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Beyond Contract – The Case for Default Arbitration in International Commercial Disputes

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Gilles Cuniberti

Abstract

The thesis of this Article is that arbitration should become the default mode of resolution of international commercial disputes. In Part I, I first address the critical issue of the legitimacy of international arbitrators. In the traditional model of voluntary arbitration, the legitimacy of arbitrators flows from the agreement of the parties. By agreeing to have their dispute settled by way of arbitration, the parties have not only empowered the arbitrators, but also abided by the power that they have conferred on them. In the model that I propose, however, arbitration loses its contractual foundation. Would arbitrators also lose all legitimacy? In the absence of any acceptance of the parties, can adjudicatory power be conferred on private individuals? In Part II, I discuss the comparative legitimacy of courts and of arbitrators to settle international commercial disputes, and find that the legitimacy of arbitrators is not lower than the legitimacy of courts. I then turn to the more traditional critiques of arbitration. Legal scholars have long debated the desirability of private adjudication. Many of them have concluded that its costs outweigh its benefits, and that it is thus undesirable. In Part III, I argue that this critique assumes features of the arbitral process which are peculiar to U.S. domestic arbitration, and which are thus not necessary. I present recent developments in specialized fields of international arbitration and argue that they indeed show that the costs of private adjudication have been overstated. Finally, in Part IV, I build on the conclusions reached in the previous parts and frame the details of the proposed model accordingly. Before discussing the theoretical foundation of the proposed model, however, I begin this Article by sketching the advantages of arbitration over litigation. I show that, in an international context, arbitration is a more suitable mode of dispute resolution, and that extending its scope would actually improve the settlement of international commercial disputes.

BEYOND CONTRACT—THE CASE FOR DEFAULT ARBITRATION IN INTERNATIONAL COMMERCIAL DISPUTES

*Gilles Cuniberti**

INTRODUCTION

Is arbitration the natural mode of resolution for international business disputes? It is commonplace to state that the essential features of the process make it the most suitable mode of dispute resolution in this context:¹ neutrality and independence of the adjudicators, seriousness and flexibility of the process, higher prospects of enforceability of the decision in the majority of the world's jurisdictions.² It may also be that the development of international trade has led to a significant increase in the number of the cases resolved by way of arbitration. Even though it is almost impossible to assess the number of cases that are arbitrated each year,³ as the process is both confidential and decentralized, there is some anecdotal evidence that international

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1. See, e.g., ANDREAS F. LOWENFELD, *LOWENFELD ON INTERNATIONAL ARBITRATION, COLLECTED ESSAYS OVER THREE DECADES* 143 (2005); BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* 5 (2005); Charles N. Brower, Charles N. Brower II & Jeremy K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 *ARB. INT'L* 415, 440 (2003).

2. The advantages of the arbitral process are discussed in Part II and throughout the Article. It may be useful to mention immediately for American readers unfamiliar with international arbitration that it is quite different from U.S. domestic arbitration, in particular in employment and consumer disputes.

3. Some scholars have nevertheless been able to propose estimates that ninety percent of international contracts include an arbitration clause. See, e.g., CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK EDS., *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 59 (2005). A recent study has found that commercial international contracts include arbitration clauses only in twenty percent of the cases, but the data are barely more representative than the typical anecdotal evidence which is used, as it only covered a couple hundred (270) international contracts. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of ex ante Arbitration Clauses in Publicly-Held Companies' Contracts* 29 (Cornell Legal Studies Research Paper Series, Paper No. 06-023, 2006), available at <http://ssrn.com/abstract=927423>.

commercial arbitration has exploded over the last forty years. Some of the major international arbitral institutions report that their caseload has increased dramatically.⁴ Numerous specialists of international arbitration report that they have witnessed a tremendous development of the field,⁵ and even that “it has become the dominant method of settling international trade disputes.”⁶ Even the U.S. Supreme Court stated in 1985 that “[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade.”⁷

The suitability of the arbitral process to the resolution of international commercial disputes is not only attested by its features and the rise of arbitration. Several states have endorsed a pro-arbitration policy. In the United States, the Supreme Court has insisted for several decades on the existence of an “emphatic federal policy in favor of arbitral dispute resolution,”⁸ and on “a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes”⁹ In France, as will be discussed below, courts have applied an even more favorable policy than in the United States, taking a variety of particularly liberal positions in favor of the arbitral process and making France, by and large, probably the most welcoming jurisdiction in the world for international arbitration.¹⁰

The steps taken by many jurisdictions to liberalize their laws

4. See, e.g., Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233 (Suppl. 2006) (stating that the number of proceedings administered by leading international institutions has doubled between 1993 and 2003, and even tripled for the American Arbitration Association).

5. See, e.g., W. MICHAEL REISMAN, W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, *INTERNATIONAL COMMERCIAL ARBITRATION* lxxvii (1997); EMMANUEL GAILLARD & JOHN SAVAGE EDS., *FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* I (1999); Brower et al., *supra* note 1, at 415-16.

6. TIBOR VARADY, JOHN J. BARCELÓ III & ARTHUR T. VON MEHREN, *INTERNATIONAL COMMERCIAL ARBITRATION* v (1999); see also W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 2 (1995) (referring to the “normalcy of international commercial arbitration”); ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 1 (4th ed. 2004); GAILLARD & SAVAGE, *supra* note 5, at 1.

7. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985).

8. *Id.* at 631.

9. *Id.*

10. See *infra* Part II.B.

of arbitration¹¹ certainly reflect to a certain extent a willingness, if not an eagerness to attract as much arbitration as possible within their borders in order to take advantage of the invisible benefits that may come with this activity. There is clear competition at the international level between several jurisdictions in this respect.¹² In Europe, a match of giants opposes France and Switzerland, with the United Kingdom as a runner-up. Judges in each of these jurisdictions are very much aware of the moves made in favor of arbitration by the courts of other jurisdictions, and try to be at the forefront of the liberalization of arbitration. Jurisdictions willing to enter into the market try to take radical steps to market themselves.¹³

Although the economic interest of the jurisdictions in seeking to attract arbitration may be an important factor in the evolution of many arbitration laws in the world, this Article will argue that another critical reason for the development of arbitration is that it is perceived by many as the natural mode for the resolution of international commercial disputes, and rightly so. It is however paradoxical that a natural mode for the resolution of any disputes not be, if not mandatory, which is exceptional in a commercial context, at least a default solution. In other words, one wonders why, if arbitration is the natural mode for the resolution of international commercial disputes, it is not the default solution when the parties have not provided for the mode of resolution of their disputes and, in particular, have not included a jurisdiction clause in their contract.

From a U.S. perspective, the situation appears even more paradoxical as the Supreme Court never misses an occasion to recall, indeed “emphatically,” that arbitration is “favored” by U.S. federal law.¹⁴ If it really were so, one would think that, in the absence of any clear statement of the parties to an international business transaction, U.S. law would not provide for the

11. See HANOTIAU, *supra* note 1, at 5; see also William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 694 (1989) (discussing the Belgian and the Swiss experiences).

12. Arthur T. von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems*, in RECUEIL DES COURS TOME 295, at 58 (2002).

13. For instance by allowing foreign parties to waive completely the possibility to challenge an award made on their territory. See Park, *National Law and Commercial Justice*, *supra* note 11, at 694.

14. See, e.g., *Mitsubishi*, 473 U.S. at 638.

jurisdiction of its courts, but would give assistance to the party willing to initiate arbitration proceedings. The truth of the matter is that the so-called pro-arbitration policy of the Supreme Court is essentially an anti-discrimination policy, providing for the enforcement of arbitration agreements when they exist, exactly as other agreements.¹⁵

There are, however, jurisdictions which genuinely favor international arbitration, and where arbitration agreements are not enforced like other contracts, but more favorably. The most advanced on that path is France. French law has now reached the extreme position where arbitration agreements are deemed valid and enforceable in all circumstances, irrespective of the traditional requirements of the French law of contract, or indeed of any other law.¹⁶ As will be developed below, the policy reason behind this solution is that the contractual nature of arbitration can be used strategically by defendants to delay and sometimes avoid the arbitral process, and that a clear rule providing for the enforceability of arbitration agreements in all circumstances should be an efficient tool against such moves. The contractual nature of international arbitration has thus begun to appear to the French judiciary as an obstacle to the development of international arbitration.

It could seem astonishing that the most essential feature of arbitration, i.e., that it is a “creature of contract,”¹⁷ could appear as an obstacle to its implementation. If arbitration was indeed perceived as one alternative mode of dispute resolution among many others, but by no means a superior or more appropriate one, then its contractual foundation should appear as the most natural technique to allow the parties to choose it and to protect them from being dragged into an alternative derogatory mode of dispute resolution without seriously considering making that unusual, out of the ordinary, choice. That is why one way to

15. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 440 (2006); *Hall Street Assoc., LLC v. Mattel Inc.*, 128 S. Ct. 1396, 1399 (2008). Once a core consent to arbitration has been found, however, a number of presumptions on the scope of consent kick in which are certainly favorable to arbitral jurisdiction. See generally Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of ‘Consent’*, 24 *ARB. INT’L* 199 (2008).

16. *Municipalité de Khoms El Mergeb v. Société Dalico*, Cass. 1e civ. (Fr.), Dec. 20, 1993, Bull. Civ. I, No. 1675, *REV. ARB.* 116, 117 (1994).

17. See, e.g., *Nolde Bros., Inc. v. Local No. 358, Bakery and Confectionary Workers Union*, 430 U.S. 243, 251 (1977); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

interpret an evolution like the French one that in effect negates the contractual nature of arbitration is to see a critical shift in paradigm. Far from remaining an alternative mode of dispute resolution, the chosen mode (by the legal order) which does not really need to be chosen (by the parties) becomes the natural mode of dispute resolution. Because it does not appear anymore as an unusual, out of the ordinary, way to resolve international commercial disputes, there is much less need, if any, to protect the consent of the parties to resort to it, and indeed to actually find such consent. In case of doubt, it makes sense to consider that the parties would actually agree to the natural mode of dispute resolution of the community.

This Article, however, is not about French law. It does not want to predict how the French law of arbitration will evolve. It wants to address a more general and normative question. Should arbitration become the natural mode of resolution of international commercial disputes? Should it lose its contractual foundation and become the default mode of dispute resolution in international commercial matters? Is it a good idea? Is it feasible? The central issue of the Article is not even primarily one of international arbitration, but rather one of international dispute resolution. As states are far from being able to offer a viable solution to resolve international private disputes in general and international commercial disputes in particular, has the private sector been able to develop an alternative solution? International commercial arbitration is now a service which has shown its efficacy. It could develop under the assumption that states would control it and that only parties willing to resort to it would undertake it. After forty years of success, however, it may be time to ask whether that tool could be used to fulfill other functions. Has the time come for the private sector to take over the resolution of international commercial disputes and provide this service to the international business community in a more efficient way than states?

The thesis of this Article is that arbitration should become the default mode of resolution of international commercial disputes. In Parts II and III, I discuss what I have identified as the most important arguments against the proposed model, and respond to them.¹⁸

18. The Article is normative. Obviously, the proposed model could only be

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adopted by changing the existing law. It could be, however, that some legal doctrines would constrain lawmakers and prevent them from implementing it. In most jurisdictions, such doctrines would be constitutional in nature. For instance, there could be constitutional rights of access to courts. The issue would then arise as to whether non-consensual arbitration would jeopardize such rights. Constitutions could also provide for the jurisdiction of courts, and prevent any stripping of such jurisdiction. Another issue would then be whether non-consensual arbitration would amount to such jurisdiction stripping. These issues will be addressed in a separate paper.

I. WHY PROMOTE ARBITRATION

The essential aim of the Article is to discuss whether a non-contractual model of arbitration is theoretically sound. Before doing so, however, I would like to show that this discussion is not only academic. Arbitration has important practical advantages which make it a better mode for resolving international commercial disputes. The proposed model would thus actually improve international dispute resolution. I begin this Part by presenting these advantages.

The practical relevance of the discussion is also attested by the French experience. The French senior judiciary has reached the conclusion that the contractual foundation of international arbitration diminishes its efficacy, and has thus become an issue.¹⁹ The reaction of courts is always very informative on the problems faced by the community. French courts perceive that there is a practical problem which needs to be addressed. I briefly present the French experience in Section B.

A. *Improving International Commercial Adjudication*

1. A Critical Advantage: Enhancing Fairness

The most important advantage that arbitration offers is a fairer process.²⁰ The arbitral process is fairer in two ways. First and foremost, the adjudicator is more neutral. Second, the parties are put on a more equal footing.

a. Neutrality

The reason that probably best explains the success of international commercial arbitration is the fear of the home town advantage.²¹ Courts are not perceived as neutral when they decide

19. See generally GAILLARD & SAVAGE, *supra* note 5, at 409-30.

20. The surveys of the comparative advantages and disadvantages of arbitration over litigation are numerous. See, e.g., Gary B. Born, *Planning for International Dispute Resolution*, 17:3 J. INT'L ARB. 61, 62-64 (2000); REDFERN ET AL., *supra* note 6, at 24-32; WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES* 389 (2007). Several surveys were also conducted among practitioners. See CHRISTIAN BURHING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 105 (2d ed. 2006); see generally Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT'L ARB. 525 (2004).

21. See, e.g., REISMAN ET AL., *supra* note 5, at lxxvii; LOWENFELD, *supra* note 1, at 1; Pierre Lalive, *On the Neutrality of the Arbitrator and the Place of the Arbitration*, in *SWISS ESSAYS ON INTERNATIONAL ARBITRATION* 28 (1984). See also the survey conducted by M. Burhing-Uhle between November 1991 and June 1992 which revealed that forum neu-

disputes between locals and foreigners. It is well known that, unfortunately, corruption is rampant in many jurisdictions of the world. It is also well known that independence is not a luxury many judiciaries can afford.²² In such cases, it is not even clear that the mode of dispute resolution offered by the relevant national courts may be properly termed adjudication. The game has other rules, that the parties are free to follow if they so wish.²³ But if they would rather have a neutral and independent third party decide their dispute, an alternative must be found. There is no international commercial court.²⁴ Arbitration seems to be the only option. Of course, there are quite a few jurisdictions where the judiciary is a truly independent power. As a result, it could be argued that another option is to litigate before the courts of those jurisdictions.²⁵ However, the superiority of those courts, in this or in any other respect, would never be accepted by the parties originating from jurisdictions where courts are not to be trusted. Moreover, judges in great democracies may be independent, but still be capable of anti-foreigner bias. If even a few instances of actual bias are made public, this will be enough to create fear among all foreigners. Such cases will exist

trality was considered as one of the two most significant advantages of international arbitration, together with higher prospects of enforcement internationally. *See* BURHING-UHLE, *supra* note 20, at 109.

22. The fear of the home town advantage concerns the ability of the adjudicator to decide the dispute without bias. It is unconnected to the fear that the decision might not be enforceable abroad. *But see* Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 *CORNELL L.R.* 1, 33 (2008) (arguing that “the neutrality advantage is a derivative of the enforceability advantage.”).

23. Unless their law of origin does not allow them to, which is increasingly the case with corruption. There are several international treaties which prohibit the bribery of foreign officials. *See, e.g.*, Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 *I.L.M.* 1, available at <http://www.oecd.org/document/21/0,2340,en264920118520178131111,00.html>.

24. In some specialized fields, there have been calls for establishing one. *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1617-18 (2005). For the time being, not only is there no prospect of establishment of such a court, but it is unclear whether many states would want to commit to its jurisdiction. By contrast, the proposed model would not require the establishment of any new institution. There are already many international arbitrators who could serve on the tribunals that would need to be constituted.

25. *See generally* Dammann & Hansmann, *supra* note 22.

in most legal orders.²⁶ Sometimes, there will be less anecdotal evidence, with the same devastating consequences.²⁷ The only workable solution is to find an alternative to national courts altogether.²⁸ This alternative is arbitration. As a private, non-national mode of dispute resolution, it does not raise any of the concerns discussed so far. The arbitral tribunal is not a public entity subject to the influence of any state. It will typically be composed of private individuals who are nationals of different states.

Moreover, it is also likely that arbitral tribunals are typically more neutral culturally. Most courts are composed of individuals whose training, background and experience are overwhelmingly national.²⁹ Even if they are willing to be open to foreign customs, practices and realities, they are likely to see the world through their cultural lenses. There will be many occasions to misunderstand the facts and assume that what was not discussed is not different from what they have personally experienced.³⁰ By contrast, arbitrators sitting in an international panel are constantly reminded of the international nature of the dispute and the likelihood that the experiences of the other actors of the

26. For the United States, *see, e.g.*, Michael I. Krauss, *NAFTA Meets the American Torts Process: O'Keefe v. Loewen*, 9 GEO. MASON L. REV. 69 (2000).

27. For the United States, *see, e.g.*, Utpal Bhattacharya et al., *The Home Court Advantage in International Corporate Litigation*, 50 J.L & ECON. 625 (2007) (recent survey finding that foreigners lose more often in American courts than they win); *see also* Francesco Guerrera & Brooke Masters, *Foreign Companies Faring Worse in US Law Courts*, FIN. TIMES (London), Dec. 13, 2006, at 15. *But see* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122-23 (1996) (survey showing the opposite).

28. Actually, one could conceive that a given jurisdiction would accept to offer to the world its courts as neutral and independent adjudicators for disputes unrelated to any of the members of its community. The reason why most jurisdictions would actually not accept it is that the service would be funded by local taxpayers. *See generally* Dammann & Hansmann, *supra* note 22 (arguing that court fees should be raised in order to make extra-territorial litigation acceptable). However, the benefits for the legal profession could be so great that it would become beneficial. In England, this idea was likely not foreign to the open court theory developed by Lord Denning. *See* *The Atlantic Star*, [1973] QB 364, 382 ("You may call this 'forum-shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of the service."). It is unlikely, however, that any given jurisdiction could deal with as many disputes as arbitral tribunals do today. Furthermore, most of the other benefits of arbitration (cultural openness, procedural flexibility) would be lost.

29. JACQUELINE NOLAN-HALEY ET AL., *INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES* 51 (2005).

30. *Id.*

process are essentially different. An international panel is therefore likely to be more open minded and thus to understand, more often than not, the context of the disputes and the facts.

The private nature of arbitral tribunals, however, raises the concern of another kind of bias. As the parties typically each appoint one arbitrator, two out of the three members of the tribunal can be suspected of wishing to favor the party who appointed them in order to be reappointed.³¹ Most arbitration specialists, in particular experienced arbitrators, claim that this rarely happens.³² Certainly, virtually all arbitration regimes provide that arbitrators are under a duty to be impartial.³³ The third arbitrator, who will often be the president of the tribunal, will have no incentive to be partial, and it may then be that his presence makes it difficult for the party-appointed arbitrators to favor too zealously the interests of the party who nominated them. Indeed, it is interesting to note that arbitral awards are often unanimous.³⁴ However, such a hidden agenda of clientelism cannot be excluded.³⁵ Yet, it must be emphasized that such a problem does not concern the entire tribunal, but one of its members. The third arbitrator, who will not have been appointed by one of the parties, will have no such bias. The other party-appointed arbitrator will either be impartial, or be biased towards the other party, thus canceling the bias of the first party-appointed arbitrator. A world of unbiased arbitrators would be a better world, but a world of biased arbitrators sitting in unbiased tribunals is already a better world than the world of national courts. Certainly, parties resorting to international arbitration continue to draft arbitration clauses allowing them to each ap-

31. While it seems clear that arbitrators wish to be reappointed, the actual reason may vary a great deal. For some, it will be the prospect of receiving additional fees. However, specialists of international arbitration also act as counsels, and this typically attracts more fees. See Jan Paulsson, *Ethics, Elitism, Eligibility*, 14:4 J. INT'L ARB. 13, 14 (1997) (noting that their incentive seems to be to maintain or to enhance their reputation).

32. See, e.g., LOWENFELD, *supra* note 1, at 101.

33. See, e.g., Arbitration Act, 1996, c. 23, § 33 (Eng.); United Nations Commission on International Trade Law [UNCITRAL] Model Law on International Commercial Arbitration, arts. 11-12 (1985) [hereinafter 1985 UNCITRAL Model Law].

34. See, e.g., REISMAN, *supra* note 5, at 959.

35. See LOWENFELD, *supra* note 1, at 82 (reporting his experience in which the opposing party's arbitrator seemed too zealous in defense of the party who nominated him).

point one of the members of the tribunal.³⁶ They rarely choose to confer to a third party the power to appoint all the members of the tribunal. While this may above all show that they want to keep some control over the experience and the professionalism of the tribunal, it also suggests that the incentives of individual arbitrators are not important causes for concern.

b. Equality

Arbitration is also a fairer process because it offers procedural equality. Most arbitral regimes expressly provide that arbitrators are under the obligation to treat the parties fairly and equally.³⁷ More importantly, most national laws of international arbitration allow the challenge of arbitral awards made in violation of procedural fairness.³⁸ As awards cannot be challenged on the merits in most jurisdictions, this ground has become very important in practice. Experienced arbitrators know that losing parties may rely on any procedural unfairness to try to challenge the award, as typically they will have no other ground to challenge it. As a consequence, experienced arbitrators take procedural fairness extremely seriously.³⁹ Thus, the practice has developed to offer the most extensive procedural equality to the parties. Each party is given the very same number of days to prepare at each stage of the procedure. If one party is late by a few days, the other party knows that the tribunal will award him the exact same amount of extra time if he so requests. Parties are also awarded the same time to argue their case, sometimes to the minute. This may seem, and indeed is, quite formal, but it prevents parties from even attempting to argue that they were not on an absolute equal footing in the procedure. A consequence

36. See Paulsson, *supra* note 31, at 14.

37. See, e.g., Arbitration Act, 1996, c. 23, § 33 (Eng.); Swiss Code on Private International Law [hereinafter CPIL], art. 182(3) (1987) (Switz.), available at <http://www.umbrecht.ch/pdf/swisspil.pdf>. The obligation is also provided by numerous arbitration rules. See, e.g., International Chamber of Commerce ("ICC") Rules of Arbitration, art. 15(2) (1998), available at http://iccwbo.org/uploadedfiles/court/arbitration/other/rules_arb_english.pdf; London Court of International Arbitration ("LCIA"), LCIA Arbitration Rules, § 14.1 (Jan. 1, 1998), available at <http://www.lcia.arbitration.com>; UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 15(1), U.N. Doc. A/31/17 (Dec. 15, 1976).

38. See, e.g., Arbitration Act, 1996, c. 23, § 68 (Eng.); NCCP arts. 1502-04 (1981) (Fr.); CPIL, art. 190(2) (1987) (Switz.).

39. REDFERN ET AL., *supra* note 6, at 488; see generally Park, *National Law and Commercial Justice*, *supra* note 11.

of the emphasis put on procedural equality is that national practices which do not comport perfectly with procedural equality are banned.⁴⁰

2. Two Other Advantages

In international disputes, the most important advantage of arbitration is to offer a fairer adjudicatory process. But arbitration also has two other important advantages, which I present below. It saves public resources, and it offers a process which is more flexible.⁴¹

a. Saving Public Resources

The issue of the comparative cost of arbitration and litigation has traditionally been addressed from the perspective of the litigants. This is because the goal of the authors who discuss the comparative advantages of arbitration and litigation is to assess whether the parties should decide to resolve their dispute by way of arbitration, or not. Therefore, they logically take their perspective. However, it is probably unwise to generalize in this respect. Arbitration can be cheaper or more expensive, depending on a variety of factors.⁴²

If one takes the perspective of the state, however, the issue becomes very different. Arbitration is a private mode of dispute resolution, which is entirely funded by the litigants. As a result, it obviously saves public resources. Arbitral tribunals decide dis-

40. For instance, the English practice of not addressing legal issues in written pleadings ("skeleton of arguments") and waiting for the day before the hearing to send the list of the cases relied upon, or the French practice of giving to the adjudicator, but not the other party, oral pleadings notes (*dossier de plaidoirie*) at the end of the oral argument. See GAILLARD & SAVAGE, *supra* note 5, at 707.

41. In any other survey of the comparative advantages of arbitration and litigation, two additional advantages would typically be discussed: confidentiality and the higher prospects of international enforcement of arbitral awards. However, the model that I propose would not be confidential and would be unlikely to benefit from the 1958 New York Convention. See *infra* Part IV.C-D. I thus do not discuss them as they would not influence my model. I do not discuss either some perceived advantages which are now hotly disputed such as the cost and the speed of the process, or the reduction of forum shopping. The practice of modern international arbitration has shown that it is unwise to generalize in the respect of cost and speed and that arbitration has been able to generate a good deal of parallel litigation. See, e.g., BORN, *supra* note 20, at 66; LOWENFELD, *supra* note 1, at 3; Linda Silberman, *International Arbitration: Comments from a Critic*, 13 AM. REV. INT'L ARB. 9, 10 (2002).

42. BORN, *supra* note 20, at 66.

putes which would have otherwise been decided by courts. In many jurisdictions, public resources are scarce. Policies which entail public resources savings are therefore likely to be particularly appreciated by public policymakers. Diminishing the docket of courts has certainly been a critical factor in the promotion of alternative dispute resolution in many legal orders.⁴³ It demonstrates that many public policymakers would regard this consequence of the proposed model as critically important.

Yet, the desirability of a policy cannot be assessed by examining its direct effect on public resources only. If such policy also entails costs, a cost-benefit analysis must be conducted in order to determine whether the benefits outweigh the costs. As far as the proposed model is concerned, two series of costs can be identified. First, the private resolution of disputes shifts costs from the state to the litigants. The litigation costs of the parties increase.⁴⁴ Second, courts serve functions other than dispute resolution that private adjudicators may not serve, or at least not as well. The proposed model may then entail societal costs. The proposed model will only be beneficial if the benefits outweigh the costs. I conduct this cost-benefit analysis in Part III, and conclude the costs entailed by the proposed model are limited and that it is thus clearly beneficial. At this stage of the Article, I would like to make a more limited point. Irrespective of my findings and indeed of critiques of alternative dispute resolution, arbitration has been promoted in many legal orders for several decades.⁴⁵ This indicates that either the policymakers have conducted a cost-benefit analysis and have also concluded that the benefits outweigh the costs, or that saving public resources is so important that they would rather ignore or bear the costs entailed by private dispute resolution than stop promoting alternative dispute resolution. In any case, for those policymakers, saving public resources will be perceived as an important advantage of the proposed model.

This advantage will be even bigger in legal orders where public adjudication is more expensive. The costs of public adjudication are higher in some legal orders than in others. This

43. See, e.g., Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U. L. REV. 267, 269-70 (1985).

44. *Id.* at 270.

45. See generally VARADY, *supra*, note 6 ; REISMAN ET AL., *supra* note 5.

may be so for a variety of reasons. Judges can obviously be paid varying salaries. A different number of judges and staff may be involved in the settlement of each dispute. The civil procedure of each jurisdiction may lead judges to spend more or less time on each case. This last difference may be the one which makes the biggest difference. In the common law world, trials last several weeks.⁴⁶ Judges then draft lengthy decisions. In the civil law world, even in important commercial cases, hearings can last less than an hour.⁴⁷ Judges will then typically draft much shorter decisions. Unsurprisingly, judges in the common law tradition typically handle significantly fewer cases than judges in the civil law tradition.⁴⁸ It follows that, in those jurisdictions where adjudication is more expensive, saving public resources is likely to be a very powerful argument. In those jurisdictions where adjudication costs less, it will be a less powerful argument. But arbitration will then be attractive in a way unknown to more expensive jurisdictions: allowing the parties to design the arbitral process in order to increase the resources dedicated to the settlement of the dispute and improve the adjudicatory process.

b. Designing Process

The third advantage that arbitration offers is procedural flexibility. The parties have the power to design the arbitral process.⁴⁹ They can determine the procedural rules which will be applicable during the arbitration. This procedural flexibility can be used in different ways. The parties may shape a process which is only slightly different from the process of the court which would have decided the dispute in the absence of an agreement to arbitrate. But the parties may also wish to shape a process which will be very different from the alternate judicial

46. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 *TEX. L. REV.* 1665, 1672 (listing the differences between common-law and civil-law systems).

47. *Id.*

48. A striking and telling difference is the number of cases handled by supreme courts. The French supreme court for private and criminal matters (*Cour de cassation*) is composed of more than a hundred judges who handle more than 20,000 cases a year. Common law supreme courts typically handle a hundred or less cases per year.

49. The power to determine the applicable procedural rules is provided by virtually all arbitration laws and rules. *See, e.g.*, Arbitration Act, 1996, c. 23, § 34 (Eng.); NCCP, art. 1494 (2) (Fr.) (1981); CPIL, art. 182 (2) (Switz.); ICC, Rules of Arbitration, art. 15(1) (1998).

process, so much so that it may become almost as important an advantage as the fairness of arbitral process.

The clearest example is how parties from jurisdictions where fewer public resources are invested in the judicial process may wish to design a more costly mode of dispute resolution. For instance, the parties may wish to present their case orally for more than a few minutes. They may wish to seek assurance that the adjudicators will carefully read and dedicate as much time as will be necessary to the study of their written submissions. They may wish to have the adjudicators hear witnesses. If arbitration gives the parties the possibility to enjoy a process which will be different on so many accounts, it not only gives them flexibility. It gives them an entirely different commercial justice: more serious, more accurate, more satisfying.

Let's take an example. Here is a French major company. It has a commercial dispute with a foreign company. If the case is litigated in France, it will go before a French commercial court.⁵⁰ French commercial courts are staffed by members of the business community, who serve part-time as judges.⁵¹ There is no requirement that they have legal training.⁵² Hearings before French commercial courts typically last less than an hour.⁵³ Witnesses are virtually never heard by the court.⁵⁴ In any case, a French rule of evidence makes evidence originating from any of the parties inadmissible, which means that no employee of any of the two companies may validly testify.⁵⁵ If this company goes to arbitration, it will be able to appoint a prestigious jurist as an arbitrator, as most likely will its opponent. The hearing will last for several days. Witnesses will be heard, in particular employees who negotiated the contract for each company. The parties will expect the arbitrators to study carefully all

50. See generally John Bell, *JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW* 89-92 (James Crawford & John S. Bell et al., eds., Cambridge Univ. Press 2006).

51. *Id.* at 90.

52. *Id.* at 89-92.

53. See Geoffrey C. Hazard, Jr., Michele Taruffo, Rolf Stumerner & Antonio Gidi, *Principles And Rules Of Transnational Civil Procedure: Introduction To The Principles And Rules Of Transnational Civil Procedure*, 33 N.Y.U. J. INT'L L. & POL. 769, 774 (2001); Hazard, Jr., *supra* note 46, at 1673-74.

54. Daniel Soulez Larivière, *Overview of the Problems of French Civil Procedure*, 45 AM. J. COMP. L. 737, 743 (1997).

55. See, e.g., *Bekkrar v. SNCF*, Cour de Cassation [Cass. 1e Civ.] [high court of ordinary jurisdiction] Paris, Apr. 2, 1996, RECUEIL DALLOZ 1996 somm. 329, 329.

the written submissions and the evidence submitted. It will cost more to the parties, but the French company will clearly see what it is getting for its money. The arbitral process will not be marginally different, the arbitral process will be essentially different.⁵⁶

Arbitration may enable the parties who can afford it to avoid the poor process that available courts offer, and to benefit from a better justice. Critics may argue that this creates one type of justice for the poor, and another type of justice for the rich. Further, it could be argued that offering an alternative to those who can afford it diminishes their incentives to work at improving the civil procedure of their country of origin. These criticisms may be fair. However, prohibiting arbitration is not an option, as a neutral forum is needed to decide international disputes. For some commercial parties, resorting to arbitration also means obtaining better justice. Good for them.

3. Disadvantages

Arbitration does not only have advantages. It also has disadvantages. Some of them are undisputed, and acknowledged even by arbitration's advocates. For instance, it is admitted by all that arbitral tribunals lack some of the remedies which are available in litigation, such as the contempt power, and that the contractual foundation of arbitration is an obstacle to the efficiency of the arbitral process.⁵⁷ Yet, nobody has ever argued that these particular disadvantages outweigh the advantages of arbitration.

The critics of arbitration have a different point of view.

56. The flexibility of the arbitral process may offer other opportunities to shape an essentially different process. In jurisdictions where the judicial process is costly, the parties may wish to give up some of the procedural guarantees that it offers to make it cheaper. For instance, American parties may wish to waive some of the guarantees afforded by American civil procedure in order to decrease the cost of the adjudicatory process. See, e.g., J. STEWART McCLENDON & ROSABEL E. EVERARD GOODMAN EDs., *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 3-4* (World Arbitration Institute 1986). A survey conducted among participants to international arbitrations under the aegis of the American Arbitration Association shows that often-cited reasons for using arbitration were to save money and to limit discovery. By contrast, the fact that the dispute was international was not cited often. See Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, 30 *INT'L BUS. LAWYER* 203, 206 (May 2002).

57. See, e.g., REDFERN ET AL., *supra* note 6, at 29-30; GAILLARD & SAVAGE, *supra* note 5, at 697. Note that this last disadvantage would disappear in a non-contractual model of arbitration such as the one that I propose. See *infra* Part IV.E.

They strongly criticize arbitration, on many accounts. They argue that arbitrators lack democratic legitimacy, that their decisions are not subject to appellate review, that the decline of adjudication entails important social costs.⁵⁸ These critiques are severe. Logically, they lead their authors to conclude that the disadvantages of arbitration are so high that they outweigh the advantages.⁵⁹ It is thus necessary and important to address these issues. I will not do it now, however, but in Parts II and III of the Article. This is because these critiques would not merely cancel the advantages of arbitration that I have articulated. In the model that I propose, the problems that these critics identify would not only remain, but actually get more acute.⁶⁰ Therefore, they are likely to become more specifically critiques of the proposed model.

B. *The French Experience*

I now present briefly the French experience, as I believe that it shows that the French senior judiciary not only strongly promotes arbitration, but also is increasingly tempted to bypass the consequences of the contractual foundation of arbitration.

For several decades, the French Supreme Court for private and criminal matters (the *Cour de cassation*)⁶¹ has strongly favored international arbitration and, to a lesser extent, domestic arbitration. The manifestations of this pro-arbitration policy have been numerous. The *Cour de cassation* favors the autonomy of the arbitral process. It has ruled consistently that arbitral awards do not belong to the legal order of the place where they were made, and thus that their nullification by the courts of such place will not prevent French courts from enforcing them.⁶² It

58. See, e.g., Brower et al., *supra* note 1, at 418.

59. *Id.*

60. For instance, the issue of the lack of legitimacy of arbitrators, which is already an issue for those critics in the traditional model of consensual arbitration, would become dramatic in a model where the parties would not even agree to go to arbitration. See *infra* Part II.

61. The French court system is divided. Since the nineteenth century, France has had an autonomous administrative court system topped by a specific and independent supreme court, the *Conseil d'Etat*. The *Cour de cassation* has jurisdiction over all private and criminal matters. Finally, the Constitutional Council has exclusive jurisdiction over constitutional matters.

62. *Société Hilmarton v. Société OTV*, Cour de Cass. [1e Ch. Civ.], March 23, 1994, *REVUE DE L'ARBITRAGE* 327, 328 (1994), Charles Jarrosson, 20 *Y.B. COM. ARB.* 663,

has also ruled that French courts are ready to assist any party seeking to compel arbitration even when the connection between the arbitration and France is remote.⁶³ The doctrine is that arbitration is delocalized and that no legal order may claim any definite hold on it. The *Cour de cassation* also defends the jurisdiction of arbitral tribunals, not only when such jurisdiction is clear to everyone, but also when it is challenged on the ground either that there is no arbitration agreement between the parties, or that such agreement is invalid.⁶⁴ The *Cour de cassation* then gives arbitrators exclusive jurisdiction to rule on such challenges, and will only recover its jurisdiction to rule on them if the resulting award is subsequently challenged.⁶⁵

For the purpose of this Article, the most interesting manifestation of the pro-arbitration policy of French courts has been their willingness to bypass the contractual nature of arbitration when it is revealed as unfavorable to the efficacy of the arbitral process. Originally, the voluntary foundation of arbitration was critical to the development of this alternative mode of dispute resolution, as it was perceived as the sole means to legitimize private adjudication.⁶⁶ Parties could not possibly be deprived of their right to bring their case to public courts, unless they so chose.⁶⁷ However, as arbitration developed, it became apparent that its contractual foundation could also be used strategically by parties wishing to delay or even to avoid the resolution of their dispute. The contractual nature of arbitration began to appear as a problem. It offered multiple arguments to challenge the jurisdiction of the tribunal by challenging the existence and the validity of the arbitral agreement, and thus the power to adjudicate of the tribunal. The oldest argument was certainly the challenge of this power on the ground that the tribunal had set aside

663-64 (1995); see also Philippe Pinsolle, *The Status of Vacated Awards in France: the Cour de Cassation Decision*, in Pytrabali, 24 *ARB. INT'L* 277 (2008).

63. *Israel v. Nat'l Iranian Oil Co.*, 30 *Y.B. COM. ARB.* 125, 125-28 (2005) (Fr.) (ruling that French courts had jurisdiction to appoint an arbitrator instead of the defendant because of the agreement of the parties on the president of the ICC as an appointing authority for the president of the tribunal).

64. NCCP, art. 1458 (1981) (Fr.); see also John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence—Competence in Transnational Perspective*, 36 *VAND. J. TRANSNAT'L L.* 1115, 1124-26 (2003).

65. *Id.* The only exception to the rule is when the lack of jurisdiction of the tribunal is "manifest," i.e., when it cannot be seriously argued that it exists.

66. See, e.g., REDFERN ET AL., *supra* note 6, at 6, 26.

67. See, e.g., *id.*

the contract containing the arbitral clause, and that, as a consequence, it had retroactively suppressed its own adjudicatory power, which flowed from the arbitration clause of the contract.⁶⁸ The doctrine of separability was crafted to reject this argument. Now widely accepted,⁶⁹ the doctrine provides that the arbitration clause is a peculiar clause of the contract, which as such can be separated from it, and thus may survive it if it is cancelled or otherwise terminated.⁷⁰ The jurisdiction of arbitrators thus remains even if they rule that the (rest of the) contract has been retroactively set aside.⁷¹

The doctrine of separability, however, could not protect arbitral agreements from direct challenges to their validity.⁷² If the applicable law made the arbitration agreement void, however separated from the rest of the contract, the agreement would have to be set aside. Defendants willing to at least delay the proceedings can thus, and often do, challenge the jurisdiction of the arbitral tribunal by challenging the validity of the clause, either on arbitration specific grounds, or on general contractual grounds directed at the arbitration agreement.⁷³ In 1993, the *Cour de cassation* decided to tackle the issue and took a radical step. In *Dalico*,⁷⁴ it held that international arbitration agreements were not to be governed by any law anymore, and that they would thus be considered as valid in principle. French courts would only have to find an actual agreement to arbitrate. The rule is much more liberal than the U.S. rule which prohibits state laws from setting aside or declaring unenforceable arbitration agreements on grounds peculiar to arbitration agreements.⁷⁵ The French rule also prevents the operation of general contractual rules. After *Dalico*, the validity of arbitration agreements may not be challenged on any ground. Many French

68. Barceló, *supra* note 64, at 1116.

69. See, e.g., REDFERN ET AL., *supra* note 6, at 195; Barceló, *supra* note 64, at 1116.

70. REDFERN ET AL., *supra* note 6, at 193.

71. *Id.* at 194-95.

72. See generally Janet A. Rosen, *Arbitration Under Private International Law: The Doctrines Of Separability And Competence De La Competence*, 17 FORDHAM INT'L L.J. 599, 628 (1994).

73. See, e.g., the application of the general contractual doctrine of unconsciousness to arbitration agreements in U.S. law.

74. See, e.g., *Municipalité de Khoms El Mergeb v. Société Dalico*, Cass. 1e civ. (Fr.), Dec. 20, 1993, Bull. Civ. I, No. 1675, REV. ARB. 116, 117 (1994) (Fr.).

75. See generally Drahozal, *supra* note 4.

commentators were, and are still, very critical of the rule. They have underlined that ruling arbitration agreements are not governed by any law does not make any sense.⁷⁶ Indeed, the truth of the matter is that whatever a French court says is representative of French law, and that the actual rule laid down by the *Cour de cassation* is that French law always governs, and that it is extremely liberal. In any case, the *Cour de cassation* has recently confirmed *Dalico*,⁷⁷ and showed that it was not willing to change its doctrine. The policy reasons behind the *Dalico* decision were given by a senior member of the French judiciary, who was later to become the president of the chamber of the court which rules on all arbitration cases. In a conference,⁷⁸ he explained that debates regarding the existence and the validity of the arbitration agreement were risky and should be avoided. The goal of the French judiciary is thus clear. The pro-arbitration policy had met an obstacle that had to be bypassed. No way around it could be found without hurting the contractual foundation of the institution. The doctrine of contract was bent.

It is not possible to know whether there are other, deeper policy reasons behind the *Dalico* line of cases. French judgments, especially from the *Cour de cassation*, barely give reasons, and never give policy ones. I submit that a deeper policy reason may have been the perception that arbitration has become the natural mode of international commercial dispute resolution, and that, as a consequence, arguments against the jurisdiction of arbitral tribunals appear as increasingly illegitimate. If French judges still perceived courts as the natural fora for such disputes, they would perhaps insist more on finding an actual agreement to derogate to their jurisdiction. But it may well be that, consciously or not, the French senior judiciary does not perceive courts as the natural fora for international disputes anymore. Arbitration is still formally a derogatory mode of dispute resolution, but it may not be perceived as such anymore. In this con-

76. See, e.g., Hélène Gaudemet-Tallon, *Comité de la municipalité de Khoms El Mergheb v. Dalico Contractors*, REV. ARB. 116, 116 (1994) (Fr.) [hereinafter *Note on Dalico*]; *Banque Worms v. Bellot*, Cass. 1e civ. (Fr.), Jan. 5, 1999, REV. ARB. 85 (2000) (Fr.).

77. *Uni-Kod v. Ouralkali*, 30 Y.B. COM. ARB. 1200, 1201 (2005); Christophe Seraglini, *Uni-Kod v. Ouralkali*, 2005 REV. ARB. 959 (2005) (Fr.).

78. Jean-Pierre Ancel, *L'actualité de l'autonomie de la clause, compromissoire*, in TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 75, 81 (1991-92).

text, there is no compelling reason to fight hard to maintain the contractual foundation of international arbitration.

The contractual nature of arbitration raises another, more critical, issue. Only parties who have actually agreed to go to arbitration may be compelled to arbitrate.⁷⁹ The next step, the most radical one, would be to move away from this rule as well. *Dalico* did not.⁸⁰ The only requirement that it maintained for the enforcement of arbitration agreements was to find an actual agreement to arbitrate as between the parties. Yet, recent judgments of the *Cour de cassation* have been increasingly liberal in their assessment of the existence of an agreement to arbitrate.⁸¹ Arbitration agreements have been found to bind parties who had not concluded them originally with surprising ease. In 2001, the court held that when a resale of goods occurs, parties to the first sale may rely on the arbitration clause contained in their contract in order to resist court proceedings initiated against them by a party to the second sale, which did not contain any arbitration clause.⁸² The court held that the party to the second sale could only avoid arbitration “upon evidence of reasonable ignorance of the existence of the [international arbitration] clause.”⁸³ In other words, the court accepted to consider that a party was bound by an arbitration agreement, which the party could have possibly known, but not necessarily. Whether or not that party would have actually consented to such clause did not even seem to matter for the court. In 2002, the court held that an arbitration clause was binding on the assignee of a contract irrespective of the validity of the assignment of the sub-

79. BUHRING-UHLE, *supra* note 20 at 33 ; REDFERN ET AL., *supra* note 6, at 175.

80. *See generally* Note on *Dalico*, *supra* note 76.

81. It should also be underlined that the peculiar conception of French courts of the competence-competence doctrine gives exclusive jurisdiction to arbitral tribunals to rule on their jurisdiction in the absence of any arbitration agreement. In most other jurisdictions, courts may retain jurisdiction if they can be satisfied that there is no agreement to arbitrate as between the parties. *See, e.g.*, *First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995). In France, courts may not, except if the lack of jurisdiction of the arbitral tribunal is “manifest.” *See, e.g.*, *Israel v. Nat’l Iranian Oil Co.*, 30 Y.B. COM. ARB. 125, 125-28 (2005) (Fr.). The French law of arbitration thus recognizes the jurisdiction of arbitrators in the absence of an arbitration agreement, but for the sole purpose of ruling on jurisdiction.

82. *Peavey Co. v. Claeys Luck*, REV. ARB. 765 (2001) (Fr.).

83. *Id.* (“sauf preuve de l’ignorance raisonnable de l’existence de cette clause [d’arbitrage international].”).

stantive rights.⁸⁴ The court justified the solution by putting forward the separability doctrine, ruling that the issue of the assignment of the arbitration clause could be addressed separately from the issue of the assignment of substantive rights.⁸⁵ Finally, in 2005, the court confirmed the decision of a court of appeal which had insisted that arbitration clauses are commonly found in international contracts of carriage by sea in order to reject an argument based upon a lack of consent to the arbitration clause.⁸⁶ After goods carried from Asia to Africa had been delivered damaged, the insurer of the consignee of the bill of lading had sued the carrier before the French court.⁸⁷ As the bill of lading contained an arbitration clause, the carrier challenged the jurisdiction of the French court.⁸⁸ The insurer argued that it had not expressly accepted the clause.⁸⁹ The court nevertheless declined jurisdiction.⁹⁰ It held that the consignee could be informed of the existence of the arbitration at the time of the delivery, and that arbitration clauses were common in such contracts anyway.⁹¹ The court did not even seek to assess whether the insurer or the consignee had actually consented to the clause.⁹² It seemed satisfied with the mere possibility that it would have been informed of its existence at a late stage of the contractual process, and most interestingly, with the mere fact that arbitration is the usual mode of maritime dispute resolution.⁹³

I do not argue that these recent liberal assessments of the existence of an agreement to arbitrate are evidence of the willingness of the *Cour de cassation* to abandon the contractual foundation of arbitration. My claim is much more limited. I submit that the faith of the French senior judiciary in the importance of

84. *CIMAT v. SCA*, REV. ARB. 397 (2003) (Fr.).

85. *Id.*

86. *Axa Corp. Solutions v. Nemesis Shipping Corp.*, REV. ARB. 437 (2006) (Fr.).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. It should be noted, however, that the case was dealing with the issue of the jurisdiction of French courts, and that the principle of competence-competence did not require the court to actually assess whether the dispute ought to be resolved by way of arbitration, but only whether the contrary was not unlikely. *See supra* note 10 and accompanying text.

the contractual foundation of arbitration has been fading. Increasingly, French senior judges are ready to ignore it in order to pursue other policies, and in particular to promote international arbitration as an efficient mode of dispute resolution. The truth of the matter is that they are not shocked by the idea of an arbitration without consent.

What does the French experience tell us? I do not claim that French solutions are better for the sole reason that they promote arbitration and are more liberal. My claim is, again, more limited. The recent developments in the French law of international arbitration beg the question that is the topic of this Article: should arbitration lose its contractual foundation? The French experience shows that the question is not only academic. The repeated attacks of French courts on such a central, unchallenged, doctrine reveal that it has tremendous practical significance.

II. *THE LEGITIMACY OF ADJUDICATION OF PRIVATE INTERNATIONAL DISPUTES*

Any theory seeking to extend the scope of arbitration beyond those disputes that the parties have actually agreed to resolve by way of arbitration raises the issue of the legitimacy of such mode of dispute resolution. Indeed, the essential reason why arbitration is perceived as a legitimate alternative to judicial litigation is that the parties have agreed to resort to arbitration. On the contrary, and maybe because arbitration has so much been presented as a creature of contract, if they have not agreed to resort to arbitration, it seems hard to imagine how this mode of adjudication could be legitimate at all. The first objection which comes to mind against arbitration as a default mode for the resolution of international commercial disputes is the lack of legitimacy of private arbitral tribunals. Intuitively, it seems that the legitimacy of national courts is so strong that any case for resort to a mode of resolution of disputes regarded as “alternative” in the absence of an actual agreement of the parties to that effect is bound to fail.

Below, I argue that the legitimacy of arbitral tribunals to decide international disputes, far from being weaker than the legitimacy of courts, is actually stronger. I review the various theories which have been offered to found judicial power, and assess

whether they hold in an international context. I find that some do not, and that those that do either equally apply to courts and arbitral tribunals, or favor arbitration.

A. *Democratic Legitimacy*

The weakness of the legitimacy of arbitrators seems to flow first and foremost from their lack of democratic legitimacy. Arbitrators are private individuals exercising a power which is normally entrusted to state officials acting with publicly accepted authority.⁹⁴ Intuitively, this seems wrong. Democratic theory commands that power be only exercised with the consent of the governed.⁹⁵ It is thus critical that the holders of any power, whether judicial or not, be appointed either directly or indirectly by the community of people where this power will be exercised. For instance, the power of American judges is legitimate because they were either elected (in most states) or at least appointed by elected officials (at the federal level). Of course, arguably, the consent of the subjects of any power could be given to be exercised in a much more limited and circumscribed way. In effect, this is what an arbitration agreement amounts to. It thus legitimizes the power of arbitrators to settle the dispute, at least as far as the parties are concerned. The purpose of this Article, however, is to assess whether arbitration should become a default mode of dispute resolution and be available in the absence of any agreement of the parties in this respect. Non-consensual arbitration would therefore raise an issue from a political theory perspective, as it would confer to some individuals a power over other individuals without the consent of the latter.

Is it true, however, that the alternative is much more satisfactory? Would the legitimacy of judges be significantly higher? Democratic theory may well demand that the subjects of any given power consent to those who will exercise such power, but do modern polities really meet this requirement? It is fair to criticize private adjudication in this respect only if the alternative would indeed be a judge enjoying democratic legitimacy. However, it appears that the democratic legitimacy of judges is not

94. See, e.g., Brower et al., *supra* note 1, at 418.

95. The Declaration of Independence ¶ 2 (U.S. 1776); see also Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUMB. L. REV. 111, 112 (2003) (citing U.S. Const. pmb.).

always strong, and that it becomes especially weak in an international context.

As a preliminary point, it is important to stress that the democratic legitimacy of judges is not an important issue in all democracies. Indeed, it might be that it is not a real issue in the majority of modern democracies. In civil law jurisdictions, which represent the majority of the legal systems in the world, judges are normally not elected, and they are not appointed by elected officials either.⁹⁶ They are typically recruited as career judges by way of examination just as any other civil servant.⁹⁷ In France, for instance, this is the path followed by most judges without any involvement of elected officials.⁹⁸ As a consequence, their legitimacy is not primarily democratic, but rather flows from their legal expertise.⁹⁹ It is often argued that they do not lack completely democratic legitimacy, as the existence of courts is typically provided by the constitution of the relevant jurisdiction, which was adopted by the people. The constitutional foundation of the existence of courts is thus also a democratic foundation.¹⁰⁰ As the will of the people was often expressed by past generations, and as it was directed at the institution abstractly and not at particular individuals, this democratic legitimacy is certainly much weaker than direct or indirect involvement in the designation of the adjudicator.

The democratic legitimacy of judges is thus above all a reality of the common law world, where judges are typically appointed by elected officials,¹⁰¹ and more specifically of the

96. See, e.g., JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 35 (2d ed. 1985).

97. *Id.*

98. *Id.* There are exceptions, however. Commercial judges, for instance, are not civil servants, do not belong to the career judiciary and are elected by the business community. Judges of the Constitutional Council are appointed by elected officials [President, heads of the National Assembly, and of the Senate].

99. See *infra* Part II.B.

100. See Guy Canivet (Member of the Constitutional Council, formerly President of the French supreme court for civil and criminal matters), in LOIC CADIET (DIR.), *DICTIONNAIRE DE LA JUSTICE, V° LÉGITIMITÉ DU JUGE*, 815, 816 (2004). For the same argument made in the Australian context, see Murray Gleeson AC, Chief Justice of Australia, Speech Before the Australian Bar Association Conference in New York: Judicial Legitimacy 2 (July 2, 2000), available at http://www.hcourt.gov.au/speeches/cj/cj_aba_conf.htm; see also E.W. THOMAS, *THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING, AND PRINCIPLES* 83 (Cambridge University Press 2005).

101. See, e.g., GLEESON, *supra* note 100, at 2 ("The will of the people, expressed through Parliament, is the foundation of judicial power.").

United States, which is the sole jurisdiction where judges are commonly elected. In the biggest part of the western world, judges enjoy little democratic legitimacy, and it would be unfair to criticize arbitrators on that account.¹⁰²

In an international context, which is the focus of this Article, there are more fundamental and general reasons why arbitrators do not enjoy less democratic legitimacy than judges. The first one is that democratic legitimacy can only be conferred by a given polity, and thus by a given community. In most cases, however, international private disputes involve parties who do not belong to the same community. They are, for instance, nationals of different states. It follows that, typically, each party will participate in a different democratic process, in the country to which the party belongs. They may each participate in the democratic process of electing an adjudicator, or electing an official who will subsequently appoint an adjudicator, but this adjudicator will not be the same. It is therefore impossible to find an adjudicator who is democratically legitimate in respect of both parties. The party who does not belong to the community of the adjudicator has expressed no will in the designation of the adjudicator, either directly (by electing it), or indirectly (by ratifying the local constitution).¹⁰³ The call for the democratic legitimacy of international adjudicators raises a second and more fundamental issue. Democratic theory is only one normative political theory. It is shared, at least in theory, by most states. But there are also states where the normative political theory is different. For instance, in religious states, legitimacy and power are founded in religion.¹⁰⁴ For parties originating from such states, the call for democratic legitimacy of adjudication is meaningless,

102. *Id.*

103. *See, e.g.*, von Merhen, *supra* note 12, at 34. Von Merhen holds that if they adhere strictly to their theoretical premise, relational theories face difficulties that are avoided by instrumental and strict power theories. Where one party has a social, political, or economic relationship to the forum but the other party has none, can it be said that the forum has adjudicatory authority over both? Strictly conceived, adjudicatory authority resting on a relationship reaches only to the party or parties that stand in the relevant relationship to the adjudicator.

See id.

104. *See, e.g.*, SAUDI ARABIA: BASIC LAW OF GOVERNMENT [Constitution], art. 7 (1992 Fundamental Law) ("Government in Saudi Arabia derives power from the Holy Koran and the Prophet's tradition [i.e., the Islamic Shari'a]"), available at http://www.mideastinfo.com/documents/Saudi_Arabia_Basic_Law.htm.

just as the call for the religious legitimacy of adjudication would be ignored in western democracies.

Democratic legitimacy is a concept which is linked to a given community. As the vast majority of communities are national, it is unlikely to contribute usefully to a debate on the legitimacy of power in a transnational context.

B. *Technocratic Legitimacy*

If the legitimacy of private international adjudication does not lie in democratic principles, it has to be found elsewhere. A traditional claim in political theory is that the foundation of judicial legitimacy can be found in the ability of judges to decide disputes in accordance with the law. Again, the claim has traditionally been made without distinguishing between domestic and international adjudication. It has thus not been presented as an alternative to democratic legitimacy, but rather as a complement.¹⁰⁵

In this paradigm, adjudication is perceived essentially as a process aiming at reaching an outcome, i.e., settling the dispute. One way to give great legitimacy to such process is to ensure that it always reaches the right outcome. It is hard to see how a technique the function of which is to reach a certain outcome could not be legitimate if it always reaches this outcome. To take a culinary parallel, the legitimacy of a chef is (or should be) to actually cook great food.

In its most radical form, the claim is thus that the legitimacy of adjudication is founded in the accuracy of the judicial process. This idea was particularly influential in France for two centuries.¹⁰⁶ It draws on Montesquieu's analysis of the role of the judiciary which was so influential during the French revolution.¹⁰⁷ Judges were to be machines who mechanically applied the law. They were to be solely the mouth of the law.¹⁰⁸ By denying judges any discretion (and law-making power), Montesquieu

105. See, e.g., Canivet, *supra* note 100.

106. See Pierre Bouretz, *Entre la Puissance de la Loi et la Puissance de L'Interprétation: L'Enigmatique Légitimité du Juge*, 74 *POUVOIRS* 71 (1995).

107. MONTESQUIEU, *DE L'ESPRIT DES LOIS*, DEUXIEME PARTIE: LIVRES XI 52 (1748) ("[L]a bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur."), available at http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/partie_2/de_esprit_des_lois_2.html.

108. *Id.*

and French revolutionaries had imagined a world where right answers existed and where adjudication would unmistakably reach them. However, the world imagined by Montesquieu was only a dream (or a nightmare). The law cannot be applied mechanically by judges. And courts often have the possibility to decide the dispute either way. The argument thus had to be re-framed.

One way to reframe it was to argue that, although judges are not machines and there are often several possible solutions to a given dispute, judges can be constrained. They do not decide cases arbitrarily, but follow at least a methodology which constrains them. In the common law world, this methodology is that of legal reasoning and of the common law.¹⁰⁹ The same point can be made with some modification in respect to the civil law world. In both systems, legal methodology is supposed to limit the solutions that judges can give to cases. The argument is fostered by two additional requirements. The first and most important one is the status of the adjudicator. One of the most common grounds for the legitimacy of adjudication is the independence of adjudicators.¹¹⁰ Once appointed, judges should have the guarantee that they cannot be dismissed or forced to accept a new position both geographically and within their court. They should also have the guarantee that their salary cannot be reduced either. Independence is a critical condition of this paradigm of judicial legitimacy because it should allow judges to ignore outside pressure, and to indeed decide cases on a mere legal basis. The second additional requirement is that only professionals mastering legal methodology be appointed to the bench. A separate but closely connected ground for the legitimacy of adjudicators is indeed their legal expertise. Many legal systems insist that the people they make judges have demonstrated outstanding legal abilities, or at least know the law very well.¹¹¹ In the United Kingdom and throughout most of the commonwealth, judges are appointed from a pool of the best lawyers of the country.¹¹² Traditionally, these top lawyers have

109. See GLEESON, *supra* note 100, at 2-3; THOMAS, *supra* note 100, at 86.

110. See, e.g., GLEESON, *supra* note 100, at 3; THOMAS, *supra* note 100, at 78; Canivet, *supra* note 100, at 819.

111. See, e.g., MERRYMAN, *supra* note 96, at 34-35.

112. See Judicial Appointments Commission, <http://www.judicialappointments.gov.uk/> (last visited Nov. 20, 2008) ("The independent Judicial Appointments Commis-

been the very best barristers.¹¹³ In most civil law countries, judges must go through special examinations which primarily test the legal knowledge of the candidates.¹¹⁴ In some civil law countries such as France, they must also attend a specialized judges' school where they deepen their legal expertise.¹¹⁵

The claim that the legitimacy of adjudication can be found in the accuracy of the judicial process has also been made by sociologists.¹¹⁶ Their perspective, however, is different. The judicial process is presented as the way to secure acceptance of adjudicatory authority by the litigants. Max Weber argued that modern societies accept political power because of the belief of the people in the legality of the actions of the ruler and the impartiality of the officials acting in accordance with the law.¹¹⁷ In his opinion, people expected that the legal order will give them both substantive and procedural rights.¹¹⁸ In his paradigm, officials act impartially, but are tightly constrained by substantive law.¹¹⁹ Indeed, interestingly enough, Weber argued that judges should act as "automatons."¹²⁰ In other words, much as in Montesquieu's model,¹²¹ litigants expect that the law will provide a single and right answer, and that officials will decide disputes in accordance with these rules.¹²² It is these beliefs that secure their acceptance of judicial power.

It is widely accepted that the legitimacy of judicial power lies to a large extent in the ability of judges to decide the dispute in accordance with the law. Undoubtedly, some litigants have a clear idea of what the law says and expect a particular rule to be applied. Such parties may well accept the decision of an adjudicator

sion (JAC) selects candidates for judicial office. It does so on merit, through fair and open competition, from the widest range of eligible candidates.").

113. Barristers have traditionally been regarded as the best lawyers within the British legal system. The best barristers are formally recognized as such by being made Queen's Counsel ("Q.C."), typically after ten years of practice.

114. See, e.g., MERRYMAN, *supra* note 96, at 35.

115. See Bell, *supra* note 50, at 61.

116. See, e.g., MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY (1970).

117. *Id.* at 199.

118. See generally MAX WEBER, ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed. (1954)).

119. *Id.*

120. WEBER, FROM MAX WEBER, *supra* note 116, at 219.

121. For a parallel between the two theorists, see Pierre Bouretz, *supra* note 106, at 75.

122. WEBER, FROM MAX WEBER, *supra* note 116, at 199.

cator upon the condition that the adjudicator properly applies the law and enforces their rights.

What is the comparative legitimacy of judges and arbitrators to apply the law accurately? It seems clear that a court staffed with judges trained in the applicable law will be highly legitimate to apply this law.¹²³ This is not to say, however, that arbitral tribunals will necessarily be less legitimate. One of the advantages of arbitration is its flexibility. The parties may appoint arbitrators with different qualities depending on their concerns. If they would rather have a tribunal composed of arbitrators highly skilled in the applicable law, they may appoint prestigious jurists from the relevant legal order who will be at least as knowledgeable as judges. Indeed, many judges begin a career as international arbitrators upon retirement.¹²⁴ More fundamentally, in many legal systems, the prestige of law professors makes them at least as suitable arbitrators as judges for this purpose.¹²⁵

Although the technocratic theory of judicial legitimacy seems widely accepted as a normative theory, its descriptive value has long been challenged.¹²⁶ The most famous criticism came from American realists, who argued that judges do not decide cases on the basis of legal rules, but instead respond to the stimulus of the facts of the case.¹²⁷ It is certainly true that some judges use their independence and the finality of their judgment to free themselves from the law or even legal methodology. This regularly happens in many jurisdictions, though probably more often in the United States than elsewhere. Overall, however, it is

123. See, e.g., Brower et al., *supra* note 1, at 418 (arguing that the legitimacy of international commercial adjudication flows from “a hierarchy of decisional instances; . . . decisions made by judges acting with publicly accepted authority; resulting finality of decisions; and a relatively consistent body of jurisprudence.”). The last argument expressly refers to the right answer paradigm, but so does the first, as hierarchy aims at correcting lower adjudicators’ decisions, and ensuring that the system will eventually rule right. For a related argument, criticizing arbitration for the lack of oversight of arbitral awards, see Silberman, *supra* note 41, at 11. The main argument of Dammann and Hansmann on the superiority of courts over arbitral tribunals is that courts will apply the law more accurately. See Dammann & Hansmann, *supra* note 22, at 33.

124. See Loukas A. Mistelis, *ADR in England and Wales*, 12 AM. REV. INT’L ARB. 167, 177, 203 (2001).

125. This is especially true in the civil law tradition. See MERRYMAN, *supra* note 96, at 56 (“[T]he civil law is the law of the professors.”).

126. See Brian Leiter, *American Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 52 (Martin P. Goldin & William A. Edmundson eds., 2005).

127. *Id.*

likely that most judges do feel constrained by the law and will more often than not apply it.

Yet, this does not mean that the ability of judges to apply the law and, in most cases, their willingness to do so, necessarily enhances their legitimacy in the eyes of the parties. The technocratic theory certainly overlooks that, in many instances, parties do not have strong expectations as far as the law and their rights are concerned. First, litigants may be more or less aware of their rights. Depending on their knowledge of the law, they could have very different expectations about the judicial process. Second, the law could be more or less clear. It could be old and known by everybody, or still to be settled. Third, the applicable law could be more or less clear. The parties could have the possibility to bring a claim before a variety of adjudicators, which could all have different choice of law rules leading to the application of different substantive laws. As long as no action is initiated before a given court, how can any of the parties expect a single outcome to the dispute? The expectations of the parties may thus vary greatly. Some may have a clear idea of what the law is and says and expect a particular rule to be applied. Such parties may well accept the decision of an adjudicator upon the condition that he properly applies the law and enforces their rights. But other parties will be unable to say what the law is. They will thus not expect the application of a given rule. In an international context, the chances are that the doubts as to the applicable law will increase dramatically, as the parties will typically have even more possibilities to bring their claims before different adjudicators applying different choice of law rules. The situation will only be different when the parties have provided for the applicable law, and when the likelihood of another court refusing to enforce such clause is low.¹²⁸ Furthermore, it should be underlined that parties also decide to submit international disputes to vague sets of rules such as the *lex mercatoria* or the equity of the adjudicator. In such instances, the certainty as to the applicable law and the legal rights of the parties is also obviously very low.

Two kinds of international disputes can thus be distin-

128. It must be recalled that, by definition, the contract will not contain any jurisdiction clause, and that the parties will thus have the possibility to bring proceedings before a variety of adjudicators.

guished. The first kind of disputes will be clearly governed by a given law containing detailed rules. Typically, the dispute will be contractual, and the parties will have agreed upon the applicable law. In this context, the parties may have strong expectations as to their legal rights. The legitimacy of the adjudicator may thus lie in his ability to apply the law accurately.¹²⁹ Still, it is important to stress that, if the law remains an abstract phenomenon for the parties, or if they are not legally sophisticated and provided more or less mechanically for the applicable law, they may not particularly value right legal reasoning. The second kind of disputes will not be clearly governed by any set of detailed rules. This will be the case when the applicable law has not been provided for by the parties, or when they have agreed upon the application of the *lex mercatoria* or some other vague set of rules. In such cases, it is hard to see why the parties would care much for the ability of the adjudicator to apply the governing law accurately.

C. Procedural Legitimacy

No democratically appointed adjudicator is available to settle the vast majority of international disputes. In most cases, there is no certainty as to which law will be applied, and experience shows that, even when there is such certainty, courts may easily find arguments to decide each way. How can the power of international adjudicators be legitimized, then? Scholars have argued that their legitimacy could be grounded in the fairness of the process.

Weber had argued that people accept judicial power because of their belief that officials are constrained by rules of law.¹³⁰ By contrast, more recent scholarship has argued that the legitimacy of adjudication is grounded in the acceptance of the validity of the judicial process alone. In his book, *LEGITIMACY THROUGH PROCEDURE*,¹³¹ German sociologist Niklas Luhmann

129. But it is important to keep in mind that this law would not necessarily be the law of the adjudicator, i.e., the *lex fori*. If the applicable law is foreign, it is hard to legitimize the power to adjudicate of the court on the legal training of its members in their own law. The legitimacy of the adjudicatory process would then depend on the reliability of the process of establishing the content of foreign law.

130. See generally WEBER, FROM MAX WEBER, *supra* note 116.

131. NIKLAS LUHMANN, *LA LÉGITIMATION PAR LA PROCÉDURE* (Lukas K. Sosoe & Stéphane Bouchard trans., Presses de l'Université Laval 2001) (1969).

submitted that the people may realize that disputes can be decided either way on the merits, but will only accept fair adjudication, which he equated to impartiality and procedural equality.¹³² Similarly, social psychologist Tom R. Tyler has long argued that procedural justice is a critical factor in the evaluation of the legitimacy of adjudication.¹³³ When substantive solutions are not obvious, as for instance in complex societies which lack a common moral code from which to draw standards of right or wrong, legal authority will be evaluated from a purely procedural point of view.¹³⁴ One could indeed think that, when an unbiased adjudicator who has allowed the parties to present their case fully makes a decision, the parties should at least consider that the resolution of their dispute was not illegitimate and thus accept the decision. Each party should be allowed to present their arguments fully and to discuss and have the opportunity to rebut the arguments of the other. The adjudicator should be unbiased and decide the case on his appreciation of the strength of the cases of the parties. The independence of adjudicators becomes the critical ground for the legitimacy of adjudication, together with the fairness of the procedure. I would also add that giving an explanation of the reasoning used, as explaining one's decision seems to be one of the most essential ways to foster acceptance of the decision by the parties. It can show to the losing party that his case was carefully and fairly considered, and that the decision was made on non-arbitrary grounds by an unbiased adjudicator.¹³⁵

Are national courts and arbitral tribunals as well equipped to offer a fair process? As was already discussed,¹³⁶ they are not. The greatest advantage of international arbitration is precisely that it offers a fairer process, especially by offering impartial adjudication, but also, often, by putting the parties on a more

132. *Id.* at 129.

133. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

134. See Tom R. Tyler, *Justice and Power in Civil Dispute Processing*, in JUSTICE AND POWER IN SOCIOLEGAL STUDIES 309, 330 (Bryant G. Garth and Austin Sarat eds., 1998).

135. Surprisingly, Luhmann neglected explaining the decision, which, in his opinion, was meant to show that the right answer had been reached by the adjudicator. It is certainly also important in the technocratic paradigm, as it ensures that a proper legal methodology has been followed. See, e.g., GLEESON, *supra* note 100, at 7 (referring to it as the "hallmark of legitimacy").

136. See *supra* Part I.A.

equal footing.¹³⁷ This is the reason why international arbitration has been so successful. In this paradigm of judicial legitimacy, arbitrators are actually much more legitimate than judges when it comes to settling international disputes.

D. *Participative Legitimacy*

There is a final important difference between arbitrators and judges. While the parties may not choose who their judge will be, they are most often involved in the designation of the members of the arbitral tribunal.¹³⁸ Although the parties are free under most arbitration regimes to decide how to appoint the members of the tribunal, the most common practice is for each party to appoint its own arbitrator, and then for the two party-appointed arbitrators to appoint the president of the tribunal.¹³⁹ It follows that each party has had its say in the composition of the tribunal. Furthermore, it is also a very common practice for the party-appointed arbitrators to seek the unofficial approval of the parties when they appoint the president.¹⁴⁰ In such a case, each party has participated actively in the designation of the majority of the actual members of the tribunal. Irrespective of the absence of agreement of the parties on the jurisdiction of the adjudicator, their active participation in the choice of the people who decide their dispute necessarily greatly enhances the legitimacy of the adjudicator.¹⁴¹

Arbitrators are conferred additional legitimacy as the parties participate in their appointment. This is a form of legitimacy by consent, comparable to democratic legitimacy. For our purposes, however, it has many advantages over democratic legit-

137. It should also be underlined that, contrary to some domestic practices, international arbitral awards typically give reasons, and typically long ones. From the perspective of legal orders where courts usually give scarce reasons (which is the case of most of the civil law world, with some extremes like France where the supreme courts barely give reasons), this is an additional procedural advantage of arbitration.

138. There would be no reason to suppress this rule as a consequence of arbitration losing its contractual foundation.

139. It is also sometimes expressly the default rule. *See, e.g.*, UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 7(1), U.N. Doc. A/31/17 (Dec. 15, 1976).

140. HANOTIAU, *supra* note 1, at 201-03.

141. *See* Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 55 (2003); Paulsson, *supra* note 31, at 14 (stating that "it seems inevitable that the international arbitral process will be perceived less readily as legitimate when a party is disappointed by an award rendered by three unknown arbitrators.").

imacy. First, it is not linked to any particular community, more specifically to any national community. Second, it does not look like a normative theory, which might not be shared by one of the parties, but rather like pure common sense.¹⁴² It thus translates well in a transnational context.

The question which this Section seeks to answer is whether, as a matter of theory, it is conceivable to resort to arbitration in the absence of an agreement of the parties to that effect. The answer is yes. Although it might be counter-intuitive, in most instances, arbitral tribunals do not enjoy less legitimacy to try international disputes than national courts. Democratic legitimacy is not a viable theory to found judicial power in an international context. Courts may have greater legitimacy to apply the law accurately, but this is far from being always true, and most often it will not change anything from the perspective of the parties. Actually, the only real differences between courts and arbitral tribunals are the greater fairness of the arbitral process and the involvement of the parties in the designation of the members of arbitral tribunals. These two last factors favor heavily arbitral tribunals, which not only do not lack legitimacy to settle international disputes, but are in fact far more legitimate than national courts.

III. COST-BENEFIT ANALYSIS

In Part II, I have argued that the model is conceivable as a matter of theory. I now ask whether it would be beneficial. The main claim of this Article is that default arbitration would result in increased procedural fairness in the resolution of international commercial disputes. This would be an important benefit. Obviously, I cannot assess the desirability of the model without investigating whether it would entail further benefits and, more importantly, costs.

Scholars have long debated the desirability of alternative dispute resolution.¹⁴³ They have always underlined the same tension. On the one hand, private dispute resolution costs

142. It also enables the parties to put into practice whatever normative theory they believe in by appointing arbitrators fitting into the said theory. For instance, parties from religious communities can consent to the appointment of arbitrators with the relevant religious background or training.

143. See, e.g., DRAHOZAL & NAIMARK, *supra* note 3, at 19-23; Silberman, *supra* note 41, at 9-14.

less.¹⁴⁴ In particular, it saves public resources. On the other hand, private dispute resolution undermines the public functions of adjudication. The legal systems which have chosen to promote alternative dispute resolution seem to consider that the benefits outweigh the costs. But scholars have mostly concluded that saving public resources could not justify undermining the public functions of adjudication.¹⁴⁵

In Section A, I seek to assess whether my model would indeed harm the legal system by preventing courts from serving their public functions. I examine evidence from the practice of several specialized fields of international commercial arbitration and conclude that the public functions of adjudication would be equally well served in my model. In Section B, I conduct an economic analysis and conclude that my model is likely to be efficient.

A. Courts as Public Goods

A significant part of the American legal academy is hostile to alternative modes of dispute resolution in general¹⁴⁶ and to arbitration in particular.¹⁴⁷ For these scholars, the rise of alternative dispute resolution raises a variety of issues. Some are not directly relevant for the purpose of this Article. For instance, a central concern is the development of alternative dispute resolution (“ADR”) in disputes between parties who are not equals.¹⁴⁸ Striking examples are employment and consumer arbitrations, where the imbalance between the parties is obvious. The issue then arises whether arbitrators have less ability to remedy the imbalance than courts.¹⁴⁹ Though not necessarily nonexistent, the concern is far less important in a commercial context where

144. See *supra* Part I.A.2.a.

145. See, e.g., Judith Resnik, *Feeling Faith: Adjudicatory Procedure in Decline*, 53 U. CHI L. REV. 494, 545 (1986) [hereinafter Resnik, *Failing Faith*].

146. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Resnik, *Failing Faith*, *supra* note 145, at 545; see also David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

147. See Geraldine Szott Moorh, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 432 (1999); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631 (2005); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 703 (2004).

148. See, e.g., Fiss, *supra* note 146, at 1076; Resnik, *Failing Faith*, *supra* note 146, at 513.

149. Sternlight, *supra* note 147, at 1648-50.

typically there will not be significant imbalance between the parties.¹⁵⁰

Some other concerns of these scholars, however, are more general. The most serious one is that the function of courts is not only to resolve private disputes.¹⁵¹ Courts do also serve public functions. The most important of them is certainly lawmaking. Courts interpret statutes, and, in their absence, lay down rules.¹⁵² Courts also educate the public on the content of the law and the functioning of the legal system.¹⁵³ Finally, courts take into consideration the public interest when they resolve disputes implicating it.¹⁵⁴ In addition to the settlement of private disputes, courts also serve a "public good." The concern is that ADR might not serve this public good. In other words, ADR may serve better the private good of settling disputes, but it fails, it is argued,¹⁵⁵ to serve the public functions of litigation. More to the point, since arbitration has developed in the fields of consumer and employment law, many scholars have argued that arbitration would underperform such public functions, and that extending its scope would erode judicial precedent and public knowledge of the law¹⁵⁶ and would also lead to underenforcement of public laws.¹⁵⁷

1. Law Making

The proposed model would obviously lead to a decrease in the number of decisions made by courts in international commercial disputes. Courts would only continue to handle cases where the parties would have agreed to their jurisdiction. A result may be that courts ultimately handle very few cases. Would courts, then, be unable to continue to lay down rules? This is

150. See, e.g., William W. Park, *Private Adjudicators and the Public Interest: the Expanding Scope of International Arbitration*, 12 BROOK. J. INT'L L. 624, 648 (1986).

151. *Id.* at 629, 635; see also Luban, *supra* note 146, at 2622.

152. William M. Landes & Richard A. Posner, *Adjudication as Private Good*, 8 J. LEGAL STUD. 235, 236 (1979).

153. See, e.g., Fiss, *supra* note 146, at 1085; Resnik, *Failing Faith*, *supra* note 146, at 554.

154. See, e.g., Park, *Private Adjudicators*, *supra* note 150, at 672.

155. See, e.g., Fiss, *supra* note 146, at 1089; Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 249 (1995); Landes & Posner, *supra* note 152, at 252.

156. Moorh, *supra* note 147, at 426; Summers, *supra* note 147, at 704.

157. Park, *supra* note 150, at 629.

not certain. They would handle fewer cases, but not necessarily so few that they would lose the possibility of continuing to develop the law. Indeed, it is unclear whether they handle many now. If the claim that arbitration is already widely used to settle international commercial disputes¹⁵⁸ is true, it may be that the model would not change much in this respect. Moreover, there might be reasons to limit the scope of the model even within commercial law.¹⁵⁹ I do indeed propose to exclude small claims from the model.¹⁶⁰ Such claims would still be settled by courts. Courts would thus continue to try a number of commercial disputes. Ultimately, perhaps the only substantive consequence of the model would be that courts would develop international commercial law more slowly.¹⁶¹ That would certainly be worse than developing it more quickly, but arguably not much worse.¹⁶²

Let's assume, however, for the sake of the argument, that the model would entail such a dramatic decrease in the number of cases handled by courts that they would not be able to serve their public functions. Whether arbitral tribunals could not possibly take over and serve these functions is far from clear. I argue that the arguments put forward by the critics of ADR and arbitration only show that certain types of ADR may raise issues, but not that all ADR would necessarily.¹⁶³ In other words, it is

158. *See supra* Introduction.

159. I discuss the scope of my model *infra* Part IV.A.

160. *See infra* Part IV.A.

161. *See* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse*, 23 *ARB. INT'L* 357, 362-65 (2007). Kaufmann-Kohler's piece shows through a survey of several hundreds of awards, that the vast majority of arbitral awards settling international commercial disputes (as opposed to sport and foreign investment disputes) do not cite prior arbitral awards. Kaufmann-Kohler argues that the existence of developed national laws makes it unnecessary for arbitrators to rely on arbitral awards to determine the content of the applicable law, which is typically national. The issue of the ability of arbitrators to take over this task only arises if national laws do not have the possibility to develop anymore.

162. It could also be that the problem is more academic than practical if most international commercial disputes are fact- and contract-driven. In a world dominated by freedom of contract, disputes would mostly be resolved by contractual interpretation and fact finding, and law would not really matter. The claim is made by one of the leading and most experienced international commercial arbitrators, Swiss Professor Gabrielle Kaufmann-Kohler. *Id.* at 375-76.

163. *See* Bruce L. Benson, *Arbitration*, in *ENCYCLOPEDIA OF LAW AND ECON.*, VOL. V. *THE ECONOMICS OF CRIME AND LITIGATION* 159, 173 (Boudewijn Bouckaert & Gerrit De Guest eds., 2000).

perfectly possible to imagine a type of arbitration devoid of the problematic features of current U.S. ADR and domestic arbitration.

a. Traditional Arguments

ADR critics make five assumptions when they claim that arbitrators cannot develop precedents. To begin with, they identify two features of the arbitral process which prevent the public from knowing what arbitral tribunals do and which rules they apply.¹⁶⁴ The first is that arbitration is confidential.¹⁶⁵ The second is that arbitrators do not give reasons, or do not give sufficient reasons, for their decisions.¹⁶⁶ One can then understand why, even if they were interested in developing precedents, arbitrators could not do so, since their decisions and reasoning would remain out of reach. Yet, there is no reason to believe that these two features are necessary. As far as confidentiality is concerned, it is true that it is one of the advantages of the arbitral process which is most often put forward by its supporters. It is not, however, a necessary feature of arbitration. There are instances of non-confidential arbitration, as will be shown shortly,¹⁶⁷ and I propose such a model. As far as the lack of reasons for arbitral awards is concerned, it is true that some arbitration laws allow awards that do not state reasons.¹⁶⁸ However, this is far from being the norm. Under most international arbitration regimes, arbitrators are under a duty to give reasons.¹⁶⁹ Furthermore, the practice of international arbitrators is to give developed and detailed reasons.¹⁷⁰ International arbitral awards are not short. They are often much longer than many national

164. See Moorh, *supra* note 147, at 431, 437.

165. See *id.* at 431; Summers, *supra* note 147, at 703.

166. See Landes & Posner, *supra* note 152, at 245; Summers, *supra* note 147, at 703.

167. See *infra* Part III.A.1.b.

168. This is obviously the case in American law, but also, for instance, in Swedish international commercial arbitration law. See L. HEYMAN, *ARBITRATION LAW OF SWEDEN: PRACTICE AND PROCEDURE* 497 (Juris Pub. 2003).

169. See, e.g., English Arbitration Act 1996, c.23, § 52 (Eng.) [hereinafter English Arbitration Act]; Zivilprozeßordnung [ZPO] [German Code of Civil Procedure] Jan. 30, 1877, ¶ 1052; Switzerland's Federal Code of Private International Law [CPIL], Dec. 18, 1987, art. 189; International Chamber of Commerce Arbitration Rules [ICC], 1998, art. 25; JEAN-FRANCOIS POUURET & SEBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 666-73 (2d ed. 2007).

170. See ALAN REDFERN & MARTIN HUNTER, *Law and Practice of International Commercial Arbitration* 392 (3d ed. 1999).

judgments (in particular those rendered by civil law courts),¹⁷¹ and it is not unusual to see awards going beyond one hundred pages. Some even provide dissenting opinions.¹⁷²

ADR critics further argue that, even if access to arbitral awards was easy, it would not bring much, as arbitrators have neither the willingness, nor the ability to develop precedents.¹⁷³ First, arbitrators would have no incentives to develop rules, as they would not be paid to perform this function, but solely to resolve disputes.¹⁷⁴ Second, they would not have the appropriate training anyway.¹⁷⁵ Finally, and in any case, even if they would and could, arbitration is too decentralized to offer the possibility to develop a consistent and precise body of rules.¹⁷⁶

The first two arguments are contradicted by the reality of modern international commercial arbitration.¹⁷⁷ It is true that the vast majority of international arbitration regimes do not require that arbitrators have legal training.¹⁷⁸ It is also true that the service that the parties seek is the settlement of their private dispute. However, in practice, most international arbitrators are distinguished jurists. They are either experienced legal practitioners, or law professors.¹⁷⁹ Their legal expertise and prestige is often very high. If one accepts that judges are not superheroes for the sole reason that they went through the appointing process of their country of origin, there is no reason to consider that arbitrators could not have the training and the skills to develop the law if they wanted to. However, would they be willing to do so? Again, the practice of international commercial arbitration is that they most often are, so much so that they are commonly urged not to forget that their main task is not to develop the law and to write legal dissertations, but to settle the disputes appro-

171. Judgments from civil law courts are traditionally much shorter than judgments from common law courts. See generally B.S. Markesinis, *Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at some Judgements of the German Federal Court*, 34 *AM. J. COMP. L.* 349 (1986).

172. See Alan Redfern, *Dissenting Opinion in International Commercial Arbitration*, 20 *ARB. INT'L* 223 (2004).

173. See Landes & Posner, *supra* note 152, at 238.

174. See *id.*

175. See Moorh, *supra* note 147, at 435.

176. See Landes & Posner, *supra* note 152, at 239; Moorh, *supra* note 147, at 437.

177. See Moorh, *supra* note 147, at 437.

178. Actually, I know of none that do.

179. See, e.g., Paulsson, *supra* note 31, at 14; REDFERN & HUNTER, *supra* note 170, at 205.

priately.¹⁸⁰ At first glance, this may seem surprising. Arbitrators do not seem to need to engage in a difficult activity without being paid for it, and parties certainly do not have any reason to pay for an activity which will essentially benefit others, i.e., future litigants.¹⁸¹ How can this seemingly inefficient conduct be explained, then? Quite simply, by the need for arbitrators to show their skills. They do not necessarily wish to market themselves aggressively so as to be appointed in future arbitrations,¹⁸² but they certainly have a professional reputation that they wish to maintain, or to enhance. Additionally, it should be underlined that many international arbitrators, especially in the civil law world, are law professors.¹⁸³ Thus, they have an inclination toward legal analysis, and may use arbitration as just another forum.

The last argument against arbitral tribunals' capacity to develop precedent is the most serious. Arbitration is a decentralized process. Tribunals rule without being subject to review.¹⁸⁴ Hence, there is no possibility for a higher court to harmonize the law. Moreover, there is no other rule or mechanism that forces tribunals to follow the decisions made by other tribunals in prior cases, such as the common law doctrine of *stare decisis*. As a result, there is a risk, which seems high at first sight, that tribunals would take different positions on similar issues. The system as a whole would be unable to develop the law harmoniously, as it would produce contradictory statements of what the law is. The assumption behind this argument is that the only incentives for judges to follow prior cases is the legal obligation to do so (in the common law world), or the risk of being overruled by a higher court (in the civil law world).

Yet, there may well be other incentives. First, irrespective of whether they are obliged to follow them, judges may seek actual guidance in prior cases to determine the best solution. Many

180. See, e.g., REDFERN & HUNTER, *supra* note 170, at 392; Lord Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award*, 4 *ARB. INT'L* 141, 154 (1988).

181. Luban, *supra* note 146, at 2622.

182. See Landes & Posner, *supra* note 152, at 238. Despite their hypothesis, Landes and Posner did not seem convinced that it could actually occur. It remains clear that "whatever their motivation, arbitrators tend to want to be *reappointed*." Paulsson, *supra* note 31, at 14.

183. Franck, *supra* note 24, at 1597-98.

184. Landes & Posner, *supra* note 152, at 248.

judges only want to apply the law and do not want to determine what the best rule is each time they decide a dispute. More importantly, once a given conduct has become a common practice in a group, few members of the group want to stand out. Men wear suits and ties without any legal obligation to do so. Of course, this is not to say that one cannot decide to ignore the practice, but this takes a good deal of courage. The easy path is to follow the practice.

The same certainly applies to adjudicators. Once several decision makers have adopted a given solution, it is difficult for the next adjudicator not to follow. Of course, a free-minded adjudicator could explain why he does not agree with the prior decisions. However, would that really be enough not to be criticized? Would other members really understand? They may, but if they do not, he puts his reputation at risk.

Finally, irrespective of an actual obligation to follow prior decisions, adjudicators may be convinced that legal certainty and predictability are good for the parties, consequently adopting solutions that are consistent with prior decisions to achieve this result.¹⁸⁵ Additional incentives to follow prior decisions do exist. Would they suffice in the absence of a superior court? Recent developments in some specialized fields of international arbitration suggest that they do.

b. Evidence from the Practice of International Arbitration

In the last decade, the practice of international arbitration has offered evidence that arbitral tribunals can develop precedents. In several specialized fields, arbitral tribunals cite, examine, and follow decisions made by prior tribunals.¹⁸⁶ Some of the common features of these specialized arbitrations explain why this has been possible. First, most of the awards made by these tribunals are public. They are typically available online shortly after being made and also published in legal journals. Second, the awards provide a detailed analysis of legal issues. Particularly in foreign investment law, such analyses commonly reach a hundred pages. Third, the vast majority of the arbitrators sitting in the tribunals consists of experienced legal academ-

185. See Gabrielle Kauffman-Kohler, *supra* note 161, at 374.

186. See generally *id.* Much of this Section draws heavily from this work.

ics or practitioners and, sometimes, very distinguished jurists.¹⁸⁷ On these three accounts, the arbitral tribunals are not significantly less equipped than courts to make the law and develop precedents. Of course, if these tribunals had been unwilling and unable to develop precedents, they would not have done so. Yet they have.

In the last decade, foreign investment law has offered evidence that arbitral tribunals can develop precedents.¹⁸⁸ Foreign investment law is a branch of international law which concentrates on the protection of foreign investment. It enables foreign investors to sue the state which hosted the investment for compensation but failed to offer due protection for the investor. Indeed, states have concluded an impressive number of Bilateral Investment Treaties (“BITs”)¹⁸⁹ affording not only substantive protection to the investors of the contracting party but also an arbitral forum¹⁹⁰ to bring claims of breaches of such protection; consequently, foreign investors have been able to initiate arbitral proceedings against host states irrespective of any arbitration agreement. Arbitral tribunals, particularly those constituted under the aegis of the International Centre for the Settlement of Dispute Resolution (“ICSID”), have thus settled several hundreds of investment disputes.¹⁹¹ They did so by applying the protection offered by the applicable BIT.¹⁹²

Formally, each BIT is different from the next. They are different instruments. In substance, however, BITs do not vary greatly. They are similar, but are not identical. For instance, they all afford fair and equitable treatment to foreign investors,

187. See Franck, *supra* note 24, at 1597-98 (noting this is especially so in foreign investment arbitration).

188. See Kaufmann-Kohler, *supra* note 161, at 365 (noting international sport law has offered similar, if not more conclusive evidence of this).

189. In 2008, more than 4000 such Bilateral Investment Treaties (“BITs”) had been concluded. There are also a few multilateral investment treaties such as the Energy Charter Treaty.

190. BITs typically offer a choice to foreign investors, who can choose to sue the host states in a variety of fora. For instance, the courts of the host states are often mentioned. Yet, in practice, almost all investors choose to initiate arbitral proceedings, as the neutrality of the courts of the state is not ensured. See Franck, *supra* note 24, at 1523.

191. See *id.* at 1539 nn.65-69.

192. See Kaufmann-Kohler, *supra* note 161, at 369. Some tribunals have noted that their decisions were dependent on the terms of the bilateral investment treaty (“BIT”) involved.

but not exactly on the same terms. A given expropriation may be a breach under one treaty, but not under the other. As a result, foreign investment law had great potential for offering evidence that a decentralized system of private adjudication could not develop a consistent body of law. Indeed, these tribunals do not even apply the same legal regimes, and there is no superior adjudicator to solve any conflict that may arise if such tribunals reach different conclusions as to the meaning of a particular provision.¹⁹³

However, what has happened is exactly the contrary. Arbitral tribunals deciding foreign investment disputes have developed over the course of a few decades, a consistent body of law, and their awards have, in effect, acquired precedential value.¹⁹⁴ This remarkable evolution has now become one of the most debated subjects in expert circles¹⁹⁵ and is even backed by an empirical study.¹⁹⁶

The practice of foreign investment arbitral tribunals evolved

193. When the arbitration takes place under the aegis of the International Centre for the Settlement of Investment Disputes ("ICSID"), annulment of the arbitral award may be sought before an ad hoc committee. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 160 (No. 8359) (1966). Such a committee, however, is not more permanent than first instance arbitral tribunals and has no power to solve any conflict of interpretation.

194. See, e.g., Kaufmann-Kohler, *supra* note 161 (suggesting that absent a doctrine of precedent per se, there exists a great reliance on the earlier cases or a stare decisis doctrine in certain specific fields, such as sports arbitration and investment arbitration); Franck, *supra* note 24, at 1616 (stating that although arbitration awards do not have precedential value, attorneys and investors rely on the published decisions to implement legitimate policy choices).

195. See, e.g., Alejandro A. Escobar, *The Use of ICSID Precedents by ICSID and ICSID Tribunals*, speech delivered at the British Institute of International and Comparative Law ("BIICL") Annual Meeting panel (June 19 2005); Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, paper delivered at "Interpretation Under the Vienna Convention On the Law of Treaties—25 Years On," (Feb. 7, 2006); Matthew Weiniger, *Is Past Performance a Guide to Future Performance—Precedent in Treaty Arbitration*, paper delivered at the BIICL's "Seventh Investment Treaty Forum Public Conference: Procedural Aspects of Investment Treaty Arbitration" (Sept. 8, 2006); Andrea Bjorklund, *Investment Arbitration Decisions as De Facto Precedent*, paper delivered at the ASIL International Economic Law Group's Annual Conference (Nov. 10, 2006).

196. See Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007); Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: The Empirical Backing*, in TRANSNATIONAL DISPUTE MANAGEMENT 6 (2007).

as follows.¹⁹⁷ In the early years, when foreign investment arbitration was slowly beginning, tribunals relied on decisions of other adjudicators, such as the decisions of international tribunals (for instance the International Court of Justice) or the awards made in international commercial cases.¹⁹⁸ It was only at a later stage that it became possible for foreign investment arbitral tribunals to think of examining the awards of other foreign investment arbitral tribunals. This came in the 1990s, when the practice of citing prior awards of such tribunals began.¹⁹⁹ Only a few awards were cited on average by each tribunal through 2002. Then, the citation rate increased exponentially, a trend which has continued to develop over the last few years. Today, awards cite on average more than ten prior awards.²⁰⁰

Prior awards are cited in order to determine how similar issues have been addressed by past tribunals. These issues are most often related to the interpretation of provisions that are commonly found in BITs. For instance, the guarantee of a fair and equitable treatment of foreign investors, found in virtually all BITs, has been consistently interpreted by tribunals, as not requiring bad faith or malicious intent of the host state.²⁰¹ Not only are prior awards cited in support of this interpretation, but a tribunal has stated that “there is a common thread in the recent awards” to adopt this solution.²⁰² Less frequently, tribunals have addressed issues which were not provided for in the BITs, such as the regulation of parallel litigation in investment disputes.²⁰³ Awards have ruled consistently that tribunals ought to apply for this purpose the civil law institution of *lis pendens*, and decline jurisdiction only when a competing adjudicator is al-

197. The evolution of the practice of international sport tribunals has followed similar lines. See Kauffman-Kohler, *supra* note 161, at 362.

198. See Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, *supra* note 196, at 153.

199. See generally Commission, *Precedent in Investment Treaty Arbitration: The Empirical Backing*, *supra* note 196.

200. See *id.* at 7.

201. See, e.g., *Azurix Corp. v. Argentine Rep.*, Case No. ARB/01/12, Award (July 14, 2006); *Siemens A.G. v. Argentine Rep.*, ICSID Case No. ARB/02/08, Award (Feb. 6, 2007).

202. See *Azurix*, Case No. ARB/01/12, Award.

203. See *Compañía de Aguas del Aconquija, S.A. [Vivendi] v. Argentine Rep.*, Award, Nov. 21, 2000, 16 ICSID REV. 641 (2001); 40 I.L.M. 426 (2001); 125 I.L.R. 1 (2004) and Annulment Decision (July 3, 2002), 41 I.L.M. 1135 (2002); 6 ICSID REP. 340 (2004); 125 I.L.R. 58 (2004).

ready seized of the same dispute from the perspective of the parties involved, the cause of action, and the remedy sought.²⁰⁴

Thus, foreign investment arbitral tribunals have been able to adopt solutions which have been consistently followed and have become a rule. This is additional evidence that arbitral tribunals can create rules, and that awards can be, in effect, precedents. It must be recognized, however, that the case law of foreign investment arbitration tribunals is not as consistent on all issues. There are instances where similar BITs' provisions have been interpreted differently not only by the tribunals which first addressed the issue, but also by subsequent tribunals. This happened most famously with the Most Favored Nation Clause,²⁰⁵ and with the so-called Umbrella Clause.²⁰⁶ Today, the interpretation of these two provisions is not settled.²⁰⁷ This divergence could be taken as evidence of the inability of decentralized systems of adjudication in general, and of foreign investment arbitral tribunals in particular, to develop a consistent body of law.²⁰⁸ A more moderate view, however, could be that "rule creation cannot be linear and that the road is necessarily bumpy, with dead-ends and U-turns,"²⁰⁹ and that consistency will

204. See *Compañía de Aguas del Aconquija, S.A. [Vivendi] v. Argentine Rep.*, Award, Nov. 21, 2000, 16 ICSID REV. 641 (2001); 40 I.L.M. 426 (2001); 125 I.L.R. 1 (2004) and Annulment Decision (July 3, 2002), 41 I.L.M. 1135 (2002); 6 ICSID REP. 340 (2004); 125 I.L.R. 58 (2004); *Genin et al. v. The Rep. of Estonia* (June 25, 2001), 17 ICSID REV. 395 (2002); *CMS Gas Transmission Co. v. Rep. of Argentina*, Decision of the Tribunal on Objections to Jurisdiction (July 17, 2003), 42 I.L.M. 800 (2003); *Azurix Corp. v. Argentine Rep.*, Decision on Jurisdiction, December 8, 2003, 43 I.L.M. 262 (2004); *Enron Corp. v. Argentine Rep.*, Decision on Jurisdiction (Aug. 2, 2004); *Lucchetti S.A. and Lucchetti Peru, S.A. v. Rep. of Peru*, Award (Feb. 7, 2005), 19 ICSID REV. 359 (2004); see generally Gilles Cuniberti, *Parallel Litigation and Foreign Investment Disputes Settlement*, 21 ICSID REV. 381 (2006).

205. The Most Favored Nation Clause provides that each contracting party shall accord to investors of the other party treatment no less favorable than treatment that it accords to investors of third parties. Conflicting awards were made as to the scope of the provision. See generally YANNICK RADI, *The Application of the Most-Favored-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse'*, 18 EUR. J. INT. LAW 757 (2007).

206. The Umbrella Clause typically provides that each contracting party shall observe any obligation it may have entered into with regard to the specific investment. The issue arose as to whether the clause could be interpreted as turning breach of particular investment contracts into violations of the treaty. See generally Thomas Wälde, *The Umbrella Clause in Investment Arbitration—A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INVESTMENT & TRADE 183 (2005).

207. See generally *supra* notes 205-06; Franck, *supra* note 24, at 1569.

208. See, e.g., Franck, *supra* note 24, at 1557.

209. Kaufmann-Kohler, *supra* note 161, at 377.

be achieved over time. It should not be forgotten that arbitral tribunals have only been deciding investment disputes on a regular basis for a few decades. In such a short time, they have established many rules. They have not created a complete and consistent body of law, but has any court been able to achieve such a result in such a short period of time? How many legal systems can claim that they never allowed inconsistent solutions to develop and to remain for some time? The truth of the matter is that modern foreign investment law not only confirms that arbitrators can develop precedents, but also suggests that it is their natural inclination.

2. Law's Exposure

Another public function of adjudication is to make the law accessible to the public.²¹⁰ Public access to adjudication enables the public to learn about the law and about procedures. Public trials and published judgements teach the public that there are rules, and that such rules are enforced.²¹¹ This knowledge increases the awareness of the public of their rights, and thus results more often in the vindication of those rights. The actual reach of the legal system is extended. Moreover, as the state is able to clearly show that it uses its power in accordance with procedures and rules, it reinforces the legitimacy of such power.

Critics of ADR argue that as adjudication declines, so does public knowledge of the law and "the occasions to observe the exercise of state authority."²¹² As already noted, it is clear that my proposed model would further contribute to a decrease in the number of cases adjudicated by public courts. Would this jeopardize public access to the law? There are several reasons to believe that it would not.

First, the public functions served by law's exposure might only require that a few cases be accessible publicly. Recall that my proposed model would not dry up litigation. Parties could still choose to litigate before a national court, and courts would retain jurisdiction over small claims. Some litigation would re-

210. See Judith Resnik, *Whither and Whether Adjudication?*, 86 BOSTON U. L. REV. 1101, 1111-14 (2006).

211. See Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 405-26 (1987).

212. Resnik, *Whither and Whether Adjudication?*, *supra* note 210, at 1102.

main, and it may be that such litigation is sufficient to ensure exposure of the law.

Second, as critics admit,²¹³ law's exposure is not only achieved through public access to trials, but also through public access to decisions and reports. While alternatives to adjudication in the United States have traditionally been out of reach of the public both because attendance to public processes was difficult and because decisions were not published, the practice of foreign investment tribunals has shown that arbitral awards could be made accessible to the public.²¹⁴ Certainly, the availability of such awards has ensured the education of many on the operation of foreign investment law. It has also shown that the guarantees afforded by BITs are enforceable and given a great deal of legitimacy by the international legal order. Again, foreign investment arbitration is evidence that arbitration can serve some of the public functions that courts have traditionally served. Two issues remain, however. One is that arbitration, a private activity, would obviously not appear as an exercise of state authority. Thus, an opportunity to reinforce the legitimacy of this authority would be lost. Would this be a problem? Are states in such desperate need of legitimacy? Certainly, the rest of litigation would remain,²¹⁵ and so would other manifestations of judicial authority such as judicial buildings.²¹⁶ Another issue is whether the absence of public access to hearings would be a significant loss. Arbitral hearings have traditionally been inaccessible to the public, even in specialized fields of international arbitration.²¹⁷ In 2006, the International Centre for the Settlement of Investment Disputes ("ICSID") amended its rules of arbitra-

213. *See id.* at 1113.

214. *See supra* notes 186-94.

215. In most legal orders, arbitration is confined to commercial matters. Exceptions exist, however, the most remarkable being the United States, where arbitration has been accepted in consumer and employment disputes. In such legal orders, the proposed model would then be part of a wider phenomenon of privatization of adjudication. For a discussion of the United States, see Resnik, *Whither and Whether Adjudication?*, *supra* note 210, at 1123. If the phenomenon became too important, it could raise additional issues that the privatization of commercial justice only would not raise.

216. On court buildings and the reinforcement of judicial legitimacy, see Judith Resnik and Dennis E. Curtis, *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses*, 151 *PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY* 139 (2007); Resnik, *Whither and Whether Adjudication?*, *supra* note 210, at 1103.

217. *See, e.g.*, Court of Arbitration for Sport, Special Provisions Applicable to the Ordinary Arbitration Procedure, Procedural Rule 43.

tion to recognize the power of foreign investment arbitral tribunals acting under the aegis of ICSID to allow third parties to attend the hearings.²¹⁸ But, for the time being, third parties are rarely admitted to arbitral hearings. However, a fair question is whether public hearings contribute as much to law's exposure as the publication of decisions. My sense is that they do not, and that what really matters is the availability of decisions. I will thus propose a model where the parties and the tribunal decide whether to make hearings accessible to the public and the press.²¹⁹ But making arbitration hearings open to the public and the press a mandatory rule is certainly also conceivable.

3. Public Interest

Finally, the extension of the scope of international arbitration might be a cause for concern for a more general reason. Courts serve a variety of functions, both private and public. I have argued that private adjudicators may be able to serve these functions. It could be argued, however, that they may not be able to serve them as well. More specifically, one may wonder whether private adjudicators would be sensitive to the public interest. Would they take it into account when deciding disputes? Would they take it into account when participating to the development of precedents?

The issue would not be a new one. Arbitration scholars have long debated about the desirability of private adjudication in fields where disputes typically involve more than the private interests of the parties.²²⁰ Antitrust claims, for instance, not only protect private competitors, but also the public at large. Should they be arbitrated, then? Or does the protection of the public interest require that such claims be handled by courts? Two approaches have been used to address the issue. First, some claims were found to implicate non-negotiable public interests and thus to be unarbitrable.²²¹ The subject matter of such claims was deemed unarbitrable, and agreements to arbitrate them would

218. ICSID Arbitration Rules, art. 32 (2006). On this evolution, see Aurelia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV. 427, 431-33 (2006).

219. See *infra* Part IV.D.

220. See, e.g., PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES *supra* note 20, at 115; Park, *National Law and Commercial Justice*, *supra* note 11, at 674-79.

221. See Park, *National Law and Commercial Justice*, *supra* note 11, at 668-74.

not be enforced. Second, public law claims could be found arbitrable, but courts would reserve a right to have a second look when the parties seek enforcement of the award.²²² An award infringing a public law of the forum would be found as contrary to public policy and thus denied enforcement. Today, the second approach dominates in most sophisticated jurisdictions. For instance, in the field of antitrust, it has been endorsed both by the U.S. Supreme Court²²³ and by the European Court of Justice.²²⁴

Policymakers have thus been aware of the issue of the protection of the public interest in arbitration for a long time. In most jurisdictions, they have continued to promote arbitration in general and international commercial arbitration in particular. They are either satisfied that the public interest is sufficiently protected under the present regime, or that, if it is not, international arbitration attracts other benefits which outweigh society's interest in supervising adjudication of public law claims.²²⁵ For the purpose of this Article, it is unnecessary to determine whether they are right. The issue of the protection of public interest in arbitration does not depend on the foundation of arbitration. It does not arise differently in a consensual or in a non-consensual model of arbitration. Thus, as a full discussion of the doctrine of arbitrability would fall outside the scope of this Article, I will defer to the assessment made by each jurisdiction with regard to the protection of the public interest in arbitration.

B. *Cost*

An obvious consequence of the model would be to decrease the number of cases handled by courts. Arbitral tribunals would decide cases which are presently handled by courts. The dockets of courts benefiting from the model would thus be reduced. Judicial resources would be spared and could be used for other purposes. As already discussed,²²⁶ it seems clear that many

222. *See id.* at 668-69.

223. *See generally* Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985); PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES, *supra* note 20.

224. *See generally* Eco Swiss China Time Ltd v. Benetton Int'l, Case 126/97, [1999] E.C.R. I-3055.

225. *See generally* Park, *Private Adjudicators*, *supra* note 150.

226. *See supra* Part I.A.2.a.

would appreciate these consequences.

However, in order to properly assess the efficiency of the model, it is necessary to take into consideration the fact that the parties would pay the costs related to the resolution of their dispute, such as the arbitrators' fees and expenses. From an economic perspective, the model is only efficient if this cost is less than the judicial costs which would be saved as a result. Otherwise, society as a whole may be better off continuing to bear the costs of dispute resolution and seeing the parties' resources invested differently. Unfortunately, judicial costs are very complex to assess, and arbitrators' fees vary.²²⁷

There are two reasons to believe that the costs of privately funding adjudication would be inferior to the costs of doing so publicly. First, privatizing adjudication would internalize what is now an externality. In the present system, parties do not pay the costs of adjudication, which are borne by the community of tax payers.²²⁸ As parties do not incur such costs, they do not consider the expenses when deciding whether to bring a claim. They have incentives to sue for claims less than judicial costs. The result is inefficient, as they may recover a sum or otherwise benefit from the suit, at the expense of a greater cost for the community. This inefficiency can be avoided by making the parties bear the costs of adjudication. In other words, the number of suits should actually decrease, as inefficient suits would not be brought anymore. Second, the price of the service would not be fixed unilaterally by states, but by the market. One could expect that competition would result in lower prices.

There is, however, yet another variable to include in the equation. Suits are not only a cost to society. They also produce benefits. As is also pointed out by civil procedure scholars,²²⁹ suits allow for rule production. They also inform the public at large that the law is enforced, and thus deter potential injurers from misbehaving. These benefits are societal. All members of

227. See Lee, *supra* note 43, at 268. In 1984, the Solicitor General of the United States evaluated the average cost of operating an American courtroom to US\$400-600 per hour. This would not be extremely different than what some of the major international arbitration institutions which calculate arbitrators' fees on an hourly basis, charge: in 2007, the London Court of International Arbitration average rate is GBP 250 per hour (this fee is per arbitrator, and does not include either the costs of the tribunal or the fees of the arbitral institution).

228. See *id.*

229. See *supra* Part I.A.

the community may enjoy them. Thus, there is a case for having all members of the community pay for their production—that is, all members of society should bear the cost of funding courts.²³⁰

There is also a case for allowing suits mainly to produce these benefits. The efficiency of litigation should take into account the broader societal benefits as well as the private benefits of the parties. A suit is efficient when the sum of the societal benefits exceeds the costs of such suits, not when only the private benefits exceed the costs of adjudication. So, an issue could arise if the parties bear judicial costs, as the parties in pursuit of their own interest would only consider their own benefits, but not societal ones. Thus, one may fear that the disputing parties would no longer sue when their private benefits are inferior to judicial costs, irrespective of the societal benefits of the claim. This argument has led many law and economics scholars to argue that charging users the court fees to bear the judicial costs, will not necessarily promote efficiency.²³¹

Although framed differently, this argument is essentially the same as the one made by civil procedure scholars, and it can be answered along similar lines. There are two reasons to think that my model will not harm rules production and the legal system's ability to deter. First, the assumption behind the argument is that private adjudication could not itself produce rules and show that the law is enforced. I argue that this assumption is wrong, and that private adjudication can be public, and thus deter, and that it can also produce rules.²³² Second, while it is likely that a dramatic decrease in litigation would prevent courts from serving their public functions, it is doubtful that even a significant decrease would. Public functions could be served by a small number of decisions. A few cases are necessary to produce a rule, and a few more to send a clear signal that injurers can be sued effectively by injured parties. In this respect, there is a critical difference between the private and public benefits of litigation. While private benefits are only enjoyed if the case is actually litigated (or settled), public benefits are enjoyed after the litigation of a few cases only. Of course, you do need these few

230. See generally RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 131 (1985).

231. See *id.* at 10; see generally STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF THE LAW* 399 (2004).

232. See *supra* Part III.A.

cases. If the private benefits are routinely inferior to the judicial costs, there is a risk of all litigation drying up. But if the private benefits are often, if not routinely, high, then the public benefits will be produced in any case. Thus, a critical issue is the average value of claims. While it could be low and thus raise issues in labor or consumer disputes, it is probably sufficiently high in commercial disputes. Furthermore, one could decide to distinguish between low and high claims, and privatize the settlement of the latter only.²³³

It thus seems that my model would be less costly and thus more efficient. It would certainly decrease public spending. In those jurisdictions facing the difficult issue of allocation of scarce public resources, this would be an important benefit.

The cost-benefit analysis that I have conducted leads me to conclude that the benefits of the model clearly outweigh its costs. The model would increase the fairness of the resolution of international commercial disputes. It would save public resources. I will also argue shortly that it would improve the arbitral process.²³⁴ Legal scholars have traditionally argued that these benefits would be cancelled by the societal cost of undermining the public functions of the courts. I find that recent developments in specialized fields of international arbitration show that this cost is not necessary. If it is not incurred, it seems clear that the model is largely beneficial.

IV. THE MODEL: DEFAULT ARBITRATION

In previous Parts, we learned that non-consensual arbitration could raise issues, but that such issues could be effectively addressed by designing a model of non-consensual arbitration incorporating certain key features. I now build on these findings and present my model.

So far, I have only insisted on the most important feature of the model. Parties may resort to arbitration in the absence of any arbitration agreement. More generally, the rule would be a default. It would apply in the absence of any agreement of the parties on the mode of resolution of their dispute. As I only

233. See *infra* Part IV.A.

234. See *infra* Part IV.E. As arbitration would lose its contractual foundation, traditional rules resulting from this contractual foundation and perceived as problematic could be changed, and the arbitral process would thus be improved.

want to discuss the resolution of international commercial disputes, I believe that there is no reason in principle why the will of the parties should not be taken into account, and their agreement enforced. In other words, if the parties have negotiated a dispute resolution regime, it must be applied. They are free to make any decision in this respect. They may agree to resort to arbitration or to bring their claim before a given national court. Fine. This hypothetical is outside the scope of this Article.

In the absence of any agreement on jurisdiction, I propose that any of the parties have the right to resort to arbitration. This means that either the plaintiff or the defendant could make the decision to arbitrate, and that the other party would have to abide by such a decision. In case that other party would not want to freely participate in the arbitral proceedings, the party willing to go to arbitration could seek enforcement of its right before a court.²³⁵ Such enforcement could take two different forms.

If the other party had already initiated proceedings before a court, that court ought to decline jurisdiction and refer the parties to arbitration instead. In practice, one can predict that this would happen most often when a foreign defendant would be sued in the plaintiff's courts. If the foreign defendant was uncomfortable litigating before his opponent's courts, he would apply for a referral to arbitration. He would not have to, and could decide to abide to the initial choice of the plaintiff if he wanted to. But even under local civil procedure, the foreign defendant would be under no obligation to do so, as the right to go to arbitration would be his under local civil procedure. This right could be enforced in a second way. Irrespective of any proceedings on the merits brought before a court, any of the parties could decide to initiate arbitral proceedings. If the defendant were then to decide to ignore the arbitration, the party willing to go to arbitration could apply to a court for an order compelling arbitration. In practice, one can predict that it would happen either when the plaintiff would want to go to arbitration, or when a defendant would have made the decision to transfer a case from a court to an arbitral tribunal, but the other party would not cooperate.

235. See Landes & Posner, *supra* note 152, at 246. The unavailability of courts would obviously make the model unworkable.

The right of the parties to go to arbitration would be exactly the same as the right of the parties who conclude arbitration agreements providing for nothing else than the principle that the dispute must be resolved by way of arbitration. In international arbitration, such an agreement is typically valid.²³⁶ It only needs to be clear as to the mode of dispute resolution that the parties have actually agreed upon. If it is, it then triggers the default arbitration regime of the applicable law. When the applicable law is sophisticated, it provides a complete regime that allows the arbitration to take place. It either provides default rules to appoint the arbitrators,²³⁷ or offers the support of local courts if the parties are not reasonable enough to use one of the recognized ways of appointing the members of the tribunal.²³⁸ Once the tribunal has been appointed, the applicable law then typically gives it a lot of discretion to conduct the proceedings, and more generally to rule on any issue that may arise. If one excepts the very few rules which are the direct consequences of the contractual foundation of arbitration, it is only necessary to apply the existing law. Though founded on a critical shift in paradigm, the arbitration would essentially look like a traditional one.

A. *The Scope of the Rule*

1. Proposed Scope

The first issue that the model raises is that of its scope. In consensual arbitration, the issue is addressed indirectly through the determination of arbitrability. As only certain types of disputes are arbitrable depending on their subject matter,²³⁹ the scope of arbitration can be deduced *a contrario* from the rules on arbitrability. Only arbitrable disputes can be arbitrated. This Article does not intend to revisit arbitrability. The model would thus apply only to arbitrable disputes. But an additional issue

236. See, e.g., NOUVEAU CODE DE PROCEDURE CIVILE [N.C.P.C.] art. 1493 (Fr.), Decree Law No. 81-500 of May 12, 1981, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], May 14, 1981; Arab African Energy Corp. Ltd. v. Olieprodukten Nederland B.V., [1983] 2 Lloyd's Rep. 419 (Q.B.) (U.K.).

237. See, e.g., 1985 UNCITRAL Model Law, *supra*, note 33, art. 11; English Arbitration Act, § 16.

238. See, e.g., Swiss Law of Private International Law, art. 179 (1987); French New Code of Civil Procedure, art. 1493.

239. See Park, *Private Adjudicators*, *supra* note 150, at 629-30.

would arise in my model. It would be necessary to determine which parties can be compelled to arbitration. In consensual arbitration, the answer is straightforward: the parties who consented to arbitration. The contractual foundation of arbitration dictates its personal scope. If the foundation of arbitration changes, the issue must be reconsidered.

As was discussed earlier, there are several reasons why arbitration appears as a more appropriate mode of dispute resolution of international commercial disputes than litigation. It offers not only neutrality, but also equality and procedural flexibility. Depending on which of these advantages is put forward, the scope of the rule could be more or less wide. As the most important rationale of the model is to ensure neutrality of adjudication, it seems that the model ought to apply first and foremost in cases where the parties would have different origins, and one party could reasonably fear disadvantage because of its origin. It follows that the model only applies to disputes involving a local party and a foreign party. For the purpose of the rule, "foreign" and "local" could be defined in different ways, but it seems that what should matter most is whether the parties actually belong to a given community. I would thus insist on their residence and domicile rather than their nationality, although one should take nationality into account if it could be shown that it alone would put a party at a disadvantage before a given court. The principle would thus be that the model would apply only to disputes involving parties domiciled in different jurisdictions. Exceptions to the principle could exist when, despite the different origins of the parties, it would be clear that neither party can reasonably fear partiality from a given court. A first exception could be made when a foreign plaintiff would have chosen to sue before the courts of the defendant. It could be considered that the defendant could not possibly claim that his own courts could be biased against him, and that seeking to transfer the case to an arbitral tribunal would most probably be a strategic move. A second exception could be made when none of the parties are local, i.e., for proceedings initiated before the court of a third state. It could be considered that no party is at a disadvantage, and that the court ought to retain jurisdiction. Note, however, that other considerations could dictate to accept to refer to arbitration even in these two instances, for example because arbitration would also offer procedural flexibility, or because it would

not be funded by local tax payers.²⁴⁰

A general exception ought to be made on the ground of denial of justice. The exception would allow parties unwilling to go to arbitration to avoid doing so in two cases. First, if a party could show that an arbitral tribunal would be unable to grant him the relief sought whereas a court could, it may be envisaged to allow this party to sue before a court. Arbitral tribunals are generally able to grant most remedies, but traditionally they are considered unable to grant certain ones, or at least to do so meaningfully. For instance, they have no contempt power. If such remedy was critical for one of the parties' cases, and if it could not be obtained in separate court proceedings, an exception could be made.²⁴¹ Second, parties unable to meet the costs of the arbitration, in particular arbitrators' fees, ought to be allowed to go to court. In a commercial context, this would often mean a bankrupt party. But it could also mean a party with too small a claim for arbitration to make sense economically. If the amount of the claim is smaller than predictable arbitrators' fees, compelling arbitration would amount to a denial of justice. There may be a case for not making an exception in such cases, in order to avoid inefficient litigation, but one could also argue that it would allow courts to continue to settle a fair amount of disputes and to continue to serve their public functions.²⁴²

When I discussed the legitimacy of adjudication, I argued that a variety of factors contribute to the legitimacy of arbitral tribunals, including the fairness of the arbitral process and the ability of the tribunal to apply the law properly.²⁴³ Fairness has always been a central concern in international arbitration. It is required, and its absence would jeopardize the validity of the award. By contrast, proper application of the law on the merits is not a concern of the arbitral process. Errors of law are no ground to challenge arbitral awards. This is understandable in a context of consensual arbitration, where it can be argued that

240. See *infra* Part V (referring to arbitration could then become an alternative to declining jurisdiction on the ground of *forum non conveniens*).

241. This hypothesis ought to be clearly distinguished from the hypothesis of higher chances of losing on the merits before one of the adjudicators. The issue of the appropriate assessment of the merits of the claims could only be seriously raised in the context of a law clearly governing the dispute, and should be dealt with by appointing arbitrators with skills in the applicable law.

242. See *supra* Part III.A-B.

243. See *supra* Part II.

arbitration was chosen in order to avoid courts. However, as soon as the contractual foundation of arbitration disappears, the issue must be reconsidered. Some may be of the opinion that, in the absence of an agreement of the parties, the arbitral process can only be legitimate if guarantees are given that the tribunal would reach the right result. Two different kinds of guarantees could be imagined. First, courts could be allowed to review the award on the merits. However, such a rule would reintroduce courts into the equation, where the initial purpose of the model was to exclude them because of their potential partiality. A second kind of guarantee could be obtained *ex ante*, before going to arbitration. A party could be allowed to resist an action to compel him to go to arbitration by showing that he has precise expectations as far as the applicable law is concerned, and that an arbitral tribunal would be more likely to deceive him than a court. I argued above²⁴⁴ that the claim that the legitimacy of international adjudication lies in the ability of the adjudicator to reach the right result is only serious when the parties can have precise expectations as to the applicable law. This is mostly the case when a clause providing for the application of a given national law has been stipulated in the contract. By contrast, the absence of such clause would often make the determination of the applicable law very complicated, as several fora with different choice of law rules would typically be available to the parties. It would also be strong evidence of how little the parties cared for the applicable law when they negotiated the contract, and arguably ever since. As a result, it should not be enough for parties unwilling to go to arbitration to show that they have precise expectation on the applicable law. They must also be able to show that an arbitral tribunal would be more likely to deceive these expectations than a court. The argument could only make sense if the alternative was between a court applying its own law, which would thus have to be available,²⁴⁵ and an arbitral tribunal whose members would not be knowledgeable in the applicable law.

2. What can be Learned from U.S. Diversity Jurisdiction?

An interesting parallel can be drawn between the model and the diversity jurisdiction of U.S. federal courts. The U.S.

244. See *supra* Part II.B.

245. At the very least, the court would have to have jurisdiction over the dispute.

Constitution provides for the jurisdiction of federal courts to decide disputes between citizens of different states and citizens of a state and foreign citizens.²⁴⁶ As in my model, diversity jurisdiction focuses exclusively on the origin of the parties and allows federal courts to retain jurisdiction irrespective of the subject matter of the dispute.²⁴⁷ What I propose as the main rationale for the model, protecting outside parties from local bias, is also "the traditional, and most often cited, explanation of the purpose of diversity jurisdiction."²⁴⁸ A direct consequence is that defendants sued before the state court of their domicile may not seek removal of the dispute at the federal level, as they should not fear partiality from their own courts.²⁴⁹

The proposed model is thus comparable to diversity jurisdiction in many respects. But what makes this parallel most interesting is that, although diversity jurisdiction has been part of U.S. law for more than two centuries,²⁵⁰ it has been strongly criticized for half of its existence.²⁵¹ The richness of the debate over the desirability of diversity jurisdiction thus may be a great opportunity to test my model and predict the issues that it will raise.

A large part of the debate on the desirability of diversity jurisdiction revolves around its efficiency. The main goal of the critics of diversity jurisdiction is to reduce the pressure on the federal caseload.²⁵² They seek to save public resources. Supporters of diversity jurisdiction answer that abolishing diversity jurisdiction would merely shift the burden from one judicial system (the federal one) to another (the judicial systems of states).²⁵³ Critics reply that it would still be more efficient, as it

246. See U.S. CONST. art. III, § 2, cl. 1.

247. However, one exception exists for domestic relation disputes. See generally JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 26 (3d ed. 1999).

248. CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 338 (2d ed. 1982).

249. See 28 U.S.C. § 1441(b) (2006). On the rationale of the rule, see ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 342 (3d ed. 1999).

250. Diversity jurisdiction was given statutory authority as soon as 1789 in the first Judiciary Act of 1789.

251. For a summary of the cases for and against diversity jurisdiction, see CHERMERINSKY, *supra* note 249, at 288-90; Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 101 (1990).

252. See Kramer, *supra* note 251, at 102.

253. See John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 412 (1979).

would cost less for states to decide these issues than it does for federal courts.²⁵⁴ The proposed model would of course be critically different from diversity jurisdiction in this respect. It would not transfer cases from one court to another, but from public courts to private adjudicators. It would certainly save public resources, but at the expense of private actors rather than other taxpayers. I have argued above that the model would be more efficient as there are reasons to believe that the price paid by private actors would be less than the public resources saved as a result.²⁵⁵ In any case, public lawmakers are usually much more concerned by the consequences of policies on public resources rather than their overall efficiency. From this perspective, the consequence of the model would clearly be beneficial.

An additional issue raised by diversity jurisdiction is that it allows forum shopping. Plaintiffs can choose to sue either in a federal or in a state forum. Although it is not uniformly criticized,²⁵⁶ forum shopping has traditionally been condemned as a manipulative tactic,²⁵⁷ including by the U.S. Supreme Court.²⁵⁸ Furthermore, the mechanisms crafted to avoid parallel litigation in each forum can be abused.²⁵⁹ Related litigation then develops before different adjudicators. The issue of the relationship between these adjudicators appears, and requires specific tools to be addressed.²⁶⁰ The judicial concurrency is thus at the origin of additional costs for both the parties and the courts, and these costs do not seem justifiable.²⁶¹ The proposed model would also

254. *See, e.g.*, HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 141 (1973). In addition, an issue peculiar to the U.S. context is that federal courts apply state laws in diversity cases, sometimes before state supreme courts settle the law, while it would make more sense if state laws were applied by state courts. *See, e.g., id.*; Kramer, *supra* note 251, at 104.

255. *See supra* Part III.B.

256. *See, e.g.*, Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 82 (1999); George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 653 (1993).

257. *See, e.g.*, Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 148 (2003); Kramer, *supra* note 251, at 107.

258. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987).

259. Abuse occurs primarily by initiating actions in state courts which do not satisfy the requirements of removal to federal courts.

260. *See* Kramer, *supra* note 251, at 105.

261. *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 9 (1963); Kramer, *supra* note 251, at 107.

allow plaintiffs to choose between different adjudicators (national courts and an arbitral tribunal). The purpose of the model would not be to allow parallel litigation before these adjudicators. If any of the parties expressed the willingness to go to arbitration, courts ought to decline jurisdiction. Of course, it cannot be ruled out that the model could not be abused, and that ways to initiate parallel proceedings before courts could not be found by clever lawyers. Tools to deal with the problem would then have to be crafted. However, there would be a critical difference between my model and U.S. diversity jurisdiction. The United States is a sovereign. Though a federal state, it is a domestic legal order hierarchically organized. In this context, aspirations to an ordered judicial world are understandable and reasonably realistic. By contrast, the international society is not hierarchically organized. Each state is a sovereign. International forum shopping exists because states define freely the jurisdiction of their courts. Judicial concurrency is a sad, but logical and inescapable reality of the international arena. It is probably not good, but it will not change anytime soon. The proposed model would probably diminish this judicial concurrency.²⁶² At the same time, it would maybe create new difficulties because it could create new kinds of parallel litigation. The model might replace what is today an unavoidable evil with a new one. This could certainly not be counted against the model.

Finally, I turn to the reason most often put forward to justify diversity jurisdiction, protection from local bias. Although legal historians still debate whether it was the actual reason behind the creation of diversity jurisdiction,²⁶³ protection from local bias remains the traditional rationale for this head of jurisdiction. The U.S. Supreme Court has consistently ruled that it is the foundation of diversity jurisdiction.²⁶⁴ The concern for local bias also remains a key issue in the debate focusing on the desirability of diversity jurisdiction.²⁶⁵ Critics challenge that there is still enough bias in modern America to justify diversity jurisdic-

262. See *supra* note 261.

263. See CHEMERINSKY, *supra* note 249, at 286 (“[T]here is little agreement about why diversity jurisdiction was created.”); see also Bassett, *supra* note 257, at 130.

264. See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945); *Burgess v. Seligman*, 107 U.S. 20, 34 (1883); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

265. See, e.g., CHEMERINSKY, *supra* note 249, at 290; Bassett, *supra* note 257, at 119.

tion.²⁶⁶ Supporters argue that even if it were so, fear of bias remains and is enough of a reason.²⁶⁷ Finally, many underline that while the question of the existence of local bias is critical, only an empirical study could resolve it, and that such a study is very difficult to devise.²⁶⁸ For the purposes of this Article, there is no need to go into the details of this debate, let alone to take a position. It will suffice to note that when critics of diversity jurisdiction propose abolishing it, they reserve the case of alienage jurisdiction.²⁶⁹

In 1978, a bill to abolish diversity jurisdiction, which passed the House of Representatives (but not the Senate), also provided for maintaining alienage jurisdiction.²⁷⁰ Two different rationales are offered to distinguish between domestic and international diversity jurisdiction. The first is that suits involving aliens can have effects on the foreign relations of the United States and should therefore be decided by federal courts.²⁷¹ The second is that the need to protect foreign parties from local bias is clear and more pressing than the need to protect out-of-state parties.²⁷² The first argument is obviously not relevant for the purpose of this Article, but the second suggests that the need to offer a neutral forum for the resolution of disputes involving foreigners is also felt in the United States.

Of course, it must be emphasized once again that diversity jurisdiction is critically different from the model proposed in this Article: what supporters of alienage jurisdiction have in mind is the transfer of a case from one American court to another, not a transfer from a court to a private adjudicator. There is only so much that one can learn from comparing apples and oranges. Yet, it is also fair to ask whether alienage jurisdiction makes such a difference for foreigners fearing local bias. After

266. See, e.g., FRIENDLY, *supra* note 254, at 141.

267. See, e.g., Douglas D. McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?*, 7 *LITIG.* 38, 39 (1980-81).

268. See, e.g., CHEMERINSKY, *supra* note 249, at 290; Kramer, *supra* note 251, at 119.

269. See Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reform*, 92 *HARV. L. REV.* 963, 966 (1979); Kramer, *supra* note 251, at 121-23; Bassett, *supra* note 257, at 146 n.133.

270. See CHEMERINSKY, *supra* note 249, at 287.

271. See, e.g., Rowe, *supra* note 269, at 967; Kramer, *supra* note 251, at 121.

272. See Bassett, *supra* note 257, at 146 n.133 (stating that bias against foreigners is well documented); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 *YALE J. INT'L L.* 1, 31 (1996).

all, as many critics of diversity jurisdiction have noted, federal judges are not very different from state judges.²⁷³ They have the same education, similar careers, and live in the same communities. Indeed, many federal judges are former state judges.²⁷⁴ If the rationale for alienage jurisdiction is to protect foreigners from local bias, then the remedy offered by the American legal system and the U.S. Constitution is too weak. Aliens ought to be offered an even more neutral forum.

The longstanding debate on the desirability of diversity jurisdiction in the United States is instructive. Many arguments used by the supporters and the critics of diversity jurisdiction are relevant for the purpose of testing the model that I propose in this Article. Their analysis in the particular context of the proposed model leads to a positive conclusion. The American experience offers additional support to the thesis developed in this Article.

B. *Grounds for Review of Awards*

In the traditional model of international arbitration, courts review arbitral awards on certain limited grounds. Generally, such review can occur for two purposes. First, the validity of the award can be challenged, typically before the courts of the seat of the arbitration. Second, awards may be enforced only after being reviewed by the courts of the jurisdiction where enforcement is sought. In each case, awards are reviewed on similar, limited grounds—mostly, the existence of an agreement to arbitrate and the fairness of the arbitral proceedings.²⁷⁵

By contrast, awards are rarely reviewed on the merits; courts do not review whether arbitrators properly applied the law and assessed the facts.²⁷⁶ Nevertheless, an exception can occur when

273. See Kramer, *supra* note 249, at 120; Clermont & Eisenberg, *supra* note 27, at 1122 n.10 (noting that judges and juries at both levels “are largely similar in characteristics and roles.”). The argument was made, however, that diversity jurisdiction should be maintained because of the real or perceived higher quality of the federal bench. See, e.g., Frank, *supra* note 253, at 410.

274. On the U.S. system of selecting judges, see POSNER, *supra* 230, at 15-22.

275. The grounds for the review of awards vary from one jurisdiction to another. Essentially, however, they almost invariably aim at verifying that the agreement of the parties was respected, and that the arbitral process was fair. For a comparative survey of the grounds for the review of arbitral awards, see JULIAN D. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 673 (2003).

276. See, e.g., REDFERN ET AL., *supra* note 6, at 530. Common law jurisdictions, how-

the award infringes public policy.²⁷⁷ Public policy is typically interpreted as referring not to any legislative policy, but rather, to the most fundamental principles of the forum.²⁷⁸ It follows that the public policy exception may come into play only in cases where arbitrators applied certain laws involving public interest, or where arbitrators reached substantive results that are not only wrong, but shocking.

In the non-consensual model of international arbitration that I advocate, the first issue to raise is whether awards could be reviewed at all. The main rationale behind the proposed model is to enhance procedural fairness by allowing the parties to avoid courts and to litigate before a more neutral forum. At the heart of the model is the recognition that parties can legitimately fear local bias. There is no reason to believe, however, that judges could show bias only in proceedings on the merits. They can also show bias in review proceedings. They could systematically set aside awards finding against local parties.²⁷⁹ The model aims to involve courts as little as possible. Yet, it would seem neither realistic nor reasonable to suppress the review of arbitral awards. To begin with, it seems clear that countries will not consent to enforce arbitral awards without verifying that they meet certain basic conditions. Furthermore, and more importantly, the grounds for review reflect policy decisions which must be sanctioned, as will be addressed shortly.

The concern of bias in review proceedings can be addressed by giving jurisdiction to entertain challenge proceedings to a court perceived as neutral. This would be done by setting the seat of the arbitration in a jurisdiction unrelated to the parties and, arguably, to the dispute.²⁸⁰ This would not solve the issue of bias in enforcement proceedings. In most cases, however, the plaintiff who could not enforce the award in a given jurisdiction—typically the defendant's country of residence—has the option of seeking enforcement in another jurisdiction that has

ever, have often been inclined to review awards on the merits. See LEW ET AL., *supra* note 275, at 677.

277. See REDFERN ET AL., *supra* note 6, at 544-45.

278. See *id.*

279. Bias in enforcement proceedings is not a rare occurrence. See, e.g., Boris Karabelnikov & Dominic Pellet, *Enforcement of International Arbitral Awards in Russia—Still a Mixed Picture*, 19 ICC BULL. 65 (2008).

280. See *infra* Part IV.F.

no reason to discriminate or disadvantage the plaintiff.²⁸¹

The grounds for review would need to be slightly adapted from the traditional model. Courts would obviously not control whether the jurisdiction of the arbitrators was properly defined in an arbitration agreement. Instead, they would control whether the requirements for the proposed model—in particular, those relating to its scope—were met.²⁸² For the rest, the same grounds for review would remain. First, courts would sanction the violation of procedural fairness. I submit that arbitral tribunals usually offer the protection and the process as adequate as those offered by the courts. However, when that is not the case, parties ought to have a remedy, if only to give an additional incentive to arbitrators to offer a fair process. Second, courts would not review arbitral awards on the merits. The proposed model recognizes that arbitration is the preferred mode of international dispute resolution. As such, it should be the default solution and prevent any court from deciding the case. If the reviewing court had the power to review the award on the merits, it would indirectly decide the dispute. The proposed model would thus deny reviewing courts the power to review awards on the merits, allowing only the public policy exception to remain.

C. *Unavailability of the New York Convention*

The critical importance of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)²⁸³ in the development of international commercial arbitration raises the issue of the consequences that the proposed model would have on its application. The New York Convention has long been credited with the success of international commercial arbitration.²⁸⁴ This is because it ensures

281. In the worst case scenario, the defendant would have no assets anywhere else, and the plaintiff would not be able to enforce the award. This seems to result in a denial of justice, but it is not a new phenomenon in the international arena. In all likelihood, the plaintiff would not have been able to enforce a foreign judgment, either.

282. *See supra* Part IV.A.

283. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted June 10, 1958), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/NYConvention.html> [hereinafter *New York Convention*].

284. *See, e.g.*, Alan Redfern, *Having Confidence in International Arbitration*, 57 *DISP. RESOL. J.* 60, 61 (2003); *see also* the surveys conducted by BÜRHING-UHLE, *supra* note 20,

high probability of enforcement of arbitral awards even outside of the jurisdiction where they were made.²⁸⁵ The New York Convention limits the grounds for denial of enforcement of foreign arbitral awards, thus creating a duty to enforce them in most circumstances. Since the New York Convention was ratified by most countries, it applies almost universally as does the obligation to enforce foreign arbitral awards.²⁸⁶ In contrast, there are few treaties ensuring the recognition of foreign judgments.²⁸⁷ For many, this gives a sufficient incentive to prefer arbitration to litigation to resolve international disputes.²⁸⁸

It seems likely, however, that the proposed model could not benefit from the New York Convention. The New York Convention only applies to the arbitral awards by a tribunal which has jurisdiction under an arbitration agreement. Although the Convention does not define the meaning of arbitration for the purpose of its application, several of its provisions clearly indicate that an agreement to arbitrate must have been concluded by the parties. Article IV of the Convention provides that the party seeking enforcement of an award shall supply the original agreement to arbitrate. Article V also seems to assume the existence of an agreement to arbitrate when it allows contracting states to refuse enforcement of the award upon evidence that the agreement to arbitrate was not valid or that the award decides a dispute which was not contemplated by the "terms of the submission to arbitration." Of course, one cannot rule out the possibil-

at 109 (finding that the international enforceability of decisions is one of the two main advantages of international commercial arbitration), and by Mistelis, *supra* note 20, at 543 (finding that the international enforceability of awards is one of the top three reasons why corporations opt for arbitration).

285. In the words of William Park, the New York Convention gives international currency to arbitral awards. See PARK, *ARBITRATION OF INTERNATIONAL DISPUTES*, *supra* note 20, at 299.

286. See *id.*

287. One of the most efficient regional treaties was the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, O.J. L 304/77 (1978), adopted by members of the European Union. It has now been replaced by Council Regulation No. 44/2001, O.J. L 12/1 (2001). For the purpose of this Article, the 2005 Hague Convention on Choice of Courts Agreement (Convention on Choice of Courts Agreement, 30 June 2005, 64 I.L.M. 1294) is not relevant because it assumes an agreement on competent court.

288. See, e.g., LOWENFELD, *supra* note 1, at 2; see also Born, *supra* note 20, at 71 (arguing that, in the absence of a global counterpart to the New York Convention for foreign judgments, international arbitral awards are more likely than national court judgments to put the parties' dispute to rest).

ity that the New York Convention could be amended if the proposed model were widely accepted. For the time being, however, this does not appear to be a realistic expectation. In recent years, the New York Convention has increasingly appeared as a limit to the development of the law of international arbitration. Many fear that any attempt to revise it not only is bound to fail, but also could offer an opportunity for quite a few countries to renounce the New York Convention altogether.²⁸⁹

Thus, a consequence of the proposed model may be to lose the benefits of this international treaty. Does it make the model any less desirable? No, it does not, because the alternative would not be traditional arbitration. As a default rule, the new model would apply in the absence of any agreement as to a competent adjudicator. Rather, the alternative would be litigation before a national court. An award likely to benefit from the New York Convention merely is not an option.

D. Confidentiality

Traditionally, confidentiality has been presented as one of the principal advantages of arbitration.²⁹⁰ Yet, its scope and actual existence have long been debated in many jurisdictions.²⁹¹ As far as the publication of awards is concerned, recent developments in certain specialized fields of arbitration have shown that confidentiality has now become the exception rather than the norm.²⁹² It is not in the very nature of arbitration to be confidential.

In the proposed model, none of the actors of the arbitral process would have a duty to observe confidentiality. It must be recalled that, as the parties would not have agreed to go to arbi-

289. For example, members of the working group willing to soften the requirement that arbitration agreements be in writing (Article II of the Convention) expressed concerns regarding the risk of initiating the revision of the Convention. See Renaud Sorieul, *UNCITRAL's Current Work in the Field of International Commercial Arbitration*, 22 J. INT'L ARB. 543, 551 (2005); see generally Toby Landau, *The Requirement of a Written Form For an Arbitration Agreement: When "Written" means "Oral"*, 11 ICCA CONGRESS SERIES 19 (2003) (arguing that the written form requirement, although a tangible problem in the world of international commercial arbitration, is not sufficiently significant to warrant tampering with the New York Convention).

290. See generally POUURET & BESSON, *supra* note 169, at 315-20.

291. See *id.* at 315.

292. Most arbitral awards rendered in the fields of investment and sport arbitration are available to the public within a few days after being made. See *supra* notes 185-94 and accompanying text.

tration, the alternative would be to resolve the dispute in public proceedings entertained by a court. As the proposed model would potentially decrease the number of international commercial cases decided by courts, it would be important to make available the decisions of the arbitrators. In principle, thus, awards could be made public.

It could also be envisaged to make the proceedings and the hearing public. It is unclear whether it would really bring much in most commercial cases. A reasonable solution could be to invest the arbitral tribunal to decide on a case-by-case basis whether to open the hearing to the public, and to allow a review of such decision by the court of the seat of the arbitration.²⁹³

E. Traditional Rules Flowing from the Contractual Foundation of Arbitration

While most of the rules existing in the traditional model could be kept in the proposed model, certain rules of international arbitration are direct consequences of the contractual foundation of the traditional model. For instance, arbitration raises a variety of issues in respect of third parties, who can neither be joined nor intervene in the proceedings because they are not parties to the arbitration agreement.²⁹⁴ At the very least, the proposed model would require reconsidering such rules—they could be kept, but they could also be amended.

It happens to be that many such rules are widely perceived as limiting the efficacy of the arbitral process, and as such as necessary evils. One of the best examples is precisely the rule preventing joinder of third parties absent the agreement of all parties concerned.²⁹⁵ In practice, this has most often meant that arbitration could not cope properly with multi-party disputes.²⁹⁶ So, modifying the rule and allowing arbitration to deal more efficiently with multi-party disputes would not be regretted by

293. Obviously, a critical factor to consider would be whether constitutional guarantees actually require such publicity. *See, e.g.*, European Convention on Human Rights art. 6, Nov. 4, 1950 (requiring a public hearing which, however, can be waived by the parties). This is why the provision does not apply in traditional consensual arbitration. *See, e.g.*, *Deweert v. Belgium*, 35 Eur. Ct. H.R. (ser. A) App. No. 6903/75 at § 49 (Feb 27, 1980); *Suovaniemi v. Finland*, No. 31737/96 (Feb. 23, 1999).

294. *See generally* HANOTIAU, *supra* note 1, at 166.

295. For more on the joinder rule and rulings in the arbitral proceedings, see HANOTIAU, *supra* note 1, at 165-77.

296. *See* REDFERN & HUNTER, *supra* note 170, at 25

many.²⁹⁷ The new paradigm will actually lead to an improvement of the arbitral process.

F. *The Seat of the Arbitration*

The seat of the arbitration carries important legal consequences.²⁹⁸ Under most national laws, it is the court of the seat of the arbitration that has jurisdiction to entertain challenges to the award, or to support the arbitral process when one of the parties does not fully cooperate. The law of arbitration in that jurisdiction also controls most of the issues which may arise during the process, and which could thus be sanctioned at the stage of the review of the award. For this reason, the seat of the arbitration is generally chosen by the parties.²⁹⁹ When they have made no such choice, arbitral regimes empower either the arbitral institution³⁰⁰ or the arbitral tribunal itself³⁰¹ to make this determination.

In a non-consensual model of international arbitration, the parties would not have the opportunity to choose the seat of the arbitration in a prior agreement. They may be able to reach an agreement in this respect at the beginning of the arbitral proceedings, but it would be unrealistic to expect this to be the rule. For the same reason, it would be unrealistic to rely on an arbitral institution, since the absence of a prior agreement would mean that, in the vast majority of cases, the parties would not agree on resorting to any specific kind of arbitration, which would generally exclude institutional arbitration.

Thus, there are only two options for the determination of the seat in the non-consensual international arbitration. The first would be to confer this power to the arbitral tribunal, along with many national laws and institutional rules.³⁰² The second

297. See, e.g., BORN, *supra* note 20, at 69; REDFERN & HUNTER, *supra* note 170, at 25.

298. See generally REDFERN & HUNTER, *supra* note 170, at 83. But see GAILLARD & SAVAGE, *supra* note 5, at 674.

299. For instance, the International Chamber of Commerce reports that the parties chose a seat in more than 80% of the cases referred to ICC arbitration. See, e.g., 2006 Statistical Report, 18 ICC ICARB. BULL. 12 (2007) (86.6% in 2006); 2005 Statistical Report, 17 ICC ICARB. BULL. 10 (2006) (87.4% in 2005).

300. See, e.g., International Chamber of Commerce Arbitration Rules, art. 14 (1998).

301. See, e.g., English Arbitration Act, art. 3; 1985 UNCITRAL Model Law, art. 20(1) (1985); UNCITRAL Arbitration Rules, art. 16 (1976).

302. See *infra* note 304.

would be to confer this power to any court requested to enforce a party's right to go to arbitration. The second solution has several drawbacks, however, which may explain why no arbitration regime has retained it. First, it confers the power to make an important decision to a court, while the fundamental motivation to choose arbitration is precisely to involve courts as little as possible in resolving the dispute. Second, relying on courts to determine the seat of jurisdiction would give jurisdiction to several courts and could result in conflicting decisions.

The arbitration regimes that have conferred the power to choose the seat of the arbitration to the arbitral tribunal have given it wide discretion, providing merely that it should have regard to the "circumstances" of the case.³⁰³ This seems to stem from the unwillingness of sophisticated jurisdictions to get involved in the arbitral process. Yet, some guidance could be found in the practice of institutions such as the International Court of Arbitration of the International Chamber of Commerce ("ICC Court"), which has a wide experience in fixing the place of the arbitration absent an agreement of the parties.³⁰⁴ The ICC Court weighs a number of factors in making such decision.³⁰⁵ First and foremost, the ICC Court seeks a seat that the parties will perceive as neutral. This means that, in most cases, it will not situate the arbitration in either of the parties' countries of origin. Additionally, the ICC Court evaluates the local law regarding international arbitration, in order to ensure that the award would not be at risk of being nullified for lack of compliance with a particular local rule and that local courts are not likely to intervene in the arbitral process if requested to do so. Finally, the ICC Court takes into consideration the convenience of the place for all parties involved. States implementing my model could adopt a rule directing arbitrators to determine the seat along those lines.

303. See 1985 UNCITRAL Model Law, art. 20(1) ("[T]he circumstances of the case, including the convenience of the parties."); English Arbitration Act, art. 3 ("[A]ll the relevant circumstances.").

304. See generally YVES DERAIS & ERIC A. SCHWARTZ, *A GUIDE TO THE ICC RULES OF ARBITRATION* (2d ed. 2005).

305. See *id.* 212-15; Sigvard Jarvin, *The Place of Arbitration: A Review of the ICC Court's Guiding Principles and Practices when Fixing the Place of Arbitration*, 7 ICC BULL. 55 (1996); Herman Verbist, *The Practice of the ICC International Court of Arbitration with Regard to the Fixing of the Place of Arbitration*, 12 *ARB. INT'L* 347 (1996).

V. IMPLEMENTATION

The implementation of such a model of non-consensual arbitration would not be easy. The most direct path would be the negotiation of an international convention whereby contracting states would undertake to amend their national laws in order to adopt the model. Is it realistic? One could argue that the foundation of the modern law of international commercial arbitration is precisely an international treaty, the New York Convention, which has been widely ratified. However, recent attempts to amend the New York Convention have shown that the dynamic which once led so many states to join the scheme of the convention and to consent to this mode of legislation has faded away. Not only is amending the Convention perceived as an impossible achievement, but many fear that contracting states would actually take advantage of a process of renegotiation to free themselves from the international scheme.³⁰⁶ The prospects of negotiating a new international treaty appear to be rather low.

It is thus likely that the implementation of the model would come from unilateral initiatives. States would unilaterally amend their legislation in order to make arbitration available in the absence of any agreement on dispute resolution. Three incentives could lead them to do so. First, some states may wish to differentiate themselves from others in the competition to attract the economic benefits of international arbitration. Such differentiation can be achieved by sending signals that their law is favorable to international arbitration. The adoption of the model could be one such signal, or at least part of a broader operation of signalling a pro-arbitration policy.

Second, some states may wish to benefit from the decrease in the caseload of their courts that would result from the adoption of the proposed model. For instance, they may wish to find an appropriate alternative for suits initiated by non-members of their community, especially for disputes remotely connected to the forum. In common law jurisdictions, the model would thus become an alternative to the doctrine of *forum non conveniens*. Instead of declining jurisdiction and effectively obliging the parties to go and litigate before foreign courts, common law courts

306. For an example, see *supra* note 212 and accompanying text.

would refer to arbitration. Unlike doctrines such as *forum non conveniens* or international abstention, the model would offer a truly impartial adjudication rather than a foreign process which might not offer all the necessary procedural guarantees.³⁰⁷

Finally, some states may want to afford a better system of dispute resolution to non-members of the community. An important incentive would be reciprocity. States may want to negotiate reciprocal obligations to offer such benefit to each other's nationals. Technically, the model would be implemented by including a clause in bilateral treaties of protection of foreign activity in the jurisdiction of each state. There are, for instance, thousands of BITs affording specific protection to foreign investors.³⁰⁸ From a jurisdictional point of view, these treaties only offer a right to sue the host state before various adjudicators, including arbitral tribunals.³⁰⁹ They could also offer a right to initiate arbitral proceedings against other parties, whether public or private. It is important to underline that, as virtually all these treaties include a Most Favored Nation clause,³¹⁰ one such benefit given to foreign investors of one nationality by one treaty would immediately extend to foreign investors of all states with which the two contracting states would have concluded other bilateral treaties. As the development of foreign investment law in the last twenty years has shown, this is not unrealistic.

307. Although a traditional requirement of the doctrine of *forum non conveniens* is that the foreign court be a suitable alternative forum, U.S. courts have generally rejected claims of foreign bias. See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 352 (3d ed. 1996).

308. See *supra* note 190 and accompanying text.

309. See *id.*

310. On the Most Favored Nation clause, see *supra* note 205.