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# Convergence and Divergence in International Dispute Resolution

Peter B. Rutledge\*

Is the golden age of international arbitration waning? According to some reports, arbitration's best days may be behind it.<sup>1</sup> Criticism comes from many corners. Some criticize arbitration as being too costly, while others argue that arbitration is lawless.<sup>2</sup> The judiciaries of some nations in developing countries have shown greater hostility toward arbitration by resuscitating memories of the Calvo doctrine.<sup>3</sup> Latin America is a prime example.<sup>4</sup> Finally, others argue arbitration has become indistinguishable from litigation.<sup>5</sup>

Unquestionably, arbitration has changed since the New York Convention ushered in the current era. Many nations have modernized their international arbitration laws, inspired in many cases by the UNCITRAL Model Law.<sup>6</sup> Arbitral institutions have become more complex and more detailed, as they address previously unforeseen problems such as consolidation and fast-track arbitration.<sup>7</sup> A host of new regional institutions have sprung up, competing for business with the major international institutions such as the International Chamber of Commerce.<sup>8</sup> A variety of "ride alongs," like the IBA Rules, address issues such as disclosure and evidence taking in international arbitral proceedings.<sup>9</sup> While some of these developments have improved arbitration, others have undoubtedly prompted the sorts of criticisms described above.

Yet the notions that arbitration is somehow in decline – or that its golden age has ended – are overblown. Arbitration should not attempt to shed the advances it has made in pursuit of some long-lost golden age. Like any good firm in a competitive marketplace, arbitral bodies should instead embrace the above-described changes and utilize them to help the practice of arbitration gain a comparative

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1 See, e.g., Caroline S. Richard, *Washington, D.C., ITA-ASIL Conference – Arbitration: The End of the Golden Age*, GLOBAL ARB. REV., Apr 27, 2010, at 36.

2 For a thorough discussion of the literature, see Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187 (2006).

3 See Jonathan C. Hamilton, *Three Decades of Latin American Commercial Arbitration*, 30 U. PA. J. INT'L L. 1099 (2009).

4 *Id.* at 1100.

5 For a good recent discussion, see Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 U. ILL. L. REV. 1 (2010).

6 See UNCITRAL, *Status 1985 - UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006*, (Feb. 2, 2012, 2:40 PM), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html).

7 See Alan Scott Rau, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX INT'L L. J. 89 (1995).

8 See Jenny S. Martincz, *Toward an International Judicial System*, 56 STAN. L. REV. 429, 441 n. 45 (2003).

9 IBA RULES ON TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (International Bar Association Council 2010).

advantage over its competitors.<sup>10</sup> Put another way, even if arbitration is becoming more like litigation, it should not attempt to shed its litigation-like qualities. Arbitration should instead strive to develop characteristics that distinguish it from litigation (and other forms of dispute resolution). By doing so, arbitration will preserve some comparative advantages in the competitive marketplace for dispute resolution services.

This symposium submission draws heavily on law and economic literature to develop its thesis. Part I lays out the literature behind the parties' choice to opt for arbitration. It also builds upon that literature by attempting to sketch out some preliminary reasons why parties might opt for arbitration over another form of dispute resolution. Part II charts how, along various axes, arbitration has begun to converge with litigation – thereby depriving it of a comparative advantage that it once enjoyed – due to innovations in arbitration and innovations in the field of international civil litigation. In brief, the traditional advantages enjoyed by arbitration – enforceable agreements and awards – are waning as the international legal architecture governing jurisdiction, forum selection clauses, and the enforcement of foreign judgments begins to catch up. Part III identifies present or future areas where arbitration, as a form of dispute resolution, can continue to enjoy a comparative advantage and remain on a surer, more competitive footing in the future. In the long run, the comparative advantages enjoyed by arbitration generally will not lie with enforceability issues but with choice-of-law issues. Unconventional sources like state arbitration laws and regional conventions will play an important role in this effort.

## I. FRAMEWORK

Gary Born's keynote address for this symposium provides an apt starting point for the analysis.<sup>11</sup> Born reminds that the hallmark of virtually all arbitration is consent.<sup>12</sup> In other words, parties exercise the choice to submit to arbitration rather than some other form of dispute resolution. Absent that choice, litigation supplies the default option. So why do parties sometimes exercise that choice?

Law and economics supply a helpful framework to answer that question. Resorting to law and economics is particularly appropriate in this context, because users of international dispute resolution tend to be sophisticated business entities that, other things being equal, are especially likely to make dispute resolution choices based on a rational calculus. Drawing on the literature, two strands help to frame this paper.

The first concerns why parties choose to arbitrate. The groundbreaking work of Richard Posner, Steve Shavell, and Keith Hylton provide the building blocks for this analytical framework.<sup>13</sup> Parties – consumers in the legal marketplace –

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10. In this case, it would appear to be litigation pursuant to forum selection clauses or, increasingly, mediation.

11. 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/>.

12. *Id.*

13. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995); Keith Hylton, *Agree-*

can resolve their disputes through various forms of dispute resolution, whether through settlement, mediation, arbitration, litigation, administrative proceedings, criminal proceedings or other forums. Courts, arbitrators, mediators and other suppliers of dispute resolution are firms in the legal marketplace competing for the opportunity to provide services. Consumers' choices among these providers are a function of the marginal costs and benefits of the various forms. In a bilateral setting, where each party has its own cost/benefit calculus, parties can opt into a particular form where their own optimal preferences match.

Consider a simple example. Suppose A and B have a dispute. A believes that, in the case of settlement, she can receive an expected payout of \$50 with \$10 in attorney's fees. However, if the case goes to trial, A has a 75% chance of receiving a \$70 verdict but with \$50 in unrecoverable attorneys' fees. Under those circumstances, it becomes rational for A to settle. B will have his own preference curve based on a mixture of expected outcomes and costs of those various forms of dispute resolution. Where A's and B's preference curves intersect, they achieve agreement on the preferred form of dispute resolution, whether resolution comes through a settlement, civil litigation or otherwise.

The foregoing example models how parties behave once a dispute arises. According to the model, parties undertake a similar calculus in the pre-dispute stage as well. Put concretely, parties engage in this cost-benefit analysis when deciding whether to insert a dispute resolution clause in their contract, and what form such a clause might take. According to Hylton's model, a party will prefer arbitration over other forms of dispute resolution if the marginal benefits of arbitration exceed the marginal costs.<sup>14</sup> Where both parties to a contract prefer arbitration to another form of dispute resolution, that intersection of preferences creates the conditions under which parties agree to insert an arbitration clause in their contract. Even where their preferences do not intersect, agreement remains possible. It may be possible where the party preferring arbitration has such a dominant bargaining position that it can dictate inclusion of the term in the contract. Or, even where this condition of dominance is lacking, it may be possible where the party preferring arbitration makes some form of side payment to the party not preferring it. Put concretely, this might occur in contract negotiations where one party agrees to arbitration in return for a concession from its counterparty on some matter unrelated to the arbitration. Where neither of these conditions exists, the parties may be unable to agree upon a method of dispute resolution in their contract. At that point, litigation becomes the default option.

Regrettably, much scholarship on the law and economics of dispute resolution selection stops at this point in the analysis. While it allows us to model at a relatively high level of abstraction the conditions under which parties opt for arbitration, it does a relatively poor job identifying the circumstances (or, put more theoretically, the preference sets) under which those agreements will obtain.

At this point, a second strand of literature becomes helpful: the literature documenting the efforts within the arbitration industry to encourage the use of arbitra-

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*ments to Waive or to Arbitrate Legal Claims. An Economic Analysis*, 8 SUP. CT. ECON. REV. 209 (2000).

14. Hylton, *supra* note 13, at 225.

tion.<sup>15</sup> Perhaps the most striking examples come from efforts by nation states to market themselves as arbitral forums. For example, Belgium modified its international arbitration law to permit parties to completely dispense with judicial review of the merits of the arbitral award in an international arbitration between non-Belgian parties.<sup>16</sup> For similar reasons, Singapore modified its arbitration law to relax rules governing representation in international arbitration proceedings in Singapore.<sup>17</sup> As some may know, Singapore fell under harsh criticism for decisions in the late 1980s that restricted the ability of parties to be represented by counsel of their choice. This prompted concern within Singapore that such a rule was hampering its ability to position itself as the forum of choice for commercial disputes in Asia. Singapore subsequently amended its international arbitration law to eliminate any restrictions on the parties' choice of counsel to precisely enhance its marketability as a forum of choice.<sup>18</sup> A final example comes from a recent white paper by the British government assessing proposed changes to the European Regulation on Jurisdiction and the Enforcement of Judgments.<sup>19</sup> That white paper attempted to quantify the importance of arbitration to the British economy and evaluated the impact of the proposed changes on Britain's marketability as an arbitral forum. This second strand of literature, thus, focuses on the comparative economic advantages of particular arbitral forums.

My goal in this paper is to bridge a gap between this second strand and the first, more theoretical strand. What is missing from both strands is a concrete, system-wide understanding about why parties opt for arbitration as opposed to other forms of dispute resolution. In other words, I seek both to give concrete understanding to the theoretical model articulated in the Shavell-Hylton strand of literature and, at the same time, move up a level of abstraction from the country-specific analysis of what makes a particular nation a desirable forum, to the more generic question of what makes arbitration a desirable form of dispute resolution. The question that interests me, therefore, is whether we can move beyond these examples of inter-jurisdictional competition over the business of arbitration to broader issues of inter-systemic competition over the business of disputes generally. In other words, are there ways in which arbitration systemically differentiates itself from litigation as a preferred form of dispute resolution in much the same way that Belgium or Singapore distinguishes itself as an arbitral forum?

## II. CONVERGENCE AND DIVERGENCE IN INTERNATIONAL DISPUTE RESOLUTION

This leads me to the concepts of convergence and divergence. By convergence, I mean those areas where arbitration and litigation increasingly resemble each other. The increased use of discovery techniques in international arbitration

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15. Christopher R. Drahozal, *Regulatory Competition and the Location of International Arbitration Proceedings*, 24 INT'L REV. L & ECON. 371 (2004).

16. Code Judiciaire, art. 1717 (Belg.).

17. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2295 (3d ed. 2009).

18. See generally *id.*

19. United Kingdom Ministry of Justice, *Revision of the Brussels I Regulation - How should the UK approach the negotiations?*, (Feb. 2, 2012), <http://www.justice.gov.uk/downloads/consultations/brussels-i-europan-commission-proposa.pdf>.

represents a degree of convergence between international arbitration and the civil litigation system in the United States. By divergence, I mean those areas where arbitration and litigation remain differentiated. For example, the freedom parties enjoy to choose their legal representative in an arbitration proceeding differentiates that form of dispute resolution from national courts, which generally continue to require representation (or appearance) by a member of the local bar.

Traditional accounts of arbitration's advantages often point to the comparatively greater enforceability of arbitration agreements and awards. Yet that traditional advantage has waned over time, and its continued salience is highly contextual. A few examples below illustrate the point.

Consider two parties – A and B – who are negotiating a sales contract. In such a transaction (as well as with most contracts), a key consideration that factors into a party's assessment is the enforceability of the result of the dispute (whether a judgment in the case of litigation or an award in the case of arbitration). Assume further that both parties have most of their assets in their respective home countries. If we stipulate further that A is a party from Germany and B is a party from France, then the choice of dispute resolution forms – arbitration versus forum selection – does not turn critically on the enforceability axis. Both countries are members of the European Union and, consequently, subject to Regulation 44/2001, governing the enforcement of jurisdiction and judgments.<sup>20</sup> At the same time, both countries also are members of the New York Convention and the European Convention, governing the enforcement of arbitration agreements and arbitration awards. Consequently, considerations of enforceability will not dominate the calculus about each party's preference regarding the choice of form of dispute resolution. Other factors will become more salient.

Now take the same example but modify it in one respect. Assume now that A hails from the United States instead of Germany. In that case, enforceability considerations become more dominant and may favor one form of dispute resolution. That is because, while both the United States and France are parties to the New York Convention, the countries are not parties to a bilateral or multilateral treaty governing judgment enforcement. Consequently, each party (to the extent it envisions the possibility of being a plaintiff or claimant in the dispute) has a reason to prefer arbitration over litigation. Thus, in this latter example, considerations of enforceability become more dominant in a party's calculus about their preferred form of dispute resolution in the contract negotiation stage.

Here, it is worth pausing and acknowledging various oversimplifications in the analysis. The first example presupposes an equal likelihood of enforceability in the two regimes of arbitration and litigation. This might not be the case either, because the legal architecture sets forth subtly different grounds for refusing enforcement of an award or judgment, such as the non-arbitrability example. It might also not be the case because, even if the documents set forth common grounds, such as a public policy exception, the courts of a country might accord different interpretations to the commonly phrased ground. For example, a line of jurisprudence holds that the public policy ground set forth under Article V.2.b of

20. Council Regulation 44/2001, 2001 O.J. (L 12) 1 (EC). For those unfamiliar with the Regulation, it sets forth common standards for judicial jurisdiction and judgment enforcement in member states of the European Union. *See* GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES* 105-06 (5th ed. 2011).

the New York Convention must be interpreted narrowly. Likewise, the latter exception presupposes that the lack of a bilateral or multilateral treaty between the United States and France governing judgment enforcement complicates efforts at obtaining recognition and enforcement under the respective country's judgment enforcement laws. That might not be the case, for example, if the applicable national law is particularly enforcement-friendly.

Even accepting that arbitration presently offers a comparative advantage, those advantages are slowly waning. Proposed revisions to the Brussels Regulation on Jurisdiction and the Enforcement of Judgments would make intra-European judgments even more easily enforced than analogous arbitral awards.<sup>21</sup> With respect to the US-Europe example, both the United States and the European Union have shown a much greater receptivity to the enforcement of forum selection clauses.<sup>22</sup> Moreover, if the United States ratifies (and Europe incorporates) the recently completed Hague Convention on Choice of Court Agreements, that treaty will provide a robust pro-enforcement regime for judgments rendered by courts designated pursuant to such clauses.<sup>23</sup> This development would largely eliminate much of the comparative advantage as to the enforceability of the end result – award versus judgment – that arbitration presently enjoys in the transatlantic commercial setting.

More recent efforts at shoring up the comparative advantages of international arbitration have focused on issues of interim measures and other forms of judicial assistance.<sup>24</sup> Three common examples of such assistance include asset freezes, antisuit injunctions and discovery orders. Over the past several decades, each of these areas of law has transformed in such a manner that the law governing arbitration no longer differs radically from that involving litigation. In my view, while these reforms are probably laudable, they will, subject to a few exceptions discussed in the next Part, do little to shore up any comparative advantages for arbitration in the dispute resolution marketplace.

Begin with antisuit injunctions. Focusing on the United States for a moment, such injunctions historically have been available as an exercise of a court's equitable power to control its docket and to prevent parallel proceedings that either threaten the issuing court's jurisdiction or undermine an important public policy.<sup>25</sup> While United States courts have not articulated a consistent standard on when they will issue such injunctions, they appear to coalesce around the common view that such injunctions are appropriate where the parallel foreign litigation is brought in violation of an arbitration clause. This approach illustrates a form of convergence

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21. Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Dec. 2010), 748, [http://ec.europa.eu/justice/civil/files/comm-2011-445\\_cn.pdf](http://ec.europa.eu/justice/civil/files/comm-2011-445_cn.pdf).

22. BORN & RUTLEDGE, *supra* note 20, at Ch. 5.

23. The Hague Conference on Private and International Law, *Convention of 30 June 2005 on Choice of Court Agreements*, (June 30, 2005).

24. By judicial assistance, I mean some act ordered by a court in support of arbitration. See Christopher Drahozal, *Party Autonomy and Interim Measures in International Commercial Arbitration*, in INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 179 (Albert Jan van den Berg, ed. 2003); Julian Lew, *Does National Court Involvement Undermine the International Arbitral Process?*, 24 AM. U. INT'L L. REV. 489 (2009); Daniel Tan, *Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers*, 47 VA. J. INT'L L. 545 (2007).

25. BORN & RUTLEDGE, *supra* note 20, at Ch. 6.

with respect to this form of judicial assistance in United States courts. Such decisions typically rest on the federal policy favoring arbitration.<sup>26</sup> While this line of authority has been praised in some corners as a boost for arbitration, it also has had the effect of aligning arbitration jurisprudence with well-established jurisprudence upholding antisuit injunctions against parallel proceedings brought in violation of a forum selection clause.<sup>27</sup> In other words, the convergence between these two lines of authority has eliminated any meaningful distinction between arbitration clauses and forum selection clauses as a desirable form of dispute resolution.

A similar convergence has occurred in Europe, albeit in the opposite direction. While many European countries traditionally have been reticent even to issue an antisuit injunction, English courts enjoy a long history of doing so, whether in the context of litigation or arbitration.<sup>28</sup> The original adoption of Regulation 44/2001 had the potential to generate a differentiating feature between the two forums.<sup>29</sup> The Regulation's "first filed" rule effectively thwarted antisuit injunctions by English courts in the litigation (or forum selection) context. The exclusion of arbitration from the regulation held out the possibility of a different rule with respect to antisuit injunctions favoring arbitration. Yet the *West Tankers* decision scuttled that possibility by holding that an English court's antisuit injunction was incompatible with Regulation 44/2001 even when it was issued in support of an arbitration sited in England.<sup>30</sup> The effect of *West Tankers* has been to place arbitration clauses and forum selection clauses on equal footing, at least as to this axis, much like the aforementioned line of authority has done so with respect to United States law. The only difference is that while the American line of authority has created convergence around a rule permitting antisuit injunctions, the European experience has created convergence around a rule forbidding such relief.<sup>31</sup>

Asset freezes represent another area where the law governing arbitration and litigation has slowly converged, particularly in the United States. While asset freezes have long been a hallmark of civil litigation, their embrace in international arbitration is a much more recent phenomenon. In the immediate aftermath of the United States' accession to the New York Convention, a few early decisions held that the Convention actually barred asset freezes and, by implication, other forms of judicially-ordered provisional measures.<sup>32</sup> Rather, the logic was that, under Article II(3) of the New York Convention, a court's role was limited to "referring"

26. See, e.g., *Ibeto Petrochemical Industries, Ltd. v. M/t T Boffen*, 475 F.3d 56, 64 (2d Cir. 2007).

27. See, e.g., *Kacpa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626-28, (5th Cir. 1996).

28. George Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 592, 594 (1990).

29. See Regulation 44/2001, *supra* note 20.

30. Daniel Rainer, *The Impact of West Tankers on the Parties' Choice of a Seat of Arbitration*, 95 CORNELL L. REV. 431 (2010).

31. The December 2010 proposal by the European Commission to reform Regulation 44/2001 may change that landscape. See *infra* Part III; see also European Commission, *Proposal for a Regulation of the European Parliament and Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Dec. 2010), available at [http://ec.europa.eu/justice/policies/civil/docs/com\\_2010\\_748\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf) [hereinafter "Brussels White Paper"].

32. See, e.g., *I.T.A.D. Assoc. v. Podar Broas*, 636 F.2d 275 (4th Cir. 1981); *McCreary Tire & Rubber Co. v. Ceat S.P.A.*, 501 F.2d 1032 (3d Cir. 1974); *Cooper v. Ateliers de la Motobecane S.A.*, 456 N.Y.S.2d 728 (1982).



the parties to arbitration (unless one of the grounds set forth in that article invalidated the agreement). More recent decisions backed away from that crabbed view of a court's role, initially concluding that courts had the power to order asset freezes where the arbitration is sited in the court's jurisdiction.<sup>33</sup> This line of authority ultimately culminated in the much-heralded *Sojitz* decision, holding that New York courts at least had the authority to freeze assets in support of an arbitration even where that arbitration was sited outside the United States.<sup>34</sup> Much like the development in the field of antisuit injunctions, developments like the New York law and decisions like *Sojitz* were heralded as measures designed to support arbitration. Yet the effect, again, was to advance the convergence between arbitration law and litigation, thereby further eliminating a feature potentially distinguishing the forms.

The final example, discovery, presents an area where there has been some convergence but also some divergence, in unusual respects. Convergence has come largely in Section 1782 proceedings. Section 1782 authorizes an interested person to petition a court to subpoena testimony or the production of documents for use in support of a proceeding before a foreign or international tribunal.<sup>35</sup> While the statute traditionally was used to obtain evidence for use in a civil proceeding before a foreign court, early efforts to invoke the statute to support a foreign arbitration fell flat. That changed in 2004 largely as a result of the Supreme Court's *Intel* decision.<sup>36</sup> While *Intel* did not even formally involve arbitration, dicta in the Court's decision strongly suggested that an arbitral tribunal qualified as a foreign or international tribunal under the statute. Those dicta spawned an array of section 1782 petitions seeking evidence in support of arbitration (many of them thanks to the Chevron Corporation) and have largely eliminated any difference between the choice of a foreign judicial forum and a foreign arbitral forum in terms of the availability of this form of judicial assistance.<sup>37</sup> Recently, a federal district court upheld yet another section 1782 petition in support of an international arbitration.<sup>38</sup> Some post-*Intel* courts, though, remain skeptical of the use of this vehicle to support a foreign arbitration, potentially preserving a degree of divergence.

Curiously, while we have seen convergence in the area of discovery supporting foreign proceedings, discovery supporting domestic proceedings has tended to diverge. Litigation in the United States, whether or not subject to a forum selection clause, is marked by ample discovery whether directed at an opposing party or a third party.<sup>39</sup> The entire tenor of the rules is structured to favor party-driven discovery, with courts becoming involved only to the extent the target of the discovery chooses to fight a request. Despite the express (and somewhat exceptional) subpoena power granted to arbitrators in section 7 of the Federal Arbitration Act (FAA), judicial gloss on that statute has significantly trimmed its availability. Most importantly, decisions like *Hay Group* and *Life Receivables Trust* have

33. See, e.g., *Contichem LPG v. Parsons Shipping Co.*, 229 F.3d 426 (2d Cir. 2000).

34. See N.Y.C.P.L.R. 7502 (c); *Matter of Sojitz*, 921 N.Y.S.2d 14 (2011).

35. 28 U.S.C. §1782 (2011).

36. *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004).

37. BORN & RUTLEDGE, *supra* note 20, at Ch. 11.

38. *In re the Republic of Ecuador*, 2011 WL 4434816 (N.D. Cal. Sept. 23, 2011).

39. 9 U.S.C. §7 (2011).

trimmed the sweep of section 7. These cases have done so by interpreting section 7 to only permit the production of evidence and testimony at an actual hearing before the arbitrators, and not in the form of pre-hearing discovery outside the presence of the fact-finder (which is typically associated with civil litigation).<sup>40</sup> The effect has been a rare divergence with respect to the United States courts' attitude to this form of judicial assistance, making such assistance more readily available in civil litigation than an analogous arbitration.

I am skeptical of judicial assistance reforms as a panacea for arbitration. I should acknowledge that, in at least two areas, judicial assistance still holds forth the promise of securing some comparative advantage to arbitration as a product in the dispute resolution marketplace.

The first comes in the area of antisuit injunctions. While I note above that the law in this area has tended to converge to favor such injunctions in the United States and disfavor them in Europe, a proposed change to European law would actually lock in a significant comparative advantage for arbitration. A proposed revision to Regulation 44/2001, designed to overrule the *West Tankers* decision, would set forth an exception to the ordinary "first filed" rule in cases involving arbitration clauses. It would require courts in other member states to refrain from exercising jurisdiction – a sort of *lis pendens* mandate, though technically not an antisuit injunction – once proceedings involving the enforcement of the arbitration agreement are brought in the courts of the arbitral forum.<sup>41</sup> Notably, this rule would apply *only* in cases of arbitration agreements and not cover forum selection clauses. Though the proposal has met with some skepticism from within the arbitration community, it would actually strengthen the divergence between arbitration and litigation by creating a European-wide forum selection rule strengthening the enforceability of arbitration clauses. This would provide European parties a valuable incentive to favor arbitration over other forms of dispute resolution.

The second area where judicial assistance can cement a comparative advantage for international commercial arbitration is the area of local standard annulments.<sup>42</sup> This involves a scenario where the courts of the arbitral forum – or theoretically also the country supplying the procedural law – set aside the award, yet the prevailing party still seeks to enforce it in a third country. As has been well documented, courts around the world are divided over the enforceability of the award in such circumstances. Though early decisions such as *Chromalloy* and *Hilmarton* showed a receptiveness to such "floating awards," the more recent trend has been to find that such awards are not enforceable anywhere.<sup>43</sup> Regardless of which position correctly interprets the New York Convention, the *Chromalloy/Hilmarton* position gives arbitral awards a privileged status compared to their judgment counterparts. The prospect for such a comparative advantage is especially ripe in Europe, where the European Convention of 1961 expressly con-

40. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008).

41. Brussels White Paper, *supra* note 31.

42. For a discussion, see Charles B. Ford & Peter B. Rutledge, *Termorio and the Problem of Local Standards Annulments*, *TRANSNAT'L DISP. MGMT.* (Sept. 2006).

43. In *Chromalloy* and *Hilmarton*, American and French courts respectively held that arbitral awards set aside in the arbitral forum could still be enforced in a third country where the award debtor had assets. See *In the Matter of Chromalloy Acroservices*, 929 F. Supp. 907 (D.D.C. 1996); *Hilmarton Ltd. v. O.T.V.*, 22 Y.B. COMM. ARB. 655-57 (1994).

templates the possibility of enforcing annulled awards and limits the extent to which the fact of annulment can supply a basis for refusing enforcement in a third country. By contrast to the treatment of awards under the New York Convention or the European Convention, judgments receive no analogous treatment. Once vacated by a reviewing body in the rendering forum, they would be entitled to no currency under the prevailing treaty regime in Europe or the foreign judgment enforcement laws in the United States.

### III. THE FUTURE COMPARATIVE ADVANTAGES OF ARBITRATION

If arbitration's traditional advantages are waning and judicial assistance does not offer much hope at providing a comparative advantage, where is an advantage likely to come from? In my view, the strongest grounds for arbitration to retain a comparative advantage – and to remain competitive in the marketplace for dispute resolution – are in the choice of law realm. I mean this at several levels.

The most obvious level is the choice of substantive law. Parties in trans-boundary transactions routinely utilize choice-of-law clauses to provide greater security about the rules governing their relations, rights and remedies. Yet courts and arbitrators do not accord identical treatment to these clauses. Courts historically did not enforce such clauses and viewed them with the same skepticism shown to arbitration or forum selection clauses.<sup>44</sup> While courts have backed off from such overt hostility, they retain certain devices under which they can invalidate such selections. These include express grounds for unenforceability (such as “public policy” or “reasonable relation”) as well as more subtle devices (like determinations or presumptions concerning the “scope” of the choice-of-law clause).<sup>45</sup> That scrutiny will occur by reference to the jurisdiction's conflicts rules which the parties cannot, by contract, exclude.

Arbitrators take a very different approach. Historically, arbitration rules did not even address the applicable substantive law. More recent rules, however, place a thumb on the scale favoring broad and exceptionless application of the parties' chosen law.<sup>46</sup> Contemporary rules specify unambiguously that the arbitrator shall apply the law chosen by the parties when so-specified in the contract. While I am unaware of empirical evidence systematically testing the proposition, anecdotal evidence strongly suggests that arbitrators routinely apply the law chosen by the parties without subjecting that choice to the same sort of scrutiny given by courts.<sup>47</sup> This stands to reason. Whereas the court derives its authority over the dispute by virtue of an express grant of jurisdiction from the lawmaking body, arbitrators (with little exception) derive their authority entirely from the parties' contract itself. This source of the arbitrator's mandate gives the arbitrator an understandable incentive to guide its deliberations by reference to the four corners of the contract, subject only to the mandatory rules of the arbitral forum. Moreover, in contrast to the conflicts analysis conducted by courts, parties can even manipulate the conflicts analysis conducted by arbitrators by excluding the conflicts rules

44. BORN & RUTLEDGE, *supra* note 20, at Chs. 5 & 13.

45. *Id.* at Ch. 8.

46. *See, e.g.*, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION RULES, art. 17 (Jan. 1, 1998).

47. H.A. Naon, *Choice of Law Problems in International Commercial Arbitration*, 16 FORDHAM INT'L L.J. 946 (1992); BORN, *supra* note 17.

of jurisdiction supplying the substantive law. Arbitrators rarely critique such exclusions.

Greater enforceability of the chosen law is not the only comparative advantage enjoyed by arbitration in this area. A further advantage comes in the menu of substantive law options. Parties sometimes do not specify a single applicable national law but opt into bi-national or transnational systems of law. Courts can view these exotic choice-of-law clauses skeptically. This is perhaps unsurprising, given that courts are themselves products of nation-states. By contrast, most sophisticated sets of arbitral rules grant arbitrators the express authority to apply “transnational law” or “rules of law” to the parties’ dispute.<sup>48</sup> Again, given the contractual nature of their mandate, arbitrators have a natural incentive to honor such agreements to the extent permitted by the law of the arbitral forum.<sup>49</sup>

Apart from the foregoing two examples, the separability doctrine allows even greater opportunities for predictable substantive choice of law. As several scholars have noted, one consequence of the separability doctrine is that the parties can subject the arbitration clause to a separate law than that governing the parties’ substantive contract.<sup>50</sup> Consequently, though rarely done, parties might subject the arbitration clause to a substantive law that more securely favors enforcement of the arbitration agreement than the law governing the parties’ underlying substantive contract. Litigation, by contrast, admits of no comparable method. About the closest analogue would be for the parties to enter into a contract with a forum selection clause, a choice-of-law clause and a separate clause designating the law applicable to the forum selection clause. Even then, a party seeking to thwart the forum selection clause could file litigation in another forum, at which point the enforceability of the clause designating the law applicable to the forum selection clause would be tested under the court’s own conflicts principles. The upshot is that arbitration offers greater opportunities to secure the enforceability of the arbitration clause.

Apart from substantive law, additional choice-of-law opportunities abound for arbitration to enjoy a comparative advantage in terms of procedural law. Some of these procedural comparative advantages are well known. For example, arbitration gives parties a greater opportunity to select the decision maker – provided she is impartial and independent – whereas they enjoy little to no such comparative opportunity in litigation.<sup>51</sup> Likewise, parties enjoy tremendous freedom to designate their legal representative in arbitration whereas litigation often requires parties to choose (or at least affiliate with) a member of the local bar.<sup>52</sup> Finally, arbitration accords the parties tremendous flexibility on matters such as holding the hearing in locations other than the arbitral forum (something especially important, for example, in cases where it becomes difficult to procure a witness’s attendance

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48 See, e.g., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION RULES art. 17.

49. In this regard it is unfortunate that Austria, in its recently revised Arbitration Act, limited the arbitrators’ authority to apply transnational legal principles absent party authorization. See Zivilprozessordnung [ZPO] [Civil Procedure Statute] ¶ 603(2) (Austria).

50. BORN, *supra* note 17, at 355-56.

51. See, e.g., ICC RULES arts. 9-11.

52. See, e.g., LCIA RULES art. 18.

in the arbitral forum); by contrast, civil litigation affords the parties no comparable flexibility.<sup>53</sup>

Apart from these familiar advantages enjoyed by parties in the choice of applicable procedures, an underappreciated procedural advantage enjoyed by arbitration is confidentiality. Most arbitral rules provide some layer of confidentiality to the proceeding, though they differ both in terms of the scope of the confidentiality obligation and the entities subject to the obligation.<sup>54</sup> By contrast, civil litigation does not extend to the parties the opportunity to decide, contractually, whether to extend the blanket of confidentiality to their proceedings. Decisions about whether to put a pleading under seal or have a closed proceeding reside with the judge.

Seen through this lens, the recent trend in international commercial arbitration away from confidentiality is regrettable. As documented in the recent Hague Conference report, the arbitration rules are weakening confidentiality obligations, which surrenders this comparative advantage enjoyed by arbitration.<sup>55</sup> To be sure, there may be some valid countervailing considerations, such as the need for transparency in certain forms of investment or trade arbitration as well as the desire to develop a more mature system of precedent within arbitration as a system. Nonetheless, viewed solely from the perspective of preserving the unique comparative advantages enjoyed by arbitration, the move away from confidentiality may be a surrender of one of its distinguishing features.

What I have described so far are particular procedural advantages that arbitration offers when parties opt into a set of rules contemplating these various devices. What remains to be done, however, is the development of a wider array of “off the shelf” products that parties can select as appropriate for their dispute. A few devices such as fast track arbitration already exist. Moreover, devices such as the IBA Rules on Evidence Taking offer the potential to work in conjunction with the arbitration clause to supply a discovery mechanism compatible with civil law and common law traditions.<sup>56</sup> Beyond that, however, it is rather remarkable that arbitration as an institution has not worked more systematically to develop a greater array of procedural products tailored to particular types of disputes. Judicial systems are simply ill-equipped to compete along this axis.

Niche industries in arbitration demonstrate how this can occur. For example, as Louise Reilly’s comments for this symposium illustrate, sports arbitration has developed a highly refined mechanism for settling disputes in the field of competitive sports.<sup>57</sup> The Court of Arbitration for Sport provides an important example for other industries and for arbitration generally. It demonstrates that dispute resolution procedures can be tailored to the particular needs of an industry, something that the judicial system remains woefully ill-equipped to do.

If choice-of-law rules supply the long run comparative advantage for arbitration, what sources of law are likely to guide those reforms? While revisions to

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53. See, e.g., *id.* art. 19.

54. See, e.g., *id.* art. 30.

55. International Law Association, *Confidentiality in International Commercial Arbitration* (2010).

56. International Bar Association, *Rules on the Taking of Evidence In International Arbitration Proceedings* (May 29, 2010), [http://www.ibanct.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#takingevidence](http://www.ibanct.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence).

57. 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).

national arbitration laws (such as the UNCITRAL Model Law) or even the New York Convention are possible, I believe some unconventional sources may help shape these changes. One source of particular importance in the United States will be state arbitration law. As Chris Drahozal's paper demonstrates, several states have very innovative arbitration laws that go far beyond the FAA's ambit.<sup>58</sup> Second, and perhaps more importantly, on the global stage, regional conventions can play an important role. For example, the European Convention of 1961 has detailed rules setting forth the applicable law to the substance of the dispute – something lacking in the New York Convention.<sup>59</sup> Likewise, the Panama Convention supplies a default procedural mechanism, namely the IACAC Rules, in cases where the parties have not specified the applicable procedural law.<sup>60</sup> It behooves scholars and practitioners to pay much closer attention to those sources in decades to come.

#### IV. CONCLUSION

In sum, the golden days of arbitration are hardly behind it. Rather, arbitration, much like a firm in a competitive marketplace, must redesign itself to remain an appealing alternative. Improvements in the legal architecture governing international litigation, especially the enforcement of forum selection clauses and trans-boundary judgments, have begun to narrow some of the traditional advantages that arbitration has enjoyed over litigation, particularly in the cross-border context. While recent attention has focused on judicial assistance to remedy arbitration's perceived defects, I do not believe those efforts will salvage arbitration in the long run. Rather, a more concerted effort at shoring up arbitration's choice-of-law advantages – both substantive and procedural – will put it on a much surer footing for the twenty-first century. Unexpected sources such as regional conventions will play an important role in this effort.

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58. Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. DISP. RESOL. 101 (2012).

59. European Convention on International Commercial Arbitration of 1961, April 21, 1961, 484 U.N.T.S. 364, art. VII, available at <http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/>.

60. See generally Inter-American Convention on International Commercial Arbitration, art. III, Jan. 30, 1975, 1438 U.N.T.S. 248.

