

ON-LINE BUT OUT OF TOUCH: ANALYZING INTERNATIONAL DISPUTE RESOLUTION THROUGH THE LENS OF THE INTERNET

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INTRODUCTION

Great advances in technology naturally provoke exuberant predictions for man's future. The space race of the 1950s and 60s, for example, inspired visions of flying cars and communities on the moon. The advent of the internet and its growth as a primary source for information and commerce has inspired similarly grandiose visions of the future. Although this is only the "internet revolution's" second decade, it is not too soon to take stock of where its development has taken us, and of where it promises to lead us in the future. This Note will examine the internet's effect on international trade, and how the dispute resolution systems meet these changes.

Today, arbitration is the primary method of international dispute resolution.¹ The principle reason for its supremacy is its ability to bridge gaps between disparate legal systems. Significantly, when international business conflicts arise, there is no independent, binding international court system for private parties to turn to in order to resolve their disputes.² Consequently, the parties are left with the complex problem of deciding which of the many available fora to take their dispute. Such analysis often leaves parties confused, with the prospect of two or more divergent national court systems creating

far greater uncertainty with respect to the rules of decision that will govern the dispute in a foreign tribunal, and thus as to [the dispute's] outcome; the rules of 'conflict of laws' will not always give a bankable answer even to the question of *which* nation's law will apply to the transaction.³

¹ CHRISTIAN BUHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS*, 141 (Dr. Julian Lew ed., Aspen Publishers 2002) (1996).

² ALAN SCOTT RAU ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS*, 928 (Foundation Press 3d ed. 2002) (1989).

³ *Id.* at 626.

Jurisdiction, therefore, presents a great obstacle for international dispute resolution. Arbitration offers parties the ability to dictate the jurisdiction to which they will submit themselves, should conflict arise. Rather than resort to the national court system of one of the parties, disputants prefer to opt for a private dispute resolution system contracted to in advance in an alternative dispute resolution clause.⁴

This Note will begin with an overview of international dispute resolution, its sources and its troubles. This analysis will be followed by a look at how the internet has complicated the regulation of international commercial activity. Section three will examine the factors that make arbitration the preeminent international dispute resolution system – as well as those factors which may be considered weaknesses – in an effort to highlight opportunities for improvement.

I – INTERNATIONAL DISPUTE RESOLUTION

Human beings are prone to conflict. It has been said that, prior to the 20th Century, war was mankind's preferred method of international dispute resolution.⁵ The legal system is but an outgrowth of this disputatious human nature.⁶ "Society, through the

⁴ See James M. Cooper, *Latin America in the Twenty-First Century: Access to Justice*, 30 CAL. W. INT'L L.J. 429, 432 (2000); see also RAU ET AL., *supra* note 2, at 936

In domestic disputes, attorneys know that they can always fall back on the local U.S. court in the jurisdiction in which the agreement was signed to remedy any breaches. In cross-border enforcement actions, the local court option in a foreign country can be less reliable and take more time and expense. Attorneys need to retain local counsel in the breaching party's country and commence a lawsuit in a foreign jurisdiction with all the risks and uncertainties of transnational litigation. These burdens of cross-border enforcement can be less onerous, however, in a foreign country with a mature legal system where the client does regular business and already has local counsel. In cross-border disputes, parties can more easily enforce a settlement agreement when it is the by-product of an arbitration proceeding. Rather than assuming the risks of enforcing a settlement agreement in a transnational lawsuit, parties can request an arbitral tribunal to incorporate the settlement agreement into an arbitration award. This option is explicitly authorized by both domestic and international arbitration rules. The resulting 'consent' award may be enforceable in foreign jurisdictions under the relatively reliable procedures of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

⁵ Maura A. Bleichert, *The Effectiveness of Voluntary Jurisdiction in the ICJ: El Salvador v. Honduras, a Case in Point*, 16 FORDHAM INT'L L.J. 799, 802 (1993).

⁶ See Karl Llewellyn, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY*, 12 (Kazi Publications 1981) (1960) ("What, then, is this law business about? It is about the fact that our society is honeycombed with disputes.").

legal system, channels the grievances of people and groups into socially controlled, non-violent means of dispute resolution.”⁷ As a corollary, international law channels the grievances of individuals and states within the international community into a socially-controlled means of dispute resolution.

The scope of international law is vast. This Note will concern itself solely with international commercial activity. International trade may occur between states, between one or more states and one or more individuals, or between individuals from two or more different nations. “In a number of ways, the addition of a cross-border element to a transaction intensifies the complications involved in the judicial resolution of disputes.”⁸ The development of trade-facilitating technologies, like the internet, has created pressure for the international community to develop a well-coordinated international jurisdictional system capable of eliminating the problems that have traditionally limited the effectiveness of international law.

The Problems of International Law

a. Enforcement

First, an international system must address the fundamental problem of enforcement. Enforcement of international law is often difficult because nations are sovereign powers that may, under certain perceived unfavorable circumstances, put their own interests ahead of those of the international community.⁹ Compounding this problem is that the mechanisms of enforcement are not well developed. One of the great obstacles that international law has yet to solve is that plaintiffs often have difficulty satisfying a victorious international judgment.¹⁰ When a defendant’s assets are not held within the jurisdiction rendering judgment, the plaintiff often has little hope of satisfying his judgment.¹¹ “A favorable

⁷ MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS*, 19 (3d ed. 2004).

⁸ William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 *AM. REV. INT’L ARB.* 531, 532 (2000).

⁹ See Andrew T. Guzman, *Global Governance and the WTO*, 45 *HARV. INT’L L.J.* 303, 316 (2004).

¹⁰ Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 *ALB. L. REV.* 1237, 1238 (1998).

¹¹ *Id.* at 1238-39 (complicating matters, a plaintiff is not only at the whim of where the defendant’s assets are located, but the plaintiff also faces the possibility that the defen-

decision against a French supplier in a New York court, for example, may be of little value if the courts of France will not recognize the New York judgment.”¹²

b. *Jurisdiction*

A successful international legal system must reduce opportunities for forum shopping. Presently, nations determine their own courts' jurisdictional realm, while simultaneously failing to apply uniform choice of law rules, enabling plaintiffs to find “the forum that applies the most pro-plaintiff substantive law.”¹³ Choice of forum problems inevitably result in several “competing fora to claim jurisdiction over some cases, leading to conflicting rulings and uncertainty as to the legal status of certain disputes.”¹⁴ Forum shopping “frustrates the goal of legal predictability and continues an international system which does not have the ability to coordinate which state's laws should apply in a given situation.”¹⁵

Not all countries assert jurisdiction equally. Under the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,¹⁶ signatory states are required to enforce the “judgments of other signatory states against domiciliaries of non-party states like the United States even when those judgments result from domestic assertions of jurisdiction that are far

dant's national court will refuse to execute foreign judgments in cases where they consider the foreign court to have asserted its jurisdiction too broadly); *see also* *Yahoo! v. La Ligue Contre le Racisme et l'Antisemitisme*, 169 F.Supp. 2d 1181 (N.D. Cal. 2001) (California court ruled that while a French court has the sovereign right to regulate speech that is impermissible in France, this court would not enforce a foreign order that would chill protected speech that occurs simultaneously within U.S. borders. The principle of international comity is outweighed by the District Court's obligation to uphold the 1st Amendment).

¹² *RAU ET AL.*, *supra* note 2, at 626.

¹³ *Strauss*, *supra* note 10, at 1239.

¹⁴ *Guzman*, *supra* note 9, at 334.

¹⁵ *Strauss*, *supra* note 10, at 1239.

¹⁶ *Id.* at 1239; *see also* Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, reprinted in 8 *I.L.M.* 229 (1969), as amended by 1990 O.J. (C 189) 1, reprinted as amended in 29 *I.L.M.* 1413 (1990). The parties to the Brussels Convention were the United Kingdom, Denmark, and the original six Member Countries of the European Union. *See id.* at tit. II, art. 3. The Brussels Convention was further modified by the Lugano Convention. *See* Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, reprinted in 28 *I.L.M.* 620 (1989) (entered into force Jan. 1, 1989). The Lugano Convention extended the basic obligations of the Brussels Convention to relations among Members of the European Union as well as those in the European Free Trade Association.

broader than the limitations prescribed as between treaty parties.”¹⁷

Thus, if I, as an American domiciliary, am alleged to have committed a tort in the United States against a French citizen, under the terms of the treaty, I could be sued in France. Likewise, German law provides that if the defendant has any property in Germany, then German courts would have unlimited personal jurisdiction over the defendant. If I, therefore, happen to own a few shares of stock in German corporations, German courts could assert unlimited personal jurisdiction over me. Moreover, British courts would be required to honor such a French or German judgment against any British assets that I might have.¹⁸

c. *Non-Trade Issues*

The international trade system must have a purview broader than mere trade-related issues. The purpose of a dispute resolution system should not merely be “to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to [the community’s values].”¹⁹ This is necessary for a system’s legitimacy, particularly where its impact is felt in areas outside of the system’s specific regulation.²⁰ “For example, environmental policy, human rights, labor and competition policy are not directly within the jurisdiction of [the World Trade Organization (“WTO”)] but in each of these areas trade and the trading system have influenced policymaking.”²¹ The hostile protests at the 1999 WTO Ministerial Conference in Seattle demonstrated that there is real concern over the WTO’s inattentiveness to non-trade issues and a need for these issues to be included in international trade regulation.²²

Technological advances from the telegraph to the internet have assisted the growth and development of international trade. Technology, like the internet, has empowered people from across the globe to instantaneously interact with one another.²³

¹⁷ Strauss, *supra* note 10, at 1239-40.

¹⁸ *Id.* at 1240.

¹⁹ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

²⁰ See Guzman, *supra* note 9, at 304 (stating that “[t]he impact of the trading regime is also felt in areas that are not subject to any specific WTO regulation.”)

²¹ *Id.* at 304.

²² *Id.*

²³ David G. Post, *Against “Against Cyberanarchy,”* 17 BERKELEY TECH. L.J. 1365, 1383 (2002).

[B]ecause of the ease with which online activity in one country can affect people in another country, there has been increasing pressure to develop uniform international rules with regard to enforcement of judgments. After all, if the rules for exercising adjudicatory jurisdiction and enforcing judgments around the world are the same, then many of the concerns about [crossing] borders . . . disappears.²⁴

Sources of International Law

The main sources of modern international law are (A) treaties, (B) law derived from international organizations, and (C) contracts. These devices work towards creating consistency in jurisdiction and enforcement, in order to minimize their negative impact on international trade.

a. *Treaties*

“The classic model of international harmonization is through bilateral and multilateral treaties.”²⁵ Treaties are created at the will of the states, however, and their effectiveness depends upon each nation’s continued interest in participation. The United States, for instance, has frequently demonstrated a willingness to minimize or disregard its treaty obligations.²⁶ A particularly strident example is the nation’s staggering arrears in United Nations’ (“UN”) dues.²⁷ Nearly forty years after the U.S. itself led a charge to consider the arrears of France and the Soviet Union as debts – leading to the deprivation of voting privileges – the U.S. owed \$1.5 billion in dues.²⁸ Alternatively, “[i]f terminating a treaty is too drastic, the desired result of minimizing U.S. obligations under it can often be achieved by [Court] interpretation.”²⁹

Participant apathy is not the only obstacle treaty regimes face. The principle drawback of treaty regimes is that they demand prior

²⁴ PATRICIA L. BELLIA ET AL., *CYBERLAW: PROBLEMS OF POLICY AND JURISPRUDENCE IN THE INFORMATION AGE*, 179 (West Group 2d ed. 2004) (2003).

²⁵ BELLIA ET AL., *supra* note 24, at 179.

²⁶ Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 A.J.I.L. 458, 458 (1998).

²⁷ *Id.* at 458-59.

²⁸ *Id.*; see Strauss, *supra* note 10, at 1243-1244; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(1) (1987) (explaining the grounds for disavowing treaties because “provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions, and requirements of the Constitution, and cannot be given effect in violation of them.”)

²⁹ Vagts, *supra* note 26, at 460 (describing a series of Supreme Court opinions which appear extremely restrictive of U.S. treaty obligations).

consensus among many countries with different social policies and economic interests.³⁰ The internet has rapidly changed the nature of international commercial activity and created pressure to develop uniform international rules. A model requiring consensus between states with disparate interests does not reach its consensus quickly.³¹ The treaty model of lawmaking may not be the appropriate mechanism for achieving international harmonization in the fast-changing world of technology.³²

b. Organizations

International organizations also play an important role in the formation of international law. The United Nations, created in the wake of World War II, created elaborate machinery for maintaining peace and security, as well as for regulating disputes among nations.³³ “The protectionist measures that had arisen during the two decades between the World Wars had hampered international trade, and most nations felt that this obstruction of free trade was a major factor contribution to the Depression and the War.”³⁴ The General Agreement on Tariffs and Trade (“GATT”) represented the first attempt by major nations to create a unified system of international trade regulation.³⁵ Despite its well-intentioned beginnings, the GATT’s ineffective dispute resolution system led to its eventual demise.³⁶ The GATT’s contracting parties, in 1994, established the World Trade Organization (“WTO”), in an effort to overhaul the international trade system.³⁷

³⁰ See Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 490, 492-93 (2000) (process of international copyright lawmaking by treaty “tended to be slow and unwieldy because it operated by way of consensus among countries with a diverse range of social and economic perspectives.”)

³¹ BELLIA ET AL., *supra* note 24, at 180.

³² *Id.*

³³ See Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2278-82 (1997).

³⁴ *Id.* at 2279.

³⁵ *Id.* at 2278.

³⁶ See *id.* at 2284 (“In response to the growing ineffectiveness of the dispute resolution system, nations relied increasingly on unilateral threats and trade sanctions to resolve their trade-related differences.”); see also *id.* at 2283 (Under the GATT, disputing nations were to argue their cases before an impartial panel. After considering the disputants’ arguments, the panel would issue a report detailing its findings and recommendations. The panel report required a consensus of the GATT’s contracting parties, however. As a result, “the losing party could effectively block adoption of the report by voting against it.”).

³⁷ *Id.* at 2285 (The WTO “officially came into existence on January 1, 1995.”).

Although the WTO replaced GATT, the trade agreements established by GATT in 1994 are part of the WTO agreement.³⁸ However, the WTO has a significantly broader scope than GATT. The WTO expanded the GATT agreement to include services, in addition to merchandise, and it has created new international protections for intellectual property as well.³⁹ The WTO utilizes a dispute settlement system that has become one of the most frequently utilized mechanisms for international dispute resolution.⁴⁰ This popularity is based on several features unique to the WTO system, which create dramatic reductions in the barriers to international trade.⁴¹ The system's features include the "right to appellate review and the possibility of sanctions for noncompliance."⁴² Significantly, the organization's rules are legally binding on its member states.⁴³ Members can refer trade disputes to the WTO where a dispute resolution panel, composed of WTO officials, serves as arbitrator.⁴⁴ Members can appeal this panel's rulings to a WTO appellate body whose decisions are final.⁴⁵

The WTO has attracted much criticism from those concerned about free trade and economic globalization. Opponents of the WTO argue that it suffers from a lack of democracy.⁴⁶ The organization is perceived as lacking democratic accountability because its hearings on trade disputes are closed to the public and press.⁴⁷ Critics charge that developing states do not have a meaningful voice in the dispute system.⁴⁸ Also of concern is that there is no provision for public participation.⁴⁹ Other grievances include the WTO's insufficiency in labor, the environment, and human rights.⁵⁰

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Jeffrey L. Dunoff, 13 *AM. REV. INT'L ARB.* 197 (2002).

⁴¹ Guzman, *supra* note 9, at 303.

⁴² Dunoff, *supra* note 40, at 197.

⁴³ See Schleyer, *supra* note 33, at 2287 (repairing a weakness of the GATT system by making adoption of the panel and appellate body decisions automatic).

⁴⁴ *Id.* at 2286.

⁴⁵ *Id.*

⁴⁶ Guzman, *supra* note 9, at 336.

⁴⁷ *Id.* at 340.

⁴⁸ See Dunoff, *supra* note 40, at 199-200.

⁴⁹ *Id.* at 200 (explaining that Non-Government Organization [hereinafter "NGO"] amicus briefs are only considered by panel when the NGO is a party to the dispute – "[t]his effectively turns NGOs from independent actors with independent perspectives into entities that simply echo government arguments, thereby destroying the potential advantages of NGO participation.")

⁵⁰ Guzman, *supra* note 9, at 304.

Criticism of the WTO culminated in the 1999 protest of more than 30,000 people outside the WTO summit in Seattle, Washington.⁵¹ The protesters called for reforms that would make the organization more responsive to labor, consumers, and the environment.⁵²

c. *Contract*

Arbitration is often referred to as “a creature of contract.”⁵³ In fact, arbitration has become the primary forum for international dispute resolution because of its contractual device. The Supreme Court, in *Scherk v. Alberto-Culver Co.*, characterized an agreement to arbitrate as, “in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute.”⁵⁴ The arbitration contract thereby empowers the parties to resolve the jurisdiction problems inherent to international law. “It is therefore not surprising that in international commercial contracts, arbitration clauses ‘not only predominate but are nowadays almost universal’ and are ‘virtually taken for granted.’”⁵⁵

The arbitral process has been hailed as “preferable to judgment because it rests on the consent of both parties and avoids the cost of a lengthy trial.”⁵⁶ This popular image of arbitration assumes that trial is the inevitable endpoint of the parties’ dispute – where they are bound to wind up, unless they agree, by contract, to avoid it and to resort to an alternative process. Yet, fewer than ten percent of cases in the United States even go to trial.⁵⁷ Instead, courts more often “serve as the background for bargaining between parties. Bargaining occurs ‘in the shadow of the law,’ but is conducted primarily, if not exclusively, by the parties and their lawyers.”⁵⁸ With parties today choosing to circumvent the court system at such a high rate, arbitration appears a likely choice to pick up the slack. However, although data indicates that the number of

⁵¹ Clyde Summers, *The Battle In Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT’L ECON. L. 61 (2001).

⁵² *Id.* at 61.

⁵³ Knull, *supra* note 8, at 534.

⁵⁴ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

⁵⁵ RAU ET AL., *supra* note 2, at 627 (quoting Kerr, *International Arbitration v. Litigation*, J. BUS. L. 164, 165, 171 [1980]).

⁵⁶ Fiss, *supra* note 19, at 1075.

⁵⁷ See David M. Trubeck et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983).

⁵⁸ *Id.*

parties contracting for arbitration as their preferred means of adjudication is rising, other empirical evidence suggests that the process is becoming *less* attractive to those involved in high-stakes disputes.⁵⁹ That is, interest in arbitration appears to decrease as the dollar figures to a contract increase.

The benefits of arbitration are frequently expressed in sharp relief against the drawbacks that inhere to the litigation process. To many commentators, practitioners and private parties, the court system has become a terribly inefficient means of adjudicating their disputes:

[w]hether we have too many cases or too few, or even, miraculously, precisely the right number, there can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike. No one should have to wait five years for a case to come to trial, but many litigants in this country face this reality.⁶⁰

Alternative dispute resolution enables parties to resolve their conflicts without the involvement of the courts. Indeed, surveys of practicing attorneys indicate that arbitration is a faster, more efficient dispute resolution process than is either a jury or bench trial.⁶¹ For the cost-conscious, therefore, arbitration may present a more efficient and less costly alternative to going to court.

Efficiency, however, is not the only reason why parties look outside the court system for dispute resolution. In the international arena, parties to a dispute are often as concerned with the lack of predictability of a foreign court's judgment as they are with its timeliness and cost.⁶² The foreign legal systems of developed nations suffer from the same *efficiency* problems as do American courts, but undeveloped nations add the greater complication of *integrity* problems, as well.⁶³ Arbitration has the potential to

⁵⁹ See Knull, *supra* note 8, at 532 (emphasis added).

⁶⁰ Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 *YALE L.J.* 1643, 1644-45 (1985).

⁶¹ Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 *IND. L.J.* 425, 460 (1988).

⁶² See Soia Mentschikoff, *Commercial Arbitration*, 61 *Col. L.Rev.* 846, 848-854 (1961) ("Apart from the enhanced possibility of delay inherent in transnational law suits, when the parties to a transaction are governed by different substantive rules of law, resort to the formal legal system poses uncertainty and relative unpredictability of result for at least one of the parties.")

⁶³ See Cooper, *supra* note 4, at 432 ("[M]ost transnational corporations do not trust the judicial systems in foreign lands. Court systems are seen as corrupt, slow, and costly. Addi-

bridge the gap between problem and solution for those parties unwilling to use a national court system.

The nature of international transactions themselves present circumstances which favor the use of arbitrated dispute resolution.⁶⁴ The involvement of two or more bodies of law and two or more court systems provides further incentive⁶⁵ for parties to avoid using national court systems to settle their disputes.

[I]t appears that the reasons why international commercial arbitration has become the principle means of dispute resolution in international business have more to do with the specific problems of litigating international business disputes in national courts than with the desire to create a type of procedure that is fundamentally different than litigation.⁶⁶

Indeed, arbitration is often necessary in international trade merely because the courts in many developing countries are corrupt, inept, or inconsistent.⁶⁷ The Supreme Court has lauded international arbitration for promoting “the orderliness and predictability essential to any international business transaction.”⁶⁸ The foregoing reasons have pushed arbitration to the forefront of international dispute resolution.

II – THE INTERNET COMPLICATES TRADE REGULATION

Arbitration’s primacy has been based partly upon the notion that it is easier to enforce an international arbitral award than it is an international litigation award. In the United States, disputants retain the option of taking their judgment to court for enforcement.⁶⁹ But in the international arena, there is no independent,

tionally, the local party, rather than the foreign litigant, appears to have the home field advantage.”).

⁶⁴ *Id.* at 536 (“In a number of ways, the cross-border element to a transaction intensifies the complications involved in the judicial resolution of disputes.”).

⁶⁵ RAU ET AL., *supra* note 2, at 626.

⁶⁶ BUHRING-UHLE, *supra* note 1, at 141.

⁶⁷ *See* Cooper, *supra* note 4, at 432.

⁶⁸ Scherk, *supra* note 54, at 516.

⁶⁹ *See* Knull, *supra* note 8, at 542

Because arbitral awards require the confirmation of a national court at the place of enforcement in order to attach assets in the face of resistance from a losing party, and international arbitration treaties provide legitimate bases upon which awards can be challenged, the rendering of an arbitral award may be only the first step in a chain of court litigation in a variety of different jurisdictions. In fact, where the only form of recourse against arbitral awards is in national courts, the appeal process may entail more than one phase of case presentation, as the losing party attempts to force its real grievances into the

binding international court system.⁷⁰ Plaintiffs are often left with the unappealing choice of trying to bring a foreigner to court, when he doesn't have any assets at risk in the jurisdiction – and therefore he has no incentive to appear – or submitting to another nation's court system.⁷¹ A state's ability to adjudicate within its own borders is predicated upon its sovereign power over a defendant: if it can *seize* the defendant's person, or his property, the state may not only prescribe, but also enforce a judgment.⁷² Without this control, a nation has little ability to bring a foreign defendant to justice.

The common dilemma of international dispute resolution include determining which nation's courts have jurisdiction over a dispute,⁷³ and whether a victorious plaintiff can even achieve enforcement of a judgment in his favor.⁷⁴ The internet has introduced a new and important question: when, if ever, may a state court properly exercise personal jurisdiction over an out of state defendant based on his conduct over the internet?

a. *The Reduced Significance of Territorial Borders*

The internet's fluidity has made jurisdiction clauses like arbitration clauses more important than ever. "We take for granted a world in which geographical borders - lines separating physical spaces - are of primary importance in determining legal rights and responsibilities. Territorial borders, generally speaking, delineate areas within which different sets of legal rules apply."⁷⁵ The internet has upset the traditional connection between geography and jurisdiction by making it easier for parties from different jurisdictions to interact and, as a result, for them to conflict. The reason is the internet's ability to overcome geographic and temporal hurdles.

[T]he world has changed, rather dramatically. . . [b]order-crossing events and transactions, previously at the margins of the legal system and of sufficient rarity to be cabined off into a small corner of the legal universe ('airplane crashes, mass torts, multi-state insurance coverage, or multinational commercial transac-

recognized grounds for vacatur and pursues its contentions up the ladder of courts in the judicial system.

⁷⁰ RAU ET AL., *supra* note 2, at 928.

⁷¹ See Knull, *supra* note 8, at 539-40.

⁷² See *id.* (emphasis added).

⁷³ See Strauss, *supra* note 10, at 1239.

⁷⁴ See *id.* at 1238-39.

⁷⁵ David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

tions') have migrated, in cyberspace, to the core of that system.⁷⁶

Professor David Post illustrates this changed world by constructing a hypothetical "effects map,"⁷⁷ in which we mark the location of every event taking place at any specific moment, the effects of which will be felt in a specific location – say, Singapore. Visually, the effects map would look like a nighttime satellite image of the Earth taken from Space.

Logically, one would expect such a map made in 1450 to bathe the territory immediately around Singapore in a dense concentration of light, representing where actions affecting Singapore took place.⁷⁸ The remainder of the Earth would be almost entirely dark. By comparison, an effects map for 1950 would likely show denser points of light flung farther outside of Singapore's borders, representing the increased number of border-crossing events and transactions with widely dispersed geographical effects, brought about by changes in communication and transportation technologies throughout the years.⁷⁹ Yet, the 1950 map would maintain its geographical coherence, with the overwhelming majority of activity taking place in Southeast Asia.⁸⁰

An effects map plotting events and transactions taking place today in cyberspace would look vastly different. Today's cyberspace map would have virtually no geographic structure at all.⁸¹ An internet event or transaction creating legally significant effects in Singapore is just as likely to originate in South America as it is in Southeast Asia.⁸² "All transactions in cyberspace are potentially border-crossing, *all* have geographically indeterminate effects, *all* resemble [the events and transactions] of realspace."⁸³

Presently, territorial sovereigns have little ability to regulate this far-flung online activity, even where it reaches inside their own borders. If, for example, Saudi Arabia aimed to proscribe the increasingly popular realm of online gambling, an offending web site could simply maintain its operations outside of the country, while

⁷⁶ Post, *supra* note 23, at 1384 (quoting Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1234 (1998)).

⁷⁷ Post, *supra* note 23, at 1381.

⁷⁸ *Id.* at 1382.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1382-83.

⁸² *Id.* at 1383.

⁸³ *Id.*

still reaching the same audience within Saudi Arabia.⁸⁴ As a result, internet regulation is facing the unfortunate dilemma of choosing between a regime enabling complete sovereign authority over internet activity within a nation's borders, or one in which only governments with control over a defendant's person or property can enforce an extraterritorial judgment. The former might subject cyberspace actors to dozens, if not hundreds, of different and possible conflicting legal regimes.⁸⁵ The latter would leave impotent a state without power over an actor's person or property.⁸⁶

b. *Personal Jurisdiction Problems*

The role of national courts in today's international commercial world is analogous to the role of state courts in the United States during the 20th Century, when the Supreme Court deemed jurisdiction to be predicated on territory. The Supreme Court held in its 1877 *Pennoyer v. Neff*⁸⁷ ruling that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum. . .an illegitimate assumption of power, and be resisted as mere abuse." The Court further clarified its stance, stating that although "every State possesses exclusive jurisdiction and sovereignty over persona and property within its territory. . .no State can exercise direct jurisdiction and authority over persons and property without its territory."⁸⁸ The underlying message of *Pennoyer* was "if a state can 'tag' you, it can have power over you; if it can 'tag' your property, it can have power over your property."⁸⁹

Eventually, technological advances which led to the growth of interstate commerce and transportation forced a shift in this doctrine. The greater ease of interstate transportation created a need for states to exercise jurisdiction over those parties over whom they were not geographically sovereign, but whom they nonetheless had an interest in bringing to justice for harm done within their borders. "In 1945, the landmark case of *International Shoe v.*

⁸⁴ See BELLIA ET AL., *supra* note 24, at 92.

⁸⁵ Post, *supra* note 23, at 1384.

⁸⁶ See Knull, *supra* note 8, at 539-40.

⁸⁷ *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877).

⁸⁸ *Id.* at 722.

⁸⁹ BELLIA ET AL., *supra* note 24, at 136.

Washington brought the era of territorial jurisdiction to an end.”⁹⁰ The *International Shoe* doctrine, set in 1945, replaced the strict territorial rules of *Pennoyer* with a more flexible due process inquiry based on whether a defendant had sufficient contact with the relevant state such that jurisdiction would be consistent with traditional notions of fair play and substantial justice.⁹¹ “Minimum contacts” would be satisfied as long as the quality and nature of a defendant’s activity within the state was sufficient in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to serve.⁹²

Significantly, the *International Shoe* decision was reached in 1945, nearly six decades after the first automobile was produced, and nearly four decades after the automobile was in widespread use.⁹³ Such a time lag indicates the willingness of courts to follow the effects of technological integration before making a doctrinal change. The ability of cyberspace to connect people from disparate places radically undermines the relationship between legally significant actions and physical location.⁹⁴ Consequently, the internet attenuates the significance of territorial boundaries even more than the automobile or the railroad that came before it. Like the automobile and the rail, the internet makes interstate commerce more fluid. However, it never transports the actors physically. The internet therefore eliminates the time and geography frictions which had previously slowed, or precluded, transnational activities.

The increasing number of corporate defendants was of equal importance to the *International Shoe* decision.⁹⁵ “[W]hile the corporation is metaphorically deemed to be a person, it is in reality a legal ‘fiction’ composed of a multitude of many different persons all performing different functions. The entity, therefore, has no physical presence, much less one in a particular jurisdiction.”⁹⁶

⁹⁰ Strauss, *supra* note 10, at 1254 (referencing *International Shoe Co. v. Washington*, 326 U.S. 310 [1945]).

⁹¹ Strauss, *supra* note 10, at 1254.

⁹² *Id.*

⁹³ See *The History of the Automobile*, at <http://www.inventors.about.com/library/weekly/aacarsgasa.htm> (the date of the first automobile is a source of debate, however, the first automobile powered by a combustion engine was produced in 1886).

⁹⁴ Johnson, *supra* note 75, at 1370.

⁹⁵ Strauss, *supra* note 10, at 1255.

⁹⁶ *Id.* at 1255 (choosing between where the company is incorporated, where its board of directors sat, where its workers worked, where its owners were, or where its customers were, the Court found no satisfactory answer to where jurisdiction was deemed to be under existing territoriality theory).

Similarly, actors in cyberspace have no real physical presence. Nevertheless, today's prevailing theory of international jurisdiction favors the territoriality of the sovereign.⁹⁷

c. *The Viability of Contracts Formed Via the Internet*

The practical effect of the internet on international trade is to bring transacting parties closer together because, in cyberspace, all points are equidistant from one another.⁹⁸ As a result, an actor may post online content which is legal in Country X, where he posts it, but illegal in Country Y, where it is viewed. The question presented is whether this online activity is sufficient to make that person subject to suit, or to criminal trial, in the far-off location. One way in which companies may seek to minimize the jurisdictional uncertainties inherent to international trade "is to include a forum selection clause or a choice-of-law clause among the contractual forms."⁹⁹

Arbitration plays an important and desirable role in dispute resolution, and agreements to arbitrate will be enforced when they are freely and fairly entered into.¹⁰⁰ In particular, a contract which is the product of a deliberate bargaining process is one which is more likely to effectuate the intentions and expectations of its parties.¹⁰¹ They are not, however, per se valid. "Arbitration is, of course, a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."¹⁰² According to the Restatement of Contracts, "the formation of a contract requires a bargain in which there is manifestation of mutual assent to the exchange and a consideration."¹⁰³ The lack of bargaining may signal that the agreement to arbitrate

⁹⁷ See *id.* at 1238-39 (if a plaintiff's ability to satisfy a judgment against a defendant depends upon whether the defendant's assets reside within the enforcing State, then international jurisdiction today under contacts theory is no more meaningful than it was under territorial sovereignty theory).

⁹⁸ Post, *supra* note 23, at 1383.

⁹⁹ BELLIA ET AL., *supra* note 24, at 658 (an arbitration clause is one such example).

¹⁰⁰ Broemmer v. Abortion Services of Phoenix, Ltd., 173 Ariz. 148, 153, 840 P.2d 1013 (Ariz.1992); See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985) (stating that although the parties' intentions control, their intentions are construed in favor of arbitrability).

¹⁰¹ Mitsubishi, *supra* note 100, at 626 ("Thus, as with any other contract, the parties' intentions control.").

¹⁰² United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

¹⁰³ Restatement (Second) of Contracts § 17(1)(1981).

was not an actual meeting of the minds. An internet purchaser is likely to dispute that clicking past a form agreement on his way to the site's checkout does not constitute assent.¹⁰⁴

“Given that online contracts are often formed by parties located far apart from one another . . . a forum selection clause may well designate a forum to which one (or both) of the parties have little, if any, connection.”¹⁰⁵ Most commercial websites include a link labeled “Terms of Use” containing a long list of contractual terms. These embedded contracts provoke us to question whether mutual assent exists. Specifically, we must determine whether the purchaser assents to the seller's terms merely because he is required to click a button agreeing to a laundry list of contractual terms – and does so – before he accesses or purchases material from a site? Has he manifested mutual consent merely by browsing through the website?

Arbitration clauses found in consumer transactions – such as credit card contracts – are increasingly being challenged in the United States on the ground that they are not enforceable as contracts.¹⁰⁶ One common argument is that they are unconscionable contracts of adhesion.¹⁰⁷ An adhesion contract is typically a standardized form, “offered to consumers on a ‘take it or leave it’ basis without affording the consumer an opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract.”¹⁰⁸ Essentially, “[t]he distinctive feature of a contract of adhesion is that the weaker party has no realistic choice as to its terms.”¹⁰⁹ That a contract is one of adhesion, however, is not by itself, determinative of its enforceability. “[A] contract of adhesion is fully enforceable according to its terms unless certain other factors are present which . . . operate to render it otherwise.”

Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof.

The first is that such a contract or provision which does not fall

¹⁰⁴ RAU ET AL., *supra* note 2, at 649 (“Especially where the parties’ autonomy in the choice of the process or in the selection of the arbitrator is reduced, the decision-makers are no longer ‘their’ arbitrators, spelling out the meaning of ‘their’ agreement in terms of their probable preferences or past practice.”).

¹⁰⁵ BELLIA ET AL., *supra* note 24, at 658.

¹⁰⁶ RAU ET AL., *supra* note 2, at 653.

¹⁰⁷ *Id.* at 653.

¹⁰⁸ *Wheeler v. St. Joseph Hosp.*, 63 Cal.App.3d 345, 356.

¹⁰⁹ *Id.*

within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. The second – a principle of equity applicable to all contracts generally – is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.'¹¹⁰

Though a buyer may not even read the contract terms, he may nevertheless be held to have assented to them.¹¹¹ Despite the law's preference for bargained contracts, there are many forms of contract which consumers do not even see until after they have purchased the item in question. Some transactions, by their nature, are ones for which it would be unreasonable to require bargained assent.¹¹² As a result, a forum-selection clause is not per se invalid merely because it was not the subject of bargaining.¹¹³

A clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.¹¹⁴

In the Gateway computers' "shrinkwrap" case,¹¹⁵ consumers were deemed to have assented to contractual terms merely by breaking the shrinkwrap that is part of the packaging of the software. Under Gateway's terms, the license form would govern unless the customer returned the computer within 30 days. Judge Easterbrook took a practical stance, pointing out that "cashiers cannot be expected to read legal documents to customers before ringing up sales," and that "a contract need not be read to be effective: people who accept take the risk that the unread terms may in retrospect prove unwelcome."¹¹⁶

¹¹⁰ *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807 (1981).

¹¹¹ *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

¹¹² *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) ("Common sense dictates that a [cruise] ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.").

¹¹³ *Id.* at 593.

¹¹⁴ *Id.* at 593-94.

¹¹⁵ *See Hill*, *supra* note 111, at 1148 (whenever a customer orders a Gateway computer by phone, the computer will arrive in a box containing the computer's equipment *and* a copy of Gateway's "standard terms and conditions," including the obligation to arbitrate any dispute).

¹¹⁶ *Id.* at 1148.

An analogous line of internet license cases, dubbed “clickwrap cases,” is developing.¹¹⁷ Although it is true that “[a] party cannot avoid the terms of a contract on the grounds that he or she failed to read it before signing,” courts are quick to add that “[a]n exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term.”¹¹⁸ Therefore, internet contracts and forum-selection clauses require “[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.”¹¹⁹

III – ARBITRATION

Arbitration may remain the most effective institution for resolving internet disputes. Because arbitration is a contractual device, parties are free to create their own rules from scratch.¹²⁰ It remains very rare, however, for parties to draft their own rules, without relying, at least in part, on established procedure.¹²¹ It is far more likely, instead, that they will choose a method of arbitration from among many choices available through myriad public and private institutions. “[U]sing contracts that incorporate pre-existing bodies of rules saves the parties the burden, costs, and delay of having to negotiate and spell out an entire code for the conduct of the arbitration.”¹²²

Groups such as the American Arbitration Association (“AAA”), and the International Center for the Settlement of Investment Disputes (“ICSID”), serve to publicize and promote arbitration as an alternative to judicial dispute resolution.¹²³ Their primary function, however, is to administrate arbitration proceedings.¹²⁴ The process begins when the contracting parties stipulate

¹¹⁷ See *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002).

¹¹⁸ *Id.* at 33.

¹¹⁹ *Id.* at 45.

¹²⁰ *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994).

¹²¹ *RAU ET AL.*, *supra* note 2, at 624 (“Only in the most exceptional circumstances can a private disputant stop to negotiate and draft a complete constitution, together with a substantive and procedural code, for the governance of his private court.”).

¹²² *Id.*

¹²³ *See id.*

¹²⁴ *Id.*

that future disputes will be arbitrated under the auspices of one of these organizations.

When the parties choose the AAA, for example, they agree that the organization's rules will govern future proceedings.¹²⁵ This preemptively resolves any potential disagreements over such issues as choice of law, rules of discovery, and method for choosing arbitrators.¹²⁶ The AAA provides alternative rules for parties to adopt depending upon which of certain specific trades or industries they may belong to.¹²⁷ In keeping consistent with its role as a one-stop shop for dispute resolution by arbitration, the AAA also furnishes the parties a list of several thousand arbitrators from which to choose.¹²⁸ The Association itself will appoint an arbitrator if the parties cannot agree on one.¹²⁹

These institutions work in concert with international treaties, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹³⁰ (the "New York Convention"), which compel member states to enforce arbitration agreements and awards. Arbitration treaties therefore make it easier for parties to enforce awards in foreign jurisdictions than they could court judgments.¹³¹ For instance,

even if a foreign party were to prevail in litigation in his opponent's home courts, execution of the judgment may be impossible if the loser's only significant assets are situated in a third country. In most countries, a validly rendered arbitration award will be enforced much as would a local court judgment. Thus, in many international disputes, arbitration is not just a preferable means of obtaining compensation, it is the only viable means of doing so.¹³²

Advantages to Arbitration

There has been an extraordinary expansion, in the last two decades, in the use of arbitration to resolve commercial disputes

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 625.

¹²⁹ *Id.*

¹³⁰ United States Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 USCS § 201 (1958).

¹³¹ Martin Hunter, *International Commercial Dispute Resolution: The Challenge of the Twenty-First Century*, 16 *ARB. INT'L* 379, 382 (2000).

¹³² Knull, *supra* note 8, at 539-40.

around the world.¹³³ The growth of arbitration is partly a reflection of the growing frequency of international commercial transactions during the past two decades.¹³⁴ However, this increased popularity is also a function of several beneficial characteristics inherent to the arbitration process. Arbitration's most frequently-cited assets include (A) its *efficiency*; (B) its *finality*; (C) the option for parties to choose an arbitrator with *subject matter expertise*; (D) the relative ease with which international arbitral awards are *enforced*, as compared to international litigation awards; and (E) its institutional goal, as a *contractual construct*, to best honor the parties' intentions.

a. *Efficiency*

Arbitration has long been championed as a more efficient process than litigation.¹³⁵ The heavy financial and emotional costs of going to court have been well documented. As far back as the mid-19th Century, Abraham Lincoln solemnly warned attorneys to “[d]iscourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, in waste of time.”¹³⁶ Essentially, parties often have as much to gain from merely ending their dispute as they might from winning it.

The parties save time by scheduling hearings at their own convenience, thus avoiding waiting in the courthouse queue for their turn on the docket.¹³⁷ Additional benefits¹³⁸ for the parties include the streamlining, or even elimination, of discovery and other pre-trial procedures. The procedural advantages of the arbitration process are variable and depend upon the arbitrator or institution em-

¹³³ *Id.* at 531.

¹³⁴ *See id.* at 533.

¹³⁵ *See* Richard E. Speidel, *Securities Arbitration: A Decade After McMahon*, 62 BROOK. L. REV. 1335 (1996).

¹³⁶ RAU ET AL., *supra* note 2, at 14.

¹³⁷ *See* Osamu Inoue, *The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard*, 11 AM. REV. INT'L ARB. 247, 251 (2000) (“The court also stated that arbitrators have a strong interest in adhering to a schedule established on the basis of convenience to parties, counsel and arbitrators.”).

¹³⁸ William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J.LEGAL STUD. 235, 240 (1979).

ployed, and the circumstances of the dispute.¹³⁹ The parties themselves retain a broad discretion in structuring the proceedings.¹⁴⁰ Savings in time and the elimination of related pre-and post-trial work can often translate into savings in expense, as from reduced lawyers' fees.¹⁴¹

b. *Finality*

The second commonly-cited advantage of arbitration over litigation is its finality. Proponents insist that the lack of a mechanism for appeal on the merits of the dispute is a benefit to the parties.¹⁴² A final decision allows them to move on, whether they win or lose. This is particularly important where the parties will continue to interact long after the decision has been made.¹⁴³ The globalization of the world economy has wrought a dramatic increase in the number of international contractual obligations that extend beyond one year.¹⁴⁴ Take, for example, a contract between a multinational corporation from a developed nation and the government of a developing nation. Under this model, the government of the developing nation takes a far more active role in shaping economic transactions than a developed nation like the United States might take.¹⁴⁵ The gap between the nation's stage of development and that of the private actor's native land are commonly large. Oftentimes, the developing nation depends upon the technical expertise and expe-

¹³⁹ See RAU ET AL., *supra* note 2, at 854 ("The personality and professional background of the arbitrator, the attitudes and relationship of the parties, the issues in contention—all will influence the way the arbitration proceeds.").

¹⁴⁰ Baravati, *supra* note 120, at 709 ("Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.").

¹⁴¹ RAU ET AL., *supra* note 2, at 601.

¹⁴² See Eric James Fuglsang, *The Arbitrability of Domestic Antitrust Disputes: Where Does the Law Stand?*, 46 DEPAUL L. REV. 779 (1997).

¹⁴³ See Jeff Trask, *Montreal Protocol Noncompliance Procedure: The Best Approach to Resolving International Environmental Disputes?*, 80 GEO. L.J. 1973 (1992) ("Arbitration would be preferable to judicial dispute resolution, because arbitration can be less adversarial and allows disputants to continue relations on as normal a basis as possible.").

¹⁴⁴ Knull, *supra* note 8, at 537 ("[W]ith major infrastructure, energy, manufacturing and other contracts now attracting financing and participation with the increasing globalization of the world economy, there are more and more very large international transactions in which the stakes can be tens, hundreds, or even thousands of millions of dollars. Projects may involve investments lasting decades, increasing the likelihood of a major dispute at some point in the project's life. They may involve resources or undertakings that are vital to the host nation's well-being.").

¹⁴⁵ RAU ET AL., *supra* note 2, at 628.

rience of its developed partner in exploiting and developing its own natural resources.¹⁴⁶ These contractual relationships are by nature long-term.¹⁴⁷ These arrangements create trouble for dispute resolution because, when conflict arises, developing nations have historically been reluctant to submit to the jurisdiction of another sovereign's court.¹⁴⁸

Dependence upon a developed nation can last many years, over which disputes inherently arise. "Conflict is a natural component of long-term commercial relations. It is atypical for a large scale infrastructure project, development project, or trading relationship not to produce claims, disputes and disagreements over rights, responsibilities, powers, obligations, and monetary rewards."¹⁴⁹ The long-term nature of this relationship dictates a need for a dispute resolution system – like arbitration – where the parties can settle their grievances quickly and (preferably) amicably, so that they may resume working together.¹⁵⁰ The under-developed nation's justice system, however, may be ill-equipped to resolve such problems. Further, the disparity between the nation's financial resources can create a very favorable situation for the well-healed corporate entity.¹⁵¹ Financial disparity and imbalances of power can distort judgment in litigation. The party with the deeper pockets can often afford the better legal representation, which can "influence the quality of presentation, which in turn has an important bearing on who wins and the terms of victory."¹⁵²

¹⁴⁶ See *id.* at 628.

¹⁴⁷ See Eric D. Green, *International Commercial Dispute Resolution: Courts, Arbitration, and Mediation—Introduction*, 15 B.U. INT'L. L.J. 175-76 (1997) (positing that these "long-term interdependent" joint enterprise relationships between multinational corporations and state-owned enterprises create complex business arrangements with high reward balanced with high risk); see also Knull, *supra* note 8, at 537.

¹⁴⁸ Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards*, 21 TEX. INT'L L.J. 397, 407 (1986) ("arbitration, by removing a dispute from resolution by local courts applying local law, takes it to a plane where the rules are made by the great international commercial interests, a process from which Third World countries normally are excluded.").

¹⁴⁹ Green, *supra* note 147, at 176; See BUHRING-UHLE, *supra* note 1, at 3-17.

¹⁵⁰ Trask, *supra* note 143, at 1994.

¹⁵¹ See Fiss, *supra* note 19, at 1076 (Fiss argues that the distribution of financial resources infects the judicial process by making one party better equipped to present its case than the other; unequal resources also lends one party great leverage against the other by being better equipped to remain longer in litigation than the other, effectively putting more pressure on that party to bow out and to accept the stronger parties' terms).

¹⁵² *Id.* at 1077.

Because long-term contractual relations generate conflict,¹⁵³ they often require a dispute resolution system that enables swift and amicable resolutions. Arbitration's finality of judgment lends itself well to such situations. However, arbitration is not so well suited for deals which are random, singular, and non-systematic. Finality is not an asset to parties who have little or no interest in cultivating future relations.¹⁵⁴ These parties prefer accuracy to finality.¹⁵⁵ The internet's immediacy has undoubtedly made it easier for individuals to transact business in a non-systematic fashion. Consequently, the internet has made arbitration's finality of judgment less meaningful to a large new class of transnational actors.

c. *Expertise*

A third commonly-cited advantage of arbitration over the judicial system is an arbitrator's expertise. The parties can typically choose an arbitrator with a technical background in the subject matter under dispute.¹⁵⁶ "[H]e is likely, then, to be familiar with the presuppositions and understandings of the trade."¹⁵⁷ The arbitrator's expertise is especially relevant to resolution where the dispute centers upon interpretations, customs, and technical standards specific to the parties' trade or industry.¹⁵⁸ Additionally, where a case is heard by a panel of arbitrators, the system provides the parties access to a breadth of expertise impossible to find in just one person. The arbitrator, unlike the judge, is free to draw upon his background in the subject matter of the dispute.¹⁵⁹ The parties benefit by not having to take time educating the judge or jury, and,

¹⁵³ See Green, *supra* note 147, at 176 ("The investments required to compete effectively expose businesses to all of the uncertainties inherent in any long-term interdependent relationship plus those associated with cross-cultural, transnational matters, including possible expropriation by one's partner, submission to the jurisdiction of foreign courts, and reliance on an alien legal system.").

¹⁵⁴ RAU ET AL., *supra* note 2, at 648 ("The usefulness of arbitration may be diluted where the parties do not, as they may in labor and commercial disputes, 'have an interest in the pie of continued collaboration.'"); See HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS*, 315 (1994).

¹⁵⁵ See Knull, *supra* note 8, at 531-32 (stating that finality is an advantage only where stakes are small and where parties have an interest in continued collaboration – where stakes are large, accuracy is chief).

¹⁵⁶ RAU ET AL., *supra* note 2, at 601.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 861.

as a result of his facility with the subject, the decision-maker is more able to make creative and versatile decisions. For example,

In one commercial dispute . . . the arbitrators awarded the buyer money damages for non-delivery even though no evidence as to the market price of the goods had been introduced. Judge Learned Hand dismissed the seller's arguments that this constituted arbitral "misconduct," remarking that if the arbitrators "were of the trade, they were justified in resorting to their personal acquaintance with its prices."¹⁶⁰

Therefore, the arbitrator's expertise not only supplements the process's capacity for efficiency, but can also empower him to create a more equitable ruling.

d. *Enforcement*

For the winning party to a judgment, enforcement in international litigation is a very uncertain prospect.¹⁶¹ "[B]ecause it can be problematic to enforce a court judgment across national borders, arbitration is frequently the only way a prevailing party to an international proceeding can actually compel payment after the resolution process is complete."¹⁶² Arbitration treaties such as the New York Convention include provisions¹⁶³ that have empowered parties to utilize the courts of member states in enforcing arbitration awards. Procedural law¹⁶⁴ is therefore centrally important to arbitration, perhaps most of all in governing not just the validity of arbitral awards, but the grounds for setting aside awards as well.

e. *Honor Parties' Intentions*

"[One] common rationale for deference to arbitration is that the parties have bargained for the judgment of an arbitrator, rather than a court, to resolve their disputes and that this bargain, once made, should be respected."¹⁶⁵ The courts' analyses of alternative dispute resolution clauses – including arbitration clauses – are intertwined with important principles of contract law and of freedom of contract.¹⁶⁶ Arbitral awards, after all, are outcomes contracted

¹⁶⁰ *Id.*

¹⁶¹ RAU ET AL., *supra* note 2, at 626.

¹⁶² Knull, *supra* note 8, at 533.

¹⁶³ See New York Convention, *supra* note 130, art. IV.

¹⁶⁴ Pippa Read, *Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium*; 10 AM. REV. INT'L ARB. 177, 179 (1999).

¹⁶⁵ RAU ET AL., *supra* note 2, at 757.

¹⁶⁶ Broemmer, *supra* note 100, at 150-51.

and agreed to by the parties involved. Even where, as in the securities industry, all disputes are sent to arbitration – the customer has willingly agreed to arbitrate his disputes as part of the cost of gaining access to the securities industry.¹⁶⁷

In international arbitration, one explanation of the relative ease with which many countries enforce arbitral awards over foreign court judgments is the preference toward regarding arbitral awards as “the outcome of contractual relationships, rather than of the exercise of state powers.”¹⁶⁸ Arbitration has even been described as another step in the movement towards deregulation of industry, “one that permits actors with powerful economic interests to pursue self-interest free of community norms.”¹⁶⁹ Additionally, some in the alternative dispute resolution circles in both the U.S. and abroad believe that “dispute resolution should not be left exclusively to the lawyers.”¹⁷⁰ It is more common for foreign businessmen to resolve their disputes between themselves, and to turn to the courts, or alternative processes, only as a last resort.¹⁷¹ This reflects an international preference that the intention of the parties, as evidenced by their contractual obligations, should be preeminent.

Disadvantages of Arbitration

Arbitration is by no means a perfect system. The strengths enumerated in the preceding section enable arbitration to strike a balance between the desire of a sovereign state to assert and to judicially enforce its own values, and the desire to honor the intentions and expectations of contracting parties. This ability is especially relevant to international transactions where parties are reluctant to submit their dispute to a foreign jurisdiction.¹⁷² The reasons for this reluctance might include concerns about the cost,

¹⁶⁷ See Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 *BROOK. L. REV.* 1381, 1411 (1996).

¹⁶⁸ Gardner, *Economic and Political Implications of International Commercial Arbitration*, in *International Trade Arbitration* 20-21 (Martin Domke ed., 1958).

¹⁶⁹ Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 *YALE L.J.* 1660, 1665 n.33 (1985).

¹⁷⁰ Walter G. Gans, *Saving Time and Money in Cross-Border Commercial Disputes*, 52 *DISP. RESOL. J.* 50 (January 1997).

¹⁷¹ *Id.* at 53.

¹⁷² Knull, *supra* note 8, at 533. (Stating that the swift expansion of arbitration in international transactions “may reflect no more than the increased frequency of transnational transactions and their associated disputes, on the one hand, and the absence of any acceptable alternative, on the other.”).

the integrity, or the predictability of judgment in a foreign court.¹⁷³ The inclusion of an arbitration clause allays these concerns because the clause becomes, in effect, “a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.”¹⁷⁴ There are several areas in which arbitration under-performs in the international trade. This section will set forth the system’s primary critiques in order to highlight opportunities for improvement.

a. *Finality as a Deterrent*

Finality, although it is traditionally cited as an advantage of the arbitration process over judicial resolution, may actually be a liability, which discourages parties from selecting arbitration.¹⁷⁵ The argument in favor of finality assumes that the losing party benefits as much, or more, from finality as he would from winning, by being able to move on past the arbitration result. This is an especially compelling point where the disputing parties’ interactions will be repeated and continuous. After resolution they “can put behind them the rancor of conflict and get on with the more serene business of making money.”¹⁷⁶

But what if the amount in dispute is so large that the absence of a mechanism to correct an erroneous result is untenable?

[A] party for whom the stakes and risk of loss are high may for that reason become less interested in [finality]—and more reluctant to chance a decision without having taken every possible advantage of the full panoply of legal procedures, including the ability to play out his hand to the bitter end.¹⁷⁷

With the amount of international transactions on the rise, and the ever-increasing sums of money involved therein, this high-stakes gamble is likely to have a chilling effect upon international arbitration.¹⁷⁸

Empirical evidence supports the theory that international arbitration is losing ground to litigation of disputes over large sums of

¹⁷³ *Id.*

¹⁷⁴ Scherk, *supra* note 54, at 516.

¹⁷⁵ See James M. Ringer & Martin L. Seidel, *Judicial Review Clauses in Transnational Arbitration Agreements*, 12(5) *INSIDE LITIG.* 6 (May 1998).

¹⁷⁶ Knull, *supra* note 8, at 531.

¹⁷⁷ RAU ET AL., *supra* note 2, at 603.

¹⁷⁸ See Knull, *supra* note 8, at 532.

money.¹⁷⁹ One study, which polled approximately fifty American and European attorneys, found that one-third stated that the absence of appeal in arbitration presented a “highly relevant” advantage to private dispute resolution.¹⁸⁰ The conclusion one reaches is that “parties are often not that concerned with costs because their main preoccupation is with the outcome of the procedure; the advantage of arbitration is not to cut costs, it is a tailor-made procedure that emphasizes quality.”¹⁸¹

b. *Justice Sacrificed for Efficiency*

The arbitral process trades the interest of justice for efficiency.¹⁸² Justice, however, is a time-consuming endeavor. The purpose of the justice system is not simply to put an end to a dispute.¹⁸³ Yet the societal goals of arbitration are often frustrated by the intentions of the parties involved. Lawsuits, like violence, are frequently brought to teach one’s adversary a lesson. However, “[t]he proverbial eye for an eye they wish to extract can be given in a more meaningful and less costly way than blinding the other side.”¹⁸⁴ The costs of litigation are great for both sides, and the main lesson learned becomes one of the uncertainty of outcomes,¹⁸⁵ the stresses of being at the mercy of strangers, and the heavy financial costs undertaken. Parties to long, drawn-out disputes tend to become removed from the issues they entered the process with, and instead become married to the emotional rewards of winning and getting even. Arbitration provides the disputants a forum for placing their contested issues to rest at a significantly reduced financial and emotional cost.

The tradeoff inherent to alternative processes of dispute resolution is that what the parties gain in efficiency may be outweighed by society’s losses. The settlement of a conflict achieves peace be-

¹⁷⁹ *Id.* at 532 (“In a recent survey of 606 corporate lawyers from America’s largest corporations, 54.3% of those who chose not to opt for arbitration said that choice was made largely because arbitration awards are so difficult to appeal.”).

¹⁸⁰ BUHRING-UHLE, *supra* note 1, at 404.

¹⁸¹ *Id.* at 142-43.

¹⁸² Fiss, *supra* note 19, at 1072 (“The dispute-resolution story makes settlement appear as a perfect substitute for judgment. . . by trivializing the remedial dimensions of a lawsuit, and by reducing the social function of the lawsuit to one of resolving private disputes.”).

¹⁸³ *Id.* at 1085 (urging that the purpose of a system of adjudication is not just to settle disputes, but also to explicate and give force to the values of a community).

¹⁸⁴ Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry Into Justice In Mediation*, 9 CLINICAL L. REV. 157, 159 (Fall 2002).

¹⁸⁵ *See id.* at 167.

tween the parties without taxing the court system. This peace, however, is obtained at the expense of a significant purpose of adjudication. Courts not only aim to achieve peace between warring parties, but also to explicate and give force to the community's values,¹⁸⁶ as they are embodied in their laws.

A court system (public or private) produces two types of service. One is dispute resolution—determining whether a rule has been violated. The other is rule formulation—creating rules of law as a byproduct of the dispute-resolution process. When a court resolves a dispute, its resolution, especially if embodied in a written opinion, provides information regarding the likely outcome of similar disputes in the future. This is the system of precedent, which is so important in the Anglo-American legal system.¹⁸⁷

An arbitrator is not obligated to follow past decisions, and his own are not subject to review. An arbitrator “may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement.”¹⁸⁸ The result is that settlements and arbitrations produce no rules or precedents binding on nonparties. The growing popularity of such a system inevitably hurts society because rules and precedents are used to guide the future actions of citizens and impose order where uncertainty would otherwise chill people's behavior.¹⁸⁹ Arbitration, therefore, deprives courts of the occasion to render an interpretation of society's values and laws.

It may be argued that any process like arbitration, which attempts to honor the intentions of the contracting parties, does thereby achieve a “just” result. The parties have, after all, agreed to live by the decision of the arbitrator, or by their own agreed-upon settlement. Nevertheless, their chosen process does not necessarily achieve justice. This is partly because not all parties agree to arbitrate for similar reasons. A less-endowed party has a strong financial incentive to agree to an arbitral clause because it cannot afford to litigate its disputes. That same party may strategically prefer litigation, yet for financial reasons, it must agree to arbitrate.

¹⁸⁶ Fiss, *supra* note 19, at 1085.

¹⁸⁷ Landes, *supra* note 138, at 235.

¹⁸⁸ *In the Matter of the Arbitration between Silverman and Benmor Coats, Inc.*, 61 N.Y.2d 299 (1984).

¹⁸⁹ See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2919 (1995).

The choice to avert the courthouse is a function of the resources available to each party to finance litigation.¹⁹⁰ Without financial pressures to influence disputants, parties would see each case through to their own legal conclusion. Yet, since so few lawsuits are actually decided by a judge or jury,¹⁹¹ it is apparent that financial realities affect most cases. Further, resources are frequently distributed unequally.¹⁹² The side with greater resources has an advantage in not only being able to potentially present a stronger case – via affording more billable attorney hours – but also in being able to outlast its financially disadvantaged opponent.¹⁹³ The party who cannot remain in litigation is forced to accept a lesser settlement because the value to them of withdrawing outweighs that of remaining in a risky court case.¹⁹⁴ Thus, though the parties have much to gain from settling their disputes, the resulting cost and efficiency benefits may come at the expense of a just outcome.

It is important to keep in mind that these are outcomes contracted and agreed to by the parties involved. Even a compulsory arbitration like the kind required in the securities industry¹⁹⁵ is merely the child of an agreement. The customer willingly agrees to arbitrate his disputes as part of the cost of gaining access to the securities industry.¹⁹⁶ As such, the justice deficiency is borne mainly by the parties involved. The parties are responsible for making their own choice and value judgment about efficiency versus justice, and for living with its consequences. Many parties are quite willing to do so.

c. Expertise Hinders Neutrality

Arbiter expertise is not a universally embraced element of the arbitration process. Preconceptions and partiality have long influenced the arbitration of disputes. Parties are free to choose arbitrators for their knowledge of the subject matter in dispute.¹⁹⁷ However, the very advantage of their education can actually hinder their neutrality. “Even decision-makers who think of themselves as

¹⁹⁰ See Fiss, *supra* note 19, at 1076.

¹⁹¹ See Trubeck et al., *supra* note 57, at 122.

¹⁹² Fiss, *supra* note 19, at 1076.

¹⁹³ See *id.* at 1076-78.

¹⁹⁴ See *id.* (lesser-endowed party is a victim of the cost of litigation if he is forced to avoid the courts, even though he may seem to benefit by avoiding the costs of litigation).

¹⁹⁵ See RAU ET AL., *supra* note 2, at 784.

¹⁹⁶ See Stempel, *supra* note 167, at 1411.

¹⁹⁷ RAU ET AL., *supra* note 2, at 601.

scrupulously neutral are often hard put to avoid the predispositions and preconceptions that seem to accompany technical expertise.”¹⁹⁸

There is an age-old practice of disputants choosing to resolve their conflicts within their own community, rather than within their legal system. Orthodox Jews have utilized Jewish arbitral proceedings since as early as the 2nd Century AD.¹⁹⁹ When submitting their case to a Din Torah, or “Torah judgment,” parties plead their sides to a tribunal of rabbis who render the ultimate decision.²⁰⁰ The Din Torah wields a powerful means of enforcement: parties accept the rabbinic resolution, lest they subject themselves to scorn and become excluded from their community.²⁰¹ The parties, and their community, ostensibly benefit from having their case determined by people who share their background and understand their values.

Industries, as well, have historically favored rule from within.²⁰² Merchants have long endeavored to create forums for settling mercantile disputes among themselves. This reflected a desire to form a separate, self-governing community, independent of the larger economic and judicial systems. Using a separate forum for resolving disputes enables those who “have the most intimate understanding of the complexities of their situation [to] achieve a resolution they find just.”²⁰³

Industry member arbitration remains suspicious to many, despite its prevalence.²⁰⁴ It is not in the public’s interest to allow industries to regulate themselves. Automobile executives have little incentive to maintain strict emissions standards, for instance, without Congress forcing them to do so.²⁰⁵ Strict standards raise costs and likely hurt business in the short-run. But without emissions

¹⁹⁸ *Id.* at 786.

¹⁹⁹ See *In the Matter of the Arbitration Between Mikel and Scharf*, 432 N.Y.S.2d 602, *aff’d*, 444 N.Y.S.2d 690 (1981).

²⁰⁰ *Id.* at 550.

²⁰¹ *Id.* at 551.

²⁰² See William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 218 (“[A]s used by merchants, arbitration is not really a substitute for court adjudication as something that is cheaper or faster or whatever, but is rather a means of dispute settling as ancient. . . as court adjudication.”).

²⁰³ Hyman, *supra* note 184, at 159.

²⁰⁴ See RAU ET AL., *supra* note 2, at 785.

²⁰⁵ See Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711 (1999) (Writing in the context of self-regulation of the communications industry, the author states that “where a company can make greater profit by ignoring self-regulation than

standards, automobile companies are able to avoid paying for their externalities - pollution. This balance of public and corporate interests is maintained through regulation from outside sources.

An additional pitfall of self-governance is that, because industries tend to recycle their chosen arbitrators, some arbiters may have an incentive to favor their industry in order to obtain future work.²⁰⁶ Nevertheless, the securities industry is permitted to arbitrate, if not regulate, itself. "At the present time, virtually all brokerage firms require customers to sign a pre-dispute arbitration agreement as a condition for opening an account."²⁰⁷ One possible rationale is that by contracting with one another, the buyer and seller in this industry create, in effect, a closed market between themselves. There are no harmful externalities produced, such as pollution, which necessitate protecting unwitting third parties.

CONCLUSION

International dispute resolution is at a crossroad. Arbitration is currently the most effective and reliable of the international institutions, but it must do more to respond to the enforcement and jurisdictional problems presented by international trade. This Note has covered a multitude of topics, including: the problems inherent to international law; the sources of international regulation; the effect that the internet has on international dispute resolution; and the factors which make arbitration the preeminent international dispute resolution system, in addition to its weaknesses. The internet has changed the way international trade is conducted. The international community must respond by improving the way it regulates trade.

complying, it is likely to do so, especially where noncompliance is not easily detected by the consumer or likely to harm the particular company's reputation.").

²⁰⁶ RAU ET AL., *supra* note 2, at 785.

²⁰⁷ *Id.* at 784.