

THE ARRIVAL OF THE “HAVE-NOTS” IN INTERNATIONAL ARBITRATION

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In its classical form, international arbitration is an idealized archetype of alternative dispute resolution.¹ It is the result of two sophisticated parties with relatively equal bargaining power who individually negotiate an agreement to resolve their dispute. They consent to this mechanism because it offers significant advantages over national court adjudication. Specifically, international arbitration provides a neutral forum with flexible procedures that are preferable to the presumed bias of the courts of the parties' home jurisdictions. In this idealized version, there are no homespun consumers, no vulnerable employees, and no injured tort victims. But this image of international arbitration is becoming more complex against the backdrop of a new global reality. In recent years, Internet commerce has brought consumers to the international market, an increasingly globalized workforce has generated a class of international employees, and the link between international trade and human rights has revealed a host of victims. The arrival of these “have-nots” in international arbitration means that its idealized visage is no longer the only face of international arbitration. As a result, previously latent questions about international arbitration's integrity as a system and role as a mechanism for transnational regulatory governance have been brought to the fore.

Against the backdrop of these developments, this Article has two purposes. First, I examine the treatment of these new arrivals in international arbitration, using experiences in the domestic and the investment arbitration contexts as a backdrop for comparison.² These other examples illustrate that

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¹ Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 462-64 (1996) (noting that historical common law model of arbitration was solely in a commercial context); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1015-24 (1999) (describing the “guild model” of arbitration).

² In this Article, I use “international arbitration” to refer to individually negotiated “non-specialized arbitration between private parties” who are involved in international transactions. See Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 530 (2005). While this form is often referred to as “international commercial arbitration,” I avoid this term here to avoid

there are two essential concerns with parties such as consumers, employees and tort or human rights victims in arbitration. First, there is a procedural concern that they are disadvantaged in relation to their opportunities in an alternative judicial forum. Second, there is a substantive concern that national law and policies designed to protect them will not be adequately enforced, or enforced at all. My comparison suggests that, while some of these concerns may be warranted in domestic and investment arbitration, they do not have the same force in international arbitration. Have-nots in domestic and investment arbitration have revealed and exacerbated structural weaknesses in those systems and produced unanticipated shifts in governmental or sovereign power to private arbitrators. The international arbitration community, by contrast, has an opportunity to engage in “deliberative construction”³ before these new parties are fully integrated and to continue to enhance its potential to contribute to effective transnational regulation.

A second, more implicit purpose of this Article is to promote a clearer understanding of the similarities and differences between U.S. domestic arbitration and the international arbitration system.⁴ If domestic and international arbitration were living organisms, most would assume that they originated as identical Siamese twins, laboriously separated from their co-joined birth in one of those dramatic televised operations. According to this legend, once detached, they went on to pursue the same job in different locales, but each would always retain the genealogy, matching features, and, most importantly, common purpose of its severed other half. This mythology of shared paternity has resulted in scholarly neglect of the differences⁵ and in judicial confusion between the legal regimes that govern the two contexts.⁶ The arrival of the have-nots in each context accentuates some of these differences and their implications for the functioning of arbitration in the respective contexts.

confusion with the discussion, *infra* notes 135-137, regarding the definition of “commercial.” I use the term “domestic arbitration” to refer to arbitration that occurs between citizens or residents of the same nation and is governed by domestic arbitration law. By “investment arbitration,” I refer to arbitration of a dispute between a foreign investor and a state in which the arbitration agreement derives from an investment treaty, instead of a specific contract between the parties.

³ This term is borrowed from Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 144-46 (2001).

⁴ In this Article, unless otherwise specified, I use the term “domestic arbitration” to refer to domestic arbitration in the United States.

⁵ There are scant few articles that engage in a meaningful comparison of the two contexts. See Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233 (2006); Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449 (2005).

⁶ As described later, in extending arbitrability doctrines to domestic arbitration, courts simply ignored the differences between international and domestic contexts. See *infra* notes 22-33 and accompanying text. Similarly, courts have been known to directly apply the FAA and domestic arbitration standards to international awards, which should instead be reviewed under the standards of the New York Convention. See Lucy Reed & Phillip Riblett, *Expansion of Defenses to Enforcement of International Arbitral Awards in U.S. Courts?*, 13 SW. J. L. & TRADE AM. 121, 122 (2006) (discussing the potential for “mission creep” if U.S. courts apply the domestic “manifest disregard” standard to international awards).

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In his groundbreaking 1974 article, Mark Galanter argued that the "haves" enjoy certain systematic advantages in litigation because they are generally repeat players⁷ who gain knowledge and can employ long-term litigation strategies that the "have-nots" cannot typically because they are one-shot players.⁸ According to many scholars, not only does the distinction between haves and have-nots carry over to arbitration, but it is dramatically amplified there.⁹ Employers, manufacturers, creditors, landlords, doctors, and insurance companies can fundamentally order the arbitration process to preclude many of the procedural opportunities that aid one-shot players in the litigation context. For example, in domestic U.S. litigation, one-shot players benefit from broad discovery, but in arbitration repeat players can effectively exclude such discovery through careful drafting of an arbitration clause.¹⁰ One of the most serious charges is that repeat players enjoy an advantage in the arbitral decision maker. Unlike judges, arbitrators only earn money if they are appointed by parties. Because one-shot players are unlikely to re-appoint an arbitrator in the future, the argument goes, arbitrators have an incentive to favor repeat players in the hopes that a favorable award will translate into future appointments.¹¹

When arbitration, both domestic and international, was exclusively between commercial parties, none of these concerns carried much weight. Commercial parties could agree to virtually any procedural arrangement they wanted, subject only to extreme abuses that were protected against at the award enforcement stage.¹² With regard to the substantive outcome, no one much

⁷ A repeat player is a litigant "which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests" through cumulative outcomes. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98 (1974). One-shot players, on the other hand, "are usually smaller units and the stakes represented by the tangible outcome of [a single] case may be high relative to total worth." See *id.* Although often aligned, it is not necessarily true that one-shot players are "have-nots" occupying an underdog position. As will be illustrated in the discussion *infra* Part I.B. of investment arbitration, legal expertise can mediate the experience of one-shot players, just as labor union representation can bestow on employees the advantages of repeat player status.

⁸ *Id.*

⁹ See, e.g., Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

¹⁰ Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 680-86 (1996). Arbitration clauses by definition preclude access to a civil jury, which can also mollify the repeat player effect. Carefully drafted clauses can also limit or eliminate the availability of particular remedies, divide the cost of the proceedings, and in practice limit available discovery. See *id.*

¹¹ See Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1316-24 (2000).

¹² The limits on what commercial parties can agree to are considered to be so minimal that courts sometimes invoke patently absurd examples to illustrate them. See, e.g., *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (reasoning that "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes"); *Team Design v. Gottlieb*, 104 S.W.3d 512, 518 (Tenn. Ct. App. 2002) (reasoning that, as

care whether Company A or Company B was found to have breached the contract. Every system has some mandatory contract rules, such as duress, unconscionability, and incapacity, which parties are not supposed to be able to contract around.¹³ These rules, however, are primarily designed to ensure fairness and protect weaker parties to a contract,¹⁴ and so were of little importance when the disputants were two companies.

Some larger regulatory concerns also arise in private commercial transactions because they can produce negative externalities that harm third parties. As a result, states have adopted mandatory rules to protect against such harms, including rules that treat as void contracts that are illegal or against public policy, and laws prohibiting such things as anti-competitive behavior, securities fraud, corruption, and the like. The substantive outcomes of disputes involving these sorts of claims matter beyond the parties to the immediate dispute, which means it begins to matter whether Company A or Company B prevails, and why. With the arrival of have-nots into historically commercial arbitration settings, other regulatory interests such as consumer protection, environmental protection, employment law, tort law, and human rights have also been brought into the fold.

The substantive outcomes of these claims also matter beyond the parties to the immediate dispute, but combine with new concerns about procedural fairness, which had been largely assured in commercial contexts by the parties' equal bargaining power. Consequently, it is not surprising that the arrival of have-nots in domestic U.S. arbitration sparked a vibrant debate about how well the mechanism can ensure procedural fairness or provide correct substantive outcomes in cases that implicate public policy. The ultimate outcome of that debate, and one of the few things that both sides of the debate appear to agree on, is that in the domestic context, arbitration has had a substantial deregulatory effect.¹⁵

The thesis of this Article is that international arbitration has not had, and need not have, a similar deregulatory effect with respect to these types of claims. Instead of a net deregulatory effect, international arbitration has the capacity to serve as a venue for mediating between conflicting national public policies, promoting effective transnational regulation, and facilitating international governance with respect to those regulatory policies that are designed to

long as they are agreed to by competent parties who are "dealing at arm's length," even procedures such as "flipping a coin, or, for that matter, arm wrestling" will be upheld).

¹³ See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989).

¹⁴ See *id.* at 88 (describing general consensus that mandatory restrictions on freedom of contract are justified by paternalistic efforts to protect parties to the contract).

¹⁵ The two sides, of course, differ regarding whether deregulation is a good or bad thing. See Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 357 (2003); Paul D. Carrington, *Self-Deregulation, the "National Policy" of the Supreme Court*, 3 NEV. L.J. 259 (2002); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 62; Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 710-12 (1999).

protect the interests of the have-nots.¹⁶ Realizing these goals and, more importantly, avoiding the pitfalls of domestic and investment arbitration will necessarily require active efforts to accommodate these new types of claims.

In advancing this thesis, this Article proceeds in three Parts. Part I describes the arrival of have-nots in domestic and investment arbitration. In domestic arbitration, the arrival of the have-nots can be viewed as a phased process of judicial opening, repeat-player excess, and reformist retrenchment. This pattern, with some important distinctions, is echoed in investment arbitration. As with domestic arbitration, the result has been a vigorous debate regarding both the procedural fairness and legitimacy of the process, as well as its ability to protect sovereign interests of those states that are parties.

Against the backdrop of these comparisons, the international arbitration context stands in marked contrast. As the have-nots arrive, two important features of the international arbitration system have produced a significantly different experience and may create a genuinely hospitable environment for resolving disputes. First, as a result of its history and the ethos of its participants, as well as the pragmatic necessities around which it is constructed, the international arbitration system appears to have a more public-oriented approach to the process of resolving disputes. Second, the legal framework that orders the system has combined with substantive variations among national laws to prevent some of the most controversial practices of U.S. arbitration and to create the possibility of regulatory arbitrage by have-nots. As a result of these features, instead of the pendulum swing of the domestic and investment arbitration paradigms, in international arbitration the competing interests have an opportunity to operate in tandem to ensure that disputes involving have-nots expand and enhance the system, rather than detract from its legitimacy and operation.

Despite these positive indicators, it would be too easy to assume a happy ending for the have-nots in international arbitration. The international arbitration system has work to do to ensure that they will be adequately accommodated. In Part III, I consider in Section A the need for structural reforms for the international arbitration system to accommodate consumers and employees. In Section B, I assess what effects these new claims might have on the market for arbitration services and in particular on the community of international arbitrators. Finally, in Section C, I consider how international arbitration might mediate between competing national policies and contribute to the development of international norms in the complex areas of human rights and seamen's claims.

¹⁶ For a thoughtful analysis of how international arbitration and private international law norms can promote a transnational regulatory function, see Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471 (2005). For arguments contending that international arbitration is "lawless," see Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 453 (1999); Linda Silberman, *International Arbitration: Comments From a Critic*, 13 AM. REV. INT'L ARB. 9, 11 (2002).

I. THE HAVE-NOTS IN DOMESTIC AND INVESTMENT ARBITRATION

This Part tracks the pattern of domestic U.S. arbitration, and later investment arbitration, in accommodating repeat players and one-shot players. The pattern in the domestic context can be divided into three phases: an enthusiastic expansion or opening of arbitration by courts, perceived abuse by repeat players, and (at least partial) retrenchment on behalf of the have-nots. While this three-phase paradigm is a useful heuristic device, it is not meant to obscure the fact that all three trends are present in all three phases. The division represents an effort to identify which actors—courts, repeat players, or reformists—are the primary protagonists at different points in time in the domestic context. In investment arbitration, the reasons for and protagonists in this pattern of openness, excess, and retrenchment are somewhat different. The overall pattern, however, remains quite similar and reveals related concerns about procedural legitimacy and the loss of sovereignty (comparable to the deregulatory effect in the domestic context).

A. *The Paradigm in Domestic Arbitration*

The modern contours of U.S. arbitration bear little resemblance to its historical profile. Up through the early part of the twentieth century, merchants from “shared normative communities” welcomed arbitration as an efficient and effective mechanism for resolving business disputes.¹⁷ Courts resisted arbitration as a threat to their jurisdiction and, as a consequence, arbitration agreements were routinely voided and arbitral awards were subject to intense judicial scrutiny or rewriting.¹⁸ Legislatures were also hostile, with many states enacting statutes that rendered arbitration agreements unenforceable.¹⁹ To promote enforcement of arbitration agreements and awards, in 1925 Congress adopted the Federal Arbitration Act (“FAA”). Even with the passage of the FAA, however, arbitration remained largely the province of commercial parties, and that province was bounded by restrictions against arbitration of certain types of statutory claims. Some years later, a line of Supreme Court decisions interpreting the FAA identified and developed a “federal policy favoring arbitration,”²⁰ which opened the door for abuses that would follow and the retrenchment those abuses would provoke.

1. *The Judicial Opening of Arbitration*

Three major judicial developments transformed arbitration from a mechanism for commercial disputes into its modern profile. First, the Supreme Court dramatically—some argue unduly—expanded the types of claims that could be arbitrated. Judicially created doctrines of non-arbitrability had prevented arbitration of statutory claims that are imbued with public policy, such as securities fraud, antitrust, and employment discrimination. In the framework of this Arti-

¹⁷ Van Wezel Stone, *supra* note 1, at 1017.

¹⁸ Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1948 (1996); Mara Kent, “Forced” vs. Compulsory Arbitration of Civil Rights Claims, 23 LAW & INEQ. 95 (2005).

¹⁹ See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

²⁰ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

cle, it strikes an ironic note that the path to apparently boundless arbitrability in domestic arbitration started with international cases. In *Scherk v. Alberto-Culver Co.*,²¹ the Supreme Court reversed earlier precedent that had held securities fraud claims to be non-arbitrable. In reaching this conclusion, the Court noted that "uncertainty will almost inevitably exist with respect to any contract touching two or more countries" and reasoned that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."²² Later in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²³ the Supreme Court again overturned prior precedent, emphasizing the importance of arbitration to international trade. Quoting from an earlier opinion in a case involving a forum selection clause, the *Mitsubishi* Court emphasized:

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.²⁴

As this reasoning suggests, international disputes do present unique reasons to permit arbitration of statutory claims, even those that implicate important public policies. But these reasons do not necessarily apply, or do not apply with equal force, to arbitration of purely domestic claims.

In international cases, national courts are burdened with competing assertions of prescriptive and judicial jurisdiction from other nations, and national court judgments face significant obstacles to enforcement abroad.²⁵ As a consequence, one nation's assertion that a particular law is "mandatory" does necessarily not make it inescapable if another nation adjudicates the case or refuses to enforce a resulting judgment.²⁶ In other words, the transnational regulatory environment is less certain and less clearly bounded than the domestic environment. As a result, permitting claims to be arbitrated in international cases does not necessarily produce a net deregulatory effect as it does in the domestic context, where there is little or no doubt about what law courts would apply and no need for them to accommodate the regulatory interests of other sovereigns.²⁷

Notwithstanding these distinctions, the Supreme Court's early arbitrability decisions soon slipped from their international moorings, and subsequent jurisprudence drifted into an apparently boundless permissiveness for arbitration of

²¹ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

²² *Id.* at 516.

²³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

²⁴ *Id.* at 629 (emphasis added) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)).

²⁵ Gary Born refers to these problems collectively as "the peculiar difficulties and uncertainties of international litigation." See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (forthcoming 2008) (manuscript ch. 2, at 47-48, on file with author).

²⁶ See Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 *YALE J. INT'L L.* 219, 225 (2001).

²⁷ The actual consequences of international arbitration on national regulatory interests will be taken up later in Part II.B.

any type of claim in wholly domestic settings.²⁸ Later cases, particularly in lower courts, casually extended these early international holdings to domestic contexts with little or no comment regarding the different practical considerations or regulatory interests implicated.²⁹ Now, not only international, but also domestic securities fraud and antitrust claims are arbitrable, along with RICO claims,³⁰ employment discrimination claims,³¹ and sexual harassment claims.³² As noted above, both supporters and critics agree that this expansion of arbitrability has a deregulatory effect, effectively privatizing adjudication and law-making in these areas.³³

The second important judicial development was the reconceptualization of consent. Courts have consistently held that arbitration is founded on consent³⁴ and party autonomy.³⁵ By emphasizing the parties' voluntariness in agreeing to submit their disputes to arbitration, courts justified their conclusions that parties could not later complain that arbitration lacked all the procedural advantages that they would have enjoyed in litigation, such as broad discovery, a civil jury, and appellate review.³⁶

Despite the stated importance of consent in legitimating the arbitral process, courts have since systematically downgraded the consent requirement. This transition was facilitated by the fact that the FAA does not require a signed writing for an arbitration agreement to be effective. In the absence of

²⁸ See, e.g., *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987). *McMahon* has unequivocally extended arbitrability of securities claims to domestic arbitration, without any mention of the fact that the *Scherk* decision had so heavily relied on the international nature of the transaction to justify its outcome.

²⁹ See, e.g., *Kowalski v. Chi. Tribune Co.*, 854 F.2d 168, 173 (7th Cir. 1988) (“[I]t seems unlikely after *McMahon* that the principle of *Mitsubishi* can be confined to international transactions.”); *Smokey Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1282 (5th Cir. 1986) (holding that “[a]lthough *Mitsubishi* arose in an international antitrust dispute and its holding purports to be limited to that context, we believe that its broad language may carry significance for domestic disputes as well”). The different practical considerations and regulatory interests are taken up *infra* Part II.

³⁰ *McMahon*, 482 U.S. at 238-42 (holding RICO claims are arbitrable).

³¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that an employment discrimination claim under the ADEA is arbitrable). In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Supreme Court held that the FAA applies to all employment contracts, except in the transportation industry. In light of *Adams*, the Ninth Circuit was forced to abandon its view, unique among the circuits, that *Gilmer* did not apply to Title VII claims. See *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003).

³² *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

³³ See *supra* note 15.

³⁴ See Celeste M. Hammond, *The (Pre) (As) sumed “Consent” of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 589 (2003) (“American courts have emphasized the ‘voluntary’ nature of the parties’ consent to substitute arbitration in lieu of litigation.”).

³⁵ See Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059, 1069 (1987) (“[T]he legitimacy of arbitral proceedings flows directly from a vision of private autonomy as the conceptual basis of contract law.”).

³⁶ See, e.g., *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) (reasoning that even if “not contemplated by the [plaintiffs] when they signed the contract, loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate”).

this requirement, which as explained in Part II differs from that in the international context,³⁷ courts have interpreted the concept of consent broadly. Under these interpretations, valid consent has been found in contracts of adhesion where the arbitration clause is made known only after the agreement has been completed and with no opportunity to object or withdraw. It is this relaxed notion of consent that has led to the development of the so-called "shrink-wrap" and "click-wrap" arbitration agreements. In a shrink-wrap agreement, according to its terms, the opening of the cellophane wrapping on the boxed software constitutes the act of assent, thus binding the purchaser to the terms included inside the box, including the arbitration agreement.³⁸

The third judicial development that laid the foundation for modern U.S. arbitration practice was the broad application of federal preemption to the FAA.³⁹ In *Southland Corp. v. Keating*,⁴⁰ the Supreme Court eliminated the possibility for states to designate certain categories of claims as non-arbitrable.⁴¹ The Court held in *Southland* that the FAA prevented the anti-waiver provision designed to protect franchisees in the California Franchise Investment Law from invalidating an arbitration clause. Although often categorized as a case regarding the validity of arbitration agreements, it and other cases that invalidated state statutes requiring judicial forum for certain claims⁴² in effect hold that states can no longer designate certain categories of claims as non-arbitrable.

Over a decade later, in *Doctor's Associates, Inc. v. Casarotto*,⁴³ the Supreme Court held that the FAA preempted a Montana statute that voided arbitration clauses in franchise agreements unless they were identified with a certain font style and placement. In *Casarotto* (which critics might be amused to know translates in Italian to mean "broken house"), the Court held that the FAA preempted state legislation that requires greater information or choice in the making of arbitration agreements than is required in other types of contracts.⁴⁴ The effect of broad federal preemption is that state courts and legislatures, the traditional loci of consumer protection, have much less leeway either to prevent enforcement of arbitration clauses that are regarded as eviscerating actual consent, or to designate matters as not arbitrable.⁴⁵

The consequence of this jurisprudence, which will be relevant to the discussion of contrasting features of international arbitration in Part II, is that the

³⁷ See *infra* Part II.B.2.

³⁸ John P. Tomaszewski, *The Enforceability of Adhesive Arbitration Clauses in International Software Licenses*, 3 J. TECH. L. & POL'Y 4, 4 (1997).

³⁹ Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 841 (2002).

⁴⁰ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁴¹ Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1452-55 (1991).

⁴² See *Perry v. Thomas*, 482 U.S. 483 (1987) (holding that FAA preempted California Labor Code provision that required judicial forum for wage claims despite existence of arbitration agreement).

⁴³ *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

⁴⁴ *Id.* at 686-88.

⁴⁵ Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 393-94 (2004).

law regarding the arbitrability and validity of an arbitration agreement is relatively uniform within the United States, but it is at odds with the law of most other foreign jurisdictions. As will be discussed later in Part II, states are permitted under the Convention on the Recognition and Enforcement of Arbitral Awards (the “New York Convention” or the “Convention”) to retain certain local protections for groups such as consumers and employees, and many states exercise that prerogative.⁴⁶

2. *Excess and Abuse*

As a result of the pro-arbitration jurisprudence described above, repeat players have been able to implement strategic arbitration clauses that critics contend undermine one-shot players’ substantive and procedural rights. In response to the Supreme Court’s permissive approach to consent, sellers have compelled arbitration by including clauses in small-print notices, envelope stuffers, or warranties contained in boxes or sent to consumers in the mail, or on websites, and in some instances in emails sent separate from the purchase.⁴⁷ Meanwhile, employers, banks, medical providers, credit card companies, landlords, and other service providers often include such provisions in take-it-or-leave-it agreements that, in other contexts, would constitute contracts of adhesion.⁴⁸ Empirical evidence suggests that most consumers, tenants, and employees do not read these provisions and that in many cases, even if they did observe them, they did not understand their meaning.⁴⁹

Having shifted potential disputes out of U.S. courthouses, repeat players have, according to critics, also engineered significant advantages for themselves in the arbitration process itself. One of the most infamous cases reads like a morality play, written expressly to sermonize against corporate excesses and the outlandishly one-sided arbitration clauses they might produce. In the case, Hooters restaurant and bar chain, perhaps not surprisingly, was sued for sexual harassment by one of its female employees and sought to compel arbitration of the claim.⁵⁰ The arbitration rules that Hooters had designed for its employees required that aggrieved employees provide at the initiation of an arbitration a detailed notice of any claim, accompanied by a list of all fact witnesses with descriptions of their testimonies. The company, meanwhile, was not required to file any responsive pleadings or to provide any notice of its defenses or descriptions of its evidence. Most remarkably, the arbitrators had to be selected from a list compiled exclusively by Hooters, which had no obligation to include arbitrators who were even nominally independent or impartial.⁵¹ Recognized as a caricature of an arbitration clause, the Hooter’s clause

⁴⁶ See *infra* Part II.B.

⁴⁷ Sternlight, *supra* note 39, at 834.

⁴⁸ Van Wezel Stone, *supra* note 1, at 956.

⁴⁹ Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37 (2007).

⁵⁰ *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999). For readers who are unfamiliar with Hooters restaurant chain, it acknowledges on its website that the uniforms of its waitresses, who are referred to as “Hooters Girls,” are specifically designed to bring an “element of female sex appeal” to the workplace. Hooters, http://www.hooters.com/company/about_hooters/ (last visited Nov. 21, 2007).

⁵¹ *Hooters of Am.*, 173 F.3d at 938-39.

was ultimately found to be unenforceable.⁵² Many other clauses, however, have been found to be enforceable, even though they raise similar (though less acute) concerns about how well have-nots might fare under arbitral procedures. For example, clauses have included provisions that limit discovery, impose significant costs, have proceedings in remote locations, shorten statutes of limitations, prohibit the use of class actions, or preclude statutorily available remedies.⁵³

Apart from any strategic disadvantages that are drafted into an arbitration clause, one-shot players are arguably disadvantaged by other features inherent in the nature and practice of arbitration generally. Critics argue that the absence of a jury, of reasoned awards, of pre-established procedural rules, and of appellate review generally inure to the benefit of the repeat players.⁵⁴ Most problematically, they argue, the structure of the market for arbitrator services creates incentives for arbitrators to favor repeat players, who are more likely to reappoint them in the future.⁵⁵ These hypotheses appear to find some support in the outcomes of empirical studies comparing various cases in which employees are or are not repeat players, and employers are or are not repeat players.⁵⁶

⁵² *Id.* at 935; *see, e.g.*, *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997) (another example of an extreme case that was struck down by the California Supreme Court).

⁵³ Sternlight, *supra* note 10, at 680-86.

⁵⁴ *See* Menkel-Meadow, *supra* note 9, at 39.

⁵⁵ *See* Guzman, *supra* note 11, at 1316-24; Marcela Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885, 1911-18 (2000). Court challenges based on similar allegations have so far not met with success. *See* Menkel-Meadow, *supra* note 9, at 35-36 ("Lawsuits already have (thus far unsuccessfully) challenged the bias of presumed repeat players who are thought to represent the repeat player interest of securities brokers or the securities industry or who are too homogeneous demographically and not sufficiently representative of the claimants.").

⁵⁶ In labor cases, where employees represented by unions are repeat players, employees prevailed in 52% of all cases. Bingham, *supra* note 9, at 212-13. In employment cases, employees prevailed in 63% of cases overall, but the win rate was only 16% for cases in which employees were up against repeat player employers. *See id.* at 210. Rates of recovery tell a similarly dramatic story. In arbitrations between employees and non-repeat player employers, employees recovered an average of 48% of their demand, while in arbitration against repeat player employers, employees recovered only 11% of what they demanded. *See id.* For additional empirical research and discussion of results, *see* Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 113-16 (1996); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 238 (1998); Menkel-Meadow, *supra* note 9, at 44-45; Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 (2001). Another study of a single employer compared arbitration results to results obtained by the EEOC in litigation and found that "the average award per [arbitration] complaint is \$576, less than one-third of the EEOC's \$1,996.54 per-claim average." David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1589 (2005) (noting that results may reflect that EEOC's caseload has been screened to select out only viable claims). Notably, empirical data also suggests that most employment claims are resolved without a full adjudication on the merits. This fact may raise questions about the reliability of statistics based on adjudicatory outcomes. *See id.* at 1582. Moreover, the fact that a "vast number" of EEOC cases are either dismissed or resolved outside of adjudication

3. Retrenchment

The disadvantages and, in some cases, outright abuses that arbitration is perceived to impose on one-shot players have prompted critique and reaction from virtually all quarters, including the judiciary, the academy, the media, legislative bodies, and arbitral institutions themselves.⁵⁷ Scholarly critics have christened the term “mandatory” arbitration,⁵⁸ arguing that there is no genuine consent when the arbitration clause is part of a small-print contract of adhesion.⁵⁹ With the dubious nature of consent as their starting point, “mandatory” arbitration’s critics have attacked everything from its constitutionality,⁶⁰ to its coherence under basic precepts of contract law,⁶¹ to its fundamental fairness,⁶² to its policy implications.⁶³ They argue that it permits repeat players to evade mandatory statutory law,⁶⁴ deprives claimants of procedural justice,⁶⁵ retards legal developments,⁶⁶ undermines democratic lawmaking,⁶⁷ and ultimately imposes substantively biased outcomes on less sophisticated parties through

“undermines the argument that arbitration will negatively affect the development of the law and public accountability.” *Id.* at 1586.

⁵⁷ See, e.g., Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL’Y 141 (2001); Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 7-8 (1998).

⁵⁸ The term “mandatory arbitration” remains subject to some debate in the domestic arbitration community. I limit my use of the term here also to avoid confusing it with discussions of “mandatory law,” which refers to legal rules that cannot be contracted around. See McConnaughay, *supra* note 16, at 474-75.

⁵⁹ Sternlight, *supra* note 39, at 831 n.1; see also Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1206 (2002) (Arbitration clauses that must be accepted as a condition of employment are “known in the industry as a pre-dispute mandatory arbitration agreement (‘PMAA’).”).

⁶⁰ Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1009-11 (2000); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) [hereinafter Sternlight, *Rethinking*]; Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).

⁶¹ See Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 33 (2003) (“State courts should recognize, though many have not, that those arbitration clauses that eliminate a pre-existing constitutional right to jury trial should be treated like civil jury trial waivers interpreted outside the arbitration context. Thus, to the extent that the state enforces civil jury trial waivers only if they are knowing, voluntary, and intelligent, that same standard should be applied to arbitration clauses.”).

⁶² See Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401.

⁶³ See Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1019 (1996).

⁶⁴ Ware, *supra* note 15.

⁶⁵ Sternlight, *Rethinking*, *supra* note 60.

⁶⁶ See Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1 (2003); Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 243 (2000); Sternlight, *supra* note 10, at 694-96.

contracts of adhesion.⁶⁸ There are some scholars who defend the arbitration regime, including the contracts of adhesion that facilitate it, on the grounds of economic efficiency.⁶⁹ The popular press, however, has sided with the critics. As Jean Sternlight observes, "[M]any major newspapers and news magazines have written at least one significant piece exposing how companies are eliminating an individual's right to sue."⁷⁰ Just recently the *New York Times* recounted another story of arbitration gone awry because of an undisclosed arbitrator conflict of interest and the lack of regulation that permits and perpetuates such problems.⁷¹

These critiques have not been lost on legislative bodies and the arbitral institutions themselves. While the Supreme Court held that the FAA preempted all conflicting state law, in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,⁷² it did leave states some role to play in promulgating state law that favors arbitration.⁷³ Meanwhile *Casarotto* prevents states from invalidating arbitration agreements, but states continue to "adopt[] laws that modify the parties' arbitration agreement . . . , regulating the arbitration process rather than the parties' obligation to arbitrate."⁷⁴ Starting from these bases, several states have passed legislation to regulate the arbitration process.⁷⁵

⁶⁷ One judicial commentator even went so far as to refer to arbitration as an "overwhelming" and "putrid odor" on the "body politic." *Knepp v. Credit Acceptance Corp.* (*In re Knepp*), 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999), *quoted in* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632 (2005).

⁶⁸ See, e.g., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131 (1996); Reilly, *supra* note 59.

⁶⁹ See, e.g., Hylton, *supra* note 66; David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 22-31 (2003); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 100 (1999); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89; Theodore Eisenberg & Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison* (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Paper Series, Research Paper No. 65, 2003).

⁷⁰ Sternlight, *supra* note 39, at 837, 860 (citing articles in the *New York Times*, the *Washington Post*, *U.S. News and World Report*, and the *San Francisco Chronicle*).

⁷¹ Gretchen Morgenson, *When Arbitrators Are Their Own Judges*, N.Y. TIMES, Aug. 12, 2007, at B1.

⁷² *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

⁷³ See *id.* at 478-79.

⁷⁴ Drahozal, *supra* note 45, at 393-94.

⁷⁵ After *Casarotto*, there are questions regarding the continued vitality of some state statutes that purport to impose limitations on the validity and enforceability of arbitration clauses. See Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 472 (1998); Robert Hollis et al., *Is State Law Looking for Trouble?: The Federal Arbitration Act Flexes its Preemptive Muscle*, 2003 J. DISP. RESOL. 463, 475-76; David Ling, *Preserving Fairness in Arbitration Agreements: States' Options After Casarotto*, 2 HARV. NEGOT. L. REV. 193, 193-94 (1997).

Among the most important of these state efforts is a California law that was adopted after a local paper ran “a series of articles featuring horror stories about the inequities of arbitration.”⁷⁶ The new rules substantially expand arbitrator disclosure requirements, provide mechanisms for regulating arbitrators, and, more controversially, potentially increase the bases for disqualifying arbitrators.⁷⁷ California has also enacted statutes regulating the conduct of institutions that administer consumer arbitrations. In a similar vein, New Mexico has adopted the Revised Uniform Arbitration Act (“RUAA”), which permits borrowers, tenants, consumers, and employees in arbitration to void an arbitration clause that provides for a less convenient forum, reduces access to discovery, limits right to appeal, precludes class actions, and the like.⁷⁸

At the federal level, at least two commissions have been established to evaluate pre-dispute arbitration clauses in the employment sector and both concluded with recommendations that the practice be abolished.⁷⁹ As a result of these commissions and critiques from other sources, Congress has also been under pressure to respond. Over the years, several bills have been proposed to provide protections for consumers, but they have all languished and failed.⁸⁰ As of the time of this writing, some new legislative proposals that would dramatically alter the arbitration regime are pending before a Democratic Congress and, some speculate, may have a better chance of success.⁸¹ Cumulatively, if passed, these proposals would radically rework the domestic arbitration frame-

⁷⁶ Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. REV. 119, 120 (2003).

⁷⁷ Ruth V. Glick, *Should California's Ethics Rules Be Adopted Nationwide?: No! They Are Overbroad and Likely To Discourage Use of Arbitration*, DISP. RESOL. MAG., Fall 2002, at 13; see also *Judicial Council of California Adopts Ethics Standards for Private Arbitrators*, 13 WORLD ARB. & MEDIATION REP. 176 (2002) (arguing that the volume of information that must be disclosed under California's new standards “may be too burdensome” and could “be used too readily” to disqualify arbitrators).

⁷⁸ See Drahozal, *supra* note 45, at 395.

⁷⁹ The Secretaries of Labor and Commerce established the Commission on the Future of Worker-Management Relations (known as the “Dunlop Commission”), which concluded that mandatory arbitration agreements should not be enforced. The Secretary of Labor also appointed a Task Force on Excellence in State and Local Government through Labor-Management Cooperation, which recommended that all employee arbitration agreements be voluntary and entered into after the initiation of a dispute. For a description of these efforts, see Reilly, *supra* note 59, at 1220; see also Menkel-Meadow, *supra* note 9, at 44-46.

⁸⁰ Sternlight, *supra* note 39, at 840.

⁸¹ See Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007). The latter two bills are companions introduced as the Arbitration Fairness Act of 2007, which would render unenforceable pre-dispute arbitration agreements covering employment, consumer, or franchise disputes as well as disputes arising under statutes designed to protect civil rights or to regulate transactions where there is unequal bargaining power. The act would also make the enforceability of an arbitration agreement a question for courts instead of arbitrators. The former bill, introduced as the Fair Arbitration Act of 2007, would require that arbitration clauses be explicitly labeled, state whether arbitration is mandatory or optional, identify a source of further information regarding the arbitration program, and provide notice that parties retain the right to bring disputes of \$50,000 or less to small claims court. The Act further provides certain procedural guarantees to the arbitration process, including the right to a neutral arbitrator, counsel or other representation, a fair, face-to-face hearing, the right to present evidence and cross-examine witnesses, a written

work by, among other things, invalidating pre-dispute arbitration clauses in consumer, employment, and franchise agreements, and requiring that arbitration clauses be specially designated to put signatories on notice.

Aware that negative publicity and public reaction could be bad for arbitration business, arbitral institutions have voluntarily undertaken an active effort to correct and prevent some of the excesses described above. The American Arbitration Association and other organizations developed the Employment Due Process Protocol and the Consumer Due Process Protocol, both of which provide for certain minimal standards of fairness in pre-dispute arbitration.⁸² The Employment Protocol, for example, requires that arbitrators have the power to award any remedy that would be available in a court proceeding.⁸³ Under these protocols, arbitral institutions would not administer arbitrations initiated under clauses that did not comply with the stated requirements.

Finally, courts have played an important role in reining in arbitral excesses. The Supreme Court interpreted the FAA as permitting courts to refuse enforcement of arbitration agreements or awards that are not valid under ordinary contract law. Using principles of fraud, duress, and unconscionability, courts have begun establishing some contractual limitations on arbitration clauses that are particularly onerous or unfair. In one example, which bears some relevance on the issues discussed in Part II, a court struck down a clause that required a consumer to arbitrate in Paris under the International Chamber of Commerce ("ICC") Rules and to deposit \$4000 as an advance toward costs in order to initiate the proceedings in a relatively small dispute.⁸⁴ The final link in this chain of retrenchment is a revision by some companies of their arbitration regimes to make them more fair, usually in response to or in anticipation of the external pressures described above.⁸⁵

This pattern of openness and excess, followed by reactive retrenchment may seem to be a natural pendulum swing that is inevitable as the various players seek to identify, maximize, and protect their interests in any dispute resolution setting. Some might argue that this process is even necessary to produce a reasonable balance between the competing interests. But it is a distant second best to intentional system design,⁸⁶ which can help avoid the costs that are generated when rival factions engage in all-out competition. Perhaps the greatest cost has been perceptions of fairness of arbitration, both among the public and individual parties. Perceived fairness is as essential as actual fairness in establishing the legitimacy of a particular dispute resolution process.⁸⁷

explanation of the arbitrator's decision, and the right to opt out of arbitration for small claims.

⁸² Sternlight, *supra* note 39, at 842.

⁸³ *Id.*

⁸⁴ See *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574 (App. Div. 1998).

⁸⁵ See Menkel-Meadow, *supra* note 9, at 46-47, 50-51 (describing changes at Brown & Root and Kaiser Foundation Health Plan).

⁸⁶ See Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 178 (2007) (describing "Dispute Systems Design" as "the intentional and systematic creation of an effective, efficient, and fair dispute resolution process based upon the unique needs of a particular system").

⁸⁷ See Christopher J. Peters, *Participation, Representation, and Principled Adjudication*, 8 LEGAL THEORY 185 (2002). For a contrasting view, see Robert G. Bone, *Agreeing to Fair*

As a result of the pattern described above, instead of being regarded as a dispute resolution “panacea,” domestic arbitration has developed a reputation among many as a “corporate tool” for repeat players.⁸⁸

B. The Paradigm in Investment Arbitration

Investment arbitration has its own struggles with perceptions of legitimacy.⁸⁹ These problems are also tied, at least in part, to the experience of have-nots in the arbitration process and to a corollary of the deregulatory effect that occurred in domestic arbitration.

In investment arbitration, distinguishing between the haves or repeat players on the one hand, and the have-nots or one-shot players, on the other hand, requires a more nuanced analysis.⁹⁰ Conventionally, in a dispute between a state and an individual, the state would be considered a repeat player, fully capable of defending its interests, particularly if matched against an individual or corporate investor.⁹¹ In the historical investment context, this was all the more true because investors most typically were required to resort to the presumably biased national courts of the host state to resolve claims against that state. The inception of the relatively new phenomenon of investment arbitration has given a twist to this familiar plot. Some developing states found themselves in a role more closely resembling the conventional one-shot player, unexpectedly having to defend themselves in an unfamiliar process against claims for “hundreds of millions or even billions of dollars, [based on] claims [that] involve[d] sensitive issues of national policy.”⁹²

Historically, developing countries had guarded their national interests by refusing to enforce arbitration agreements involving all future disputes (not only those including nation-states themselves) on the ground that they were an infringement of sovereignty.⁹³ In the “sweeping liberalizations” of the 1980s and 1990s, developing nations began accepting international arbitration for their citizens and acceding to the New York Convention to ensure enforceability of agreements and awards. By the mid-1990s, many developing nations had also entered into bi-lateral or multi-lateral investment treaties, which designated arbitration as the mechanism for foreign investors to bring claims against host governments regarding their investments.⁹⁴ In other words, states not only permitted their national laws to be enforced (or not enforced) by arbitrators, but agreed to submit their own sovereign conduct and lawmaking to evaluation by

Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U. L. REV. 485, 510 (2003).

⁸⁸ Sternlight, *supra* note 10, at 637.

⁸⁹ See Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 383-86 (2003); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

⁹⁰ As Marc Galanter explains, the distinction between one-shot players and repeat players is not so much a dichotomy, but ideal types that represent the ends of a continuum. See Galanter, *supra* note 7, at 97-98.

⁹¹ See *id.* at 97 (referring to prosecutors as repeat players).

⁹² Drahozal, *supra* note 5, at 247.

⁹³ See BORN, *supra* note 25 (manuscript ch. 5, at 21).

⁹⁴ Franck, *supra* note 89, at 1525-27.

arbitrators. If domestic arbitration can be said to have a deregulatory effect, investment arbitration might be described as creating a form of global administrative review of national decisionmaking.⁹⁵

In bringing investment claims against states, foreign investors typically hired one of the major international law firms, which have practice groups that specialize in investment treaty arbitration⁹⁶ and that are often headed by attorneys who also serve as arbitrators in investment arbitrations. Many developing countries did not avail themselves of these firms, either because the cost of these firms was beyond the budgets of many developing countries, particularly least-developed countries, or because they decided for political reasons not to retain them.⁹⁷ As a result, many developing countries have their own government attorneys defend them in investment arbitrations, which led in some cases to "shocking disparities in the quality of legal representation between investor claimants and developing nation defendants."⁹⁸ For example, in its first investment arbitration, Argentina's lead attorney purchased key arbitration treatises with his own money and, given the lack of legal resources in Argentina's Solicitor General's office, flew to Washington, D.C. a few days before the hearing to conduct legal research at the International Centre for Settlement of Investment Disputes ("ICSID") and local law school libraries.⁹⁹ In an even more striking example, in *CDC v. Seychelles*, Seychelles was represented by its Attorney General, who had no experience in investment arbitration claims, no Internet access that would have permitted legal research on Westlaw or LexisNexis, and no other resources with which to research investment law.¹⁰⁰

Inequalities in legal representation were originally a consequence of market dynamics, but they were exacerbated by the general lack of transparency of the system, which served to entrench the advantages of insiders over newcomers. Rulings by prior tribunals were known to experienced counsel, who could cite them and develop case strategies around them. Unwritten procedural practices were familiar to, and perhaps even developed by, the experiences of the investment arbitration specialists in the major law firms.

One of the most troubling disadvantages for developing countries has been their lack of experience or sophistication in selecting arbitrators. As leading

⁹⁵ Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 123, 145 (2006) (arguing that "investment arbitration has emerged as a species of global administrative law" and reviewing the "scope and potency of this regime as a means of reviewing and controlling the exercise of public authority by the state"). For an interesting analysis of how investment arbitration effectuates shifts in power, see Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014 (2007).

⁹⁶ Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 253 (2007).

⁹⁷ See *id.* at 254; see also Barry Leon & John Terry, *Special Considerations When a State Is a Party to International Arbitration*, DISP. RESOL. J., Feb.-Apr. 2006, at 68, 75 ("Sometimes financial resources may make a state unable to employ counsel who is experienced in international arbitration," which can "lead to the retention of counsel without the necessary expertise in international arbitration.").

⁹⁸ Gottwald, *supra* note 96, at 255.

⁹⁹ *Id.* at 263-64.

¹⁰⁰ *Id.* at 261-62.

arbitrator Rusty Park has explained, “Just as in real estate the three key elements are ‘location, location, location,’ so in arbitration the applicable trinity is ‘arbitrator, arbitrator, arbitrator.’”¹⁰¹ Despite the importance of this decision, when developing nations need to select arbitrators, they are often at a loss. Anna Joubin-Bret of the United Nations Conference on Trade and Development (“UNCTAD”) reports that representatives from developing nations, who are often unfamiliar with the field and unable to obtain reliable information about arbitrator candidates, have been known to resort to relatively random selection criteria, such as nominating an academic they happened to encounter at a conference on investment arbitration.¹⁰² Other experts in the field confirm that, without the aid and guidance of one of the leading investment arbitration law firms, developing countries founder in their efforts to obtain reliable information about arbitrator candidates.¹⁰³

Today, many of these inequities have been ameliorated. Some developing countries have built up impressive expertise in dealing with investment arbitration, most notably Argentina, whose Solicitor General’s office today “look[s] more like an investor-state arbitration practice [than] you might find at one of the major international law firms.”¹⁰⁴ Other states have retained prestigious international law firms, often times at deeply discounted rates. Despite the fact that these developments would seem to put them squarely within the definition of “repeat player,” the perception of their disadvantage persists and continues to resonate. There are many other complaints about investment arbitration that are unrelated to the disadvantages that developing countries have encountered, but the perception of procedural unfairness has continued to fuel these other complaints, particularly about substantive outcomes and their effects on national and sovereign interests.¹⁰⁵

As in the domestic U.S. arbitration context, these perceived inequities have produced a palpable retrenchment among scholars, non-governmental organizations (“NGOs”), and states. There have been direct attacks on both the substantive outcomes of investment arbitration and the procedures that have produced them. Respected NGOs such as the World Wildlife Fund have assailed investor-state arbitration as “lacking transparency” and “shockingly unsuited to the task of balancing private rights against public goods.”¹⁰⁶ Perhaps also in light of other considerations, Bolivia and Ecuador have withdrawn

¹⁰¹ William W. Park, *Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803, 813 (2002).

¹⁰² Anna Joubin-Bret is a Senior Legal Advisor and Technical Assistance Coordinator for UNCTAD, which works with developing nations to promote the integration of developing countries into the world economy. Ms. Joubin-Bret specifically works on policy and technical issues.

¹⁰³ Interview with Toby Landau, Barrister with Essex Court Chambers, in London, Eng. (July 16, 2007).

¹⁰⁴ Gottwald, *supra* note 96, at 264 (attributing this development to the fact that Argentina now has “the experience of litigating several ICSID cases under its belt”).

¹⁰⁵ It is beyond the scope of this Article to analyze the treatment of national policy interests in investment arbitration. For a thoughtful discussion of these issues, see Alvarez & Park, *supra* note 89.

¹⁰⁶ *Id.* at 384 (quoting HOWARD MANN, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT AND WORLD WILDLIFE FUND, PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA’S CONTROVERSIAL CHAPTER OF INVESTOR RIGHTS 46 (2001)).

from the ICSID Convention altogether and urged other Latin American states to follow suit.¹⁰⁷

Similar to the domestic context, complaints have also been expressed through concerns about the bias of arbitrators and institutions.¹⁰⁸ Developing nations have attacked the conduct and alleged bias of arbitrators and institutions,¹⁰⁹ both through procedural challenges in individual arbitrations and more systemically. Meanwhile, one environmental advocate has lobbed the provocative allegation that a leading arbitral institution, far from being a neutral administrator, is an active proponent of investment deregulation and that its interest in deregulation "provides incentives for individual panels to rule in favor of investors."¹¹⁰ At a more concrete level, there is now a campaign to prohibit those who sit as arbitrators in investment arbitrations from also serving as counsel in other investment arbitrations on the ground that they may, as arbitrators, engineer awards that will be useful for them to cite later as counsel in other cases.¹¹¹

There have also been efforts at systemic reform. Pressed by national legislatures and non-governmental institutions, arbitral institutions themselves have been working to make the system more transparent and predictable by ensuring public access and participation as *amicus curiae* in investment arbitration proceedings.¹¹² Seminars and other programs have been sponsored by UNCTAD to guide developing countries in managing investment disputes.¹¹³ One interesting proposal suggests formalizing these efforts through creation of

¹⁰⁷ *Latin America Ponders Pullout of ICSID*, DISP. RESOL. J., May-July 2007, at 12.

¹⁰⁸ See Joel C. Beauvais, Student Article, *Regulatory Expropriations Under NAFTA: Emerging Principles & Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 262-63 (2002); Renée Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 282.

¹⁰⁹ See, e.g., *Hague District Court Dismisses Ghana's Challenge of Arbitrator*, MEALEY'S INT'L ARB. REP., Jan. 2005, at 7; Luke Eric Peterson, *Dutch Court Finds Arbitrator in Conflict Due to Role of Counsel to Another Investor*, INVEST-SD: INV. L. & POL'Y WEEKLY NEWS BULL., Dec. 17, 2004, available at www.iisd.org/pdf/2004/investment_investsd_dec_17_2004.pdf.

¹¹⁰ Mark Vallianatos, *De-Fanging the MAI*, 31 CORNELL INT'L L.J. 713, 727 (1998) (making this allegation with respect to the ICC). This provocative thesis may raise legitimate questions about the relationship between the ICC's political branch and arbitration administering branch, or at least signal the need for the ICC to make clear the separation. Proponents of this theory do not, however, clarify how the alleged bias of the institution "provides incentives" for specific panels in individual cases. *Id.*

¹¹¹ HOWARD MANN ET AL., COMMENTS ON ICSID DISCUSSION PAPER, "POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION" 11 (2004), available at www.iisd.org/pdf/2004/investment_icsid_response.pdf ("[P]racticing lawyers who either themselves act as counsel in cases or have partners who do by definition have a conflict of interest (actual or perceived) that is inimical to their participation as arbitrators."); Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, DISP. RESOL. J., Feb.-Apr. 2006, at 60, 62 ("[A]rbitrator's prior statements about an issue in dispute (an 'issue conflict'), has been the subject of scant guidance and has become the subject of growing controversy over the last few years." (footnote omitted)).

¹¹² See Chris Ford, *What Are 'Friends' For? In NAFTA Chapter 11 Disputes, Accepting Amici Would Help Lift the Curtain of Secrecy Surrounding Investor-State Arbitrations*, 11 SW. J. L. & TRADE AM. 207 (2005).

¹¹³ Gottwald, *supra* note 96, at 270.

a legal assistance center for developing nations.¹¹⁴ These efforts have been accompanied by proposals by other groups to rewrite the substantive provisions of underlying investment treaties and to reorder arbitration procedures to accommodate regulatory goals that are necessary to ensure sustainable development.¹¹⁵

Analogous to what happened when judicial decisions opened up new frontiers in domestic arbitration, the newness and unknown quality of investment arbitration led to perceived excesses and abuses, and ultimately a crisis of legitimacy. One cost of these problems may be that today, in addition to legitimate concerns about the system, unfounded complaints may be given more credibility than they otherwise deserve. Another potential cost, although difficult to measure, may be the reluctance of states to enter into new investment treaties that provide for arbitration or to subscribe to the ICSID Convention.¹¹⁶ Like domestic arbitration, investment arbitration is still struggling not only to function better as a practical matter, but to restore its tarnished image and reassure its constituents that it is capable of striking an appropriate balance with respect to sovereign interests.

II. THE HAVE-NOTS IN INTERNATIONAL ARBITRATION

While domestic U.S. arbitration and investment arbitration have had their legitimacy questioned as a result of their treatment of have-nots, international arbitration is not necessarily destined to follow the same path. Several features that are peculiar to the international context have imposed structural limits on the potential for abuse by repeat players, while other features of the system suggest that it may hold unique benefits that favor one-shot players. In the first Section, I profile the arrival of have-nots in international arbitration. In Sections B and C, I analyze how and why the experience of consumers and employees in international arbitration has not, for the most part, tracked the pattern of the U.S. domestic arbitration experience. Divergent national laws and related issues regarding enforcement of awards under the New York Convention have slowed the entrance of the have-nots, enabled them greater flexibility, made it more difficult for repeat players to indiscriminately impose their own preferences, and created opportunities for recourse against potential abuses by repeat players. Meanwhile, international arbitration resolves many of the practical problems that make it difficult or impossible for these groups to vindicate claims in national courts. Far from having the deregulatory effect that many argue has resulted from arbitration of publicly imbued claims in the United States, entrusting claims to international arbitration may promote opportunities for effective transnational regulation.

¹¹⁴ See *id.* at 270-71.

¹¹⁵ BRITISH INST. OF INT'L AND COMPARATIVE LAW, INVESTMENT TREATY FORUM, RESPONSE TO WORKING PAPER OF 12 MAY 2005 ON SUGGESTED CHANGES TO THE ICSID RULES AND REGULATIONS (2005); MANN ET AL., *supra* note 111, at 11.

¹¹⁶ Allegations of systematic bias by arbitrators and the system have led some to argue that it remains "a huge task" to convince developing nations that they can expect a fair hearing before international arbitration tribunals. John Beechey, *International Commercial Arbitration: A Process Under Review and Change*, DISP. RESOL. J. Aug.-Oct. 2000, at 32, 33.

A. *The Have-Nots' Arrival*

The arrival of have-nots in international arbitration occurred later and for different reasons than it did in the domestic U.S. experience. In the United States, the have-nots' arrival was precipitated by legal developments that opened up U.S. arbitration law.¹¹⁷ In the international context, by contrast, their arrival has been tied to economic and political realities brought on by globalization. Even if not yet highly visible, their presence is not negligible,¹¹⁸ and promises to increase in the future. This section provides a brief overview of those developments, and previews some of the optimism that has been expressed regarding their prospects.

1. *Employees*

One by-product when business went global was the creation of the "denationalized employee," whose employment contract and even daily work is separated from a particular, or even any particular, situs.¹¹⁹ The original and most denationalized employees are seamen,¹²⁰ but today many other employment relationships involve transnational relationships as employees more and more frequently move across national boundaries in pursuit of work. As described above, in U.S. domestic employment arbitration, there are concerns about how faithfully U.S. employment laws may be enforced. In the international context, however, effective unilateral application of such laws is more dubious. In cross-border employment settings, the state where employment occurs and the state or states where the employee and employer originate may each have different and conflicting policies that would apply to the employment relationship. Given the impediments to enforcing these policies transnationally through litigation in national courts, arguably arbitration may provide a more viable mechanism for safeguarding national interests represented in employment laws, and for finding a meaningful accommodation of conflicting national laws. For these reasons, some scholars predict increasing use of arbitration clauses in transnational employment contracts.¹²¹

2. *Consumers*

Similar to the employment context, with the lowering of trade barriers and the advent of the Internet, consumers are increasingly purchasing across national borders.¹²² "American consumers can purchase books not only on

¹¹⁷ See *supra* Part I.A.

¹¹⁸ For example, the ICC reports that nearly 3% of its cases are for claims valued at under \$50,000. See *2006 Statistical Report*, 18 ICC INT'L CT. ARB. BULL. 5, 14 (2007). While this statistic does not necessarily imply the presence of parties who are have-nots, it does suggest a case with a very different profile than usually supposed in international cases, which are usually valued in the millions of dollars.

¹¹⁹ James B. Boskey, *The Resolution of Disputes in Transnational Employment: Arbitration and Its Discontents*, 3 J. SMALL & EMERGING BUS. L. 189, 190 n.8 (1999).

¹²⁰ For further discussion of seamen's claims, see *infra* Part III.C.2.

¹²¹ Boskey, *supra* note 119, at 195-96.

¹²² Donna M. Bates, Note, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 FORDHAM INT'L L.J. 823, 823 (2004) ("Consumer transactions drive many national economies, and with the advent of the Internet

Amazon.com, but also on Amazon.co.uk, Amazon.de, Amazon.fr, Amazon.co.jp, Amazon.ca, and other transnational merchandisers, while Amazon.com will ship goods to customers worldwide.”¹²³ These cross-border consumer transactions are occurring at staggering rates, particularly over the Internet,¹²⁴ with no signs of stopping. When disputes inevitably arise, international arbitration, particularly online dispute resolution, is often touted as the only viable means for consumers to pursue claims. This enthusiasm for international arbitration is expressed not only by repeat players, who might be expected based on the experience of U.S. arbitration to be the primary beneficiaries. Instead, legal commentators and consumer groups have also urged the use of arbitration for these cross-border disputes.¹²⁵ Perhaps even more surprising, the European Union, which as described below has a pronounced pro-consumer legislative agenda that precludes pre-dispute arbitration clauses, has developed policies to promote the use of online arbitration by consumers.¹²⁶ Similarly, the Organization for Economic Co-Operation and Development (the “OECD”) has sponsored research and devoted symposia to the topic.¹²⁷

3. *Human Rights Victims*

Finally, and in some ways most surprisingly, human rights advocates are arguing that international arbitration may provide not only a possible venue, but

and e-commerce, consumer shopping has taken on a cross-border flavor. The growth in transactional traffic increases the need for effective dispute resolution mechanisms.”)

¹²³ Drahozal, *supra* note 5, at 250.

¹²⁴ The U.S. Commerce Department estimates that electronic commerce transactions in 2005 totaled \$2.4 trillion. See U.S. CENSUS BUREAU, E-STATS (2007), available at <http://www.census.gov/eos/www/2005/2005reportfinal.pdf>. Meanwhile, “[p]rojections for future growth range from 17% to 19% per year through 2008 for business-to-consumer (B2C) e-commerce to 45% per year through 2006 for business-to-business (B2B) e-commerce. Much electronic commerce is domestic—i.e., within a single country. But increasingly Internet transactions cross national boundaries.” Drahozal, *supra* note 5, at 250; see also Mohamed Wahab, *Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement*, 12 INT’L J.L. & INFO. TECH. 123, 127 (2004) (citing estimates “that 63% of the online population will be purchasing goods and services over the Internet by 2006 [and] . . . that the total value of e-commerce transactions around the world should reach US \$1 trillion in 2003, and over US \$ 6 trillion in 2005”).

¹²⁵ See Karen Stewart & Joseph Matthews, *Online Arbitration of Cross-Border, Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1136 (2002) (“As the difficulty inherent in applying domestic laws to electronic commerce has become more apparent, many consumer groups have changed sides on the issue and are now in favor of establishing fair procedural standards for international arbitration.” (citing BUREAU OF CONSUMER PROT., FED. TRADE COMM’N, CONSUMER PROTECTION IN THE GLOBAL ELECTRONIC MARKETPLACE: LOOKING AHEAD (2000), available at <http://www.ftc.gov/bcp/icpw/lookingahead/electronicmkpl.pdf>)).

¹²⁶ COMMISSION OF THE EUROPEAN COMMUNITIES, GREEN PAPER ON ALTERNATIVE DISPUTE RESOLUTION IN CIVIL AND COMMERCIAL LAW (2002), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf.

¹²⁷ See Organisation for Economic Co-operation and Development, *Building Trust in the Online Environment: Business-to-Consumer Dispute Resolution – Conference Agenda*, http://www.oecd.org/document/52/0,3343,en_21571361_34590630_1865204_1_1_1_1,00.html (last visited Nov. 22, 2007).

a mechanism for enforcing human rights.¹²⁸ In the most thoughtful work in this area, Roger Alford argues that international arbitration can impose liability on sovereigns that has so far proven impossible in international human rights litigation because of the Foreign Sovereign Immunities Act.¹²⁹ Companies that are subject to liability for aiding and abetting rogue governments can pursue indemnity through international arbitration when allowed by their contracts or a governing bi-lateral investment treaty. Meanwhile, Alford and others have pointed out that the combination of contract and arbitration can empower socially responsible corporations to enforce human rights norms against their distributors, suppliers, and other contractors.¹³⁰ In the most progressive and innovative of his proposals, Alford suggests that such corporations can even draft arbitration clauses to permit third parties—such as the human rights victims themselves or organizations that represent them—to pursue arbitration claims directly against malfeasors.¹³¹

While arbitration and human rights seem like strange bedfellows, arbitration actually has a long history of facilitating individual claims against governments that are not suitable for national courts and lack any other viable forum. That is the reason why claims tribunals, which are a species of international arbitration, have been historically successful in processing claims by individuals.¹³²

B. National Regulatory Interests and the Structure of the International Arbitration System

The New York Convention permits states significant opportunities to protect their national interests by designating categories of claims as non-arbitrable, as violative of public policy, or as non-commercial, and therefore not subject to the Convention. Similarly, the Convention requires that an arbitration clause be signed and in writing, or evidenced in an exchange of correspondence, but it leaves to contracting states latitude in determining when those and other formation requirements are met. Consistent with these provisions and the flexibility they afford, national approaches to arbitrability, formation, and the definition of “commercial” vary. The effect of this variation is that, as described later in Section C, U.S.-style pre-dispute arbitration clauses have not

¹²⁸ Roger P. Alford, *Arbitrating Human Rights*, 99 AM. SOC'Y INT'L L. PROC. 233, 235 (2005); Ian H. Eliasoph, *A Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms*, 10 NEW ENG. J. INT'L & COMP. L. 83 (2004); Sheldon Leader, *Human Rights, Risks, and New Strategies for Global Investment*, 9 J. INT'L ECON. L. 657, 684-89 (2006).

¹²⁹ Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. (forthcoming 2007) (manuscript at 4-6, on file with author).

¹³⁰ See *id.* (manuscript at 2).

¹³¹ See *id.* (manuscript at 35-41).

¹³² For example, a claims tribunal was established to deal with claims by Holocaust survivors against Swiss banks. See Holocaust Victims Claim Resolution Tribunal Official Information Website, http://www.crt-ii.org/index_en.phtml (last visited Nov. 22, 2007).

gone global and, instead, there exist the preconditions that permit regulatory arbitration to promote the interests of have-nots.¹³³

I. Arbitrability, the “Commercial” Exception, and Public Policy

Like the FAA, the New York Convention has a pro-arbitration bias that is designed to promote uniformity and ensure the enforceability of arbitration agreements and awards.¹³⁴ Because it is an international agreement, however, the New York Convention cedes to contracting states more flexibility than the Supreme Court has deemed necessary to allow the individual states under a federal statute. There are essentially three ways a state can insulate claims or awards from the purview of the New York Convention.

First, Article I(3) of the Convention provides for a “commercial” reservation, which allows signatories to refuse to enforce agreements or awards that are not considered “commercial.” To be effective, the reservation must be specifically invoked by a signatory at the time they sign the Convention, and to date fifty-one states have done so.¹³⁵ While the term “commercial” is generally interpreted to be very broad, many signatories do not treat consumer claims¹³⁶ or employment claims as being within its meaning. In fact, some commentators argue that “[t]he commercial reservation represents the general international antipathy towards consumer arbitration.”¹³⁷

Second, Articles II(1) and V(2)(a) of the New York Convention permit contracting states to designate claims as non-arbitrable, which many states (other than the United States) have done with employment and consumer claims. A claim that is not arbitrable under a state’s law need not be referred to arbitration by that state’s courts in the first place, and awards that deal with non-arbitrable subjects are not required to be recognized or enforced by that state.¹³⁸ While the background assumption has been that the Convention affords states unbounded discretion to designate categories as non-arbitrable (or to define public policy), leading commentator Gary Born has recently offered a more thoughtful and nuanced analysis.¹³⁹ He reasons that the structure and nature of the New York Convention implies certain restrictions on states’ ability to designate categories as non-arbitrable, most particularly if such designa-

¹³³ “Regulatory arbitrage” is sometimes used as a synonym for a “race to the bottom,” presumably because the term originated to describe corporate conduct that exploited regulatory gaps to avoid legal obligations.

¹³⁴ See *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004) (noting the “general pro-enforcement bias informing the convention”); *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974) (same).

¹³⁵ See MAURO RUBINO-SAMMARTANO, *INTERNATIONAL ARBITRATION LAW AND PRACTICE* 947 (2001).

¹³⁶ *Id.*

¹³⁷ Stewart & Matthews, *supra* note 125, at 1136. But see BORN, *supra* note 25 (manuscript ch. 2, at 116) (describing a “clear trend . . . towards a liberal and expansive definition of the term”).

¹³⁸ See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. II(1), V(2)(a), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

¹³⁹ BORN, *supra* note 25 (manuscript ch. 5, at 431-32).

tions are discriminatory or idiosyncratic.¹⁴⁰ Under this reasoning, states cannot designate categories as non-arbitrable for international arbitration if those same categories are arbitrable in domestic arbitration or if they are peculiarly out-of-sync with general international consensus.

The existence of an international consensus about categories of arbitrable claims is not always clear, however, nor is the question of what criteria should be used to determine when such consensus exists.¹⁴¹ For example, both the United States and the European Union permit arbitration of antitrust or competition claims.¹⁴² These are the two largest and most active regulators in the area of antitrust law, and other important jurisdictions have also followed suit, including Australia, New Zealand, Canada, and China.¹⁴³ Given this degree of apparent national consensus, which has also been recognized and invoked by several international arbitration tribunals,¹⁴⁴ it is arguably fair to say that international consensus has emerged that competition or antitrust claims are arbitrable. The same cannot be said about consumer or employment claims.

In most countries, pre-dispute arbitration agreements with consumers are unenforceable as a category.¹⁴⁵ The EU Directive on Unfair Terms in Con-

¹⁴⁰ See *id.* at 116 (“[P]rovisions of national law that subject international arbitration agreements to requirements not applicable to other contracts or to domestic arbitration agreements, or that are idiosyncratic[,] . . . are superseded by Article II(1) and II(3) of the Convention.”).

¹⁴¹ See BORN, *supra* note 25 (manuscript ch. 4 n.468) (suggesting that when arbitrability of a particular subject area becomes systematically recognized by international and national tribunals and generally acceded to by nation-states, it may develop into a customary international law norm of arbitrability, such that designating that topic as non-arbitrable would be idiosyncratic and thus violate the New York Convention).

¹⁴² Thomas E. Carbonneau & François Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 TUL. J. INT’L & COMP. L. 193, 194 (1994) (arguing that “the dilution of [restrictions limiting] arbitrability in United States law is also occurring in France and other European civil law jurisdictions”). The European Court of Justice indirectly ruled on the arbitrability of EU competition claims in *Eco Swiss China Time Ltd. v. Benetton International NV*. Case C-126/89, *Eco Swiss China Ltd. v. Benetton Int’l NV*, 1999 E.C.R. I-3055. While the ECJ did not expressly affirm the arbitrability of competition claims, the vast majority of the commentators regard *Eco Swiss* as inferring that the court considers them as arbitrable in principle, even if EC competition law implicates public policy. See, e.g., Luciana Laudisa, *Gli arbitri e il diritto comunitario della concorrenza*, 2000 RIVISTA DELL’ARBITRATO 592 (“The decision of the Court of Justice of the European Communities implicitly states that the EC antitrust claims are arbitrable.”) (author’s translation); Richard C. Levin & Gregory P. Laird, *International Arbitration of Antitrust Claims*, METROPOLITAN CORP. COUNS., May 2003, at 10; P.J. Slot, *The Enforcement of EC Competition Law in Arbitral Proceedings*, 23 LEGAL ISSUE EUR. INTEGRATION 101, 102 (1996).

¹⁴³ See BORN, *supra* note 25 (manuscript ch. 5, at 367-68); see also WANG SHENG CHANG, *RESOLVING DISPUTES IN THE PRC* 78 (1996) (“Except for the disputes specified by Article 3 of the Arbitration Law, it is established that any types of commercial disputes, including trademark disputes, patent disputes, *competition disputes*, and security disputes, which were previously considered to be sensitive, are now arbitrable under the Arbitration Law.” (emphasis added)); see also CHENG DEJUN ET AL., *INTERNATIONAL ARBITRATION IN THE PEOPLE’S REPUBLIC OF CHINA: COMMENTARY, CASES AND MATERIALS* 724 (2d ed. 2000).

¹⁴⁴ BORN, *supra* note 25 (manuscript ch. 5, at 369) (“[A]rbitral tribunals have uniformly affirmed their power to entertain and decide competition law disputes.”).

¹⁴⁵ Laws that render arbitration agreements with consumers categorically ineffective could be conceived of either as a matter of arbitrability or as an issue of formation and validity.

sumer Contracts includes as “unfair,” and hence unenforceable, any contract term that has the effect of “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.”¹⁴⁶ In implementing this Directive, EU member states have adopted legislation that treats as “unfair” clauses that oblige arbitration for claims that are less than a specified amount (e.g., approximately \$10,000).¹⁴⁷ These protections do not necessarily imply that there is no room for arbitration of consumer claims, even if the pre-conditions for such claims remain uncertain. As noted above, the same EU that passed the Directive rendering pre-dispute arbitration agreements unfair is elsewhere turning to arbitration to resolve international consumer disputes.¹⁴⁸

The final category that affords states some regulatory leeway under the Convention is with respect to the public policy exception. Article V(2)(b) of the New York Convention permits states to refuse enforcement of awards that violate public policy.¹⁴⁹ At first blush, it appears to open an exception broad enough to swallow the Convention itself, particularly in light of the policy-based reasons for historic resistance to arbitration. In practice, however, it has been interpreted exceedingly narrowly. It has drawn the most attention as a potential counterbalance to arbitrability.¹⁵⁰ For example, when the U.S. Supreme Court permitted arbitration of antitrust claims, it hedged its decision

On the one hand, like arbitrability, they treat an entire category of claims (even if that category is defined by the identity of one of the parties instead of the subject matter of the claim itself). On the other hand, however, the substance of the prohibitions seems to track more closely formation and validity defenses, such as incapacity or unconscionability. One added twist is that when states designate claims as non-arbitrable, it is often an absolute prohibition on the mechanism, whereas many laws regarding consumer arbitration preclude only arbitration when it is agreed to pre-dispute. For the purposes of this discussion, I have treated categorical prohibitions as a question of arbitrability, and I deal with more limited formation requirements in consumer contracts below.

¹⁴⁶ Council Directive 93/13/EEC, art. 3(3), annex 1(q), 1993 O.J. (L 095) 29.

¹⁴⁷ See BORN, *supra* note 25 (manuscript ch. 5, at 411).

¹⁴⁸ There may be other signs of softening when consumer cases are international. A French appellate court has ruled that the domestic limitations on arbitration of consumer claims do not apply in the international context. *Meglio v. Société V2000*, Cass. le civ., May 21, 1997, 1997 Rev. arb. 537, note E. Gaillard. There is scholarly debate about applicability of this French court opinion beyond the unusual facts of that case, but some scholars argue that it indicates a carve out in France (a jurisdiction traditionally protective of consumers) for international arbitration of consumer claims. According to other scholars, as a collector of luxury cars, the “consumer” in the *Jaguar* case was really more of an investor and it is doubtful whether a claim by a more modest consumer would have met the same fate. See Thomas Clay, *Arbitrage et modes alternatifs de règlement des litiges*, 44 RECUEIL DALLOZ 3050, 3053 (2005) (Fr.). Notably, the dollar value of the car probably also excludes it from protection under the EU Directive.

¹⁴⁹ Article V(2)(b) of the Convention provides that awards need not be recognized if doing so “would be contrary to the public policy” of the state where recognition is sought. See New York Convention, *supra* note 138, at art. V(2)(b).

¹⁵⁰ Gary Born explains the distinction between the two as follows: “[T]he public policy doctrine provides that certain results reached by arbitral awards contradict public policy and cannot be recognized, while the non-arbitrability doctrine provides that the arbitral process itself cannot be used to produce a binding decision in particular cases.” See BORN, *supra* note 25 (manuscript ch. 5, at 330). Meanwhile, he explains that the availability of the public

by announcing the so-called Second Look Doctrine, which postulates that courts would still be able to protect U.S. regulatory interests through the public policy exception.¹⁵¹ Meanwhile, when the European Court of Justice impliedly accepted arbitrability of EU competition law claims,¹⁵² it also emphasized that competition law "may be regarded as a matter of public policy within the meaning of the New York Convention."¹⁵³ States vary in their apparent willingness to scrutinize awards under the public policy exception, but the potential for more exacting review can affect how arbitral tribunals apply antitrust law and other mandatory laws.¹⁵⁴

This express opportunity to protect national interests in international arbitration contrasts with domestic arbitration. Under the FAA, there is a judicially created public policy exception to award enforcement, though it is not universally recognized¹⁵⁵ and is difficult to implement because it applies only to awards whose outcomes violate express federal public policy (not state public policy). These policies are, in turn, difficult to identify since domestic tribunals routinely issue awards that do not include articulated reasons. In international arbitration, reasoned awards are the norm,¹⁵⁶ which means that states can more readily assess whether they violate national public policy. The established practice of issuing reasoned awards prefigures the institutional values that characterize the international arbitration community and that have led it to take an

policy exception is what justifies allowing claims that involve public policy to be arbitrable in the first instance. *Id.*

¹⁵¹ Specifically, the Court stated, "While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985).

¹⁵² *Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV*, 1999 E.R.C. I-3055.

¹⁵³ *Id.* ¶ 39.

¹⁵⁴ In the United States, the Second Look Doctrine has proven to be largely an empty threat. See Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 *GEO. WASH. INT'L L. REV.* 17, 52 (2002) (referring to the "elusive 'Second Look'" doctrine that "courts have yet to engage in"); Travis Newport, *Tortious Interference with International Contracts*, 9 *CURRENTS: INT'L TRADE L.J.* 80, 84 (2000) ("As of yet, the Supreme Court's second look has not materialized."). In Europe, on the other hand, it seems that courts might be somewhat more inclined to ensure that EU competition law is not being circumvented. The apparently greater willingness of European courts to scrutinize arbitration awards implicating public policy may provide an incentive for arbitrators to favor European law when deciding choice of law questions. Niccolò Landi & Catherine A. Rogers, *Arbitration of Antitrust Claims in the United States and Europe*, 13-14 *CONCORRENZA E MERCATO* 455 (2005-06) (postulating that arbitrators may be more inclined to resolve conflicting laws in favor of European competition law because of concerns about enforceability).

¹⁵⁵ See, e.g., *Warbington Constr., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 857-58 (Tenn. Ct. App. 2001) (rejecting "public policy" standard as ground for award non-enforcement because it is not specifically provided for in FAA).

¹⁵⁶ See Hon. Lord Justice Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitral Award*, 4 *ARB. INT'L* 141 (1988) (tracing the history of reasoned awards back to the "strong balance of international opinion in favour of the giving of reasons by arbitrators" in the European Convention of 1961, which created a presumption in favor of reasoned awards in the absence of contrary party agreement).

express interest in developing and upholding national and international public policy.¹⁵⁷

2. *Formation, Validity, and Enforceability Under the New York Convention*

In addition to the threshold questions described above, at a more technical level, the New York Convention establishes the framework for the formation, validity, and enforceability of international arbitration agreements. This framework, once again combined with national legal variation, precludes the possibility that certain types of U.S.-style pre-dispute arbitration agreements could develop on a global scale.

Article II(1) of the Convention requires recognition and enforcement of “agreement[s] in writing,” which are defined by Article II(2) to include “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”¹⁵⁸ Since shrink-wrap agreements do not involve any signature or “exchange,” arbitration clauses contained in those agreements would not be enforceable under the Convention¹⁵⁹ because the writing requirement has not been met.¹⁶⁰ There is room to argue that states may supplement the Convention’s writing requirement with other forms of agreements that are recognized under national law.¹⁶¹ Even if that interpretation were to gain traction, however, under existing national regulation it would be unlikely to alter the scene very much with regard to employee and consumer claims.¹⁶²

The United States is apparently unique among major jurisdictions in finding consent by consumers, employees, patients, and passengers in shrink-wrap, small-print boilerplate terms, or unread employee handbooks.¹⁶³ National law, in most instances, is more onerous than the New York Convention’s form requirements. For example, German law requires that arbitration clauses in consumer contracts be contained in a separate document that is signed by the consumer,¹⁶⁴ and New Zealand law requires both that “the consumer, by separate written agreement, certif[y] that, having read and understood the arbitration

¹⁵⁷ See *infra* notes 173-76.

¹⁵⁸ New York Convention, *supra* note 138, at art. II(1)-(2).

¹⁵⁹ Depending on the facts of an individual case, this requirement would seem to prevent applicability of arbitration provisions established in an employee handbook, but not arbitration clauses included in employment agreements that are signed by employees as a condition of employment.

¹⁶⁰ See Stewart & Matthews, *supra* note 125, at 1134 (citing U.N. Comm’n on Int’l Trade Law, *Settlement of Commercial Disputes: Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement*, U.N. Doc. A/CN.9/WG.II/WP.108/Add.1 (Jan. 26, 2000)).

¹⁶¹ See BORN, *supra* note 25 (manuscript ch. 5, at 57-58).

¹⁶² As discussed in Part III, there are some proposed changes to the UNCITRAL Model Law that could alter this situation. See *infra* notes 200-02 and accompanying text.

¹⁶³ As Jean Sternlight explains, descriptions of U.S. domestic consumer and employment arbitration often prompt “statements to the effect that ‘we have nothing like that in my country’ and ‘that could never happen in my country.’” Sternlight, *supra* note 39, at 843.

¹⁶⁴ BORN, *supra* note 25 (manuscript ch. 5, at 412 & n.1198) (citing Zivilprozeßordnung [ZPO] § 1031(5) (Ger.)).

agreement, the consumer agrees to be bound by it" and that the arbitration agreement disclose the waiver of various protections.¹⁶⁵ These examples suggest that the have-nots may have arrived at international arbitration's doorstep, but structural features of the system have so far prevented them from being shoved over the threshold in the same way they were in domestic arbitration in the United States.

C. *The Regulatory and Mediating Function of International Arbitration*

In assessing the potential for have-nots in arbitration, the domestic regulatory climate and domestic litigation forums are often used as the yardstick against which their gains and losses are measured.¹⁶⁶ While this is a relatively easy calculus when assessing domestic arbitration, it is more complicated when assessing international arbitration. As previewed by the structural features described above, the transnational regulatory environment differs significantly from national contexts. In *Scherk and Mitsubishi*, the Supreme Court justified its decisions to permit arbitration of important statutory claims by pointing to the fact that, in transnational contexts, states are much less able to enforce "mandatory" laws than they are in a purely domestic context.¹⁶⁷ In cases that touch more than one state, multiple national courts can usually assert jurisdiction to enforce their national laws, though their judgments face significant obstacles to enforcement abroad.¹⁶⁸ As a consequence, as described above, one nation's assertion that a particular law is "mandatory" does not necessarily make it so if another nation adjudicates the case or refuses to enforce a judgment applying that law.¹⁶⁹

Perhaps ironically, U.S. mandatory law is difficult to enforce in international cases precisely on account of the procedural mechanisms that make the U.S. justice system so appealing to consumers, employees, and tort and human rights victims in the first place. Broad assertions of jurisdiction, aggressive party-controlled discovery, class actions, punitive damages, and civil juries all contribute to the foreign hostility that makes it difficult to litigate international cases or to enforce U.S. judgments abroad.¹⁷⁰ Against this backdrop, interna-

¹⁶⁵ *Id.* (manuscript ch. 5, at 413 & n.1200) (citing New Zealand Arbitration Act of 1996 § 11).

¹⁶⁶ See Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 42 (2005) (arguing that "the endowment of public adjudication in the United States provides the baseline against which the democratic character of other dispute resolution processes may be measured, arbitration under the FAA tends to fall short of the mark in many important respects").

¹⁶⁷ As one scholar notes regarding employment law: "As employment is denationalized . . . the state's capacity to regulate employment and, when it chooses to do so, its ability to enforce those regulations become increasingly tentative." Boskey, *supra* note 119, at 190.

¹⁶⁸ See *supra* note 25.

¹⁶⁹ See John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodations of Conflicting Public Policies*, 64 N.C. L. REV. 219, 224 (1986). This argument has also been advanced by some commentators, who point out that expert arbitrators may be substantively superior to lay juries. See Dora Marta Gruner, Note, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 944 (2003).

¹⁷⁰ See Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 319-20 (2002)

tional arbitration arguably may have greater potential to enforce mandatory law, to resolve claims, and to provide remedies for transnational wrongs than U.S. courts.¹⁷¹

Shifting to the opposite vantage point, the absence of claimant-friendly U.S.-style procedures in other systems may make arbitration comparatively less procedurally detrimental to have-nots than it is considered to be in the U.S. domestic context. In the absence of class actions, contingency fees, and punitive damages, private enforcement of antitrust, securities fraud, products liability, and other types of claims remains relatively low in European courts.¹⁷² Similarly, it is difficult to complain that international arbitration would deprive parties of their right to a jury trial because no other system similarly guarantees a jury in civil actions. In the absence of all these features of American judicial procedure, international arbitration of consumer and employment claims may have the potential to be a more attractive forum to European consumers and employees than their own courts.

This potential is housed in a system that has internalized a sense of its own regulatory function. International arbitrators do not simply decide individual cases for a fee. They were the original architects of the system and are self-consciously the modern day custodians of it. The system they have developed and maintain intentionally straddles the public-private divide. In it, arbitrators not only resolve disputes between parties, but produce law-bound decisions that often intentionally take into account mandatory law and public policy.¹⁷³ Interestingly enough, international arbitrators have developed theories and criteria for enforcing mandatory national law that have not been selected by the parties, but are implicated by the dispute or the underlying contract.¹⁷⁴ Unlike domestic arbitration, the international arbitration system has also created public goods through an informal system of precedent. Arbitral awards are being published with increasing frequency,¹⁷⁵ and over the years these awards have generated important procedural rules and substantive commercial rules, both of which

(“[M]uch of the attack on American-style judicial jurisdiction is not really about jurisdiction at all, but about unhappiness with other aspects of civil litigation in the United States—juries, discovery, class actions, contingent fees, and often substantive American law, which is perceived as pro-plaintiff and selected under similar pro-plaintiff choice of law rules in U.S. courts.”).

¹⁷¹ For an extended discussion about the incentives for and track record of international arbitrators in applying mandatory law, see Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT’L L. REV. 957 (2005).

¹⁷² For example, the European Commission recently concluded after extensive study of the private enforcement of EU competition law that “the picture that emerges . . . in the enlarged EU is one of astonishing diversity and total underdevelopment.” DENIS WAELBROECK, DONALD SLATER & GIL EVEN-SHOSHAN, ASHURST, STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES 1 (2004), available at http://ec.europa.eu/comm/competition/cartels/studies/comparative_report_clean_en.pdf, quoted in Johan Ysewyn, *Private Enforcement of Competition Law in the EU: Trials and Tribulations*, 19 INT’L L. PRACTICUM 14, 20 n.33 (2006).

¹⁷³ See Rogers, *supra* note 171.

¹⁷⁴ See *id.*

¹⁷⁵ Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1319 (2006).

have been exported to other international decisional contexts.¹⁷⁶ Most notably, international arbitrators have also developed rules of international public policy involving such important topics as bribery and corruption, tax evasion, and money laundering.

These practices signal important distinctions between international and domestic arbitration. Domestic arbitration is often said to operate in the shadows of the law.¹⁷⁷ The international arbitration system, on the other hand, has the potential to shine light into the lawless corners of transnational activities, which are darkened by regulatory gaps and by ambiguities about jurisdiction, choice of law, and enforceability of judgments.¹⁷⁸ To realize this potential, the international arbitration system must engage in a dialectic process with the states that support it. Both through individual tribunal decisions and through the institutions that administer it, the system must accommodate the national policies that they have entrusted to it,¹⁷⁹ as it has with other areas such as antitrust claims. When those national policies are personified in sympathetic parties such as employees, consumers, and human rights victims, contravention is bound to attract more attention.

D. Regulatory Variation and Regulatory Arbitrage

National regulatory variations described above in Section B, combined with institutional features of the international arbitration system in Section C, have effectively limited the ability of repeat players to implement structural dispute resolution advantages on a global scale as they have in the U.S. domestic arbitration setting. In the employment context, while there is no reliable data regarding multinational firms' use of dispute resolution clauses in employment contracts,¹⁸⁰ existing evidence suggests that multinational corporations have not generally (because they cannot) insisted on arbitration agreements across the board in foreign employment settings.¹⁸¹ Meanwhile, manufacturers who market products internationally include shrink-wrap arbitration clauses in products sold in the United States, but modify those clauses for overseas cus-

¹⁷⁶ *Id.* at 1318.

¹⁷⁷ See Bruce L. Benson, *Arbitration in the Shadow of the Law*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 93 (Peter Newman ed., 1998).

¹⁷⁸ International arbitration has demonstrated this potential, but I do not intend to overstate its accomplishments to date, nor do I mean to suggest that it is assured that the system will live up to this potential absent external pressures from states. See Robert Wai, *Transnational Liff-off and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 267 (2002) ("[I]nternational commercial arbitration operates very much 'in the shadow of the law,' and national laws continue to impose important limits."). The thesis of this Article is that new participants and new types of disputes will create new pressures to test the extent and limits of this potential.

¹⁷⁹ See *id.* at 267-68.

¹⁸⁰ Paul Teague, *New Employment Times and the Changing Dynamics of Conflict Resolution at Work: The Case of Ireland*, 28 COMP. LAB. L. & POL'Y J. 57, 81 (2006).

¹⁸¹ T. Turner et al., *Multinationals and Human Resource Practices in Ireland: A Rejection of the 'New Conformance Thesis': A Reply*, 12 INT'L J. HUM. RESOURCE MGMT. 128, 129-30 (2001).

tomers, either by deleting the arbitration provisions altogether or by including a clause that leaves arbitration as an option to be agreed upon post-dispute.¹⁸²

The national variations that produce these differences, meaning variations regarding arbitrability, the definition of “commercial,” and the requirements for formation and validity of agreements, have made U.S.-style arbitration agreements improbable in the international context. This regulatory diversity does not simply mean that companies must adopt geographically specific dispute resolution clauses to accommodate different national regimes. It also creates the preconditions for regulatory arbitrage. While regulatory arbitrage is often regarded as a boon to repeat players, in this instance it may favor consumers and employees, and even undermine, albeit indirectly, the absolutism of pre-dispute arbitration within the United States.

Consider the following hypothetical. A Belgian citizen buys a product while on vacation in the United States. Like many products packaged for American consumers, it contains a shrink-wrap pre-dispute arbitration agreement that would be enforceable in the United States but is unenforceable under European law and the New York Convention. The Belgian consumer returns to Belgium and a dispute arises. The Belgium consumer does not want arbitration on the terms provided for in the manufacturer’s clause and therefore brings a claim in a Belgian court.¹⁸³ In the European Union, there is a jurisdictional norm that makes businesses subject to suit by consumers in their home jurisdiction and by employees in the jurisdiction where they habitually work. These rules are enshrined in the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and reiterated in the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,¹⁸⁴ which has never been concluded, and the Hague Convention on Choice of Court Agreements, which was concluded on June 30, 2005 (collectively, the “Hague Conventions”).¹⁸⁵

Even if these conventions are not directly applicable in this hypothetical, an assertion of jurisdiction against a U.S. manufacturer would ultimately depend on national law of the individual European states. The European norm of home-court advantage for consumers, combined with existing national bases for exorbitant jurisdiction, make the assertion of such jurisdiction a very real

¹⁸² Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT’L L. & COM. REG. 357, 383 (2002).

¹⁸³ A similar dynamic may occur in the employment setting. For example, if a dispute arose under a contract between a French employee and a U.S. company regarding employment in France, even if the contract included an arbitration clause, because employment claims are not arbitrable in France, the employee would be able to seek refuge in French courts, either by bringing an affirmative claim, or by attempting to have French courts block an arbitration if it were seated in France. Moreover, France would not recognize or enforce any award that was rendered elsewhere.

¹⁸⁴ The draft Hague Convention specifically provides that consumers and employees can only be sued in their home jurisdictions and have the right to sue either in their home jurisdiction or (in the case of employees) in the state where they work. See Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters arts. 7 & 8 (Draft 1999), available at <http://launet.com/Hague/Oct99Draft.html>.

¹⁸⁵ See Convention on Choice of Court Agreements art. 2(1)(a), June 30, 2005, 44 I.L.M.1294, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

prospect.¹⁸⁶ As a consequence of the existence of such a judicial forum, the consumer would have a platform on which to invalidate or avoid the arbitration clause either under EU law or under the New York Convention.¹⁸⁷ Even under this scenario, however, the dispute may still end up in arbitration. For the reasons described above, the consumer may want to arbitrate the dispute, particularly given the complexities and expense of litigating it. In that post-dispute setting, however, the consumer can probably insist on an alternative arbitration provision that would be more consumer-friendly and thereby enforceable under EU law.¹⁸⁸

While foreign tourist purchases represent an infinitesimally small part of the total U.S. market, online purchases and gray market importation of products packaged for sale in the United States may make the critical features of this hypothetical more systematic and widespread.¹⁸⁹ Globalized markets, and more specifically the European commitment to consumer protection, may not only create opportunities for regulatory arbitrage by "little guy" consumers and employees, but also focus attention on comparative models that demonstrate how post-dispute arbitration agreements can function effectively in these areas.¹⁹⁰

These opportunities for regulatory arbitrage occur against a significantly different set of procedural opportunities than exist in purely domestic cases. As described above,¹⁹¹ national courts are not as readily available or effective at resolving international disputes. As a result, international arbitration provides procedural and structural advantages that may make it not simply a lesser alternative to national court litigation, but a superior choice.

¹⁸⁶ See Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474 (2006); John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT'L L. 695 (1993).

¹⁸⁷ As Chris Drahozal explains:

In many if not most cases, the individual presumably will be able to sue in his or her home country. But the arbitration clause may well prevent the individual from suing the business or employer in the United States, and thus from taking advantage of procedural aspects of the American litigation system such as juries and class actions.

Drahozal, *supra* note 5, at 255.

¹⁸⁸ In Europe, there are well-organized and active groups that represent consumers. They provide a number of services, including advice, counseling, and occasionally representation in disputes, as well as lobbying. See Luisa Antonioli, *Consumer Law as an Instance of the Law of Diversity*, 30 VT. L. REV. 855, 875 n.81 (2006).

¹⁸⁹ To date, importation of gray market goods is not generally permitted in the European Union. See Kimberly Reed, *Levi Strauss v. Tesco and E.U. Trademark Exhaustion: A Proposal for Change*, 23 NW. J. INT'L L. & BUS. 139 (2002).

¹⁹⁰ For example, some proponents of arbitration in the United States argue based on law-and-economics analysis that post-dispute arbitration could never be effective in the consumer context. The Belgian example, where post-dispute arbitration agreements are evidently both popular and effective with consumers, provides a provocative real-world counter-example, even if there are cultural, economic, and legal differences that might affect how easily the experience could be transplanted to the United States. Maud Piers, *How EU Law Affects Arbitration and the Treatment of Consumer Disputes: The Belgian Example*, DISP. RESOL. J., Nov. 2004-Jan. 2005, at 76.

¹⁹¹ See *supra* notes 25-27 and accompanying text.

III. INTERNATIONAL ARBITRATION AS A GLOBAL GOVERNANCE MECHANISM

The procedural and structural advantages described above combine with the internal values of the international arbitration system, and the network of organizations that influence its functioning, to suggest that it has the potential to be more than simply an effective mechanism for resolving disputes. International arbitration could be a forum for resolving conflicting national policies and laws, developing international norms, mediating national differences among national procedural strategies, and ultimately promoting effective transnational governance. The arrival of have-nots has and will focus attention on two important features of the system that have been and will be essential for this potential to be realized. First, in Section A, I address the inter-relational role of national authorities with the system and the need for international standards to replace discordant national rules. In Section B, I consider how the market for arbitration services might respond to these new parties. Finally, in Section C, I take up international arbitration's greatest challenges in mediating conflicting national rules, such as in the context of seamen's claims, and developing transnational norms, such as in the human rights context.

A. National Legislation and the New York Convention

Because the regulatory climate in the transnational context differs significantly from domestic contexts, states do not have "a normative monopoly on transnational conduct."¹⁹² As a result, non-state based systems, such as international arbitration, can be an important context for national policies to be debated, mediated, and enforced. On the other hand, national authorities should not simply abandon their national policies to the system,¹⁹³ as some argue the U.S. has with other important regulatory claims, such as antitrust and securities.¹⁹⁴ The continued influence of national protections for consumers and employees is an important factor in preventing international arbitration from sliding down the same slope that domestic arbitration did. At this point, however, international standards for formation and validity of arbitration clauses, as well as harmonized procedural standards, should be developed for transborder consumer and employment contexts.

To date, most proposals for development of transnational substantive contract law have intentionally avoided the areas involving consumers and employees, in large part because they are laden with widely divergent national policies that seem to be beyond the potential for harmonization.¹⁹⁵ This exclusion of substantive claims has not been mirrored in efforts to draft transnational private

¹⁹² See Wai, *supra* note 178, at 267.

¹⁹³ See *id.* at 267-68.

¹⁹⁴ See McConnaughay, *supra* note 16, at 475.

¹⁹⁵ Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87, 91 (2001) (arguing in favor of a global commercial code, but arguing that it should avoid interfering with domestic consumer protection rules). The European Union presents an interesting counter-example in that it has special competences regarding consumer contracts but not for general contract law. See Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 TEX. INT'L L.J. 625, 653 (2007).

law instruments. Under the Hague Conventions, described above,¹⁹⁶ forum selection clauses in contracts involving consumers and employees are permitted, but can only be entered into after a dispute has arisen.¹⁹⁷ While neither Convention has direct application in international arbitration, they illustrate the existence of international consensus and the possibility of drafting international carve outs for these types of claims.

In the absence of such carve outs specifically applicable to international arbitration, individualized carve outs have been imposed by states through exercise of their prerogatives under the New York Convention. This approach has effectively prevented the global spread of U.S.-style pre-dispute arbitration clauses,¹⁹⁸ but the regulatory arbitrage it has afforded is only an intermediate step, not a permanent solution. Loading national regulatory interests into concepts of arbitrability and "commercial," and into nationally defined formation requirements, arguably undermines the New York Convention's objective of promoting uniform enforcement of arbitration agreements and awards.¹⁹⁹ In those instances where states have altogether precluded application of the New York Convention to consumer and employment claims by designating them non-commercial or non-arbitrable, they have precluded those groups from invoking, even post-dispute, a mechanism that may be uniquely capable of effectively vindicating their claims and enforcing national policies.

There is a need for express carve outs in the New York Convention and the UNCITRAL Model Law²⁰⁰ for the formation of arbitration agreements involving consumers and employees to replace the protections that are now embedded in divergent national laws. In this respect, recent revisions to the UNCITRAL Model Law are a missed opportunity to include a uniform, global carve out for consumer and employment claims. While the 2006 revisions are said to "substantially liberalize[] and modernize[]" the formation requirements of arbitration agreements,²⁰¹ they fail to recognize the national interests that are implicated in consumer and employer claims, and instead effectively eliminate the New York Convention's writing requirement, which has been an impedi-

¹⁹⁶ See *supra* notes 184-85 and accompanying text.

¹⁹⁷ See Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *supra* note 184, at arts. 7(3)(a) (consumers) & 8(2)(a) (employees).

¹⁹⁸ See *supra* notes 158-66 and accompanying text.

¹⁹⁹ See BORN, *supra* note 25 (manuscript ch. 2, at 124).

²⁰⁰ "UNCITRAL" stands for the United Nations Commission on International Trade Law. It has promulgated both Arbitration Rules, which are procedural rules that can be adopted by parties in their arbitration clauses, and a Model Law, which can be adopted by states to provide a domestic legal framework to support international arbitration, much like the FAA does in the United States.

²⁰¹ See BORN, *supra* note 25 (manuscript ch. 5, at 69-70). The revisions were meant to address some of the New York Convention's antiquated notions of formation and commercial practices. See *id.* at 54. ("Many readers may never have seen a "telegram," while new forms of electronic communication such as facsimile transmissions, e-mails, SMSs, instant messaging and the like are routine occurrences in international business," but are not included in the New York Convention's formation requirements.)

ment to the global spread of American-style consumer and employee arbitration.²⁰²

Apart from internationalizing the formation requirements, there is also work to be done to ensure procedural or substantive protections for these groups. As Rusty Park suggests, “The *laissez-faire* court scrutiny appropriate to an international proceeding, between sophisticated business managers with access to competent counsel, may be quite misplaced in a consumer case, where an arbitration clause might require an ill-informed individual to seek uncertain remedies at an inaccessible venue.”²⁰³ To date international arbitration institutions have not formally adopted procedural accommodations or specialized rules similar to the Employment and Consumer Due Process Protocols adopted by the AAA.²⁰⁴ Moreover, it remains to be seen whether heightened review of arbitral awards involving consumer or employment claims by national courts is the best way to ensure that mandatory laws are being enforced or at least duly considered. In sum, the international arbitration system does not have in place structures to accommodate these new types of claims, such that states might reconsider relinquishing the obstacles that they have created under national law.

B. *The Market for Arbitrator Services*

In domestic and investment arbitration, concerns about both procedural fairness and substantive outcomes have sometimes been expressed as, and on occasion directly stem from, real or perceived misconduct by arbitrators. This reaction is not surprising because the arbitrator both personifies the promise of neutral decisionmaking that is the essence of adjudication²⁰⁵ and provides the only tangible indicia of decisional legitimacy. International commercial arbitration has not itself been entirely free from issues regarding arbitrator bias and conduct.²⁰⁶ The number of challenges to arbitrators has risen sharply in recent years,²⁰⁷ and there is lively debate about standards for disclosure and challenge. These issues, however, have largely percolated within the system without creating an externally perceptible crisis of legitimacy.²⁰⁸ The arrival of the have-

²⁰² If adopted as is, without national amendment, the Model Law would effectively eliminate the form requirements on which national variations are currently based. See UNCITRAL Model Law on International Commercial Arbitration art. 7(2)-(3) (amended 2006).

²⁰³ William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1243 (2003). Rusty Park argues for a carve out to preclude application of the New York Convention to such claims altogether. The concerns behind this argument, however, might be satisfied by other means.

²⁰⁴ It may well be that when the ICDR is seized with an international consumer or employment case, it insists on application of the protocols.

²⁰⁵ See Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 86-87 (2005).

²⁰⁶ For a discussion of ethics and conduct issues raised about international arbitrators, see *id.*

²⁰⁷ International Chamber of Commerce International Court of Arbitration, *Securing a Regime for Effective International Arbitrations*, at 4, Jan. 26, 2005.

²⁰⁸ One important exception to this observation is the concern expressed by and on behalf of parties from developing countries that international commercial arbitration is biased against them. See Beechey, *supra* note 116, at 33; Ahmed Sadek El-Kosheri, *Is There a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?*, in INTERNATIONAL

nots will present specific new challenges regarding arbitrator conduct and the functioning of the market for arbitrator services.

The starting point for evaluating these challenges is the observation that one of the most vital patrimonies of the international arbitration system has been the cadre of arbitrators who decide its disputes. One notable distinction between international and domestic U.S. arbitrators is that American-style highly partisan party-appointed arbitrators are largely rejected as inappropriate in international arbitration.²⁰⁹ This difference can be attributed, at least partially, to what might be called the professional²¹⁰ ethos of the international arbitrators and institutions. This collective sense of mission focuses the arbitration community on many topics that might otherwise be considered beyond their basic dispute resolution function. In addition to its attentiveness to national mandatory law described above,²¹¹ the community has been collectively moving to make itself more transparent,²¹² a development that makes the system more user-friendly for newcomers and smaller parties. In addition, international arbitrators are openly concerned about their role in ensuring the fairness of proceedings, including how to strike an appropriate balance when the parties are not well matched, which is again a preoccupation that will bode well for have-nots.

More fundamentally, the international arbitration community is highly sensitive to perceptions of its own legitimacy. As described above, it also has developed a shared sense of the system's regulatory function, which is manifest in various ways that make it more reliable and more sturdy under the strain of a new genre of claims than domestic U.S. arbitration proved to be.²¹³ This community, in other words, epitomizes what Oscar Schachter referred to as "the invisible college of international lawyers."²¹⁴

DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE 47, 47-48 (Albert Jan Van Den Berg ed., 1998). While there are strong similarities, this critique has been expressed less systematically and less vigorously in the international commercial context than in the investment arbitration context.

²⁰⁹ James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for "Nonneutrals,"* 11 AM. REV. INT'L ARB. 295, 298-99 (2000); see also Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections,* 30 TEX. INT'L L.J. 59, 65 (1995) (noting international norms that seek to neutralize perceived partisanship in the party-appointed arbitrator); V.V. Veeder, *Is There Any Need for a Code of Ethics for International Commercial Arbitrators?*, in LES ARBITRES INTERNATIONAUX 187 (José Rosell ed., 2005) (noting that the "national problem of the partisan arbitrator is largely missing amongst international arbitration tribunals").

²¹⁰ In using the term "professional" or "profession" to describe arbitrators, I am not referring to those whose exclusive occupation is to sit as an arbitrator. Instead, I am referring to the sense of a particularized obligation that arbitrators share and cultivate as a community, even though the community includes those whose primary occupation is that of barrister, solicitor, or lawyer. For his insistence on the importance of this distinction, I am grateful to Martin Hunter.

²¹¹ See *supra* notes 173-76 and accompanying text.

²¹² For an overview of various developments that have rendered the system more transparent, see Rogers, *supra* note 175, at 1319.

²¹³ See *supra* notes 174-76 and accompanying text.

²¹⁴ Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217, 225 (1977) (referring to "la conscience juridique" or sense of justice that characterizes international lawyers).

On the other hand, two important recent changes have affected the make-up and mission of this stalwartly group. In recent years, the number and diversity of international arbitrators have expanded dramatically,²¹⁵ while at the same time newer arbitrators are decidedly more entrepreneurial than the “grand old men” who founded the system.²¹⁶ As a result of these two trends, international arbitrators as a group are less constrained by shared traditions than they once were. Moreover, there is a risk that newer arbitrators may not be inculcated with the same professional ethos that has traditionally been a source of their strength. The entry of have-nots will likely increase the pressure on both of these trends.

Cases involving have-nots will inevitably involve significantly lower dollar amounts,²¹⁷ and hence significantly lower arbitrator fees. Already, arbitrators complain that fees are too low in smaller cases when compensation is set based on the amount in dispute,²¹⁸ but there are also concerns that, when fees are based on hourly or daily rates, arbitrators may be tempted to artificially extend the matter to earn more fees.²¹⁹ Meanwhile, there is a competing concern that international arbitration is inherently too expensive for smaller parties, which as described above has prompted at least one U.S. court to invalidate an ICC arbitration clause because of the excessive cost.²²⁰

The likely response to these competing pressures is the entry of new “discount” international arbitrators. This development, however, could raise potential problems. There is a risk that these new arbitrators might develop into a

²¹⁵ Rogers, *supra* note 171.

²¹⁶ See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 34-36 (1996).

²¹⁷ As indicia, some European consumer protection legislation is limited to purchases with a value of under 10,000 euro. See *supra* note 148. Meanwhile, with the exception of discrimination cases that might garner punitive damages if U.S. law is applied, employment disputes are unlikely to involve excessive dollar values.

²¹⁸ See Eric A. Schwartz, *The ICC Arbitral Process, Part IV: The Costs of ICC Arbitration*, 4 ICC INT’L CT. ARB. BULL. 8, 11 (1993) (“The Court regularly receives complaints from arbitrators that their fees are too low and do not take sufficient account of the number of hours devoted by them to a case.”); Jacques Werner, *Remuneration of Arbitrators by the International Chamber of Commerce*, J. INT’L ARB., Sept. 1988, at 135, 135 (stating that under the ICC system “in the large number of cases where the [case] is small or medium-sized, the arbitrators are underpaid”). These citations come from John Gotanda’s thoughtful work on arbitrator fees. John Yukio Gotanda, *Setting Arbitrators’ Fees: An International Survey*, 33 VAND. J. TRANSNAT’L L. 779, 784 n.10 (2000).

²¹⁹ Gotanda, *supra* note 218, at 786 & n.17 (noting that fees calculated on an hourly or daily basis do “not provide an incentive for efficiency” and describing one commentator’s concern about the “danger” that an arbitrator can intentionally prolong proceedings to earn higher fees). For further discussion of arbitrator compensation trends, see Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What’s Happening and What’s Not*, 56 U. MIAMI L. REV. 949, 950-51, 968-69 (2002).

²²⁰ See *supra* note 84 and accompanying text. This case has also received attention from scholars who note:

[A]t least one court has held that a previous version of the Gateway clause, which provided for arbitration under the Arbitration Rules of the International Chamber of Commerce (ICC), was unconscionable and thus unenforceable, because of the high costs of ICC arbitration relative to the small amount at stake in the proceeding.

Drahozal & Friel, *supra* note 182, at 381-82.

secondary sub-class, meaning that they would not be integrated into the existing international arbitration community. If regarded as a sub-class of interlopers instead of full-fledged members of the community, these new arbitrators would be trading on the reputation and working with the institutions of the international arbitration community, but they would not be incorporated into international arbitrators' normative community. They would be less likely, as a result, to internalize the standard of integrity and the commitment to a transnational regulatory function that characterizes the traditional model of the international arbitrator.

Another related concern with the entry of have-nots is that the panoply of cases will involve claims that are much more divisive than conventional international arbitration disputes. As noted above, there have not generally been in international commercial arbitration allegations of categorical bias similar to those that have infected domestic and investment arbitration.²²¹ One important reason why such allegations have not erupted is the professional ethos described above. Another reason is that in conventional international commercial disputes, ideological affiliations or divisions are more muted because the identity of the parties is largely irrelevant to the merits of a contract dispute. As noted in the Introduction, no one much cares whether Company A or Company B is found to have breached a particular contract.²²² In the absence of readily identifiable "sides," arbitrators in commercial disputes are not as easily regarded as ideologically aligned with or partial to one "side," as they are alleged to have been in domestic arbitration and investment arbitration. Claims involving consumers and employees will challenge this conventional model.

Consumer and employee claims are more likely to implicate a decision maker's ideological persuasion, as they are perceived to do in domestic U.S. and investment arbitration settings. If new arbitrators lack a professional ethos, the more divisive nature of disputes may produce more polarized outcomes and, if the worst of allegations are to be believed, a strategic favoring of repeat players.

To avoid these potential problems, international arbitration institutions such as the ICC, the LCIA, and the ICDR have a leading role to play in building capacity for the system to handle these new claims. They are in the best position to influence whether new arbitrators develop into a peripheral subclass of the arbitration community or into an integrated part of it. One way to ensure the latter would be to encourage consumer arbitration as a training ground for junior practitioners. Most institutions already sponsor training programs for young lawyers seeking to become arbitrators and use these sessions not only to impart information and develop specific skills, but also to transmit

²²¹ See *supra* notes 11, 108-11 and accompanying text.

²²² See *supra* notes 11-14 and accompanying text. This general rule may not hold when the dispute is between a state and a private party. Not surprisingly, claims that international commercial arbitration is biased are often founded in cases involving states. El-Kosheri, *supra* note 208, at 47-48 (noting that, despite the long history and current popularity of arbitration in Arab nations, the Arab legal community remains hostile toward transnational arbitration because of biased treatment by Arab state interests by Western arbitrators).

the system's commitment to larger goals such as fairness and effectiveness.²²³ Because no other credential can substitute for actual experience as an arbitrator, some institutions already have a policy of appointing junior practitioners as arbitrators in smaller cases.²²⁴ Consumer claims make for ideal training cases because the factual and legal issues are relatively simple (as compared, for example, to small value construction or intellectual property disputes), and the relatively small amounts in dispute suggest that even large companies are unlikely to send senior counsel to handle the matter.

Employment claims present a more difficult proposition. They tend to be more complicated both legally and factually, and even cases with small amounts in dispute may implicate company policies that prompt senior counsel to handle claims. For these reasons, they may be a less friendly training ground for junior arbitrators and may be more prone to development of a separate, specialized group of arbitrators, as has occurred in the United States. Even in this context, international institutions still have an important role to play. In the domestic context, the Employment Due Process Protocol described above²²⁵ specifically calls for training of arbitrators in the applicable statutes and legal issues involved in such claims. Such training would inevitably be more complicated when employment touches multiple jurisdictions, which may have incompatible mandatory employment laws. It is precisely this added complexity, however, that would make such training an essential step toward ensuring the quality of international employment arbitration.

C. International Arbitration, Transnational Regulation, and International Legal Norms

The international arbitration system has, as described above, demonstrated a robust respect for national mandatory law and has developed both theories for its application and for application of substantive international public policy.²²⁶ These theories and rules were developed within the arbitration community over time and through a dialectic process in conjunction with other national and

²²³ See, e.g., Organisation for Economic Co-Operation and Development, How Does the International Chamber of Commerce (ICC) Contribute to Capacity Building? The Way Forward, at 2 (Dec. 12, 2005), available at <https://www.oecd.org/dataoecd/22/46/37215823.pdf> (describing the ICC training program for young lawyers and special opportunities for those from developing countries); The London Court of International Arbitration, Young International Arbitration Group, http://www.lcia.org/YIAG_folder/yiag_main.htm (last visited Nov. 22, 2007) (describing the Young International Arbitrator Group sponsored by the LCIA and organized to provide a forum in which to "exchange views on, and to debate, topical issues in international commercial arbitration"); ICCA Young Arbitration Practitioners Program, <http://www.iccamontreal2006.org/english/young/> (last visited Nov. 22, 2007) (covering a range of topics that affect young arbitrators, including consumer disputes).

²²⁴ The other training opportunity is to act as a secretary to the tribunal. While having the advantage of giving aspiring arbitrators a chance to observe first hand, it is presumably less effective at helping them develop their own style and skill in presiding over proceedings. See Emilia Onyema, *The Role of the International Arbitral Tribunal Secretary*, 9 VINDOBONA J. INT'L COM. L. & ARB 99, 109 (2005) (stating that the position of the tribunal secretary "affords young and aspiring arbitrators the opportunity of being present at an arbitral hearing and actually getting involved in the arbitral reference").

²²⁵ See *supra* notes 82-83 and accompanying text.

²²⁶ See *supra* notes 173-76 and accompanying text.

international legal actors.²²⁷ This process, as well as its outcomes, illustrates that international arbitration can be a "venue for the contact and mutual influence of different systems," as well as a context "to encourage contestation among and across other normative orders" and to develop transnational norms.²²⁸ Among the various categories of have-nots, human rights victims and seamen are the most likely to test the extent and limits of this potential.

1. *Developing and Enforcing Transnational Human Rights Norms*

The entry of human rights victims in international arbitration complicates the identity of putative have-nots. In the scenarios posited by Alford and other scholars, these cases will involve large multinational corporations and "Western" NGOs, whose resources and long-term strategies put them in the role of repeat player, against potentially small offending companies (such as local suppliers or distributors) that acted in collaboration with the governments of (often) developing countries.²²⁹ Local distributors or suppliers will not have either the resources or the sophistication of the multinationals or the NGOs, and as illustrated above in the context of investment arbitration,²³⁰ developing nations may not be well-equipped to adequately represent their own interests.

Even acknowledging these potential limitations, international arbitration still holds the promise of being a more effective mechanism than national courts for holding human rights abusers, including governments, accountable.²³¹ It not only avoids jurisdictional problems such as foreign sovereign immunity, but it also obviates comity concerns that arise when the courts of one nation sit in judgment on the actions of another and the practical problems involved in enforcing national court judgments.²³² International arbitrators may also have unique insights into the commercial contexts in which such abuses arise. This perspective may make them uniquely suited to resolve disputes regarding, and to develop transnational norms to govern, some of the

²²⁷ For example, as the rule against enforcement of contracts for payment of a bribe or that are procured through bribery was developing in international arbitration, outside-the-system pressures came from invigorated enforcement of the Foreign Corrupt Practices Act in the United States, the development of the OECD Convention, and the lobbying efforts of NGOs such as Transparency International. The result is that the international arbitration system provides an essential, though not perfectly uniform, function in helping thwart the otherwise intractable regulatory problem of international bribery.

²²⁸ Wai, *supra* note 16, at 483.

²²⁹ For example, Ian Eliasoph posits a multinational apparel company including a contractual obligation to respect fair labor standards in an agreement with its subcontractor and bringing an arbitration claim if that obligation is violated. *See* Eliasoph, *supra* note 128, at 84. Alford relies on similar hypotheticals but also suggests that corporations may also go one step further, creating third-party beneficiary rights in contracts so that human rights advocates could bring arbitration claims directly against the offending entities or states. *See* Alford, *supra* note 129 (manuscript at 24-30).

²³⁰ *See supra* Part I.B.

²³¹ *See supra* Part II.A.3.

²³² As several commentators have noted, judgments in human rights litigation have largely been symbolic and have not resulted in monetary recovery. *See, e.g.*, Alford, *supra* note 129 (manuscript at 1) ("For years human rights litigation appeared to be an act of public shaming, somewhat effective as a tool for embarrassment, but of little use to genuinely compensate victims or punish violators.").

more delicate questions that remain open to debate in international law. For example, international arbitrators may have unique perspectives to contribute in the development of norms regarding the nature and extent of corporate liability for aiding and abetting human rights abuses, a subject that has split U.S. courts.²³³ Their notable experience developing international public policy norms against bribery, corruption, and money laundering will provide a useful foundation in fulfilling this function.

2. *Mediating Divergent National Policies Regarding Seamen's Claims*

Seamen are the ultimate denationalized employees, but adjudication of their claims presents unique issues and special challenges to international arbitrators in light of the competing national policies involved. Historically, U.S. courts and Congress were committed to a policy that treated foreign seamen as wards of the American admiralty courts and ensured them a “rightful” day in a U.S. court, predicated on their and their employers’ physical presence in the U.S.²³⁴ While there has been some wavering on this policy,²³⁵ in general U.S. law is still committed to permitting them to bring claims in U.S. courts when there is a substantial connection to the United States. This policy appears to be reflected in section 1 of the FAA, which excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from the FAA’s coverage.²³⁶ This policy, however, clashes directly with Philippine policy, which mandates that claims arising out of seamen’s employment contracts be arbitrated as part of an effort to secure

²³³ *Compare In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 549-50 (S.D.N.Y. 2004) (concluding that the international sources for aiding and abetting liability do not establish “a clearly-defined norm”), *with Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002) (applying an international standard for criminal aiding and abetting to determine Unocal’s liability for its role in human rights abuses committed by the Myanmar military), *reh’g granted*, 395 F.3d 978 (9th Cir. 2003). One of the most thoughtful works on theories for corporate responsibility for human rights violations is by Steven Ratner. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

²³⁴ The ancient doctrine that the seaman is the ward of the admiralty developed precisely because seamen were considered to be vulnerable parties requiring judicial protection. The doctrine’s modern incarnation should hold that seamen from developing countries like India, Ukraine, or the Philippines—men and women who are probably undereducated, desperate, and willing to work aboard ship (where, out of necessity, their freedoms are greatly constrained) on almost any terms—merit special solicitude.

Matthew Nickson, *Closing U.S. Courts to Foreign Seamen: The Judicial Excision of the FAA Seamen’s Arbitration Exemption from the New York Convention Act*, 41 TEX. INT’L L.J. 103, 143 (2006).

²³⁵ While courts had traditionally sought to protect the “friendless seaman,” more recently they have shown a greater willingness to dismiss under the doctrine of forum non conveniens. See Patrick Knight, *Tort Reform Going Overboard: Congress Decides the Issue of Foreign Seamen in American Courts*, 9 U.S.F. MAR. L.J. 279, 290-92, 300 (1996). Moreover, Congress has flirted with the idea of legislation that would have impaired the ability of foreign seamen to bring claims in U.S. courts. See *id.* at 292-98.

²³⁶ Nickson, *supra* note 234, at 107.

overseas jobs for citizens and thereby improve the Philippine economy.²³⁷ Recent U.S. decisions have permitted claims by foreign seamen to be sent to arbitration, reasoning that the FAA's language excluding seamen from its purview does not apply to international cases governed by the New York Convention.²³⁸ Some commentators have questioned these outcomes in light of the language of section 1 of the FAA, but they may also be at least partially explainable as an expression of judicial deference to the competing Philippine policy.

Whatever the motivation for courts to permit arbitration, shipping companies may have pressed for arbitration on the assumption that arbitrators will be less robust in protecting seamen than U.S. courts. Ultimately, the accuracy of this assumption will depend a great deal on the individual arbitrators. Perhaps not coincidentally, the choice of arbitrators appears to be limited under the arbitration clauses at issue in these cases. These clauses require that disputes be submitted either to the "[Philippine] National Labor Relations Commission (NLRC), pursuant to Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 or to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators."²³⁹ Anecdotal reports from U.S. attorneys who specialize in seamen's claims suggest that awards from NLRC arbitrators are notoriously low, particularly in contrast to what they would receive in a U.S. court. Low compensation for injured seamen may reflect both economic and legal assumptions underlying Philippine notions about what constitutes "just" compensation, but also Philippine national policy that seeks to bolster employment of Philippine nationals by keeping the costs of employing them low. As a national organ, the NLRC is presumably charged with applying these national standards and policies.

Notably, the arbitration clause also seems to contemplate the possibility—although it is not entirely clear under what conditions—that a "voluntary arbitrator or panel of arbitrators" may decide the case. To the extent that this phrase leaves open the possibility for cases to go before international arbitrators, as opposed to NLRC arbitrators, they would arguably not be strictly constrained by either set of national policies and may therefore be able to mediate the competing U.S. and Philippine policies more effectively than either U.S. courts or NLRC arbitrators.

IV. CONCLUSION

As Robert Wai argues, one risk of international arbitration is that it may become "autopoietic," meaning that the norms of the system would be generated from within, and be reinforced by, the system itself.²⁴⁰ As a closed system, his argument goes, international arbitration would only imperfectly and

²³⁷ Brief of the Department of Labor and Employment of the Republic of the Philippines as Amicus Curiae in Support of Appellees at 4-8, *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005) (No. 03-15884).

²³⁸ See *Bautista*, 396 F.3d 1289; *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002).

²³⁹ See *Bautista*, 396 F.3d at 1293 n.5; *Francisco*, 293 F.3d at 271 n.1.

²⁴⁰ Wai, *supra* note 178, at 258.

indirectly interact with other systems or networks. Ultimately, this limitation would undermine the possibility that it might be able to provide a regulatory function²⁴¹ and obscure any role for national law. There may be some varieties of international arbitration, such as maritime or re-insurance arbitration, that operate like the closed systems that Wai hypothesizes and are therefore subject to such risks. It is also true that the international arbitration system has elements that are self-reproducing and self-constructing. However, because it relies on support from national courts for enforcement of agreements and awards, and accommodates the national interests in tradeoff for that support, the generalized international arbitration system remains actively engaged with national systems and other networks that operate at the global level.

National variations in consumer and employment protection have kept the international arbitration system tied into national regulatory priorities. Aided by its own internal values and mechanisms produced by those values, international arbitration appears poised to accommodate the competing interests that arise in adjudication of claims by have-nots. As a consequence, international arbitration has the potential to operate as an instrument for developing fair and efficient procedures for resolving diverse categories of disputes, for mediating conflicting national laws and policies, for securing effective transnational regulation, and for generating international public policy norms. The arrival of the have-nots will test the extent to which it is ready and committed to fulfill that role.

²⁴¹ See *id.* (“The autopoietic character of transnational business systems may undermine hopes that the regulatory function might be contained within the new systems themselves.” (citing Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149 (1997))).