

# Michigan Journal of International Law

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Volume 25 | Issue 4

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2004

## Arbitral Law-Making

Thomas E. Carbonneau  
*Penn State Dickinson School of Law*

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### Recommended Citation

Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT'L L. 1183 (2004).  
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# ARBITRAL LAW-MAKING

Thomas E. Carbonneau\*

|   |      |
|---|------|
| I. INTRODUCTION .....                           | 1183 |
| II. THE FOIBLES OF MUNICIPAL ADJUDICATION ..... | 1187 |
| III. THE ARBITRAL SOLUTION .....                | 1195 |
| IV. THE ARBITRAL LEGAL CULTURE .....            | 1199 |
| V. THE ARBITRAL LEX MERCATORIA .....            | 1202 |
| VI. PROSPECTIVE ARBITRAL PRACTICE .....         | 1206 |

## I. INTRODUCTION

Diversity—of a cultural, economic, religious, and political kind—exists not only among nation-states and in the sources and interpretation of international law, but also among the group of commentators who study the interactions of transborder actors and institutions.<sup>1</sup> For example, sociologists interested in the global community<sup>2</sup> seek to identify emerging entities and activities and to elaborate conceptual models that explain the new differentiations within the traditional pattern. Some of them have a mounting interest in the fashioning of transborder commercial justice by international arbitrators and private arbitral institutions.<sup>3</sup> Who are these new players? How did they acquire their mandate? Further, how effective are they in performing their mission?

International relations scholars<sup>4</sup> bring the perspective of historical distance to bear upon contemporary world events. Knowledge of the past can be

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\* Thomas E. Carbonneau is the Samuel P. Orlando Distinguished Professor of Law at the Penn State Dickinson School of Law.

1. The participants in the conference reflect a diversity of approaches to the study of the international system. Symposium, *Diversity or Cacophony?: New Sources of Norms in International Law*, 25 MICH. J. INT'L L. 845 (2004). An emphasis was placed, it seems, upon political history and sociology. Legal considerations and power relationships among States were present but did not dominate. The conference did not relate directly to legal doctrine, but rather studied institutions within the world government and patterns of behavior within the world community. In short, there were many different "takes" on trade and commerce among nations and other sovereign relationships.

2. Saskia Sassen, Ralph Lewis Professor of Sociology, The University of Chicago; Karel Wellens, Professor of International Law, Catholic University of Nijmegen; Gunther Teubner, Professor of Private Law and Legal Sociology, University of Frankfurt.

3. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996); Louise Barrington, *Arbitral Women: A Study of Women in International Commercial Arbitration, in THE COMMERCIAL WAY TO JUSTICE* 229 (Geoffrey M. Beresford Hartwell ed., 1997); Ottoarndt Glossner, *Sociological Aspects of International Commercial Arbitration, in THE ART OF ARBITRATION* 143 (Jan C. Schultz & Albert Jan Van Den Berg eds., 1982).

4. Stephen Krasner, Professor of International Relations, Stanford University; Daniel Philpott, Assistant Professor of Political Science, University of Notre Dame.

instrumental to understanding current events because present-day behaviors often repeat by-gone follies. The U.S. policy in Vietnam from the late 1950s until the fall of Saigon in 1975<sup>5</sup> is an eloquent testimonial to the fact that the passage of time makes nations and their leaders forgetful and foolhardy. Their vanity pushes them to misinterpret the cycle of events as a singular occasion to achieve a new national destiny and personal historic immortality.<sup>6</sup>

In addition to sociologists and international relations scholars, lawyers also annotate transborder events and examine the significance of sovereign relationships. Public international lawyers,<sup>7</sup> in fact, are preoccupied with political conduct among States. Some public internationalists are particularly interested in the exchanges that occur among sovereigns within international organizations. For many of them, legal doctrine does not stand on its own. The true purpose of legal regulation is to integrate the dynamics of global governmental relations into the framework of established public agencies. Bureaucratization can civilize these relationships and permit States to see beyond the pressure of immediate events.<sup>8</sup> The ambition of these academic

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5. See Walter J. Boyne, *The Fall of Saigon*, 83:4 AIR FORCE MAG. (April 2000), available at <http://www.afa.org/magazine/april 2000/0400saigon.asp>; R. FORD, ET AL., GRANTA 15: THE FALL OF SAIGON (1985).

6. Then-Secretary of Defense Robert McNamara and other members of President Johnson's cabinet appear to have ignored the evident lessons that proceeded from the history of Vietnam. The French experience in Vietnam and the fall of Dien Bien Phu should have alerted these advisers to the peril of military involvement in that country. See generally Bruce Kennedy, *Dien Bien Phu: 1954 Battle Changed Vietnam's History*, available at <http://www.cnn.com/SPECIALS/cold.war/episodes/11/spotlight> (last visited Sept. 4, 2004) ("The fall of Dien Bien Phu shocked France and brought an end to French Indochina."); *Battle of Dien Bien Phu*, available at [http://en.wikipedia.org/wiki/Battle\\_of\\_Dien\\_Bien\\_Phu](http://en.wikipedia.org/wiki/Battle_of_Dien_Bien_Phu) (last visited Sept. 4, 2004).

7. The distinction between public and private international lawyers reflects the differentiation made in traditional civil law systems between lawyers who specialize in public law matters and those who work with private law. Public international lawyers focus upon diplomacy, treaties, and international agencies. Their concerns center upon the conduct of States as political entities that seek to advance their national self-interest. They look to organizations such as the World Court (ICJ) or the World Trade Organization (WTO) to help build consensus on various issues of policy-making. In contrast, private international lawyers look to the impact of national laws and courts upon private transborder actors and events. Traditionally, much of their work involves choice-of-law and the conflict of laws—and, inevitably, forum-shopping. Currently, such lawyers chiefly counsel parties about the risks and opportunities of the international marketplace and assist them in dealing with the perplexities of international litigation before national courts or arbitral tribunals. Generally, the clients are private persons, not States or State agencies. The applicable law usually is the tort or contract law of a particular State, not a treaty or a regulatory edict from an international agency. For more on this distinction, see David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 582–85 (1997) (stating that it is "characteristic of public international lawyers" to "combin[e] . . . formalism and fusion with a national political agenda" and that "[p]rivate international lawyers tend to see themselves in relationship to the projects of private parties in a sphere outside government, regulated only exceptionally").

8. Indeed, this is the entire purpose of the WTO and its dispute settlement body (DSB). Rather than have trade wars and protectionism, the WTO attempts to have States agree to basic

diplomats is to influence the conduct of foreign relations and to anticipate the direction of policy in the shifting sands of sovereign self-interest.

International politics, however, can be difficult to harness. Sovereign prerogative can result in policies that exclusively seek momentary advantage. Their creators take comfort in convenience. Higher, longer range objectives often recede to the background because of their risk, cost, and greater difficulty.<sup>9</sup> The volume and intensity of worldwide clashes constantly fragment and reconfigure the international community. The headwind of perpetual discord makes it difficult to reach the eye of the storm. Even when the eye is reached, a greater ferocity lies just beyond the other wall. Unbending, obdurate, and usually invisible, sovereign self-interest seeps into every pore of the international community,<sup>10</sup> often rendering regulatory goals illusory and

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principles and practices on world trade. The agreement, negotiated among sovereigns, is generally intended to foster free and unrestricted trade. The DSB was created to address and sanction violations of the trade agreement. The procedure respects the sovereign character of the participants, but establishes an effective and relatively efficient mechanism for enforcing agreed-upon terms. For an extensive discussion of the WTO and the DSB, see BERNARD M. HOEKMAN, ET AL., DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK (2002); World Trade Organization: Dispute Settlement: Appellate Body, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) (last visited on Sept. 4, 2004); World Trade Organization: Appellate Body Annual Report for 2003, available at [http://www.wto.org/english/news\\_e/news04\\_e/news04\\_e.htm#ab\\_annual\\_report](http://www.wto.org/english/news_e/news04_e/news04_e.htm#ab_annual_report) (released May 7, 2004).

9. At the United Nations the discussion of the invasion of Iraq between the United States and the United Kingdom, on the one hand, and France and Germany, on the other, demonstrated the possible dichotomy in policy approach. The French position against the invasion was based upon the long-standing French attitude, which originated during the presidency of Charles DeGaulle, that France should act as a rival of the United States and thereby set an example for the assertion of national autonomy in the clash of the atomic titans. The French position on Iraq also was substantially motivated by the lucrative contracts, estimated in the hundreds of millions of dollars, that French enterprises had with and through the Saddam regime. The German position may have also been motivated by longer range diplomatic concerns, but it reflected the substantial opposition among the German population to another Gulf war and the pressures of electoral politics. German companies also had large contracts with the former Iraqi government and private Iraqi enterprises. For a discussion of these matters, see Faye Bowers, *Driving Forces in War-Wary Nations; the Stances of France, Germany, Russia, and China are Colored by Economic and National Interests*, CHRISTIAN SCI. MONITOR, Feb. 25, 2003, at 3 (stating that "Germany, too, is owed billions by Iraq in foreign debt"); Patrice M. Jones, *U.S. Successes in War Undercut Chirac's Stance: Business, Party Leaders Critical*, CHI. TRIB., Apr. 12, 2003, at 3 (stating that "[b]oth France and Russia have significant economic footholds in Iraq" and reporting that "French companies built Baghdad's water system and much of its phone network, and oil corporations such as France's TotalFinaElf have long ties with Iraq").

10. In the preceding note, French and German opposition to entering a military coalition against Iraq was described as motivated in part by large financial concerns and electoral politics. See text, *supra* note 9. These foundational elements of the French and German position were generally known at the time of the UN Security Council debate, but were never emphasized or discussed in the North American press. The bogus allegation that U.S. policy was devised for the purpose of confiscating Iraqi oil received much greater media attention. Be that as it may, self-interests of a callous economic kind seem to motivate surreptitiously the content of State policies. For a discussion of the French and German positions on Iraq, see Marcus Walker, et al., *Why Greed Isn't Driving U.S. or Europe Over Iraq*, WALL ST. J., Feb. 14, 2003, at A6.

making the grandiose designs of public law theory the stuff of fiction.<sup>11</sup> The *realpolitik* dominates global relations. The use of force is more likely to be the instrument of sovereign policy than inspired diplomacy. Even with international organizations, like the WTO, or multilateral regional treaty frameworks, like NAFTA,<sup>12</sup> the surrender of sovereignty is subject to endless reconsideration and re-evaluation. When compared to domestic law, international law-making is plagued by the rule of force and the absolute supremacy of national sovereignty.

Private international lawyers<sup>13</sup> embrace less lofty ambitions: their task is to protect clients from the risks of the international marketplace.<sup>14</sup> Although sovereignty remains a factor in this setting,<sup>15</sup> it is not a black hole that eats up every morsel of legal civilization. The debate surrounding competing political positions—e.g., on the costs of disarmament,<sup>16</sup> on environmental policy,<sup>17</sup> and on the disproportionate use of resources by wealthy countries<sup>18</sup>—is substantially attenuated and can even be ignored in the swirl of “boundaryless

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11. The discourse in which public international lawyers engage is often more aspirational than realistic. Their texts also are filled—often times—with the conceptualism of political theorists. The discussion often becomes a doctrinaire statement about acceptable values within the singular polity that is being envisioned. This type of elucidation is likely to have a very modest impact upon the content of policy. See BURNS WESTON, ET AL., *INTERNATIONAL LAW AND WORLD ORDER* (3d ed. 1997); Anthony D’Amato, *Human Rights as a Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 47 (1995/1996).

12. North American Free Trade Agreement (NAFTA), Dec. 17, 1992, Can.-Mex.-U.S., art. 2203, 32 I.L.M. 605, 702 (1993); see also NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (codified at 19 U.S.C. §§ 3301-3473 (1993)); COMMERCIAL MEDIATION AND ARBITRATION IN THE NAFTA COUNTRIES (Luiz M. Diaz & Nancy A. Oretskin eds., 1999); Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB. INT’L 393 (2000); Daniel M. Price, *Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT’L & COMP. L. REV. 421 (2000); R. Edward Ishmael Jr., *North American Free Trade Agreement: Dispute Resolution Procedures*, 2 AM. REV. INT’L ARB. 455 (1991).

13. See, e.g., text, *supra* note 7 (discussing the distinction between public and private international lawyers).

14. See generally GEORGE A. BERMAN, *TRANSNATIONAL LITIGATION IN A NUTSHELL* (2003); RICHARD H. KREINDLER, *TRANSNATIONAL LITIGATION: A BASIC PRIMER* (1998); RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING* (4th ed. 2003).

15. See Foreign Sovereign Immunity Act (FSIA) of 1976, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-1611.

16. See generally THOMAS GRAHAM JR., *DISARMAMENT SKETCHES: THREE DECADES OF ARMS CONTROL AND INTERNATIONAL LAW* (2002).

17. See Robert Andalman, *The Enforcement of CERCLA Judgments Against Foreign Defendants*, 10 B.U. INT’L L.J. 61, 80 (1992) (“[L]egal relationships between public bodies and private individuals often cannot be neatly characterized as ‘public’ or ‘private’ in the way those terms have been used in international law. . . . By pressing for enforcement of cost recovery actions, through test cases or by treaty efforts, the United States can advance its own environmental policy, as well as the international law of enforcement of judgments.”).

18. See generally The UN Conference on Environment and Development, UN Doc. A/CONF. 151/26, 31 I.L.M. 18744 (1992).

transactions.” Events do not need to be “spun”<sup>19</sup> to encourage perceptions favorable to national self-interest. The *privatistes* aim to make global commercial transactions possible by providing for the international protection of private legal rights. The globalization of commerce, seen by most nation-states as beneficial to their self-interest,<sup>20</sup> cannot take place without a workable system of transborder adjudication.<sup>21</sup>

## II. THE FOIBLES OF MUNICIPAL ADJUDICATION

Municipal legal solutions to the problems of transborder commercial litigation are approximative at best. Processing international commercial claims through national courts leads to a decentralized system that is byzantine both in its structure and operation, evincing the profound limitations of legal methodology.<sup>22</sup> It is a system that is created and operated by and which, therefore, works for the lawyers and judges—not the clients who must avail themselves of it and pay its costs.<sup>23</sup> In this regard, the fragmentation and

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19. In the political culture of false contrition, “spinning” an event or set of circumstances represents an attempt to distort the reality of the situation sufficiently to achieve an interpretation of the occurrence that is advantageous to the spinner’s side. The truth or objective character of the circumstance is seen merely as an obstacle to achieving the desired advantage. This strategy fits into the manipulation of the media, which in turn manipulates the political process for copy. The general view is that, if your version of events is stated incessantly and repeated by the media, it becomes the truth of the matter. “Talking points,” therefore, eventually define veracity in political discourse. The adversarialization of the political process and the media, as well as the additional conversion of the media to entertainment, make it nearly impossible to know how or why policy is formulated. Consumerism and careerism in higher and professional education has had a similar corrupting impact upon academic standards in U.S. universities. The end goals of power monopolies, advertising revenues, and indecently high salaries for managers appear to be the exclusive objective; all other values are subordinated. It is the same adversarialism that paralyzes the operation of the judicial process.

20. *Privatistes* is a term that French academic lawyers use to distinguish between public and private law lawyers. Those lawyers who study torts, contracts, commerce, conflict of laws, and the relationships among private individuals are *privatistes*. Public law lawyers focus upon administrative law, criminal law, and other forms of public regulation. See text *supra* note 7 (discussing the distinction between private and public law lawyers). On States’ interest in global commerce, see INTERNATIONAL COMMERCIAL ARBITRATION (Eric E. Bergsten et al. eds., 1975); see also INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS ‘JUDICIALIZATION’ AND UNIFORMITY (Richard B. Lillich & Charles N. Brower, eds., 1994).

21. See Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 775–77 (2002).

22. See THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 1–11 (1989).

23. During a lecture at Tulane University School of Law in 1988, a justice of the Australian Supreme Court remarked that she was astounded that the legal profession had for so long pulled the wool over everyone’s eyes in terms of the provision of dispute resolution services. Lawyers and judges, in effect, transform the litigants’ dispute and turmoil into arcane and elaborate jurisdictional, procedural, evidentiary, and interpretative problems. The resolution of the dispute has ultimately little to do with the parties’ fundamental conflict or with the plight of the human personality that it translates. Moreover, the proceedings can be protracted and subject to inordinate delay. The costs of litigation can be staggering. The marketplace would hardly tolerate the provision of such a service if

disunity—or diversity—of the international community are as fully apparent in the private as in the public transborder sector. Diversity is as unworkable before national courts as it is in public international organizations.<sup>24</sup>

Transborder commercial litigation is complex, difficult, and inefficient.<sup>25</sup> It portrays the law at its theoretical best and at its practical worst.<sup>26</sup> The ethic of pragmatism succumbs to sectarianism. The utility of litigation is corroded by the antics of forum-shopping.<sup>27</sup> After the remedial strategies have been exhausted, judgments are likely to conflict and to be rendered ineffective. The variability of national legal systems<sup>28</sup> and the quest to find litigious advantage confound the functionality of the process. Further, the amounts of time and money expended to reach an inconclusive outcome is likely to have been enormous. An abysmal outcome is the result simply because parts or aspects of the transaction crossed national boundaries.<sup>29</sup>

The problems with transborder litigation begin at the outset of the process. Private transborder lawsuits are riddled by jurisdictional issues.<sup>30</sup> Whether a court has a lawful basis for asserting its authority over a dispute and the disputants is generally determined by reference to the court's national law. Lawsuits involving the same parties and circumstances brought in

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it were not imposed coercively by law. Judicial litigation does not usually improve the clients' lives or situation, but rather provides them eventually with finality at the price of exorbitant transaction costs. See CARBONNEAU, *supra* note 22, at 11–13.

24. Political differences certainly are difficult to reconcile. They involve historical assumptions about culture, morality, and social organization that are embedded in the fabric of a national community. It is easy to forgo reconciliation when such matters are involved, especially when they carry an economic and domestic political price tag. Bringing suit against foreign parties in their courts, third-party courts, or in domestic courts involves the same confrontation of basic dispositions. The legal profession, the judiciary, the trial system, and the applicable law bear the same name, but differ radically in substance. For a discussion of these issues, see RICHARD A. DANNER & MARIE-LOUISE BERNAL, *INTRODUCTION TO FOREIGN LEGAL SYSTEMS* (1994).

25. See generally KREINDLER, *supra* note 14.

26. Transborder litigation uses the analytic and adversarial characteristics of legal thinking to create a system of litigation that responds fully to all the aspects of processing international claims before national courts. The system is so complex that it can be resorted to only for large claims, if at all; further, it is so protective of the litigants' rights that it becomes dysfunctional. The inconclusive character of enforceability renders the system ultimately of little utility.

27. See Friedrich K. Juenger, *Forum-Shopping, Domestic and International*, 63 *TUL. L. REV.* 553 (1989).

28. On foreign and comparative law, see H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (2000); HENRY P. DE VRIES, *CIVIL LAW AND THE ANGLo-AMERICAN LAWYER* (1976).

29. The only real distinction between transborder and standard litigation is that the underlying transaction involves contact with a foreign jurisdiction. This factor sets in motion an entire system of procedure to deal with what are perceived to be exceptional lawsuits. If domestic courts would restrain their jurisdiction to rule, apply solely local law to resolve disputes, and use adaptive evidentiary standards, it would reduce the complexity of the process and of its operation.

30. See *Asahi Metal Indus. Co. v. Super. Ct. of California*, 480 U.S. 102 (1987); *In re Union Carbide (Bhopal)*, 634 F. Supp. 842 (S.D.N.Y. 1986); *Bulova Watch Co. v. Hattori*, 508 F. Supp. 1322 (E.D.N.Y. 1981).

different countries probably will all go forward because national laws are not coordinated on the question of court jurisdiction.<sup>31</sup> These varied national laws provide for inconsistent results on the basis of different rationales. Even in those rare instances in which national prescriptions converge, the convergence is achieved on the basis of countervailing interpretations of the law.<sup>32</sup> The standard situation: parallel proceedings in different jurisdictions with an exchange of anti-suit injunctions<sup>33</sup> between the two venues. U.S. courts and courts from other common law jurisdictions benefit from the additional possibility of resorting to the *forum non conveniens* doctrine,<sup>34</sup> under which they may refuse—for both practical and policy reasons—to exercise their jurisdictional authority. Civil law courts, however, cannot abstain from exercising their authority because the law establishes their power to adjudicate.<sup>35</sup> The hapless U.S. national and California resident who goes to Tokyo, Japan to appear in commercial spots and is involved in a car accident there will get lost between the two trial systems as well as in the translation. Each affected venue will seek to impose its own brand of justice upon the case and will thereby contribute to a situation in which no useful result is reached.

Much more lies in wait after the jurisdictional preliminaries. The choice of a governing law can trigger interminable debates between advocates. Legal systems have concocted recondite frameworks for choosing (or not) an applicable law to the litigation.<sup>36</sup> After examining a legion of localization factors, if the court concludes that it must rule pursuant to a foreign law, the problem of proving or establishing that law arises.<sup>37</sup> This circumstance necessitates the hiring of experts—at least one for each side in the U.S. system<sup>38</sup>—to discover what the law provides and to explain the findings to a

31. See SHOICHI KIDANA ET AL., *OUTLINE OF PRIVATE INTERNATIONAL LAW* 261 (1985); Thomas E. Carbonneau, *The French Exequatur Proceeding: The Exorbitant Jurisdictional Rules of Article 14 and 15 (Code Civil) As Obstacles to the Enforcement of Foreign Judgments in France*, 2 *HASTINGS INT'L & COMP. L. REV.* 307 (1979).

32. See KIDANA, *supra* note 31, at 261.

33. On anti-suit injunctions, see BERMANN, *supra* note 14, at 110.

34. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); see also Rosato, *Restoring Justice to the Doctrine of Forum Non Conveniens For Foreign Plaintiffs: Who Sue U.S. Corporations in the Federal Courts*, 8 *J. COMP. BUS. & CAP. MKT. L.* 169 (1986).

35. On the jurisdiction of civil law courts, see DE VRIES, *supra* note 28.

36. See FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* (1993); Kurt Lipstein & Istram Szasz, *Interpersonal Conflict of Laws*, in 3 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* ch.10 (Kurt Lipstein ed., 1971) (discussing choice of law).

37. See *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Corp. Salvadorena de Calzado v. Injection Footwear Corp.*, 533 F. Supp. 290 (S.D. Fla. 1982); see also *FED. R. CIV. P.* 44.1; *N.Y. C.P.L.R.* 4511 (2004); *CAL. EVID. CODE* § 452 (2004).

38. In civil law systems, the court appoints a single expert who eventually submits a report to the court to which the parties can respond. The procedure is known as *l'expertise judiciaire*. The expert acts for a public, non-adversarial purpose. See generally Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History,*



judge (or, worse yet, a jury) that has little or no training in foreign law, and no real desire to learn it. Given the obstacles, the process—once culminated—usually ends, directly or indirectly, in the application of the only law that the presiding judge (or jury) knows and understands; the local law.<sup>39</sup>

As the process evolves, the problem of identifying, gathering, and admitting evidence emerges. When transborder litigation is conducted in the United States especially, the gathering and admission of evidence creates special problems. The Federal Rules of Civil Procedure authorize the federal courts to command the production of evidence<sup>40</sup> and the Rules of Evidence impose relatively stringent standards for the admissibility of evidence.<sup>41</sup> Orders for the production of evidence and subpoenas for testimony or documents sent to foreign jurisdictions often are met with local resistance and blocking statutes<sup>42</sup> that express the foreign State's unwillingness to compromise or surrender its national legal sovereignty. For example, although the Hague conventions<sup>43</sup> were drafted to enhance transborder service of process and evidence-gathering, the Hague mechanism has been of very limited utility.<sup>44</sup> Despite their stated goals, the conventions fail even to approximate the promised reconciliation of common law and civil law trial differences.<sup>45</sup> The bureaucratization of transborder service of process and evidence-gathering through national central authorities<sup>46</sup> has not increased accessibility; there is now, in fact, greater delay, more political positioning, and less control over the quality of the evidence. Local obfuscation has not been

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*Practice, and Procedure*, 31 *TEX. INT'L L.J.* 181 (1996). The use of experts in the U.S. process is dominated by the adversarial ethic, resulting in experts on both sides canceling each other out.

39. It appears unrealistic to assume that an entire education in foreign and comparative law can be achieved in the setting of an ordinary litigation. The linguistic problems themselves create a nearly insurmountable threshold barrier. Judges are not any more disposed than any other U.S. trained lawyer to understanding Asian, religion-based, or civil law legal systems. It is difficult to believe that sophisticated decision-makers could readily switch gears.

40. *FED. R. CIV. P.* 28.

41. *FED. R. EVID.* 804(b)(1).

42. On blocking statutes, see *KREINDLER*, *supra* note 14, at 148–149, 183–184. See also *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct., S.D. Iowa*, 482 U.S. 522 (1987).

43. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, (entered into force Feb. 10, 1969) [hereinafter *Convention on the Service Abroad*]; Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 847 U.N.T.S. 231, 23 U.S.T. 2555 (1973) [hereinafter *Convention on the Taking of Evidence Abroad*]; see *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) (examining the purpose behind the Hague conventions).

44. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct., S.D. Iowa*, 482 U.S. 522 (1987); see also Russell J. Weintraub, *The Need for Awareness of International Standards When Construing Multilateral Conventions: the Arbitration, Evidence, and Service Conventions*, 28 *TEX. INT'L L.J.* 441 (1993).

45. See, e.g., *Convention On The Taking Of Evidence Abroad*, *supra* note 43, arts. 3(h–i), 9, 15, 21(c–d), 23.

46. See *Convention on the Service Abroad*, *supra* note 43, at art. 2; *Convention on the Taking of Evidence Abroad*, *supra* note 43, at art. 2.

eliminated; it simply has been given another means of expression.<sup>47</sup> Moreover, the federal rules do not guarantee the admissibility of evidence gathered abroad under the Hague framework,<sup>48</sup> nor do they warrant that foreign courts will assist U.S. parties in collecting usable evidence abroad.<sup>49</sup>

The enormous differences in trial procedures among legal systems<sup>50</sup> create even more difficulties. Adversarial trials and inquisitorial trials differ markedly, as they represent different religions of law. Each's proponents see their approach as uniquely and exclusively correct. The role of the judge, the function of experts, the means of establishing a record, the importance of oral testimony, the function of party representation, and the availability of appeal are all dissimilar.<sup>51</sup> Therefore, the measure of justice—the protection of rights and the availability of remedies—varies from national jurisdiction to national jurisdiction. The choice of forum can often give effect to or foreclose the parties' cause of action.<sup>52</sup> Given the disparities between national legal systems, the lack of uniform trial procedures, and the competition between litigating

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47. A central authority has six months to respond to a letter of request and can, at the end of that period, find some discrepancy with the request and ask that the document be resubmitted in proper form. The Hague system was established by diplomats; its primary objective was to achieve a compromise between antagonistic positions on matters of service and evidence. On the one hand, civil law jurisdictions found the pursuit of discovery on their territory by private U.S. attorneys to be offensive "fishing expeditions." On the other, U.S. litigators needed to secure "usable" evidence abroad, i.e., depositions that were produced under oath pursuant to adversarial examination and party representation. The proceedings also needed to yield a verbatim transcription of the testimony. The drafters of the convention sought to achieve a reconciliation of the competing interests by giving the State that received the request maximum flexibility. This flexibility essentially rendered the convention useless.

48. According to the Federal Rules of Civil Procedure, the federal courts need only give circumspet validity to evidence obtained abroad pursuant to a letter of request: "Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules." FED. R. CIV. P. 28.

49. See *id.*, at 4(e), 4(i), 28(b), 29; see also 28 U.S.C. §§ 1782, 1783.

50. On these procedural differences, see, e.g., GLENN, *supra* note 28.

51. See, e.g., Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313 (2003); Catherine Kessedjian, *La modélisation procédurale*, in LA MONDIALISATION DU DROIT (Eric Loquin & Catherine Kessedjian eds., 2000); Pierre Mayer, *Le pouvoir des arbitres de régler la procédure, une analyse comparative des systèmes de civil law et de common law*, REVUE DE L'ARBITRAGE 163 (1995).

52. The circumstances of *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), illustrate the point well. The case involved a Houston, Texas company that had entered into a towing contract with a German company to transport an oil rig to the Mediterranean Sea. *Id.* at 2. The German company had submitted the low bid. *Id.* The contract, however, contained an exculpatory clause in addition to a forum selection clause that provided that disputes would be resolved by a court in London. *Id.* at 2-3. Rough seas in the Gulf of Mexico damaged the rig and caused the tower to seek safe harbor in Tampa, Florida. *Id.* at 3. The damages were calculated at \$3.5 million. *Id.* at 3-4. Enforcing the poorly written forum-selection clause meant that English law would apply. *Id.* English law, unlike its American counterpart, favored the use of exculpatory clauses and held that they were enforceable. See *id.* at 8 n.8. By ordering the parties to litigate in London pursuant to the forum-selection clause, the U.S. Supreme Court decided the merits of the case: it gave the German towing company an immunity to liability that was not available under U.S. law. See *id.* at 19.

parties, international litigators resort to forum-shopping strategies to neutralize and damage the other side. The attempt to maximize the client's position by going to a favorable forum, however, generally results in fleeting advantage. Nevertheless, both parties can and do engage in the warfare, even as their respective efforts cancel each other out.

It should be noted that transborder litigation practice is not unique to the United States.<sup>53</sup> Although few, if any, States have enacted legislation to regulate international litigation,<sup>54</sup> many countries have acted as venues for such litigation. Generally, courts apply the provisions of domestic law to this form of litigation.<sup>55</sup> Therefore, not only is international litigation commonplace, but it also is plagued universally by the same problems. Foreign judicial systems, in fact, may be less hospitable than their U.S. counterpart. Delays in foreign jurisdictions may be much more considerable than before U.S.

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53. U.S. courts have had a significant role in this type of litigation since the 1960s because of the economic strength of the United States and the multi-national expansion of U.S. companies. The days of rulings like the one in *In re Romero*, 56 Misc. 319, 107 N.Y.S. 621 (1907), in which the court steadfastly refused to engage in any international judicial assistance for a Mexican court in order to protect the interests of a U.S. national, have passed. The court therein stated that "[t]he doctrine is well established that the laws of a foreign country will not be enforced, if such enforcement will contravene the settled policy of the forum or be prejudicial to the interests of its own citizens." 107 N.Y.S. at 622. See also *In re Letters Rogatory Out of First Civil Court of City of Mexico*, 261 Fed. 652, 653 (S.D.N.Y. 1919) ("It is undesirable, in my opinion, to aid a process which may require residents of this district to submit to the burden of defending foreign suits brought in distant countries, where they have no property, or as an alternative to suffer a personal judgment by default, which will be enforceable against them personally whenever they may enter the foreign territory.").

The days of nearly messianic exuberance also have passed. In the 1960s, U.S. courts would readily assert jurisdiction over transborder litigation that had very little connection to the United States or its laws, such as when the litigating parties were foreign nationals and the events transpired abroad. Given the global reach of U.S. economic activity, American courts began to assume an international judicial function. The policy made a highly sophisticated litigation process available on a worldwide basis and dedicated U.S. judicial time and resources to the stabilization of the international marketplace. It also had the consequence of exporting American justice standards to other parts of the world. See *TACA Int'l Airlines v. Rolls-Royce of Eng., Ltd.*, 204 N.E.2d 329 (N.Y. 1965); *Frummer v. Hilton Hotels Int'l, Inc.*, 227 N.E.2d 851, 854 (N.Y. 1967) (in his dissent, Judge Breitel criticized the court's cavalier approach to the assertion of jurisdiction over foreign litigation).

Finally, the era of judicial economy provided the impetus for a more sober policy on the assertion of U.S. judicial jurisdiction in matters of transborder litigation. The cost of servicing the world had become prohibitive and dispute resolution exclusively on U.S. terms problematic. See *Delagi v. Volkswagenwerk AG*, 278 N.E.2d 895 (N.Y. 1972); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Indus. Co. v. Super. Ct. of California*, 480 U.S. 102 (1987).

For a description of the law of transborder litigation in other countries, see Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003) (discussing the interplay of national laws in the international arena).

54. See Carbonneau, *supra* note 31, at 316.

55. See KIDANA, *supra* note 31; *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

courts.<sup>56</sup> In some countries, the national supreme court may have original jurisdiction in some aspects of foreign litigation—a circumstance that can prolong the procedures inordinately.<sup>57</sup> Also, juridical quality may vary from country to country; the influence of external political or religious beliefs may as well. Finally, corruption and bribery can also become considerations.<sup>58</sup>

The final phase of transborder litigation involves the enforcement of foreign court judgments. In many ways, the “back end” issue of enforcement restates the “front end” problem of jurisdiction. The enforceability of the court’s ruling, obviously critical to the successful resolution of the dispute, can depend upon whether the court of rendition had proper jurisdiction initially.<sup>59</sup> Moreover, it is imperative that the judgment be enforceable in a jurisdiction in which the defendant has sufficient assets to satisfy the terms of the foreign court decision. Some legal systems impose a “reciprocity” threshold<sup>60</sup> before a foreign court judgment can be considered for enforcement. In effect, the reciprocity requirement asks whether courts in the country of rendition enforce the requested State’s court judgments and other juridical acts. The concept of reciprocity can be as difficult to define as the notion of the reasonable person.<sup>61</sup> It can involve assessing the foreign courts’ general policy on enforcement or looking to whether they give effect to specific types of judgments. In effect, what constitutes the requisite *quid pro quo* is a matter of judicial interpretation, judgment, and choice in the circumstances of each case.

Once reciprocity is established, foreign judgments are evaluated on the basis of various factors, *e.g.*, whether the court of rendition had proper domestic and international jurisdiction under the law of the requested State; whether the judgment debtor had adequate notice of the proceeding and a reasonable opportunity to defend; whether the judgment is free of fraud; and whether enforcement violates the requested State’s public policy.<sup>62</sup> A merits

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56. Despite their caseloads, U.S. courts are very efficient from a comparative perspective and benefit from a sophisticated infrastructure and generous public funding. For a discussion of the operation of courts in other countries, see DANNER & BERNAL, *supra* note 24; Maria Dakolias, *Court Performance Around the World: a Comparative Perspective*, 2 YALE HUM. RTS. & DEV. L.J. 87 (1999).

57. This is the case in some Latin American countries. See Felipe Sáez García, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT’L L. REV. 1267 (1998).

58. See U.S. DEPARTMENT OF STATE, DOING BUSINESS ABROAD, available at <http://www.state.gov/e/eb/cba/176.htm> (last visited Oct. 20, 2004).

59. See, *e.g.*, *Hilton v. Guyot*, 159 U.S. 113 (1894); *Munzer c. Dame Jacoby-Munzer*, Cass. 1e civ., Jan. 7, 1964, J.C.P. 1964, II, 13590.

60. See, *e.g.*, § 328 ZPO (German code of civil procedure). *But see* *Hunt v. BP Exploration Co., Ltd.*, 492 F. Supp. 885 (N.D. Tex. 1980).

61. See KIDANA, *supra* note 31, at 268.

62. See, *e.g.*, *Hilton v. Guyot*, *supra* note 59; Mark D. Rosen, *Should “Un-American” Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783 (2004); Linda J. Silberman, *Enforcement and*

review or *révision au fond* is generally excluded. The exclusion of a merits review represents an advancement in transborder legal cooperation and civilization.<sup>63</sup> In some jurisdictions, enforcement can be resisted if the court of rendition applied the wrong choice-of-law or if the outcome is not available under the law of the requested State.<sup>64</sup> Although judgments from like-minded or aligned States could be deemed to be presumptively enforceable,<sup>65</sup> except in the EU setting, there is no multilateral treaty on jurisdiction and the enforcement of foreign judgments.<sup>66</sup> The question is so divisive on cultural and systemic grounds that even the United States and the United Kingdom have been unable to agree to a bilateral framework (despite serious diplomatic attempts to do so).<sup>67</sup> Therefore, not only can the results of litigation in different venues conflict, but they may also be enforceable only in the place of rendition—and not where the judgment debtor has assets.

In the final analysis, even though their professional mission is less august, private international lawyers do not negotiate any more effectively than their public law counterparts the white water rapids of diversity within the international community. In general, transborder commercial litigation before national courts produces unsatisfactory results. Enormous sums can be expended and clients left without an enforceable solution. Professional fees in such circumstances can be difficult to collect. Therefore, politics in the public sector and conflicts in the private sector render the accomplishment of a transborder rule of law extremely difficult. Diversity engenders disharmony and insecurity. In each sector, the actors perceive the mere tolerance of differences as a surrender of national authority and, as a consequence, a defeat. Even complete dysfunctionality is preferable to defeat. The key to transborder success, however, is precisely the sublimation of national legal and political authority in a higher design that mandates a relinquishment of national sovereignty as a first and fundamental step to resolution.

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*Recognition of Foreign Country Judgments in the United States*, in INTERNATIONAL BUSINESS LITIGATION & ARBITRATION (John Fellas ed., 2004).

63. See Silberman, *supra* note 62.

64. See, e.g., *Munzer c. Dame Jacoby-Munzer*, Cass. 1e civ., Jan. 7, 1964, J.C.P. 1964, II, 13590.

65. See *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d. Cir. 1971).

66. See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil & Commercial Matters, Oct. 30, 1999, Hague Conference on Private International Law, available at <http://www.hcch.net/e/conventions/draft36e.html> (last visited August 28, 2004).

67. Andreas F. Lowenfeld & Linda J. Silberman, *A Difficult Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 635–36 (2000) (discussing the draft convention).

### III. THE ARBITRAL SOLUTION

Arbitration appears to have tamed segments of the diverse international environment. It has given expression to the need to establish a workable adjudicatory process for transborder commerce.<sup>68</sup> In some respects, arbitration has achieved the monumental inroad of reducing the impact of sovereignty on international relations. It has done so indirectly by enticing States to participate in international arbitral proceedings to resolve the commercial conflicts that proceed from foreign investment and the State's marketplace activities.<sup>69</sup> More directly, the NAFTA arbitral framework allows aggrieved individuals to sue directly a member State and also allows arbitrators to assess the transborder commercial liability of the domestic conduct of member States.<sup>70</sup> NAFTA arbitration, therefore, embodies a truly restrictive theory of sovereign immunity from suit and execution<sup>71</sup> and gives the Foreign Sovereign Immunities Act (FSIA) commercial activities exception its most meaningful expression.<sup>72</sup>

68. See, e.g., THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION*, 337 (2004).

69. See BERTHOLD GOLDMAN, *INVESTISSEMENT ETRANGERS ET ARBITRAGE ENTRE ETATS ET PERSONNES PRIVEES* (1969); *INTERNATIONAL ARBITRATION BETWEEN PRIVATE PARTIES AND GOVERNMENTS* (Gerald Aksen & Robert B. Von Mehren, eds., 1982); M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* (2000); Emmanuel Gaillard, *L'arbitrage sur le fondement des traités de protection des investissements*, *REV. ARB.* 853 (2003); Horacio A. Grigera Naón, *The Settlement of Investment Disputes Between States and Private Parties—An Overview from the Perspective of the ICC*, 1 *J. WORLD INVEST.* 59 (2000). See also Phillipe Leboulanger, *L'arbitrage international Nord-Sud*, in *ETUDES OFFERTES À PIERRE BELLET* 323 (1991).

70. See Charles H. Brower II, *Investor-State Disputes Under NAFTA: a Tale of Fear and Equilibrium*, 29 *PEPP. L. REV.* 43 (2001); Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 *COLUM. J. TRANSNAT'L L.* 43 (2001); Patrick Dumberry, *The NAFTA Investment Dispute Settlement Mechanism—a Review of the Latest Case-Law*, 2 *J. OF WORLD INVESTMENT* 151 (2001); Cheri D. Eklund, *A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes*, *J. INT'L ARB. DEC.* 1994, at 135; Patrick G. Foy, *Effectiveness of NAFTA's Chapter Eleven Investor-State Arbitration Procedures*, 18(1) *ICSID REV.—FOREIGN INVESTMENT L.J.* 44 (2003); Céline Lévesque, *Investor-State Arbitration Under NAFTA Chapter 11: What Lies Beneath Jurisdictional Challenges*, 17 *ICSID REV.—FOREIGN INVEST. L.J.* 320 (2002); Daniel Posin, *The Multi-Faceted Investment Arbitration Rules of NAFTA*, 13 *WORLD ARB. & MED. REP.* 13 (2002); J. C. Thomas, *Investor-State Arbitration Under NAFTA Chapter 11*, 37 *CANADIAN Y.B. INT'L L.* 99 (1999); Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 *CANADIAN BUS. L.J.* 405 (2002).

71. See, e.g., K. I. VIBHUTE, *INTERNATIONAL COMMERCIAL ARBITRATION AND STATE IMMUNITY* (1999); Leon E. Trakman, *Arbitrating Investment Disputes Under the NAFTA*, 18 *J. INT'L ARB.* 385 (2001). But see Jacques Werner, *The Frailty of the Arbitral Process in Cases Involving Authoritarian States—And Other Pitfalls of Investment Arbitration*, 1 *J. WORLD INVEST.* 321 (2000).

72. See, e.g., Tara A. O'Brien, *The Validity of the Foreign Sovereign Immunity Defense in Suits Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 *FORDHAM INT'L L.J.* 321 (1983–84); Richard J. Oparil, *Waiver of Sovereign Immunity in the United States and Great Britain by an Arbitration Agreement*, 3 *J. INT'L ARB.*, Dec. 61 (1986); Amy L. Rothstein, *Recognizing and Enforcing Arbitral Agreements and Awards Against Foreign States: The Mathias Amendments to the Foreign Sovereign Immunities Act and Title 9*, 1 *EMORY J. INT'L DISP. RESOL.* 101 (1986).

States have also moderated their sovereign prerogatives by ratifying the New York Arbitration Convention<sup>73</sup> and the ICSID Convention.<sup>74</sup> Both instruments are popular among the members of the international community and represent a strong commitment to enforce international arbitral awards and to make governments accountable for their transborder commercial conduct. In some respects, the need to develop world trade and commerce—to spread the benefits of economic development more widely—has broadened national perspectives and enabled an international common interest to triumph over the insularity of diversity. The achievement is not without its difficulties and exceptions, but it is a process that has survived economic downturns and other negative pressures. It appears to be firmly in place. Participation in transborder commerce is perceived as an effective means of stimulating local economic activity and achieving domestic prosperity. Arbitration is essential to the conduct of world business. Therefore, the acceptance of, and recourse to arbitration together comprise a necessary precondition to entry into trans border commerce.<sup>75</sup>

It is inaccurate and unfair to criticize international arbitration as a “Northern” mechanism that silences or muffles the diversity of the world community. Transborder arbitration has reconciled some of the geo-political and systemic differences and erected a workable and truly global system of adjudication. International commercial arbitration began as a European process; at that stage in its development, it reflected the adjudicatory methodology of continental civil law systems. It eventually became the basis for the conduct of business between North America and Europe and a battle-

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73. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (codified at 9 U.S.C.A. 201–208 [1970]) [hereinafter New York Arbitration Convention]. The literature on the New York Arbitration Convention is voluminous. *See, e.g.*, COMMERCIAL ARBITRATION—AN INTERNATIONAL BIBLIOGRAPHY 29–39 (Hans Smit & Vratislav Pechota eds., 3d ed. 2004). The basic references include: THE NEW YORK CONVENTION (Girgio Gaja & Kenneth R. Simmonds eds., 1979); ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981). *See also* UNITED NATIONS, ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, U.N. Sales No. E.99.V.2 (1999); IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (Albert Jan van den Berg ed., 1999). Recent articles include: Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT’L ARB. 213 (1996); David P. Steward, *National Enforcement of Arbitral Awards Under Treaties and Conventions, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY?* 163 (Richard B. Lillich & Charles N. Brower eds., 1994).

74. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. *See* Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DE COURS (REC. COURS) 333 (1972); Georges R. Delaume, *La convention pour le règlement des différends relatifs aux investissements entre états et ressortissants d’autres états*, 93 J. DROIT INT’L 26 (1966); Michael M. Moore, *International Arbitration Between States and Foreign Investors—The World Bank Convention*, 18 STAN. L. REV. 1359 (1966).

75. *See* CARBONNEAU, *supra* note 68.

ground between the American adversarial trial process and the European approach to litigation.<sup>76</sup> During the cold war era, it also made East-West trade possible through East-West arbitrations conducted in Sweden.<sup>77</sup> It is now a springboard for global commerce in Latin America,<sup>78</sup> Asia,<sup>79</sup> and—increasingly—in Africa.<sup>80</sup>

Arbitration both embraces and transforms global diversity when it fosters uniform law-making by international organizations, States, and arbitrators. It is beyond cavil that there is—both emerged and emerging—a world law of arbitration.<sup>81</sup> The two international instruments referred to

76. See Giorgio Bernini, *Cultural Neutrality: A Prerequisite to Arbitral Justice*, 10 MICH. J. INT'L L. 39 (1989); Christian Borris, *Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration*, 60 ARB.—J. CHARTERED INST. ARB. 78 (1994); Christian Borris, *Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION I (Stefan N. Frommel & Barry Alexander K. Rider eds., 1999); Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: the Role of Interactive Arbitration*, 14 ARB. INT'L 157 (1998); Charles Carabiber, *L'évolution de l'arbitrage commercial international*, 99 REC. COURS 119 (1960–61); Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773 (2002); Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT'L 121 (1997); Andreas F. Lowenfeld, *Harmonizing Cultural Differences: An Arbitrator's Experience*, in IFCIAI, FIFTH BIENNIAL DISPUTE RESOLUTION CONFERENCE 118 (1999); Lucy Reed & Jonathan Sutcliffe, *The 'Americanization' of International Commercial Arbitration?*, 16 MEALEY'S INT'L ARB. REP. 37 (2001).

77. See Ulf Franke, *International Arbitration in Sweden*, 76 AM. SOC. INT'L L. PROC. 166 (1982); Lars A. E. Hjernner, *Sweden: the Stockholm Arbitration Institute*, in HANDBOOK OF INSTITUTIONAL ARBITRATION 187 (Ernest J. Cohn et al. eds., 1977); Ulf Holmbäck, *Commercial Arbitration in Sweden*, 6 INT'L TRADE L. & PRAC. 491 (1980); Werner Melis, *East-West Arbitration*, 47 ARB.—J. CHARTERED INST. ARB. 84 (1981); Ulf Nordenson, *The Arbitral Proceedings in International Arbitration in Sweden*, 1984 Y.B. SWED. & INT'L ARB. 19. See generally LARS HEUMANN, *ARBITRATION LAW OF SWEDEN: PRACTICE AND PROCEDURE* (2003).

78. See ALEJANDRO M. GARRO, *LATIN AMERICAN LAW: ARBITRATION LAW & PRACTICE* (2001); Sergio Bermudes & Carlos Lins, *The Future of Arbitration in Brazil and in Latin America*, in INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE 125 (Martin Hunter et al. eds., 1995); David Fraser, *Arbitration in Latin America: an Overview*, 5 INT'L ARB. L. REV. 60 (2002); Robert Layton, *Changing Attitudes Toward Dispute Resolution in Latin America*, 10 J. INT'L ARB. 123 (1993); Fernando Mantilla-Serrano, *Major Trends in International Commercial Arbitration in Latin America*, 17 J. INT'L ARB. 139 (2000).

79. See INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA (Philip J. McConaughay & Thomas B. Ginsburg eds., 2002); Neil Kaplan, *Arbitration in Asia: Developments and Crises*, 19 J. INT'L ARB. 245 (2002); Jessica L. Su, *Enforcement of Arbitral Awards: a Survey of Selected Asian Jurisdictions*, 3 INT'L ARB. L. REV. 179 (2000).

80. See AMAZU A. ASOUZU, *INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT* (2001); *ARBITRATION IN AFRICA* (Eugene Cotran & Austin Amisssah eds., 1996); Roland Amoussou-Guenou, *The Evolution of Arbitration Laws in Francophone Africa*, 64 ARB.—J. CHARTERED INST. ARB. 62 (1998); Amazu A. ASOUZU, *Arbitration in Africa: Agenda for Reform*, ARB. & DISP. RES. L.J. (1997); G. Kenfack Douajni, *OHBLA Arbitration*, 17 J. INT'L ARB. 127 (2000).

81. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (1992); Fabien Gélinas, *Arbitration and the Challenge of Globalization*, 17 J. INT'L ARB. 117 (2000); Catherine Kessedjian, *The Global Context: is Global Harmonization Needed?*, in *ARBITRAL TRIBUNALS OR STATE COURTS: WHO MUST DEFER TO WHOM?* 101 (Pierre A. Karrer ed., 2001); Lloyd, *Globalization and Harmonization of the Basic Notions in International*



earlier attest to an international consensus surrounding arbitration.<sup>82</sup> The New York Arbitration Convention, in particular, symbolizes the State recognition of the transborder utility and necessity of arbitration. The Convention supplies the critical element of enforceability to the process.<sup>83</sup> The Convention is reinforced by other UNCITRAL<sup>84</sup> instruments in the form of a Model Law on International Commercial Arbitration<sup>85</sup> (Model Law) and Model Rules of Arbitration.<sup>86</sup> The Model Law is particularly significant because it embodies those principles of arbitration law that worldwide experts believed were the core elements of the law of arbitration. The Model Law establishes the basic substantive rules for regulating arbitration while the Model Rules supply the framework for the conduct of an arbitral trial.

UNCITRAL has recently undertaken to collect and catalogue all of the judicial opinions on the New York Arbitration Convention.<sup>87</sup> This information will allow for more accurate predictions as to enforcement in specific jurisdictions. It will also permit the depth of the world consensus on arbitration to be gauged with greater precision. In addition, the Model Law

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*Arbitration*, 13 INT'L CONSTR. L. REV. 144 (1997); Luca G. Radicati di Brozolo, *Mondialisation, jurisdiction, arbitrage: vers des règles d'application semi-nécessaires?* 92 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ (REV. CRIT. DR. INT'L PRIV.) 1 (2003); Jernej Sekolec, *The Need for Modern and Harmonized Regime for International Arbitration*, 1 CROATIAN ARB. Y.B. 27 (1994); Henry P. de Vries, *International Commercial Arbitration: a Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982).

82. See text, *supra* notes 73 and 74.

83. See generally DOMENICO DI PIETRO & MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION OF 1958 (2001); Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175 (1995-96).

84. See PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION (2001).

85. See ARON BROCHES, COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1990); ISAAK DORE, THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE (1993); Karl-Heinz Böckstiegel, *Introduction to the UNCITRAL Model Law on International Arbitration*, in CARSWELL'S HANDBOOK OF INTERNATIONAL DISPUTE RESOLUTION 512 (Babak Barin ed., 1999); Susan Cohen, *International Commercial Arbitration: a Comparative Analysis of the United States System and the UNCITRAL Model Law*, 12 BROOK. J. INT'L L. 703 (1986); Gerold Herrmann, *13 Years Experience with the UNCITRAL Model Law on International Commercial Arbitration*, in DERECHO MERCANTIL CONTEMPORANEO 67 (Ana Piaggi & Luis Estoup eds., 2001); Gerold Herrmann, *The UNCITRAL Arbitration Law: a Good Model of a Model Law*, 3 UNIFORM L. REV. 483 (1998).

86. See John P. Dietz, *Introduction: Development of the UNCITRAL Arbitration Rules*, 27 AM. J. COMP. L. 449 (1979); John D. Franchini, *International Arbitration Under the UNCITRAL Arbitration Rules: a Contractual Provision for Improvement*, 62 FORDHAM L. REV. 2223 (1994); Peiter Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Y.B. COM. ARB. 172 (1977); Pieter Sanders, *Procedures and Practices under the UNCITRAL Rules*, 27 AM. J. COMP. L. 453 (1979); Terence Thompson, *The UNCITRAL Arbitration Rules*, 17 HARV. INT'L L.J. 141 (1976).

87. See Jernej Sekolec, *International Dispute Resolution: Areas Where Further Research May Be Useful*, 20 J. INT'L ARB. 35 (2003).

has fulfilled its objective in an increasing number of national jurisdictions.<sup>88</sup> It was designed to provide States with a highly advanced statutory framework of arbitration law—in effect, to make it possible, especially for developing States, to become instantly supportive of arbitration and thereby able to participate in transborder commerce.<sup>89</sup> Numerous Latin American jurisdictions<sup>90</sup> have adopted the Model Law as has Germany<sup>91</sup> and nearly twenty U.S. states.<sup>92</sup> The UNCITRAL framework, with the recent publication of the Model Law on International Conciliation, establishes a self-contained system of international commercial dispute resolution. It is an architecture of law that transcends national and regional differences and codifies a truly global approach to international commercial dispute resolution. While the system is not without its flaws and idiosyncracies,<sup>93</sup> and even has some noticeable disabilities,<sup>94</sup> it nevertheless has significantly advanced international uniformity and unity in matters of arbitration.

#### IV. THE ARBITRAL LEGAL CULTURE

As with other developments in private international law, arbitration law relies heavily upon contract principles to establish its content. In fact, freedom of contract (*pacta sunt servanda*)<sup>95</sup> is instrumental to the law of

88. See, e.g., Richard B. Potter, *The Coming of Age of the UNCITRAL Model Law in Canada*, 24 CANADIAN BUS. L.J. 429 (1995); Xavier E. Romeu-Matta, *New Developments in International Commercial Arbitration: a Comparative Survey of New State Statutes and the UNCITRAL Model Law*, 1 AM. REV. INT'L ARB. 140 (1990); David St. John Sutton, *Hong Kong Enacts the UNCITRAL Model Law*, 6 ARB. INT'L 358 (1990); Frank-Bernd Weigand, *The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden*, 11 ARB. INT'L 397 (1995); Zhang Yulin, *Towards the UNCITRAL Model Law—a Chinese Perspective*, 11 J. INT'L ARB. 87 (1994); Ivan S. Zykin, *The UNCITRAL Model Law on International Commercial Arbitration: the Russian Experience*, 9 ANN. DE LA HAYE DROIT INT'L 21 (1996).

89. See, e.g., Gerold Herrmann, *The UNCITRAL Model Law—Its Background, Salient Features, and Purposes*, 1 ARB. INT'L 6 (1985); J. Martin H. Hunter, *The UNCITRAL Model Law*, 13 INT'L BUS. LAW. 399 (1985).

90. See generally GARRO, *supra* note 78.

91. See Klaus P. Berger, *The Implementation of the UNCITRAL Model Law in Germany*, 13 MEALEY'S INT'L ARB. REP. 38 (1998).

92. See, e.g., Vratislav Pechota, *UNCITRAL Arbitration Rules*, in 3 HANS SMIT & VRATISLAV PECHOTA, WORLD ARBITRATION REPORTER 3083 (1986).

93. See Francis Higgins, William Brown, & Patrick Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035 (1980).

94. See C. Chatterjee, *Bias in Arbitrators and Bias Against Arbitrators?*, 3 J. WORLD INVEST. 369 (2002); Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: a "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453 (1999); Saul Perloff, *The Ties That Bind: the Limit of Autonomy and Uniformity in International Commercial Arbitration*, 13 U. PA. J. INT'L BUS. 323 (1992). See also KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION (2003).

95. See Karl-Heinz Böckstiegel, *The Role of Party Autonomy in International Arbitration*, DISP. RES. J. 24 (Summer 1997); C. Chatterjee, *The Reality of the Party Autonomy Rule in International Arbitration*, J. INT'L ARB. 539 (Dec. 2003); Douglas Jones, *Arbitration and Party*

arbitration.<sup>96</sup> Parties must agree to submit their disputes to arbitration; once they have entered into a valid agreement to arbitrate, they must go to arbitration (unless they mutually rescind or disavow the agreement).<sup>97</sup> The parties have the contractual right to forgo judicial relief at the time of entering into the contract and prior to the emergence of a dispute.<sup>98</sup> Also, modern laws on arbitration provide for the presumptive enforceability of arbitration agreements and awards.<sup>99</sup> The parties' decision to arbitrate is not subject to unilateral reconsideration and courts must uphold awards unless they transgress fundamental fairness.<sup>100</sup> In any event, the substance of the arbitral ruling cannot be revisited or revised by a court.<sup>101</sup> The controlling legislation requires courts to cooperate with and sustain the arbitral process. Actual court supervision of the procedures and results is extremely circumscribed. As stated recently by the U.S. Supreme Court in a landmark opinion,<sup>102</sup> once the courts find an enforceable contract of arbitration, the arbitrator assumes decisional sovereignty over the process and the eventual substantive determination.<sup>103</sup>

A good portion of the content of the world law on arbitration is settled—e.g., the application of separability<sup>104</sup> and *kompetenz-kompetenz* doctrines,<sup>105</sup> the use of the setting aside procedure<sup>106</sup> at the place of arbitration, and the effect of the *functus officio* doctrine.<sup>107</sup> Parts of the law, however, are still in evolution, indicating that the regulation of arbitration is dynamic and in-the-making. Altering the law and developing new rules revitalize both the law and the arbitral process. Dynamic evolution avoids stagnation and obsolescence. For instance, two issues of contemporary arbitration law challenge the foundational principles of the process and demonstrate its need for an ability to adapt: arbitrator neutrality and the contractual right to modify the statutory standards of arbitral awards.

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*Autonomy—How Free Is the Choice to Arbitrate?*, in THE COMMERCIAL WAY TO JUSTICE 121 (Geoffrey M. Beresford Hartwell ed., 1997); Pierre A. Karrer & Anne-C. Imhoff, *L'autonomie de la volonté dans L'arbitrage international en Suisse: portée et limites spécifiques*, 1997 INT'L BUS. L. J. 353.

96. See, e.g., Johannes Trappe, *The Arbitration Proceedings—Fundamental Principles and Rights of Parties*, J. INT'L ARB. 93 (Sept. 1998).

97. See CARBONNEAU, *supra* note 68, at 59, 92.

98. *Id.*

99. *Id.* at 92, 108, 297.

100. *Id.* at 297.

101. *Id.*

102. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); see also *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002).

103. *Id.*

104. For a discussion of this concept, see CARBONNEAU, *supra* note 68, at 29.

105. *Id.*

106. *Id.* at 348.

107. *Id.* at 304.

First, the topic of arbitrator neutrality has generated recent debate.<sup>108</sup> The central focus has been on the impartiality of party-designated arbitrators. Should party-appointed arbitrators be required or presumed to be neutral? How should arbitrator neutrality be achieved? If by a duty of disclosure, how far should the duty extend? Arbitrator neutrality clearly affects the legitimacy of arbitration as an adjudicatory mechanism.<sup>109</sup>

Second, there is discussion among courts and commentators about whether parties have the contractual right to modify the statutory standards by which arbitral awards are confirmed, vacated, nullified, or set aside.<sup>110</sup> In particular, can parties require the court of enforcement to review an award on the merits despite the prohibition against merits review in the applicable statute? Courts and commentators are divided on the question.<sup>111</sup> Nonetheless, it tests the contractual foundation of arbitration by challenging the effectiveness of the principle of freedom of contract.

The rule of law in transborder arbitration is influenced to a considerable degree by private arbitral institutions. The most prominent among them include: The International Chamber of Commerce (ICC);<sup>112</sup> the London Court of International Arbitration (LCIA);<sup>113</sup> the Stockholm Chamber of Commerce and the Institute of Arbitration;<sup>114</sup> the Chartered Institute of Arbitrators;<sup>115</sup> the World Intellectual Property Organization (WIPO);<sup>116</sup> the American Arbitration Association (AAA);<sup>117</sup> and the National Arbitration Forum (NAF).<sup>118</sup> A number of these institutions spearheaded the developments relating to arbitrator neutrality and have been vigilant about maintaining the fairness of arbitral procedures and the legitimacy of the process. These service-providers and other organizations also developed the practice of fast-track

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108. See MARC HENRY, *LE DEVOIR D'INDEPENDENCE DE L'ARBITRE* (2001); James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for 'Nonneutrals'*, 11 AM. REV. INT'L ARB. 295 (2000); Gavan Griffith, *Constitution of Arbitral Tribunals: The Duty of Impartiality in Tribunals or Choose Your Arbitrator Wisely*, 13 ICSID REV.—FOREIGN INVESTMENT L.J. 36 (1998); Lee Korland, *What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act*, 53 CASE W. RES. L. REV. 815 (2003); Mark W. Levine, *The Immunity of Arbitrators and the Duty to Disclose*, 6 AM. REV. INT'L ARB. 197 (1995).

109. See Alan Rau, *On Integrity in Private Judging*, 14 ARB. INT'L 115 (1998).

110. See CARBONNEAU, *supra* note 68, at 167–77.

111. See Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147–49 (1997); Victoria L.C. Holstein, *Co-Opting the Federal Judiciary: Contractual Expansion of Judicial Review of Arbitral Awards*, 1 J. AM. ARB. 127 (2002); Alan Rau, *"Arbitrability" and Judicial Review: A Brief Rejoinder*, 1 J. AM. ARB. 159 (2002).

112. See COMMERCIAL ARBITRATION—AN INTERNATIONAL BIBLIOGRAPHY, *supra* note 73, at § 3.05.

113. *Id.* at § 4.09.

114. *Id.* at § 4.03.

115. *Id.* at § 3.10, § 4.12.

116. *Id.* at § 3.09.

117. *Id.* at § 4.02.

118. *Id.* at § 3.10, § 4.12.

arbitration<sup>119</sup> in order to respond more fully to the needs of the users of the arbitral process. Fast-track procedures, developed initially by a prominent law professor-arbitrator,<sup>120</sup> attribute greater powers to the arbitrator and use time constraints to maximize the efficiency of arbitral proceedings. Arbitral institutions have also integrated mediation into the menu of services that are offered to respond more effectively to actual client needs.<sup>121</sup> Finally, these organizations supervise arbitral procedures<sup>122</sup> to maintain their functionality, fairness, and finality.

Arbitration has generated an impressive quantity of statutes and judicial opinions. Law-making, therefore, surrounds arbitration and is relatively uniform. A parallel question is whether arbitrators themselves make law. In other words: Is arbitration simply the subject of law, or is it also a source of law? Do modern-day arbitrators fashion a commercial, antitrust, employment, maritime, securities, and contract law? Or, do they merely decide the submitted cases on an *ad hoc* basis?

## V. THE ARBITRAL LEX MERCATORIA

At the transborder level, there is a definite ambition to establish or discover an international commercial law or law of international commercial contracts.<sup>123</sup> There are already a number of aspirants. The CISG,<sup>124</sup> for example, was intended to act as a U.C.C. for international transactions; if ratified by the host country, it applies to the transaction automatically unless the parties expressly exclude it.<sup>125</sup> The UNIDROIT has drafted a set of Principles on

119. See John Ballen, *Fast-Track Arbitration on the International Scene*, 2 AM. REV. INT'L ARB. 152 (1991); Benjamin G. Davis, *Improving International Arbitration: the Need for Speed and Trust*, in IMPROVING INTERNATIONAL ARBITRATION LIBER AMICORUM MICHEL GAUDET 28 (Benjamin G. Davis ed., 2000).

120. See Hans Smit, *Fast-Track Arbitration*, 2 AM. REV. INT'L ARB. 138 (1991).

121. See CHRISTIAN BÜHRING, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS: DESIGNING PROCEDURES FOR EFFECTIVE CONFLICT MANAGEMENT* (1996); EILEEN CARROLL & KARL J. MACKIE, *INTERNATIONAL MEDIATION—THE ART OF BUSINESS DIPLOMACY* (2000); Klaus Peter Berger, *Integration of Mediation Elements into Arbitration: 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators*, 19 ARB. INT'L 387 (2003); Steven J. Burton, *Combining Conciliation with Arbitration in International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637 (1995); Emilia Onyema, *The Use of Med-Arb in International Commercial Dispute Resolution*, 12 AM. REV. INT'L ARB. 411 (2001); David W. Plant, *The Arbitrator As Settlement Facilitator*, 17 J. INT'L ARB. 143 (2000).

122. See Paul J. Davidson, *The International Federation of Commercial Arbitration Institutions*, 5 J. INT'L ARB. 131 (1988).

123. See text *supra* note 81.

124. The United Nations Convention on Contracts for the International Sale of Goods (CISG), April 11, 1980, U.N. Doc. A/Conf 97/18, 1489 U.N.T.S. 3, 19 I.L.M. 671.

125. See *id.*; see also COMMENTARY ON THE INTERNATIONAL SALES LAW (Massimo C. Bianca & Michael Joachim Bonell eds., 1987).

International Commercial Contracts (Principles).”<sup>126</sup> The proponents of The Principles argue that it could serve as a transborder law of contracts and should govern in litigations involving international commercial transactions.<sup>127</sup> Finally, English courts and legislators might argue, from a more traditional choice-of-law perspective, that English commercial law has become so stable and sophisticated after years of judicial construction that it could readily function as the transborder *lex mercatoria*.<sup>128</sup>

There are at least two other views on the question of whether a transborder commercial law is emerging and how arbitrators participate in fashioning it. First, pursuant to consecrated contract principles, the parties choose the governing law in the contract. Courts must respect the parties’ choice of law unless it violates the jurisdiction’s public policy.<sup>129</sup> In each case, the transborder commercial law can be the law chosen by the parties. Second, the designated arbitrators can also influence the selection of the law applicable. For example, in the event that the parties fail to exercise their contract prerogative, the designated arbitrators would determine the matter because, at this stage of the process, the parties are unlikely to agree and, therefore, must cede their authority to the arbitrators who—in any event—are responsible for the proper conduct of the arbitration.<sup>130</sup> Under standard institutional rules, the arbitrators can use any choice-of-law formula they deem suitable to choose the applicable law. Further, whichever law they choose, they must apply it in conformity with customary trade usages.<sup>131</sup> Accordingly, in some cases, the transborder commercial law will be the law chosen by the arbitrators when the parties default on the choice-of-law but the construction of that law must be in conformity with standard commercial practices. Therefore, assuming the fealty of the arbitrators’ interpretation, the mercantile community ultimately sets the rule of law.

Given the contemporary sophistication of international business, it is unlikely that parties would fail to exercise their right to choose the governing law. Even systematic party choice, however, does not eliminate the arbitrators’ influence. They retain the authority to mold the chosen law to the

126. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994).

127. See Michael Joachim Bonell, *Unidroit Principles and the Lex Mercatoria*, in *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* 249 (Thomas E. Carbonneau ed., 1998).

128. See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 *YALE J. INT’L L.* 435 (2000); Mark Garavaglia, *In Search of the Proper Law in Transnational Commercial Disputes*, 12 *N.Y.L. SCH. J. INT’L & COMP. L.* 29 (1991).

129. See CARBONNEAU, *supra* note 68, at 23.

130. *Id.* at 6–13.

131. See Yves Derains, *Le statut des usages du commerce international devant les juridictions arbitrales*, in *REVUE DE L’ARBITRAGE* 122 (1973); Philippe Fouchard, *Les usages, l’arbitre et la juge*, in *LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES: ÉTUDES OFFERTES À BERTHOLD GOLDMAN* 67 (Philippe Fouchard et al. eds., 1982).

specific circumstances of the litigation. They must also generally interpret the law and determine what it says. As members of the business community, arbitrator can hardly ignore generally accepted practices. The content of the governing *lex*, however chosen, is quite malleable then, with the degree of malleability being determined by the arbitrator's ingenuity.<sup>132</sup> It is difficult to escape the fact that arbitrators are hired for their expertise, business acumen, and judgment. On a case-by-case basis, they invest the governing law with content. In a word, arbitrators make law in the matters in which they sit.

They also can make law beyond the individual case. A process of *stare decisis* has emerged regarding transborder arbitral awards.<sup>133</sup> Although arbitral awards are private and can consist primarily of factual determinations, they have served as official or unofficial precedent in subsequent arbitrations. They have been used as a vehicle for establishing, modifying, or contradicting the content of the governing law. Arbitrators can refer to determinations they reached in other arbitrations or rely upon awards rendered by other arbitrators. Ruling arbitrators may seek to decide in a manner that is in keeping with other arbitral rulings, thereby contributing to the establishment of a set of core commercial law principles of wide application. This objective may require that they take liberties with the governing law and their adjudicatory powers under the contract. Arbitrators bear primary responsibility to decide the submitted matter, but they also operate within a larger adjudicatory system.<sup>134</sup> The arbitrators' decisional sovereignty may be restricted by an unstated, perhaps unrecognized, obligation to decide in conformity with the general principles of law that have arisen in other arbitrations. The parties' reference to arbitration implies their acquiescence to a system of arbitral adjudication beyond the bargain for the business judgment of the arbitrators. At the transborder level, arbitrators may make law both for the appointing parties and for the system in which they function.

The practice of the Court of Sports Arbitration (CSA)<sup>135</sup> confirms the law-making activity of arbitrators. The CSA implements the regulations that pertain to the training and competition of amateur athletes. It publishes its

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132. See, e.g., Otto Sandrock, *How Much Freedom Should an International Arbitrator Enjoy?—The Desire for Freedom from Law v. the Promotion of International Arbitration*, 3 AM. REV. INT'L ARB. 30 (1992).

133. See, e.g., Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT, *supra* note 127, at 23.

134. See, e.g., *The Status of the Arbitrator*, in THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN (Supp. Dec. 1995); Werner Melis, *Function and Responsibility of Arbitral Institutions*, 13 COMP. L. Y.B. INT'L BUS. 107 (1991); D. J. Sharp, *The Arbitrator's Duty of Good Faith*, 66 ARBITRATION 226, 228–29 (2000); Murray L. Smith, *Contractual Obligations Owed by and to Arbitrator: Model Terms of Appointment*, 8 ARB. INT'L 17 (1992).

135. See, e.g., GABRIELLE KAUFMANN-KOHLER, *ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION & SPORTS LAW* (2001).

opinions. Its activities and determinations have been the subject of commentary and evaluation. Its rulings are seen as having substantial prospective value. Similarly, ICC arbitral awards have long been characterized as having precedential impact.<sup>136</sup> Even within the U.S. legal process, arbitration has become a critical remedy in employment,<sup>137</sup> securities,<sup>138</sup> and consumer<sup>139</sup> matters. A perusal of recent employment arbitration awards<sup>140</sup> revealed that the vast majority of the awards are purely factual determinations. A small percentage reflect summary dispositions. Approximately twenty percent of the awards are mixed determinations; they contain factual determinations but also include brief, episodic, and relatively inconsequential references to and discussions of the applicable law. About seven percent of the awards are the equivalent of substantial judicial opinions on employment law. These awards warrant commentary and analysis and could have a precedential effect (in the sense that they could influence another arbitrator's appraisal of law or could be integrated into the adversarial dialogue about the meaning of the governing law).

The essential point is simply stated: Even though an adjudicatory process is private in character, if it applies broadly in an area of activity, it eventually yields substantive results that have a systemic character. A procedural system for the adjudication of claims cannot long function without developing an overt and system-wide discussion of applicable decisional predicates. The airing and molding of principles are necessary to the consistency and even-handedness (and, therefore, the legitimacy) of the process. Where arbitration serves as the principal process of dispute resolution, arbitrators make law both inside and outside national legal systems.

As a result, the law's intersection with the process of arbitration is of historical significance.<sup>141</sup> Arbitration is no longer relegated to specialty fields; it is becoming the primary process of civil litigation within the United States.<sup>142</sup> It also absorbs regulatory and statutory

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136. *Id.*

137. *See* CARBONNEAU, *supra* note 68, at 251.

138. *Id.* at 210.

139. *Id.* at 225.

140. The awards can be classified in four rubrics: Class One awards consist of arbitral rulings that have an evident precedential value in light of the sophistication of the legal reasoning and the application of the law to the facts of the matter. Class Two awards are determinations that are likely to be important in guiding other arbitrators in reaching their conclusions on the basis of law. Legal discussion is present in these awards and the law is applied to the findings of fact. Class Three awards represent determinations reached exclusively on the basis of facts. These awards are well-crafted and composed—they are entirely professional and rigorous—but they do not contain any discussion of law. Finally, Class Four awards are summary dispositions of the matters presented. In the classification, each award is introduced by a headnote and a brief summary of the facts and, if relevant, a discussion of the law. The awards are on deposit with the author.

141. *See* CARBONNEAU, *supra* note 68, at 1.

142. *Id.* at 57–77.



claims.<sup>143</sup> Furthermore, it provides transborder merchants with a stable process of adjudication and is beginning to fashion—or at least to participate in the making of—an international law of commerce and international contracts.<sup>144</sup> Arbitration, therefore, fills gaps, supplies access to adjudication, and develops workable substantive norms for transnational commerce and the central subject areas of domestic civil litigation. NAFTA arbitration<sup>145</sup> is particularly promising in terms of law-making. It has tremendous transnational potential because of its scope and its anchor in regulatory and treaty law. Throughout the field of arbitration, practical imperatives and the need for functionality outweigh the controversial inconsistencies of diversity.

## VI. PROSPECTIVE ARBITRAL PRACTICE

The international and domestic significance of arbitration may call for a new form of public regulation of the arbitral process and of arbitrators. Arguing that courts should review awards on the merits because they may have acquired a systemic law-making capacity is a perilous position to take. The historical liberation of arbitration was achieved by limiting the judicial scrutiny of awards to whether the procedure giving rise to the arbitrator's determination was fundamentally fair and whether arbitrators remained within the contractual boundaries of their authority in rendering awards.<sup>146</sup> Even if the merits review of awards became essential, vacatur on this basis should be confined to the arbitrator's denaturing of the governing law.<sup>147</sup> A similar standard should apply even in domestic arbitrations involving civil rights claims. In order to preserve the functionality of the arbitral process, it seems that society must trust the arbitrator to reach the "right" or a plausible conclusion—or, at least, not to settle on a profoundly repugnant determination. Engaging in *post facto* supervision directed exclusively at the content of awards does not respond well to the need to protect disputing parties from arbitrator abuse.

The regulation of arbitral law-making, it seems, must be centered upon the arbitrators themselves and must take place at the head of the process. Given the arbitrators' potential law-making role, some form of certification or licensure should be established and satisfied prior to appointment. Because the arbitrator is asked to perform the function of a judge and the rendered award can have an impact beyond the particular transaction, the

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143. *Id.* at 177.

144. *Id.* at 354–68.

145. See text *supra* notes 69–72.

146. See, e.g., Federal Arbitration Act (FAA) § 10, 9 U.S.C. § 1; New York Arbitration Convention, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, at art. V.

147. Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: a Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231 (1990).

arbitrator becomes a type of public figure exercising a quasi-public mandate. Even when the arbitrator merely decides the submitted matter, the arbitrator acts in a professional capacity and should be subject to some form of regulation beyond the private contract. The importance of judging demands the imposition and fulfillment of minimal professional requirements.

The desirability and exact character of the credentialing process need to be discussed.<sup>148</sup> That discussion exceeds the scope of the present writing. Suffice it to state that it seems that the cottage industry character of international commercial arbitration may no longer be a sufficient framework for operating the transborder arbitral process. The growth and development of the process demand greater transparency and access. Clients should be able to know readily how to choose their arbitrators. Individuals who seek to serve as arbitrators should be able to discover how they might enter the process. It may well be the case that the basic rationale for hiring someone as an arbitrator will never change. Parties choose arbitrators because of their experience and demonstrated judgment in a particular commercial field; credentials rarely overwhelm the reality and necessity of experience. It also would be difficult to justify a situation in which the parties could be prevented from appointing the person they want as arbitrator because of a failure of credentials, although the movement toward fully neutral party arbitrators at least points in that direction. Be that as it may, if the possible law-making function of arbitrators justifies requiring credentials, the certifying process cannot become a perfunctory exercise. Requiring meaningless credentials would defraud the process and all of the affected parties.

The need for external scrutiny and approval of arbitrators is especially strong in domestic employment or consumer arbitrations that involve the application of civil rights laws or other fundamental social policy regulations. In these circumstances, the professionalism of the arbitrator and the composition of the tribunal can have a direct bearing upon the acceptability of the result. Arbitrators who lean either way on the political issues that are raised should be excluded from the process. However meritorious their grievances, it is difficult to accept the position of African-Americans and women that the seated arbitral tribunal should include an arbitrator who favors their position or that the majority of the tribunal be sympathetic to their political convictions.<sup>149</sup> If partisan arbitrators favoring civil rights must be appointed in cases involving allegations of civil rights violations in the workplace, it might require the designation of a "racist" arbitrator in a three-member tribunal. Such a circumstance would be untenable for the administering institution

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148. See, e.g., Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitration*, 87 IOWA L. REV. 1337 (2002).

149. This is the arbitral device that was used in the settlement of the discrimination suit against Smith Barney and in a similar suit against Merrill Lynch. See THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 561 (3d ed. 2002).

and would undermine the legitimacy of the proceedings and the arbitral process. In matters involving divisive political issues, the appointment of a three-member panel seems necessary simply to accommodate the range of possible views. Perhaps the parties should have a nearly absolute right to appoint “their” arbitrator, provided full disclosure is made on specified relevant matters. Disclosure should avoid vacatur of the award because of the “evident partiality” of the arbitrator. The administering institution should present the two party-appointed arbitrators with a slate of three “acceptable” candidates for the position of chair. The listing can indicate the administering institution’s order of preference for the neutral arbitrator. If the two arbitrators and the appointing parties are unable to agree on a single choice within a reasonable period of time, the administering institution should designate its first preference as the chair. The appointment can be subject to immediate judicial review for clear abuse of discretion.

Although they remain controversial, the public law issues are nowhere near as divisive in international arbitrations, in which the need for external scrutiny and the application of external standards are much less. Although “reparations” are not the issue, a variety of “reconciliations” need to take place in light of the diversity of the international community. The international arbitrator needs to have an awareness of the global geo-political divisions (North-South, East-West), the positions on trade policy, and the national legal traditions that constitute the rule of law. The international arbitrator should not only be a commercial expert and player, but also a historian of the international community and knowledgeable about its current developments. The international arbitrator should also have the multi-cultural and multi-linguistic experience necessary to understand transborder cultural and sociological differences. The challenge of elaborating necessary credentials for international arbitrators may best be left to the *ad hoc* decision-making of the contracting parties and their lawyers, but it is clear that the international arbitrator plays a significant role in bridging the diverse groups and practices of the international community. In the end, the harmonization of the diverse practices and cultural dispositions of national legal systems will take place in the mind of the arbitrator.