because of the low probability of amending the Convention. Moreover, in adopting policy, ICSID must maintain a level playing field between capital-exporting countries and their capital-importing counterparts. The adoption of rules, policies, and regulations by ICSID must strike a

[57] The award is often written in a language that is not the primary language of its authors. Moreover, in the more successful proceedings, the award follows the model of a deliberation characterized as having considerable verve from the active participation of all tribunal members. Yet, the formal quality of written work-product by committee itself has been questioned and has fostered the adage, "a horse by committee is a camel." In this limited formal regard, the committee work may prove to be a hindrance.

[58] *See, e.g.*, Methanex Corporation v. United States of America, Decision of the Tribunal on Petition from Third Persons to Intervene as "Amici Curiae," (Jan. 15, 2001) ¶ 23 [hereinafter *Methanex v. United States*] (explaining that the United States consented to the "open and public hearing of all hearings before the Tribunal").

[59] *See, e.g.*, *Id.* ¶ 10 (explaining that Canada "supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible").

[60] *See, e.g.*, *Id.* ¶¶ 9-10 (explaining the differing approaches of Mexico and Canada with respect to the standing of amicus petitions under NAFTA).

[61] *Id.*

[62] *See, e.g.*, *Id.* ¶ 10 (explaining that Canada "supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible").

balance that harmonizes the interests of prospective claimants[63] while safeguarding classical sovereignty concerns that host states—mostly developing nations—have expressed.[64]

A. The ICSID Perspective

The ICSID Secretariat's Working Paper dated May 12, 2005 expresses that "[t]he Discussion Paper suggested changes concerned preliminary procedures, publication of awards, access by third parties to the proceedings, and disclosure requirements of arbitrators."[65] The underlying Discussion Paper on which the May 12, 2005 Working Paper of the ICSID Secretariat is premised was sent to the ICSID Administrative Council Business and Civil Society Groups from whom the Secretariat of the Centre sought comments from "arbitration experts and institutions around the world."[66] Of the six arbitration rules published in the Working Paper with suggested changes, four concerned transparency either in the form of observation—monitoring, disclosure, publication—or submissions of non-disputing parties.[67] These four suggested rule changes were materially adopted and comport virtually verbatim with the current iteration of the corresponding rule.[68]

While the Working Paper described that reactions to the suggested changes as "generally favorable," it did note that the "suggestions regarding access of third parties in particular elicited some disagreement. Concerns were expressed that any provisions on access of third parties to proceedings should subject such access to appropriate conditions ensuring, for example, that the third parties do not by their participation unduly burden parties to the proceedings."[69] With one notable exception, none of the four transparency rules mention the words "confiden-

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[63] Claimants understandably express concern over the extent to which host-states may use national law under the pretext to public health safety, or the environment to issue investment-impairing regulations or legislation.

[64] Venezuela and Bolivia's recent departures from the Convention, Ecuador's officially expressed intent to withdraw from the Convention, and Brazil's non-membership status, all highlight the delicate procedural positioning and substantive import that any new policy, rule, or regulation that the center adopts should meet. *See, e.g.*, Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes – Adoption, Adaption, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1379-80 (2006) (addressing this very issue and contextualizing it as part of a new generation of texts "consolidating, clarifying, and promoting transparency practice").

[65] ICSID Secretariat, Suggested Changes to the ICSID Rules And Regulations (May 12, 2005) (working paper), *available at* https://icsid.worldbank.org/ICSID/FrontServ-let?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=25_1.pdf [hereinafter Suggested Changes to the ICSID Rules].

[66] *Id.* at 3.

[67] *Id.* The suggested changes concerned ICSID Arbitration Rule: 39 (Preliminary Procedures), 41 (Preliminary Procedures), 48 (Publication of Awards), 32 (Access of Third Parties), 37 (Access of Third Parties), and 6 (Disclosure Requirements for Arbitrators). *Id.* An additional suggested change was raised concerning ICSID Administrative and Financial Regulation 14. *Id.*

[68] *See* Press Release, Amendments to the ICSID Rules and Regulations (April 5, 2006), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=Open-Page&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Achive_Announcement26.

[69] *See* Suggested Changes to the ICSID Rules, *supra* note 65, at 4.

tial" or "private" in any form.[70] Only in the declaration that members of the constituted tribunal must execute does the word "confidential" appear with respect to knowledge secured from the proceedings or the contents of any award made by the tribunal. This latter subject matter to which confidentiality on the part of tribunal members attaches appears to enshrine the confidentiality attendant to the tribunal's deliberation process.

Instead of casting the amendments in the language of "privacy," "confidentiality," "transparency," or "public," the principle of party-autonomy, whether by happenstance or design, pervades the framework. By way of example, ICSID Rule 32(2) applies party-autonomy in the first subordinate clause: "unless either party objects,"[71] but the word "public" is not referenced. Alternatively, the concept of public access is addressed with the language, "the Tribunal, after consultation with the Secretary General, *may allow other persons*, besides the parties, their agents, counsel and advocates, witnesses, and experts during their testimony. . .."[72] Consequently, while greater public access,[73] participation,[74] and even clarity by dint of award publication subject to party agreement[75] do indeed provide for greater transparency generally, the 2006 Amendments do not import a substantive principle of transparency gleaned from customary or conventional international law.[76] The amendments do eloquently illustrate the propositions that even within the rubric of transparency reforms (i) it is party-autonomy and not a principle of transparency that is accorded conceptual prominence, (ii) despite legitimate public interest, the "non-disputing party rule" meaningfully qualifies

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[70] *See* Int'l Ctr. for Settlement of Inv. Disputes, ICSID Convention, Regulations, and Rules: Rules on Procedure for Arbitration Proceedings, r. 6(2) [hereinafter ICSID Rules]. In part it states:

> Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form: I shall keep *confidential* all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.

Id. (emphasis added).

[71] *See id.* at r. 32(2) ("Unless either party objects, the Tribunal . . . may allow other persons, besides the parties . . . to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.").

[72] *Id.* (emphasis added).

[73] *Id*.

[74] *See id.* at r. 37(2)(a)-(c) (discussing the circumstances for allowing a non-party to file a writeen submission with the Tribunal regarding a matter within the scope of the dispute).

[75] *Id.* at r. 48(4).

[76] One of the difficulties inherent in the task of defining transparency in terms of a substantive norm, or more generally identifying the principle in international law, arises from the many different, and commonly disparate, applications and uses of the term.

such participation,[77] and (iii) the revisions to the rules studiously omit structural pronouncements as to the framework as "public," "private," or "confidential."[78]

B. Revisiting *Methanex* and the Case for a Transparency Norm

The non-disputing party rule, to a considerable extent, is the progeny of the tribunal's decision on petitions from non-party *amici curiae* issued in 2001 in *Methanex Corp. v. United States of America*[79] and *United Parcel Service of America Inc. v. Government of Canada*.[80] Both cases—particularly *Methanex* because it addressed public policy and health and safety regulatory issues in the context of environmental measures—gave rise to considerable literature.[81]

In seeking to make the case for the development of a substantive norm of transparency to be incorporated into the very narrow field of international dispute resolution evidence gathering, it will suffice to study the analytical bases upon which *Methanex* was premised, which only once referenced transparency[82] and

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[77] ICSID Rules, *supra* note 70, r. 37(2). This rule reads:

> *After consulting both parties*, the Tribunal *may* allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. *In determining whether to allow such a filing*, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Id. (emphasis added).

[78] *See* Suggested Changes to the ICSID Rules, *supra* note 65, at 6-13. *See also* Press Release, Amendments to the ICSID Rules and Regulations (April 5, 2006), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actioVal=OpenPage&PageType=Announcements Frame&FromPage=NewsReleases&pageName=Archive_Announcement26.

[79] *Methanex v. United States*, *supra* note 58.

[80] United Parcel Service of America, Inc. v. Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (Oct. 17, 2001) [hereinafter UPS v. Canada].

[81] *See, e.g.*, Kara Dougherty, *Methanex v. United States: The Realignment of NAFTA Chapter 11 with Environmental Regulation*, 27 Nw. J. Int'l L. & Bus. 735 (2007); Jessica C. Lawrence, *Chicken Little Revisited: NAFTA Regulatory Expropriations after Methanex*, 41 Ga. L. Rev. 261 (2006-07); Marisa Yee, *The Future of Environmental Regulation after Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases*, 9 Hastings W.-Nw J. Envt'l L. & Pol'y 85 (2002-2003).

[82] *Methanex v. United States*, *supra* note 58, ¶ 49.

> There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.

Id.

actually minimized scrutiny of substantive norms of international law in favor of procedural rigor arising from textual language in applicable procedural rules. In fact, the tribunal in *Methanex*,[83] when faced with claimant's objection to the *amici curiae* petitions on the theory that it would disavow the *in camera* application of Article 25(4) of the UNCITRAL Arbitration Rules,[84] found that the extent to which arbitration is confidential, the tribunal did not have to decide the point.[85] But for discussion on this very singular and circumscribed issue that it did not decide and fleeting reference to a general benefit redounding to Chapter 11 arbitral processes from "more open or transparent" proceedings,[86] the decision is brilliantly bereft of considerations of any substantive norms of international law that either would define international arbitration as "private" or "confidential" or have any effect on such a proceeding. The tribunal in *Methanex* decided that neither NAFTA[87] nor the UNCITRAL Rules proscribed *amici curiae* participation. Despite not explicitly referencing it, the tribunal availed itself of the principle of party-autonomy in fashioning its ruling. A review of the panel's reasoning is instructive.

The public nature of the *Methanex* case arising from the safety, healthcare, and environmental regulations underlying the operative claim commands a brief narrative in order to contextualize the Tribunal's analysis of the *amici curiae* petitions, which raised a classical public-access concern. Methanex's claim involved the production and sale of a methanol-based source of octane and oxygenate for gasoline that is known as methyl tertiary-butyl ether ("MTBE"). Specifically, Methanex averred that MTBE was a safe, effective, and economical component of gasoline and the oxygenate of choice in markets where free and fair trade is allowed.[88] Methanex also alleged that MTBE generated environmental benefits and did not at all pose risk to human health or the environment.[89] Central to Methanex's position was the contention that firstly, no methanol production plants were located in California and secondly, during the period 1993-2001 only a fraction of the methanol directly consumed in California was produced anywhere in the United States (an average of 20.2 thousand metric tons out of a total consumption figure of 185.5 thousand metric tons).[90]

The claims were brought under Article 116(1) NAFTA, based on breach by the USA of two provisions in Section A of Chapter 11 of NAFTA: Article

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[83] The panel was initially constituted by William Rowley QC, Warren Christopher Esq, and V.V. Veeder QC (Chairman), and later was reconfigured when Warren Christopher resigned and was substituted by Professor W. Michael Reisman. *See* Methanex v. United States, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), pt. II, ch. A, p. 5 [hereinafter Methanex Final Award].

[84] The predecessor to the current Article 28(3) as revised in 2010 UNCITRAL Arbitration Rules.

[85] *Methanex v. United States*, *supra* note 58, ¶ 46.

[86] *Id*.

[87] North American Free Trade Agreement, Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA].

[88] Methanex Final Award, *supra* note 83, at 1, pt. II, ch. D.

[89] *Id*.

[90] *Id.* at 2. In the proceeding it was uncontested that methanol is *the* essential oxygenating element of MTBE.

1105(1) and Article 1110(1)—purportedly arising from losses caused by the State of California's forthcoming ban on the sale and use of MTBE, which was scheduled to become effective on Dec. 31, 2002.[91]

Viewed as a possible landmark case with far-reaching policy implications the International Institute for Sustainable Development (the "Institute") was the first of four NGOs to file a petition for *amicus curiae* status asserting an apology in favor of a host-state's proper exercise of sovereignty through the enactment of regulatory measures in furtherance of the public welfare touching on health, safety, and environmental objectives, applied on a non-discriminatory basis.[92] The NGOs further advanced that under no analysis can such regulations be construed as violating international law and that they properly pertain to a host-state's prerogative within its regulatory space.[93] Two additional precepts on which the Institute predicated its petition were that the interpretation of Chapter 11 of NAFTA should reflect legal principles underlying the concept of sustainable development and "that participation of an *amicus* would allay public disquiet as to the closed nature of arbitration proceedings under Chapter 11 of NAFTA."[94]

At the outset of its opinion the tribunal did not articulate any general pronouncement concerning the confidential or private nature of arbitration. No rebuttable presumption of this kind, whether embedded in the cultural practice of international arbitration (commercial or investor-state) or discernible from international law, was stated. Instead, the tribunal opted for a very narrow construction of the issue without casting privacy or confidentiality as structural elements of the entire arbitral framework.

In its crisp point of departure, the tribunal observed that "there is nothing in either the UNCITRAL Rules or Chapter 11, Section B, that expressly confers upon the tribunal the power to accept *amicus* submissions or expressly provides that the tribunal shall have no such power."[95] In fact, the Tribunal distanced itself from Methanex's argument that because former Article 25(4) of the UNCITRAL

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[91] Methanex Final Award, *supra* note 83, at 1, pt. I, Preface. Methanex ultimately challenged three legislative texts, (1) the 1999 California Executive Order certifying that "on balance, there is significant risk to the environment from using MTBE in gasoline in California," (2) California Code of Regulations Title 13, §§2273 requiring gasoline pumps containing MTBE to be labeled in California as follows: "Contains MTBE. The State of California has determined that use of this chemical presents a significant risk to the environment." §§2262.6 provided at sub-section (a)(1) that: "Starting December 31, 2002, no person shall sell, offer for sale, supply or offer for supply in California gasoline which has been produced with the use of methyl tertiary-butyl ether (MTBE)," and Amended California Regulations of May 2003, expressly banning the use of methanol as an oxygenate in California. *Id*. at 7, pt. II, ch. D.

[92] Petitions eventually were filed by (i) the International Institute for Sustainable Development, (ii) Communities for a Better Environment, (iii) The Bluewater Network of Earth Island Institute, and (iv) The Center for International Environmental Law. Methanex Final Award, *supra* note 83, at 15, pt. II, ch. C.

[93] *See* Methanex v. United States, Petitioner's Final Submission Regarding the Petition of the International Institute for Sustainable Development to the Arbitral Tribunal for *Amicus Curiae* Status (Oct. 16, 2000), ¶¶ 10-18. *See also Methanex v. United States*, *supra* note 58, ¶ 5 (The Institute's petition sought leave "(i) to file an *amicus* brief (preferably after reading the parties' written pleadings), (ii) to make oral submissions, (iii) to observe status at oral hearings.").

[94] *Methanex v. United States*, *supra* note 58, ¶ 5.

[95] *Id.* ¶ 24.

Arbitration Rules (current Art. 28(3)) provides that hearings are to be held *in camera*, confidentiality attaches to documents prepared in anticipation of hearings.[96] Not having indulged in assumptions of privacy or confidentiality with respect to international arbitration or in drawing inferences from the specific *in camera* command in Article 28(3), the tribunal aptly sought normative foundation in the procedural principles vesting it with discretion found in former Article 15(1) (current Article 17) of the UNCITRAL Rules.[97] Article 15(1) ascribes to the tribunal vast discretion in conducting the arbitration, subject to the controls deriving from "procedural equality and fairness towards the Disputing Parties."[98]

Having found recourse in a procedural principle, the tribunal was able to dispense with any petition that would have the effect of adding parties to the arbitration or engrafting substantive rights, status, or other privileges of a disputing party upon non-parties. The tribunal explained that "receipt of written submissions from a person other than Disputing Parties is not equivalent to adding that person as a party to the arbitration."[99] This distinction is particularly true, where, as in that case, Methanex did not question the tribunal's authority to receive *amicus* submissions, but rather asserted that the tribunal was to exercise its discretion by first determining that the papers at issue would contribute to the tribunal's adjudication while not burdening the parties with otherwise unforeseeable submissions concerning a non-disputant party who cannot be cross-examined.[100]

Four fundamental findings were reached material to the Tribunal's final order holding that Article 15(1) allowed it to receive the written submissions petitioned.[101] Its treatment of these predicate sub-issues to the inquiry—concerning the extent to which former Article 15 vests a tribunal with discretion to accept

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[96] *Id.* ¶ 12. Methanex also asserted that the Sept. 7, 2000 Consent Order, the parties' had agreed that transcripts, written submissions, witness statements, reports, etc., were to be kept confidential. *Id.*

[97] *See id.* at ¶ 25-34 (describing the scope and application of UNCITRAL rule 15(1)).

[98] *Id.* ¶26.

[99] *Id*. ¶30.

[100] Methanex raised four fundamental arguments. First, as to jurisdiction, it contended that the tribunal lacked the jurisdiction to add a party to the proceedings absent agreement of the parties. On this point Methanex asserted that the tribunal lacked jurisdiction to engraft Chapter 11 NAFTA party status to petitioners and that any such exercise of discretion would be beyond the scope of Article 15 of the UNCITRAL Arbitration Rules. Second, claimant maintained that public interest concerns were amply protected by Article 1128 of NAFTA, which provided private interest groups with a methodology for conveying their information to the NAFTA Parties, who in turn had standing to intervene if indeed there was a NAFTA issue to be interpreted. In turn, the disputing parties had the ability to call petitioners as witnesses. If petitioners were to appear as *amici curiae*, the disputing parties would be foreclosed from cross-examination of the actual factual foundations underlying the operative submissions. Third, Methanex, as did Mexico as a NAFTA party, advanced that it was "inappropriate" to engraft the practice of the municipal courts that allowed for robust *amici curiae* participation onto international ISAs. While the U.S and Canada embrace amicus briefs as a routine aspect of their respective domestic laws, Mexico does not. Fourth and finally, claimant asked the tribunal to disregard WTO practice as irrelevant. It also added that even if WTO practice were to be adopted as analytically helpful, the WTO precedent on the issue revealed that the WTO Panel or Appellate Body Panel routinely ruled that such submissions were not to be considered and that the power arising from Article XIII of the Dispute Settlement Understanding to seek data from non-party sources had not been applied to these issues. *Id*. ¶¶ 14-5.

[101] Specifically, four issues were framed and addressed:

(i) whether the Tribunal's acceptance of *amicus* submissions fall within the general scope of the sub-paragraph numbered [2] of former Article 15(1);

submissions from third-party non-disputants—was comprehensive and technical but certainly did not reach out to international law in search of a substantive transparency norm. Instead, the Tribunal (i) traced the contours of the Iran-U.S. claims tribunal, the WTO, and ICJ practice in finding that it does not offend international arbitration practice to receive submissions from third-party non-disputants;[102] (ii) observed that any burden arising from petitioners' written submissions would be equally shared by both disputing parties and, therefore, cannot be regarded as necessarily excessive for either disputing party;[103] (iii) considered articles 1126(10), 1128, 1133, and 1137(4) of NAFTA and concluded that neither these articles nor any provision in Chapter 11 of NAFTA directly addressed a tribunal's authority to accept *amicus* submissions;[104] and (iv) analyzed the scope of former Article 25(4) (now Article 28(3)) of the UNCITRAL Rules finding that the article is irrelevant as to receipt of submissions but pertinent to petitioners' attendance at hearings and access to copies of materials provided to the tribunal.[105] It did not, however, seek recourse to international law for the proposition that international arbitrations are endemically private or confidential or that receipt of the submissions was compelled as a matter of international law or public policy. Further, despite a passing reference to the benefits of transparency, the

> (ii) whether the acceptance of amicus submissions could affect the equal treatment of the Disputing Parties and the opportunity of each fully to present its case, under the sub-paragraph [3] of former Article 15(1);
> (iii) whether there are any provisions in Chapter 11, Section B of NAFTA that modify the application of Article 15(1) for present purposes; and
> (iv) whether other provisions of the UNCITRAL Arbitration Rules likewise modify the application of a former Article 15(1) in regard to this particular case, given the introductory words of the sub-paragraph [1] of former Article 15(1).

Id. ¶¶ 27-8.

[102] *Id.* ¶¶ 32-4. In that connection, the tribunal emphasized that, the ICJ's practices reflect that "written submissions were received by the ICJ, unofficially, in *Case Concerning the Gabcikovo-Nagymaros Project,* ICJ Reports, 1997." *Id.* ¶ 34. The Tribunal added:

> The ICJ's practices provide little assistance to this case. Its jurisdiction in contentious cases is limited solely to disputes between states; its Statute provides for intervention by States; and it would be difficult in these circumstances to infer from its procedural powers a power to allow a non-state third person to intervene.

Id.

[103] *Id.* ¶ 36. The Tribunal added:

> In theory, a difficulty could remain if a point was advanced by a Petitioner to which both Disputing Parties were opposed; but in practice, that risk appears small in this arbitration. In any case, it is not a risk the size or nature of which should swallow the general principle permitting written submissions from third persons.

Id. ¶ 37.

[104] *Id.* ¶¶ 38-9. Specifically, it was observed that, "There is nothing relevant in these provisions for present purposes. As the tribunal has already concluded, there is no provision in Chapter 11 that expressly prohibits acceptance of *amicus* submissions but likewise nothing that expressly encourages them." *Id*. ¶ 39.

[105] *Id.* ¶¶ 40-2. The Tribunal underscored that it is unsettled whether former Article 25(4) of the UNCITRAL Arbitration Rules impose a duty of confidentiality, and in so doing can vest authority from the Swedish Supreme Court in *Bulgarian Foreign Trade Bank, Ltd. v. A.I. Trade Finance Inc.* (27.X.2000) suggesting that "a privacy rule in an arbitration agreement does not give rise under Swedish law to a separate duty of confidentiality, at least as regards the award." It also underscored that the approach was, "supported by the decision of the High Court of Australia in *Esso/BHP v. Plowman* (1993) and 183 CLR 10, distinguishing between confidentiality and privacy, particularly as subsequently applied by the New South Wales court in *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd.* (1995) 36 N.S.W.L.R. 662." *Id.* ¶ 43.

tribunal did not rely on a principle or norm of transparency as conceptual support for its decision.[106]

Methanex rightfully has been recognized for meaningfully contributing to a transparent dispute resolution regime.[107] This distinction is well justified. The manifold richness of the opinion in addressing trilateral parties, deftly adjudicating the extent to which domestic regulations concerning public health, safety, and the environment may affect international law protecting foreign investors, exploring the conceptual role of *amici curiae,* and finally, addressing the privacy/confidentiality dichotomy, is noteworthy. Adding to the Award's recognition, it was the beneficiary of the NAFTA Free Trade Commission's ("FTC") July 31, 2001 Notes of Interpretation of Certain Chapter 11 Provisions addressing access to documents, as well as considerable transparency related work that preceded it.[108] Precisely because the *Methanex* decision embodies multiple facets of transparency, namely: public access, non-party submissions, non-party participation, non-party access to arbitral papers, and the incorporation of the FTC Interpretive Note, the case is of considerable assistance in helping emphasize the privacy vestige that ISA inherited from ICA. Additionally it exemplifies the structural corrections that public international law must undertake in adjusting for private international law contention legacies.

Both the 2006 Revisions to the ICSID Rules and the *Methanex* analysis contribute to the justification for the development of a substantive privative transparency norm that can be resorted to without any fundamental framework modification to the workings of private and public international law dispute resolution. The development of such a privative transparency norm would serve as a principle of convergence capable of bridging and harmonizing otherwise disparate juridical traditions. A transparency norm is particularly necessary in transnational evidence gathering and can provide for more vibrant participation, disclosure, accountability, and expediency without the need to fashion rules of

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[106] *Id*. ¶ 49.

[107] Howard L. Mann, *The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles*, INTL. INST. FOR SUSTAINABLE DEV. (2005), *available at* http://www.iisd.org/pdf/2005/commentary_methanex.pdf.

[108] The NAFTA Free Trade Commission's Interpretive Note read:

> Nothing in the NAFTA imposes a general duty of confidentiality under disputing parties to a Chapter 11 Arbitration [or] precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter 11 tribunal.
>
> . . .
>
> Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter 11 tribunal, subject to redaction of: (a) confidential business information; (b) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and (c) information which the Party must withhold pursuant to the relevant Arbitral Rules, as applied.

Notes of Interpretation of Certain Chapter 11 Provisions of the NAFTA Free Trade Commission (July 31, 2001), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=eng&view=d. Methanex contended that the FTC's Interpretive Note was an amendment and not a viable interpretation of Article 1105, and, therefore, not binding of the tribunal pursuant to Article 1131(2) NAFTA. The tribunal, in part, emphasized "Methanex cites no authority for its argument that far-reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the Parties." Methanex Final Award, *supra* note 83, at 10, pt. IV, ch. C.

evidence gathering with substantive technical definitions that in turn would invite objections based upon lack of universality. The general transparency principles already adopted in international law documents would serve as necessary foundational conceptual premises.

IV. The Principle of Uncertainty in International Dispute Resolution and the Need for a Unifying Transparency Norm

A. Unsettled Structural Issues in Investor-State Arbitration

The privacy vestige is only one element of international dispute resolution suggestive of a need for a privative transparency norm. ISA, and to a lesser extent, ICA, structurally and substantively suffer from a want of a uniform framework. This absence gives rise to a "principle of uncertainty."[109] Moreover, critical aspects of ISA dispute resolution processes lack predictive value. ISA is constituted by a fragmented system of approximately 3,000 bilateral investment treaties that are not at all interconnected, conceptually organized, or containing monolithic material clauses.[110] The universe of multilateral, regional, and bilateral investment treaties is completely devoid of structure, hierarchy, or of any comparable organizing principle.[111]

At a less formal and more substantive level, rudimentary precepts of ISA remain materially unsettled. By way of example, perhaps the cornerstone standard raised in ISA is the fair and equitable treatment standard ("FET") of protection provided to foreign investors.[112] Similarly, FET's relationship to the International

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[109] This *principle of uncertainty* primarily pervades ISA, as shall be discussed. The principle, however, finds considerable resonance in international commercial arbitration because of the vast discretion accorded the arbitral tribunal, which is unprecedented in private international law. International commercial arbitration also presents uncertainties that concern structural features such as (i) the complete absence of an evidentiary framework that transfers this feature to virtually unbridled arbitral discretion, (ii) indefinite as to the extent to which cross-examination would be allowed, (iii) evidence-gathering that is too restrictive, (iv) equity-centric adjudication that displaces applicable substantive law, and (v) a general adversity towards non-contractually based causes of action. These components of international commercial arbitration do violence to the core principles upon which international arbitration purports to be founded and to further: party-autonomy, uniformity, transparency of standard, and predictability.

[110] One commentator creatively has analogized the rubric as "a 'spaghetti bowl' of around 3,000 overlapping bilateral and regional treaties, tens of thousands of transnational contracts, and an unknown number of domestic statutes whose purported aim is to stimulate economic development by attracting and protecting foreign investments within the sovereign territories of individual host-states." Maupin, *supra* note 23, at 2.

[111] In this regard, international investment law stands in high relief with its international trade law counterpart, which has been duly endowed with a framework and multi-institutional standing, such as the WTO.

[112] The fair and equitable treatment standard is perhaps the most malleable and, therefore, susceptible even to unintentional over-use by claimants seeking to assert multiple claims arising from the same or overlapping infractions. Commentators have criticized the standard as conducive to abuse by claimants seeking to engraft it on violations, which, according to these writings, are substantively distinct from the fair and equitable treatment claim. Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 961 (2006-07) (citing Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 306 (2004)) ("Fair and equitable treatment clauses . . . have become 'black holes of investment treaties' that invite a flood of litigation not originally contemplated by developing countries.").

Minimum Standard ("IMS") has also galvanized a number of competing theories of practical consequences to international dispute resolution.[113] Is IMS the same or different from FET? If substantively different, what is the difference? May the difference have any effect on damages *quantum*?

Whether an umbrella clause[114] in an ISA shall be allowed to incorporate non-treaty based claims into the proceeding remains equally ill defined. The seminal cases on whether an umbrella clause indeed automatically accords treaty status to contractual claims remain hopelessly unsettled.[115]

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[113] *See, e.g.*, IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT (2011). The author cogently asserts that FET is separate and distinct from IMS and points, *inter alia*, to the aberrant development of the standard as being one that first was codified and only subsequently forming part of customary international law in contrast with the converse conceptual development pursuant to which customary international law principles are later codified, as part of the grounds that give rise to this confusion. Kläger in turn observes:

> It might well be that in some circumstances in which the international minimum standard is sufficiently elaborate and clear, the standard of fair and equitable treatment might be equated with it. But in other cases, it might as well be the opposite, so that the fair and equitable treatment standard will be more precise than its customary international law forefathers.

ROLAND KLÄGER, FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT LAW 81 (2011). Here Kläger suggests that the evolutionary development of the standard is one from customary international law to conventional international law. In material contrast to Tudor, Kläger further states:

> On many occasions, the issue will not even be whether the fair and equitable treatment standard is different or more demanding than the customary standard, but only whether it is more specific, less generic and spelled out in a contemporary fashion so that its application is more appropriate to the case under consideration. This does not exclude the possibility that the fair and equitable treatment standard imposed under a treaty can also eventually require a treatment additional to or beyond that of customary law. Such does not appear to be the case with the present dispute, however. The very fact that recent interpretations of investment treaties have purported to change the meaning or extent of the standard only confirms that, those instruments aside, the standard is or might be a broader one.

Id.

[114] An umbrella clause is a provision present in many bilateral investment treaties that imposes a requirement on each contracting state to observe typically all investment obligations entered into with investors from the other contracting state. *See* Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 137 (2006). The umbrella clause, for example, in the bilateral investment treaty (BIT) between United States and Romania, signed on May 28, 1992, in Article II(2)(C) states that "[e]ach [p]arty shall observe any obligation it may have entered into with regard to investments." *Id.* The BIT between the Netherlands and the Republic of Paraguay in Article III(4) is slightly more elaborate: "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party." *Id.* Finally, by way of illustration, the BIT between the Republic of Korea and Libya in Article X(3) adds the element of territoriality to the BIT: "Each Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party." *Id.*

[115] Quite remarkably, the cases addressing this issue all have the same claimant. *See* SGS Société Genérale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (Dec. 19, 2002), 8 ICSID Rep. 398 (2005); SGS Société Genérale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004), 8 ICSID Rep. 518 (2005). The tribunal in *SGS v. Pakistan* deemed the adoption of claimant's interpretation of the umbrella clause in Article 11 of the BIT between Switzerland and Pakistan so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, and so burdensome in their potential impact upon a Contracting Party that clear and convincing evidence must be adduced by the claimant that such was indeed the clear intent of the Contracting Parties. *SGS v. Pakistan*, 8 ICSID Rep. 518, ¶167. Accordingly, *SGS v. Pakistan* stems from the proposition that there is a strong presumption that umbrella clauses do not apply to obligations arising under investor-state contracts. In stark contrast, in *SGS v. Philippines,* the tribunal decided that the umbrella clause applies to all breaches of the relevant investor-state contract but ultimately declined

Fundamental inquiries concerning the scope and application of a Most Favored Nation ("MFN") clause remain unsettled, if not altogether opaque.[116] It is unclear whether an MFN clause only applies to substantive and not procedural terms of a treaty.[117] Additional uncertainty arise as to the extent to which claimants abuse their rights when seeking to secure recovery from a State's exercise of sovereignty in furtherance of public health and welfare pursuant to environmental decrees, or whether in the name of "public purpose" a sovereign's exercise of its regulatory authority is exempt from international investment law.[118] ISAs borrow considerable normative precepts for final awards from other similarly situated *ad hoc* tribunals whose awards *lack* binding authority as precedent.[119]

The uncertainty principle in arbitration arises from the absence of predictive value that is endemic to procedural structural elements and substantive doctrines configuring ISA. This uncertainty principle, coupled with the privacy vestige, make the most persuasive and compelling case for the propriety of a transparency norm that is substantive in nature and more than just a general rule prescribing disclosure, monitoring, or access. Identifying elements of a substantive transparency norm in treaties, international law documents, and other sources authority, is a condition precedent to the application of such a norm to discreet aspects of international dispute resolution, such as evidence gathering, if in fact international dispute resolution is to redeem its promise to harmonize disparate juridical cultures and systems.

V. A Substantive Transparency Norm and Evidence Gathering

A. In Search of a Principle of Transparency in International Law

The foundational work necessary for the development of an overarching substantive principle of transparency in international law begins first as a search for principles. As a very general concept, transparency has garnered the attention of

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to exercise jurisdiction because the underlying contract contained an exclusive forum selection clause that designated a different forum for the resolution of contractual disputes. *SGS v. Philippines*, 8 ICSID Rep. 518, ¶155. As to this finding, Professor Gaillard commented:

> [T]o the extent this solution recognises 'in principle' an investor's right to choose an international arbitral tribunal for the settlement of its investment disputes, and, in the same breath, requires that the selected tribunals stay the proceedings on the basis of an exclusive forum selection clause contained in the investment contract, it results in the BIT tribunal having jurisdiction over an empty shell and depriving the BIT dispute resolution process of any meaning.

Emmanuel Gaillard, International Investment Law and Arbitration: Leading Cases From The ICSID, NAFTA, Bilateral Investment Treaties and Customary International Law 325, 334 (2005).

116 Most-favored nation clauses "oblige the State granting MFN treatment to extend to the beneficiary State the treatment accorded to third States in case this treatment is more favorable than the treatment under the treaty between the granting State and the beneficiary State." Stephan W. Schill, *Mulitilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496, 502 (2009).

117 *Id*. at 528-48.

118 Chung, *supra* note 112, at 963.

119 Even the extent to which dissenting opinions should issue is being aggressively contested in contemporary commentaries. *See, e.g.*, Cheng, *supra* note 112 (discussing multiple facets of the function of precedent); *see also* Martinez-Fraga & Samra, *supra* note 47 (advocating for the inclusion of published dissents in arbitration proceedings).

commentators who have appreciated the need to communicate or render public structural features of international dispute resolution.[120] More expansively, the term transparency has been identified as relevant to the development of international economic law,[121] a fundamental principle of corporate governance applicable to multinational corporations,[122] a central precept defining citizens' right to government information,[123] and an organizing principle in the relations between institutions and regimes of international law and member States.[124] Transparency as an undefined principle has found a voice and stature as a criteria by which to measure the legitimacy of purported democratic political processes[125] and even as an essential element of human rights.[126]

Despite the thoughtful proliferation of writings surrounding the term in virtually every major aspect of international law, transparency as a principle of international law remains elusive.[127] The evasive nature of transparency is fundamentally connected to the word's own extraordinary aspiration of presenting what is actual and free from attributes that may detract from or alter that which is true. Thus, it is intimately connected at a fundamental conceptual level with the Attic Greek term for truth, "aletheia,"[128] which in turn is derived from the verb "lanthanum,"[129] and connected with the noun, "leithei."[130]

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120 *See, e.g.*, Fracassi, *supra* note 19 (discussing confidentiality in NAFTA-related arbitration); McGraw & Amerasinghe, *supra* note 20 (discussing transparency in investor-state arbitration); Rogers, *supra* note 21 (discussing transparency in commercial arbitration).

121 Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle of International Economic Law,* 27 MICH. J. INT'L L. 579, 580-81 (Winter 2006).

122 Rogers, *supra* note 21, at 1325, n.103 (citing Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 304 (2006)).

123 Marcel Claude Reyes et al. v. Chile, Case 12.108, Inter-Am. C.H.R. Report No. 60/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 (2003).

124 Zoellner, *supra* note 121, at 581; William J. Aceves, *Institutionalist Theory and International Legal Scholarship,* 12 AM. U. J. INT'L L. & POL'Y 227, 250-51 (1997); Kenneth Abbott, "*Trust but Verify": The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L. J. 1, 40-5 (1993).

125 *See, e.g.*, Larry Diamond, *Democratic Rollback: The Resurgence of the Predatory State*, 87 FOREIGN AFF. 36, 45-6 (2008) ("Poorly performing democracies need better, stronger, and more democratic institutions-political parties, parliaments, and local governments—linking citizens to one another and to the political process. . . . Reform requires the internal democratization of political parties through the improvement of their transparency and accessibility and the strengthening of other representative bodies.").

126 *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935, 1957-58 (2002) (underscoring the importance of transparency to compliance with international human rights treaties and the efficacy of international law).

127 *See, e.g.*, Kristin Lord, *War and Peace in an Age of Transparency*, 4 GEO. J. INT'L AFF. 130 (2003) (regarding international security); Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927 (2003-2004) (regarding international trade law); Timothy J. McCormally, *Responding to the New Age of Transparency*, 14 INT'L TAX REV. 3 (2003) (regarding international taxation).

128 AN INTERMEDIATE GREEK-ENGLISH LEXICON 34 (H. G. Liddell, Robert Scott, and Henry Stuart Jones eds., Oxford 9th ed. 1945) (1889).

129 *Id.* at 464-65.

130 *Id*. at 470-71.

The verb *lanthanum* is etymologically connected to the noun *leithei*. Despite the wide range of meanings that can be legitimately ascribed to the verb *lanthanum*, all appear to single out one very common concept of "escaping notice", and therefore, "of being forgotten", or even "of causing something to be forgotten."[131] The noun *leithei* means "forgetting" or "forgetfulness".[132] The Attic Greek word for truth, *aletheia,* curiously has a privative etymological root meaning, i.e., "the absence of forgetfulness."[133] The meaning of *aletheia* expands to include—primarily the sense of the true as opposed to the false—the real in contrast to the apparent and the unconcealed as opposed to the hidden.[134] Contrary to the modern use of the English word "truth", the word "aletheia" is used of things as well as of statements of the unconcealed as opposed to the obscured, of the honest in contrast to the deceptive, and of the true statement as opposed to the false one.[135] For present purposes, it is important to observe that the Attic Greek language for truth, *aletheia*, is not presented positively. Instead, *aletheia* presents the truth conceptually in the negative, as the absence of concealment.

The use of transparency in international law also is presented negatively, much like *aletheia*, in the sense of access or disclosure requiring affirmative undertaking on the part of the object. These uses of transparency are susceptible to being categorized rather comprehensively into nine sets: (1) openness/access to spectators,[136] (2) openness/access to source materials,[137] (3) openness/access to monitor,[138] (4) openness/access to full participation,[139] (5) disclosure manifested in an affirmative production of information,[140] (6) openness/access to submit,[141] (7) procedural openness facilitating process legitimacy,[142] (8) political accountability,[143] and (9) openness/access to corroborate parity and/or reciprocity compliance.[144]

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131 *Id.* at 464-65.

132 *Id.* at 470-71. The River "Lethe", in Greek mythology, the "River of Forgetfulness" is referenced in Book X in Plato's *The Republic*, where presumably the reincarnated souls have to cross the "plain of Lethe" and drink from the river before being born again so that all memory of their past life may be erased. PLATO, THE REPUBLIC 277 (Allan Bloom trans., 1968) (c. 380 BC).

133 AN INTERMEDIATE GREEK-ENGLISH LEXICON, supra note 128, at 34.

134 *Id.*

135 *Id*.

136 *See, e.g.*, *Methanex v. United States*, *supra* note 58, ¶ 23 (explaining that the United States consented to the "open and public hearing of all hearings before the Tribunal.").

137 *See id.* ¶ 10 (explaining that Canada "supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible.").

138 *See id.* ¶ 23 (explaining that the United States consented to the "open and public hearing of all hearings before the Tribunal.").

139 *Id.*

140 *See id.* ¶ 10 (explaining that Canada "supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible.").

141 *See id.* ¶¶ 9-10 (explaining the differing approaches of Mexico and Canada with respect to the standing of amicus petitions under NAFTA).

142 *Id.*

143 *Id.*

144 *Id.* ¶¶ 10, 23.

Because of the multiple structural needs for some form or permutation of transparency requiring a corresponding act of "unconcealing" as to access or publication, the term lingers on without conceptual development. The multifarious environment in which transparency in some form finds space in international law comports with the nine above-referenced classifications.

B. Transparency in Select Sources of International Law

An emblematic treaty that embodies the post-Westphalian sovereignty model of *interdependence*—in contrast with *independence*—of nations is the Energy Charter Treaty (the "ECT").[145] The ECT explicitly references transparency in connection with the substantive international investment law principles of FET, non-discriminatory practice, and IMS.[146] The ECT mentions transparency together with "stable, equitable, and favorable" as adjectives for the conditions that investors are to enjoy in each of the contracting States, which in turn would include the core of international investment law standards that host-states are committed to provide to foreign investors: FET, FPS,[147] protection from unreasonable or discriminatory measures, and IMS.

The application of transparency to the broad gamut of conditions attendant to investments implicitly suggests that the form of transparency that the ECT contemplates as a predicate to application of the substantive standards of investment protection to foreign investors, must itself be privative, i.e., incorporating all nine categories of transparency identified herein.[148] This view of transparency within the meaning of Article 10(1) of the ECT not only comports with the variety and manifoldness of investment conditions giving rise to FET and IMS, but also with the very nature of a treaty—the enforcement of which generally necessitates political and procedural transparency.

Although the term "transparency" does not appear in any form in Chapter 18 of the NAFTA, virtually all elements of what here has been identified as "privative transparency" are present. The NAFTA parties are charged with rigorous publication requirements concerning its laws, regulations, procedures, and administrative rulings as well as other matters that may be of interest to citizens of the NAFTA signatories.[149] Also, proposed measures and access for participation

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[145] Energy Charter Treaty, Dec. 1994, 34 I.L.M. 360 (1995) [hereinafter ECT].

[146] *Id.* at art. 10(1). This article explains:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and *transparent* conditions for investors of other Contracting Parties to make Investments in its area. Such conditions shall include a commitment to accord at all times, to Investments, of Investors of other Contracting Parties fair and equitable treatment. Such Investments also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment, or disposal. In no case shall such Investments be accorded treatment less favorable than that required by international law, including treaty obligations.

Id. (emphasis added).

[147] Instead of Full Protection and Security, the ECT mentions "constant protection and security." *Id.* at art. 10(1).

[148] *Supra* Part V.A.

[149] *See* NAFTA, *supra* note 87, art. 1802(1).

is additionally memorialized in this chapter.[150] Actual participation in proceedings extended to non-NAFTA parties, along with "procedural transparency" are addressed.[151] The absence of explicit reference to transparency in the NAFTA Chapter 18 does not diminish the compelling statement that central elements of a privative transparency norm pervade administrative and institutional provisions. An explicit reference to transparency is not necessary because of the Preamble's declaration concerning the establishment of "clear and mutually advantageous rules governing [the trade of the NAFTA parties] [and to] ensure a predictable commercial framework for planning and investment."[152]

The United Nations Conference on Trade and Development ("UNCTAD") comments on the gradual but "significant qualitative progress" that the principle of transparency has forged in bilateral investment treaties.[153] UNCTAD's summary on this specific issue merits reading and re-reading in its entirety:

> A minority of BITs include *transparency* provisions. However, gradual, yet significant qualitative progress has been made with regard to the rationale and content of such rules. While there has been a trend towards viewing transparency as an obligation imposed on countries to exchange information, new approaches also deem it to constitute a reciprocal obligation involving host-countries and foreign investors. Transparency obligations are also no longer exclusively geared towards fostering exchange of information; rather they relate to transparency in the process of domestic rule-making aimed at enabling interested investors and other stakeholders to participate in that process.[154]

UNCTAD's observations attest to the development and ascendancy not only of the narrow issue of transparency in BITs, but more importantly the multiple spheres of the transparency principle referenced—if not systematically defined and adopted—by international law. Reference is also made to transparency as a principle that encompasses not only reciprocal disclosure obligations, but one that also occupies the space of domestic rule-making and the realm of process participation legitimacy.[155]

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[150] *See id.* art. 1802(2).

[151] *Id.* art. 1804(a) & (b). This article reiterates that:

> (a) wherever possible, persons of another Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy: (b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding and the public interest permit . . . .

Id.

[152] *See* NAFTA, *supra* note 87, pmbl.

[153] U.N. Conference on Trade and Development ("UNCTAD"), *Bilateral Investment Treaties 1995-2006: Trends in Investment Rule-Making*, UNCTAD/ITE/IIT/2006/5 (2007).

[154] *Id.* at (xiii) (emphasis added).

[155] UNCTAD observes that

> [m]ost other approaches used in its BITs however, do not focus on transparency concerning investment opportunities, but rather on laws, regulations and administrative practices applicable

Beyond the parameters of international investment law, transparency in general terms has been identified as a necessary principle. The United Nations has called for transparency on a wide range of issues from measures to be implemented in controlling and bringing an end to "illicit traffic in small arms and light weapons"[156] to "development and poverty eradication."[157] The United Nations reiterated the primacy of transparency as embodied in its Millennium Declaration in the Monterrey Consensus on Financing for Development.[158] As part of an effort to fashion a global response to challenges confronting financing for development, the final text of agreements and commitments adopted at the International Conference on Financing for Development declares:

> Recognizing that peace and development are mutually reinforcing, we are determined to pursue our shared vision for a better future, through our individual efforts combined, with vigorous multilateral action. Upholding the Charter of the United Nations and building upon the values of the Millennium Declaration, we commit ourselves to promoting national and global economic systems based on the principles of justice, equity, democracy, participation, *transparency*, accountability, and inclusion.[159]

More specifically, the United Nations text on the Monterrey Consensus identified a need for a transparency principle in sectors such as the mobilization of public resources and the management of their use by governments,[160] the enhancement of domestic markets pursuant to the development of sound banking systems,[161] and foreign direct investments into developing countries.[162] In this

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> to foreign investment in the host country. Transparency is conceived as a tool to foster a more predictable investment climate, in which investors can clearly assess the conditions and rules applying to their investments.

Id. at 77. It is also reported that certain BITs, such as the 2004 Canadian model BIT expands transparency with respect to investment-related rule-making to apply "not only to existing legislation, but also to draft laws and regulations." *Id*. at 78. Finally, the UNCTAD Report explains that "[t]he emphasis of some BITs on using transparency provisions to strengthen the concept of due process of law is underlined by some supplementary obligations included in other agreements," citing to the BIT between the United States and Uruguay (2005). *Id.*

156 United Nations Millennium Declaration, G.A. Res. 55/2., at 3, U.N. Doc. A/RES/55/2 (Sept. 18, 2000), *available at* http://www.un.org/millennium/declaration/ares552e.htm.

157 *Id*. at 4 ("Success in meeting these objectives depends, *inter alia*, on good governance within each country. It also depends on good governance at the international level and on *transparency* in the financial, monetary, and trading systems. We're committed to an *open*, equitable, rule-based, *predictable*, and non-discriminatory multilateral trading and financial system.") (emphasis added) *Id.*

158 International Conference on Financing for Development, Monterrey, Mexico, Mar. 18-22, 2002, *Monterrey Consensus on Financing for Development*, ¶¶ 9, 25, 53, U.N. Doc. A/CONF.198/11 (Oct. 2003).

159 *Id.* ¶ 9.

160 *Id.* ¶ 15.

161 *Id.* ¶ 17.

162 *Id.* ¶ 21

> To attract and enhance in-flows of productive capital, countries need to continue their efforts to achieve a transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact . . . .

Id.

same vein, the United Nations Security Council Report of the Secretary-General connects the rule of law with procedural and legal transparency.[163]

C. The Application of the Transparency Norm to International Evidence Gathering

After reviewing select international law instruments, a general principle of transparency can be readily discerned. Much like the conceptual etymology of the term *aletheia*, the principle as it appears suggests, if not altogether commands, an affirmative undertaking as its privative pronouncement calls for a universal absence of concealment. However, if a transparency principle is to develop and maximize its contribution to international law, it must be vested with particularity as to standard which it sets forth. Based on the multiple uses of transparency in international law, this particularity should comprise two parts, the first of which consists of nine elements.

The first conceptual category with which a privative transparency norm must be vested is an affirmative imperative of access and disclosure. The nine elements of this category have been gleaned from universally accepted sources of international law, and, as already referenced,[164] consist of the following:

(i) Openness/access as to spectators,
(ii) Openness/access as to source materials,
(iii) Openness/access to monitor,
(iv) Openness/access to full participation,
(v) Disclosure as in an affirmative production of information,
(vi) Openness/access to submit,
(vii) Procedural openness leading to process legitimacy,
(viii) Political accountability, and
(ix) Openness/access to corroborate parity and/or reciprocity compliance.

The second category constituting the transparency norm is affirmative reciprocity/parity.

The theory underlying this first-step, embryonic framework is to provide a standard by which the transparency norm may find universal acceptance at a theoretical level, while preserving a practical aptitude. A non-value vested standard would be most conducive to juridical cultural convergence. By way of example, it would additionally provide transnational procedural rules concerning

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[163] See The Secretary General, Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, ¶6, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004)

> The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, even independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and *procedural and legal transparency*.

(emphasis added) *Id.*

[164] *Supra* Part V. A.

evidence gathering greater uniformity in their application, simultaneously introducing substantive content to critical terms.

The IBA Rules serve as an instructive functional model.[165] Perhaps the most important standard that the IBA Rules articulate is the "relevant to the case and material to its outcome" pronouncement.[166] That standard appears throughout the architecture of the Rules as a recurring criterion.[167] The strategic and uniform use of the standard at the consultation, self-disclosure, and disclosure procedural junctures emphasizes its primacy. Yet, the standard, which is deemed to represent a synthesis fundamental to common and civil law concerns,[168] nowhere defines the terms "relevant" or "material".

Similarly, the terms "evidence" and "expert" are not defined. While the term "expert report" is defined as "a written statement by a Tribunal-appointed Expert or a Party-appointed Expert," within the terms of the IBA Rules,[169] there is no significant predicate from which to infer the significance of the term "expert" within the IBA Rules' own regime. The qualification of a witness as an expert is thus relegated to the arbitral tribunal's discretion.

Parallel in importance to the "relevant to the case and material to the outcome" standard is the introduction of a good faith requirement, which is new to the 2010 iteration of the IBA Rules.[170] As with the terms "relevance," "material," and "expert witness," "good faith" is not defined.

Whether by happenstance or design, the absence of substantive definitions—either conceptual or by way of a standard—emphasizes the challenges that legitimate and actual juridical cultural convergence faces. Terms such as good faith or relevance vary greatly depending on the legal framework housing them. While not necessarily unachievable, arriving at substantive definitions or standards for these terms on a cross-cultural basis would be very difficult and finds little favor.

A more achievable aspiration would be a transparency norm that helps flesh out the parameters of applicability in relation to concepts such as materiality and relevance. The categorical standards that comprise the privative transparency norm that this writing proposes as a preliminary effort would allow a tribunal to test access and disclosure requirements. Similarly, considerations of reciprocity and parity may facilitate good faith analyses. It would redound to the best interest

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165 It is not within the scope of this writing to comment extensively, let alone exhaustively on the IBA Rules. Instead, the objective is to highlight structural aspects of the Rules, merely as a model, where a transparency norm as here preliminarily defined may give rise to more comprehensive and universal application of the rules. It is not here asserted that the privative transparency norm conceptually should be limited to evidence gathering. Transnational evidence gathering, however, happens to combine a privacy vestige with an evidence gathering system that multiplies lack of juridical cultural convergence.

166 First encountered in IBA 2010 RULES, *supra* note 11, art. 2, ¶ 3(a) ("The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issue: (a) that the Arbitral Tribunal may regard as *relevant to the case and material to its outcome* . . . .) (emphasis added).

167 IBA 2010 RULES, *supra* note 11, art. 3, ¶ 3(a)-(b), art. 3, ¶11, art. 4, ¶9; art. 8, ¶5, art. 2, ¶3(a).

168 *Id.* at pmbl., ¶ 1.

169 *Id.* ¶ 5 (defining "expert report").

170 The term "good faith" appears only twice in the IBA Rules – in the Preamble and again in the final paragraph – the symmetry in the placement of the term on these two occasions is important and suggestive. *Id.* at pmbl., ¶ 1, art. 9, ¶ 7.

of the international law community to fashion a privative transparency norm commanding affirmative undertakings which, in effect, arises from customary and conventional usage of transparency in international law. While the *ad hoc* use of the word devoid of any single particular meaning has served international law well, the benefits deriving from the multifarious application of the general term compel conceptualization in the form of a single norm.

VI. Conclusion

In light of economic and informational globalization, the demand for legal convergence among disparate juridical traditions has never been greater. Unlike its international trade law counterpart, international investment law, and more particularly the law of international dispute resolution, are yet to develop so as to keep pace with the needs of economic and informational globalization. Consequently, ICA and ISA remain as "weigh stations" until such time as transnational judicial tribunals may exercise jurisdiction over disputes arising in both private and public international contexts.

Perhaps the most pronounced chasm dividing common and civil law juridical cultures is to be found in the difference between evidence gathering and American-style discovery. Although meaningful efforts, such as the IBA Rules, seeking to accommodate both traditions represent material gains in the field, the divide lingers and continues to be polarizing. One approach in an attempt to harmonize competing conceptions is to incorporate a norm premised on transparency that in turn may help to reconcile these differences. A transparency-based norm appears to be particularly appropriate because of the privacy/confidentiality structural configuration of ICA, engrafted as a developmental legacy onto investor-state arbitration. The structural and substantive uncertainties endemic to both ICA and ISA also create a space for this norm. Moreover, numerous sources of international law concerning diverse fields—ranging from human rights to international investment protection—have adopted some form the concept of transparency, but have never elevated it to the stature of a norm or principle of international law. The privative transparency norm outlined purports to represent a first-step towards this effort by comprising two conceptual categories, both arising from the general *ad hoc* use of transparency as the term appears in international law sources. Arbitrators, judges, practitioners, and captains of industry would be able to accord greater uniformity and predictive value to international frameworks, such as those of the IBA Rules, that otherwise would leave undefined and untested central premises of practical consequences.

Ironically, the significance of the word "transparency" in international law is less than clear. Yet, its very ubiquitous nature compels its ascendance to theoretical normative standing in order to maximize transparency's uniform and practical application.

Ethics in International Arbitration: Traps for the Unwary

Margaret L. Moses[†]

Ethics in international arbitration is a complex subject. A number of factors contribute to this complexity, including, first, the likelihood that lawyers involved in arbitration in a foreign jurisdiction may be subject to more than one set of ethical rules. Moreover, those rules may not just be different, but may be inconsistent or even incompatible.[1] Thus, it may be impossible for an attorney to comply with the two or more different sets of rules. It is important to remember that in most international arbitrations, a minimum of three jurisdictions will have potentially applicable rules. The parties are each from a different country—that is what makes the arbitration international—and the parties usually choose to have the hearing in a third, neutral country, which is the seat of the arbitration. Therefore, each of these three jurisdictions may have an interest in the ethical conduct of the attorneys.

A second factor is the lack of clarity about what particular rules may govern attorney conduct in an international arbitration and how the determination of the appropriate rules should be made. One possibility is that the governing rules should be the ethical rules from the jurisdiction where the attorney is licensed. If that were the case, however, then because the attorneys are likely to come from different jurisdictions, they would be subject to different rules, which would tend to create an uneven playing field. A second possibility is for all attorneys to be subject to the rules of the jurisdiction where the arbitration takes place. While this might appear to level the playing field, nonetheless the national ethical rules in a particular jurisdiction are intended to deal with local lawyers practicing domestically and may not be particularly appropriate for international dispute resolution. A third possibility is that the ethical rules should be the rules laid down by the particular tribunal. If that appears to be the best solution, then the inevitable question is whether tribunals actually have the power to impose ethical rules on attorneys. Can the rules of the tribunal override the domestic ethical rules of the jurisdiction where the arbitration is being held, as well as the national ethical rules from the home country of the different attorneys?

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[1] *See, e.g.*, Catherine Rogers, *Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration,* 23 Mich. J. Int'l L. 341, 345-46 (2002) ("[I]nternational attorneys remain subject to often conflicting professional obligations."); Siegfried H. Elsing, *Ethical Issues in International Litigation from a German Perspective*, Artigos Juridicos Internacionais, http://www.camarb.com.br/areas/subareas_conteudo.aspx?subareano=42 (last modified 2005) ("[R]egardless of. . . in which country the foreign lawyer is admitted, he has to observe both the German professional rules and the rules of his home country.").

A third factor affecting attorney ethical conduct concerns who should be regulating or enforcing ethical rules in this international context. Should it be the licensing authorities, the bar associations, or the courts in the jurisdiction where the attorney is licensed? Or should it be similar authorities in the jurisdiction where the arbitration takes place? Or should the regulating or enforcing authority be international organizations, institutions, or the tribunal that is presiding over the arbitration?

As a framework for dealing with ethical complexities in international arbitration, it is important to consider the purpose of ethical rules. Rules of ethics are supposed to provide parameters for lawyers in making appropriate ethical choices in the conduct of their work, decision-making, and behavior. The rules should promote high standards of conduct and help preserve professional integrity. A set of ethical rules tends to work pretty well to accomplish these goals in a homogeneous legal and cultural environment, but tends to work less well when very different legal cultures come together, as they do in an international commercial arbitration. The concern of ethical rules is to protect and guard the integrity of the profession. They are not supposed to be interpreted in a way that provides an advantage to one side or a disadvantage to the other.

So how can lawyers find and follow the proper ethical path when different legal and cultural backgrounds cause clashes in ethical rules? Legal norms and associated ethical rules may collide, for example, in some of the following areas:

1. Preparation of witnesses for testimony, which is precluded in some jurisdictions, but considered an obligation in others.[2]

2. The issue of privilege for certain documents, and confidentiality of communications with the client, which exist for in-house counsel in some jurisdictions but not in others.[3]

3. The obligation to produce documents, which is required in some jurisdictions but forbidden by blocking statutes in others.[4]

4. The obligation of confidentiality of settlement discussions. In the U.S., an attorney is obliged to communicate any settlement proposal to a client while in other jurisdictions the attorney may be prohibited in certain circumstances from disclosing such information to a client.[5]

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[2] Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, *in* The Art of Advocacy In International Arbitration 49, 52 (Doak Bishop & Edward G. Kehoe eds., 2010), *available at* http://ssrn.com/abstract=1559012; Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT'L & COMP. L. REV. 139, 142 (2007).

[3] *See* Rogers, *supra* note 2, at 52-3 (explaining the significant national divergences regarding disclosure of certain documents, such as requiring non-privileged document disclosure in the United States, while in other jurisdictions having no requirements regarding this type of disclosure).

[4] Catherine A. Rogers, *Lawyers Without Borders,* 30 U. PA. J. INT'L L. 1035, 1084 n.155.

[5] *See* Rogers, *supra* note 2, at 53 (pointing out that a French attorney may be ethically required to keep confidential from his own client a settlement proposal by opposing counsel, whereas U.S. ethical rules mandate disclosure to the client of any such settlement proposal).

5. The obligation to report client perjury to the tribunal. An attorney from the U.S. may have such an obligation,[6] but attorneys from other jurisdictions may have an obligation not to disclose such information.[7]

6. The obligation not to have ex parte communications with a member of the tribunal. In the U.S., such communications with a member of the tribunal are prohibited, whereas in other jurisdictions, such as Germany, they may be permitted.[8]

7. The question of who may appear as a fact witness. Some jurisdictions prohibit a party from being a witness.[9]

8. The obligation not to present as fact to the tribunal statements not supported by any known evidence. In some states, such presentations by counsel are permitted.[10]

In dealing with these various situations, some arbitration tribunals, international rules, and national rules have tried to level the playing field among the parties and have succeeded to some extent, but a myriad of problems still exist. However, focusing on all of these areas is beyond the scope of this article. This article will concentrate on just one of the situations referred to above—witness preparation. In particular, this article will deal with the application of Rule 8.5 of the Model Rules of Professional Conduct to witness preparation in an international context.

In the United States, lawyers spend a great deal of time, effort, and energy preparing a witness to testify. An American attorney who did not prepare her witnesses carefully would be considered quite remiss.[11] In other jurisdictions, however, an attorney may be prohibited from even interviewing a witness prior to that witness providing testimony.[12] If each attorney follows the different rules of her home country, there could be substantial differences in the performances of the witnesses, possibly giving an advantage to the side that had expended more effort to prepare the witness. If, on the other hand, the tribunal finds that the ethical rules of the seat of arbitration should govern, and those rules do not permit any interviews or preparation of witnesses, an American attorney unaware of this prohibition would risk a violation of those ethical rules.

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[6] MODEL RULES OF PROF'L CONDUCT R. 3.3 (a)(3) (2009).

[7] Rogers, *supra* note 1, at 361.

[8] Doak Bishop and Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy, in* ARBITRATION ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES NO. 15 391, 395 (Albert Jan Van Den Berg ed., 2011).

[9] *Id.*

[10] *See* INTERNATIONAL CODE OF ETHICS FOR LAWYERS PRACTICING BEFORE INTERNATIONAL ARBITRAL TRIBUNALS, *in* ARBITRATION ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES NO. 15 408, 417 (Albert Jan Van Den Berg ed., 2011) ("In some states (such as Mexico and Saudi Arabia) a lawyer may make statements to the tribunal about the facts, even if this statement is not supported by any known evidence.").

[11] *See* McMorrow, *supra* note 2, at 142 ("For U.S.-trained defense counsel, however, it would be considered inappropriate not to interview and prepare a witness for the rigors of trial if there were an opportunity to do so.").

[12] Bishop and Stevens, *supra* note 8, at 395.

Efforts are being made in the arbitration community to try to achieve equality of arms—that is, to try to keep one side from having an unfair advantage because of limitations imposed by different ethical rules. In some countries where court cases have stated that all contact with witnesses is prohibited, such as Belgium, France, Italy and Switzerland, specific carve-outs, or exceptions, have been made to permit witness contact in international arbitration proceedings.[13] Moreover, the International Bar Association Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"), which are frequently referred to for guidance if not specifically adopted in an arbitration, provide in Rule 4(3) that it shall not be improper to interview witnesses or potential witnesses and to discuss their prospective testimony with them.[14] Thus, there is a growing consensus that some contact between counsel and witnesses is permissible in an international arbitration proceeding. But it is not clear that the IBA Rules will necessarily prevail over contrary national rules that would prohibit such contact. Nor is it clear that if the national rules of the arbitration seat prohibit contact with witnesses, the carve-outs in an attorney's home country permitting such contact will prevail over the local rules. As some commentators have noted, "[a]ttorneys' home ethical rules continue to cast a 'shadow' that 'is omnipresent for the lawyers and judges.' "[15]

So how does Rule 8.5 of The American Bar Institute ("ABA") Model Rules of Professional Conduct apply with respect to the witness preparation situation? Rule 8.5 has been adopted by twenty-four states in the U.S., and similar rules have been adopted by another twenty-one states.[16] The first premise of the rule is that "a lawyer admitted to practice in [the] jurisdiction is subject to the disciplinary action of that jurisdiction, regardless of where the lawyer's conduct occurs."[17] Therefore, an Illinois attorney is subject to disciplinary action in Illinois for improper conduct occurring outside Illinois.

The rule then goes on to state, "[F]or conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits are the rules to be applied [to the attorney's conduct], unless the rules of the tribunal provide otherwise."[18] This appears to impose the rules of the seat in most cases, unless the tribunal has its own rules.

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[13] *See* Ian Meredith and Hussain Khan, *Witness Preparation in International Arbitration – A Cross Cultural Minefield*, MEALEY'S INT'L ARB. REP. September 2011, at 3 ("In court cases in Belgium, France, Italy, and Switzerland, all contact with witnesses is prohibited.").

[14] INT'L BAR ASS'N [IBA], IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), *available at* www.ibanet.org/publications_IBA_guides_and_free_materials-.aspx.

[15] McMorrow, *supra* note 2, at 142; Rogers, *supra* note 4, at 1081.

[16] *See* STATE IMPLEMENTATION OF MODEL RULE 8.5 (Oct. 2010), *available at* http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf.

[17] MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2009).

[18] *Id.* R. 8.5(b)(1). Interestingly, when this rule was first adopted, it had excluded lawyers practicing internationally, and said that international lawyers should be subject to agreements between jurisdictions or subject to appropriate international law. However, there were not any relevant agreements between jurisdictions or appropriate international laws that governed attorney conduct. By 2002, when the rule was revised, international lawyers lobbied to be included. They wanted more certainty as to what rules governed their conduct. So new Comment 7 now provides that section 8.5 (b)(1), the choice of law

However, there may be complications in the case of witness preparation. First, assume the tribunal sits in a country whose rule is that attorneys can have no contact with witnesses about their testimony, and no carve-outs exist for international arbitration. It seemingly follows that an American attorney in that case cannot meet with the witnesses for his clients before they testify. Rule 8.5 applies the rules of the jurisdiction where the tribunal sits. As previously noted, however, there is an exception, permitting application of the tribunal's rules if the tribunal has adopted different rules. So suppose that the parties and the tribunal have agreed that the IBA Rules apply. Remember that Rule 4(3) of the IBA Rules says it is not improper to interview witnesses and discuss their prospective testimony with them. Thus, from the American attorney's perspective, adoption of these rules is an improvement because they are more flexible. However, it is still not clear whether the tribunal in the particular jurisdiction has the right to override a local ethical rule that says there can be no contact with witnesses. So the lawyer who decides to meet with a witness will be in accord with ABA Model Rule 8.5, which permits application of the tribunal's rules, but may not be in compliance with the local jurisdiction's rule.

Here is another murky issue. Even if the IBA Rules can be said to govern, what does it mean to say one can interview the witness and discuss his prospective testimony with him? Is "interviewing" and "discussing" different from a full-blown American "preparation of the witness," which may include extensive time in mock examination and cross-examination? The answer is that the American practice is probably much more extensive than what the IBA Rule envisions.

As an example, the English, although they permit contact by attorneys with witnesses before they testify, nonetheless do not permit the same kind of interaction with witnesses that American attorneys have in the normal course of their practice. English cases have distinguished between three kinds of interactions with witnesses: interviewing, familiarization, and coaching.[19] *Interviewing* is basically interaction with a witness for the purpose of obtaining evidence needed for production of a witness statement. *Familiarization* involves explaining the process and such techniques as cross-examination. The British will even permit mock cross-examination, but only on hypothetical facts—just to help the witness understand how cross-examination works—and not on the actual facts of the case at hand.[20] That would be coaching. *Coaching* is viewed as a detailed discussion of the specific facts in order to rehearse the witness with respect to questions likely to be asked, and with respect to witness responses that would be appropriate. Although English courts permit interviewing and familiarization, they have expressly stated that coaching is not permitted.[21] They think a witness should testify without that testimony having been influenced by others, and particularly

provision, applies to lawyers engaged in transnational practice, unless international law treaties or other agreements between regulatory authorities in the affected jurisdiction provide otherwise. *See* Rogers, *supra* note 4, at 1037 (explaining the evolution of Rule 8.5 and its express extension to transnational activities).

[19] Meredith & Khan, *supra* note 13, at 1.

[20] *Id.* at 3.

[21] *Id.* at 2.

not by counsel.[22] Other countries, such as Australia and New Zealand, have similar rules including a specific prohibition on witness coaching.[23]

So even if everyone agreed that the IBA Rules applied and allowed counsel to talk with witnesses, in a situation where one attorney is British and another is American, it is not clear that they will interpret the rule in the same way. Moreover, it is not clear whether one of those interpretations might lead to an ethical violation.

In addition, in countries such as France and Switzerland, where there is now a carve-out for contact with witnesses in an international arbitration, the proper level of interaction between attorney and witness is not spelled out.[24] Therefore, attorneys from these countries do not have the same restraints found in the English system (no coaching allowed) or even in the U.S. system, in which the Model Rules of Professional Conduct impose certain restrictions.[25] Because the restrictions on witness contact vary greatly, and because now some countries have removed the restriction against speaking with witnesses but have not cabined this new freedom in any way, there remains an enormous variation in what different attorneys may perceive to be ethical conduct in dealing with witnesses.

The drafters of ABA Model Rule 8.5 were trying to make the rule simple and straightforward, but their concept of how things work internationally did not encompass the many complexities that arise from the convergence of different legal norms and practices in international arbitration. For example, Comment 3 to Rule 8.5 states that the rule provides that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct. That sounds good, but it is not that simple. For example, assume the arbitral tribunal is in the U.S., but the American attorney has to do something abroad. Further assume a deposition has to be taken in Brazil, because a witness there cannot come to the U.S. for a hearing. In Brazil, a civil law country, the deposition will essentially be taken by a judge, and there will thus be a matter pending before a tribunal in Brazil.[26] Remember that the U.S. requirement under ABA Model Rule 8.5 is that attorney conduct in connection with a matter pending before a tribunal is governed by the rules of the jurisdiction where the tribunal sits. In this case, however, there will be both a matter pending in the U.S., where the arbitral hearings are, and a matter pending in Brazil, where the deposition is being taken under the auspices of a

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[22] *Id.* at 1.

[23] *Id.* at 1.

[24] *See* Rogers, *supra* note 2, at 7-8 (giving examples of some specific exceptions that have been created to deal with these issues, but explaining there is still no straightforward guidance on this conflict).

[25] Some restrictions include the following: Model Rule 3.3 provides that "a lawyer shall not knowingly. . .offer evidence that the lawyer knows to be false." MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2009). Moreover, if a lawyer is aware that a witness has offered false material evidence he must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. *Id.* In addition, an attorney must not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." *Id.* R. 3.4(b).

[26] Rogers, *supra* note 4, at 1056-57.

judge.[27] It appears that ethical rules in each jurisdiction will apply, and may well be incompatible.

Increasingly, scholars and practitioners are urging that a uniform, binding international code of ethics be developed for attorneys engaged in international arbitration.[28] They urge that international rules should trump both the ethical rules of the seat and the national ethical rules, which tend to function in a totally different procedural and cultural context. Such international codes could be developed through international organizations, arbitral institutions, or by specific international tribunals. In the last few years, there have been a number of initiatives by institutions. The American Bar Association, the International Bar Association, the American Society of International Law, and the International Law Association have all begun to consider standards of conduct for lawyers practicing in the field of international arbitration.[29] There is also a Code of Conduct for European Lawyers (the CCBE), amended in 2006, which was created to address issues of cross-border practice, but deals with arbitral proceedings in a fairly limited fashion.[30]

Assuming one or more international ethics codes are developed, how might they be enforced? Various proposals include having arbitral institutions adopt a code of ethics, incorporate it into their rules, and thus make the code binding as a matter of the parties' consent.[31] If the code is incorporated into the institutional rules, it should be able to be enforced by the institution or by the tribunal.

Another approach for enforcement of ethical violations would be to have national authorities coordinate their enforcement efforts with international tribunals that have first identified and evaluated conduct believed to be unethical.[32]

Some tribunals have viewed their power over the attorneys before them as limited. However, Professor Catherine Rogers, one of the foremost scholars of ethics in international arbitration, has said that adjudicatory tribunals "must have the ability to sanction and control the behavior of attorneys appearing before them. . . [T]ribunals and their rules of conduct . . .cannot be held 'captive to out-of-state disciplinary authorities.' "[33] Professor Rogers argues that arbitrators must have not only the power to regulate the proceedings before them but also the

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[27] *See id.* (discussing the change in the rule from the term "proceeding" to "matter," which broadens the application of the rule to depositions, thus making ethical rules of both jurisdictions apply to depositions).

[28] Rogers, *supra* note 1, at 350, 423; *see, e.g.*, Doak Bishop, *Ethics in International Arbitration*, *in* ARBITRATION AND ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES 15, 383, 388 (Albert Jan van den Burg ed., 2011).

[29] Bishop & Stevens, *supra* note 8, at 397.

[30] CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS (2010), *available at* http://www.ccbe.eu/index.php?id=32.

[31] *See, e.g.*, Bishop, *supra* note 28, at 389.

[32] Rogers, *supra* note 4, at 1083.

[33] *See id.* at 1085 *(*quoting Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer or no Answer at All?*, 36 S. TEX. L. REV. 715, 778 (1995)).

power to regulate the conduct of the attorneys who are an integral part of those proceedings.[34]

Although there are no easy solutions in this complex area of ethics in international arbitration, it is at least conceivable that the adoption and enforcement of a uniform code of ethics for international commercial arbitration would help bring sunshine to a cloudy area. An international code would help provide transparency and certainty for proper attorney conduct, help level the playing field, contribute to the fairness of the procedure, and improve the confidence of the participants and the public in the arbitration process.

[34] *Id.*

American Exceptionalism in Consumer Arbitration

Amy J. Schmitz†

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"American exceptionalism" has been used to reference the United States' outlier policies in various contexts, including its love for litigation.[1] Despite Americans' reverence for their "day in court," their zest for contractual freedom and efficiency has prevailed to result in U.S. courts' strict enforcement of arbitration provisions in both business-to-business

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[1] *See, e.g.*, *Exceptionalism – What is exceptionalism?*, Encyc. of the New Am. nation, http://www.americanforeignrelations.com/E-N/Exceptionalism-What-is-exceptionalism.html (defining and discussing the concept); *see* Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century,* Fac. Pubs. Paper, 1-5, 17-18 (2011), *available at* http://scholarship.law.wm.edu/facpubs/1139 (last visited Dec. 1, 2011) (discussing "American exceptionalism" with respect to pleading standards and the role of judges, but noting how this is diminishing).

("B2B") and business-to-consumer ("B2C") contracts. This is exceptional because although most of the world joins the United States in generally enforcing B2B arbitration under the New York Convention, many other countries refuse or strictly limit arbitration enforcement in B2C relationships due to concerns regarding power imbalances and public enforcement of consumer protections. The resulting clash in arbitration policy has left consumers in cross-border cases uncertain whether they must abide by arbitration clauses in an increasingly global marketplace.

I. Introduction

Many companies routinely include pre-dispute arbitration clauses in their contracts as means for privately and efficiently resolving disputes, especially in international business-to-business ("B2B") contracts. This is due, largely in part, to the international enforcement of arbitration under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("N.Y. Convention"), adopted by the United States and 148 other countries.[2] This treaty generally mandates strict enforcement of international arbitration agreements and awards, subject to limited grounds focused on procedural improprieties or lack of a valid arbitration agreement.[3] The N.Y. Convention nonetheless allows nations to refuse enforcement based on "nonarbitrability of the subject matter" or where enforcment "would be contrary to public policy."[4]

The U.S. Congress implemented the N.Y. Convention through Chapter Two of the Federal Arbitration Act (the "FAA") and U.S. courts have vigorously applied this law to both B2B and business-to-consumer ("B2C") arbitration.[5] This coincides with the U.S.'s strict enforcement of domestic arbitration under Chapter One of the FAA.[6] The FAA also augments this strict enforcement with provisions for liberal venue, immediate appeal from orders adverse to arbitration, appointment of arbitrators if parties cannot do so by agreement, limited review of arbitration awards, and treatment of awards as final judgments.[7] Furthermore, the U.S. Supreme Court has mandated the FAA review standards be applied nar-

[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, arts. I-XVI, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (last visited Nov. 2, 2012) [hereinafter N.Y. Convention]; *see Status:1958–Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL (2012), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Dec. 1, 2011) (noting 147 countries had adopted the N.Y. Convention).

[3] N.Y. Convention, *supra* note 2, art. V.

[4] *Id.* art. V(2).

[5] Federal Arbitration Act, 9 U.S.C. §§ 201-08, 301-07 (1970) (implementing the N.Y. Convention under §§ 201-208 and the Panama Convention under §§ 301-307); Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 Am. J. Comp. L. 233, 233-55 (2006) (noting how U.S.'s strict enforcement of arbitration has made the U.S. a popular venue for international arbitration proceedings).

[6] 9 U.S.C. §1-16 (1947-1990). The same is true under the FAA's state counterpart, the Uniform Arbitration Act. Uniform Arbitration Act, 7 U.L.A. §1 (2000).

[7] *See* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 Ga. L. Rev. 123, 124–35 (2002).

rowly and has admonished states from singling out arbitration for special treatment or otherwise hindering the enforcement of arbitration in contracts affecting interstate commerce.[8] This leaves states with little power to regulate consumer arbitration provisions beyond the application of general contract defenses.[9]

Unlike the U.S., other nations do not extend strict enforcement of pre-dispute arbitration clauses to B2C or employment agreements.[10] France, Germany, and the United Kingdom ("U.K."), for example, generally limit or refuse to enforce pre-dispute arbitration agreements in employment contracts with respect to employees' wrongful dismissal claims.[11] Public policies in these countries protect employees' rights to bring their dismissal claims to public tribunals or courts.[12] Policies in the U.K. and other European countries similarly limit or preclude enforcement of pre-dispute arbitration clauses in consumer contracts.[13] These policies flow from concerns regarding asymmetry of power, enforcement of public rights, and competence of private arbitrators and arbitral institutions.[14]

Similar concerns have prompted private arbitration providers in the U.S. to suggest due process protocols for consumer and employment arbitration.[15] Providers have also promulgated special procedural rules that they use for small dollar cases in uneven bargaining contexts.[16] Policymakers in the U.S. have also become increasingly critical of FAA enforcement of arbitration awards in consumer and employment cases. This can be seen in renewed efforts to enact the Arbitration Fairness Act ("AFA"), which would bar enforcement of pre-dispute arbitration agreements in consumer, employment, and civil rights cases.[17]

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[8] *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (emphasizing limited review).

[9] *See* Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681 (1996) (finding the FAA preempted state notice requirements that singled out arbitration clauses for special treatment); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (holding the FAA preempted Alabama law limiting consumer arbitration).

[10] *See* PABLO CORTES, ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN THE EUROPEAN UNION 107-11 (2010) (noting how the United States and the EU have diverged in their enforcement of arbitration in consumer contexts); *see also* Matthew W. Finkin, *Privatization of Wrongful Dismissal Protection in Comparative Perspective*, 37 INDUS. L. J. 149, 153-63 (2008) (highlighting comparative enforcement of arbitration in employment contexts).

[11] Finkin, *supra* note 10, at 149-65.

[12] *Id.*; *see* Clyde & Co. L.L.P. v. Van Winkelhof, [2011] EWHC (QB) 668 (refusing enforcement of an arbitration agreement in an employment relationship).

[13] *See* Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 843-64 (2002) (highlighting how the U.S. has diverged from European and most other nations by enforcing pre-dispute arbitration agreements in consumer and employment contracts); *see* CORTES, *supra* note 10, at 106-12.

[14] *See, e.g.*, Finkin, *supra* note 10, at 155-56, 159-60 (discussing policy concerns).

[15] *Consumer Due Process Protocol*, NAT'L CONS. DISP. ADVISORY COMM. (April 17, 1998), *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 [hereinafter Protocol]; *JAMS Consumer Arbitration Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness*, JAMS, July 15, 2009, *available at* http://www.jamsadr.com/consumer-arbitration/ (last visited April 4, 2011).

[16] *See* W. Mark C. Weidemaier, *Arbitration and the Invidiuation Critique*, 49 ARIZ. L. REV. 69, 87-91 (2007) (discussing providers' due process rules).

[17] Arbitration Fairness Act of 2011, H.R. 1873, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

In addition, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or the "Act")[18] bans enforcement of pre-dispute arbitration clauses in mortgage contracts and claims under whistle-blower provisions.[19] It also created the Consumer Financial Protection Bureau ("CFPB") and gave it power to write and enforce various lending and consumer protection regulations that may include prohibitions or limitations on enforcement of pre-dispute arbitration agreements in consumer financial products and services contracts.[20] The Act gives the Securities and Exchange Commission ("SEC") power to limit or prohibit agreements requiring customers of any broker or dealer to arbitrate future disputes arising under federal securities laws.[21]

This Article does not rehash the well-trodden debates regarding the propriety, fairness, and efficiency of consumer and employment arbitration.[22] Instead, it focuses on differences in the enforcement of B2C arbitration in the U.S. versus the European Union (EU) and U.K. and seeks to spark discussion regarding the creation of globally enforceable means for consumers to access remedies. Consumers and companies currently face uncertainties regarding enforcement of pre-dispute arbitration clauses in international B2C contracts due to conflicting and uncertain laws, but arbitration is often the only feasible means for enforcing international contracts. This is especially problematic in the increasingly international online marketplace.

Part II of this Article provides a synopsis of the U.S.'s exceptional enforcement of B2C arbitration under the FAA and the U.S. Supreme Court's holdings endorsing strict arbitration enforcement even when statutory rights and class re-

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[18] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank].

[19] *Id.* § 1414. This provision amends the Truth in Lending Act ("TILA") and is codified in 15 U.S.C. § 1639(c). *Id.* The Act's effective date for provisions that do not call for regulations is July 22, 2010. *Id.*

[20] *Id.* § 1028; *see also* Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009). This bill, which is now the Dodd-Frank Act, establishes an agency to regulate consumer financial products and services, and authorizes the agency to approve pilot programs for effective disclosure of consumer contract terms. *Id.*

[21] *See* Dodd-Frank, *supra* note 18, § 921 (amending 15 U.S.C. § 78(o) (1934)).

[22] Indeed, this debate has been surging for many years and there is an abundance of relevant articles, books and commentary. *See generally* Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001) (critiquing arbitration of employment claims); *see also* Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 213–14 (2006) (defending arbitration to the extent that it is less "lawless" than some fear); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration,* 74 WASH. U. L. Q. 637, 637 (1996) (critiquing companies' use of arbitration clauses in contracts with consumers and employees); Searle Civil Justice Inst. Task Force on Consumer Arbitration, *Consumer Arbitration Before the American Arbitration Assoc. Preliminary Report,* SEARLE CIV. JUST. INST., at 68-87 (Mar. 2009) (reporting study results indicating that overall, consumers do well in arbitration versus court); Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 627–86 (2008) [hereinafter Schmitz, *Warranty Woes*] (discussing pros, cons and ideas for reform with respect to consumer arbitration); Amy J. Schmitz, *Regulation Rash? Questioning the AFA's Approach for Protecting Arbitration Fairness*, 28 BANKING & FIN. SERVS. POL'Y REP. 16, 16-35 (2009) (critiquing the AFA's approach and offering suggestions for procedural fairness regulations); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEG. L. REV. 115, 115-94 (2010) [hereinafter Schmitz, *Legislating in the Light*] (discussing arbitration debate and research).

lief are at stake. Part III then outlines contrasting perspectives on B2C arbitration in France, Germany, and the U.K. Part IV introduces international movements toward creating Online Dispute Resolution ("ODR") mechanisms that would transcend contrasting views toward arbitration for cross-border B2C disputes. It also suggests means for implementing online arbitration ("OArb") processes to assist consumers in accessing meaningful remedies with respect to international purchases.[23] Part V concludes with a call for international collaboration in creation of such an OArb system.

II. Arbitration Law and Policy in the United States

Arbitration has a rich history in B2B relationships despite courts' historical distrust of such private processes.[24] Furthermore, the FAA and Uniform Arbitration Act ("UAA") ensure arbitration's enforcement and the U.S. Supreme Court has strengthened the FAA's arbitration enforcement beyond the B2B context. This has allowed employment and consumer arbitration to flourish in the U.S. even when statutory claims are at issue. Courts have nonetheless used contract defenses in some cases to police the fairness of arbitration in these uneven bargaining contexts.

A. FAA Law and Jurisprudence

Courts' fear of arbitration's private power prompted passage of the FAA to mandate specific enforcement of arbitration agreements and limited judicial review of arbitration awards.[25] The FAA then served as the model for the N.Y. Convention. The impetus of the law and, in turn, the treaty was to allow merchant and trade groups to efficiently and privately resolve disputes in accordance with applicable norms.[26] However, U.S. courts now apply FAA enforcement of pre-dispute arbitration clauses beyond B2B contexts, including B2C cases. This enforcement is limited only by application of general contracts defenses.

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[23] *See generally* Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 62 BAYLOR L. REV. 178 (2010) (discussing pros and cons of ODR and OArb).

[24] *See* Wharton Poor, *Arbitration Under the Federal Statute*, 36 YALE L. J. 667, 676-78 (1927) (emphasizing arbitration's independence, but noting arbitration "can by no means be relied upon as a solution of all litigious matters"); *see also* WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS 792-97 (1930) (discussing courts' power struggles with arbitration).

[25] *See* Poor, *supra* note 24, at 674-75 (describing courts' historical distrust of the arbitration process).

[26] *See generally* LUJO BRENTANO, ON THE HISTORY AND DEVELOPMENT OF GILDS, AND THE ORIGIN OF TRADE-UNIONS 33-39 (1870) (exploring the historical means used by merchant and trade groups to resolve disputes privately); *see also* Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L. Q. 238, 246 (1930). International arbitration proceedings even continued during the American Revolutionary War despite the closure of the public courts. *See generally* William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L. Q. 193, 207-12 (1956).

1. Arbitrability of Statutory Rights in the U.S.

Despite the U.S. Supreme Court's historic concerns for public enforcement of statutory rights, the Court now sanctions arbitrability of statutory claims unless Congress has expressly precluded arbitration of the claims at issue or there is very strong evidence that arbitration would severely hinder the statute's purpose.[27] The Court therefore has condoned arbitration of a broad range of statutory claims extending to discrimination, consumer lending, and securities fraud.[28] Furthermore, courts construe general arbitration clauses to cover statutory claims and have agreed that arbitration of statutory claims does not constitute state action subject to constitutional due process requirements.[29]

In the B2C context, the Supreme Court has held that Truth in Lending Act ("TILA") claims may be subject to arbitration.[30] The majority of courts have also held that consumers' claims under the Magnusson-Moss Warranty Act ("MMWA") are arbitrable, although the Supreme Court has never addressed the issue.[31] This is true even in cases where the applicable arbitration provision requires consumers to arbitrate outside of their home jurisdictions or requires consumers to pay administrative and filing fees in asserting small-dollar claims.[32]

Most recently, the Supreme Court settled a split in authority in holding that consumers' claims under the Credit Repair Organizations Act ("CROA" or the "Act") may be subject to arbitration.[33] The CROA aims to protect consumers by preventing organizations that sell purported credit repair services from overreaching and requiring these organizations to inform consumers of their right to a private cause of action for violations of the Act.[34] The CROA also precludes organizations from requiring consumers to waive these rights.[35]

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[27] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20-21, 26-27 (1991) (finding statutory age discrimination statute could be subject to arbitration).

[28] *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485-86 (1989) (holding securities claims are arbitrable); *see also* Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 89-92 (2000) (finding the Truth in Lending Act ("TILA") claims arbitrable).

[29] *See Gilmer*, 500 U.S. at 26-27 (stating statutory claims are clearly subject to arbitration); *see also* Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions,* 47 WM. & MARY L. REV. 1711, 1714-23, 1745-62 (2006) (discussing agreement that private arbitration does not involve state action).

[30] *Green Tree Fin. Corp. Ala.*, 531 U.S. at 89-92 (finding TILA claims arbitrable).

[31] *See* Schmitz, *Warranty Woes*, *supra* note 22, at 627-32, 641-50 (2008) (discussing arbitrability of MMWA claims).

[32] *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1147-50 (7th Cir. 1997); *see also* Petition for Petitioner at 23, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (No. 96-1760), 1997 WL 33561488 (rejecting the Hills' claim that they should not be compelled to arbitrate their MMWA claims regarding a $4,000 computer because the Hills would have to pay upwards of $4,000 in arbitration costs). *But see* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1337-41 (D. Kan. 2000) (refusing to follow *Hill* regarding enforcement of the same clause).

[33] Credit Repair Organizations Act, 15 U.S.C. § 1679 (1996); *see* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668-75 (U.S. 2012) (holding CROA claims are arbitrable).

[34] 15 U.S.C. § 1679.

[35] *See id.* § 1679f(a) (precluding "[a]ny waiver . . . of any protection provided by or any right of the consumer. . .").

Prior to the Supreme Court's holding, the majority of courts had concluded that the CROA's right to sue and anti-waiver provisions were not sufficient to manifest Congressional intent to prevent consumers from entering into enforceable agreements for arbitration of claims against an organization for violations of the Act.[36] However, in *Greenwood v. CompuCredit Corp.,* the U.S. Court of Appeals for the Ninth Circuit disagreed with the majority of other appellate courts in holding that the language and purpose of the CROA preclude arbitration of claims under the Act.[37] In that case, the Ninth Circuit held that the consumers had a right to disregard an arbitration clause in their contracts and bring a class action against credit repair organizations for allegedly charging fees on their credit cards in violation of the CROA and California's Unfair Competition Law ("UCL").[38] The U.S. Supreme Court reversed, and confirmed a narrow reading of the CROA's anti-waiver and right to civil remedies provisions to permit arbitration clauses because they simply provide a non-judicial means for accessing CROA remedies.[39]

Some individuals have nonetheless been successful in arguing that the specific procedures or costs of arbitration in their cases precluded them from vindicating their statutory rights. This has allowed employees, for examble, to avoid arbitration of statutory discrimination claims where they proved that the high costs of arbitration were likely to hinder their enforcement of public rights.[40] However, these challenges rarely succeed.[41] This is because the Untied States Supreme Court in *Green Tree Financial Corp. v. Randolph* established a high burden for proving such prohibitive costs.[42] In that case, the Court found that the consumer claimants failed to prove that their inability to pay arbitration costs would hinder their TILA claims.[43] In reaching this conclusion, the Court noted that the arbitrators had discretion to limit or excuse fees for hardship and that, in its oral arguments, the lender offered to pay any prohibitive costs.[44]

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[36] *See* Gay v. CreditInform, 511 F.3d 369, 378 (3d Cir. 2007) (holding CROA claims arbitrable); *see also* Vegter v. Forecast Fin. Corp., No. 1:07-CV-279, 2007 WL 4178947, at *1 (W.D. Mich. Nov. 20, 2007) (holding arbitration clause valid under the CROA).

[37] Greenwood v. CompuCredit Corp., 615 F.3d 1204, 1205 (9th Cir. 2010), *rev'd*,132 S. Ct. 665, 668-75 (2012).

[38] *Id.* at 1214; *cf.* Rex v. CSA-Credit Solutions of Am., Inc., 507 F. Supp. 2d 788 (W.D. Mich. 2007) (holding that CROA claims are arbitrable, but severing as unconscionable the Texas venue provision because the parties negotiated and performed the contract in Michigan and the defendant had a Michigan address).

[39] Greenwood v. CompuCredit Corp., 132 S. Ct. 665, 668-75 (2012).

[40] *See* Ball v. SFX Broad., Inc., 165 F. Supp. 2d 230, 238-40 (N.D.N.Y. 2001) (finding employee had satisfied the burden of proving prohibitive arbitration costs that she could not bear).

[41] *See, e.g.*, James v. McDonald's Corp., 417 F.3d 672, 675-80 (7th Cir. 2005) (rejecting cost-based challenge of arbitration agreement).

[42] *See* Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 91-2 (2000) (finding that although Randolph had provided information regarding high AAA arbitration fees and costs, it was not clear that she would bear these costs and that she could not pay them).

[43] *Green Tree Fin. Corp. Ala.*, 531 U.S. at 91-2.

[44] *Green Tree Fin. Corp. Ala.*, 531 U.S. at 91-2; *see* Transcript of Oral Argument at 21, Green Tree Fin. Corp. Ala. v. Randolph 121 U.S. 79 (2000) (No. 99-1235), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/99-1235.pdf (although it is laudable for businesses to offer to

2. Recent Supreme Court Reinforcement of a Pro-Business Stance on Arbitration

The U.S. Supreme Court reinforced its pro-business and pro-enforcement stance on consumer arbitration in the recent cases of *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., AT&T Mobility, L.L.C. v. Concepcion*, and *Rent-A-Center v. Jackson*.[45] The Court in *Stolt-Nielsen S.A* and *AT&T Mobility, L.L.C.* significantly narrowed courts' and arbitrators' power to order class arbitration.[46] Furthermore, the Court in *Rent-A-Center v. Jackson* reinforced its mandate that courts only consider contract challenges that target the enforceability of an arbitration agreement itself and sanctioned provisions allowing arbitrators to determine the validity and scope of their own jurisdiction.[47]

i. Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.

In recent years, concerns have heightened regarding the power of arbitration agreements to squash class actions with respect to statutory, or public, rights. This has prompted arbitral institutions such as the American Arbitration Association ("AAA") to develop rules for class arbitration proceedings, thereby allowing individuals to join together to save time and money in asserting their similar claims despite agreements to arbitrate.[48] Furthermore, the United States Supreme Court's plurality opinion in *Green Tree Financial Corp. v. Bazzle* delegated to arbitrators the determination of whether an arbitration agreement allows for class-wide arbitration.[49]

In the wake of these developments arbitrators began ordering class proceedings, but the Supreme Court's ruling in *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.* narrowed their ability to do so.[50] In that case, customers of large shipping companies asserted class arbitration on their antitrust claims relying on their stan-

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pay such costs, these post-hoc offers allow them to avoid changing their contracts ex ante, thus reserving the benefits of such assistance to only those who expend resources and time to challenge cost provisions); *see also James*, 417 F.3d at 675-80 (emphasizing that consumers would have to show that arbitration was truly more expensive than litigation in terms of overall costs); *see also* Bailey v. Ameriquest Mortg. Mtg. Co., 346 F.3d 821, 823-24 (8th Cir. 2003) (finding cost challenge of arbitrability was for the arbitrator under the parties' agreement); *see also* Phillips v. Assocs. Home Equity Servs., Inc., 179 F. Supp. 2d 840, 846-48 (N.D. Ill. 2001) (stating that the court would reconsider its ruling denying enforcement of an arbitration clauses due to high costs if the defendants agreed to pay these costs).

[45] AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740, 1743-56 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010); Rent-A-Ctr, W., Inc. v. Jackson, 130 S. Ct. 2772, 2777-80 (2010).

[46] *See AT&T Mobility*, 131 S. Ct 1740, 1748-53 (stating that classwide arbitration is inconsistent with the FAA); *see also Stolt-Nielsen S.A.,* 130 S. Ct. at 1773-76 (holding a party cannot be compelled under the FAA to class arbitration unless contractual basis indicating parties agreed to).

[47] *See* Rent-A-Ctr, W., Inc., 130 S. Ct. at 2777-80 (holding clause in employment contract delegating to the arbitrator exclusive authority to decide enforceability of the arbitration agreement was a valid delegation under the FAA).

[48] AM. ARB. ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2010), *available at* http://www.adr.org/sp.asp?id=21936.

[49] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451-53 (2003).

[50] *Stolt-Nielsen S.A.*, 130 S. Ct. .

dard contracts requiring arbitration in New York.[51] After the dispute arose, the parties stipulated that their contract was "silent" in that there was "no agreement" regarding class proceedings, and therefore asked the arbitrators to determine whether the agreement allowed for proceedings under the AAA's class arbitration rules.[52] The arbitrators found that the agreement allowed for class arbitration in the absence of intent to preclude it.[53]

The Supreme Court changed that result in its five to three decision holding that the parties could not be compelled to participate in class proceedings based on the contract's silence regarding class proceedings.[54] Writing for the majority, Justice Alito concluded that the arbitration panel had "imposed its own conception of sound policy" and exceeded its authority in finding that the sophisticated commercial parties involved in the action intended by their silence to allow for class arbitration.[55] Justice Alito opined that class proceedings would dramatically alter the nature of arbitration by hindering the efficiency and secrecy of the process.[56]

The opinion left questions regarding the viability of the "manifest disregard of the law" standard for vacating arbitration awards and *Bazzle*'s designation of arbitrators to determine whether agreements allow for class arbitration.[57] It also left practitioners asking what constitutes sufficient agreement for class arbitration, especially in uneven bargaining contexts.[58] Meanwhile, courts continued to use state contract law or public policy to strike arbitration clauses with class waivers, even where they otherwise may have severed offending class waivers to nonetheless order arbitration.[59]

ii. AT&T Mobility L.L.C. v. Concepcion

Prior to *Stolt-Nielsen*, courts in California had become proactive in holding class action waivers unenforceable in B2C contracts where they are likely to

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[51] *Id.*

[52] *Id.* at 1765-67.

[53] *Id.* at 1770, n.7.

[54] *Id.* at 1776-77.

[55] *Stolt-Nielsen S.A.*, 130 S. Ct. at 1769-77.

[56] *Id.* at 1776-77. *But see* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1212-30 (2007) (noting that arbitration is not necessarily confidential).

[57] *See Stolt-Nielsen S. A.*, 130 S. Ct. at 1768-72 (declining to decide if the "manifest disregard" exists and a non-statutory ground for vacating arbitration awards, and emphasizing that the *Bazzle* opinion giving the arbitrator power to determine whether an arbitration agreement allows for class arbitration was merely a plurality opinion).

[58] *Id.*

[59] *See* Fenterstock v. Educ. Fin. Partners, 611 F.3d 124, 132-39 (2d Cir. 2010) (holding that *Stolt-Nielsen* did not preclude the court from holding the class waiver unconscionable, but it did bar the court from severing the waiver to enforce class arbitration); *see* Mathias v. Rent-A-Ctr., Inc., 2010 WL 3715059, at *5 (E.D. Cal. Sept. 15, 2010) (holding that *Stolt-Nielsen* did not require that the FAA preempts use of state contract law); *see* Brewer v. Missouri Title Loans, Inc., 323 S.W.3d 18, 18-24 (Mo. 2010) (finding that *Stolt-Nielsen* requires courts to strike arbitration clauses entirely where courts find a class waiver unenforceable under contract law).

hinder statutory or small claims.[60] In *AT&T Mobility L.L.C. v. Concepcion* the Court severely limited these courts in holding that the FAA preempts a state court from using unconscionability to condition enforcement of an arbitration clause on preserving consumers' ability to bring class-wide arbitration proceedings.[61]

Consumers in that case filed a class action lawsuit against AT&T alleging that it had fraudulently offered "free" phones that were not actually free because phone costs were rolled into plan prices and customers paid sales tax on phones.[62] The consumers' standard cellular phone agreements included an arbitration clause that precluded arbitrators from ordering class relief or consolidation, but allowed for small claims court actions, their recovery of double attorney fees if an award exceeded the company's settlement offer, and the company's payment for all arbitration costs.[63] The court in California held the class waiver unconscionable under California state law barring such waivers where they appeared to "cheat large numbers of consumers out of individually small sums of money."[64]

In a five to four decision, the U.S. Supreme Court reversed this holding and admonished California's use of state contract law to hinder enforcement of class waivers. The Court also frowned on the concept of class arbitration altogether, suggesting it hinders the traditional efficiency and cost-saving purposes of arbitration.[65] The opinion nonetheless failed to address left open whether courts may use more general unconscionability law to void class waivers under different circumstances.[66] Still, most have read *AT&T Mobility* to expand the FAA's preemptive power and to augment *Stolt-Nielsen* in severely curtailing judicial and arbitral power to order class arbitration.[67] These opinions seem to welcome U.S. companies' express preclusion of class proceedings of any kind in their standard B2C contracts.[68]

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[60] *See* Discover Bank v. Super. Ct., 113 P.3d 1100 (Cal. 2005) (holding class action waiver unenforceable where it targeted small consumer claims); *see also* Gentry v. Super. Ct., 165 P.3d 556 (Cal. 2007) (holding class action waiver in arbitration agreement unenforceable under California law).

[61] AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740, 1743-56 (2011).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1747-58.

[65] *See id.* at 1748-55 (emphasizing that class action arbitration sacrifices informality, a major advantage of arbitration, and that class action arbitration rules, unlike the Federal Rules of Civil Procedure, are ill-suited to protecting defendants in class litigation because they do not provide the same appellate review).

[66] *See* Kristian v. Comcast Corp., 446 F.3d 25, 26-55 (1st Cir. 2006) (severing a class action waiver provision in an arbitration clause where the customers sought to bring individually small antitrust claims and distinguishing cases enforcing class action waivers where recovery of attorney fees mitigated the financial impracticability of individual claims).

[67] *See* Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 481-91 (2011) (highlighting how recent Supreme Court opinions curtail class action relief).

[68] *See id.* at 477-81 (noting how companies expressly preclude class relief in court or arbitration).

iii. Rent-A-Center v. Jackson

Under the FAA, arbitrators presumptively determine challenges of the underlying contract, but courts, rather than the arbitrators themselves, determine the enforceability of an arbitration agreement unless the parties "clearly and unmistakably" delegate the issue to the arbitrators.[69] The Court in *Rent-A-Center v. Jackson* went further by endorsing enforcement of a provision within an arbitration agreement that gives the arbitrators power to determine arbitrability and their own jurisdiction.[70] In doing so, the Court welcomed companies' use of such delegation clauses to effectively insulate claims from public courts.

In *Rent-A-Center*, an employee claimed that the arbitration clause in his employment agreement was unconscionable with respect to his discrimination claims against his employer. The U.S. Ninth Circuit Court of Appeals agreed with the employee, but the U.S. Supreme Court reversed, holding that the employee had to assert his arbitrability claim in arbitration because the agreement gave the arbitrator "authority to resolve any dispute relating to [its] interpretation, applicability, enforceability or formation."[71] Writing for the majority, Justice Scalia opined that this delegation narrowed courts' authority to only consider challenges to that delegation, and not arguments directed toward the arbitration provision as a whole. In so holding, the Court endorsed arbitrators' power to determine their own jurisdiction, and confirmed another hurdle for consumers seeking to challenge arbitration clauses in court.[72]

B. Limited Survival of Contract Law Challenges of Pre-dispute Arbitration Clauses

These and other Supreme Court pronouncements have adamantly reinforced preemption and courts' narrow power to consider only general contract law challenges of pre-dispute arbitration clauses in B2C cases.[73] These challenges mainly include lack of assent, unconscionability, lack of consideration, or fraud.[74] Furthermore, they are only for the court to determine if they target an arbitration clause and the clause does not contain an enforceable delegation provision.[75]

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[69] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443-449 (2006); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

[70] Rent-A-Ctr.,W., Inc. v. Jackson, 130 S. Ct. 2772, 2776-85 (2010).

[71] *See id*. at 2776-78 (employee claiming that the arbitration agreement was unconscionable because it was adhesive and contained an onerous fee-sharing provision, and that this unconscionability claim was a gateway question of arbitrability for the court).

[72] *Id.* at 2778-81.

[73] *See generally* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006) (discussing formalistic application of contract defenses).

[74] *See* Walton v. Rose Mobile Homes, L.L.C., 298 F.3d 470, 478 (5th Cir. 2002) (emphasizing that courts must use only general fraud or unconscionability defenses).

[75] *Rent-A-Ctr.,W., Inc.*, 130 S. Ct. at 2776-85; *see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) (solidifying the "separability" concept limiting courts' consideration to attacks on an arbitration clause itself).

Moreover, many courts have been formalistic in their applications of contract law, especially in the wake of *AT&T Mobility*.[76]

Unconscionability challenges of pre-dispute arbitration clauses are the most common and most successful for consumers and employees. Generally, consumers asserting unconscionability must prove that an arbitration agreement is both substantively and procedurally unconscionable.[77] Procedural unconscionability focuses on whether the bargaining process was unduly one-sided, whereas substantive unconscionability asks whether the terms of the provision are oppressive or otherwise unfair.[78] These standards are flexible, thereby allowing courts to consider context and use this defense as a "safety-net" for catching unfair contracts that evade more regimented contract defenses.[79] However, this malleability also may foster uncertainty and open the door to courts' unequal treatment of arbitration provisions.[80] This is what troubled the Supreme Court in *AT&T Mobility.*

Unconscionability nonetheless survives, although many question how *AT&T Mobility* will impact unconscionability challenges based on class waivers.[81] It is often fairly easy for consumers to show that arbitration clauses in form B2C contracts are adhesive, or procedurally unconscionable, but consumers must also show that the provisions are substantively unfair.[82] Some consumers have been successful, for example, in proving this unfairness due to oppressive terms such as carve-outs for a seller's option to litigate, cost and fee allocations that overly burden consumers, inconvenient arbitration hearing locations, and preclusions of statutory remedies.[83]

Ting v. AT&T Corp. provides an example of a court holding an arbitration clause unconscionable in a B2C contract. In that case, the Ninth Circuit found that a confidentiality provision in AT&T's Consumer Services Agreement was unconscionable under California law because it allowed AT&T to potentially prevent seven million Californians from obtaining information regarding discrim-

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[76] *See supra* notes 45-46 and accompanying text (discussing *AT&T*).

[77] *See* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 265 (3rd Cir. 2003) (noting both elements of unconscionability under most state contract law).

[78] *See id.* at 266 (finding "take-it-or-leave-it" contract prepared by the employer without negotiation by the employees was procedurally unconscionable); *see also* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1174-75 (9th Cir. 2003) (finding one-year limitation on claims under the arbitration clause in an employment contract was substantively unconscionable because it deprived employees of the benefit of the continuing violations doctrine available under a state employment discrimination statute).

[79] *See* Schmitz, *supra* note 73, at 73-90 (exploring development, evolution, and functions of unconscionability, and critiquing courts' formulaic application of unconscionability).

[80] *See* AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740, 1743-53 (2011) (finding that the California court had applied unconscionability in a manner that singled out arbitration for negative treatment).

[81] *AT&T Mobility, L.L.C.*, 131 S. Ct. at 1740-60; *see also* Kimberly Atkins, *Future of Arbitration in Supreme Court's Hands*, LAWYERS WEEKLY USA, Nov. 15, 2010, at 299 (highlighting arguments and focus on allowance for class arbitration).

[82] *See* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 265 (3rd Cir. 2003) (describing adhesion contracts).

[83] *See* CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS, 113-14 (2002) (listing suspect terms and citing cases supporting and denying these claims).

ination claims against the company.[84] The court also noted that the confidentiality clause gave AT&T undue advantages in gathering knowledge on how to negotiate its form contracts and control claims.[85]

Nonetheless, most other courts have been unreceptive to consumers' unconscionability challenges of pre-dispute arbitration agreements.[86] For example, one court denied the consumers' challenge of an arbitration provision in their loan agreements that subjected the consumers to high arbitration and appeal costs and precluded class relief.[87] The court rejected the trial court's findings that the arbitration provision was unduly adhesive and made it financially impracticable for consumers to bring individual claims, thereby hindering their access to remedies.[88] The court opined that the overall costs of litigation would exceed the average daily rates of $1,225 that the consumers would pay in arbitration.[89]

Other contract defenses such as lack of assent or consideration and misrepresentation remain available for challenging pre-dispute arbitration clauses. These claims are quite narrow and generally difficult to establish.[90] Courts therefore have enforced arbitration clauses in pre-printed B2C form terms in papers sent with bills, product packaging, and "click-wrap" e-provisions accessible through links in contracts formed over the Internet.[91]

For example, the court in *Hill v. Gateway 2000, Inc.* enforced an arbitration clause located in purchase terms buried among the papers that came with a computer the Hills bought over the phone.[92] Courts similarly find consumers' assent to arbitration clauses in cellular phone service contracts although consumers have no choice but to accept the clauses or cancel the services.[93] Furthermore, courts seemingly condone the illusory nature of consent to form agreements in denying

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[84] *See generally* Ting v. AT&T Corp., 319 F.3d 1126, 1133, 1149–52 (9th Cir. 2003). The Court found that "[a]ny arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award." *Id.* at n.16.

[85] *Id*. at 1152; *see also* Acorn v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002) (holding confidentiality provision in arbitration agreement unconscionable); McKee v. AT&T Corp., 191 P.3d 845, 858-59 (Wash. 2008) (holding the same provision unconscionable).

[86] *See, e.g.*, Fleetwood Enters., Inc v. Gaskamp, 280 F.3d 1069, 1077 (5th Cir. 2002) (denying unconscionability challenge to an arbitration agreement); Johnnie's Homes, Inc. v. Holt, 790 So. 2d 956, 963-65 (Ala. 2001) (enforcing a consumer's duty to arbitrate warranty, fraud, breach, and other claims); Green Tree Fin. Corp. v. Lewis, 813 So. 2d 820, 825 (Ala. 2001) (denying unconscionability challenge to arbitration clause by illiterate consumer); Garcia v. Wayne Homes, L.L.C., 2002 WL 628619, at *13 (Ohio Ct. App. 2002) (denying unconscionability challenge based on risk of prohibitive arbitration costs).

[87] Tillman v. Commer. Credit Loans, Inc., 629 S.E.2d 865, 868-80 (N.C. Ct. App. 2006), *rev'd*, 655 S.E.2d 362, (N.C. 2008).

[88] *Id.* at 868-82.

[89] *Id.* at 868-74.

[90] *See* Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511, 1515-20 (2007) (discussing enforcement theories); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 435-51, 485-87 (2002) (explaining why electronic contracts promote efficiency and are not adhesion contracts).

[91] *See* Alces, *supra* note 90, at 1521-24 (discussing the expanding world of contracting practices).

[92] Hill v. Gateway 2000, Inc., 105 F. 3d 1147, 1147-50 (7th Cir. 1997).

[93] Chandler v. AT&T Wireless Servs., Inc., 358 F. Supp. 2d 701, 704-06 (S.D. Ill. 2005).

challenges of arbitration clauses that automatically become effective unless the recipient proactively opts out or otherwise disputes the clause within a stated time.[94]

Consumers face an even higher burden in succeeding on lack of consideration challenges of arbitration clauses. This is because courts find that arbitration provisions are supported by adequate consideration if they are mutual or the arbitration clause is one of many promises in a contract.[95] Courts usually find other contract provisions or circumstances that constitute sufficient consideration to uphold the arbitration clauses.[96] Nonetheless, at least one court found lack of consideration where the arbitration clause was non-mutual and heavily one-sided.[97]

Fraud and misrepresentation claims also tend to fail.[98] A consumer asserting fraud to resist arbitration must target the arbitration clause—not merely the contract as a whole.[99] The consumer then bears a heavy burden in proving that the contract drafter intentionally or recklessly made material misrepresentations about the arbitration that the claimant relied on in accepting the arbitration provision.[100] This is not easy to prove, especially since it is not sufficient that a seller failed to disclose the existence of an arbitration clause.[101]

III. E.U. and U.K. Perspectives on B2C Arbitration

In contrast to strict enforcement of arbitration clauses in B2C contracts in the U.S., laws in Europe and elsewhere preclude or strictly limit enforcement of these clauses. Many countries subject B2C arbitration clauses to special form requirements and strictly limit when they will be allowable. This leaves the law unclear with respect to enforcement of arbitration clauses in international B2C contracts and begs questions about the need for system improvements with respect to current arbitration regimes.

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94 Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108-09 (9th Cir. 2002).

95 Hawkins v. Aid Ass'n for Lutherans, 338 F.3d 801, 808 (7th Cir. 2003) (emphasizing that consideration need not lie in the arbitration provision itself where the initial contracts allow for subsequent changes).

96 *See* Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 341-44 (Ky. Ct. App. 2001) (denying consumers' challenge of an arbitration provision that allowed the lender to litigate collection and foreclosure suits).

97 *See* Arnold v. United Co. Lending Corp., 511 S.E.2d 854, 859-62 (W. Va. 1998) (holding arbitration provision in consumer loan contract unconscionable where lender could seek foreclosure and collection actions in court).

98 *See In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 756-58 (Tex. 2001) (challenging arbitration based on fraud).

99 *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co, 388 U.S. 395, 403-04 (1967) (holding that fraud in the inducement is an arbitrability question for the court unless it goes directly to the arbitration clause).

100 *Firstmerit Bank, N.A.*, 52 S.W.3d at 758.

101 *Id.* at 752-53, 759 (denying consumers' fraud challenge of an arbitration addendum to a mobile home sales agreement based on seller's nondisclosure).

A. European and EU B2C Arbitration Laws

European countries generally bar or limit enforcement of pre-dispute arbitration agreements in B2C contexts under their domestic laws.[102] EU Directives place arbitration clauses among the "unfair" terms precluded by consumer protection policies. Law and policy in the U.K. similarly limits enforcement of B2C arbitration, and precludes enforcement of all arbitration clauses in small dollar cases.

1. France's Red Light on B2C Arbitration

The French Civil Code (the "Code") permits a person to submit to arbitration any dispute in most "commercial," or B2B, matters and impliedly bars enforcement of pre-dispute arbitration clauses in consumer contracts.[103] Furthermore, the Code expressly precludes arbitration with respect to the status and capacity of persons, divorce, and matters involving public policy.[104] The Code also deems "unfair" clauses in B2C contracts which act to the detriment of the consumer where there is "a significant imbalance between the rights and obligations of the parties to the contract."[105] Examples of such "unfair" terms include those with have the effect of "canceling or impeding the institution of legal proceedings or means of redress by the consumer, in particular, by obliging the consumer to exclusively refer the case to an arbitration panel not covered by legal provisions."[106]

Nonetheless, it is unclear whether French courts would enforce pre-dispute arbitration clauses against consumers with power to negotiate their contracts. The Code's reference to arbitration clauses as 'unfair' is specifically with respect to instances where the terms are imposed on one with weaker bargaining power. This seems to place the burden on the consumer to show a clause's unfairness.[107]

It is also unclear whether French courts will apply the Code's preclusion of pre-dispute arbitration clauses in international B2C transactions. Professor Em-

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[102] Peter B. Rutledge & Anna W. Howard, *Arbitrating Disputes Between Companies and Individuals: Lessons from Abroad*, DISP. RESOL. J., Feb-Apr 2010, at 30, 34 (noting European law's protection of consumers from unfair arbitration provisions). *See also* CONSUMER PROTECTION ACT, R.S.Q. 1978 c. P.40.1, amended by S.Q. 2006, c. 56 s. 11.1 (Can.); CONSUMER PROTECTION ACT, R.S.O. 2002, c.A.30 s. 8(1) (Can.) (invalidating arbitration or other clauses that preclude consumers from bringing class actions).

[103] Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 391 (2010); *see* Rutledge & Howard, *supra* note 102, at 34 (noting French law).

[104] *France*, *in* WORLD ARBITRATION REPORTER 1641, 1652 (Bette E. Shifman & Wendy S. Dorman eds., JurisNet, LLC 1st ed. 2007).

[105] CODE DE LA CONSOMMATION [C. DE LA CONSOMMATION] art. L132-1 (Fr.), *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=61 (last visited Jan. 27, 2012).

[106] *Id.* art. L132-1 Annex 1(q). This is pursuant to Décret n° 2011-48 portant réforme de l'arbitrage, which modifies Articles 1442 et seq. of the French Code of Civil Procedure (entered into force on May 1, 2011). French Code of Civil Procedure – Art. 1442-1527 and Civil Code Title XVI of the Arbitration Agreement (Compris) (law No. 72-625 of July 5, 1972) – art. 2059-2061. CODE CIVIL [C. CIV.] art. 2059-61 (Fr.), *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=610 (last visited Jan. 25, 2012).

[107] *See* Rutledge & Howard, *supra* note 102, at 34 (noting this burden placed on consumers).

manuel Gaillard of Paris XII University has highlighted French courts' distinction between domestic and international arbitration enforcement and concludes that the Cour de Cassation has consistently promoted the enforcement of international arbitration over the past twelve years.[108] He also notes two cases in which French courts upheld pre-dispute arbitration clauses in cross border consumer contracts.[109] He nonetheless acknowledges that the law remains unclear in areas of public policy.[110]

At the same time, the N.Y. Convention should dictate more pro-enforcement treatment, especially in light of the limited grounds for non-enforcement set forth under the Convention.[111] However, the Convention allows courts to refuse enforcement when due to "nonarbitrability of the subject matter" or when enforcement is "contrary to public policy."[112] Some countries use these grounds to refuse enforcement of international B2C arbitration clauses. Also, scholars suggest that French law and policy with respect to arbitration awards applies equally to domestic and international cases.[113] This may explain why the legal community in France generally assumes that B2C arbitration clauses are unenforceable. Indeed, the International Chamber of Commerce ("ICC") based in Paris does not even conduct B2C arbitrations.[114]

2. Germany's Yellow Light on B2C Arbitration

Germany takes more of a "yellow light" approach toward enforcing pre-dispute arbitration clauses in B2C contracts. Instead of precluding all enforcement of B2C arbitration clauses, the German Arbitration Law and the German Civil Code focus on form and notice.[115] Although pre-dispute arbitration clauses are

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[108] Emmanuel Gaillard, Professor, University of Paris XII, *The Jurisprudence of the Court of Cassation in International Arbitration,* Lecture at the Court of Cassation, March 13, 2007, *available at* http://www.courdecassation.fr/colloques_activites_formation_4/2007_2254/inter-vention_m._gaillard_11066.html?idprec=9748# (last visited April 18, 2012).

[109] *Id.* (citing Cass. civ. 1st, March 30, 2004, Rado Lady c. Painvewebber and Cass. civ. 1st, May 21, 1997, c Meglio. Jaguar stereo).

[110] *Id.*

[111] N.Y. Convention, *supra* note 2, art. IV; 9 U.S.C. § 201 (2006).

[112] N.Y. Convention, *supra* note 2, art. V(2); 9 U.S.C. § 201.

[113] *See* Kristina L. Morrison, Comment, *A Misstep in U.S. Arbitral Law: A Call for Change in the Enforcement of Nondomestic Arbitral Awards*, 46 TORT TRIAL & INS. PRAC. L.J. 803, 811-15, n. 44 (2011) (citing Emmanuel Gaillard, *France*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION, at 466, §6.209, indicating that French rules for enforcement of arbitration awards apply equally to international and domestic arbitration).

[114] E-mail from ICC Int'l Ct. of Arbitration to Holly Andersen, Research Assistant to Professor Amy Schmitz (Oct. 24, 2011, 6:59 MST) (on file with author) (bluntly indicating that "ICC arbitration could not be applied to consumer contracts").

[115] *See generally* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, REICHSGESETZBLATT [RGBL] 97, as amended, §§ 1025-66, *available at* http://www.gesetze-im-internet.de/englisch_zpo/index.html (last visited Jan. 27, 2012) [hereinafter ZPO]; DEUTSCHES SCHIEDSVERFAHRENSRECHT, 1998, REICHSGESETZBLATT [RGBL] (Ger.), *available at* http://www.dis-arb.de/en/51/materials/german-arbitration-law-98-id3 (last visited Jan. 27, 2012) [hereinafter German Arbitration Law]; BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL] 195, as amended, §§ 305-10. (Ger.), *available at* http://www.gesetze-im-internet.de/englisch_bgb/ (last visited

ostensibly enforceable, they must be written in an "intelligible and transparent manner" under the good faith requirement of Section 307(1).[116] Furthermore, the German Arbitration Law specifies that an arbitration agreement to which a consumer is a party must be in a separate document personally signed by the parties.[117]

The German Civil Code also states that in B2C contracts, "[s]tandard business terms are deemed to have been presented by the entrepreneur, unless they were introduced into the contract by the consumer."[118] This is true for form contract terms even if they are intended only for non-recurrent use to the extent that the consumer had no influence on their contents.[119] Nonetheless, courts assessing unreasonable disadvantage under section 307 (1) and (2) must consider "the other circumstances attending the entering into of the contract."[120] Failure to meet the form requirements can be remedied by appearance in court.[121]

3. European Council Directives

France and Germany are EU member-states and thus their enforcement of B2C arbitration in cases involving parties from different Member States generally follows EU Council Directives. This is important because the EU Directives with respect to consumer contracts deem arbitration clauses in B2C contracts presumptively unfair.[122] In voiding such a clause, the court in one recent case explained that Council Directive 93/13/EEC declares unfair any clause that excludes or hinders the consumer's right to take legal action, particularly by requiring arbitration. It also emphasized that courts have power under European Court of Justice ("ECJ") rulings to revisit the enforcement of an arbitration clause in a B2C contract at the award enforcement stage. This is true even where the consumer has failed to raise the issue until that time.[123]

Accordingly, regardless of Germany's "yellow light" approach to B2C arbitration under its national laws, German courts have struck down arbitration clauses under the EU Directives where the clauses required arbitration in the United

Jan. 27, 2012) [hereinafter BGB]. Taken as a whole, these statutes illustrate Germany's "yellow light" approach to B2C arbitration.

116 Rutledge & Howard, *supra* note 102, at 30, 34 (citing Marco Ardizzoni, German Tax and Business Law, 1066 (Thomson/Sweet & Maxwell 2005)).

117 *See* ZPO, *supra* note 115, § 1031(5) ("No agreements other than those referring to the arbitral proceedings may be contained in such a document or electronic document.").

118 BGB, *supra* note 115, § 310(3).

119 *Id.*

120 *Id.*

121 ZPO, *supra* note 115, § 1031(6).

122 Jana Kolackova & Pavel Simon, *At the Edge of Justice: Arbitration in Unequal Relationships*, 1 CZECH & CENT. EUR. Y.B. OF ARB. 183, 188 (2011).

123 *Id.* at 188-89; *see* Stephen Wilske & Lars Markert, *Germany*, WORLD ARB. REPORTER GER-5 (Loukas Mistelis & Laurence Shore eds., JurisNet, LLC 2nd ed. 2010) (citing ECJ, Case C-168/05, Mostaza Claro v. Móvil, Decision 26 October 2006) (noting that the ECJ directs courts to examine on their own motion whether the arbitration agreement is void, even if the consumer has neglected to raise this issue with the arbitral tribunal).

States of disputes between Dutch and German parties.[124] Similarly, The Czech Republic has been fairly pro-arbitration in B2B cases and created the Prague-based Arbitration Court to provide alternative dispute resolution ("ADR") for .eu domain name disputes.[125] It also established an arbitral system for settling disputes between patients and their health insurance companies.[126] Courts in the Czech Republic nonetheless have held arbitration clauses in B2C contracts void as "unfair" to the consumer under the EU Directives and a presumption of uneven bargaining power in B2C contracts.[127] One scholar described Czech arbitration as "wild" due to courts' uncertain enforcement of arbitration in the wake of the Directives and conflicting policies.[128]

B. U.K. Protection of Consumers in Arbitration

English laws generally adhere to the N.Y. Convention in enforcing arbitration agreements in B2B relationships. However, the English Arbitration Act of 1996 precludes enforcement of all arbitration agreements if the pecuniary remedy is less than £5,000.[129] This law applies to both pre- and post-dispute agreements as means for preserving access to English small claims proceedings.[130]

English courts also may limit enforcement of pre-dispute arbitration clauses in B2C contracts more generally. Although B2C arbitration agreements are ostensibly enforceable, courts will only enforce pre-dispute arbitration provisions in B2C contracts if the seller can prove that the arbitration provision was individually negotiated and made in good faith. Courts also will refuse to enforce a pre-dispute arbitration clause if such enforcement would cause a significant imbalance to the detriment of the consumer.[131]

Furthermore, the English regulation governing Unfair Terms in Consumer Contracts includes arbitration clauses in its non-exhaustive list of terms which may be deemed unfair.[132] This statute mimics the Council Directive 93/13/EEC. Nonetheless, the U.K. does not deem all enforcement of B2C arbitration provisions void, but rather leaves room for a more pro-enforcement attitude in interna-

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[124] Jan Kraayvanger & Mark C Hilgard, *Setback for Use of Arbitration Against Consumers: the ECJ Rules that Article 6 of Directive 93/13 is a Rule of Public Policy*, 15 NO. 2 IBA ARB. NEWS 45 (IBA, London), Sept. 2010, at 45.

[125] *See About the Czech Arbitration Court*, ADR.EU, *available at http://eu.adr.eu/about_us/court/index.php* (last visited Jan. 28, 12) (providing information about the non-profit Czech Arbitration Court).

[126] Kolackova & Simon, *supra* note 122, at 184-85.

[127] *Id.* at 188-90.

[128] Tomas Pavelka, *The Wild Arbitration Blows Retreat?: On Implementation of the Unfair Contract Terms Directive in the Czech Republic*, SOC. SCI. RES. NETWORK, April 20, 2001, at 2, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1837686 (last visited March 4, 2012).

[129] Unfair Arbitration Agreements (Specified Amount) Order 1999, 1999, S.I. 1999/2167, ¶ 3 (U.K.), *available at* http://www.legislation.gov.uk/uksi/1999/2167/contents/made.

[130] Arbitration Act, 1996, c. 23, § 91.1, (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1996/23/contents.

[131] Unfair Terms in Consumer Contracts Regulations, 1999, §5(1), (U.K.), *available at* http://www.legislation.gov.uk/uksi/1999/2083/contents/made.

[132] *Id.* sch. 2 (1)(q).

tional contexts.[133] At the same time, nations like Mexico have become more favorable toward enforcement of arbitration clauses in cross-border cases in order to promote efficient dispute resolution and international comity.[134]

IV. Creating a Global remedy mechanism to Address Clashing Policy

International enforcement of court judgments remains uncertain and impractical for most B2C disputes. Furthermore, international divergence in laws regarding enforcement of B2C arbitration agreements prevents companies from being able to rely on—and thus pass along savings from—arbitration clauses in their international B2C contracts. This often leaves consumers with no means of obtaining remedies with respect to their cross-border contracts. Accordingly, international policymakers are developing online dispute resolution mechanisms that transcend arbitration and litigation enforcement concerns.

A. International Movements to Develop Cross-Border ODR for B2C Claims

The EU has proposed Regulations calling for use of ODR for cross-border disputes, and the United Nations Commission on International Trade Law ("UNCITRAL") has instituted a Working Group on ODR for establishing a type of OArb for B2C disputes.[135] Hopefully, these groups will ultimately collaborate to create globally accepted mechanisms for providing consumers throughout the world with means for obtaining remedies with respect to their ePurchases.

1. E.U. ODR Directives

The EU has proposed a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes ("EU ADR Directive"), as well as a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes ("EU ODR Regulation").[136] Together, this Directive and Regulation aim to establish an ODR system at the EU level that will promote European commerce by providing a mandatory framework for resolution of cross-border disputes. However, these proposals preserve Member States' power to determine the means for implementing the framework.[137]

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[133] Rutledge & Howard, *supra* note 102, at 33.

[134] *See* Pierre Bienvenu, *The Enforcement of International Arbitration Agreements and Referral Applications in the NAFTA Region*, *in* COMMERICAL MEDIATION AND ARBITRATION IN THE NAFTA COUNTRIES 149,164 (Luis Miguel Díaz & Nancy A. Oretskin eds.,1999) (stating "the trend in the Mexican courts is to hold parties to what they contract for and estop parties from complaining later"); *see also* Margarita Trevino Balli & David S. Coale, *Recent Reforms to Mexican Arbitration Law: Is Constitutionality Achievable?*, 30 TEX. INT'L L.J. 535, 542-43 (1995) (explaining the broadening of issues subject to arbitration).

[135] *See* Colin Rule & Vikki Rogers, *Building a Global System for Resolving High-Volume, Low-Value Cases*, 29 ALTS. TO HIGH COST LITIG. 135 (Int'l Inst. for Conflict Prevention & Resolution, New York, NY), (July/Aug. 2011) (explaining formation of working group).

[136] *The Out-Of-Court Settlement of Consumer Disputes*, COM (1998) 198.

[137] *Commission Staff Working Paper Executive Summary Of the Impact Assessment*, at 69, SEC (2011) 1409 final (Nov. 29, 2011).

Prior EU non-binding ADR Directives have yielded little results, with only 40% of the existing ADR schemes being reported to the EU under old Directives.[138] Directives that encourage the development of ADR are laudable, but do not prompt most Member States to act.[139] Moreover, even mandatory rules take time for implementation, and such implementation is essential for success of any EU Directives.[140]

The new ODR Regulation proposal brings the ADR Directives into the digital age in order to confront the uncertainty about efficient means to resolving on-line cross-border disputes.[141] Companies currently resist selling to consumers in other countries because of laws that generally require merchants to sue consumers in their home locations.[142] In addition, the new Regulations would allow for in-person, along with online, dispute resolution in order to acknowledge that many consumers do not have the means or opportunity to conduct the entire ADR process online. Furthermore, the Regulations envision synergy between ADR and ODR by emphasizing that "[i]f ADR coverage at national level does not improve, it is not possible to develop ODR for cross-border online disputes."[143]

With that in mind, the EU proposed an updated framework ADR Directive to ensure that consumers can refer all their domestic and cross-border disputes to quality ADR schemes, and receive information on ADR schemes competent to deal with their disputes. It also specifies that ADR schemes participate in existing EU sector-specific ADR networks, but preserves Member States' freedom to choose the form and methods for ADR schemes. In addition, the Regulation requires establishment of an EU system for a web-based platform. This platform would emanate from national ADR schemes, but reach further in effectively dealing with cross-border e-commerce disputes online.[144]

Ultimately, the Regulations seek to ensure that consumers are able to submit to the EU web-based platform any dispute related to cross-border ePurchases.[145] The platform aims to be user-friendly by providing standard forms and electronically directing disputes to the competent national ODR scheme.[146] The platform will allow use of native languages, uniform technical specifications for interconnection with national ADR schemes, and common rules for timing, eligibility conditions, and common procedural aspects. Experts will facilitate the function-

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138 *Id.*

139 *Id.*

140 *Id.* at 29 (also noting that the recommended Directives will continue to set out ADR principles that schemes should respect and ask Member States to notify on an ad hoc basis those ADR schemes that function in accordance with these principles).

141 *Id.* at 25-6.

142 *Id.* at 26.

143 *Id.* at 62.

144 *Id.* at 65.

145 *Id.* at 53.

146 *Id.*

ing of the web-based platform and the European Consumer Centres Network (ECC-Net) will finance the platform.[147]

2. UNCITRAL ODR Project

The UNCITRAL ODR Working Group—with representatives from over 60 nations, including the United States—is currently aiming to create a binding online mechanism for settling conflicts regarding cross-border online purchases.[148] The goal is to establish a globally enforceable and accepted means for consumers and businesses to resolve claims regarding eContracts. However, the project is currently limited to claims regarding payment and delivery with respect to those contracts. This would exclude warranty and other more complicated claims, which often infiltrate any breach of contract claim.[149]

The Working Group has been meeting regularly in person and via teleconferences, and has been gaining support from many Member States.[150] The project creates promise for consumers seeking remedies with respect to their eContracts. Though this project may currently have limits, it could create momentum for a broader OArb process covering a wider range of global e-commerce disputes.[151]

B. Building on International Momentum to Create a Globally Accepted OArb System

Nations have different views on B2C arbitration with good reason. Some companies abuse pre-dispute arbitration clauses to escape liability and sidestep legal regulations. However, it would be unwise to preclude use of all such clauses in international B2C contracts. Insistence on post-dispute arbitration agreements is impractical because parties rarely agree to arbitrate after relationships have soured. It also may harm consumers because companies are not inclined to lower prices or otherwise pass on cost savings based on the hopes of establishing post-dispute arbitration programs.[152] Furthermore, the data indicates that consumers are generally satisfied with their arbitration experiences, and arbi-

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[147] *See generally European Consumer Centres Network*, EUR.COMM., http://ec.europa.eu/consumers/ecc/index_en.htm (last visited Jul. 23, 2011).

[148] *See generally Working Group III*, UNCITRAL, http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html (last visited April 13, 2012) (setting forth materials and resources for the working group).

[149] *Id.*

[150] I recently became an ABA Delegate to the Working Group and am eager to participate and assist with this endeavor.

[151] Further description of the Group's work are outside the scope of this article, but much more extensive discussion will be forthcoming. This is an exciting process and I am thankful to be a part of it.

[152] Others also have argued that the AFA approach of barring enforcement of pre-dispute arbitration clauses in broad and ill-defined categories was over- and under-inclusive, and that it may be more beneficial to legislate procedural reforms. *See, e.g.*, *Arbitration – Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees – Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007)*, 121 HARV. L. REV. 2262, 2267 (2008) (critiquing the Act's broad scope and approach).

tration may be the only feasible binding remedy process in cross-border disputes due to difficulties of enforcing foreign court judgments.[153]

That is not to say that unfair arbitration regimes should suffice for B2C claims. Instead, policymakers should capitalize on benefits of Computer Mediated Communications ("CMC") such as e-mails and online chatrooms to create a globally accepted and enforceable OArb framework.[154] Internet dispute resolution processes save parties' time and money, while easing stress and environmental impacts of travel and paper documentation involved with in-person processes.[155] Furthermore, OArb is particularly suited for cross-border claims because it results in a binding award enforceable under the N.Y. Convention.[156] OArb also may be more satisfactory and productive than non-binding processes because parties participate knowing that the process will end in a final determination.[157]

Nonetheless, global B2C OArb systems must be properly regulated in order to earn consumers' and companies' trust, and help ensure their enforcement. As I have suggested elsewhere, policymakers should require that OArb mechanisms comply with procedural fairness standards similar to those set forth in the Protocol.[158] Mandatory regulations should set minimum standards that help ensure transparency, accessibility, and overall due process. Furthermore, properly regulated OArb processes should be user-friendly and worth their costs in light of the complexity and possible payout on the claims at issue.[159]

OArb mechanisms must be sufficiently simple for consumers to use without the need for legal assistance and should allow consumers to obtain neutral claim evaluations and enforceable remedies.[160] Regulations should cap consumers'

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153 Harris Interactive, Arbitration: Simpler, Cheaper, and Faster than Litigation, Conducted for U.S. Chamber Inst. For Legal Reform 6 (April 2005), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (last visited May 22, 2011) (indicating that 40% of those who lost in arbitration were still satisfied with the process); *see also* Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051, 1054-75 (2009) (questioning assumptions that arbitration is bad for consumers).

154 Full discussion of the pros and cons of ODR and OArb, and proper regulation of a B2C remedy system is beyond the scope of this paper and has been covered elsewhere. Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 328–29 (2008) (discussing benefits of ODR); *see* Schmitz, *supra* note 23, at 205-07 (discussing how online arbitration, what I term "OArb," opens new avenues for consumers to obtain remedies on their contract complaints); *see also* Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 308–10 (2007-2008) (noting use for consumer small claims).

155 ODR does come with accessibility and trust issues, but these drawbacks pale in comparison with its benefits. Noam Ebner & Colleen Getz, *ODR: The Next Green Giant*, 29 CONFLICT RESOL. Q. 283, 286 (discussing how ODR helps the environment by eliminating travel and cutting down on paper use); *see generally* Schmitz, *supra* note 23, at 181-85 (discussing pros and cons of ODR and OArb).

156 OArb differs from other ODR because it results in a final third-party determination without the cost and stress of traditional litigation. *See* Schmitz, *supra* note 23, at 183-86, 193-99 (advocating for OArb).

157 *See id.* at 193.

158 *See, e.g.*, Schmitz, *supra* note 22, at 23-9 (offering a "top ten" tailored more for in-person arbitration fairness regulations).

159 Geoffrey Davies, *Can Dispute Resolution Be Made Generally Available?*, 12 OTAGO L. REV. 305, 308–16 (2010).

160 *See id.* at 309–18 (noting what works and does not work in dispute resolution mechanisms).

costs and set strict time limits for companies to respond to complaints. Policies also should allow for sufficient but properly limited discovery and limit time on evidentiary submissions and awards. Furthermore, arbitrators must have power to hold companies responsible for failing to quickly comply with arbitration awards.

Parties must have an equal voice in choosing arbitrators from a database of neutral, trained, diverse, and accredited individuals. The database should also capture parties' feedback through follow-up surveys in order to foster continual system improvements.[161] At the same time, a "trustmark" or ratings system for OArb mechanisms could boost the credibility of the system and provide guidance for consumers and companies in choosing a mechanism for resolving their particular disputes.[162] This could be similar to what the Better Business Bureau uses in the U.S. to indicate that a company abides by best practices in the given industry.[163] Again, no mechanism will be successful unless parties accept and trust it. Indeed, it is imperative that even countries that usually frown on traditional B2C arbitration nonetheless enforce this OArb system.[164]

V. Conclusion

The United States has been exceptional in its strict enforcement of B2C arbitration under the FAA and N.Y. Convention, while other nations have refused or limited enforcement of these arbitrations due to policy concerns. Nonetheless, consumers and businesses crave fair, reliable and enforceable means for resolving cross-border disputes. This is especially true with respect to growing e-commerce. Accordingly, the EU and UNCITRAL are developing global OArb and ODR mechanisms that transcend divergence and ambiguity regarding litigation and enforcement of face-to-face arbitration for resolution of e-commerce disputes. This gives policymakers great opportunity to collaborate in creating globally enforceable OArb mechanisms that promote transparency and abide by fairness standards.

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[161] Colin Rule et al., *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments*, 42 UCC L.J. 221, 239-40 (2010) (discussing how to create a global system for resolving consumer disputes); *see* Schmitz, *supra* note 23, at 235–37; *see also* Xu Junke, *Development of ODR in China*, 42 UCC L.J. 265, 266–72 (2010) (discussing importance of trust and consumer confidence to boost ODR processes). *See also* Schmitz, *supra* note 23, at 178–244 (proposing prudent expansion of ODR and Oarb).

[162] *See* Schmitz, *supra* note 23, at 237-40 (proposing a trustmark system).

[163] *Id.*

[164] Further discussion of ideas for creating a fair and accessible OArb system are beyond the scope of this article due to space limitations. *See generally* Schmitz, *supra* note 23, at 237-40 (proposing a trustmark system). *See e.g.*, Amy J. Schmitz, *Building Bridges to Consumer Remedies in eConflicts,* 34.4 U. A. L. Rev. (forthcoming 2012).

Pre-Tribunal Emergency Relief in International Commercial Arbitration

Erin Collins[†]

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I. Introduction

International commercial arbitration has been the international business community's preferred method of handling disputes for years. The process is efficient and private. It also gives parties to the arbitration more control and more choice while eliminating the unfairness of trying to litigate in a foreign country's courts.

Although international commercial arbitration has many advantages over resolving conflicts through litigation, arbitral institutions historically did not offer a remedy in cases where emergency relief was necessary. Generally, in traditional litigation, a party can go to court and get an injunction or similar remedy to preserve assets or otherwise maintain the status quo of a situation if it is truly an emergency. International commercial arbitration had no corresponding system. While it is true that arbitrators are not judges and therefore do not have the same amount of power over the parties, there still existed situations that could have been handled with arbitration proceedings if the right rules were in place.

Eventually, arbitral institutions began adding rules to allow arbitral tribunals to give emergency orders and awards. This did not solve the problem entirely. There was still no option for parties who needed relief prior to the formation of an arbitral tribunal. Today, many major arbitration institutions have started to address that situation.

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It is important for arbitral institutions to address this void in the remedies offered by international commercial arbitration because companies generally prefer arbitration to transnational litigation but, until recently, had no arbitration option when it came to emergencies. In order for international commercial arbitration to continue to grow and prosper, and to provide a true alternative to litigation, arbitral institutions need to provide remedies for as many situations as possible—including emergency situations that arise prior to the formation of the arbitral tribunal.

Section II of this article will provide a general background of international commercial arbitration and discuss why it has become such a popular method of dispute resolution. It will also explain the shortcomings of international commercial arbitration, with a focus on the emergency situations that have forced parties to resort back to judicial systems for years. Section III provides the rules of emergency relief in arbitration, as they exist today, in five major international arbitral institutions. Section IV will analyze those five sets of rules—both their strengths and their weakness—and look at other problems impeding emergency relief in commercial arbitration today. Section V will propose ways for emergency relief in international commercial arbitration to grow, develop, and become widely utilized just as international commercial arbitration is. Finally, a short conclusion in Section VI will emphasize the ways this growth could take place.

II. Background

Unlike traditional litigation, international commercial arbitration is completely voluntary.[1] The arbitral tribunal's power over the parties derives directly from the parties' arbitration agreement.[2] International commercial arbitration is a private dispute resolution system[3] that provides parties with substantial control over the proceedings,[4] as well as confidentiality.[5] Parties to an international commercial arbitration agreement have control over many different procedural elements that are beyond their control when litigating a dispute in court.[6] These elements include control over the number of arbitrators, the selection of the arbitrators (or at least the manner in which they will be chosen),[7] whether the arbitration will take place through an arbitral institution or conducted ad hoc,[8] where the arbitration will take place,[9] and the language in which the arbitration will be conducted.[10] Arbitration ensures that neither party has a "home court" advantage,

[1] Margaret L. Moses, The Principles and Practice of International Commercial Arbitration 2 (2nd ed. 2012).

[2] *Id.*

[3] *Id.* at 1.

[4] *Id.* at 2.

[5] *Id.* at 3.

[6] *Id.* at 2.

[7] *Id.* at 46-7.

[8] *Id.* at 9.

[9] *Id.* at 47-8.

[10] *Id*. at 48.

thereby creating a more neutral forum than a court in either party's country could offer.[11]

Unlike a court decision, an arbitrator's award generally cannot be overturned on its merits.[12] As a result, the final award in arbitration proceedings is rarely overturned.[13] An award from an international commercial arbitration proceeding is often easier to enforce than an award from a foreign court.[14] This is a result of the success of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention," or "Convention").[15] The New York Convention was enacted on June 7, 1959, and there are now 147 parties to the Convention.[16] The Convention provides that "signatory nations must recognize arbitral awards issued in foreign signatory nations, subject to several very narrow exceptions."[17]

Due to the popularity of international commercial arbitration, many institutions dedicated solely to administering such arbitration proceedings exist today.[18] While these institutions successfully arbitrate hundreds of claims each year,[19] the international commercial arbitration process does have some shortcomings, including the inability of parties to appeal decisions, limited discovery, and the limited power an arbitrator has to force compliance with deadlines and other requests.[20] In addition to these disadvantages, the arbitration process can be a slow one. Arbitrators do not have the ability to penalize parties if they do not comply with requests of the arbitrator.[21] As a result, a party can draw out an arbitration proceeding and delay resolution if it so desires. The process can be lengthy for other reasons as well. It may take an extensive period of time to appoint an arbitrator, or a panel of arbitrators, and then even longer to set a hearing schedule convenient for all parties involved in the arbitration.[22] This can be a dangerous position to be caught in. If a party has already applied to begin an arbitration proceeding but a tribunal has not been appointed, the party is two

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[11] *Id.* at 3.

[12] *Id.* at 203. For more information on judicial review of arbitral awards see generally Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 61-Jan DISP. RESOL. J. 16 (2006-2007).

[13] *Id*.

[14] Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AM. REV. INT'L ARB. 317, 319-20 (2009).

[15] *Id.* at 320.

[16] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations Treaty Collection, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg-_no=XXII-1&chapter=22&lang=en#EndDec (last visited Sept. 9, 2012).

[17] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 1, June 10, 1958, 9 U.S.C. .§ 201, 330 U.N.T.S. 3.

[18] MOSES, *supra* note 1, at 10.

[19] *Statistics-2011*, Singapore International Arbitration Centre, http://www.siac.org.sg/-index.php?option=com_content&view=article&id=339&Itemid=73 (last visited Sept. 9, 2012).

[20] MOSES, *supra* note 1, at 4-5.

[21] *Id*. at 5.

[22] Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 299, 300 (2006).

steps away from obtaining any type of relief. First a tribunal has to be appointed and then the actual arbitration proceedings must take place. These challenges do not bode well for a party seeking emergency relief before or during the arbitration proceedings.

If a party cannot obtain emergency relief through arbitration, they are forced to turn back to the courts. Emergency relief has been available in judicial systems around the world for many years but was not contemplated by international arbitration institutions until recently.[23] In 2006, the United Nations Commission of International Trade Law (UNCITRAL) amended the UNCITRAL Model Law on International Commercial Arbitration 1985 to include provisions for interim relief.[24] Today, most international arbitration rules have been updated to include at least some type of emergency relief provision[25] but resorting to court is still a viable option and is often necessary.[26]

While it is an option, and can be necessary at times,[27] resorting to court causes the parties to sacrifice many of the benefits they hoped to take advantage of by choosing arbitration.[28] For this reason, arbitration institutions are starting to offer different ways for parties to get the emergency relief they require, while still retaining all the benefits of international commercial arbitration.

III. Discussion

Many arbitral institutions have adopted some type of procedure to address a party's need for emergency relief.[29] These procedures range in comprehensiveness and in strategy. Some emergency relief measures only allow a party to receive interim relief after a tribunal has been instituted but before the final award is made.[30] Few institutions provide a way to expedite the tribunal formation process[31] or allow an emergency arbitrator to step in and issue an emergency award prior to the formation of the arbitration tribunal.[32]

The emergency relief rules of the London Court of International Arbitration (LCIA), the American Arbitration Association International Centre for Dispute Resolution (ICDR), the Singapore International Arbitration Centre (SIAC), the Stockholm Chamber of Commerce (SCC) and the International Chamber of Commerce International Court of Arbitration (ICC) are discussed below. These institutions have taken varying approaches to solving the emergency relief problem. Although some institutions offer different forms of emergency relief, this

[23] *Id.* at 299-300.

[24] *Id.*

[25] Sherwin & Rennie, *supra* note 14, at 321.

[26] Davies, *supra* note 22, at 301.

[27] *Id.*

[28] Sherwin & Rennie, *supra* note 14, at 317.

[29] *Id.* at 321.

[30] *Id.* at 357.

[31] *Id.*

[32] *Id.*

article will focus on the provision of relief prior to the formation of an arbitral tribunal.

A. London Court of International Arbitration

The LCIA was formally established in 1892,[33] and currently operates under rules that entered into force on January 1, 1998.[34] In 2010, the LCIA handled 246 arbitration cases.[35] Although the institution is currently reviewing its rules and likely will update them soon, the current set of rules provides for one type of emergency relief prior to the formation of the arbitral tribunal.[36]

Article 9 of the LCIA Arbitration Rules (the "LCIA Rules") lays out a procedure for the expedited formation of a tribunal.[37] This article allows for such an expedited formation in cases of "exceptional urgency."[38] Any party can apply to the LCIA Court for expedited formation on or after the *commencement* of the arbitration,[39] so the parties do not already have to be engaged in arbitration or have an arbitral tribunal appointed to receive emergency relief. Article 9 states, "[T]he LCIA Court may, in its complete discretion, abridge or curtail any time-limit under these Rules for the formation of the Arbitral Tribunal, including service of the Response and of any matter or documents adjudged to be missing from the Request."[40] Article 9 limits what time limits the LCIA Court may abridge.[41] The LCIA Court may not abridge or curtail any time limit other than those mentioned specifically.[42] This limits their ability to fast track proceedings but is still useful when trying to cut down on the length of the proceedings.

Article 25 of the LCIA Rules lays out the rules regarding interim and conservatory measures.[43] Unless parties choose to opt-out of this Article in writing, Article 25.1(a) gives the Arbitral Tribunal power to order any respondent to "provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate."[44] Article 25.1(b) gives the Arbitral Tribunal the power to "order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitra-

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[33] *History of the LCIA*, LCIA ARB. AND ADR WORLDWIDE, http://www.lcia.org/LCIA/-Our_History.aspx (last visited Sept. 9, 2012).

[34] *LCIA Arbitration Rules*, LCIA ARB. AND ADR WORLDWIDE, http://www.lcia.org/-Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx (last visited Sept. 9, 2012).

[35] LONDON COURT OF INTERNATIONAL ARBITRATION, DIRECTOR GENERAL'S REPORT 1 (Mar. 2011).

[36] LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES (1998).

[37] *Id.* art. 9.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* art. 25.

[44] *Id.* art. 25.1(a).

tion."[45] Essentially, Article 25.1 gives the Arbitral Tribunal the power to protect assets. Finally, Article 25.3 ensures that each party's right to seek interim or conservatory relief from a court is preserved.[46]

Article 9 and Article 25.1 work together to create emergency relief prior to the formation of an arbitral tribunal. A party has the ability to convene a tribunal quickly under Article 9 and then ask for the preservation of assets under Article 25.1. Although there are no procedures to appoint an emergency arbitrator, the rules do provide an option for parties looking for emergency relief within arbitration. Nonetheless, they will not be as immediate as proceedings that utilize an emergency arbitrator.

B. American Arbitration Association's International Centre for Dispute Resolution

The American Arbitration Association (AAA) ICDR was established in 1996 as a part of the AAA to handle the growing number of international arbitrations.[47] ICDR's current International Arbitration Rules (the "ICDR Rules") went into force on June 1, 2009.[48] The ICDR handles several hundred multinational cases each year but does not offer specific numbers.[49]

Article 37 of the ICDR Rules is entitled "Emergency Measures of Protection."[50] Unless parties opt-out of Article 37, it applies to arbitrations conducted under arbitration clauses or agreement entered into on or after May 1, 2006.[51]

Article 37 is meant to help parties "in need of emergency relief prior to the constitution of the tribunal."[52] Parties must properly apply for emergency arbitration as required under Article 37, paragraph 2.[53] After they do so, "a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications" will be appointed within one business day.[54] If either party is going to challenge the appointment, they must do so within one business day of learning who was appointed and the possible conflicts of interest the arbitrator might have.[55] Once the emergency arbitrator is appointed, the arbitrator "shall as soon as possible, but in any event within two business days of appoint-

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[45] *Id.* art. 25.1(b).

[46] *Id.* art. 25.3.

[47] *About the International Centre for Dispute Resolution*, AM. ARB.ASS'N, http://www.adr.org/about_icdr (last visited Sept. 9, 2012).

[48] INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) art. 37 (2009).

[49] *About the International Centre for Dispute Resolution*, *supra* note 47.

[50] INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, *supra* note 48, art. 37.

[51] *Id.* art. 37.1.

[52] *Id.* art. 37.2.

[53] *Id.*

[54] *Id.* art. 37.3.

[55] *Id.*

ment, establish a schedule for consideration of the application for emergency relief.[56]

The emergency arbitrator has power to "order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property."[57] They also have the power to "modify or vacate the interim award or order for good cause shown."[58] The emergency arbitrator has no power once the tribunal is formed, and can only serve as a member of the tribunal if the parties agree to it.[59]

Finally, Article 37 states that seeking interim relief from a judicial authority is not incompatible with "Article 37 or with the agreement to arbitrate or a waiver of the right to arbitrate."[60]

Article 37 of the ICDR Rules offers a different type of emergency relief procedure than the LCIA Rules. This type of procedure gives a party the option of bringing in an emergency arbitrator who is completely separate from the arbitral panel that will inevitably be convened. To facilitate this, Article 37 allocates specific periods of time for completing steps and procedures each party must follow in seeking an emergency arbitrator. In fact, Article 37 has had success in producing emergency relief since its implementation in May of 2006.[61]

C. Singapore International Arbitration Centre

The SIAC was established in 1991.[62] The rules the SIAC is currently using went into force on July 1, 2010.[63] The SIAC administered 140 international arbitration cases in 2010.[64]

While the SIAC's rules do contain rules for expedited procedure in Article 5 and interim and emergency relief in Article 26, the emergency relief for parties requiring it before the creation of an arbitral tribunal is laid out in Schedule 1, "Emergency Arbitrator," of the Arbitration Rules of the Singapore International Arbitration Centre.[65]

The SIAC's rules in Schedule 1 for an Emergency Arbitrator are similar to the rules in Article 37 of the ICDR's International Arbitration Rules. A party can apply for emergency relief under Schedule 1 "concurrent with or after filing a

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[56] *Id.* art. 37.4.

[57] *Id.* art. 37.5.

[58] *Id.*

[59] *Id.* art. 37.6.

[60] *Id.* art. 37.8.

[61] Guillaume Lemenez & Paul Quigley, *The ICDR's Emergency Arbitrator Procedure in Action, Part I: A Look at the Empirical Data*, 63 Disp. Resol. J. 60, 69 (2008).

[62] Singapore Int'l Arb. Centre, http://www.siac.org.sg (last visited Jan. 13, 2012).

[63] *Our Rules*, Singapore Int'l Arb. Centre, http://www.siac.org.sg/cms/index.php-?option=com_content&view=article&id=72&Itemid=85 (last visited Jan. 13, 2012).

[64] *Statistics-2011*, *supra* note 19.

[65] Singapore International Arbitration Centre, Arbitration Rules of the Singapore International Arbitration Centre sched. 1 (4th ed. 2010).

Notice of Arbitration but prior to the constitution of the tribunal."[66] The Chairman, if he decides the Centre should accept the application, should appoint an Emergency Arbitrator within one business day of the receipt of the application and payment.[67] The parties have one business day from the identification of the Emergency Arbitrator to identify any possible conflicts.[68] After the Emergency Arbitrator is appointed, he many not act as an arbitrator for any future arbitrations relating to the dispute unless the parties agree otherwise.[69]

After appointment, the Emergency Arbitrator has two business days to propose a schedule.[70] That schedule must allow parties time to be heard, and can allow for the use of alternative methods like written submissions or telephone conference.[71] After a hearing takes place, the Emergency Arbitrator has the "power to order or award any interim relief that he deems necessary."[72] He also has the power to "modify or vacate an interim award or order for good cause shown,"[73] but has no more power after the tribunal is constituted.[74]

The SIAC's rules place an expiration date on the interim award.[75] "Any order or award issued by the Emergency Arbitrator shall, in any event, cease to be binding if the Tribunal is not constituted within 90 days of such order or award or when the Tribunal makes a final award or if the claim is withdrawn."[76]

Again, these rules are very similar to the ICDR emergency relief rules. Both sets of rules provide a comparable procedure and timeline. One of the only real differences is the expiration of the order or award under the SIAC's rules.

D. Stockholm Chamber of Commerce

The SCC was established in 1917.[77] The SCC's current arbitration rules went into force January 1, 2010.[78] In 2010, the SCC handled 197 arbitration cases, 91 of which were international.[79]

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[66] *Id.* sched. 1, para. 1.

[67] *Id.* sched. 1, para. 2.

[68] *Id.* sched. 1, para. 3.

[69] *Id.* sched. 1, para. 4.

[70] *Id.* sched. 1, para. 5.

[71] *Id.*

[72] *Id.* sched. 1, para. 6.

[73] *Id.*

[74] *Id.* sched. 1, para. 7.

[75] *Id.*

[76] *Id.*

[77] *About the SCC*, ARB. INST. OF THE STOCKHOLM CHAMBER OF COM., http://www.chamber.se-/hem-3/om-oss-3.aspx (last visited Sept. 9, 2012).

[78] *Rules*, ARB. INST. OF THE STOCKHOLM CHAMBER OF COM., http://www.chamber.se-/skiljeforfarande-2/regler-4.aspx (last visited Sept. 9, 2012).

[79] *SCC Continues to Soar*, ARB. INST. OF THE STOCKHOLM CHAMBER OF COM., http://www.chamber.se/hem-3/statistik-2.aspx (last visited Sept. 21, 2012).

Appendix II of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce is entitled "Emergency Arbitrator,"[80] and lays out a very detailed procedure for emergency relief measures to be used before the case is referred to an arbitral tribunal.[81] The SCC's rules and procedures are similar to those of the ICDR and SIAC, but are more detailed and include more specific requirements for applications and awards,[82] referring to other articles from the rules to clarify powers and procedures.[83]

Appendix II of the SCC's arbitration rules lays out the emergency relief procedure in ten articles.[84] A party can apply for the appointment of an Emergency Arbitrator up until the case has been referred to an Arbitral Tribunal.[85] Once the case has been referred to an Arbitral Tribunal or when the emergency decision is no longer binding, the Emergency Arbitrator's powers terminate.[86] An application for the appointment of an Emergency Arbitrator must contain certain information such as a summary of the dispute—"a statement of the interim relief sought and the reasons therefore."[87] When this application is received, the secretariat of the SCC must send it to the other party to the arbitration.[88] The SCC's board of directors has 24 hours to appoint an Emergency Arbitrator after receipt of the application, and each party shall have 24 hours to challenge the appointment after they learn whom the Emergency Arbitrator is and what possible conflicts of interest he or she might have.[89]

Additionally, the emergency arbitration proceedings must be completed within a specific timeframe.[90] "Any emergency decision on interim measures shall be made not later than 5 days from the date upon which the application was referred to the Emergency Arbitrator."[91] This time can be extended upon the request of the Emergency Arbitrator.[92] The Emergency Arbitrator's decision is binding on both parties and both parties must comply with the decision until it ceases to be binding.[93] The emergency decision ceases to be binding if and when any of the following occur:

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[80] Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm Chamber of Commerce, Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce app. II (2010).

[81] *Id.* app. II, art. 1.

[82] *Id.* app. II, art. 2, 8.

[83] *Id.* app. II, art. 1, 2, 4, 7, 8.

[84] Id. app. II.

[85] *Id.* app. II, art. 1.

[86] *Id.*

[87] *Id.* app. II, art. 2.

[88] *Id.* app. II, art. 3.

[89] *Id.* app. II, art. 4.

[90] *Id.* app. II, art. 8.

[91] *Id.*

[92] *Id.*

[93] *Id.* app. II, art 9.

> (i) the Emergency Arbitrator or an Arbitral Tribunal so decides; (ii) an Arbitral Tribunal makes a final award; (iii) arbitration is not commenced within 30 days from the date of the emergency decision; or (iv) the case is not referred to an Arbitral Tribunal within 90 days from the date of the emergency decision.[94]

The SCC's is one of the most detailed plans for emergency relief currently in force. The Appendix itself addresses more issues than other sets of rules and where it does not fully address an issue, the rules refer the reader to an Article within the SCC rules that does address it. The comprehensive nature of these rules helps a party understand the process and how their emergency arbitration will be handled.

E. International Chamber of Commerce International Court of Arbitration

Finally, the ICC International Court of Arbitration was established in 1923.[95] The ICC recently passed a new set of arbitration rules that went into force on January 1, 2012.[96] In 2010, the ICC handled 793 requests for arbitration.[97]

The ICC International Court of Arbitration has the newest emergency relief provision examined in this article. The previous set of rules, in force between January 1, 1998 and December 31, 2010,[98] contained an option for a pre-arbitral conference.[99] The new set of rules contains the most comprehensive set of emergency relief procedures of all institutional rules considered in this article.

The ICC's "Emergency Arbitrator" rules start in Article 29 of its arbitration rules.[100] Article 29 contains some general rules about when emergency arbitration is appropriate but refers to Appendix V for the majority of the rules.[101] Article 29 clarifies that an application for an Emergency Arbitrator should be filed when "a party needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal."[102] In this situation, Appendix V rules are appropriate.[103] Article 29 also specifies when the Emergency Arbitrator

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[94] *Id.*

[95] *The Merchants of Peace*, INT'L CHAMBER OF COM.: INT'L CT. OF ARB., http://www.iccwbo.org/about-icc/history/ (last visited Sept. 9, 2012).

[96] *The ICC 2012 Rules of Arbitration*, INT'L CHAMBER OF COM.: INT'L CT. OF ARB., http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-arbitration-procedure/ (last visited Oct. 5, 2012).

[97] *Statistics*, INT'L CHAMBER OF COM.: INT'L CT. OF ARB., http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ (last visited Jan. 13, 2012).

[98] *ICC Dispute Resolution*, INT'L CHAMBER OF COM.: INT'L CT. OF ARB., http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/dispute-board-rules/ (last visited Oct. 5, 2012).

[99] INTERNATIONAL COURT OF ARBITRATION, INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION (1998) [hereinafter RULES OF ARBITRATION].

[100] INTERNATIONAL COURT OF ARBITRATION, INTERNATIONAL CHAMBER OF COMMERCE, ICC RULES OF ARBITRATION art. 29 (2012).

[101] *Id.*

[102] *Id.*

[103] *Id.*

Provisions do not apply.[104] Finally, Article 29 clarifies that these provisions are "not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority."[105]

The rules in Appendix V requires specific information on an application for emergency measures, such as a description of the circumstances that gave rise to the dispute and the application, the emergency measures sought, and the reasons the party cannot wait for a tribunal to be formed.[106] The application must also specify any relevant agreements, such as the arbitration agreement, and any agreement pertaining to the place, language or applicable rule of law to be followed in the arbitration.[107]

The rules dictate that the appointment of an Emergency Arbitrator should take place as soon as possible—normally within two days of receipt of the application.[108] If a party wishes to challenge an appointment, they must do so within three days of receipt of the appointment.[109] After the appointment is made, the Emergency Arbitrator must establish a procedural timetable for the proceedings as soon as possible—normally within two days of getting the file.[110]

All of the parameters for the Emergency Arbitrator's decision, the "order," are laid out in Article 6.[111] Certain pieces of information must be in the emergency arbitrator's order, including the reasons for the order, the date, and the Emergency Arbitrator's signature.[112] There are a number of situations that would cause the award to cease to be binding.[113] These may include a challenge to the award, a final award by the arbitral tribunal, or withdrawal of the claim.[114]

The ICC's new rules are extremely detailed. They apply specifically to each step of the emergency arbitration process, just like the rules governing the regular arbitration process. Rules this thorough specificity makes emergency relief more accessible and makes the choice to go to arbitration instead of the courts less of a guessing game.

These five institutions all provide emergency relief for a party before the arbitral tribunal is formed. While most arbitral intuitions provide for interim relief,[115] far fewer allow parties access to emergency relief before the formation of an arbitral tribunal.[116]

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[104] *Id.*

[105] *Id.*

[106] Id. app. V, art. 1.

[107] *Id.*

[108] *Id.* app. V, art. 2.

[109] Id. app. V, art. 3.

[110] Id. app. V, art. 5.

[111] Id. app. V, art. 6.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Davies, *supra* note 22, at 299.

[116] Sherwin & Rennie, *supra* note 14, at 357.

IV. Analysis

Emergency relief has been described as the "Achille's heel" of international arbitration.[117] This is historically one of the few areas of arbitration where use of the traditional judicial system could be more efficient and is more likely to produce the desired results.[118] However, the emergency relief measures discussed above are those five institutions' attempts to change that.[119] While it is likely true that there are some situations where courts will always be necessary—such as joining a third party the arbitrator does not have jurisdiction over[120]—international arbitral institutions can change and mold their rules to make emergency arbitration the preferred method of obtaining emergency relief in most cases.

Arbitral institutions have adjusted their rules to allow for interim relief after an arbitral tribunal is in place,[121] but have been slower to provide a way to obtain relief before an arbitral tribunal is in place.[122] Relief of this kind is important to the continued growth and success of international commercial arbitration. This is the case for a number of reasons. First, timing is often the crucial reason for requesting emergency relief.[123] A party is frequently trying to preserve something—be it money or property—which may be compromised if no action is taken to preserve it.[124] The judicial system can be efficient in a situation like this, while many arbitral institutions require the formation of an arbitral tribunal before making any decisions. This process can take months.[125] Unless the parties were already involved in arbitration proceedings, the judicial system used to provide the only safe and reliable option for obtaining emergency relief. The five institutions' rules for emergency relief before the appointment of an arbitral tribunal have addressed this problem in different ways.

A. The Rules

The LCIA Rules is the only set of rules out of the five discussed above that contains provisions for expedited formation of a tribunal rather than for the appointment of a pre-tribunal emergency arbitrator.[126] While this process is not as quick as an emergency arbitrator can be, expedited formation of a tribunal is a

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[117] Davies, *supra* note 22, at 333.

[118] Moses, *supra* note 1, at 105-12.

[119] *See supra* Part III (describing the attempts by the institutions to change the emergency relief measures available in international arbitration).

[120] *Id.* at 300.

[121] Sherwin & Rennie, *supra* note 14, at 357.

[122] *Id.*

[123] *Id.* at 322.

[124] Moses, *supra* note 1, at 105.

[125] Davies, *supra* note 22, at 300.

[126] *See supra* Part III (describing the LCIA rules, among other sets of rules of the institutions, in the context of emergency relief).

great option if timing is not as essential or if the parties can wait out the extra time.[127]

By opting for expedited formation of the tribunal, the parties can get an award from the same tribunal that will decide their final award.[128] This way there is only one set of decision makers who will follow the case through from beginning to end.[129] This setup is more cohesive and likely more efficient in the long run than having an emergency arbitrator step in. Again, for this to really work, the need for relief cannot be as urgent as it is when emergency arbitrator proceedings are invoked. Even though this process is not as rapid, expedited formation is still a promising option for parties when timing is not the driving consideration.

The ICDR was one of the first major institutions to allow emergency arbitrators to step in.[130] Article 37 of the ICDR has been successful in achieving the end goal of providing relief.[131] The ICDR only offers emergency relief by way of an emergency arbitrator.[132] They do not have rules for expedited proceedings. This leaves parties with one option. Although it is the preferable option when time is of the essence, having only one option is a disadvantage to the institution.

Emergency situations can call for a range of different remedies. If an arbitration institution offers a variety of possible solutions, parties are more likely to find a remedy that suits them within arbitration instead of having to resort to the judicial system for an appropriate remedy.

The SIAC rules offer both remedies under Article 5 that allows expedited procedure[133] and Schedule 1 has rules for an Emergency Arbitrator.[134] Article 5 is limited to situations where the amount in controversy does not exceed $5,000,000, where the parties agree to the expedited procedure, or when there is a case of exceptional urgency.[135] Only one of these criteria has to be satisfied to qualify for expedited proceedings.[136] Because SIAC rules have two different types of remedies available before a tribunal is formed, parties seeking emergency relief with the SIAC can choose the best course of action for their specific situation. This is a benefit that few other institutions offer.

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[127] Sherwin & Rennie, *supra* note 14, at 322.

[128] Article 9 provides for the expedited formation of an arbitral tribunal once the arbitration has commenced. This refers to the formation of the final arbitral tribunal, not just an emergency arbitrator. Therefore, the tribunal being formed under this rule on an emergency basis is the tribunal that will decide the entire dispute. LCIA Arbitration Rules, *supra* note 36, at art. 9.

[129] *Id.*

[130] Sherwin & Rennie, *supra* note 14, at 339.

[131] Lemenez & Quigley, *supra* note 61, at 64.

[132] Lemenez & Quigley, *supra* note 61, at 62.

[133] Singapore International Arbitration Centre, *supra* note 65, art. 5.

[134] *Id.* sched. 1.

[135] *Id.* art. 5.1.

[136] *Id.*

The SCC also offers both expedited proceedings[137] and emergency arbitrator proceedings,[138] but in order to take advantage of their expedited proceedings both parties have to agree to participate.[139] So while the SCC offers both types of relief, it is not always easy to get the other party to agree to expedite proceedings in an emergency situation. As a result, parties might not be able to take advantage of their preferred option—as they likely could under SIAC rules.

The SCC's emergency arbitration provision, however, is a very effective option. These rules do not set as many hard and fast deadlines during the process like other institutions do, but instead state that a decision "shall be made not later than 5 days from the date upon which the application was referred to the Emergency Arbitrator."[140] The structure of this procedure allows for more flexibility while still assuring parties that the process will be completed in five days. Although the SCC's expedited rules might not lend themselves to emergency relief in every situation, their emergency arbitrator rules provide for speedy relief.

The ICC is one of the oldest and best-known arbitral institutions.[141] It also has the newest set of rules out of the five institutions reviewed for this article. Before these new rules went into effect, the ICC only offered a "Pre-Arbitral Referee Procedure."[142] Parties had to specifically opt-in to this clause before they could use it.[143] This was one of the first attempts by an arbitration institution to provide for urgent relief[144] and remains an option today.[145] That said, the process could take up to 38 days[146] and has been rarely used.[147]

The new rules contain a much more extensive emergency arbitration procedure. While the ICC's arbitration rules do not address expedited formation or procedure, the emergency arbitrator procedure they now have is the most thorough of the five institutions discussed in this article.

The time limits in the new ICC rules are not as tight as the time limits in other institutions' emergency arbitrator rules. There is more time given at each step and the total process must be completed "no later than 15 days from the date on which the file was transmitted to the emergency arbitrator."[148]

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[137] Stockholm Chamber of Commerce, Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce 2010, at 2 (2010) [hereinafter SCC Rules for Expedited Arbitrations].

[138] Arbitration Institute of the Stockholm Chamber of Commerce, *supra* note 80.

[139] SCC Rules for Expedited Arbitrations, *supra* note 137.

[140] Arbitration Institute of the Stockholm Chamber of Commerce, *supra* note 80, app. II, art. 8.

[141] Sherwin & Rennie, *supra* note 14, at 338.

[142] Rules of Arbitration, *supra* note 99, at 3.

[143] *Id.*

[144] Sherwin & Rennie, *supra* note 14, at 339.

[145] International Court of Arbitration, International Chamber of Commerce, Rules for a Pre-Arbitral Referee Procedure (1990) [hereinafter Rules for a Pre-Arbitral Referee Procedure].

[146] Sherwin & Rennie, *supra* note 14, at 339.

[147] *Id.* at 340.

[148] International Court of Arbitration, *supra* note 100, app. V, art. 6.

In addition to the extended time limits, these rules provide specifics for every step of the process. Few institutions specify the language of the application or the place the arbitration will be held. These are important parts of an arbitration proceeding. Creating specific rules for each step of the arbitration could prevent possible delay resulting from working through these measures on an ad hoc basis.

It is important that the ICC changed their emergency relief rules. The ICC rules may be the most widely used rules in international arbitration.[149] An institution of this size could set a powerful example for the rest of the international arbitration community by adopting a cohesive emergency arbitrator procedure. If other institutions follow this example, emergency relief could become more widely available and help strengthen this weak spot in international arbitration.

Each set of rules varies in the exact types of emergency relief offered before an arbitral tribunal is convened. There are positives and negatives to each system, but the systems that allow a party to choose between different courses of action are the institutions that give parties a chance to address their problems in the way that most suits them. These institutions also are more likely to create a way for parties to avoid court. Some emergency situations are urgent. For these situations parties can utilize the emergency arbitrator. For less urgent situations that still require a decision before normal arbitration proceedings would be able to provide one, parties can choose expedited procedure. If an institution is missing either step, a party may have to resort to court for a remedy or use a more rushed process than they preferred.

B. Preserving the Right to Seek Help From Courts

Even as institutions work and adjust their rules to create emergency relief procedures for parties who want to participate in arbitration, each of the five institutions discussed above has preserved in its rules the parties' ability to seek relief from a judicial system, especially before the formation of the tribunal.

The LCIA Rules say the arbitral tribunal's power "shall not prejudice howsoever any party's right to apply to any state court or other judicial authority for interim or conservatory measure before the formation of the Arbitral Tribunal and, in exceptional cases, thereafter."[150] The ICDR Rules state that a party's request for interim relief from a judicial system "shall not be deemed incompatible with this Article 37 or with the agreement to arbitrate or a waiver of the right to arbitrate."[151] The SIAC's rules state that a request for interim relief from a judicial authority before the Tribunal is formed, or, in exceptional circumstances, after the formation, "is not incompatible with these Rules."[152] The SCC's rules proved that a request is not incompatible with arbitration agreement or with the SCC's rules.[153] Finally, the ICC Rules say "the Emergency Arbitrator Provisions

[149] Sherwin & Rennie, *supra* note 14, at 338.

[150] London Court of International Arbitration, *supra* note 36, art. 25.3

[151] International Centre for Dispute Resolution, *supra* note 48, art. 37.8.

[152] Singapore International Arbitration Centre, *supra* note 65, art. 26.3.

[153] Arbitration Institute of the Stockholm Chamber of Commerce, *supra* note 81, art. 32.5.

are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measure, and in appropriate circumstances even thereafter."[154] The ICC does require that parties notify the Secretariat of any action taken by a judicial authority.[155]

All of these institutions have deliberately kept this option open for parties. This is important because there are situations where a court is necessary to provide relief. Arbitrators do not have coercive powers.[156] They cannot compel compliance in the same way the courts can.[157] Additionally, arbitrators can rarely join outside parties.[158] These parties have not agreed to arbitrate and therefore do not have to participate in the proceedings. If the emergency relief a party is seeking involves a third party in some way, court is often the best option.

As all of these institutions have recognized, national courts are the exclusive holder of certain powers required to assist and facilitate arbitration and interim relief.[159] There is also some level of consensus that "the local court can have a proper and beneficial part to play in the grant of supportive measures."[160]

This need for the court system presents an interesting hurdle for international arbitral institutions. These institutions are trying to provide a way for parties to enter into arbitration proceedings in any circumstance, but to do so knowing that parties will always want the option to resort to court. In order to handle this, it is important, again, for institutions to provide parties with as many options as possible so courts are truly the parties' last resort. Parties want to arbitrate. They enter into agreements to arbitrate because of the many advantages of arbitral proceedings over court proceedings. If arbitral institutions continue to adjust their rules and find ways to resolve different problems, the number of situations where the judicial system is absolutely necessary may diminish.

C. The Role of the Judicial System

However, not all courts have the ability to grant interim awards or enforce interim awards handed down by arbitrators. "The source of the court's jurisdiction to order interim measures depends on when and how the application for assistance is made, and also on the kind of measure sought."[161] In the United States, there is no consensus on how a court can intervene.[162] The only official power a court has regarding arbitration, under the Federal Arbitration Act (FAA),

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154 INTERNATIONAL COURT OF ARBITRATION, *supra* note 102, art. 29.

155 *Id.*

156 MOSES, *supra* note 1, at 5.

157 *Id.*

158 *Id.*

159 Davies, *supra* note 22, at 300-01.

160 *Id.* at 301.

161 *Id.* at 303.

162 Ira M. Schwartz, *Interim and Emergency Relief in Arbitration Proceedings*, 63 DISP. RESOL. J. 56, 60 (2008).

is to order the parties to arbitrate.[163] United States courts are not in agreement about whether or not they can grant an interim award in conjunction with an order to compel arbitration.[164] The answer can depend on factors like which party brought the request, if that party is trying to aid arbitration or avoid it, and the type of relief sought.[165]

Part of the reason US courts do not agree on whether or not they can provide emergency relief is the concern that parties will use emergency relief from the courts to avoid their arbitration agreement.[166] Courts want to enforce contracts. They want parties who agreed to arbitrate to do so. The US courts would benefit from a rule like the one in the English Arbitration Act 1996[167] to clarify what they can and cannot do.

English courts have the power to make interim awards that aid international arbitration under the English Arbitration Act 1996.[168] English courts have broad power to issue interim relief to any party who requests it, but are hesitant to do so in cases that are not connected to the United Kingdom in some way.[169]

The New York Convention does not address this issue so there is not the same type of uniformity between countries' actions concerning interim awards and their enforcement as there is concerning other international arbitration issues. The UNCITRAL Model Law on International Commercial Arbitration does address this issue. The Model Law says that interim awards made by court systems before or during arbitral proceedings are not incompatible with an arbitration agreement.[170] Countries that have adopted the 2006 version of the UNCITRAL Model Law do allow courts to make interim awards.

This type of variation can be a problem for parties but the adaptation of emergency relief measures by arbitration institutions can only help to alleviate it. Emergency arbitration provisions can help parties avoid this problem, especially in the United States where there is no consensus on the courts' role in granting interim relief to parties engaging in international arbitration.[171]

Pre-tribunal emergency relief has developed significantly since many of the first emergency arbitrator provisions went into force in 2006. Institutions now offer different types of emergency relief as well, but the number of institutions offering relief needs to continue to grow and the clarity surrounding the emergency relief process and enforcement of an emergency award need to increase.

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163 Federal Arbitration Act, 9 U.S.C. § 206 (1970).

164 Davies, *supra* note 22, at 303-13.

165 *Id.*

166 Davies, *supra* note 22, at 301.

167 English Arbitration Act 1996, ch. 23, art. 39, 44.

168 Schwartz, *supra* note 162, at 60.

169 *See* Davies, *supra* note 22, at 319-22 (although the English Arbitration Act of 1996 gives courts in the UK the power to assist not only arbitrators in the UK, but also arbitrators in foreign arbitration, the jurisprudence developing around this power suggests it should be used sparingly).

170 *Id.* at 322.

171 Schwartz, *supra* note 162, at 60.

V. Proposal

Arbitration institutions should continue to create and offer new and varying options for emergency relief. The more options parties have to choose from, the more likely they are to find and choose one that fits their specific needs.

The first step in this process is for more institutions to adopt measures that allow parties to obtain emergency relief from the arbitration institution before the formation of the arbitral tribunal. Since the UNCITRAL model rules were updated in 2006 to contain emergency relief provisions,[172] more institutions have been adopting them. The new ICC rules should also help move more institutions in that direction. Because the ICC is so prominent and widely used, other institutions are likely to look to them and follow their example.

After more institutions adopt these measures and start to work out the kinks in them, each institution should try to incorporate other forms of emergency relief procedures into their rules. Institutions should continue to alter their rules as they find issues or areas that require clarification. It is important that emergency arbitration procedure continues to evolve and change just as international arbitration is evolving and changing. Keeping emergency provisions current and adjusting the rules to be as efficient and useful as possible will help this area of arbitration grow and become trusted to be relied upon by the international community. To do this, institutions must learn from each emergency arbitration proceeding and adjust to case law as it develops.

It is important that different institutions keep their individuality. Each arbitration institution has its own set of rules in place. Parties choose a specific arbitration institution for a number of different reasons, such as its rules, its administration, the types of disputes the institution specializes in and its location. All of these factors are important. The type of emergency relief the institution can offer is important as well. Each institution has developed its specific set of arbitration rules for a reason. Each institution had to assemble the appropriate set of general arbitration rules for their institution, and will have to do the same for their emergency arbitration rules.

Arbitration institutions will have to specify which emergency remedies will be available in any given situation. For example, the SCC only allows expedited proceedings if both parties agree to them.[173] The SIAC allows expedited proceedings to take place if any one of three possible conditions is met.[174] Neither the SIAC[175] nor the SCC[176] has this type of restriction on their emergency arbitrator procedures. These institutions chose to restrict the rules the way they did for a reason. Institutions have to consider this for all types of relief. Clarity and comprehensiveness will make emergency arbitration more approachable. Clear

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[172] Davies, *supra* note 22, at 299-300.

[173] SCC Rules for Expedited Arbitrations, *supra* note 141, app. II.

[174] Singapore International Arbitration Centre, *supra* note 65, art. 26.3.

[175] *Id.* sched. 1.

[176] Arbitration Institute of the Stockholm Chamber of Commerce, *supra* note 80, art. 9, app. II.

and understandable rules will help businesses trust emergency relief procedures and as a result, this area of international arbitration can grow.

Part of the problem with emergency relief in international arbitration is that it is such a nascent area of law. As a result, there is still much uncertainty surrounding important issues. There is a lack of uniformity in how judicial systems grant interim awards when arbitration is involved.[177] There is also a grey area around the enforcement of the awards made by emergency arbitrators.[178] Issues like these will only be ironed out as courts and legislatures see the problems and fix them. Arbitration institutions should be on the forefront of tracking these changes and helping potential arbitration clients understand the possible benefits and consequences of choosing to seek emergency relief from an institution instead of a court.

In that same vein, legislatures can do a lot to clear up how emergency relief will be handled in each country. This would help parties become comfortable with what will happen if they choose emergency arbitration over resorting to a judicial system.

Essentially, emergency arbitration proceedings need to offer parties the same benefits as normal arbitration proceedings. By clarifying the conditions under which emergency arbitration takes place and by creating and maintaining a diverse set of emergency relief options for parties to choose from, this can happen. It will take work from arbitration institutions, courts, and legislatures to make emergency arbitration beneficial and reliable for parties, just as it did to make general arbitration as trustworthy and popular as it is today.

VI. Conclusion

In conclusion, incorporating emergency relief prior to the formation of the arbitral tribunal was a necessary step in the growth of international arbitration. Now that more international arbitration institutions have adopted emergency relief provisions, participating in emergency arbitration must offer the same benefits that participating in standard international commercial arbitration offers.

Arbitral institutions need to offer a variety of emergency relief measures. Two procedures—expedited tribunal formation or proceedings and emergency arbitrator proceedings—are already in place. These two remedies have different strengths and weaknesses, making the application of each type of relief appropriate for different situations. A variety of emergency relief measures need to be in place to make emergency arbitration a more attractive option than emergency relief from the judicial system in as many situations as possible.

There also needs to be more clarity around emergency arbitration proceedings. Parties need to know the consequences of choosing to participate in emergency arbitration over petitioning the courts and vice versa. This cannot happen until it is clear from court systems and from legislatures what the potential roadblocks, consequences, and benefits exist within each national system.

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[177] Schwartz, *supra* note 162, at 60.

[178] *Id.* at 58.

If emergency relief continues to grow and develop, participating in emergency arbitration can become a more attractive option than seeking emergency relief from the courts, just as participating in international arbitration is often a more attractive option than transnational litigation.