The Culture of International Arbitration

Won L. Kidane

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

Library of Congress Cataloging-in-Publication Data

Names: Kidane, Won, author.
Title: The culture of international arbitration / Won L. Kidane.
Description: New York : Oxford University Press, 2017. | Includes bibliographical references and index.
Identifiers: LCCN 2016037389 | ISBN 9780199973927 ((hardback) : alk. paper)
Subjects: LCSH: Arbitration (International law)
Classification: LCC KZ6115 .K53 2017 | DDC 347/.09—dc23 LC record available at https://lccn.loc.gov/2016037389

9 8 7 6 5 4 3 2 1

Printed by Sheridan Books, Inc., United States of America

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The Evolving Justifications of International Arbitration

Through the ages, the justifications for international arbitration ranged from the promotional promises of low cost, speed, flexibility, confidentiality, expertise, and neutrality[1] to the more foundational premise of "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[2] This chapter outlines the evolving justifications and critically assesses the contemporary justifications. The leading texts on international arbitration demonstrate a unity of vantage points on the advantages and disadvantages of international arbitration. This chapter contends that the dominant narrative on the advantages of international arbitration is that of the archetypal multinational business that wants to stay out of what it considers inhospitable, biased and ignorant local courts and take its opponent to a more familiar, presumably enlightened, and culturally acceptable forum. The local party's story in the new forum is hard to profitably tell. This chapter tells that story.

A. INITIAL JUSTIFICATIONS

As indicated in Chapter 3, during the French Revolution, initially, the "*Assemblée Constituante* believed arbitration to be the usual and natural way of settling disputes

1. Every contemporary textbook lists these factors. The leading ones are extensively referenced throughout this chapter.

2. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972). ("The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."). *Id.; see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 629 (1985). Although, in *Bremen*, the Supreme Court said this in the context of a forum selection clause, in *Mitsubishi* it incorporated the basic principle into the arbitration domain. *Bremen*, 407 U.S. at 9–12; *Mitsubishi*, 473 U.S. at 629. It said in particular: "[a]n agreement to arbitrate before a specified tribunal [is], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Mitsubishi*, 473 U.S. at 630.

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and rendering justice" before the system quickly fell out of favor because of allegations of abuse and rendition of "manifest injustice."[3] As a result of this perception of injustice, the *Napoleonic Code de Procédure Civile* of 1806 imposed severe restrictions on arbitration.[4] Indeed, in 1843, the *Cour de cassation* disallowed the enforceability of agreements to arbitrate future disputes that failed to name the specific arbitrators.[5]

Almost half a century later, on November 23, 1892, the London Chamber of Arbitration was founded on the premise that:

> [The] Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer up of strife.[6]

During the same era, a similar sentiment prevailed in America. In a famous 1906 speech delivered at the annual meeting of the American Bar Association, Roscoe Pound, who later became dean of Harvard Law School, said:

> Uncertainty, delay and expense, and above all, the injustice of deciding upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the art of every sensible businessman in the community.[7]

In the time since the early 1900s, none of these justifications seemed to have particularly inspired confidence. In the meantime, however, many other contemporary justifications have emerged. The "gradual legalization"[8] of the North-South relations and increased transnational commerce and associated jurisdictional and court judgment enforcement problems led to the adoption of the New York Convention.[9]

3. Jean-Louis Delvolvé, Jean Rouche & Gerald H. Pointon, French Arbitration Law and Practice 3 (2003) [hereinafter Delvolvé et al.].

4. Among these restrictions are those on the state, local authorities, and public institutions to submit to arbitration. *See id*. at 3–4.

5. *Id.* at 4 (citing Cass. civ. 10 July 1843, S. 1843.1. p. 561 and D. 1843.1 p. 343; *republished in* Rev. Arb. 1992, 399 with the opinion of Advocate General Hello to the contrary).

6. Blackaby et al., Redfern and Hunter on International Arbitration 61 (5th ed. 2009) (citing V.V. Veeder & Brian Dye, *Lord Bramwell's Arbitration Code*, 8 Arb. Int'l 330 (1992) (quoting Manson (1983) IX LQR)).

7. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. pt. I, 395, 404 (1906).

8. *See* Yves Dezalay & Bryant Garth, Dealing in Virtue 64 (1996).

9. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York), 330 U.N.T.S., 21 U.S.T. 2517, 7 I.L.M. 1046 (June 10, 1958), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf [hereinafter New York Convention]. Comprehensive information on the New York Convention, including the *travaux préparatoires*, is available at New York Convention, http://www.newyorkconvention.org/ (last visited October 2, 2016).

Similar factors in the investment arena led to the adoption of the ICSID Convention[10] and the proliferation of regional and bilateral investment agreements.[11] The purposes and justifications of international arbitration cannot be understood detached from the purposes and justifications of the legal instruments that enabled their existence. Nonetheless, contemporary justifications do not necessarily mirror the main purposes of these instruments. The following sections critically examine the contemporary justifications.

B. CONTEMPORARY JUSTIFICATIONS

Textbooks, journal articles, other forms of academic and trade publications, and speakers in conferences as well as courts of different jurisdictions have advanced various justifications for the increased use of international arbitration that include cost, expediency, procedural flexibility, control over the decision-making process through appointment of arbitrators, confidentiality, neutrality, and enforceability of the agreements, as well as the awards. However, decades of experience with international arbitration have shown that most of these justifications are promotional or uncertain at best.

The justifications could be bifurcated into principal justifications and subsidiary justifications. The leading treatises have now settled on two principal justifications and some uncertain subsidiary justifications. The principal ones are: neutrality and enforceability.[12] Neutrality refers to the neutrality of both the forum and the selected arbitrators. Enforceability refers to the availability of the legal frameworks that enable the enforcement of foreign arbitral awards, such as the New York Convention.[13] The subsidiary and uncertain advantages include flexibility, expertise, confidentiality, and the special roles of arbitrators.[14]

10. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (as amended), Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159, https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx [hereinafter ICSID Conference]. Comprehensive information on the ICSID Convention including information on cases is available on the official website at International Centre for Settlement of Investment Disputes, https://icsid.worldbank.org (last visited October 2, 2016.).

11. The United Nations Conference on Trade and Development (UNCTAD) maintains a database of most of the world's Bilateral Investment Treaties (BITs). The texts and additional information of thousands of BITs are available on the official website of UNCTAD at UNCTAD, IIA Databases, http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx (last visited October 2, 2016).

12. *See* Blackaby et al., *supra* note 6, at 31–32. *See* also Margaret L. Mosses, The Principles and Practice of International Commercial Arbitration 3–4 (2d ed. 2012). Gary Born's textbook offers more nuanced discussions on the subject. *See* Gary Born, International Arbitration: Cases and Materials 87–102 (2011). Margaret Mosses writes matter-of-factly: "The benefits of international commercial arbitration are substantial . . . the two most significant reasons were (1) the neutrality of the forum (that is, being able to stay out of the other party's court) and (2) the likelihood of obtaining enforcement." Mosses, *supra*, at 3. The other advantages she mentions are confidentiality, less discovery, and speed. Mosses, *supra*, at 3–4.

13. Blackaby et al., *supra* note 6, at 31.

14. *Id.* at 33–34.

Each justification is described before a critical examination is offered in the next subsection. Neutrality is one of the two principal justifications. Alan Redfern presents its virtues as follows:

> Parties to an international contract usually come from different countries. The national court of one party will be a foreign court to the other party. It will be "foreign" in almost every sense. It will have its own formalities and its own rules and procedures, which may (quite naturally) have been developed to deal with domestic matters and not for international commercial or investment disputes. It will also be "foreign" in the sense that it will have its own language—which may or may not be the language of the contract—and its own bench of judges and lawyers.[15]

The supposed strictly neutral tribunal makes perfect sense only if certain improbable assumptions are made, that is, that the other party would not face the same obstacles when the case is moved to some far-off cosmopolitan location. This goes to the question of the balance of neutrality, and will be discussed in more detail in the next section. But the second justification is the greater enforceability of the award under the existing legal infrastructure set up by the New York Convention, the ICSID Convention, and other regional and bilateral arrangements.[16] Evidently, because of these instruments, the odds of enforcing arbitral awards are now better than the odds of enforcing court judgments in many parts of the world.[17] Within the

15. *Id.* at 32. The passage continues:

> This means that a party to an international contract which does *not* contain an agreement to arbitrate may find, when a dispute arises, that it is obliged to commence proceedings in a foreign court, to employ lawyers other than those who are accustomed to its business and to embark upon the time-consuming and expensive task of translating the contract, the correspondence between the parties, and other relevant documents into the language of the foreign court. Such a party will also run the risk, if the case proceeds to a hearing, of understanding very little of what is said about its own case.

Id.; see also text accompanying n.69.

16. *Id.* at 31–33.

17. *Id.* at 33. There is no universal court judgment recognition convention to date. HCCH's attempts have not been remarkably successful in this regard. Comprehensive information including drafts are available at Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, HCCH, Feb. 1, 1971, https://www.hcch.net/en/instruments/conventions/full-text/?cid=78. The European Union, however, has a binding treaty, that is, European Council Regulation No. 44/2001. Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, The Council of the European Union, Dec. 22, 2000, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF. In the United States, there is the Uniform Foreign Money Judgment Recognition Act of 1962. The Uniform Act has no legal effect but is a recommendation for the states. *See* National Conference of Commissioners on Uniform State Laws, Uniform Foreign Money-Judgments Recognition Act (1962), https://lettersblogatory.com/wp-content/uploads/2011/01/UFMJRA.pdf. Apparently, the community of nations has found it easier to agree on recognition of arbitral awards than their respective courts' judgments.

enforceability advantage, Redfern incudes finality of the award.[18] This is essentially the absence of an appellate process.[19] Others consider this a disadvantage.

Within the subsidiary but uncertain justifications fall two perceived advantages: (1) the flexibility of the rules that might be adjusted to fit certain cases and industries,[20] and (2) the ability to choose one's own arbitrators who, "should be able to grasp quickly the salient issues of fact or law in dispute. This will save the parties both time and money, as well as offering them the prospect of a sensible award."[21] However, these perceived advantages are based on several unwarranted assumptions, such as the system's superior ability to select arbitrators who would always quickly grasp facts and law and dispense fair justice. The merits of these justifications will also be assessed in the next section.

Confidentiality[22] is another justification. It is supposed to protect parties that are dragged into arbitration against their will, or that are compelled to resort to arbitration against their wish.[23] It protects trade secrets or competitive advantages, or even shields their own "bad-decision-making."[24] What else it shields from scrutiny is not a part of the narrative frequently told.

The leading textbooks also contain discussions on disadvantages of international arbitration. The disadvantages-list often contains cost, delay, and some jurisdictional complications.[25]

It appears more specifically that the leading developed nations considered arbitral awards, which were then expected to be seated and made in the developed countries by jurists from the developed world, to be more acceptable to the courts of the developed world than court judgments of the developing world.

18. Blackaby et al., *supra* note 6, at 32.

19. Although ordinarily, in most modern systems, the merits of final awards are not subject to judicial review, other possible post-award processes such as annulment proceedings and permissible resistance to enforcement action often deprive arbitral awards of finality.

20. Blackaby et al., *supra* note 6, at 32–33.

21. *Id.* at 33.

22. A related concept is privacy, which is limited to the privacy of the proceedings. Confidentiality agreements often restrict access to information of all types, including the pleadings and awards.

23. Blackaby et al., *supra* note 6, at 33–34.

24. *Id.* at 33.

25. *Id.* at 34–36. Redfern highlights the limitations of arbitral power as a disadvantage in the following terms:

> In general, the power accorded to arbitrators, whilst adequate for the purpose of resolving the matter in dispute, fall short of those conferred upon a court of law. For example, the power to require the attendance of witnesses under penalty of fine or imprisonment, or to enforce awards by the attachment of a bank account or the sequestration of assets, are powers which form part of the prerogative of the State. They are not powers that any State is likely to delegate to a private arbitral tribunal, however eminent or well-intentioned that arbitral tribunal may be. In practice, if it becomes necessary for an arbitral tribunal to take a coercive action in order to deal properly with the case before it, such action must usually be taken indirectly though the machinery of the local courts, rather than directly as a judge himself can do." *Id.* at 36.

Most recent surveys by stakeholders do not necessarily illuminate the textbook renditions when examined carefully. A 2015 survey of 763 questionnaire responses and 105 interviews by White & Case LLP and the School of International Arbitration of Queen Mary University of London[26] is one of the most recent ones. The White & Case Survey found that 90 percent of respondents surveyed prefer international arbitration to resolve cross-border commercial disputes over litigation,[27] and that the most preferred venues are in London and Paris, with Hong Kong and Singapore standing third and fourth, respectively.[28]

The survey generally shows that the advantages of arbitration are enforceability of the awards, avoidance of specific legal systems, flexibility, and selection of arbitrators in descending order.[29] Cost and lack of speed have been cited as disadvantages.[30] Consider the perspective again: ability to stay out of a particular court, and enforce foreign awards. Consider also the five most preferred seats: London, Paris, Hong Kong, Singapore, and Geneva, with Singapore and Hong King selected as the most improved.[31] The preferred arbitral institutions are: ICC, LCIA, HKIAC, and SIAC.[32]

One of the most important questions that the survey asked was: "What are the three most valuable characteristics of international arbitration?"[33] The results were interesting: 65 percent of the respondents chose enforceability, 64 percent chose avoiding specific legal systems/national courts, 38 percent chose flexibility, 38 percent chose selection of arbitrators, 33 percent chose confidentiality and privacy, 25 percent chose neutrality, 18 percent chose finality, 10 percent chose speed, 2 percent chose cost, and 2 percent chose other things.[34] The results are evaluated below, but consider the breakdown of the respondents of the survey. The survey asked where the respondents are based; the result was the following: 53 percent in Europe, 26 percent in Asia, 18 percent in the Americas, 2 percent in Africa, and 1 percent in Oceania.[35] In terms of the representation of legal systems: 39 percent civil law, 36 percent common law, 22 percent both civil and common law, and 3 percent others.[36]

26. White & Case LLP & Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (2015), http://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations [hereinafter White & Case Survey].

27. *Id.* at 2.

28. *Id.* at 12 chart 7.

29. *Id.* at 17 chart 13.

30. *Id.* at 2.

31. *Id.*

32. *Id.*

33. *Id.* at 6 chart 2.

34. *Id.*

35. *Id.* at 52 chart 47.

36. *Id.* at 52.

This, in fact, appears to be a relatively good demonstration of the current realization of the contemporary reasons for international arbitration. For example, regarding the survey question on the most valuable characteristics of international arbitration, the scores of neutrality and arbitrator selection, 18 percent and 38 percent respectively, are both interesting because they mean that of all the respondents, only 18 percent and 38 percent considered neutrality and arbitrator selection to be the most valuable characteristics of arbitration.[37] As indicated in the survey results, one interviewee put it nicely when he paraphrased what Winston Churchill said about democracy: "Arbitration is the worst form of international dispute resolution, except for all those other forms that have been tried from time to time."[38]

This would suggest that the most legitimate reason for arbitration is the ability to stay out of the other party's court and a better chance of enforcing the award.

During about the same period as the White & Case Survey, the International Bar Association Arb 40 Subcommittee also issued what it called "The Current State and Future of International Arbitration: Regional Perspectives."[39] The IBA Report noted that although growth is anticipated in all regions, in Africa, Latin America, and some parts of Asia, national court litigation remained the predominant means of dispute settlement.[40]

More substantively, the factors for growth that the IBA Report cites include: legislative reform (enactment of more supportive legislation), party autonomy (the ability to choose arbitrators and flexible procedures), enforcement regime (the New York Convention), speed and cost (better than court litigation), expertise (better decision- makers than court judges), neutrality (of forum), and confidentiality.[41] The IBA Report does not attempt to empirically prove the propositions, but it is a rehash of the mythology of efficiency, expertise, speed, flexibility, neutrality, confidentiality, and enforceability as universal advantages and justifications.

Among the hurdles that the Report cites are the lack of court support (in the enforcement of the agreements or awards, or even during proceedings) in some jurisdictions—such as in Africa[42]—increasing costs, a limited pool of arbitrators, problems with enforcement, and the demand for transparency.[43] On an important and related note, the Report says in particular that the limited pool of arbitrators "was of particular concern to practitioners in Europe, North America and Asia-Pacific.

37. *Id.* at 7 chart 3.

38. *Id.* at 10.

39. International Bar Association Arb 40 Subcommittee, The Current State and Future of International Arbitration: Regional Perspectives (2015), http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx [hereinafter IBA Report].

40. *Id.* at 9.

41. *Id.*

42. The Report notes in particular that: "In Africa, it was observed in many jurisdictions that there is often a lack of support generally from the courts, if not hostility on occasions." *Id.* at 10.

43. *Id.*

Primarily, the concern expressed was that a limited pool of arbitrators is leading to delays in the proceedings and awards being rendered."[44] The Report also indicated other concerns that arise out of the limited size of the pool without saying why the pool had to be limited. It states that: "arbitrators were not being proactive enough by identifying preliminary issues, were not prepared for hearings, were too biased in favor of the appointing party and were not producing quality arbitral awards."[45] The mythology of the need for an elite group of arbitrators, by IBA's own admission, has led to this kind of unprepared, unresponsive, and biased justice that ultimately the system appears to consider a minor glitch.[46] This particular matter is central to this study and will be explored in greater detail in subsequent chapters.

As far as Africa is concerned, the IBA Report says that "while much of the demand for international arbitration is driven by international companies investing in Africa, local entrepreneurs are beginning to embrace international arbitration."[47] In terms of the preference of seat, "most [African] contributors consider their home jurisdictions to be safe seats for the settlement of small commercial disputes, while some referenced the United Kingdom, France and Switzerland as safe seats when dealing with large and sensitive commercial disputes."[48] The IBA Report does not, however, say why the African respondents made that distinction.[49] To the extent that such a statistical entry represents a school of thought, it would appear that the school equates the accuracy of the legal process and the quality of justice that emerges out of it to technological and material advancement.

C. ASSESSING THE CREDIBILITY OF THE CONTEMPORARY JUSTIFICATIONS

Contrary to what is consistently and repeatedly stated in the leading texts, there is no universal set of justifications applicable in all circumstances for all parties. In transnational contacts, as far as how disputes should be settled, the parties' interests and preferences are almost always divergent.[50] Arbitration is mostly an option preferred by the party that wants to stay out of the other party's home courts. In cases of foreign investment or projects carried out by foreign companies in a particular country, it is typically the foreign company that insists on moving the dispute out of the country in which the project is supposed to be implemented.[51] As such, the justifications

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 20.

48. *Id.*

49. *See generally id.*

50. *See generally* 1 Gary B. Born, International Commercial Arbitration 70–71 (2d ed. 2014).

51. *See generally, id.* at 74–76.

for arbitration are often provided from the point of view of the foreign party. There are a number of complex historical, political, and ideological reasons for that, but those are beyond the scope here. For purposes of this critical analysis, the contemporary justifications could be classified into two broad categories: jurisdictional and promotional. The jurisdictional justifications (which include front-end and back-end enforcement issues) are real, but the promotional justifications (which include cost, speed, efficiency, flexibility, expertise, confidentiality, etc.) are situational and mainly economic. This section assesses both sets of justifications in turn.

1. Jurisdictional Justification

Every textbook, every study, and report rightfully mentions the superiority of the legal infrastructure for the enforcement of arbitral awards as opposed to court judgments as one of the justifications and advantages of international arbitration.[52]

Gary Born endorses many of the standard and promotional answers on the benefits of arbitration, including neutrality, cost, speed, confidentiality, flexibility, competence, and enforceability,[53] but unlike most writers, he also provides a more serious and nuanced scholarly note on the purpose and objective of international arbitration and the real jurisdictional justifications thereof.

International arbitration alleviates some of the serious front-end and back-end jurisdictional problems, while of course, creating its own jurisdictional complications along the way.[54] Born's description of the problem is instructive:

> In today's global economy, business enterprises of every description can find themselves parties to contracts with foreign companies (and states) from around the world, as well as parties to litigation before courts in equally distant locales. The Consequence of these proceedings—and of losing them—are often enormous. A contract means no more than what it is interpreted to say, and how it is enforced; corrupt, incompetent, or arbitrary decisions can rewrite a party's agreements or impose staggering liabilities and responsibilities.[55]

Born properly describes the challenges of decision-making. Indeed "corrupt, incompetent, or arbitrary decisions can rewrite a party's agreements or impose staggering liabilities and responsibilities,"[56] but how is arbitration immune from this? In an attempt to answer this question, Born continues writing: "There are many reasons why the same dispute can have materially different outcomes in different forums.

52. *See, e.g., id.* at 77–80.

53. *See id.* at 73–93.

54. Granted that international arbitration also brings its own jurisdictional complexities that would not have existed, on balance, it would appear that it eliminates more jurisdictional problems than it creates.

55. Born, *supra* note 50, at 70.

56. *Id.* at 70.

Procedural choice-of-law and substantive legal rules differ dramatically from one country to another."[57] So far arbitration does not seem to enjoy any particular advantage, but consider more of his statements:

> Other considerations, such as inconvenience, local bias and language, may make a particular forum much more favorable for one party than another. More pointedly, the competence and integrity of judicial officers also vary substantially among different forums; annual corruption indices and other studies leave little doubt as to the uneven levels of integrity in some national judiciaries. Those indices are, regrettably, confirmed by contemporary anecdotal experience as to the corruption endemic in civil litigation in some jurisdictions.[58]

Hence, local courts are biased, corrupt, and lack integrity. All of these might be true of judiciaries around the world, but what superior mechanism does the arbitral system have to avoid all of the above, that is, bias and lack of integrity? Born does not say much about this but continues writing: "Precisely because national legal systems differ profoundly, parties inevitably seek to ensure that, if international disputes arise, those disputes are resolved in the forum that is most favorable to their interests."[59] If by "parties" we always mean parties who agree that the local courts are biased and corrupt, it makes perfect sense for them to be looking for some disinterested and pure dispenser of justice, but if one of the parties disagrees, removal of the case to a forum more favorable to the other party only shifts the risk—it does not eliminate it.

In any case, the more genuine problem is jurisdictional. Born describes it well in the following terms:

> In turn, that can mean protracted litigation over jurisdiction, forum selection and recognition of foreign judgments. These disputes can result in lengthy and complex litigation—often in parallel or multiple proceedings—which produce more in legal costs and uncertainty than anything else. In this regard, contemporary international litigation bears unfortunate, but close, resemblances to the difficulties reported by Medieval commentators regarding transnational litigation in early eras.[60]

The dispute resolution provision in contracts would indeed help these jurisdictional difficulties. Born assumes the achievability of a reliable forum that would resolve these problems, and further assumes that international arbitration would offer such reliability.[61]

57. *Id.*

58. *Id.* at 70–71 (citations omitted).

59. *Id.* at 71.

60. *Id.*

61. *Id.* "Because of the importance of forum selection in the international context, parties to cross-border commercial transactions very often include dispute resolution provisions in their agreements, selecting a contractual forum in which to resolve their differences. By selecting a forum in

Leaving aside the assumptions that Born makes about the universal reliability of international arbitration, which could be as biased as litigation—if not more—this passage describes the serious jurisdictional uncertainties and possible multiplicity of litigations that international arbitration, if legitimately organized, could potentially avoid. To be sure, although international arbitration might mitigate such possibilities, it cannot eradicate the problem of parallel and other types of litigation complications. The recent Yukos debacle of multiple judicial proceedings offers a good example.[62]

Arbitration agreements could avoid the front-end jurisdictional problems as they function like a forum selection clause enforceable as a matter of international obligation, whether through the New York Convention, the ICSID Convention, or some other regional or bilateral treaties. When the contracts are done well, the front-end jurisdictional problems—including personal jurisdiction, subject matter jurisdiction, venue, etc.—could be avoided. Arbitration agreements could also avoid back-end problems as the awards, if done properly, would be enforced by courts of law under the same legal infrastructure. Although arbitration could sometimes give rise to its own jurisdictional complications, leading to complex litigation both relating to the enforcement of the agreement and to the award, it does, more frequently than not, help avoid jurisdictional problems.

Although international arbitration sometimes introduces its own jurisdictional complications, the minimization of front-end and back-end jurisdictional and associated choice-of-law problems is perhaps the legitimate and peculiar advantage of international arbitration.[63] Almost every other justification, as stated earlier, is either incorrect, situation dependent, or merely promotional.

advance, parties are able to mitigate these costs and uncertainties of international dispute resolution, through the centralization of their dispute in a single, reliable forum." *Id.* (citations omitted).

62. In what is considered to be the largest arbitral award to date, an arbitral tribunal siting in The Hague found the respondent state, Russia, liable for damages in the amount of $50 billion. Russia, in addition to filing an annulment action in The Hague, continues to challenge enforcement on various legal grounds, including in the United States. The result is yet to be seen. Information about the various aspects of this case is available at Dmytro Galagan & Patricia Živković, *The Challenge of the Yukos Award: An Award Written by Someone Else—a Violation of the Tribunal's Mandate?*, Kluwer Arb. Blog (Feb. 27, 2015), http://kluwerarbitrationblog.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/. *See also* Neil Buckley & Courtney Weaver, *France and Belgium Freeze Russian State Assets over Yukos Case*, Fin. Times (June 18, 2015), http://www.ft.com/cms/s/0/3ab475a6-15da-11e5-a58d-00144feabdc0.html#axzz3tLfF1VF1; Jake Rudnitsky & Anton Doroshev, *Russia Set for Global Asset Fight over Yukos after Seizures*, Bloomberg Bus. (June 18, 2015), http://www.bloomberg.com/news/articles/2015-06-18/russia-braces-for-global-asset-fight-over-yukos-after-seizures-ib2boyg9.

63. The theoretical foundations of this jurisdictional advantage are very well summarized by the U.S. Supreme Court in Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974) (citing The Bremen v. Zapata Offshore Co., 407 U.S. 1, 7–15 (1972)) as follows:

> [U]ncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore,

2. Promotional Justifications

Among the textbook justifications claiming universal appeal are neutrality, expertise, flexibility, and confidentiality. The meaningfulness of all of these justifications assumes the invariable validity of the following proposition: integrity of arbitrators of the highest order despite the absence of meaningful review and checks and balances. A critical review of each follows.

a. Neutrality

Consider the assumptions that Born as well as the other writers make. First, neutrality of the arbitral forum as a justification is often cited together with the incapacity, bias, or simple inconvenience of domestic courts. Corruption is also frequently added to the mix of what ails judiciaries around the world.[64] In situations where the contracting parties do not come from comparably developed countries the neutrality justification is often expressed with greater emphasis.[65] But when the disputing

> such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.
>
> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements . . . .
>
> Two Terms ago in *The Bremen v. Zapata Off-Shore Co.*, we rejected the doctrine that a forum-selection clause of a contract, although voluntarily adopted by the parties, will not be respected in a suit brought in the United States "unless the selected state would provide a more convenient forum than the state in which suit is brought." Rather, we concluded that a "forum clause should control absent a strong showing that it should be set aside." We noted that "much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place [where personal or *in rem* jurisdiction might be established]. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."
>
> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

64. *See* Born, *supra* note 50, at 71 (citing *Corruption Perception Index 2011*, Transparency Int'l, http://www.transparency.org/cpi2011/ (last visited Mar. 16, 2016)).

65. *See generally id.* at 80–81.

parties are from the same level of development—say between the United States and Japan—neutrality as a reason for arbitration is often not accompanied by the same level of zeal, especially if the alternative is litigation in U.S. courts. In fact, it is not inconceivable that the Japanese party might want to litigate in the United States depending on what is at stake, and vice versa.[66] Indeed, in these times of a complex multination corporate world, it might even be impossible to know exactly what nationality the corporation has for purposes of assigning local bias. A Toyota plant hiring hundreds of thousands of Americans in southern parts of the United States may not want to go to Japan for a dispute affecting the economic interests of the American workers. As such, Gary Born's example that a dispute between a U.S. company and a Japanese company are better off arbitrating in Switzerland or England[67] is an outdated concept. It all depends on so many factors in each individual case.

The conventional thinking described above assumes that choices are unencumbered and unlimited, that neutrality is always achievable, that courts everywhere are not neutral, and that the neutrality that could be obtained through party choice is superior to the courts. It looks at the advantages from one particular vantage point. It suggests the universality of the advantages and disadvantages. It ignores the possibility that for every winner, there are losers, and losers would look at everything from a different perspective. Redfern expands on his discussion of the virtues of neutrality as follows:

> [A] party to an international contract which does *not* contain an agreement to arbitrate may find, when a dispute arises, that it is obliged to commence proceedings in a foreign court, to employ lawyers other than those who are accustomed to its business and to embark upon the time-consuming and expensive task of translating the contract, the correspondence between the parties, and other relevant documents into the language of the foreign court. Such a party will also run the risk, if the case proceeds to a hearing, of understanding very little of what is said about its own case.[68]

The above passage focuses—in very broad terms—on the cultural barrier and uncertainties that the foreign party would face. Beyond shifting the cultural barrier to the other party, "neutrality" has some more advantages.

> By contrast, a reference to arbitration means that the dispute is likely to be determined in a neutral forum (or place of arbitration) rather than on the home ground of one party or the other. Each party will also be given an opportunity to participate in the selection of the tribunal. If this tribunal is to consist of a single arbitrator, he or she will be chosen by agreement of the parties, or by some outside institution to which the parties have agreed; and he or she will be

66. *See generally id.*

67. *See id.* at 75.

68. Blackaby et al., *supra* note 6, at 32; see also text accompanying n.15.

> required to be independent and impartial. If the tribunal is to consist of three arbitrators, two of them may be chosen by the parties themselves, but nevertheless each of them will be required to be independent and impartial (and may be dismissed if this proves not to be the case). In this sense, whether the tribunal consists of one arbitrator or of three, it will be a strictly "neutral" tribunal.[69]

This is obviously excellent advice to a company that does business in some far-off foreign land. But consider, for example, this "strictly neutral" proposition from the perspective of an African state involved in a dispute with a European multinational. This advice would take the dispute out of Africa to Europe. The private investor would be satisfied because—according to the proposition—the removal of the proceeding from an unfamiliar environment to a familiar environment would save it from stranger justice where she had to hire unfamiliar lawyers, translate documents, and navigate unfamiliar rules. But then if one considers it from the African party's perspective, it would be subjected to exactly the types of stranger justice that the private party wishes to avoid in the name of neutrality: hire unfamiliar lawyers, translate documents, go to some far-off forum, etc. Neutrality in this sense is not neutral. Neutrality in the true sense of the term is difficult to achieve, at least in the current state of North-South economic hierarchy. If a true neutral forum were to be devised in the above scenario, the disputants would take their case to Seoul or Beijing where they have to hire Korean lawyers and translate documents into Korean or Chinese. Therefore, even in the context of the dominant thinking of neutrality, it cannot justify international arbitration as a means of dispute resolution in the existing world economic order, at least when developing countries are involved. It is a concept that mainly shifts the risk.

Even then, the value that the users and practitioners assign to it does not seem very high. The White & Case Survey shows that only 25 percent of the respondents chose neutrality as one of the most valuable characteristics of arbitration.[70] Even when the regional imbalance is taken out of the equation, as the White & Case Survey indicates, neutrality as a justification ranks very low. Part of this is explained by the lack of confidence in the neutrality of party-appointed arbitrators. The IBA Report puts this as concerns over arbitrators being "*too biased in favour of the appointing party* and were not producing quality arbitral award."[71] This properly expresses the reality of the current marketplace of arbitration.[72] Neutrality as a justification for international arbitration in general is, thus, principally promotional. The textbooks and treatises need updating.

69. *Id.* at 32.

70. White & Case Survey, *supra* note 26, at 6 chart 2.

71. IBA Report, *supra* note 39, at 10 (emphasis added).

72. A somewhat extreme position would even suggest a more serious and fundamental flaw:

> To put it simply, if a doctor is sponsored by a pharmaceutical company, we might question whether the medicine prescribed is the best for our health; if a public servant receives money from a lobbyist, we might question whether the policies they promote are in the public

b. Confidentiality

At the most basic level, recognizing that some cultures would legitimately value confidentiality for its own sake, in modern commercial dealings confidentiality often presupposes that at least one party wants to hide something from public scrutiny. Although at times legitimate interests might need protection, confidentiality cannot be a universal virtue. If anything it requires its own independent justification because a system of justice that shields itself from public scrutiny cannot escape suspicion. Confidentiality as an objective of international arbitration is sometimes cited as a reason to avoid aggravation of the parties' dispute, or as Born puts it, avoidance of "trial by press release" while acknowledging that "commercial parties sometimes affirmatively desire certain disputes and their outcomes be made public."[73]

What is often not told is what else confidentiality hides about the system of justice. In international arbitration, apart from the occasional legitimate party request for protection from disclosure of certain parts of the commercial relations and the dispute thereof, confidentiality appears to be structurally promoted by arbitral institutions,[74] arbitrators, counsel, and the arbitration literature in general. But inasmuch as it protects information that the parties do not want disclosed, it also shields from scrutiny the nature and quality of the justice that emerges out of the process. Most important, it shields bad decisions and bad players; obviously it also deprives credit to good decisions and good actors.

A system of justice that thrives behind closed doors cannot escape suspicion. In many cases, it is fair to assume that the party that is making unsubstantiated claims or wishes to manipulate procedure for lack of confidence in the merits of the claim

> interest. In the same vein, if an arbitrator's main source of income and career opportunities depends on the decision of companies to sue, we should wonder how impartial their decisions are.
>
> And concerns not only arise from the financial benefits arbitrators gain. Arbitrators frequently combine their role with several other hats: working as practitioners, academics, policy advisers or as media commentators. With these various roles, this small group of investment lawyers can influence the direction of the investment arbitration system in a way that they can continue benefiting from it.
>
> A close examination of the arbitration world soon reveals why arbitrators, far from being neutral, have become powerful players who have shaped the pro-corporate investment arbitration system that we see today.

Corporate Europe Observatory, *Chapter 4: Who Guards the Guardians? The Conflicting Interests of Investment Arbitrators* (Nov. 27, 2012), http://corporateeurope.org/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interests-investment-arbitrators.

73. Born, *supra* note 50, at 89.

74. The ICC Court, for example, states on its website that: "The Court respects your privacy. In contrast with ordinary courtroom proceedings under public and media gaze, ICC does not divulge details of an arbitration case and keeps the identities of the parties completely confidential. So your business remains nobody else's business. Sometimes, of course, parties will publicize an award—but ICC's lips are always sealed. If you wish, you may also enter into a confidentiality agreement with the opposing party as an additional safeguard." *Frequently Asked Questions on ICC Arbitration*, http://www.iccwbo.org/faqs/frequently-asked-questions-on-icc-arbitration/#Q4 (last visited Mar. 16, 2016).

may be more inclined to seek confidentiality. Unfortunately, the default thinking being confidentiality, arbitrators are quick in embracing confidentiality where there is room for discretion.

The recent backlash against investment arbitration[75] is partly fueled by suspicions about confidentiality. Its public manifestation is captured very well by a passage from a *New York Times* report: "Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged."[76]

Indeed, recent trends are toward more public accountability and transparency. For example, the investment dispute settlement section of the Trans-Pacific Partnership Agreement contains the following transparency requirement:

> Article 9.24: Transparency of Arbitral Proceedings
> 1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:
> (a) the notice of intent;
> (b) the notice of arbitration;
> (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to

The LCIA Rules are even more explicit. Article 30 on Confidentiality states:

> 30.1 The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.
>
> 30.2 The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26 and 27.
>
> 30.3 The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.

LCIA Arbitration Rules (2014), LCIA, http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article 30.

75. *See, e.g.*, The Backlash against Investment Arbitration: Perceptions and Reality (Michael Waibel et al. eds., 2010); Gus Van Harten, Investment Treaty Arbitration and Public Law (2007).

76. Anthony DePalma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. Times (Mar. 11, 2001), http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html?pagewanted=all&src=pm.

Article 9.23.2 (Conduct of the Arbitration) and Article 9.23.3 and Article 9.28 (Consolidation);
(d) minutes or transcripts of hearings of the tribunal, if available; and
(e) orders, awards and decisions of the tribunal.[77]

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, called the "Mauritius Convention on Transparency,"[78] is another example of the most contemporary trend.[79] This is also reinforced by the White & Case Survey, which found that only 33 percent of the respondents chose confidentiality and privacy as the most valuable characteristic of international arbitration.[80] The White & Case Survey also indicates that lack of transparency regarding arbitrator performance was one of the negative factors.[81] With the exception of some specific and legally protected information in various industries, confidentiality as a virtue in all sorts of arbitral proceedings and as a general justification for international arbitration is thus an outdated concept. In practice, arbitrators and some counsel seem to

77. Text of the Trans-Pacific Partnership was released on November 5, 2015. It is available at *Chapter 9: Investment*, http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/TPP-text/9.%20Investment%20Chapter.pdf (last visited Mar. 16, 2016).

78. Text of the Convention is available at UNCITRAL, *Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency")* (2014), http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf.

79. The Convention incorporates the UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration. UNCITRAL, *Rules on Transparency in Treaty-based Investor-State Arbitration*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html (last visited October 2, 2016) These Rules require the publication of documents as follows:

> Article 3. Publication of documents
> 1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.
> 2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.
> 3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1or 2 above. This may include, for example, making such documents available at a specified site.

80. *See* White & Case Survey, *supra* note 26, at 6 chart 2. Confidentiality signifies the prohibition imposed on the parties not to disclose information whereas privacy simply restricts access to third parties. See Born, *supra* note 50, at 89 n.614 and accompanying text.

81. *See* White & Case Survey, *supra* note 26, at 7.

be more interested in confidentiality than the parties they represent. Even in commercial arbitration, however, the default position of confidentiality seems to be gradually receding. And again, the textbooks need updating both figuratively and literally.

c. Flexibility

Daniel Fisher of Forbes wrote on February 8, 2015, that "[t]he FAA reflected mayhem in the federal court system, where until the Federal Rules of Civil Procedure were passed in 1938, each judge picked whatever procedural rules he wanted and courts were overwhelmed with Prohibition-related cases anyway."[82] This passage suggests that the lack of defined rules of procedure gave too much discretion to judges, which led to mayhem in the court system. Congress attempted to address this problem by allowing a private means of dispute resolution. But then, the Federal Rules of Civil Procedure brought order to the civil justice system. That means in enacting the FAA, the suggestion is that Congress felt that lack of procedural regularity in the court system required the assistance of a more structured private justice system. However, once the Federal Rules of Civil Procedure came into being, court proceedings improved. The conclusion that logically flows from this is that defined rules of procedure reduce mayhem in any system. In other words, discretionary procedural flexibility has its own perils.

In arbitration, procedural flexibility is a function of party autonomy, which allows the parties to grant the arbitrators discretion on many procedural issues. As Born suggests "parties are typically free to agree upon the existence and scope of discovery or disclosure, the modes for presentation of fact and expert evidence, the length of the hearing, the timetable of the arbitration and other matters. The parties' ability to adopt (or, failing agreement, the tribunal's power to prescribe) flexible procedures is a central attraction of international arbitration—again as evidenced by empirical research and commentary."[83]

The White & Case Survey shows that 38 percent of the respondents chose international arbitration for its flexibility.[84] Theoretically, flexibility of procedures is perfectly appealing, however, in practice, what flexibility means is essentially trusting and empowering arbitrators with almost unreviewable power to decide on vital issues of procedure. This might include burden and standard of proof, the extent of disclosure, the nature and presentation of evidence, time limits, decisions on weight and admissibility of evidence, etc. These procedural powers would allow tribunals to effectively shape the outcome of the case regardless of the merits, not to mention their control over the costs of the proceedings.

82. Daniel Fisher, *Arbitration vs. Litigation: It Is Not an Either-Or Proposition*, Forbes (Nov. 8, 2015), http://www.forbes.com/sites/danielfisher/2015/11/08/arbitration-vs-litigation-its-not-an-either-or-proposition/.

83. Born, *supra* note 50, at 85. One of the empirical studies cited is 2013 International Arbitration Survey: Corporate Choices in International Arbitration: Industry Perspectives, Queen Mary University of London 8 (2013), finding that flexibility is the second most important benefit of arbitration.

84. *See* White & Case Survey, *supra* note 26, at 6.

Fundamentally, flexibility often assumes that arbitral tribunals are always manned by persons of the highest integrity who would not abuse their power in any case. The political economy of modern day investment and commercial arbitration between parties of uneven access and power is such that the above cannot always be assumed.

In an ideal world of selfless and unbiased justice, flexibility would be beneficial, but in the real world of unreviewable discretionary power, it could be a fertile source of abuse. Granted that a serious due process vitiation might result in annulment or refusal of enforcement, abuse of process often comes clothed in neutral and subtle packaging. There is a reason courts of law everywhere (including in democratic societies where judges are elected or carefully chosen) have procedural powers restricted by law. Flexibility, just like confidentiality, has the potential to legitimize arbitrary and even corrupt outcomes. Procedural flexibility often gives too much unchecked power to arbitrators.

As everyone who practices international arbitration would recognize, for the party that benefits from the balance on the tribunal because of ideology, incentives, or otherwise, it is always good, but for the party that is in the minority (i.e., one of three arbitrators), procedural flexibility is not her friend. Flexibility as an advantage assumes too much. One would get a good perspective by appearing as counsel for a party that is ideologically disfavored by at least two of the three arbitrators and see how procedural flexibility could be used to disadvantage one party and shape the outcome.[85]

d. Expertise

The dominant narrative of international arbitration is that arbitrators are persons of the highest expertise, wisdom, and integrity who could be trusted with flexible procedures. To paraphrase James Madison, if arbitrators were angels, there would be no need for concern. But nonetheless before considering the concerns, note Gary Born's delivery of the conventional line:

> Another essential objective of international arbitration is providing a maximally competent, expert dispute resolution process. It is a harsh, but undeniable, fact that some national courts are distressingly inappropriate choices for resolving international commercial disputes. In some states, local courts have little experience or training in resolving international transactions or disputes and can face serious difficulties in fully apprehending the business context and terms of the parties' dispute.[86]

85. Consider, for example, a hypothetical tribunal in a construction dispute ruling by a majority vote to order the production of every single minutes of meetings for six years amounting to tens of thousands of pages of documentation to allow the contractor to see if it could find anything of interest, and effectively delay the proceedings after other evidence made it clear that the contractor would lose. This is possible because of flexible rules on discovery, which effectively means whatever two members of the tribunal want.

86. Born, *supra* note 50, at 80.

He adds an interesting footnote to this: "Even where such experience exists, the need to translate evidentiary materials or legal authorities into the language of the forum will often create practical problems and jeopardize a tribunal's comprehension of the case."[87] It appears that Born is writing from the perspective of the English- or French-speaking business that would like to avoid the "distressingly inappropriate" local courts because the judges lack expertise and probably don't even speak English or French. But if one looks at it from the perspective of the local party—say a government-owned local power company in a developing country—the deficiencies of the local courts may not seem all that distressing because that is all they have got when not dealing with foreign parties. What might be distressing would be appearing before a tribunal with technical knowledge of the power industry, but with no idea about the cultural context of the facts as well as the subtleties of the differences between the local laws and their mixed colonial and customary origin. Perhaps the transnational problem that the English-speaking company fears would befall the local company because the arbitrators do not understand the local language; perhaps—as Born fears of the local courts—the arbitrators' "comprehension would be jeopardized" if they are required to arbitrate in the local language. Adjudicating in the local language seems unthinkable only because everyone is accustomed to thinking in terms of a Northern victim of injustice in the South, not necessarily because of principles of impartial justice for all.

To support the expertise rationale, Born makes an even bigger claim: "Even more troubling, in some states, basic standards of judicial integrity and independence are lacking."[88] His examples are Nigeria and China.[89] He exempts "courts in New York, England, Switzerland, Japan, and Singapore and a few other jurisdictions."[90] Even these are not as good as arbitration because "even in these jurisdictions, local idiosyncrasies can interfere with the objectives of competence and objectivity in resolving commercial disputes."[91] His examples of negative idiosyncrasies are the civil jury trial in the United States and the divided legal profession in England.[92]

The argument is that arbitration could remedy all of these perceived shortcomings of local judiciaries ranging from Nigeria to the United States. It is uncorrupt, competent, and unencumbered with local idiosyncrasies. Such proposition, apart from being decidedly elitist and perhaps mildly uninformed, forgets so many encumbrances that plague international arbitration, ranging from pervasive conflicts, wrong financial

87. *Id.* at 80 n.556.

88. *Id.*

89. *Id.* at 80 n.557 (citing Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems of Failure of the Judiciary in Nigeria*, 31 Brook. J. Int'l L. 9 (2005); Eric W. Orts, *The Rule of Law in China*, 34 Vand. J. Transnat'l L. 43 (2001)). Born also relies on Transparency International, Global Corruption Report 2007: Corruption in Judicial Systems (2007); U.S. State Department, Country Reports on Human Rights Practices (2013)).

90. Born, *supra* note 50, at 81.

91. *Id.*

92. *Id.* at 81 n.560.

incentives, and absence of ethical rules and meaningful means of checks and balances, to confidentiality's shield of impropriety and sloppy work, elitism, and cultural incompetence to name just a few.

The empirical evidence is not so supportive of the claim that arbitration is chosen because of perceived expertise. In the White & Case Survey, only 38 percent of the respondents said they selected international arbitration because of the ability to choose arbitrators.[93] That means a significant proportion did not do so because they thought arbitrators brought the level of expertise and integrity that courts lacked. The result is not surprising. The pool of "qualified" arbitrators is unacceptably low. It is a market phenomenon with no resemblance to what arbitrators are supposed to do in the real world: determine local facts and apply local law. Some arbitrators claim involvement in 600[94] or even 700[95] arbitrations in every conceivable industry and area of law whether as arbitrators or as counsel, whereas others who have the time and do not lack the skills would be lucky to get three appointments a year.

The 2015 Arbitration Scorecard offers a remarkable insight into the small world of international arbitration.[96] The report captured 69 contracts disputes and 59 treaty disputes over the $1 billion mark active during the two-year period preceding the reporting in July 2015.[97]

First, it empirically confirms what everybody already knows that "the same small group of arbitrators are routinely deciding the world's biggest disputes."[98] The numbers are staggering. The report puts it in the following terms: "Indeed, our roster of leading arbitrators has shown remarkable stability in the past decade. The top 18 arbitrators in this contest include all the top 10 from 2013, 2011 and 2009, nine off the top 10 from 2007, and seven of the top 10 arbitrators from 2005."[99] Who are they? They are called "the mafia" but they call themselves "a large family."[100] The family is described in *Profiting from Injustice*: "Pro-business,

93. *See* White & Case Survey, *supra* note 26, at 6.

94. *See, e.g.*, Gary Born's bio at Gary Born, Wilmer Hale, https://www.wilmerhale.com/gary_born/ (last visited Mar. 19, 2016) ("Mr. Born. Has participated in more than 600 arbitrations").

95. *See* Jan Paulsson's bio at Jan Paulsson, U. Miami School of L., http://www.law.miami.edu/faculty/jan-paulsson (last visited October 2, 2016).

96. Michael D. Goldhaber, *2015 Arbitration Scorecard: Deciding the World's Biggest Disputes*, TAL Asian Lawyer (July 1, 2015), http://www.international.law.com/id=1202731078679/2015-Arbitration-Scorecard-Deciding-the-Worlds-Biggest-Disputes [hereinafter *2015 Arbitrator Scorecard*].

97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.* The "mafia" reference comes from Dealing in Virtue, in which Dezalay and Garth report a young arbitrator as having said: "It's a mafia because people appoint one another. You always appoint your friends—people you know." *Id.* The "big family" reference comes from what Brigitte Stern, who usually tops the chart, said to the authors of the *2015 Arbitrator Scorecard* in

males and from the rich North."[101] Indeed, it appears that only 15 of the "rich northerners" have decided 55 percent of the world's investment arbitration ever.[102] The percentage of arbitrators from developing countries is perhaps too small for a statistical entry to be made but the percentage of women has for

particular: "Some people call it a mafia. A nicer way to put it would be a large family, or even an unorganized non-governmental organization of arbitrators! They are mostly very good lawyers and interest people. It's a large family I am proud of to be a part of." *Id*. Corporate Europe Observatory adds this anecdote: "This small group of lawyers, referred to by some as an 'inner mafia', sit on the same arbitration panels, act as both arbitrators and counsels and even call on each other as witnesses in arbitration cases. This has led to growing concerns, including within the broader legal community, over conflicts of interest." Pia Eberhardt et al., Profiting from Injustice: How Law Firms, Arbitrators, and Financiers Are Fueling an Investment Arbitration Boom 8 (Helen Burley ed., 2012), http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf [hereinafter Profiting from Injustice].

101. *2015 Arbitrator Scorecard, supra* note 96 (quoting Profiting from Injustice). The text under the subtitle, "Pro-business, males and from the rich North" in Profiting from Injustice adds the following note:

> Most of the members of this club are men from a small group of developed countries:
>
> - *Proportion of arbitrators from Western Europe and North America:* 69% for all cases held at the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and 83% if taking into account arbitrators who have sat in more than 10 cases.
> - *Proportion of arbitrators who are women*: 4%. Two women (Brigitte Stern and Gabrielle Kaufmann-Kohler) dominate this list, accounting for three quarters of the cases taken by women.
>
> Even more important for the cohesion of the arbitration industry is their shared outlook of the world. "Arbitrators have to make choices to resolve the disputes, which are of course informed by their political standpoint", Brigitte Stern has noted. Evidence shows that many of the arbitrators enjoy close links with the corporate world and share businesses' viewpoint in relation to the importance of protecting investors' profits. Given the one-sided nature of the system, where only investors can sue and only states are sued, a pro-business outlook could be interpreted as a strategic choice for an ambitious investment lawyer keen to make a lucrative living.

Profiting from Injustice, *supra* note 100, at 36 (citations omitted). It is also indicated incidentally that the most frequent hosts of these proceedings are Washington (24), Paris (20), London (18), and Switzerland (13) "with a smattering of disputes outside the U.S. and Europe." 2015 Arbitrator Scorecard, *supra* note 96, at 2.

102. *See* Profiting from Injustice, *supra* note 100, at 38–39 tbl. 2 ("Together they have decided on: 55% (247 cases) out of 450 investment-treaty disputes known today; 64% (79 cases) out of 123 treaty disputes of at least $100 million; 75% (12 cases) out of 16 treaty dispute of at least $4 billion.") The table shows the following breakdown: Brigitte Stern (France) 39 of 450 cases, 8.7% of all known treaty cases; Charles Brower (U.S.), 33 cases, 7.3% of all cases; Marc Lalonde (Canada), 30 cases, 6.7% of all cases; L. Yves Fortier (Canada), 28 cases, 6.2% of all cases; Gabrielle Kaufmann-Kohler (Switzerland), 28 cases, 6.2% of all cases; Albert Jan van den Berg (Netherlands), 27 cases, 6.0% of all cases; Karl-Heinz Böckstiegel (Germany), 21 cases, 4.7% of all cases; Bernard Hanotiau (Belgium), 17 cases, 3.8% of all cases; Jan Paulsson (France), 17 cases, 3.8% of all cases; Stephen M. Schwebel (U.S.), 15 cases, 3.3% of all cases; Henri Alvarez (Canada), 14 cases, 3.1% of all cases; Emmanuel Gaillard (France), 14 cases, 3.1% of all cases; William W. Park (US), 9 cases, 2.0% of all cases; and Daniel Price (U.S.), 9 cases, 2.0% of all cases. The diagram that Profiting

long stayed at a depressing 4 percent, with two women consistently topping the chart.[103] Some dispute the accuracy of the statistics but nobody denies the diversity challenge and the legitimacy problem.[104]

The generalist judge would probably adjudicate thousands of cases in her lifetime involving many different types of subject matter. If that is a disadvantage to her in developing expertise in a particular subject matter, how is the number of cases one is involved in a proxy for specialized expertise? In many cases, appointments are made on the basis of how many cases one had handled before—often regardless of the particular sector.

The reason for such levels of repeat appointments is a subject of profound curiosity and debate. Opinions range from "it's a mafia because people appoint one another. You always appoint your friends—people you know"[105] to "[i]t's the parties that close the circle" because they don't trust outsiders.[106]

The responses on one end of the spectrum are well presented in the Corporate Europe Observatory's *Profiting from Injustice*, which essentially concludes that international arbitration is "a lucrative industry built by illusions of neutrality" by powerful

FROM INJUSTICE drew to show the web of interconnectedness of these arbitrators sitting together on panels or serving as counsel when others are arbitrating is described by Michael D. Goldhaber, the author of 2015 Arbitration Scorecard, as "a diagram on an FBI blackboard."). *2015 Arbitrator Scorecard, supra* note 96.

103. *The 2015 Arbitration Scorecard, supra* note 96. They are Brigitte Stern and Gabrielle Kaufmann-Kohler. *Id.*

104. *See, e.g.*, Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429, 430 (2015) empirically showing that "[t]he median international arbitrator was a fifty-three year old man who was a national of a developed state reporting ten arbitral appointments; and the median counsel was a forty-six year old man who was a national of a developed state and had served as counsel in fifteen arbitration." The analysis also shows that 17.6 percent of arbitrators were women and up to as many as 20 percent of arbitrators are from the developing world. *Id.* This study further notes that: "Recognizing the data revealed diversity in international arbitration is a complex phenomenon, the data nevertheless supported, rather than disproved, claims that international arbitration is a relatively homogenous group." *Id.* The results are summarized in the abstract.

105. This is attributed to Dezalay and Garth's interview of a young arbitrator. *See 2015 Arbitration Scorecard, supra* note 96, at 3.

106. This is attributed to Brigitte Stern in *id.* at 3. Gaillard's statement is more forceful. He faults the diagram that Corporate Europe Observatory created to show the frequency of 15 arbitrators who sat side by side by saying:

> First, it fails to capture the hundreds of occasional or less frequent appointments which should be featured around the activity of the perceived core players. Second, and more importantly, it misses the reason why repeat players are nominated by the parties. In most cases, the appointments are made by the parties themselves, not by the institutions. So it is the conservatism of the parties, both on the State side and the investor side, which explains the chart. Anecdotal evidence shows that institutions actively seek to appoint newcomers and promote diversity. It is the parties who resist change.

Emmanuel Gaillard, *Sociology of International Arbitration* 31 ARB. INT'L 1, 15–16 (2015).

economic and political beneficiaries that discourage change.[107] The responses on the other end of the spectrum are equally forceful; they appear to unite the "family" across ideological lines. As the 2015 Arbitrator Scorecard reports: "Though Gaillard and Stern differ on legal issues [Stern being governments' favorite and Gaillard being businesses' favorite], Stern shares his view of the process. 'I agree we need more diversity,' she says. 'But the fault is not in the family. The fault is in the parties. I've been trying very hard to propose women, public international lawyers, and newcomers from outside Europe and the U.S. The parties say, "Ah, we don't trust these people because we don't know how they think." It's the parties that close the circle.'"[108]

In October 2015, 20 years after *Dealing in Virtue* was published, one of the authors, Bryant Garth, gave a keynote speech at Dutch Arbitration Day in Amsterdam on October 15, 2015. The Global Arbitration Review reported the keynote under the title: "*Dealing with Defensiveness: Garth Shares Views Two Decades after Seminal Book*." The report indicated that Garth said that "the core players remained largely the same—'just older'—and that they are now on the defensive."[109] Interestingly, he said that Gaillard and other members of the elite "have an agenda, which can be seen as a defense of the field."[110]

The response was offered by none other than Jan Paulsson, who is reported to have said: "If arbitrators are on the defensive 'so be it'" because the survival of the system depends not on their defense, but "on the adequacy and fairness of the process. If viewed as incapable of cost efficiency and deficiency in ethics, arbitration will 'perish'"[111]

Such extreme positions appear to obscure the fundamental issues. The first gives arbitrators and law firms and their academic friends more power that they could possibly wield in the world economic and political order. The "family's" position is also either naïve or deliberately less than forthcoming. The "rich-male-northerners" are merely beneficiaries of what Dezalay and Garth call the "gradual legalization" of North-South relations[112] who were at the right place at the right time. It is a complex world economic and political order they neither created nor could they ever destroy, but the most serious puzzlement is: Why then do parties nominate or appoint out of the same "family"?

The answer is not because of a combination of a campaign of misinformation and threat by the family as those in the left-end of the spectrum would suggest,

107. *See* Profiting from Injustice, *supra* note 100, at 5, 70.

108. *2015 Arbitration Scorecard, supra* note 96.

109. Alison Ross, *Dealing with Defensiveness: Garth Shares Views Two Decades after Seminal Book*, Global Arb. Rev. (Nov. 18, 2015), http://globalarbitrationreview.com/news/article/34351/dealing-defensiveness-garth-shares-views-two-decades-seminal-book/.

110. Id. at 4.

111. *Id.* He is also reported to have said that "while they might defend the current system to the hilt, Paulsson suggested that, if it were suddenly changed so that arbitration counsel were assigned to cases by tombola and arbitrators randomly allocated by UNCITRAL computer, Gaillard and he would adapt to the evolving system 'with all the skill that they could muster." *Id.*

112. *See* Yves Dezalay & Bryant Garth, Dealing in Virtue 64 (1996).

or because they don't trust anyone outside of the "family" as the right-end would suggest. The real reason is what one might call the prisoner's dilemma. The parties are constantly striving to match the weapons in the duel. It is not a new phenomenon. Irish Code Duello, the version that became popular in America, had a basic rule: "Typical weapons were cased dueling pistols which were tuned for identical appearance, reliability and accuracy."[113] What determined Aaron Burr's choice of weapon and position was Alexander Hamilton's choice because under the duel rules, the challenged would have the choice of weapon and position.

Unlike the real duel, however, in investor-state or private-public disputes, the party initiating the dispute, that is, the private party, always has the choice of weapon by nominating from among the "family." The challenged party, who needs to tune the weapon "for identical appearance, reliability and accuracy" would have to look for someone within the "family" who is likely to be respected by its members. If the private investor brings a tank, the respondent also brings a tank, although the dispute could have been settled better by two matching pistols. What limits the choice and brings the extravagance is the initial appointment. In selecting the chair, the two members of the "family" obviously appoint another member of the "family"—someone who both members will likely respect as chair. If these two members are unable to agree, the institution in the exercise of prudence will fill the void by appointing a chair from the same "family." The whole selection process is dictated by the right of first choice of weapons, which in investment cases, is always held by the private party. It sets the stage in all investment arbitration cases and spills over to commercial arbitration, reinforcing the mythology of competence and integrity.

The more profound problem is the frequent mismatch between the expertise held by the arbitrators and the expertise the job requires. The expertise the "family" brings is not the kind of expertise that many disputes demand. The selection criteria are skewed by the political economy. Most cases require the simple ability and integrity to determine local facts and apply local law. Expertise in the kinds of skills needed to accurately understand the facts and the law in any given dispute is necessary; however, the promotional justification of "expertise" in the sense of the volume of cases, publications, and public speeches does not have a directly proportional correlation with an accurate and acceptable outcome. If anything it may even have a negative correlation because of the problem of availability and lack of attention. As this book suggests throughout, the politics, economics, and promotions aside, a sufficient degree of familiarity with the cultural origin of the facts and the specific applicable laws, lack of conflict, availability, and proven record of integrity are the only necessary preconditions for appointment. It is only in that sense that expertise of the arbitrators could be promoted as an advantage of international arbitration over litigation. There is no legitimate expertise-related reason that limits the pool of arbitrators. It is a self-perpetuating myth.

113. Adopted "at the Clonmel Summer Assizes, 1777, for the government of duellists, by the gentlemen of Tipperary, Galway, Mayo, Sligo and Roscommon, and prescribed for general adoption throughout Ireland." *See Code Duello*, Fact Index, http://www.fact-index.com/c/co/code_duello.html (last visited Mar. 20, 2016).

D. CONCLUSION

International arbitration is a "system" or a "framework"[114] whose advantages are limited to bridging the gap between courts of different nations. It is a gap filler—nothing else—but market forces of its own have supplied and grown theories and promotional justifications that have become true because of repetition.

Initially it was cost. Nobody now thinks that international arbitration is less costly in an era of discovery broader than even the Federal Rules of Civil Procedure in the United States would tolerate and—in certain cases—with thousands of pages of post- hearing briefs.[115] Low cost can no longer be used for promotional purposes. In fact, the most common criticism of international arbitration (both commercial and investment) within the community itself has now become rising costs and delay.[116]

The system's self-diagnosis has also identified three factors that contributed to increased costs and delay. The first one is the use of disputes rather "as a weapon than a means of overcoming disagreement."[117] This is said to have exacerbated the fight into a "total war."[118]

The second factor is the caveat emptor one that Augustus Hand warned about nearly a century ago:

> Arbitration sometimes involves perils that even surpass the "perils of the sea". Whether in any particular instance it is a desirable risk is not for us to say. It is a mode of procedure fostered by statute and in the present case invoked under the agreement of the parties. If they consent to submit their rights to a tribunal with extensive powers and subject to a most restricted review, they cannot expect the courts to relieve them from the effect of their deliberate choice.[119]

Menon brings up this issue in the sense of the misinformation of courts and parties about the perils of agreeing to arbitrate and regretting the choice. Here is how

114. On whether it is a "system" or a "framework," *see generally*, Chapter 4 *supra*.

115. *See* Sundaresh Menon, Singapore Chief Justice, Address at the Chartered Institute of Arbitrators London Centenary Conference 23 (July 2, 2015), https://www.ciarb.org/docs/default-source/centenarydocs/london/ciarb-centenary-conference-patron-39-s-address-(for-publication).pdf?sfvrsn=0 (citing Bernard Hanotiau who said that he received a 4,000-page post-hearing brief).

116. *See, e.g.*, Sundaresh Menon, Singapore Chief Justice, Standards in Need of Bearers: Encouraging Reform within at the Chartered Institute of Arbitrators: Singapore Centenary Conference 12–13 (Sept. 3, 2015), http://www.ciarb.org.sg/wp-content/uploads/2015/09/Keynote-Speech-Standards-in-need-of-Bearers-Encouraging-Reform-from-.pdf (citing 2006 and 2013 studies by the School of International Arbitration at Queen Mary University of London, the results of which show that the concerns over costs and delays have remained unaddressed over the seven-year period between the two studies). The studies from 2006 until 2015 are available at School of International Arbitration, Queen Mary University of London, http://www.arbitration.qmul.ac.uk/research/2015/index.html (last visited October 2, 2016). All show the concern over cost and delay. *Id.*

117. *See* Menon, *supra* note 116, at 14. Menon also mentions the decline in voluntary compliance. *Id.* at 15.

118. *Id.* at 14.

119. *In re* Canadian Gulf Line, 98 F. 2d 711, 714 (2d Cir. 1938).

he presents the perils that might force parties to seek judicial remedy: "Given the sheer volume of materials that are placed before arbitrators, the chances of arbitrators committing errors of fact and law are not negligible."[120]

Other factors add to the reality of error of fact and law "because of the one-tier feature of arbitration, issues will often not have been distilled and become crystallized by the time the award is presented to the court, as they ordinarily would be where a case progresses through the appellate structure in commercial litigation. This also increases the chances of errors." He concludes that "such errors can often give rise to a justifiable sense of grievance."[121] Grievance obviously raises concerns of legitimacy and leads to problems of enforcement.

The third factor that Menon cites is the formalization of the arbitral process itself in a desire to make it challenge-proof on obvious due process and related grounds.[122] The fourth factor is the elephant in the room, but Menon does not give it more than an honorable mention in the following terms:

> The fourth broad factor I wish to touch upon relates to causes of discontent which are arbitrator-specific. Parties look to appoint arbitrators who have an established reputation in the international arbitration community and a depth of experience in a particular industry and/or area of law. The pool of arbitrators who satisfy these criteria is not very deep. This means that the arbitrators that the parties often look to tend to be busier and sometimes may tend to over commit themselves and this inevitably results in delays in the arbitral process. Additionally, arbitrators may not have the time to adequately prepare for hearings and the consequent lack of familiarity will often contribute to the hearing being unwieldy because critical issues have not been identified beforehand.[123]

The source of the problem is the marketplace. It is the monopoly of trade in services, not by explicit conspiracy, but by an old and outdated custom that considers the number of cases handled a proxy for expertise, availability, temperament, and even integrity. The solution to all is not complicated. It is the recognition that in most cases arbitration should be a simple exercise of finding local facts and applying local law—just like any judicial proceedings. Its glorification, mystification, exclusion, and promotion is a function of economics, not of justice. The reality is more

120. *See* Menon, *supra* note 116, at 17.

121. *Id.* He adds that this "in turn results in the aggrieved party resorting to various legal manoeuvres to have them rectified. A judge who accedes to an invitation for him to intervene and correct errors of fact and law, will often be promoting an outcome which runs completely contrary to the expectations of finality with which the parties agreed to arbitration in the first place. The point I make here is that judges may well be persuaded to do so and parties must be advised of this possibility upfront so that they can either choose a different seat court or adjust their expectations from the start. Some of the dissatisfaction parties have with arbitration may be a result of their not having been so advised." *Id.*

122. *Id.* at 18 (citing Blackaby et al., *supra* note 6, 40 ¶ 1.115)

123. *Id.* at 18–19 (citing PricewaterhouseCoopers LLP & Queen Mary University of London, International Arbitration: Corporate Attitudes and Practices 2006, at 16–17, http://www.arbitration.qmul.ac.uk/docs/123295.pdf.

like what Lord Mustill said: "[Arbitration has] all the elephantine laboriousness of an action in court, without the saving grace of the exacerbated judge's power to bang together the heads of recalcitrant parties."[124] And without—one might add—the checks and balances of laws that produce accountable and disinterested judges in democratic societies.[125]

The promotional justifications must be understood for what they are. As serious questions continue to be asked and measures taken,[126] identifying the outdated justifications and focusing on the real jurisdictional advantages of international arbitration and attempting to remedy the serious problems of legitimacy, accuracy, and fairness would only help promote it for the right reasons.

124. *Id.* at 18 (quoting Michael John Mustill, *Arbitration: History and Background*, 6 J. Int'l Arb. 43, 56 (1989)).

125. The deleterious effects of the absence of checks and balances are not unique to international arbitration. Domestic arbitration also suffers from the same type of accountability problems. The *New York Times* documented serious concerns about the system of arbitration in a series of articles titled "Beware the Fine Print" in October and November 2015. Susan Lehman, *Podcast: Beware the Fine Print*, N.Y. Times, Nov. 11, 2015, http://www.nytimes.com/2015/11/11/insider/podcast-beware-the-fine-print.html?_r=0. In one of these reports published on November 1, 2015, it is stated that: "Over the last 10 years, thousands of businesses across the country—from big corporation to storefront shops—have used arbitration to create an alternate system of justice. There, rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients, The Times found." Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System"*, N.Y. Times, Nov. 1, 2015, http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0. The *Times* study makes interesting findings and offers interesting observations about the system. First it states that "[t]he secretive nature of the process makes it difficult to ascertain how fairly the proceedings are conducted." *Id.* As a result, "[b]ehind closed doors, proceedings can devolve into legal free-for-alls. Companies have paid employees to testify in their favor. A hearing that lasted six hours cost the plaintiff $150,000. Arbitrations have been conducted in the conference rooms of lawyers representing the companies accused for wrongdoing." *Id.* Second, the *Times* investigation has found that "[t]o deliver favorable outcomes to companies, some arbitrators have twisted or outright disregarded the law, interviews and records show." *Id.* Third, "records obtained by The Times showed that 41 arbitrators each handled 10 or more cases for one company between 2010 and 2014." *Id.* The *Times* quotes a California appeals court judge, Anthony Kline, as saying, "Private judging is an oxymoron. This is a business and arbitrators have an economic reason to decide in favor of the repeat players." *Id.* Having documented several real cases that resulted in deplorable outcomes because of bias and conflicts in areas ranging from employment to eldercare, the *Times* reported that the more than three dozen arbitrators that the *Times* interviewed said that they "felt beholden to the companies. *Beneath every decision, the arbitrators said, was the threat of losing business.*" *Id.* (emphasis added).

126. *See, e.g.*, The Hague Convention on Choice of Court Agreement is now being hailed as a game changer. The Hague Conference on Private International Law, *Convention on Choice of Court Agreements* (June 30, 2005), http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (came into effect Oct. 1, 2005). The European Commission's recent proposal for a standing investment court is also gaining traction. *See, e.g.*, Press Release, European Commission, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm. Singapore has also recently set up a new International Commercial Court (SICC). Information about this new court is available at *Establishment of the SICC*, Singapore International Commercial Court, http://www.sicc.gov.sg/About.aspx?id=21 (last visited Mar. 20, 2016).