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Essay*

Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration

*S.I. Strong***

In many ways, the relationship between litigation and international commercial arbitration is a curious one, with experts adopting diametrically opposed positions on how the two procedures do or should interact. For example, some people take the view that international commercial arbitration is a uniquely self-contained dispute resolution mechanism that proceeds entirely independent of state control.¹ Thus, Julian Lew has stated that:

* This brief Essay sets the foundation for this symposium issue and introduces a number of points made by Gary Born, the keynote speaker for the Center for the Study of Dispute Resolution's 2011 Annual Symposium, "Border Skirmishes: The Intersection Between International Commercial Arbitration and Litigation." In so doing, this Essay discusses the reasons for the apparent increase in litigation relating to international arbitral proceedings and applies Mr. Born's analytical framework to one of international commercial arbitration's more intransigent issues, namely the use of anti-suit injunctions. Because this Essay is primarily intended to reflect on various ideas presented in an oral discussion, the text contains fewer and less comprehensive citations to authority than might be the case in a traditional law review article. Those who are interested in seeing Mr. Born's keynote address in its entirety may access it through the University of Missouri Law School website at <http://www.law.missouri.edu/csdr/symposium/2011>.

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1. Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 *ARB. INT'L* 179, 180 (2006) [hereinafter Lew, *Autonomous*]; see also FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 95-97 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter FOUCHARD GAILLARD GOLDMAN]; W. Michael Reisman & Heide Irvani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 *AM. REV. INT'L ARB.* 5, 5 (2010).

[i]nternational arbitration is a *sui juris* or autonomous dispute resolution process, governed primarily by non-national rules and accepted international commercial rules and practices. Party autonomy is still today the principal basis for arbitration. As such, the relevance and influence of national arbitration laws and of national court supervision and revision is greatly reduced.²

Certainly, that type of approach to arbitration would be highly desirable, since it allows parties to have their disputes resolved in an efficient, neutral, and private manner.³ However, the role of national courts does not seem to be diminishing in this area of law. To the contrary, empirical evidence strongly suggests that an ever-increasing number of matters ancillary to international commercial arbitration are being brought before U.S. courts.⁴

A quick survey of U.S. case law demonstrates the magnitude of the issue.⁵ For example, during the years 1970 to 1979, U.S. federal courts rendered only 30 decisions mentioning the world's most important treaty on international commercial arbitration, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, colloquially known as the New York Convention.⁶ However, the number of federal decisions discussing that instrument tripled during the years 1980 to 1989, when 105 opinions were handed down, and more than doubled between both 1990 and 1999, when 268 cases were reported, and 2000 to 2009, when 544 decisions were rendered.⁷ The number of arbitration-related matters being heard in U.S. federal courts is set to double yet again, given that 187 decisions mentioning the New York Convention have already been heard in the first two years of the current decade (2010-2011).⁸ Similar patterns exist

2. Lew, *Autonomous*, *supra* note 1, at 180.

3. For example, there is no need for judicial intervention in cases where parties voluntarily comply with an arbitration agreement and with any award that is rendered as a result of the arbitral proceedings. Indeed, it has been said that most parties comply with the terms of an international arbitral award without having to be compelled to do so by court order. See NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* ¶ 11.02 (2009) [hereinafter *REDFERN & HUNTER*].

4. It may be that even larger numbers of arbitrations are being heard in a fully autonomous fashion. However, those figures are impossible to obtain. See *infra* note 31.

5. This analysis does not purport to identify all judicial decisions in U.S. courts concerning international arbitration, but merely focuses on a single type of proceeding so as to demonstrate the relative numbers of cases over time.

6. The New York Convention was ratified by the United States in 1970 and took effect on December 29 of that year. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518 [hereinafter *New York Convention*]; *New York Convention Status*, available at http://www.uncitral.org/uncitral/cn/uncitral_texts/arbitration/NYConvention_status.html; see also Westlaw.com (searching terms "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" or "New York Convention" along with "arbitration" or "arbitral" in the allfeds library for the relevant time period; references to "arbitration" or "arbitral" were added to exclude decisions discussing the constitutional convention known as the New York Convention).

7. See Westlaw.com (searching terms "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" or "New York Convention" along with "arbitration" or "arbitral" in the allfeds library for the relevant time periods).

8. See Westlaw.com (searching terms "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" or "New York Convention" along with "arbitration" or "arbitral" in the allfeds library for the relevant time period).

with respect to both other multilateral conventions concerning international commercial arbitration⁹ and state court decisions.¹⁰

These statistics strongly suggest that the autonomous theory of international commercial arbitration does not hold true, at least in the United States. However, the clarity of the evidence is only matched by the ambiguity of its interpretation. For example, these numbers could be viewed as contradicting longstanding assumptions about the efficacy of international commercial arbitration.¹¹ Indeed, the significant increase in the rate of ancillary litigation could suggest to some observers that international commercial arbitration is in some way “broken.”¹²

9. While the New York Convention is commonly considered to have revolutionized the world of international commercial arbitration, that instrument is only one of several treaties in this area of law. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 91-101 (2009); JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶ 1-21 to 1-22 (2003). For example, the Inter-American Convention on International Commercial Arbitration, colloquially known as the Panama Convention, was ratified by the United States in 1986, although the ratification was not deposited with the Secretary General of the Organization of American States until 1990. See New York Convention, *supra* note 6; Inter-American Convention on International Commercial Arbitration of 1975, Pub. L. No. 101-369, 104 Stat. 448 (1990) [hereinafter Panama Convention]; see also Organization of American States, Foreign Trade Information System, available at <http://www.sicc.oas.org/dispute/comarb/iacac/iacac2c.asp> [hereinafter SICE]. The number of U.S. federal court decisions referring to the Panama Convention have also increased over the years, with 14 cases appearing between the years 1990 and 1999, 42 appearing between 2000 and 2009, and 7 appearing in the first two years of the current decade (2010-2011). See Panama Convention, *supra*; see also Westlaw.com (searching terms “Inter-American Convention on International Commercial Arbitration” or “Panama Convention” along with “arbitration” or “arbitral” in the allfeds library for the relevant time periods). It is not surprising that the Panama Convention has generated a smaller number of decisions than the New York Convention, given that only 17 states have ratified the Panama Convention while 146 states have signed the New York Convention. See New York Convention Status, *supra* note 6; SICE, *supra*. However, it is significant that the rate of increase in Panama Convention cases is roughly approximately to the rate of increase in New York Convention cases. Notably, these statistics do not reflect the entirety of all U.S. federal court decisions concerning international commercial arbitration, since international arbitration agreements and awards are enforceable in U.S. courts even in situations where a convention does not apply. Furthermore, some U.S. courts have failed to refer to a relevant convention, even when that convention clearly applied to the dispute at issue. See *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venez.*, 991 F.2d 42, 44 (2d Cir. 1993) (failing to refer to the New York Convention despite an arbitration clause between a U.S. and foreign party calling for arbitration in London).

10. For example, there are no U.S. state court decisions between the years 1970 and 1979 mentioning the New York Convention in some way, 7 decisions between the years 1980 and 1989, 9 decisions between 1990 and 1999, 23 cases between 2000 and 2009, and 4 decisions in the first years of the current decade (2010-2011). See Westlaw.com (searching terms “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” or “New York Convention” along with “arbitration” or “arbitral” in the allstates library for the relevant time periods); see also New York Convention, *supra* note 6. The numbers of state cases dealing with the Panama Convention are negligible, with 1 decision appearing between 1990 and 1999, 1 decision between 2000 and 2009, and no decisions between 2010 and 2011. See Westlaw.com (searching terms “Inter-American Convention on International Commercial Arbitration” or “Panama Convention” along with “arbitration” or “arbitral” in the allstates library for the relevant time periods); see also Panama Convention, *supra* note 9.

11. See REDFERN & HUNTER, *supra* note 3, ¶ 11.02.

12. Commentators regularly claim that a particular type of arbitration is somehow “broken.” See Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 37-71 (July 2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>; *Proceedings of the 2009 Midwest Securities Law Institute Symposium*, 10 J. BUS. & SEC. L. 173, 308 (2010); Adam Primm, *Salary Arbitration Induced Settlement in Major League Baseball: The New Trend*, 17 SPORTS L. J. 73, 110 (2010) (suggesting sports arbitration is broken).

However, there may be other, less pejorative reasons why U.S. courts are becoming more involved in matters associated with international commercial arbitration. Three possibilities come immediately to mind.

First, increased litigation could be the result of rising numbers of generalist practitioners and arbitrators who are entering the field without a proper appreciation of the different policies and practices associated with international commercial arbitration.¹³ Under this theory, the increase in court cases is simply evidence of a learning curve generated by newcomers making mistakes that must be corrected through ancillary litigation.¹⁴ As these novices become more proficient in the nuances of international commercial arbitration, litigation rates will drop.¹⁵

However, it is not just that newcomers and infrequent participants in international commercial arbitration are making mistakes *per se*. Instead, these non-specialists may be unconsciously affecting the overall culture of the field by adopting procedures that they know best, which in the case of U.S.-trained lawyers involves techniques used in domestic U.S. litigation and arbitration.¹⁶ Although some of these procedures – such as cross-examination – are also used in international arbitration, others – such as discovery – are not. Nevertheless, the pervasive use of U.S. litigation tactics by a sufficiently large number of practitioners can, over time, change the tenor of international commercial arbitration to something that looks increasingly like U.S.-style litigation, complete with repeated requests for judicial assistance and intervention.¹⁷ Indeed, the “Americanization” of international commercial arbitration has been much discussed over the last ten years, often in a not very favorable light.¹⁸

This idea of the “Americanization” of international arbitration raises the question of whether the increase in ancillary litigation is simply a U.S. phenomenon

13. See Jan Paulsson, *International Arbitration Is Not Arbitration*, 2008 STOCKHOLM INT’L ARB. REV. 1, 1 (asserting “the essential difference” between international and other types of arbitration “is so great that their similarities are largely illusory”); S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT’L ARB. 119, 128-29 (2009) (noting increased numbers of generalists involved in international commercial arbitration). Generalists may wish to enter the field of international commercial arbitration because it is seen as more profitable and/or prestigious than other areas of practice. See Christopher J. Borgon, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT’L L. REV. 685, 718 (2007).

14. For example, an inexperienced party who files a claim in an improper forum may create a situation that requires the respondent to seek an anti-suit or anti-arbitration injunction in addition to an order to compel arbitration in the proper locale.

15. Of course, the problem, at least in the United States, is that there is a massive number of newcomers and infrequent participants who are continually entering the field, making it difficult to see the reduction in litigation as a result of increased expertise.

16. See Eric Bergsten, *The Americanization of International Arbitration*, 18 PACE INT’L L. REV. 289, 294, 301 (2006).

17. See *id.*

18. See Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 69 (2003); Bergsten, *supra* note 16, at 294, 301; Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and “Americanization” in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, 43 TEX. INT’L L.J. 359, 365-70 (2008); William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 677-79 (2009); Lucy Reed & Jonathan Sutcliffe, *The “Americanization” of International Arbitration?* 16 MEALEY’S INT’L ARB. REP. 36 (2001). But see Susan L. Karamanian, *Overstating the “Americanization” of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5 (2003).

brought on by U.S.-style litigation tactics or whether the problem is also apparent elsewhere in the world.¹⁹ This question can be answered by comparing the amount of litigation ancillary to international commercial arbitration in the United States to the amount of similar litigation in other countries. While this is not the time or the place to conduct an exhaustive comparative study, it is nevertheless useful to consider litigation rates in at least one other country. The United Kingdom appears to be a good candidate,²⁰ since England is one of the leading jurisdictions in the world for international commercial arbitration (the other two top contenders are France and Switzerland), and it would be expected that English courts would see a similar rise in the number of court cases if ancillary litigation rates were rising worldwide rather than just in the United States.²¹ Although the United States and the United Kingdom differ significantly in their relative sizes, there is no need to consider absolute or per-capita numbers, since useful information can be gleaned from a comparative analysis of the relative rates of litigation in each jurisdiction over time.

Interestingly, the evidence shows some increase in litigation in the United Kingdom over the relevant time periods, although the numbers do not reflect precisely the same pattern as in the United States. For example, one search yielded 20 judicial decisions relating to the New York Convention arising out of British courts between the years 1975 and 1984, 22 between 1985 and 1994, 56 between 1995 and 2004, and 84 in the most recent eight-year period (2005 to 2011), suggesting an approximate doubling of litigation rates from the preceding decade.²²

19. While lawyers practicing in international commercial arbitration are not geographically limited in the same way that lawyers practicing in national courts are, outside counsel are usually chosen for their expertise in a particular national system. Therefore, U.S.-trained lawyers are typically hired in matters involving U.S. law or U.S. parties, at least until a particular attorney gains an international reputation in the field and thus transcends his or her national affiliation.

20. Although many people think of the United Kingdom as a single legal entity, the country actually consists of several different legal systems, although there are some legal principles that govern the nation as a whole. The law that is most often associated with the country is actually English law, which governs in England and Wales. Scottish law is entirely different than English law, since it is rooted in the civil rather than common law tradition. Northern Ireland also has its own laws, which are strongly influenced by that region's unique political and cultural history.

21. See Jan Paulsson, *Arbitration-Friendliness: Promises of Principle and Realities of Practice*, 23 *ARB. INT'L* 477, 477-78 (2007). It is also useful to compare two common law jurisdictions, since there are some procedural devices, such as the anti-suit injunction, that are only really available legal systems following the common law tradition. See *infra* notes 55, 64 and accompanying text. Furthermore, the author has experience acting as a London-based solicitor specializing in matters concerning the overlap between English litigation and international commercial arbitration as well as a New York-based lawyer involved in similar issues from the U.S. perspective.

22. See Westlaw.com (searching terms "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" or "New York Convention" along with "arbitration" or "arbitral" in the All UK Cases library for the relevant time period); see also New York Convention Status, *supra* note 6 (noting the United Kingdom did not accede to the New York Convention until 1975, five years after the United States). These numbers need to be considered in light of the fact that the United Kingdom does not have a unified court reporting system, as is the case in the U.S., although recent reforms have led to cases being given a unique case identification number that helps confirm that decisions published in different series are in fact the same. The multiplicity of reporting series in the United Kingdom means that the statistics cited above must be considered subject to two provisos. First, the Westlaw database does not include all reported decisions including these terms, since several British reporting series are owned by publishers not affiliated with West Thomson, the owner of Westlaw (however, some of these series may be found on LexisNexis, for those who wish to conduct additional research). Therefore, the absolute numbers of reported decisions might be higher, although one would expect the proportions of

These figures are significantly lower than those from the United States, which might initially be explained by the relative size of the two countries. However, if England is indeed a more popular forum for international commercial arbitration than the United States, then one might expect to see more reported decisions in England than in the U.S., if judicial assistance is being sought at roughly similar rates.

While it is impossible to gauge the percentage of arbitrations in each jurisdiction that end up in litigation (and indeed, some ancillary litigation might be brought in a place other than the arbitral seat), what is clear is that litigation concerning international commercial arbitration has been on the rise in England in recent decades, just as it has been in the United States. However, it is again unclear what the cause of these increases are. One explanation might be that England's adoption of a new arbitration statute in 1996 affected litigation rates in both national and international disputes as parties began to work their way through the new statutory provisions.²³ However, the fact that litigation has remained relatively steady since that time suggests that the enactment of the Arbitration Act 1996 was not the sole reason for the increase in cases since 1995.

Although one could claim that generalist practitioners may be driving increased litigation rates in the U.K. in the same way that they (arguably) are in the U.S., this argument may not be as persuasive given England's use of a split bar. For example, English solicitors typically engage barristers to assist on any matter involving a dispute, including a dispute that is to be heard in arbitration, which would suggest that an experienced barrister could quash any ill-conceived strategies suggested by a solicitor or client who was not well informed about the nuances of international arbitral practice.²⁴ Furthermore, any action taken in an English court would need to be taken by a barrister or specially qualified solicitor who could act as a buffer between an inexperienced solicitor and the courts, again

cases to be relatively similar. Second, computerized searches in Westlaw's U.K. database often bring up duplicate versions of the same case, since the same decision may be published in multiple reporting series. Duplicate decisions have not been reported in the totals cited above, although appellate decisions have, since appellate decisions would have been captured in the statistics cited above on U.S. litigation rates.

23. See Arbitration Act 1996, available at <http://www.legislation.gov.uk/ukpga/1996/23/contents>. England also overhauled its civil procedure system in the late 1990s, imposing what was colloquially known as the Woolf Reforms, named after Lord Woolf, the Law Lord given the task of modernizing the rules of civil procedure. See CIVIL PROCEDURE RULES 1998, available at <http://www.legislation.gov.uk/ukSI/1998/3132/contents/made>. This change could also have affected litigation rates concerning international commercial arbitration.

24. English legal practice is split between solicitors, who handle transactional and corporate issues and who interact directly with clients in litigation-related matters, and barristers, who provide legal opinions relating to transactional and corporate issues and who appear in court. Barristers typically specialize in a very narrow area of law and are hired by solicitors for their expertise in that field. (Clients do not hire or interact with barristers directly.) While solicitors may be becoming increasingly active as advocates in international commercial arbitration, the professional ethos in England is such that a solicitor would be very hesitant to move into this area of practice without significant training and experience in that regard, since there is a great deal of respect within the profession for the specialized nature of advocacy work. However, it is also true that recent reforms have allowed barristers to be employed in solicitors' firms rather than only working as independent counsel in barristers' chambers, which could affect the inclination of a particular firm to accept a matter involving international arbitration and to handle it without the assistance of a barrister in chambers.

dampening the effect that inexperienced generalists might have on the rate of ancillary litigation.²⁵

Therefore, increasing numbers of generalist practitioners and the subsequent “Americanization” of international commercial arbitration could be one way to explain the rise of litigation ancillary to international arbitration. However, other factors may also be contributing to the increased frequency of judicial activity in this area of law.

A second reason for increased amounts of litigation regarding international commercial arbitration could be that international transactions are simply becoming more complicated. At one point in the not-too-distant past, cross-border commerce primarily consisted of relatively simple bilateral contracts. Although these sorts of transactions continue to arise, businesses and individuals are now taking part in an increasing number of multi-party, multi-contract, multi-national deals.²⁶ The sheer novelty of these types of disputes, combined with their inherent complexity, could be the cause of a number of judicial challenges. Furthermore, many of these transactions involve regulatory issues that could arguably be subject to the exclusive jurisdiction of various national courts, again increasing the amount of litigation ancillary to arbitration.²⁷

One corollary to the escalating complexity of modern commercial relationships involves the likelihood that issues will arise relating to non-signatories. With so many interrelated contracts and interrelated parties involved in a single transaction, situations often arise where a dispute arising under one agreement implicates a party under a separate but related agreement. As a result, an existing party may seek to bring a non-signatory into an ongoing arbitration or a non-signatory may seek to join that proceeding. The U.S. has one of the most liberal attitudes in the world towards the participation of non-signatories in arbitration,²⁸ and it may be that this highly inclusive policy has generated a number of judicial challenges

25. Recent reforms have allowed solicitors to obtain additional qualifications to obtain rights of audience in some of the higher courts, including the commercial court where most matters involving international commercial arbitration are heard. These specially qualified lawyers are known as solicitor advocates. Another reason why the increase in ancillary litigation in England may not be due to an influx of generalist practitioners relates to the fact that international commercial arbitration in the U.K. is primarily centralized in London, both in terms of geography and legal expertise, thus minimizing both the need and opportunity for non-specialists to enter the market. See S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 J. DISP. RESOL. 119 (2012) (discussing reasons for expansion of international commercial arbitration in the United States) [hereinafter Strong, *Navigating*].

26. See LEW ET AL., *supra* note 9, ¶ 16-1 (noting the percentage of multiparty arbitrations administered by the ICC rose from 20 percent to 30 percent between 1995 and 2001); Martin Platte, *When Should an Arbitrator Join Cases?*, 18 ARB. INT'L 67, 67 (2002) (noting more than 50 percent of LCIA arbitrations reportedly involve more than two parties).

27. Regulatory concerns can easily be seen in several contexts ranging from class arbitration to trust arbitration to arbitration of certain issues relating to agency, franchise and exclusive distributorship relationships. See Stefan Michael Kröll, *The “Arbitrability” of Disputes Arising From Commercial Representation*, in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 317, ¶¶ 16-5, 16-8 to 16-23 (Loukas A. Mistelis & Stavros L. Breckoulakis eds., 2009); S.I. Strong, *From Class to Collective. The De-Americanization of Class Arbitration*, 26 ARB. INT'L 493, 507, 514-16 (2010); S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide* 45 VAND. J. TRANSNAT'L L. ___ (forthcoming 2012) (discussing issues of “limited arbitrability”). Regulatory matters often give rise to questions relating to arbitrability, and since arbitrability is quintessentially a matter of state concern, such disputes may logically end up in court. See LEW ET AL., *supra* note 9, ¶¶ 9-1 to 9-4.

28. See BORN, *supra* note 9, at 1142-1205.

relating to who may be a proper participant in an arbitration.²⁹ Furthermore, the interest in non-signatory participation may be higher in international arbitration than in domestic disputes, given that foreign arbitral awards are significantly easier to enforce than foreign judgments.³⁰ All of these factors could contribute to the amount of judicial activity that currently exists vis-à-vis international commercial arbitration.

A third and final reason for the growing amount of ancillary litigation may be that international commercial arbitration is simply becoming more prevalent in the U.S. and elsewhere. Not only is arbitration the dispute resolution mechanism of choice among those commercial entities that have long operated in the cross-border context, but arbitration has also been widely embraced by small to mid-sized businesses that have only recently entered the international arena as a result of globalization. Given the increasing number of international arbitrations overall, it is to be expected that the amount of ancillary litigation would also increase.

This theory is very attractive in many ways because it suggests that there has been no potentially blameworthy change in practice. Instead, the only significant change over time would be the rates at which the business community is using international commercial arbitration, something that could only be considered positive.

The problem is that testing the accuracy of this hypothesis would require an analysis of whether the percentage of litigation ancillary to international commercial arbitration has changed over the years or whether it has remained steady. Unfortunately, this question is impossible to answer empirically.³¹ Instead, researchers are left with nothing more than anecdotal evidence claiming that most parties comply with arbitration awards voluntarily.³²

29. The various means of allowing a non-signatory to participate in an arbitration include theories involving "agency (actual and apparent), alter ego, implied consent, 'group of companies,' estoppel, third-party beneficiary, guarantor, subrogation, legal succession and ratification of assumption." *Id.* at 1137-38, 1142-1211; see also Thomson-CSF, SA v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995). Indeed, some non-signatories may assert rights under an arbitration agreement even when the named parties do not wish to arbitrate their dispute. See Arthur Andersen LLP v. Carlisle, 556 U.S. 624 (2009). It could also be that international inconsistencies regarding the ability of non-signatories to participate in arbitration is one of the causes of increased litigation. See Strong, Navigating, *supra* note 25.

30. See BORN, *supra* note 9, at 91-101; LEW ET AL., *supra* note 9, ¶¶ 1-21 to 1-22.

31. There are several problems in this regard. First, an international arbitration can inspire litigation in several different countries, thus requiring extensive international analysis to determine which courts have become involved in any particular arbitration. Second, it is impossible to identify the number of international commercial arbitrations that go forward in any given year. While it is possible to ask arbitral institutions to provide data on the number of arbitrations filed with them annually, the number of organizations involved in arbitration is increasing all the time, making it difficult if not impossible to ascertain the number of arbitrations arising worldwide. Furthermore, that approach does not take *ad hoc* proceedings into account. Finally, for a study of this type to be useful, it would be necessary to consider longitudinal data, which is unavailable and impossible to construct.

32. See REDFERN & HUNTER, *supra* note 3, ¶ 11.02; see also Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT'L 121, 128 n.24 (1997) (citing data suggesting "about 98 per cent of awards in international arbitrations are honoured or successfully enforced and that enforcement by national courts has only been refused in less than 5 per cent of cases"). It is unclear whether this anecdotal evidence extends to include voluntary compliance with arbitration agreements as well. However, what does appear certain is that those matters that must go to court for enforcement have a high rate of success. See *id.*; see also Albert Jan van den Berg, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, United Nations Audiovisual Library of International Law,

However, quantitative analysis of litigation rates is not the only way to evaluate the success of international commercial arbitration as a dispute resolution mechanism. Indeed, an increase in ancillary litigation, either on a percentage or absolute basis, is only problematic if judicial activity is considered to be improper in some way.³³ If some types of court actions are considered to be appropriate, then a mere increase in litigation does not signal any kind of trouble, so long as the types of matters being heard by judges fall within the realm of issues that may permissibly be resolved through judicial involvement.

This concept is obviously contrary to the notion that international commercial arbitration is or should be an entirely autonomous system of dispute resolution.³⁴ However, in his keynote address in this symposium, Gary Born introduced the idea that there may be times when it is both appropriate and perhaps necessary for courts to become involved in arbitral proceedings.³⁵ Under this “hybrid” model of arbitration, which Born stated was clearly contemplated by the New York Convention, “border skirmishes” between litigation and international commercial arbitration are not only to be expected but welcomed in some instances.³⁶

Of course, the difficulty with such an approach is distinguishing appropriate types of judicial involvement from inappropriate ones, and determining how best to minimize or eliminate the latter. This is a vast subject, with experts asserting a variety of views as to the sorts of arbitral issues that can or should be heard in court.³⁷ However, Born’s keynote discussion may shed new light on some of the more intransigent problems in this area of law by providing a new framework for analysis.³⁸

According to Born, some types of judicial relief provide a constructive and useful safety valve in a process that might otherwise be deemed too potentially injurious to party or state interests.³⁹ These types of permissible judicial actions might be referred to as “border crossings,” since they comport with both the letter of international law as well as the principles underlying public and private support of the international commercial arbitration regime.

available at <http://untreaty.un.org/cod/avl/ha/crcfaa/crcfaa.html> (noting the more than 1400 court decisions in the *Yearbook Commercial Arbitration* reflect an enforcement rate of over 90 percent).

33. This would be the likely conclusion of commentators who believe that arbitration is or should be an entirely autonomous system. See Lew, *Autonomous*, *supra* note 1, at 180.

34. See *supra* notes 1-2 and accompanying text.

35. See Gary Born, Keynote Address, Center for the Study of Dispute Resolution Annual Symposium 2011, “Border Skirmishes: The Intersection Between International Commercial Arbitration and Litigation,” Oct. 21, 2011, available at <http://www.law.missouri.edu/csdr/symposium/2011/> [hereinafter Born Keynote Address].

36. See *id.*

37. See BORN, *supra* note 9, at 1020-48, 2028-66; LEW ET AL., *supra* note 9, ¶¶ 15-1 to 15-57; George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. INT’L L. 1 (2012); Renata Brazil-David, *Harmonization and Delocalization in International Commercial Arbitration*, 28 J. INT’L ARB. 445 (2011); V.V. Vccder, *Strategic Management in Commencing Arbitration*, in ARBITRATION ADVOCACY IN CHANGING TIMES, 15 ICCA CONG. SER. 27, 33-34 (2011).

38. See Born Keynote Address, *supra* note 35. Though other commentators have asserted somewhat similar views, see Reisman & Iravani, *supra* note 1, at 30-36, the unique parlance of this symposium may add a new twist to the discussion.

39. See Born Keynote Address, *supra* note 35.

Some types of “border crossings” are apparent from even a cursory analysis of the New York Convention.⁴⁰ For example, a party that has not received proper notice of an arbitral proceeding might seek to have an award set aside at the place where it was made or might object to enforcement of that award in another state.⁴¹ These actions constitute border crossings not only because they are based on the text of the New York Convention, but because they provide parties with an appropriate escape mechanism in cases involving procedural improprieties. If parties do not have the ability to avoid enforcement of an award that violates basic concepts of procedural fairness, then private support for international commercial arbitration will diminish and parties will choose not to enter into arbitration agreements.⁴² Therefore, courts may properly become involved in arbitration to uphold a party’s desire to protect itself from these sorts of procedural improprieties.⁴³

Procedural fairness is of utmost importance to parties.⁴⁴ However, some issues – such as arbitrability – are more of a state concern, even if parties are also permitted to rely on such matters as a defense to the enforcement of either an arbitration agreement or an arbitral award.⁴⁵ Since the New York Convention pro-

40 See New York Convention, *supra* note 6.

41. See *id.*, arts. V(1)(b), V(1)(c).

42. Parties who opt out of international commercial arbitration will likely end up in national court, which could lead to increased transaction costs in international commerce, given the expense and uncertainty associated with transnational litigation. See BORN, *supra* note 9, at 84-86. Of course, this conclusion is based on the assumption that transnational litigation is the only option remaining to parties who opt out of the international arbitral regime. There are those who believe that international commercial mediation will soon replace international commercial arbitration as the transnational dispute resolution mechanism of choice. See Jacquelin M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT’L L. & COM. REG. 981 (2012). Indeed, the European Union has taken significant measures in promoting mediation as a means of resolving cross-border commercial disputes. See Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3.

43. Of course, the devil is in the details. While few people would object to judicial actions relating to lack of notice, there are other issues that are much more controversial. See Strong, *Navigating*, *supra* note 25.

44. This is not to say that procedural fairness is not also important to states. For example, while most of the procedural protections in the New York Convention are placed in Article V(1) and, thus, can only be asserted by the parties, some states have been known to “elevate” what is predominantly an Article V(1) concern to Article V(2) status, which allows the enforcing state to raise an issue *sua sponte* and consider the propriety of the procedure in question in light of the enforcing state’s national law. See New York Convention, *supra* note 6, art. V; see also *Jiangsu Changlong Chem. Co., Inc. v. Burlington Bio-Med. & Sci. Corp.*, 399 F. Supp. 2d 165, 168 (E.D.N.Y. 2005) (relying on enforcing state’s notions of due process, not forum state’s); *Guang Dong Light Headgear Factory Co., Ltd. v. ACI Int’l*, 31 Y.B. COM. ARB. 1105, 1118 (2006) (citing U.S. Supreme Court precedent concerning due process requirements of notice in the context of an international enforcement proceeding); *Unión de Cooperativas Agrícolas Epis-Centre (France) v. La Palentina SA (Spain)*, 27 Y.B. COM. ARB. 533, 538-39 (2002) (noting procedural safeguards must be examined “in accordance with the criteria established by the Constitutional Court, which is the highest interpreter of the fundamental provisions in whose principles, rights and liberties international public policy is embodied”); *Italian Party v. Swiss Company*, 29 Y.B. COM. ARB. 819, 829 (2004) (“Denial of due process is in principle a violation of procedural public policy.”); *Buyer (Danish) v. Seller (German)*, 4 Y.B. COM. ARB. 258 (1979) (dealing with failure to give notice of the names of the arbitrator and noting that, “As the right of the parties to challenge has a fundamental meaning for a fair arbitral procedure, the exclusion of this right constitutes a violation of the German public order”).

45. See New York Convention, *supra* note 6, arts. II(1), V(2)(a); see also LEW ET AL., *supra* note 9, ¶¶ 9-1 to 9-4. The fact that a court may raise the issue of arbitrability *sua sponte* during an enforce-

vides states with the means to assert national laws regarding non-arbitrability, litigation meant to enforce that principle would not be improper in any way.⁴⁶ In fact, if states are not given the opportunity to protect the rights that are outlined the New York Convention and other international instruments or do not see widespread international adherence to the principles described in those documents, then some states may choose to withdraw from those agreements.⁴⁷ This latter outcome is not as far-fetched as it might once have appeared, given recent events in the world of international investment arbitration, where the absence (real or perceived) of suitable escape mechanisms has led several states to denounce or threaten to denounce various treaties, including the International Convention on the Settlement of Investment Disputes (ICSID Convention).⁴⁸

Therefore, Born views the various “border crossings” outlined in the New York Convention as both necessary and desirable.⁴⁹ However, other types of court involvement are less defensible.⁵⁰ In these situations – which Born refers to as “border incursions” – courts ignore the international obligations set forth in the New York Convention and other international agreements, and instead adopt highly parochial interpretations of the various treaties so as to shield the courts’ own nationals from adverse outcomes.⁵¹ Although these cases appear to arise most frequently when the state is a new or infrequent participant in the world of international commercial arbitration, some states continue to embrace this sort of protectionist stance for years.⁵² Even those nations that are considered sophisticated

ment proceeding suggests that states have an interest in this issue that is independent of the interest of the parties. See New York Convention, *supra* note 6, art. V(2)(a).

46. See New York Convention, *supra* note 6, arts. II(1), V(2)(a).

47. See Born Keynote Address, *supra* note 35; Reisman & Iravani, *supra* note 1, at 12.

48. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1720, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. At this point, Venezuela, Bolivia and Ecuador have formally denounced the ICSID Convention. See Christopher Toothaker, *Venezuela Announces Formal Withdrawal from World Bank’s International Arbitration Body*, Globalnews.com (Jan. 26, 2012), available at <http://www.globalnews.ca/Money/venezuela+announces+formal+withdrawal+from+world+banks+international+arbitration+body/6442567114/story.html>; UNCTAD, *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, IIA ISSUES NOTE NO. 2, 1 (Dec. 2010), available at http://www.unctad.org/cn/docs/webdiacia20106_cn.pdf.

49. See New York Convention, *supra* note 6; Born Keynote Address, *supra* note 35.

50. Born Keynote Address, *supra* note 35.

51. Born Keynote Address, *supra* note 35; see also New York Convention, *supra* note 6.

52. For example, courts in Canada, Colombia, Egypt and Indonesia have all demonstrated varying degrees of protectionism in the past. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 113-16 (2d Cir. 2007) (outlining offensive and defensive actions brought in Switzerland, Singapore, Hong Kong, Canada and Indonesia as well as both U.S. district and circuit courts in the Second and Fifth Circuits); *Termorio S.A. E.S.P. v. Eltranta S.P.*, 487 F.3d 928, 936 (D.C. Cir. 2007) (discussing Colombian court decision); *Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt*, 939 F.Supp. 907, 911 (D.D.C. 1996) (discussing Egyptian court decision); Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 2012 J. DISP. RESOL. 83, 86 n.11 (2012) (discussing Canadian court decision). While Canada and Colombia have both changed their views regarding the proper role of courts in international commercial arbitration, Indonesia appears to remain something of an outlier in this regard. See *id.* (discussing Canada); Giulia Carbone, *The Interference of the Court of the Seat with International Arbitration*, 2012 J. DISP. RESOL. 217, 231-32 (2012) (discussing Indonesia); S.I. Strong, *International Arbitration and the Republic of Colombia: Commercial, Comparative and Constitutional Concerns From a U.S. Perspective*, 22 DUKE J. COMP. & INT’L L. 47, 63, 102-03 (2011) (discussing Colombia).

participants in international commercial arbitration have been known to experience occasional difficulties applying the New York Convention in a manner that is consistent with international expectations, as reflected by some recent U.S. decisions.⁵³

While some “border incursions” represent nothing more than a blatant misreading of the New York Convention and other international agreements, there are some issues that cannot be viewed in simple black and white terms. Indeed, it is often difficult to appreciate the difference between an appropriate “border crossing” and an inappropriate “border incursion” because so much depends on context. This is particularly true when parties seek types of judicial relief that are not explicitly contemplated by any of the relevant international agreements. One prime example of this sort of problem involves the availability of anti-suit injunctions in matters involving international commercial arbitration.⁵⁴

A growing body of literature exists regarding the use of these primarily common law devices,⁵⁵ with a variety of theories being used alternatively to support or challenge the propriety of anti-suit injunctions in international arbitration.⁵⁶ Al-

53. The D.C. Circuit Court decision in *Termorio* is the one of the more egregious examples of a U.S. court misapplying the New York Convention in recent years. See New York Convention, *supra* note 6; *Termorio*, 487 F.3d at 936; BORN, *supra* note 9, at 2683-84; Christopher Koch, *The Enforcement of Awards Annulled at Their Place of Origin*, 26 J. INT'L L. 267, 285-89 (2009); Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 25, 34-36 (2009).

54. This discussion focuses on true anti-suit injunctions that are intended to prohibit litigation elsewhere. Anti-arbitration injunctions are somewhat different, in that they intend to prohibit an existing or threatened arbitration from going forward. Since the goal of the New York Convention is to facilitate arbitration, see *infra* notes 57-65 and accompanying text, these types of injunctions are presumptively inappropriate. See Dominique T. Hascher, *Injunctions in Favor of and Against Arbitration*, 21 AM. REV. INT'L ARB. 189, 189, 191 (2010) (noting anti-arbitration injunctions are inconsistent with the French view of arbitration). However, an exception to this general rule might be made if the existing or threatened arbitration could be shown to be patently contrary to the terms of the arbitration agreement (for example, if the agreement stated that the proceeding would be seated in London and administered by the London Court of International Arbitration and the arbitration was actually filed with the American Arbitration Association with a purported seat in New York). In such a case, an anti-arbitration injunction might be appropriate, although the standard needed to justify intervention would be very high, perhaps analogous to that used by French courts to decline to send a matter to arbitration. See Filip de Ly & Audley Sheppard, *ILA Final Report on Lis Pendens and Arbitration*, 25 ARB. INT'L 3, 27 (2009) (noting French courts will send a matter to arbitration unless the arbitration agreement is “manifestly null,” citing article 1458 of the New Code of Civil Procedure). Given the brief nature of this Essay, extensive consideration of anti-arbitration injunctions is beyond the scope of the current discussion.

55. Discussions about anti-suit and similar types of injunctions are often colored by the fact that such types of relief are virtually unknown in civil law jurisdictions, even in litigation. See BORN, *supra* note 9, at 1036-43; Hascher, *supra* note 54, at 189.

56. See *Oppenheimer & Co Inc v. Deutsche Bank AG*, No 09 Civ. 8154 (LAP), 2009 WL 4884158, *2 (S.D.N.Y., Dec. 16, 2009); *Ghassabian v. Hematian*, No. 08 Civ. 4400 (SAS), 2008 WL 3982885 (S.D.N.Y., Aug. 27, 2008); see also *Bensadoun v. Jobc-Riat*, 316 F.3d 171, 175 (2d Cir. 2003); BORN, *supra* note 9, at 1036-41; Charles Falconer & Amal Bouchenaki, *Protecting Measures in International Arbitration*, 11 BUS. L. INT'L 183, 183-84 (2010); Robert Forcé, *The Position in the United States on Foreign Forum Selection Clauses and Arbitration Clauses, Forum Non Conveniens, and Antisuit Injunctions*, 35 TUL. MAR. L.J. 401, 441-64 (2011); Hascher, *supra* note 54, at 190-97; Gabrielle Kaufmann-Kohler, *How to Handle Parallel Proceedings: A Practical Approach to Issues Such as Competence-Competence and Anti-Suit Injunctions*, 1 DISP. RESOL. INT'L 110, 113 (2008) (claiming “a workable rule” regarding parallel proceedings and anti-suit injunctions “would give priority in time to the arbitrator’s decision and provide a limited measure of court control to prevent abuses”); Julian D.M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?* 24

though these analyses obviously merit serious consideration, anti-suit injunctions can also be analyzed in a manner that is consistent with the theme of this symposium.

For example, it might be said that anti-suit injunctions are permissible “border crossings” when they are used to halt litigation that is proceeding in violation of national courts’ positive duty to refer matters to arbitration pursuant to Article II(3) of the New York Convention.⁵⁷ Alternatively, these sorts of anti-suit injunctions could be framed as a means of upholding what has been called the negative duty under the New York Convention not to litigate arbitrable disputes.⁵⁸ Either way, the effect of the injunction would be to uphold the principles of the New York Convention, which is to have disputes arising under an arbitration agreement heard in arbitration.⁵⁹

Indeed, regardless of whether the issue is framed as the positive duty to arbitrate or the negative duty not to litigate, Article II of the New York Convention strongly suggests that only one forum – arbitration – is proper from the moment a dispute is initiated until the time that it has been finally decided.⁶⁰ Although an anti-suit injunction does involve a second forum – a national court – the involvement of the court is fleeting and is only used as a means of protecting the primary forum.⁶¹ Once the exclusive authority of the tribunal has been re-established, the court issuing the anti-suit injunction is *functus officio*.

Furthermore, the court issuing the anti-suit injunction is not claiming that it has the power to decide either the merits of the dispute or the question of jurisdiction over the potentially arbitrable dispute.⁶² Instead, the court issuing the injunc-

AM. REV. INT’L ARB. 489, 499-519 (2009) [hereinafter Lew, National Court]; Chetan Phull, *U.S. Anti-Suit Injunctions in Support of International Arbitration: Five Questions American Courts Ask*, 28 J. INT’L ARB. 21 (2011); Alan Scott Rau, *Understanding (and Misunderstanding) “Primary Jurisdiction,”* 21 AM. REV. INT’L ARB. 47, 131-36 (2010); Reisman & Iravani, *supra* note 1, at 30-36. One interesting corollary issue is whether an arbitral tribunal has the power to issue an anti-suit injunction. See Emmanuel Gaillard, *Anti-Suit Injunctions Issued by Arbitrators*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? XIII ICCA CONG. SER. 235, 235-66 (Albert Jan van den Berg ed., 2006).

57. See New York Convention, *supra* note 6, art. II(3) (stating “[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”).

58. See BORN, *supra* note 9, at 1021; see also New York Convention, *supra* note 6, arts. II(1), II(3). Interestingly, Born claims that the positive obligation to arbitrate is less clear under the New York Convention than the negative duty not to litigate an arbitrable matter. See BORN, *supra* note 9, at 1014 (noting the United States is the exception to this rule, given the ability under sections 4, 206 and 303 of the FAA to compel arbitration anywhere in the world).

59. See New York Convention, *supra* note 6, art. II(3). The fact that anti-suit injunctions impose a duty on parties, rather than on courts, is not itself problematic, since there is no way for the courts of one country to directly affect the decisions or actions of another national court.

60. See *id.*, arts. II(1), II(3).

61. This reference to primary and secondary fora is not the same as the concept of primary and secondary jurisdiction. See *infra* notes 73-76 and accompanying text (distinguishing the concept of primary and secondary jurisdiction)

62. This was one of the problems of the infamous *West Tankers* case. See *Allianz Spa v. West Tankers*, Case C-185-07 [10 Feb. 2009], 2009 WL 303723. There, a dispute had been filed in an Italian court, despite the purported applicability of a contractual provision calling for arbitration in London. Although an English court had issued an anti-suit injunction against the Italian litigation, the English House of Lords (the highest court in the English legal system at that time) certified a question to the European Court of Justice to determine whether the English courts had such a power in light of certain European legislation concerning jurisdiction and choice of courts in inter-European matters.

tion leaves these matters to the arbitral tribunal in a manner that could be seen as reflecting a particularly robust version of the principle of negative *competence-competence* (*Kompetenz-Kompetenz*).⁶³ Under this analysis, the court is embracing the principle of negative *competence-competence* because the judge is assisting the arbitral tribunal in its task to determine its own jurisdiction, free of judicial interference. Interestingly, framing the use of anti-suit injunctions in terms of negative *competence-competence* may help build support for the device even among those who are philosophically opposed to such injunctions as a general matter.⁶⁴

Because these sorts of anti-suit injunctions are being used to protect the tribunal's jurisdiction, they can only arise prior to the initiation of the arbitration or while the proceedings are ongoing. That means anti-suit injunctions sought at the beginning or in the middle of a legal dispute would be presumptively permitted, to the extent that the injunction attempts to enjoin litigation in favor of arbitration.⁶⁵

However, a different analysis is necessary after the arbitration has concluded. At this point, Article II, with its presumption of a single forum, no longer applies, since the focus has shifted from the enforcement of an arbitral agreement to en-

See id. ¶ 18; *see also* Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12, 16/01/2001, art. 1(2)(d) (Brussels I Regulation). The European Court of Justice indicated that the Brussels I Regulation required the Italian court to have the first opportunity to determine whether it had jurisdiction over the matter, an outcome that many in the international arbitral community found objectionable. *See* Massimo V. Benedettelli, "Communitarization" of International Arbitration: A New Spectre Haunting Europe? 27 *ARB. INT'L* 583 (2011); Guido Carducci, *Arbitration, Anti-suit Injunctions and Lis Pendens Under the European Jurisdiction Regulation and the New York Convention*, 27 *ARB. INT'L* 171 (2011). Notably, the approach adopted by the European Court of Justice is contrary to the theory regarding anti-suit injunctions advanced in this Essay, since the New York Convention suggests that it is the arbitral tribunal – not the court – that should decide these jurisdictional matters absent a finding that the arbitration agreement is "null and void, inoperative or incapable of being performed." *See* New York Convention, *supra* note 6, art. II(3). The future of the *West Tankers* approach is somewhat in doubt, given ongoing discussions in Europe about revisions to the Brussels I Regulation, particularly with respect to the regulation's applicability to matters involving arbitration.

63. *See* de Ly & Sheppard, *supra* note 54, at 22 (stating that "in some jurisdictions, competence-competence has a further connotation, namely that the arbitral tribunal should be the first to make a determination as to jurisdiction, and national courts should defer to the tribunal, while retaining a right of review in any setting-aside application. This is referred to as negative competence-competence, and is more controversial").

64. Lawyers trained in the civil law tradition often oppose anti-suit injunctions, since such devices are not common in civil law courts. However, anti-suit injunctions are not necessary in civil law legal systems because of differing conceptions of jurisdiction and widespread use of the principle of *lis pendens*. *See* Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 *MICH. J. INT'L L.* 1003, 1061-64 (2007). The situation is different in arbitration, since the strict application of a rule of *lis pendens* might result in an arbitrable matter being heard in litigation. *See supra* note 62. However, this may ultimately be a common law method of considering the issue, for if each decision-maker, be it court or tribunal:

in deciding whether it has jurisdiction, must make its decision multilaterally, then it must also consider all the vertical arguments in view of the claims of other courts [or tribunals] to jurisdiction, and no court should restrain another court from making this decision autonomously. The question both courts face is the same and neither of them is hierarchically superior to the other.

Michaels, *supra*, at 1064. *But see* Gaillard, *supra* note 56, at 264-65 (advocating use of anti-suit injunctions issued by arbitral tribunals in some circumstances; author is a civil law-trained lawyer).

65. A different outcome might ensue if the injunction were framed as prohibiting all dispute resolution activities, arbitral or judicial. *See supra* note 54.

forcement of an arbitral award.⁶⁶ Now, the other aspects of the New York Convention come into play. Notably, a number of these provisions – most notably Articles V(1)(e) and VI – clearly indicate that post-arbitration proceedings may be brought in several different courts.⁶⁷

Although the Convention expressly recognizes that several different types of judicial proceedings may arise during the post-arbitration phase of the dispute (i.e., set aside proceedings and enforcement proceedings),⁶⁸ the Convention does not provide any required order of priority between these different actions. Indeed, only one provision – Article VI – even vaguely addresses the issue of the timing of post-hearing judicial involvement.⁶⁹ However, that article only goes so far as to indicate that a court faced with a motion to enforce an arbitral award may – in the court’s discretion – decide to stay enforcement proceedings pending the outcome of an action to set aside an award in the state in which, or under the law of which, the award was made.⁷⁰

This provision leads to certain conclusions. First, Article VI does not require the enforcing court to impose such a stay, so enforcement actions are permitted to proceed in parallel with set aside proceedings. Second, neither Article VI nor any other provision of the Convention provides enforcing courts with the authority to stay their own proceedings pending an enforcement action in another jurisdiction.⁷¹ This suggests that multiple enforcement actions may proceed simultaneously, if the parties so desire. Third, nothing in the New York Convention authorizes courts that are hearing an action to set aside an award to stay their own actions pending the outcome of an enforcement proceeding in another jurisdiction or to require parties to wait until the set-aside proceeding has been concluded before seeking enforcement elsewhere. Indeed, the latter of these two possibilities would be entirely contrary to one of the main purposes of the Convention, which was to abolish the need for double *exequatur*.⁷²

Therefore, the explicit text and the implicit purpose of the Convention suggest that parties may not only bring actions in multiple courts after an arbitration is concluded, but may bring these actions in whatever order and combination the moving party desires. While many parties may prefer to proceed *seriatim* so as to avoid incurring unnecessary costs, there is no requirement that they do so, which means that multiple actions may proceed simultaneously.

This observation has serious implications for anti-suit injunctions. Anti-suit injunctions have as both their purpose and effect the cessation of parallel proceedings so that the dispute may be heard at a single time, in a single place. However,

66. See New York Convention, *supra* note 6, arts. II(1), II(3).

67. See *id.* art. III (placing a duty of enforcement on all Contracting States); *id.* art. V(1)(e) (contemplating enforcement actions after or during set-aside proceedings in the state in which, or under the law of which, the award was made); *id.* art. VI (providing for a discretionary ability to stay enforcement proceedings subject to the outcome of annulment proceedings).

68. Because the New York Convention does not require the courts of one state to refrain from making a decision regarding an arbitral award in deference to the courts of another state, it is clear that multiple proceedings may take place after the arbitration has concluded. See FOUCHARD GAILLARD GOLDMAN, *supra* note 1, ¶¶ 1691-92.

69. See New York Convention, *supra* note 6, art. VI.

70. See *id.*

71. See *id.*

72. See BORN, *supra* note 9, at 2659 n.578; FOUCHARD GAILLARD GOLDMAN, *supra* note 1, ¶ 251.

if the New York Convention allows parties to initiate judicial proceedings in any jurisdiction and order they wish once the arbitration has concluded, then any attempt to halt one of these proceedings through an anti-suit injunction would be an improper “border incursion.” This conclusion holds true regardless of whether the action to be prohibited involves enforcement or annulment of the award.

Furthermore, this conclusion holds true regardless of which court is issuing the anti-suit injunction.⁷³ In this, the current critique differs from that undertaken by commentators who rely on the concept of primary and secondary jurisdiction to describe the propriety of certain types of anti-suit injunctions.⁷⁴ Analyses relating to primary and secondary jurisdiction are based on certain beliefs regarding the relative power of different states vis-à-vis the arbitration. Although courts and commentators who invoke the concept of primary and secondary jurisdiction base their analyses on the text of the New York Convention, the theory is very much a U.S. construct and is not embraced by everyone in the international arbitral community.⁷⁵ Indeed, many courts and commentators take the view that the New York Convention does not give precedence to the courts of any particular jurisdiction, not even those at the arbitral seat.⁷⁶ Therefore, any analysis that relies on the concept of primary and secondary jurisdiction will be found lacking by a number of people, simply as a result of the theoretical foundation of the analysis.

The analysis that is being advanced in this Essay does not rely on the relative power of the various courts. Instead of focusing on the location of the court issuing the anti-suit injunction, the analysis here simply concentrates on whether the New York Convention contemplates a single forum or multiple forums at the relevant time period. Not only does this latter approach have the benefit of simplicity, it frames and upholds the goals of the New York Convention in very straightforward terms, namely, to promote arbitration at the time when the dispute on the merits is initiated or ongoing and to promote enforcement of the arbitral awards at the time when the award has been rendered.

To some extent, different parties in arbitration will be treated differently, since the only time that an anti-suit injunction will even possibly be available is if the dispute, the parties, or the arbitration has some connection to a country that embraces the anti-suit injunction as a matter of basic civil procedure.⁷⁷ However, that does not seem unduly problematic, since parties with no connection to such a legal system would presumably not want to utilize an anti-suit injunction in any

73. Some commentators combine an analysis of the timing of the anti-suit injunction with an emphasis on which court would be issuing the anti-suit injunction. See *Lcw, National Court*, *supra* note 56, at 523 (noting the “greatest risk of . . . misuse” of anti-suit injunctions “appears to be when they are granted after the arbitration award, that is, where they are employed by courts of the seat of an arbitration to protect an arbitration award that has already been made”). However, the conclusion that anti-suit injunctions issued after the conclusion of the arbitration are presumptively improper appears to hold true regardless of the location of the court issuing the anti-suit injunction.

74. See *Reisman & Iravani*, *supra* note 1, at 12-17; see also *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 125 n.17 (2d Cir. 2007); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 308-10 (5th Cir. 2004); *BORN*, *supra* note 9, at 1286.

75. See *BORN*, *supra* note 9, at 1286; *FOUCHARD GAILLARD GOLDMAN*, *supra* note 1, ¶¶ 1666, 1688-89.

76. See *id*.

77. This connection is necessary if the court that has the power to order an anti-suit injunction is to have proper jurisdiction over the parties in question as a matter of domestic law.

way, and any party that did could simply seat the arbitration in a jurisdiction that offered injunctive relief of this nature.⁷⁸ Those parties that might worry about being subject to an unwanted anti-suit injunction in cases involving a common law party or seat could explicitly bar the availability of anti-suit injunctions in their arbitration agreements, although that might be seen as heralding an intent not to comply with the terms of the arbitration agreement in the future.

One inevitable result of this type of approach is that it will curtail certain powers that are normally available to various courts as a matter of national law. For example, a U.S. court faced with a request for an anti-suit injunction should deny the request if the injunction relates to proceedings to enforce or set aside an arbitral award in another state, even if the requesting party has met all the necessary qualifications for obtaining an anti-suit injunction as a matter of domestic U.S. law.⁷⁹ Although U.S. judges may not appreciate constraints of this nature, such limitations are both necessary and permissible given that the New York Convention not only constitutes binding federal law but also reflects the United States's international treaty obligations.⁸⁰ Since there is a "very specific interest of the federal government in ensuring that its treaty obligation to enforce arbitration agreements covered by the Convention finds reliable, consistent interpretation in our nation's courts,"⁸¹ "no mere disagreement with a party's approach to enforcing or attacking a foreign arbitral award under the Convention should suffice to support an anti-foreign-suit injunction."⁸²

This example provides only a cursory look at how the concept of border crossings and border incursions might play out in practice. However, this discussion has also shown how difficult it can be for parties and courts to navigate a system that uses a context-dependent analysis to identify which interactions between courts and arbitral tribunals are permissible.⁸³ Because border skirmishes

78. Interestingly, the English House of Lords noted in the *West Tankers* case that the availability of anti-suit injunctions constituted one of England's competitive advantages in the world of international commercial arbitration. See *Allianz Spa v. West Tankers*, Case C-185-07 [10 Feb. 2009], 2009 WL 303723, ¶ 17.

79. To obtain an anti-suit injunction in a U.S. court, a movant must typically demonstrate that the parties in the foreign litigation are the same as those who are bound by the agreement to arbitrate; that the foreign litigation involves the same issues as would be resolved under the arbitration agreement; that irreparable injury or grave hardship would occur absent the injunction; and that the public policy of the U.S. forum warrants a grant of injunctive relief. See *BORN*, *supra* note 9, at 1039-41. Furthermore, courts considering cross-border disputes must weigh matters of international comity against "the need to 'prevent vexatious or oppressive litigation' and to 'protect the court's jurisdiction.'" *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366 (5th Cir. 2003); see also *Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 471 (6th Cir. 2009) (noting that although "it is well settled that American courts have the power' to issue foreign anti-suit injunctions, '[c]omity dictates that [these injunctions] be issued sparingly and only in the rarest of cases'").

80. See *Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538-39 (1995); Kaufmann-Kohler, *supra* note 56, at 112 (noting increasing number of U.S. courts that exercise self-restraint).

81. *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 579 (7th Cir. 2007); see also *New York Convention*, *supra* note 6.

82. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 125 n.17 (2d Cir. 2007).

83. Certainly, a more black-and-white approach would be easier to apply and predict, and would avoid uncomfortable questions about where to draw the line between permissible and impermissible behavior. Interestingly, some lawyers may be predisposed to prefer predictive certainty while others

arise in a range of situations, including but not limited to anti-suit injunctions, it is therefore useful to consider alternative means of addressing and resolving the various interactions between litigation and international commercial arbitration.

One way to address the various border skirmishes that can arise between litigation and international commercial arbitration is through the type of law that is used to resolve these sorts of disputes. This is the approach suggested by Frédéric Bachand in his article, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*.⁸⁴ According to Bachand, judges asked to consider matters relating to international commercial arbitration should rely on principles of transnational law whenever domestic law is unclear. This would result in a more satisfactory outcome as a matter of public and private international law because courts that looked to international standards would be more likely to live up to their international obligations under the relevant treaties. Furthermore, it would also help ensure the continued vitality of arbitration, since it would constitute a clear means of differentiating arbitration from litigation.

Comparative advantages and disadvantages of different procedures were also discussed by Peter Rutledge in *Convergence and Divergence in International Dispute Resolution*.⁸⁵ In his article, Rutledge challenges the conventional wisdom that parties choose international commercial arbitration primarily because foreign arbitral awards are significantly easier to enforce than foreign judgments. According to Rutledge, the decision to adopt arbitration over litigation is not based on a single-issue analysis, but is instead based on a multiplicity of factors distinguishing one form of dispute resolution from another. This suggests that arbitration should retain its unique qualities so as to maintain its competitive edge.⁸⁶ Therefore, if judges adopt transnational legal principles in cases involving international commercial arbitration as Bachand suggests⁸⁷ and that constitutes a clear difference from litigation, then that distinction will help drive parties' procedural choices one way or another.

Choice of law concerns were also considered to some extent by Christopher Drahozal. In his article, *The New York Convention and the American Federal System*, Drahozal tackles the thorny question of federal preemption under the Federal Arbitration Act (FAA).⁸⁸ According to Drahozal, the FAA leaves some room for state law in cases involving international commercial arbitration, thus providing an opportunity for parties to choose to have the law of individual U.S. states govern their international arbitrations. This could open the door to a number of

are more comfortable with a context-dependent analysis. These preferences may be based on different conceptions of "jurisdiction," as it is defined in the judicial realm. See Michaels, *supra* note 64, at 1011 (claiming that American visions of jurisdiction reflect an "'in or out' approach that is vertical, unilateral, domestic, and political," while the European perspective, as espoused in the Brussels I Regulation, reflects an "'us or them' paradigm that is horizontal, multilateral, international, and apolitical"). This fundamental difference of opinion, which may be irreconcilable in the judicial realm, could also affect people's views of jurisdictional issues in arbitration. See *id.* at 1005-11.

84. See Bachand, *supra* note 52.

85. See Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RESOL. 49 (2012).

86. For example, if disclosure in arbitration begins to resemble discovery in litigation, then that issue will not play a role in driving parties toward or away from arbitration.

87. See Bachand, *supra* note 52.

88. See Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. DISP. RESOL. 101 (2012), see also 9 U.S.C. §§ 1-307 (2011).

comparative advantages of the type identified by Rutledge,⁸⁹ since parties could use state law to further tailor their international arbitral proceeding. For example, Drahozal believes the use of U.S. state law might allow parties to adopt a number of distinctive procedures ranging from expanded judicial review of arbitral awards to the possibility of enforcing foreign arbitral awards on grounds other than those set forth in the New York Convention.⁹⁰

In their submissions, Bachand, Rutledge and Drahozal all seek either to (1) explain the current tensions between courts and arbitral tribunals or (2) propose new ways of either easing or embracing those tensions. However, some readers may be less interested in resolving existing pressure points than in simply identifying them. People who fall into this camp may find another of the articles found in this symposium issue, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, to be a useful practical guide to the way in which U.S. courts currently interact with international commercial arbitration.⁹¹ The article is organized on a motion-by-motion basis so as to allow arbitrators, practitioners and new or infrequent participants in international commercial arbitration to jump straight to issues of importance. However, readers are strongly recommended to scan through the introductory sections as well, since there are important foundational matters discussed in those sections that are invaluable in setting later sections into context.

Some commentators work on a large, relatively comprehensive basis while others focus their analysis more narrowly, delving into particular problems in more detail. The last three contributors to this symposium issue adopt the latter approach to good effect. For example, in her article, *The Interference of the Court of the Seat with International Arbitration*, Giulia Carbone sets aside issues relating to the enforcement of arbitral awards (which she says are routinely addressed in the legal literature) and focuses on the more unusual question of judicial involvement with arbitral procedures during the early stages of a dispute.⁹² In so doing, Carbone includes examples from arbitration in the private commercial realm as well as arbitrations under the North American Free Trade Act (NAFTA) and the ICSID Convention, thus providing an interesting cross-section of issues relating to judicial intervention in the early stages of a dispute.⁹³

Another helpful way of analyzing border skirmishes between courts and arbitral tribunals is to place the discussion within a particular context. This can be a particularly useful technique when examples are drawn from developing areas of law, since new problems can sometimes lead to new solutions. One such example involves the Court of Arbitration for Sport (CAS), which only came into being in 1984. However, as Louise Reilly describes in her article, *An Introduction to the Court of Arbitration for Sport (CAS) & Observations on the Role of National Courts in International Sports Disputes*, the CAS has developed into an extremely

89. See Rutledge, *supra* note 85.

90. See New York Convention, *supra* note 6; see Drahozal, *supra* note 88.

91. See Strong, *Navigating*, *supra* note 25. Eventually, of course, U.S. practitioners will have the benefit of the *Restatement (Third) of the U.S. Law of International Commercial Arbitration*, but that project is still several years away from completion.

92. See Carbone, *supra* note 52.

93. See ICSID Convention, *supra* note 48; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

successful and well-regarded means of resolving certain categories of disputes due, in part, to its innovative approach to procedural matters.⁹⁴ Although the CAS only deals with sports concerns, the various procedural mechanisms, including the relationship between the CAS and the Swiss Federal Tribunal, may yield some interesting ideas for courts, commentators, and counsel seeking to improve the international commercial regime outside the area of sports law.

Another rapidly changing area of law involves class arbitration, which is the topic of Gary Born's article, *The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*.⁹⁵ Although class arbitration is often seen as a predominantly or even uniquely American device, the procedure is gaining increased relevance and interest internationally. Indeed, several of the cases addressed by Born were prominently discussed in a groundbreaking award in the realm of international investment arbitration,⁹⁶ and future instances of cross-fertilization between the two fields are highly likely.

As the preceding discussion has shown, national courts are becoming increasingly involved with international commercial arbitration. Although this observation may be disheartening to those who support the autonomy of the international arbitral regime,⁹⁷ the continued interaction between courts and tribunals is less troubling to those who view international commercial arbitration as a "hybrid" method of dispute resolution, with numerous opportunities for permissible "border crossings."⁹⁸

That is not to say that courts can or should become involved with every aspect of arbitration. Instead, impermissible "border incursions" diminish the effectiveness of international commercial arbitration and could erode public or private support for the international arbitral regime. Therefore, courts, counsel, and commentators must remain vigilant in policing borders skirmishes, both to protect permissible border crossings and minimize improper border incursions. As the excellent submissions to this year's annual symposium for the University of Missouri's Center for the Study of Dispute Resolution show, the arbitral community is more than able to undertake that task.

94. See Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63 (2012).

95. See Gary Born & Claudio Salas, *The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21 (2012).

96. See *Abaclat (formerly Beccara) v. Argentine Republic*, ICSID Case No. Arb/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion dated Oct. 28, 2011, ¶¶ 150, 152, 172, 237, available at http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf.

97. See *supra* notes 1-2 and accompanying text.

98. See Born Keynote Address, *supra* note 35.