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# Fall of Last Safeguard in Global Dejudicialization: Protecting Public Interest in Business Disputes



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*The importance of courts is shrinking. This is largely due to global dejudicialization*: *the process of outsourcing disputes to private dispute resolution. In the last several decades, along with the triumph of neoliberalism, privatization of the resolution of disputes has become the gospel of modern judiciaries. Courts have been pushed to the tail end of the private adjudication process and are used only as the last resort. The courts' warm embrace of this structure along with practitioners' push has led to a staggering expansion of private dispute resolution. The world therefore has witnessed an unprecedented growth of arbitration—the primary mode of private dispute resolution. Despite its importance, judicial review at the tail end of dispute resolution has been understudied. Much of the existing literature focuses on doctrinal definition, normative recommendations, and commentaries about specific high-profile cases. With at least three decades of growing cross-border business disputes, research is needed to form a more holistic view of national courts' review of arbitration and to provide a path forward in the redesign of the modern global private dispute resolution.*

*This Article achieves that goal by providing an empirical and doctrinal analysis of the public policy exception as a pivotal indicator for judicial reviewability and supervisory function of transnational commercial disputes. The modern private justice system provides an important (if not the only) substantive safeguard to courts. As one of the last remaining safeguards, the public policy doctrine grants discretion to courts to set aside arbitration agreements and awards that harm the public. Owing to the evasive nature of this doctrine, courts and arbitral tribunals alike have grappled with an appropriate way to define and approach this notion. In a comprehensive study, this Article analyzes arbitral tribunals' and courts' treatment of public policy claims in commercial disputes over the last three decades using coding and empirical research. The study demonstrates the frequency of public policy claims in courts and arbitral tribunals, issues presented under this rubric, and the success rate of these claims. Results suggest that*

*public policy arguments have increased, while the courts and arbitral tribunals alike have remained passive to these arguments. This Article argues that a triangle of a pro-arbitration policy of courts, the doctrine of international public policy, and the contractual view of arbitration has led to underutilization, ineffectiveness, and the fall of the public policy doctrine as the last safeguard in the dejudicialization of domestic and global business disputes. This Article calls for an overhaul of this structure whereby judicial review is not exclusively available at the end of the private dispute resolution process.*

## INTRODUCTION

Arbitration is one of the main methods of resolution of business disputes. One private U.S. institution and its international arm, for instance, has handled more than 8560 commercial cases totaling $15.47 billion in 2017.[1] This happened while the courts have remained utterly deferential.

In his first Supreme Court opinion, Justice Kavanaugh stated that "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms."[2] The word "contract" appeared no less than twenty-five times in his short eight-page opinion. The other newly appointed Justice on the Supreme Court, Neil Gorsuch, similarly stressed the sanctity of arbitration, which should be protected against "judicial antagonism."[3] These opinions are a continuation of a decades-long series of pro-arbitration decisions that built the edifice of modern private justice and provide extremely limited avenues to safeguard the public interest in this privatization.[4] In domestic arbitration, the Supreme Court effectively eviscerated state law safeguards of

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[1] Am. Arbitration Ass'n & Int'l Ctr. for Dispute Resolution, *Arbitration Remains a Trusted Venue for Resolving B2B Disputes*, ADR.ORG (Feb. 27, 2018), https://www.adr.org/sites/default/files/document_repository/180223_AAA_ICDR_Arbitration_Caseload_Data_Press_Release.pdf [https://perma.cc/A4FA-WREU].

[2] Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019) (citing Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010)).

[3] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) ("Just as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,' *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today.") (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2010)). *See generally* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004).

[4] *See infra* Section IV.A.

arbitration.[5] At the federal level, the avenues to control arbitration are almost nonexistent[6] and do not even allow for vacatur of arbitral awards in cases of "serious errors of law or fact."[7] At the transnational level (arising out of transnational commercial contracts), however, there is a gap in existing research that requires an in-depth analysis. In 1985, the U.S. Supreme Court in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, which involved international arbitration, announced that it would have "little hesitation in condemning" arbitration agreements "as against public policy" if such agreements amount to "prospective waiver of party's right to pursue statutory remedies," in this case, for antitrust violations.[8] This approach, which formed the basis of effective vindication doctrine,[9] has not been thoroughly analyzed in the context of international arbitration. After more than three decades, it is time to investigate whether transnational arbitration has effectively vindicated statutory rights and take a closer look into the question of public policy in commercial arbitration generally.

Arbitration is a form of consensual and binding dispute resolution outside of the judiciary.[10] It has become increasingly common in both domestic and cross-border contracts.[11] By including arbitration clauses

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5 *See, e.g.*, Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 534 (2012) (remanding the West Virginia Supreme Court's refusal to enforce a predispute arbitration agreement); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2010) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.").

6 *See, e.g.*, *Concepcion*, 563 U.S. at 351 (describing the FAA as providing for "no effective means of review"); Matthew J. Stanford, *Odd Man Out: A Comparative Critique of the Federal Arbitration Act's Article III Shortcomings*, 105 CAL. L. REV. 929, 931 (2017) ("barring demonstrable fraud or abuse of economic power, the [Supreme] Court will 'rigorously enforce' the [arbitration] agreement." (citation omitted)).

7 Sutter v. Oxford Health Plans LLC, 675 F.3d 215, 220 (3d Cir. 2012) ("[E]ven serious errors of law or fact will not subject [an arbitrator's] award to vacatur.").

8 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).

9 *See generally* Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375 (2014); David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723 (2012).

10 *Arbitration*, AM. BAR ASS'N, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/ [https://perma.cc/39D6-6KV5] (last visited Oct. 6, 2019).

11 *See, e.g.*, ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION (2018), https://www.epi.org/files/pdf/144131.pdf [https://perma.cc/K9SG-NX4Z]; Claudia Salomon & Irina Sivachenko, *When International Arbitration Becomes Domestic*, LAW360 (Nov. 14, 2018, 2:07 PM), https://www.lw.com/thoughtLeadership/When-International-Arbitration-Becomes-Domestic [https://perma.cc/WBF6-D8JH].

in their contracts, parties agree that their dispute will be resolved by private persons instead of the judiciary.[12] International and domestic arbitration differ in several ways, including their scope and enforceability. Typically, domestic laws define the contours of the types of disputes that fall under domestic or international arbitration.[13] Most commonly, domestic laws—which may follow UNCITRAL Model Law on International Commercial Law—designate arbitration clauses that are embedded in contracts with some international elements as "international."[14] According to UNCITRAL Model Law, an arbitration is international if the parties' places of business reside in different countries or the subject matter of the arbitration agreement relates to more than one country.[15] The U.S. Federal Arbitration Act (FAA) does not follow the UNICTRAL Model Law but provides a similar approach.[16] Another difference between domestic and international arbitration pertains to its enforceability. Enforcement of the judgments of arbitration—called awards—arising out of domestic arbitration can be challenged before courts on general contract law grounds.[17] Challenges of international arbitral awards, which can only occur before national courts, are much more limited, with public policy

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12 KLUWER LAW INT'L, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 9–10 (Emmanuel Gaillard & John Savage eds., 1999).

13 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 330 U.N.T.S. 4739 [hereinafter N.Y. Convention]; *Id.* at art. I(1) ("It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.").

14 Salomon & Sivachenko, *supra* note 11.

15 Michael F. Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, 20 INT'L L. 327 (1986).

16 Federal Arbitration Act, 9 U.S.C. § 202 (2018) ("[A]n agreement . . . which is entirely between citizens of the United States" does not fall under international arbitration, "unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."); *see also* Peter D. Doyle & Michael D. Reisman, *Arbitration in 47 Jurisdictions Worldwide*, KIRKLAND & ELLIS LLP (2009), https://www.kirkland.com/siteFiles/Publications/5783168B1949F84468D7E20DBA71C7F0.pdf [https://perma.cc/9R5F-BTKJ].

17 9 U.S.C. § 2 (2019) (providing that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"); *see also* Hoellering, *supra* note 15, at 338. For example, Article 36(a)(i) states that a recognition or enforcement of an arbitral award can be refused if the arbitration "agreement is not valid under the law to which the parties have subjected it." N.Y. Convention, *supra* note 13, at art. V(1)(a).

being the primary substantive ground.[18] In the context of international commercial arbitration, the public policy exception is set out in the New York Convention, which is the leading convention with 159 signatories that requires national courts to recognize and enforce arbitral awards made in other contracting nations.[19]

The difference between domestic and international arbitration should not, however, be exaggerated. Particularly, in both domestic and international arbitration, public policy remains a strong ground for challenging the enforcement of awards.[20] The scope of public policy ground is determined largely by national courts on a case-by-case basis.[21] In other words, public policy is inherently a matter of domestic law.[22] Elsewhere I have extensively discussed the concept of public policy in law,[23] and here I will provide a brief overview in the context of arbitration.[24]

In summary, public policy refers to essential laws and norms that cannot be violated in contracts and arbitral awards.[25] The interpretation and application of public policy, therefore, is important for both domestic and international arbitration. National courts determine their approach toward public policy, similar to the *Mitsubishi* case.[26] Like national courts, arbitral tribunals investigate matters of public policy

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18 N.Y. Convention, *supra* note 13, at art. V(2)(b). The Federal Arbitration Act chapter 2 incorporates the N.Y. Convention. *Compare* N.Y. Convention, *supra* note 13, *with* 9 U.S.C. §§ 201–208 (2019).

19 N.Y. Convention, *supra* note 13.

20 *Compare* Hoellering, *supra* note 15, *with* N.Y. Convention, *supra* note 13, at art. V(2)(b).

21 Karl-Heinz Böckstiegel, *Public Policy as a Limit to Arbitration and Its Enforcement*, IBA J. DISP. RESOL. (SPECIAL ISSUE) (2008) ("[P]ublic policy is dependent on the judgment of the respective legal community. What is considered to be part of public policy in one state may not be seen as a fundamental standard in another state with a different economic, political, religious or social, and therefore, legal system."); *see also* Farshad Ghodoosi, *Arbitrating Public Policy: Why the Buck Should Not Stop at National Courts*, 20 LEWIS & CLARK L. REV. 237, 258–69 (2016) [hereinafter *Arbitrating Public Policy*].

22 N.Y. Convention, *supra* note 13, at art. V(2)(b) (discussing recognition and enforcement of an arbitral award. An award may be refused if "[such] recognition or enforcement of the award would be contrary to the public policy of that country.").

23 *See generally* Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685 (2016) [hereinafter *The Concept of Public Policy in Law*] (arguing that the concept of public policy is not a monolithic concept and consists of three distinct yet intertwined notions of public interest, public security, and public morality).

24 *See infra* Part I.

25 *See generally The Concept of Public Policy in Law*, *supra* note 23.

26 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).

since most conflicts of law dictate that public policy can "override an otherwise valid choice-of-law agreement."[27] For that reason, this Article investigates the problem before both national courts and arbitral tribunals. Moreover, as shown in Part IV below (with a focus on the United States as a leading jurisdiction), the courts' general view toward arbitration is key for the interpretative approach toward the role of public policy in arbitration. I employ the United States as a case study to argue that courts' general approach toward arbitration in the last three decades has brought us to the current situation in which public policy, as the last substantive ground for courts' supervision, has become utterly ineffective.

To illustrate the problem, imagine you are an arbitrator deciding a business dispute between a U.S. company incorporated in Maine and a Belgian company over a construction contract for a plant in Bulgaria.[28] The Belgian company becomes insolvent, and the question for the arbitral tribunal is whether the tribunal can pierce the corporate veil and hold the parent company responsible. In this scenario, which is far from rare in our globalized world, many legal systems are considered: the incorporation places of these two companies, the place of contract performance, the place where the contract was signed, the seat of arbitration, and the jurisdiction(s) in which the award will be enforced. Consequently, many mandatory rules with public policy implications are at stake: rules regarding bankruptcy and insolvency, rules pertaining to corporate governance, and rules prohibiting fraud and intentionally undercapitalizing corporations, to name just a few.

But, how are these laws protected? In other words, the inquiry is what safeguard is in place for courts to ensure that multinational entities comply with laws of imperative nature (e.g., bankruptcy laws) in our globalized world, particularly when disputes are resolved through arbitration as the principal method of resolving cross-border commercial disputes. The center of criticism, at least in the United States, has been on the arbitration agreements signed by "little guys" (e.g., consumers and employees) that affect their ability to access justice.[29] This Article shows the impact of arbitration agreements as

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[27] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2690–722 (2d ed., 2015).

[28] JEAN-JACQUES ARNALDEZ ET AL., COLLECTION OF ICC ARBITRAL AWARDS 1996-2000 474, 562–63 (2003). The relevant case is Case No. 8385 of 1995.

[29] Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 639, 644–74 (1996) ("Nor are courts rushing to protect consumers and other little guys from these mandatory arbitration

employed by the "big guys" (e.g., corporations) on public interest and the ineffectual and haphazard control mechanism at play when it comes to transnational arbitration. This Article demonstrates and analyzes the laissez-faire and lethargic approach of the national courts that has paved the way for the globalization of disputes and dejudicialization of laws and policies. The present project is a much-needed step to assess the last safeguard or safety valve designed to protect public interests from increasingly globalized private dispute resolution.

In order to address these issues, we need to take a step back and briefly review the transnational legal structure that allows the transnational flow of goods, capital, and services. Much of globalization as we know it today is largely due to the legal infrastructure that was built following World War II. Institutions such as the World Bank, International Monetary Fund, and World Trade Organization are just a few of the organizations that helped to create globalization.[30] In addition to this macro-level development, at the micro level businesses and parties around the world were soon able to do business with each other with low transaction costs. These transnational contracts often included arbitration clauses, a dispute resolution mechanism outside of national judiciaries designed to resolve the disputes of private parties.[31] The success of arbitration was due in large part to the wide acceptance of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), also known as the New York Convention and the UNCITRAL Model Law,

clauses."); *see also* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808 (2015); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703 (2012).

30 Joseph E. Stiglitz, *Globalization and the Logic of International Collective Action: Re-examining the Bretton Woods Institutions*, *in* GOVERNING GLOBALIZATION: ISSUES AND INSTITUTIONS 238–53 (Deepak Nayyar ed., 2002); David Grewal, *Globalism and the Dialectic of Globalization*, LAW & POL. ECON. (Apr. 17, 2019), https://lpeblog.org/2019/04/17/globalism-and-the-dialectic-of-globalization/ [https://perma.cc/QT6A-463R] ("[N]eoliberalism remains a policy choice, made effective on the global stage through treaties and related instruments of international law-making."); Farshad Ghodoosi, *The Limits of the Free Movement of Capital: The Status of Customary International Law of Money*, 7 NW. INTERDISC. L. REV. 287, 290–91 (2014).

31 David J. McLean, *Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration*, 30 U. PA. J. INT'L L. 1087, 1089–93 (2009).

which provided various jurisdictions with model legislation for arbitration.[32]

The architecture of the private dispute resolution mechanism is simple: parties submit their disputes to private arbitration—often administered by private institutions stationed in various parts of the world—and nations commit to enforce the outcome of such arbitration in their respective jurisdictions.[33] In exchange for recognizing these private dispute resolutions, states have retained an important control mechanism. States can set aside the outcomes of such arbitral proceedings based on limited grounds in the enforcement stage.[34] The only ground on which arbitral proceeding outcomes can be set aside, which allows for limited substantive review, is under the public policy exception.[35]

The lynchpin of today's international arbitration control mechanism, therefore, is the concept of public policy. States kept the final say regarding whether the arbitral awards comply with their public policy.[36] This simple yet vague idea initiated a host of legal questions and practical challenges. With the unprecedented surge of transnational disputes, the concept of public policy remains one of the last bastions

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[32] José María Alonso, *The Globalization of International Arbitration*, GLOBAL ARB. NEWS (June 13, 2017), https://globalarbitrationnews.com/the-globalization-of-international-arbitration/ [https://perma.cc/G7GA-F7DD].

[33] McLean, *supra* note 31, at 1089–93.

[34] *Id.* at 1090 ("The foremost achievements of the New York Convention were to restrict the grounds pursuant to which a country could refuse to recognize and enforce a foreign award . . . .").

[35] N.Y. Convention, *supra* note 13, at art. (V)(2)(a)–(b) ("Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to *the public policy of that country*.") (emphasis added).

[36] As I discussed elsewhere, the tension between the *private* nature of arbitration and its *public* function creates a conflict of governance between courts and arbitration. *Arbitrating Public Policy*, *supra* note 21; *see also The Concept of Public Policy in Law*, *supra* note 23. Inevitably, granting the adjudicating authority to a third party creates a form of governance. Alec Stone Sweet & Florian Grisel, *The Evolution of International Arbitration: Delegation, Judicialization, Governance*, *in* INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE 22, 27 (Walter Mattli & Thomas Dietz eds., 2014). This governance in disputes such as antitrust, intellectual property, and employment law clashes with laws aimed to protect the fundamental public interests of a society: public policy doctrine. This unresolved challenge occurs before referral to arbitration (arbitrability of disputes), during arbitral proceedings (due process and mandatory rules), and at the enforcement of arbitral awards in national courts (public policy exception doctrine).

states hold in order to control and supervise the arbitral proceedings and their outcomes. To this day, however, the scope, substance, and frequency of public policy claims, and the issues and approaches concerning public policy, remain highly unclear.

Judging transnational disputes arising from often complex contractual relationships is a challenging task. As the example at the outset of this Article shows, the adjudication of transnational disputes often implicates laws from various jurisdictions. Little to no attention has been given to the actual impact of such laws (i.e., public policy) on the arbitral process, despite its importance. In other words, studies have failed to examine the extent to which the public policy of national laws has affected the outcome of transnational dispute resolution.

In practice, issues related to public policy of national laws arise in arbitration quite often.[37] Approximately 8% of all public arbitral awards involve matters related to public policy concerns raised by parties or are referred and discussed by tribunals.[38] A leading institution handling transnational private disputes is the International Chamber of Commerce International Court of Arbitration (ICC).[39] Out of 367 awards published by the ICC in Kluwer Arbitration from 1976

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37 There are two main types of cross-border business disputes: ones that are between private parties and ones that directly involve states as sovereign. The former is often referred to as international commercial arbitration, which can also involve states but only if they are engaging in commercial activities. The latter is between investors and states as sovereign protectors of public interest. This is commonly referred to as investor-state arbitration. Anthea Roberts, *Divergence Between Investment and Commercial Arbitration*, 106 AM. SOC'Y INT'L L. PROC. 297, 298 (2012). In international commercial arbitration, mandatory laws trump the law selected by the parties. Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELB. J. INT'L L. 205, 206–07 (2005). The built-in exception for mandatory rules paves the way for arbitrators to deviate from the conflict of laws rules and apply national laws that aim to protect the public interest. *Id.* at 206. Laws of this nature include labor protection, antitrust, securities, and anticorruption laws. BORN, *supra* note 27, at 2635. If the arbitrators do not pay adequate attention to the mandatory rules, the courts of the place of enforcement of arbitral awards can review and even set aside the award based on the public policy exception. *Id.* at 3312. In the investor-state arbitration, often public policy and mandatory laws are derived from sources other than national laws. For example, public policy sources include "the fundamental principles of natural law[s], universal justice, *jus cogens*, the general principles of morality[,] . . . international custom, arbitral precedent and the spirit of international treaties." Martin Hunter & Gui Conde E. Silva, *Transnational Public Policy and Its Application in Investment Arbitrations*, 4 J. WORLD INVESTMENT 367, 369 (2003); *see also* FARSHAD GHODOOSI, INTERNATIONAL DISPUTE RESOLUTION AND THE PUBLIC POLICY EXCEPTION 131–44 (2017) [hereinafter INTERNATIONAL DISPUTE RESOLUTION].

38 Arbitral Award Search, KLUWER ARBITRATION, http://www.kluwerarbitration.com (follow "Advance Search" hyperlink; search for term "public policy" in "free text" tab). The data here includes investment and commercial arbitration cases.

39 *Id.* (including investment and commercial arbitration cases).

until today, roughly 18% (67) of the decisions involve or discuss—at different lengths—the issues related to public policy.[40] A quick survey of all arbitral awards using the same source after the year 2000 shows that almost 12% of the decisions grappled with some form of public policy issue.[41] These numbers clearly demonstrate the importance of the discussion of public policy and the frequency by which such issues are raised by parties during arbitral proceedings.

This Article has several contributions. First, it explains how the doctrine of public policy in transnational commercial arbitration can protect the public interest of various jurisdictions. Second, using empirical analysis and coding, this Article provides much-needed data on the actual application of public policy by both courts and arbitral tribunals. Third, this Article explains the results by pointing at three important theoretical and practical developments that have rendered the doctrine of public policy toothless.

The Article is divided into four parts. Part I discusses in detail a few notable cases to showcase the importance of the topic and how the public policy doctrine can protect public interest in increasingly globalized business disputes. Analyzing arbitral cases in the last three decades, Part II provides data on the frequency, application, and success rate of public policy arguments. Part III provides similar information (frequency, application, and success rate of public policy arguments) in national courts at four points in time. Part IV explains the results of Parts II and III by showing how a triangle of pro-arbitration policy, the doctrine of international public policy, and the contractual view of arbitration have suppressed the public policy doctrine.

We live in the era of modern judiciary that is premised on the privatization of justice. In this era, courts are mere supervisors of private dispute resolutions and can only step in if public policy is in danger. As presented in this Article, data suggest that courts have not developed a systemic review of public policy doctrine. Public policy is haphazardly applied, if applied at all. The supersession and decline of protecting public interest in the privatization of disputes is largely due to the legitimacy narratives put forward for the edifice of modern arbitration. The legitimacy narrative undergirding the overexpansion of arbitration is structured through three main pillars: (1) pro-arbitration

40 *Id.*

41 *Id.*

intent of the legislature (at the expense of traditional contractual defenses, such as unconscionability), and hence limited and exceptional reviewability of arbitration and its outcomes (i.e., arbitral awards); (2) development of arbitration-specific doctrines, in particular international public policy, which have called for the limitation of national courts' review based on some vague transnational ideas; and (3) a general contractual view of arbitration that sees arbitration as nothing more than a continuation of a contract between parties with limited to no public adjudicatory protections.

## I
## SAFEGUARDING PUBLIC INTEREST

### *A. Public Interest in Transnational Business Disputes*

The following two examples illustrate the importance of protecting public interest in our globalized world.

#### *1. Public Interest and Intellectual Property Rights*

Public interest is at the center of intellectual property rights. The idea behind intellectual property is that certain rights are granted on an exclusive basis to private parties in exchange for such rights to be made public for public interest.[42] This is particularly important in light of new groundbreaking developments achieved by pharmaceutical companies that produce biological drugs. As opposed to traditional chemical drugs, biological drugs work based on gene transcription and cellular biologics.[43]

On August 24, 1984, a German corporation filed with the German Patent Office for an "enhancer for eukaryotic expression systems."[44] Enhancers are used in biological drugs and "are often derived from viruses which take over a cell's reproduction machinery to produce protein that the virus needs to reproduce."[45] Following a presentation at a conference, Genentech, a California-based biotechnology corporation, entered into a licensing agreement with a German

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[42] *See, e.g.*, Susan Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267, 272–73 (2004) ("Intellectual property protection always has been a form of public policy.").

[43] FDA, *What Are "Biologics" Questions and Answers*, https://www.fda.gov/aboutfda/centersoffices/officeofmedicalproductsandtobacco/cber/ucm133077.htm [https://perma.cc/C59J-MLNS] (last updated Feb. 6, 2018).

[44] Hoechst GmbH v. Genentech, Inc., Case No. 15900/JHN/GFG, Arb. Mat'l, Third Partial Award 4 (ICC Int'l Ct. Arb. Sept. 5, 2012).

[45] *Id.* at 3.

corporation, Sanofi, subject to German laws. The licensing agreement was signed on August 6, 1991.[46] On June 30, 2008, the German counterpart[47] requested that Genentech provide information as to whether any of its commercial products—most notably a successful drug for arthritis called Rituxan®—had used the patents for enhancers. If so, Genentech would owe running royalties on such products to the German party. In response, on August 27, 2008, Genentech dispatched a notice of termination of the licensing agreement. As a result, the German company initiated an arbitration seated in Paris under ICC rules[48] claiming breach of the licensing agreement and unpaid running royalties.[49]

During the proceeding, Genentech presented a final decision by the United States Court of Appeals for the Federal Circuit, which stated that Genentech's Rituxan drug did not infringe Sanofi's patents. One of Genentech's main defenses was that the arbitrator should accept the U.S. court ruling on this matter. Genentech's legal expert claimed that granting the royalties "would infringe United States *public policy* because Patent law is linked with public interest."[50] Moreover, the expert argued that it is the United States law that is relevant because the award is likely to be enforced in the United States.[51] The claimant, on the other hand, argued that German law was applicable and that under German law the validity of the patent is not a prerequisite to a claim of royalty.[52]

The arbitrator agreed with the claimant, arguing that "steps before the federal courts in the United States are directed at the intrinsic validity of the American Patents, while the present arbitration concerns a licensing agreement under German law."[53] The arbitrator also stated

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46 *Id.* at 7.

47 "The original licensor, Behringwerke, later assigned its rights under the [license agreement to] Hoechst GmbH, [] a German entity. By now, Hoechst is part of the Sanofi-Aventis group of companies." *Id.* at 9.

48 INT'L CHAMBER OF COMMERCE, ARBITRATION RULES: IN FORCE AS FROM 1 MARCH 2017 (2019), https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf [https://perma.cc/9ERB-PNFW].

49 *Hoechst GmbH*, Arb. Mat'l at 10.

50 *Id.* at 51 (emphasis in original).

51 *Id.*

52 *Id.* at 50.

53 *Id.*

that "under the law of the United States, public policy cannot be loosely invoked each time *some* public interest is involved."[54]

As shown, the arbitrator ultimately rejected the relevance of the U.S. court ruling and found that U.S. patent law and public policy generally were inapplicable. As a result, the arbitrator calculated the running royalty based on the *worldwide* retail sales by Genentech and its affiliates of Rituxan manufactured or in the process of being manufactured during the life of the licensing agreement.[55]

The arbitrator claimed that the intrinsic validity of the patent is irrelevant and that the arbitration is solely related to a licensing agreement.[56] There is no doubt, however, that public policy of at least another jurisdiction, (i.e., the United States) was directly affected by this decision. Moreover, the decision sets a precedent with significant public interest implications. For one, this decision promulgates that royalties are a matter of licensing agreements and can be independent from the validity of the underlying patent—in particular, when the patent and its validity are linked to another jurisdiction other than the applicable law of the licensing agreement.[57] This decision will undoubtedly have a significant impact on various legal orders. Yet, and most relevant to our discussion, the arbitrator did not seem to engage in a meaningful way with the public policy ramifications of his decision. He justified this, like many other arbitrators and tribunals, based on (a) his limited discretion to resolve only the agreement and contract before him, and (b) the United States' very narrow application of public policy in the context of arbitral awards.

### *2. Public Interest and Financial Investments*

The second example is a dispute between a Cayman Islands hedge fund and a private Indian finance company. In this case, the hedge fund was using an Indian finance company to invest in the burgeoning

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54 *Id.* at 51 (emphasis in original).

55 *Id.* at 67.

56 *Id.* (Mr. Pierre A. Karrer was the arbitrator in this case).

57 In a preliminary ruling request, the Advocate General of European Court of Justice was asked by Court of Appeals in Paris whether Article 101 of Treaty on the Functioning of the European Union (TFEU) regarding competition "precludes an obligation imposed on a licensee under a patent license agreement to pay royalties for the entire duration of the agreement until its termination, notwithstanding the absence of infringement or the revocation of the licensed patents or patents." Case C-567/14, Genentech Inc. v. Hoechst GmbH, 2016 EUR-Lex CELEX LEXIS 1 (Mar. 17, 2016). The Advocate General opined that, *inter alia*, the arbitral award does not "restrict Genentech's ability to determine its prices." *Id.*

financial market of India. The hedge fund was a minority shareholder (47.5%) while the Indian finance company owned the rest of the company. The shareholder agreement stipulated New York as the applicable law and the country of India as the place of performance. The agreement was subject to the rules of the American Arbitration Association. The business plan was to invest in initial public offerings (IPOs) in India with the help of the Indian finance company. Pursuant to the agreement, if the Indian finance company failed to initiate and invest in an IPO within a specified time period, the hedge fund would have the right to exit from the agreement. This is precisely what happened, and the hedge fund decided to exercise its right to exit through "Put Notice," an exit ramp stipulated in the agreement "caus[ing] IFSL [Indian Finance Company] to acquire all or a portion of Claimant's [hedge fund's] equity shares in the capital stock" of the Indian Finance Company.[58]

The problem lay in the fact that such an exit ramp and payment would be in part against Indian foreign exchange rules. Such rules make it unlawful in India for a nonresident of India to sell shares of an Indian company to an Indian resident at a price greater than the fair value of those shares.[59] The formula set forth in the agreement would have put the price-per-share valuation above the threshold of the fair value.[60] The claimant argued, *inter alia*, that party autonomy should prevail and that New York law was the sole applicable law on this matter.[61] The respondent submitted that Indian rules on foreign exchange were applicable and that it was unrealistic to apply only New York law as though "this tribunal [was] in a bubble where only New York law applies on this earth."[62]

The tribunal sided with the respondent by stating that it could not "ignore" Indian foreign exchange rules.[63] The tribunal declared that "any international arbitral award involving an Indian party" that implicates Indian foreign exchange rules "risks not being recognized or enforced in India, as being contrary to the public policy of India."[64]

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58 Amaprop Ltd. v. Indiabulls Financial Serv. Ltd., Case No. 50181T0004410, Arb. Mat'l, Final Award 12 (ICDR Mar. 21, 2011).

59 *Id.* at 30–31.

60 *Id.* at 30.

61 *Id.*

62 *Id.* at 44.

63 *Id.* at 49.

64 *Id.* at 52.

As a result, the tribunal decided to bifurcate its decision by awarding the greatest possible amount under Indian law for the fair value and making a "separate disposition of the remaining monetary claim."[65]

This ruling is particularly interesting given a few conflicting prior decisions, as noted by the claimant. In a 1991 unpublished award, the arbitrator refused to apply foreign exchange rules of Romania in a contract between a French supplier and a Romanian buyer with Swiss law as applicable.[66] In at least two instances, the New York courts also took an opposite stance. In *JP Morgan Chase Bank v. Controladora Comercial Mexicana*, the court considered the transactions at issue in that case valid even though "the [t]ransactions [were] illegal under Mexican law" governing foreign exchange and derivatives.[67] In another case, a New York court ruled that Uganda's foreign exchange rules that forbid payment to an Israeli party would not be applied, as New York courts should apply their "own sense of justice and equity."[68] It is noteworthy that in a recent decision the High Court of Delhi decided that violation of Indian foreign exchange rules is not a violation of public policy of India.[69]

These two examples are illuminating in at least two ways: first, they show the importance of the discussion of public policy in arbitration. These examples clearly dispel the myth that private arbitration simply resolves contractual disagreements behind closed doors with little to no public policy implications. Contrary to the common belief, many arbitral proceedings involve some laws and regulations that can be considered fundamental to the economic and social order of a given society. By resolving such disputes, arbitrators at least de facto set precedents for such public policy issues. Second, these two examples show the level of inconsistency on this issue. In the first example, the arbitrator did not find it convincing that the possibility of enforcement in the United States would justify following a U.S. court decision. In

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65 *Id.*

66 *Id.* at 40.

67 JPMorgan Chase Bank v. Controladora Comercial Mexicana, No. 603215-08, slip op. 1, 13 (N.Y.S.2d Mar. 16, 2010).

68 J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd., 333 N.E.2d 168, 173 (1975). The Court also applied New York law as the applicable law to the contract while refusing to apply Korean law on foreign exchange rules. *See* Korea Life Ins. Co. v. Morgan Guar. Tr. Co., 269 F. Supp. 2d 424, 442 (S.D.N.Y. 2003).

69 Nandan Nelivigi et al., *In a Landmark Ruling, Indian Court Rejects Objections to Enforcement of a $300 Million LCIA Award*, WHITE & CASE (June 7, 2017), https://www.whitecase.com/publications/alert/landmark-ruling-indian-court-rejects-objections-enforcement-300-million-lcia [https://perma.cc/V2QU-C7VJ].

the second example, the possibility of enforcement in India was one of the main reasons the tribunal decided to apply Indian foreign exchange rules.

As is evident from the preceding examples, public policy doctrine serves an important function. It prevents parties from entering into and enforcing any private legal arrangement that is contrary to policies of high importance in each jurisdiction.[70] Public policies range from embargos, exchange control regulations, antitrust laws, and laws against corruption, bribery, and violation of public morality.[71] Parties should not be able to avoid such policies by contracting around them. For instance, Swiss law is renowned for its relaxed rules on antitrust matters.[72] Depending on the national jurisdiction, however, parties cannot derogate from their host countries' competition law simply by choosing Swiss law as the applicable law for their contracts.[73]

### *B. Doctrine of Public Policy Explained*

As I have explained elsewhere,[74] the doctrine of public policy refers to supervening laws or norms that trump the ordinary application of private legal arrangements. Traditionally, public policy, which is independent from illegality, is served as the last check on the

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[70] *The Concept of Public Policy in Law*, *supra* note 23, at 695–98.

[71] CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 267–79 (2009). Some issues are typically discussed under the rubric of mandatory rules: embargos, exchange control regulations, competition laws, securities laws, U.S. Racketeer Influenced and Corruption Organizations Act (RICO), carriage of goods by sea, and product liability. *Id.* at 267. Other issues are typically discussed under the category of public policy:

> bribe or corrupt government officials, arrangements to smuggle goods in to or out of a particular country, assembling a mercenary army to support an insurrection against a legitimate government, agreement to transport children intended for slavery or under age labour, or to transport and smuggle individuals into another country, supplying armaments to a terrorist organization.

JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 423–24 (2003).

[72] JEAN-FRANÇOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 607 (Stephen V. Berti & Annette Ponti trans., 2d ed., 2007).

[73] Several ICC awards recognize that EU competition laws should be considered mandatory rules from which parties cannot derogate. Gordon Blanke, *Antitrust Arbitration Under the ICC Rules*, *in* 1 EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS 1840 (Gordon Blanke & Philip Landolt eds., 2011).

[74] *The Concept of Public Policy in Law*, *supra* note 23, at 695–98 (explaining the exogenous and unruly character of public policy doctrine).

enforcement of contracts to ensure that they are not injurious to public morality.[75]

With the increased use of alternative dispute resolution, both nationally and internationally, modern public policy has emerged to safeguard a legal order against enforcement of decisions contrary to its fundamental norms.[76] Public policy was built into the legal infrastructure of global dispute resolution to ensure that national courts have the final say before lending their enforcement to arbitral decisions.[77] The New York Convention, for instance, declares that "[r]ecognition and enforcement of an arbitral award" may be refused if such recognition or enforcement "would be contrary to the public policy of that country."[78] Owing to the success of the expansion of global dispute resolution, many scholars have looked at the tension and interaction between public policy and arbitration.[79]

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75 *Id.*

76 *Id.*

77 ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION: HISTORY, INTERPRETATION AND APPLICATION 3–4 (2013).

78 N.Y. Convention, *supra* note 13, at art. V(2)(b).

79 *See, e.g.*, Paula A. Barran & Todd A. Hanchett, *Public Policy Challenges to Labor Arbitration Awards: Still a Safe Harbor for Silly Fact Finding?*, 38 WILLAMETTE L. REV. 233 (2002); Alfred W. Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 RUTGERS L. REV. 217 (1960); Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511 (1988); Henry Drummonds, *The Public Policy Exception to Arbitration Award Enforcement: A Path Through the Bramble Bush*, 49 WILLAMETTE L. REV. 105 (2012); Carie Fox & Brian Gruhn, *Toward a Principled Public Policy Standard: Judicial Review of Arbitrators' Decisions*, 1989 DET. C.L. REV. 863 (1989); David M. Glanstein, *A Hail Mary Pass: Public Policy Review of Arbitration Awards*, 16 OHIO ST. J. ON DISP. RESOL. 297 (2001); Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173 (1998); Stephen L. Hayford & Anthony V. Sinicropi, *The Labor Contract and External Law: Revisiting the Arbitrator's Scope of Authority*, 1993 J. DISP. RESOL. 249 (1993); Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. DISP. RESOL. 91 (2000); James Michael Magee, Note, *The Public Policy Exception to Judicial Deferral of Labor Arbitration Awards—How Far Should Expansion Go?*, 39 S.C. L. REV. 465 (1988); Judith Stilz Ogden, *Do Public Policy Grounds Still Exist for Vacating Arbitration Awards?*, 20 HOFSTRA LAB. & EMP. L.J. 87 (2002); Donald J. Petersen & Harvey R. Boller, *Applying the Public Policy-Exception to Labor Arbitration Awards*, 58 DISP. RESOL. J. 14 (2004); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990); Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1980); George J. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1 (1972); S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1 (2008); Laurie A. Tribble, *Vacating Arbitrators' Awards Under the Public Policy Exception: Are Courts Second-Guessing Arbitrators' Decisions?*, 38 VILL. L. REV. 1051 (1993).

In practice, the doctrine of public policy is not limited to recognition and enforcement. Based on the doctrine of public policy, some arbitral tribunals apply laws that would not normally be applicable due to the mandatory nature of such laws.[80] The idea is that arbitral tribunals should not render awards that are unenforceable under any laws or rules of mandatory nature. These mandatory rules can derive from various sources and laws. For example, arbitral tribunals have taken into account mandatory rules of governing law, laws of the place of contractual performance, laws of the forum in which the award will be enforced, laws of the seat of arbitration, laws of the *lex arbitri*, and other potential rules that have a connection to the dispute.[81] According to one study, more than half of international arbitration cases involve some form of mandatory rules.[82]

The following Part presents data on the actual impact of public policy in arbitral and enforcement proceedings. Arbitral tribunals and courts alike have regularly faced arguments grounded in public policy. The current literature, however, does not provide a holistic analysis of the tribunals' nor the courts' treatment of this pressing issue. The following Part fills this gap.

## II
## DATA ON THE APPLICATION OF PUBLIC POLICY BY ARBITRAL TRIBUNALS

### *A. Methodology*

In order to understand the impact of public policy on the outcome of arbitration proceedings, I used the most comprehensive database for commercial awards: Kluwer Arbitration.[83] Commercial arbitration awards are not typically made public and are generally confidential. However, some awards have become available publicly either because parties have consented to make them public—sometimes with

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[80] Barraclough & Waincymer, *supra* note 37, at 215–16; *see also The Concept of Public Policy in Law*, *supra* note 23, at 700–01.

[81] BRUNNER, *supra* note 71, at 277; LEW ET AL., *supra* note 71, at 421; POUDRET & BESSON, *supra* note 72, at 609.

[82] Marc Blessing, *Mandatory Rules of Law Versus Party Autonomy in International Arbitration*, 14 J. INT'L ARB. 23, 24 (1997).

[83] KLUWER ARBITRATION, http://www.kluwerarbitration.com/ [https://perma.cc/KKM6-ZMQ2]. Previously, I conducted a more limited study that focused only on the data from the International Chamber of Commerce International Court of Arbitration published by the Yearbook of Commercial Arbitration, edited and complied by Albert Jan van den Berg and other sources. INTERNATIONAL DISPUTE RESOLUTION, *supra* note 37, at 113–17.

significant redaction—or a national court with public reporting has been asked by one of the parties to enforce the award. The number of commercial awards made public is increasing due to better reporting and technological advancements. As a result, the database culled by Kluwer Arbitration now includes approximately more than 2400 commercial arbitration awards.

In order to enhance accuracy, I included all the awards in the Kluwer Arbitration database search and only limited the awards based on the phrase "public policy."[84] Then, I reviewed the awards one by one and qualitatively analyzed them based on the issues raised and the arbitral tribunals' decisions. I surveyed the awards from 1987 to 2008, spanning more than thirty years. I reviewed a total of 206 arbitral awards. The study encompasses all issues and arguments that parties or arbitral tribunals (*ex officio*) refer to as "public policy" and that require a decision by the tribunals. The aim of my study was to focus on commercial arbitration. For this reason, I excluded all the awards rendered in investor-state arbitration, which often has different legal regimes and includes public international law. I also excluded cases directly involving a sovereign state. Similarly, I excluded sports arbitration cases as the subject matter is different from commercial and contractual disputes.

Further, I excluded the awards that reference the phrase "public policy" in passing. For instance, awards that have simply reiterated that contractual agreements should be enforced if not contrary to public policy have been excluded; only the awards that engage with issues of public policy in a meaningful way have been included in the study. Also, the study is composed of all partial and full awards as well as procedural orders.

The awards are from various arbitral institutions, including but not limited to the International Chamber of Commerce International Court of Arbitration (ICC), International Center for Dispute Resolution (ICDR), International Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation (ICAC), Cairo Regional Center for International Commercial Arbitration, London Court of International Arbitration (CRCICA), London Court of International Arbitration (LCIA), American Arbitration Association

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[84] I also included cases that reference the terms "*ordre public*," "mandatory rule," and "mandatory law." Only seven cases referred to the terms "mandatory rule" and "mandatory law" and not "public policy." Only six cases referenced the terms "mandatory rule" and "mandatory law" and not "public policy": 13,610 (2006); 8528 (1996); 7047 (1994); 6998 (1994); 7528 (1993); 6379 (1990).

(AAA), JAMS International, Arbitration Institute of Finland Chamber of Commerce, Hong Kong International Arbitration Centre (HKIAC), International Commercial Arbitration at the Ukrainian Chamber of Commerce and Industry, China International Economic and Trade Arbitration Commission, and Japanese Commercial Arbitration Association.

### *B. Frequency*

As discussed in the Introduction, approximately 8% of all public arbitral awards in the Kluwer Arbitration database[85] involve matters related to public policy concerns raised by parties and/or referred to and discussed by tribunals.[86] Out of 367 awards available from the International Chamber of Commerce—a leading arbitral institution—roughly 18% (67) of the decisions involve or discuss issues related to public policy. Table 1 on the following page demonstrates roughly the percentage of public policy discussions in various arbitral institutions.

It should be noted that because of the lack of systematic reporting and indexing, such data could not be fully relied upon. Despite this shortcoming, these numbers show that matters related to public policy are raised rather frequently in various cases and before various arbitral institutions.

### *C. Common Issues*

Also lacking in the present studies are the common issues (i.e., subject matter) of public policy arguments. In other words, parties and tribunals raise a discussion of public policy in relation to certain issues. This survey shows the issues that amount to public policy in the litigants' or the tribunals' eyes. This is particularly critical because there is no systematic discussion of such issues nor is there any concrete and coherent judicial analysis of public policy issues.

Based on the survey of awards from 1987, as explained in the methodology Section, I have identified the following to be common issues among the cases in which arbitral tribunals meaningfully engage with public policy. In Figure 1, the vertical axis lists the issues and the horizontal axis depicts their frequency. Other issues listed in Figure 1 include contract law, fiduciary duty, agency laws, corporate

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85 *See supra* Introduction.

86 This includes investment and commercial arbitration cases.

governance, corporation regulations, competition law, and fraud and corruption, among others.

Table 1. *Frequency of Public Policy Discussions Before Leading Commercial Arbitral Institutions*

| Arbitral Institution | Headquarters | Number of Published Cases | Cases Involving Public Policy | Percentage (Approx.) |
|---|---|---|---|---|
| ICC[87] | France | 367 | 67 | 18% |
| ICDR[88] | United States | 178 | 8 | 4.5% |
| ICAC[89] | Russia | 122 | 2 | 2% |
| CRCICA[90] | Egypt | 90 | 12 | 13.5% |
| LCIA[91] | England | 44 | 3 | 7% |
| JAMS | United States | 16 | 1 | 6.5% |
| AAA[92] | United States | 29 | 1 | 3.5% |
| SCC[93] | Sweden | 21 | 4 | 19% |

*Source*: Kluwer Arbitration Database.[94]

87 International Chamber of Commerce International Court of Arbitration.

88 International Center for Dispute Resolution.

89 International Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation.

90 Cairo Regional Center for International Commercial Arbitration, London Court of International Arbitration.

91 London Court of International Arbitration.

92 American Arbitration Association.

93 Arbitration Institute of the Stockholm Chamber of Commerce.

94 KLUWER ARBITRATION, http://www.kluwerarbitration.com/ [https://perma.cc/KKM6-ZMQ2].

Figure 1. *Number of Common Public Policy Issues in Transnational Commercial Arbitration*


### *D. Application*

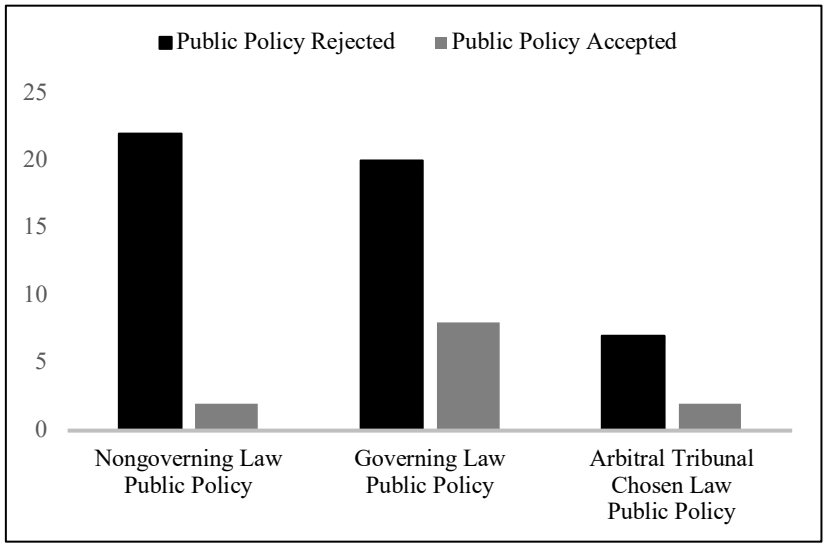
In order to provide reliable data for the success rate, I thoroughly analyzed each case to link the governing law with the public policy arguments and their effects on the outcome of each case. Each case is organized based on the laws governing the contract, the laws governing the arbitration (*lex arbitri*), and the laws upon which the public policy argument is raised. I used the code number 1 for cases where nongoverning public policy law was raised and code number 2 for cases where governing public policy law was at stake. I assigned code number 3 to those cases in which arbitrators chose a law and made a decision about a public policy matter related to that law. In order to understand the outcomes of the case, I parsed each decision to make sure that the public policy argument was directly linked to the dispute, not simply a rhetorical and unrelated statement.

With regard to the coding of the results, if public policy considerations did not affect the outcome of the case in any way, I coded the case as number 1; if it did affect the case, I assigned it as number 2. The results are shown in Figure 2. It is hard to claim that the analyses and coding of the decisions is not subjective, as the outcomes of arbitrations are not always clearly linked to the arguments raised vis-à-vis public policy matters. It is possible that others might code some

cases differently. However, that disagreement might be related to only a few of the difficult cases. As a result, Figure 2 serves as a good representation of the success rate of public policy arguments both stand-alone and in connection with the applicable law.

The overall number of cases in which arbitral tribunals meaningfully engage with public policy is sixty-one. The data show that in cases in which arbitral tribunals accept public policy, approximately 3% of those cases involved public policy arguments not based on governing law, 13% were related to public policy arguments based on governing law, and 3% concerned public policy defenses of the law chosen by the arbitral tribunal. Overall, out of the sixty-one cases, approximately 20% resulted in the arbitral tribunal accepting the public policy argument in whole or in part. Figure 2 shows the number of cases that fall under each category of the source of public policy arguments.

Figure 2. *Number of Applications of Public Policy by Arbitral Tribunals*




## III
## DATA ON THE APPLICATION OF PUBLIC POLICY BY COURTS

### *A. Methodology*

In order to understand courts' supervision of transnational dispute resolution mechanisms, national court decisions at the enforcement stage should also be analyzed. Parties resort to national courts to enforce, confirm, or set aside an arbitral award or to challenge an

arbitral process. Drawing from multiple sources,[95] Kluwer Arbitration database has culled courts' decisions of various national jurisdictions in the context of international arbitration. Thus, Kluwer Arbitration database serves as a comprehensive database for national courts' decisions. Despite its shortcomings, this is the most comprehensive database on the enforcement of international arbitral awards at the national level. As of December 2017, the database includes 11,308 court decisions from no less than thirty-nine jurisdictions.[96] To the best of my knowledge, this database has not been the subject of a systematic and data-driven study.

In order to analyze the court decisions, I have selected decisions that are limited in scope based on the phrase "public policy." Due to the large number of decisions, this qualitative review has been limited to decisions from four years: 2018, 2013, 2003, and 1998. Following the review of the decisions in each of the four years specified above, I have identified the decisions that have been affected pursuant to public policy grounds. Moreover, those decisions that have appeared twice or more in the database (due to reporting from different sources) have been removed. Also removed are the decisions that include cursory references to public policy. After careful review of each decision, a summary of the public policy issues that have affected the courts' decisions is included next to each decision.

### *B. Frequency*

As mentioned above, the Kluwer Arbitration database included more than 11,308 court decisions at the time this Article was drafted. Out of the 11,308 court decisions, 3421 include the phrase "public policy" or the often-used French equivalent "*ordre public*." This means that in over 30% of the court confirmation proceedings, transnational arbitral awards were challenged based on public policy grounds.[97] Despite the shortcomings of this methodology, it can be argued that almost one-third of challenges raised in national courts against transnational

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[95] Sources include ICCA Yearbook Commercial Arbitration, Yearbook Commercial Arbitration and contribution by the Institute for Transnational Arbitration (ITA) Board of Reporters.

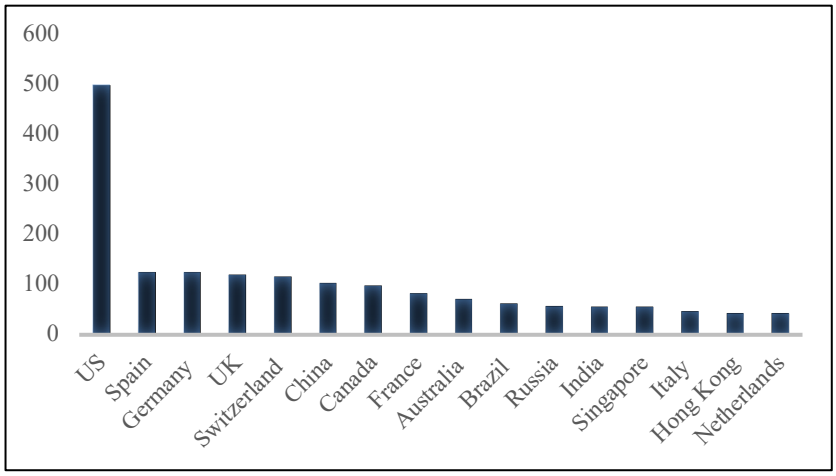
[96] Arbitral Award Search, KLUWER ARBITRATION, http://www.kluwerarbitration.com (follow "Advance Search" hyperlink; search for term "public policy" in "free text" tab).

[97] It is important to note that this number includes mere cursory references to the text of the Convention or public policy doctrine without engaging with the doctrine in a meaningful way.

arbitral awards include some form of discussion related to public policy.

The United States remains at the top of the list in terms of the jurisdiction that hears most of these challenges. The large number of cases in the United States as compared to other jurisdictions could be due to the simple fact that many large corporations, entities, and wealthy individuals that have been part of transnational litigations also have assets in the United States. The prevailing parties in arbitration resort to U.S. courts for enforcement of such awards and attachment of assets. This phenomenon could also be a result of robust indexing and reporting that exists in the U.S. as opposed to other jurisdictions. Figure 3 shows the number of cases per jurisdiction. The data are from 1953 to 2018.

Figure 3. *Number of Cases Involving Public Policy Before National Courts*




An analysis of the database further shows an increase in the number of cases involving public policy challenges. The increase in the number of such cases is a result of an increase in the number of global commercial disputes. The increase could also be a result of better reporting of cases involving such matters. Moreover, the increase is a result of ever-expansive arbitral authority and arbitral tribunals' handling of more subject matters. Figures 4 and 5 clearly show the increase in both the United States and other jurisdictions. The data are from 1985 to 2017.[98]

[98] Since additional decisions may be reported and added to 2018, Figures 4 and 5 do not include information from 2018. Arbitral Award Search, KLUWER ARBITRATION,

Figure 4. *Number of Cases Challenged Based on Public Policy Grounds Before U.S. Courts in International Commercial Arbitration*

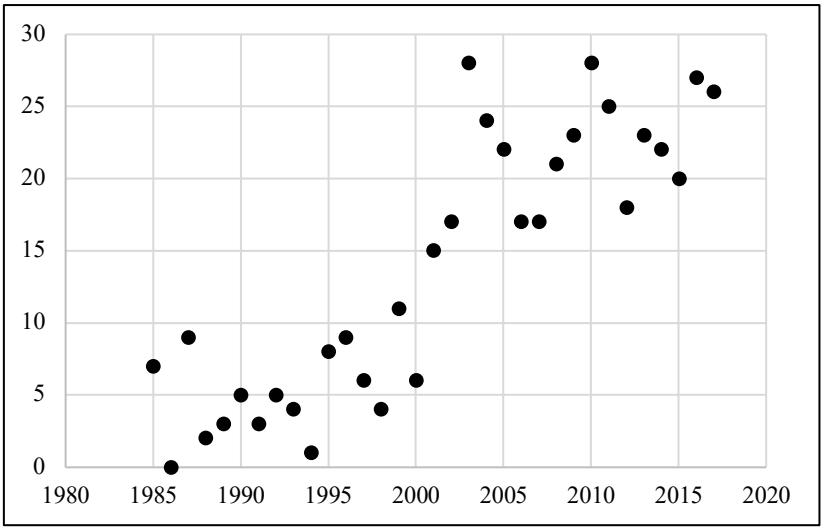
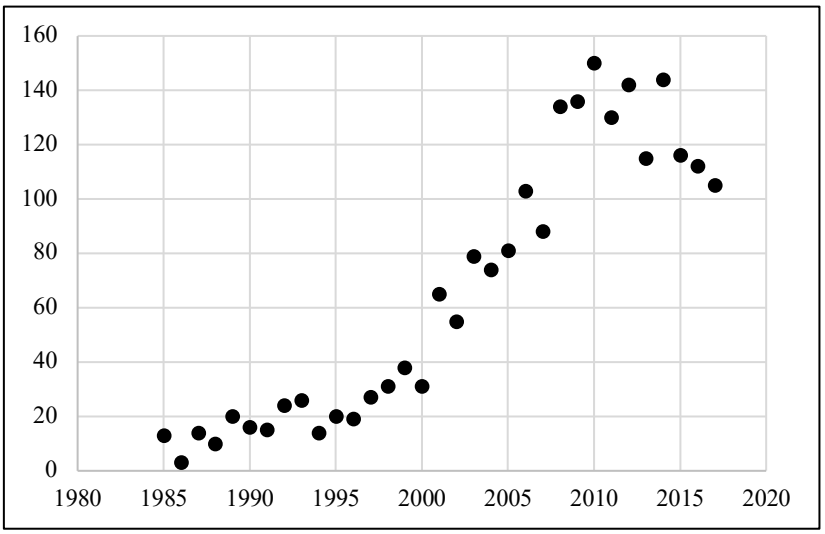



Figure 5. *Number of Cases Challenged Based on Public Policy Grounds Before National Courts in International Commercial Arbitration*




http://www.kluwerarbitration.com (follow "Advance Search" hyperlink; search for term "public policy" in "free text" tab; restrict to "US Courts" and "Courts").

It is clear from the data in Figures 4 and 5 that the number of cases involving challenges related to public policy have increased over the last thirty years. The figures undoubtedly show the increasing friction between courts and international arbitral tribunals over issues related to public policy. Moreover, the span of relevant dates dispels the myth that issues of public policy are tangential and inconsequential in international commercial arbitration.

### *C. Common Issues*

The issues that are raised by the parties before the courts during enforcement proceedings vary. Because of the limited grounds on which arbitral awards can be set aside, parties invoke the public policy doctrine in a variety of issues. As explained in the methodology Section,[99] I analyzed the case law at four points in time: 2018, 2013, 2003, and 1998. Despite the variety of issues raised by the parties, issues can generally be divided into procedural and substantive matters. Procedural public policy generally refers to due process concerns in the arbitral process. Substantive public policy emanates from laws and regulations that clash with the substance of the controversy before the arbitrators.[100] Procedural irregularities (i.e., challenges based on due process) remain one of the principal avenues by which courts have enforced the doctrine of public policy.[101]

There are other issues that do not quite fit within the dichotomy of procedural versus substantive public policy. Arbitrability—or the ability of the subject matter of the dispute to be referred to and adjudicated by private arbitrators—is another area where courts have resorted to public policy.[102] National courts have also set aside awards due to lack of a valid arbitration agreement, abuse of power, annulment at the seat of arbitration, and fraud by invoking public policy grounds. Abuse of power refers to situations where arbitrators have exceeded the powers vested in them pursuant to the arbitration

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99 *See infra* Section III.A.

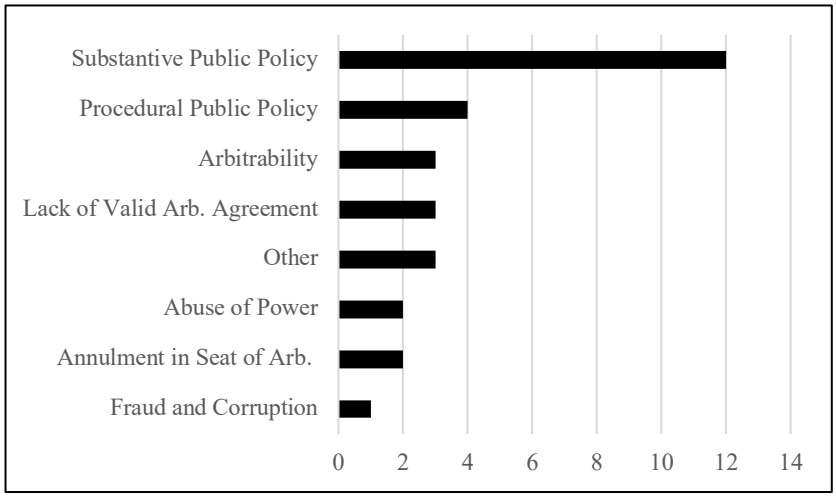
100 MATTI S. KURKELA & SANTTU TURUNEN, CONFLICT MGMT. INST., DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 21–22 (2d ed. 2010); *see generally* Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20 ARB. INT'L 333 (2004).

101 This is consistent with the liberal approach adopted by the United States Supreme Court. As long as the due process afforded to the parties suffices and meets some minimum standards, delegation to alternative dispute resolution is permissible. Resnik, *supra* note 29, at 2808.

102 KLUWER LAW INT'L, *supra* note 12, at 312–13.

agreement.[103] Annulment of arbitral awards at the seat refers to the situations where the party seeking to enforce the arbitral award attempts to enforce it in another jurisdiction even though the award has been set aside in the seat of arbitration.[104] There are generally two approaches to this issue,[105] but some national courts do not enforce awards that have been set aside at the seat and find it against public policy to do so. Figure 6 shows on the horizontal axis the number of cases that fall under each accepted public policy issue.

Figure 6. *Number of Public Policy Issues Accepted by National Courts*




### *D. Application*

The analysis of the cases worldwide in the four time points suggests that courts, based on public policy grounds, have refused to enforce or

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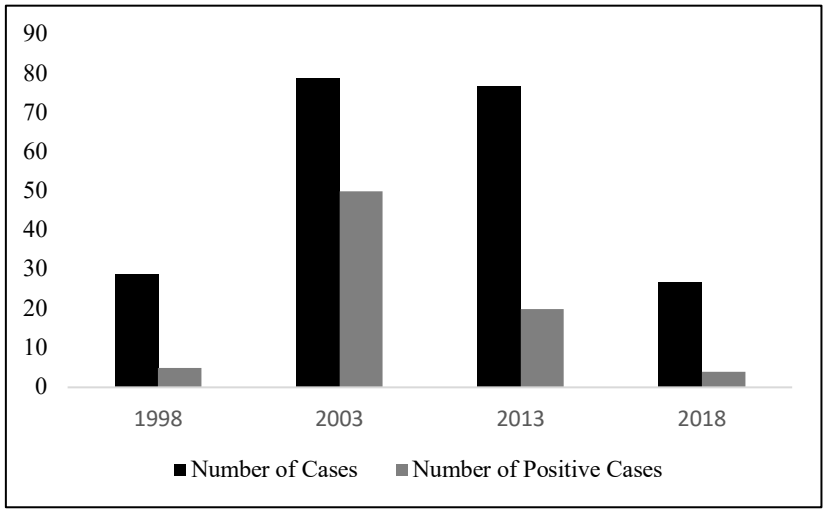
[103] W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 745–46 (1990).

[104] Jonathan I. Blackman & Ellen London, *Respecting Awards Annulled at the Seat of Arbitration: The Road from Chromalloy to TermoRio*, 63 DISP. RESOL. J. 70 (2008).

[105] *Compare* Declaration of Jan Paulsson, Corporación Mexicana de Mantenimiento Integral v. Pemex Exploración y Producción, 962 F. Supp. 2d 642 (S.D.N.Y. Mar. 27, 2012) (No. 10-cv-00206 (AKH)), *and* Further Revised Declaration of Jan Paulsson, Corporación Mexicana de Mantenimiento Integral v. Pemex Exploración y Producción, 962 F. Supp. 2d 642 (S.D.N.Y. Apr. 27, 2012) (No. 10-cv-00206 (AKH)), *with* Legal Opinion of Albert Jan van den Berg re Non-Enforceability of an Annulled Award Under the Panama and New York Conventions, Corporación Mexicana de Mantenimiento Integral v. Pemex Exploración y Producción, 962 F. Supp. 2d 642 (S.D.N.Y. Apr. 12, 2012) (No. 10-CV-206 (AKH)).

confirm arbitral awards in approximately 15%–26%[106] of the cases where public policy has been raised as an objection to enforcement. This is reflected in Figure 7.

Figure 7. *Number of Applications of Public Policy by National Courts*




The numbers and percentages above are based on the cases where public policy has been a defense or argument in the case. The percentage is much lower when taking into account the total number of cases before national courts for enforcement of arbitral awards. Out of the total number of cases, national courts have set aside awards in only 2.5%–4% of all the awards before them for enforcement and recognition in the four time points analyzed in my data.[107]

These numbers correspond with the data culled from the arbitral tribunals in situations where a public policy challenge is raised. As discussed above, in 20% of the cases that involve matters of public policy, such arguments have altered the outcome of the arbitration. This number, however, is less than 1% in the overall arbitration cases recorded in the database.

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[106] I qualitatively analyzed and encoded courts' decisions in four time points to assess the success rate of public policy arguments. The following shows first the year and second the success rate of public policy arguments that alter the outcome of court proceedings in cases where public policy has been raised as a challenge to enforcement: 2018 (15%); 2013 (26%); 2003 (18%); 1998 (17%).

[107] I qualitatively analyzed and encoded courts' decisions in four time points to assess the success rate of public policy arguments. The following shows first the year and second the success rate of public policy arguments that alter the outcome of court proceedings in all cases concerning enforcement of international arbitral awards: 2018 (4%); 2013 (4%); 2003 (2.5%); 1998 (4%).

## IV
## REMOVAL OF NATIONAL CONTROL MECHANISM

There are several takeaways from the analysis above. Chief among them is that defenses and arguments based on public policy grounds are rarely accepted. Interestingly enough, however, the data suggest that the frequency of such arguments has increased. In other words, despite the low probability of success of such arguments, parties increasingly resort to public policy as a defense. This phenomenon might simply be because cases that involve public policy arguments are reported more often. But it could also be that parties increasingly realize the only possible avenue to challenge arbitration is through the public policy doctrine, even if the success rate is extremely low.

The data dispel any doubts that tribunals do not engage with matters of public policy, although some tribunals reject such arguments based on the notion that arbitration is simply a matter of private contract and arbitrators cannot adjudicate matters of public policy.[108] Another interesting finding is that arbitral tribunals tend to engage more with substantive public policy while courts engage more with procedural public policy. In particular, when substantive public policy emanates from the governing law of the contract, arbitral tribunals tend to engage and at least partly litigate the matter.

Moreover, the data suggest that the acceptance rate of public policy arguments is higher in arbitral tribunals. Out of the cases where parties have raised public policy arguments, the data show that courts have accepted public policy arguments in 15% of the cases, whereas tribunals accepted close to 20%. Although the numbers are close, it shows that tribunals have been more amenable in accepting such arguments.

As shown above and is clear from the data, the doctrine of public policy, as the last bastion of protecting public interest, is rarely enforced. Several factors have contributed to the laissez-faire and permissive approach of the courts and tribunals over the last few decades. The main factors include the approach taken by U.S. courts, the introduction of the concept of international public policy in some jurisdictions, and the contractual view of arbitration.

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108 *See infra* Section IV.C.

### *A. U.S. Courts' Jurisprudence*

The United States has been the leading force behind post–World War II globalization and neoliberalism. As a result, the jurisprudence of the U.S. courts has had a critical impact on other jurisdictions in terms of their approach to the increasingly globalized dispute resolution apparatus. In the last few decades, the U.S. courts have created an edifice of arbitration through several important doctrines. There are two doctrines that are most important for the present discussion: (1) federal policy favoring arbitration and (2) the narrow interpretations of the public policy doctrine and the moral doctrine. The U.S. Supreme Court has been at the center of opening the floodgates of widespread use and unprecedented growth of arbitration through its interpretation of the Federal Arbitration Act.[109] The series of significant decisions by U.S. courts was influenced by neoliberalization of power, and the outsourcing of judicial disputes has shaped the globalization of disputes.[110]

#### *1. Federal Policy Favoring Arbitration*

The principal jurisprudential push has come as a result of U.S. courts' emphasis on the public policy favoring arbitration. The intent of the Federal Arbitration Act was only to afford a speedy and economical means of resolving disputes to merchants who negotiate at arm's length with relatively equal bargaining powers.[111] It was not until the 1980s that, in a series of cases, the United States Supreme Court judicially created a "federal policy" that favored "arbitration over litigation."[112]

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[109] Resnik, *supra* note 29, at 2808; *see also* Sternlight, *supra* note 29, at 644–74. Judith Resnik states that the current mandatory arbitration "ought to be seen as unconstitutional." Resnik, *supra* note 29, at 2809. *But see* PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION (2013).

[110] *See generally* SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (4th ed. 2008); IMRE STEPHEN SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013).

[111] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting); *see also* Sternlight, *supra* note 29, at 641. The Federal Arbitration Act of 1925 was enacted primarily to revoke the common law rule that made the specific performance of arbitration agreements impossible. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2012)).

[112] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56–58 (1995); Gilmer v. Interstate, 500 U.S. 20, 26 (1991); Rodriguez de Quijas v. Shearson, 490 U.S. 477, 481 (1989); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 475–76 (1989); Perry v. Thomas, 482 U.S. 483, 489–90 (1987); Shearson v. McMahon, 482 U.S. 220, 226 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S.

In *Epic Systems Corp. v. Lewis*, one case in the pre-1980s series of cases on arbitration and public policy, the Supreme Court quoted an earlier Second Circuit decision and analogized the recent attacks on limits of class action lawsuits in arbitration with "judicial antagonism toward arbitration before the Arbitration Act's enactment [that] 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy.'"[113] In this case, the Supreme Court reinforced its pro-arbitration approach in the context of employer-imposed arbitration despite the Federal Arbitration Act's explicit exclusion of certain employment contracts from its scope.[114]

This pro-arbitration policy is judicially made. As noted by several Supreme Court Justices, the Supreme Court of the United States created this edifice and not the Federal Arbitration Act. In his dissent in *Circuit City Stores, Inc. v. Adams*, Justice Stevens stated that "[t]here is little doubt that the Court's interpretation of the [Federal Arbitration] Act has given it a scope far beyond the expectations of the Congress that enacted it."[115] A few years prior to this decision, in another Supreme

614, 625 (1985); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); *see also* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 59 (2015). Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 776 (2002) ("Even more than those devices, however, mandatory arbitration clauses have become not merely favorites but darlings of the courts.").

113 *Epic Sys. Corp*., 138 S. Ct. at 1612.

114 According to the Federal Arbitration Act, its scope does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Federal Arbitration Act, Pub. L. No. 80-282, 61 Stat. 669 (1947). In 1991, the Supreme Court authorized arbitration of claims under the Age Discrimination and Employment Act of 1967. *Gilmer v. Lane*, 500 U.S. 20, 41–42 (1991). In 2001, the Supreme Court ruled that the employment-related exception under the Federal Arbitration Act should be construed narrowly. Cherine Foty, *U.S. Supreme Court Holds That Individualized Employer-Employee Arbitration Agreements Must Be Enforced As Written*, KLUWER ARBITRATION BLOG (June 29, 2018), http://arbitrationblog.kluwerarbitration.com/2018/06/29/u-s-supreme-court-holds-individualized-employer-employee-arbitration-agreements-must-enforced-written-2/ [https://perma.cc/9NS5-3EY7]. The liberal approach and pro-arbitration policy of the U.S. courts toward arbitration remained robust in 2018 as well. Kiran Nasir Gore, *2018 in Review: A View from the United States*, KLUWER ARBITRATION BLOG (Dec. 23, 2018), http://arbitrationblog.kluwerarbitration.com/2018/12/23/2018-in-review-a-view-from-the-united-states/ [https://perma.cc/9W6F-744X]. In a recent unanimous decision, the U.S. Supreme Court declared that the FAA's exclusion of certain "contracts of employment" extends to transportation workers and that the term "employment" encompasses independent contractors. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019).

115 Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting).

Court case, Justice O'Connor conveyed her frustration of this trend by stating that "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[116] Recently, in her dissent in *Epic Systems*, Justice Ginsburg noted that it was not until 1983 that the Supreme Court of the United States held that the Federal Arbitration Act "evinces a 'liberal federal policy favoring arbitration.'"[117] Thereafter, the Supreme Court of the United States issued a series of decisions stating that the Federal Arbitration Act requires "enforcement of agreements to arbitrate not only contract claims, but statutory claims as well."[118]

As stated by scholars, because of a series of Supreme Court decisions, "arbitration has become a force to be reckoned with in both transborder and domestic matters."[119] The arbitration edifice, as noted by some, is a result of at least two legal fictions: consent and ascertaining congressional intent.[120]

Courts have created this edifice through several phases[121] and by gradually eradicating any meaningful grounds for review on which awards can be set aside.[122] U.S. courts have held that any ambiguity

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116 Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

117 *Epic Sys. Corp.*, 138 S. Ct. at 1644 (Ginsburg, J., dissenting) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). This shift could be because of the new Court's approach whereby it "abandoned its reliance on Article III and insisted instead that the FAA was the product of Congress's Commerce Clause powers." Resnik, *supra* note 29, at 2839.

118 *Epic Sys. Corp.*, 138 S. Ct. at 1644 (2018) (Ginsburg, J., dissenting) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)); Shearson v. McMahon, 482 U.S. 220 (1987).

119 Thomas E. Carbonneau, *The Story of Arbitration Law*, *in* CARBONNEAU ON ARBITRATION: COLLECTED ESSAYS 51, 65 (2010).

120 Deepak Gupta, *For Decades, Court Has Built "an Edifice of Its Own Creation" in Arbitration Cases — It's Time to Tear It Down and Rebuild*, SCOTUSBLOG (May 24, 2018, 4:13 PM), http://www.scotusblog.com/2018/05/symposium-for-decades-court-has-built-an-edifice-of-its-own-creation-in-arbitration-cases-its-time-to-tear-it-down-and-rebuild/ [https://perma.cc/4JQY-ZTAU].

121 Some scholars believe that arbitration in the United States has undergone three phases: in the first phase, the Supreme Court asserted that so long as statutory rights are vindicated, arbitration is "merely a substitution of forum and not a waiver of substantive statutory rights." In phase two, the Supreme Court "weakened the effective vindication doctrine but left intact state contract law doctrines that protect the parties." In the last phase, the U.S. Supreme Court however "nailed the lid on the coffin of the effective vindication doctrine and emasculated state contract law doctrines." Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 59 (2016).

122 Sternlight, *supra* note 29, at 639–40.

should be construed in favor of the federal policy favoring arbitration.[123] Also, U.S. courts have limited contractual defenses (such as unconscionability) available under state laws.[124] The U.S. Supreme Court further established that states cannot enforce laws that bar arbitration of certain disputes or in any way impede the federal policy favoring arbitration.[125] In the same vein, the courts have knocked out state legislation efforts to curtail arbitration through the preemption doctrine.[126] Moreover, the U.S. Supreme Court recently ruled that courts cannot entertain the question of arbitrability if the contract in question has delegated the authority to arbitration even if the motion to compel to arbitration is "frivolous" and "wholly groundless."[127]

U.S. courts have also fervently endorsed a pro-arbitration and pro-enforcement policy in the context of international arbitration. The courts found a "strong public policy favoring confirmation of foreign arbitration awards"[128] and announced that the "principal purpose" of the New York Convention was "to encourage the recognition and enforcement" of arbitration and "to unify the standards" by which arbitral awards are enforced.[129] The courts have certainly adopted the pro-enforcement policy of the New York Convention without truly putting forward unified standards for supervision of arbitral agreements and arbitral awards.

### *2. Narrow Interpretation of Public Policy Doctrine*

The U.S. courts' broad reading of the pro-arbitration public policy of the FAA was accompanied by their narrow reading of their own supervisory role pursuant to the public policy doctrine. The courts have

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

124 Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 285 (9th Cir. 1988) (rejecting the unconscionability defense in light of policy favoring arbitration); Benoay v. E.F. Hutton & Cos., 699 F. Supp. 1523, 1526 (S.D. Fla. 1988) (rejecting arguments as to unequal bargaining power, unconscionability, duress, lack of mutuality, and fundamental unfairness in view of federal policy encouraging arbitration).

125 *E.g.*, Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265 (1995).

126 Southland Corp. v. Keating, 465 U.S. 1, 2 (1984) (preempting a California court's interpretation that claims under a certain California statute could not be arbitrated); Perry v. Thomas, 482 U.S. 483, 483 (1987) (preempting a California fair employment statute's proscription on arbitration).

127 Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527 (2019) (ruling that the arbitrator should decide the issue of arbitrability and not the court).

128 Ministry of Def. v. Cubic Def. Sys., 665 F.3d 1091, 1098 (9th Cir. 2011).

129 Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

gradually narrowed the scope of this doctrine and significantly limited the instances where arbitral awards can clash with the forums' public policy. First, the courts have tied the doctrine to an ambiguous and hard-to-prove standard (i.e., "most basic notions of morality and justice").[130] Second, the courts have divorced the notion of public policy from misapplication of law and illegality.[131] Third, the courts have limited their review based on public policy to enforcement proceedings.[132]

U.S. courts have developed a standard for the doctrine that has made it extremely hard to prove. The most paradigmatic shift came as a result of the 1974 Second Circuit case in *Parsons*. In this widely cited case, the court declared that the Convention's "public policy defense" should be "construed narrowly" and enforcement of arbitral awards could be refused only in instances where "enforcement would violate the forum state's most basic notions of morality and justice."[133] The Second Circuit stated that the public policy defense under the New York Convention is not "meant to enshrine the vagaries of international politics under the rubric of 'public policy.'"[134]

The Second Circuit and subsequent courts citing and quoting its decision never clarified what constitutes the United States' most basic notions of morality and justice.[135] Other national courts soon used the narrow interpretation referencing the "most basic notions of morality and justice" without much clarification or elaboration.[136]

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130 *See, e.g.*, Parsons v. Société Générale De L'Industrie Du Papier, 508 F.2d 969, 974 (2d Cir. 1974).

131 *See, e.g.*, Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 819 n.32 (D. Del. 1990).

132 *See, e.g.*, Thomas v. Carnival Corp., 573 F.3d 1113, 1123–24 (11th Cir. 2009).

133 *Parsons*, 508 F.2d at 974; *see also Ministry of Def.*, 665 F.3d at 1097 ("Although [a public policy] defense is frequently raised, it 'has rarely been successful.'"); TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 938 (D.C. Cir. 2007); Admart AG v. Stephen & Mary Birch Found., Inc., 457 F.3d 302, 308 (3d Cir. 2006); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306 (5th Cir. 2004); Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 593 (7th Cir. 2001); M&C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 851 n.2 (6th Cir. 1996); Tamimi Global Co. v. Kellogg Brown & Root LLC, No. H-11-0585, 2011 WL 1831719, at *1, *3 (S.D. Tex. May 12, 2011).

134 *Parsons*, 508 F.2d at 974.

135 For example, the Southern District of Texas did not find providing kickbacks offensive to the "most basic notions of morality and justice." *Tamimi Global Co.*, 2011 WL 1831719, at *1,*3.

136 Courts in other jurisdictions such as Hong Kong, Australia, Singapore, India, Canada, and New Zealand have adopted this view to limit the public policy doctrine. Court Decisions Search, KLUWER ARBITRATION, http://www.kluwerarbitration.com (search for phrases "most basic notions of morality and justice" within the court decisions category).

Moreover, U.S. courts have expressly announced that the most basic notions of morality and justice would not be violated in a case of misapplication of laws, error of law, or illegality.[137] For instance, in *National Oil Corp. v. Libyan Sun Oil Co.*, the U.S. District Court for the District of Delaware announced that "a mere error of law would not [] be sufficient grounds to refuse recognition of the award."[138] Some other U.S. courts have equally emphasized that erroneous application of laws would not be injurious to public policy of the enforcing forum.[139]

Moreover, U.S. courts have limited the public policy defense only at the enforcement stage and thereby recused themselves from reviewing the issues before the end of arbitral proceedings.[140] This approach significantly raises the cost for parties if courts refuse to enforce the arbitral award since the losing party either has to relitigate the matters before national courts or another arbitral tribunal, depending on the circumstances, or find a friendly forum. Therefore, there is a strong incentive for the courts to avoid imposing such costs on parties and find ways to enforce the awards at the enforcement stage.

U.S. courts have also narrowed public policy by detaching it from national policy and foreign policy. For example, in the *Ameropa AG*

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137 Traditionally and in the context of contract law, public policy was developed as a distinct category from illegality and unenforceability. *The Concept of Public Policy in Law*, *supra* note 23, at 689–98. It should be noted that misapplication of laws and illegality in public policy in arbitration pertain to third-party adjudication.

138 Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 819 n.32 (D. Del. 1990); *see also* TCL Air Conditioner Co. v. Judges of the Fed. Court of Austl., Case No. S178/2012, HCA, 569 (Mar. 13, 2013) ("Error of law is not a ground for setting aside an award or refusing its enforcement under the Australian International Arbitration Act.").

139 Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306 (5th Cir. 2004) ("Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention."); Brandeis Intsel Ltd. v. Calabrian Chemicals Corp., 656 F. Supp. 160, 165 (S.D.N.Y. 1987) ("'[M]anifest disregard' of law, whatever the phrase may mean, does not rise to the level of contravening 'public policy,' as that phrase is used in Article V of the Convention.") (emphasis in original); *see also* X SA v. Y SA, [TF] [Federal Supreme Court] Nov. 13, 1998, 25 Y.B. Comm. Arb. 514 (Switz.) ("The scope of the ground [for appeal] relying on the violation of public policy is thus strongly limited. It does not include violation of the law or incorrect application of the law or even arbitrariness in the sense of Art. 4 of the [Federal Constitution of the Swiss Federation]. Nor do a manifestly erroneous interpretation of the facts, appreciation of evidence or even application of the law suffice by themselves to justify the annulment of a decision (ATF 116 II 534, note 4).").

140 Brown v. Royal Caribbean Cruises, Ltd., 549 F. App'x 861 (S.D. Fla. 2013) ("The public policy argument is appropriate only at the arbitration [award]-enforcement stage.") (citing Thomas v. Carnival Corp., 573 F.3d 1113 (11th Cir. 2009)); *see also* Henry Schein Inc. v. Archer & White Sales Inc., 139 S. Ct. 524 (2019).

case, the court emphasized that the "national policy is not synonymous with public policy."[141]

The permissive approach of U.S. courts toward arbitration has only one major substantive caveat: arbitral tribunals can decide almost all matters so long as they provide opportunities for effective vindication of statutory rights.[142] As noted by scholars, the U.S. Supreme Court has rarely declined to enforce an arbitration agreement or an arbitral award for failing to provide adequate remedies for statutory rights.[143] One of the very few examples was *Thomas v. Carnival Corp.*, where the U.S. Supreme Court held that the arbitration provision requiring application of foreign law constituted a waiver of seafarers' rights under the Wage Act and therefore was against public policy.[144] Later decisions by the Court, however, seem to suggest that such waiver is no longer against public policy.[145]

The public policy favoring arbitration in the U.S. has, in essence, resulted in eradication of any review based on public policy. In other words, the wide acceptance of *positive* public policy endorsing

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141 Ameropa AG v. Havi Ocean Co., No. 10 Civ. 3240, 2011 WL 570130, at *1,*3, (S.D.N.Y. Feb. 16, 2011) (rejecting that the sanction regime against Iran would constitute a public policy ground based on which the award can be set aside). The court followed another similar case in which a similar argument was raised related to the Cuban sanctions regime. Belship Navigation Inc. v. Sealift, Inc., 1995 WL 447656, at *1, *7 (S.D.N.Y. July 28, 1995).

142 *See, e.g.*, Shearson v. McMahon, 482 U.S. 220, 240–42 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985); Gilmer v. Interstate, 500 U.S. 20, 28 (1991). *See generally* Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 30 (2016) ("The Court's rationale that an agreement to arbitrate did not waive substantive statutory rights but merely substituted the arbitral forum for the judicial forum for adjudication of those rights as long as the aggrieved party could effectively vindicate those rights in arbitration led lower courts to police arbitration procedures to ensure effective vindication."). The Court also held that enforcement can be avoided if a "contrary congressional command" can be shown or an "inherent conflict" exists between the statutory right and arbitration. Resnik, *supra* note 29, at 2863 (citing *McMahon*, 482 U.S. at 226–27, and *Gilmer*, 500 U.S. at 26).

143 Resnik, *supra* note 29, at 2840.

> In many decisions, Justices complained that litigation was "costly and time consuming," or praised arbitration's capacity to produce "streamlined proceedings" providing prospective litigants with opportunities adequate to "effectively vindicate" their federal rights. Yet while regularly articulating that standard, the Court has not—to date—declined to enforce an arbitration mandate for its failure to provide adequate remedies.

144 Thomas v. Carnival Corp, 573 F.3d 1113 (11th Cir. 2009).

145 Asignacion v. Rickmers, 783 F.3d 1010 (5th Cir. 2015) (rejecting to apply the prospective-waiver doctrine of public policy in the context of a Philippine arbitral for maritime injuries).

arbitration has stymied any *negative* public policy controlling the system. This fervor of pro-arbitration policy also influenced other jurisdictions, which not only have embraced the pro-arbitration policy but also have competed to be perceived as arbitration-friendly venues.[146] As reported in the latest White & Case survey, after "enforceability of awards," avoiding "specific legal systems/national courts" is ranked highest for the most valuable characteristic of arbitration. The survey also lists the most preferred seat, which is selected, *inter alia*, for "its track record in enforcing agreements to arbitrate and arbitral awards."[147]

### *B. Emergence of International Public Policy*

For a long time, proponents and practitioners of international arbitration have tried to divorce national public policy from international public policy. Through this approach, the enforcement of awards would not be subject to nuances and vagaries of national laws and public policy.[148] As noted by an arbitral tribunal, "The application of international principles of law . . . independent of the particularities of any domestic legal system."[149] Some court decisions are explicit that this approach imposes a "less strict notion of public policy" as opposed to national public policy.[150] This view is reinforced by the idea that parties can "internationalize" their contract by subjecting it to an

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146 *See generally* Chi Manjiao, *Is the Chinese Arbitration Act Truly Arbitration-Friendly: Determining the Validity of Arbitration Agreement Under Chinese Law*, 4 ASIAN INT'L ARB. J. 104 (2008); Vasudha Sharma & Pankhuri Agarwal, *Rendering India Into an Arbitration Friendly Jurisdiction-Analysis of the Proposed Amendments to the Arbitration and Conciliation Act, 1996*, 3 NUJS L. REV. 529 (2010).

147 *2018 International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARY U. LONDON, http://www.arbitration.qmul.ac.uk/research/2018/ [https://perma.cc/5Z9E-QZ4J] (last visited Oct. 9, 2019).

148 *See, e.g.*, KLUWER ARBITRATION, http://www.kluwerarbitration.com ("When enforcing an foreign arbitral award, international public policy is applicable which might allow a higher degree of deviation from German provisions of law than national public policy would allow.") (citing headnotes of BayObLG, Case No. 4Z Sch 17/03, Highest Regional Court of Bavaria (2003)).

149 TRANS-LEX.ORG, http://www.trans-lex.org/850100 [https://perma.cc/3BEH-ZWMF] (last visited Oct. 9, 2019) (translated from French); *see also* ANA M. LÓPEZ RODRÍGUEZ, LEX MERCATORIA AND HARMONIZATION OF CONTRACT LAW IN THE EU 127 (2003).

150 Mohamed S. Abdel Wahab, *Brexit's Chilling Effect on Choice of Law and Arbitration in the United Kingdom: Practical Reflections Between Aggravation and Alleviation*, 33 J. INT'L ARB. 463 (2016) (citing Sté Grands Moulins de Strasbourg v. Cie Continentale France, Cour de cassation [Cass.] (1988)).

international arbitration.[151] Even when parties select a national law as the applicable law to their contract, some scholars argue that the parties do not intend to apply the law in its entirety.[152]

The main argument of this approach rests on the premise that the set of standards applicable in determining and applying national public policy must be and is different from the standards applied in the transnational context. The main tenets of this approach are twofold: (1) transnational legal order is independent from national legal order, and (2) norms applicable to international disputes differ from national disputes.

Pierre Lalive, a Swiss arbitrator and law professor, framed the discussion of international public policy in 1987.[153] Lalive argued in favor of international public policy that limits the application of national public policy in the context of international commercial arbitration. Lalive referred to three cases from the United States Supreme Court—*Zapata*,[154] *Scherk*,[155] and *Mitsubishi*[156]—to buttress his claim that national courts should refuse to enforce transnational arbitral awards only if they are against "transnational" or "truly international" public policy. In his opinion, the "needs of international

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151 HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 75 (2013) ("[One] process for the internationalization of a contract consists in inserting a clause providing that possible differences which may arise in respect of the interpretation and the performance of the contract shall be submitted to arbitration.") (quoting Texaco Overseas Petroleum Co. v. Gov't of the Libyan Arab Republic, Award, ¶ 44 n.53 (Jan. 19, 1977)); *see also* G. Jaenicke, *The Prospects for International Arbitration: Disputes Between States and Private Enterprises*, *in* INTERNATIONAL ARBITRATION: PAST AND PROSPECTS 158 (A.H.A. Soons ed., 1990) (arguing that reference to international dispute resolution automatically subjects the contract and dispute to international law).

152 POUDRET & BESSON, *supra* note 72, at 607.

153 Kyriaki Karadelis, *Pierre Lalive 1923–2014*, GLOBAL ARB. REV. (Mar. 10, 2014), https://globalarbitrationreview.com/article/1033233/pierre-lalive-1923-2014 [https://perma.cc/4397-FV3E].

154 M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) ("We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.").

155 Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974) ("A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.").

156 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) ("[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.").

commerce," among other factors, necessitates application of international public policy by courts.[157] According to Lalive, it is the "international community of merchants" who should have a "vast power" of "self-regulation."[158] He suggests that tribunals should apply only supervening norms and rules that are truly transnational in nature.[159]

Other scholars and court decisions soon echoed his ideas. For example, in an important case, the French *Cour de Cassation*, the Supreme Court for Judicial Matters, stated that the arbitral award "rendered in Switzerland" is an "international award" that is "not integrated in the legal system of that State."[160] This approach has been consequential in arbitral tribunals' treatment of anti-suit injunctions[161] and national courts' enforcement of awards that have been annulled in other jurisdictions.[162]

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157 Louis Kossuth, *Transnational (or Truly International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 315 (Pieter Sanders ed., 1987) ("Since [states] were conscious of the totally inadequate adaptation of domestic laws to the needs of international commerce and of the difficulty to come to a general agreement on a uniform international law of trade, States preferred to leave to the international community of merchants a *vast power of self-regulation*.") (emphasis in original).

158 *Id.*

159 Pierre Lalive, *Ordre Public Transnational (Ou Réellement International) et Arbitrage International*, REVUE DE L'ARBITRAGE 329, 339 (1986).

160 Société Hilmarton Ltd. v. Société Omnium de Traitement et de Valorisation, Case No. 92-15.137, 20 Y.B. Comm. Arb. 663 (Mar. 23, 1994). A synopsis is also available at http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=140&seule=1[https://perma.cc/56LC-85NM].

161 For discussions on anti-suit injunctions in arbitration and various opinions on this topic. *See, e.g.*, George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990); Gabrielle Kaufmann-Kohler, *How to Handle Parallel Proceedings: A Practical Approach to Issues Such as Competence-Competence and Anti-Suit Injunctions*, 2 DISP. RESOL. INT'L 110 (2008); Geoffrey Fisher, *Anti-Suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement*, 22 BOND L. REV. i (2010).

162 INTERNATIONAL DISPUTE RESOLUTION, *supra* note 37, at 104–07; For an example on anti-suit injunctions, see S. v. State X, Case No. 10623, 21 ASA Bulletin 99 (ICC Int'l Ct. Arb. 2001) ("The Arbitral Tribunal accords great respect to the courts of State X, both in their own right and as the courts of the seat. Nevertheless, in this case, we are of the view that it would be improper, in light of our primary duty to the parties, to observe the injunctions issued by those courts, which have already significantly delayed these proceedings, given that they have the effect of frustrating the parties' agreement to submit disputes to international arbitration."). For an example on enforcement of awards that have been annulled in the jurisdiction of the seat of arbitration, compare *Société Hilmarton Ltd.*, Case No. 92-15.137, 20 Y.B. Comm. Arb. 663 (Mar. 23, 1994), http://newyorkconvention1958.org/index.php?lvl=notice_display&id=140 [https://perma.

Espousal of the internationalization of public policy paved the way for new delocalization. Some scholars suggest that parties can contract around a disfavored national law by selecting another national law in their contract so long as it is not against international public policy.[163] Others suggest a more proactive role for arbitrators in determining and applying transnational norms through international public policy.[164]

On the basis of this approach premised on sidelining national courts, some practitioners started to theorize about international arbitration, arguing that it has its own "*juridicity*" independent of national legal systems.[165] The promise of such an independent juridical order is that it produces its own rules and public policy that offer "as much predictability, if not more predictability, than genuine legal systems."[166] Consequently, because of the "transnational source of arbitrators' power," the state's "isolated position" should not be taken into account, but rather the "rules that are generally endorsed at a given time by the international community."[167] These theoretical developments, which I discussed in detail elsewhere,[168] ushered international commercial arbitration into a direction most favorable to enforceability of arbitral awards at the expense of a meaningful national courts' supervision. As a result of these developments, scholars advanced a view that public policy doctrine acts as a balance between "the need for freedom from the constraints of various states' domestic law" and "desire of . . . states and the international

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cc/56LC-85NM] (last visited Oct. 15, 2019) ("[T]he award rendered in Switzerland was an *international award* which was not integrated into the legal order of that State and therefore continues to exist notwithstanding the notion that it had been set aside and its recognition in France was not contrary to international public policy.") (emphasis added) with TermoRio S.A. E.S.P v. Electranta S.P., 487 F.3d 928 (D.C. Cir. 2007); Corporación Mexicana de Mantenimiento Integral v. Pemex Exploración y Producción, 962 F. Supp. 2d 642 (S.D.N.Y. Aug. 27, 2013). For an in-depth discussion of the U.S. approach to this issue, see Marc J. Goldstein, *Annulled Awards in the U.S. Courts: How Primary Is "Primary Jurisdiction"?*, 25 AM. REV. INT'L ARB. 19 (2014).

163 Lawrence Boo & Adriana Uson Ong, *Mandatory Laws: Getting the Right Law in the Right Place*, *in* JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION 203 (Neil Kaplan & Michael Moser eds., 2018).

164 Pierre Mayer, *Effect of International Public Policy in International Arbitration?*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 61, 65–66 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

165 EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 30–32 (2010).

166 Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, 17 ARB. INT'L 59, 70–71 (2001) ("[C]ontrary to common wisdom, transnational rules offer as much predictability, if not more predictability, than genuine legal systems.").

167 *Id.* at 37.

168 INTERNATIONAL DISPUTE RESOLUTION, *supra* note 37, at 91–130.

community to protect and preserve basic notions of morality and justice."[169]

Some national courts were also quick to embrace this notion.[170] Approximately 6% (a whopping 679 decisions out of 11,308) have referenced the notion of international public policy.[171] Yet, despite its prevalence, the scope and application of this notion remains quite ambiguous.[172]

Despite the desire to streamline the public policy doctrine by proponents of this approach, the notion of transnational public policy stems at least from three conflicting paradigms. As I explained

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169 Buchanan, *supra* note 79, at 531 (discussing public policy including Lalive's idea of transnational public policy).

170 The notion of international public policy also emerged in investment arbitration, which involves disputes between investors and sovereign states. One of the earliest cases that referred to the notion of international public policy was *Wena Hotels v. Egypt* in 2000. The case involved a lease for two hotels between a company established in the United Kingdom and a state-owned company in Egypt. Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, 41 I.L.M. 896, Award, ¶¶ 15, 111–17 (Dec. 8, 2000). In the case, Egypt raised the issue that the claimant tried to improperly influence the decision-making regarding the lease. *Id.* The tribunal agreed with the claimant that if such allegation is proven it would be contrary to "international bones mores," citing Professor Lalive's article on transnational public policy. *Id.* ¶ 111. Ultimately, the tribunal rejected claimant's claim concerning alleged illegal payment because the claimant "failed to present any evidence." *Id.* ¶ 117. Doubts have been expressed in the area of international investment arbitration. Following the two cases of ICSID (*World Duty* and *Inceysa*) ruling on public policy grounds, some scholars have questioned its necessity even in international investment arbitration. For instance, Donald Francis Donovan argues that an investment arbitration tribunal should not impose an international norm on both the state and the investor of a particular dispute. Donald Francis Donovan, *Investment Treaty Arbitration*, *in* MANDATORY RULES IN INTERNATIONAL ARBITRATION 286–90 (George A. Bermann & Loukas A. Mistelis eds., 2011). He poses the question that if a state has not assumed any international obligation by ratifying a treaty, why would an investment arbitration tribunal impose it on that particular state? *Id.* The tribunal has traditional legal principles such as good faith, fair dealing, or sanctions against fraud to rely on in cases involving corruption, bribery, and the like. *Id.* He questions the need "to resort to international public policy, rather than simply to rely on the law of the treaty against the backdrop of general international law." *Id.*; *see* W. Michael Reisman, *Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 849, 856 n.2 ("Certainly international investment law, if it looks to public policy, should look to international public policy, if it is admissible. The law applied in investment arbitration is authentically international and not national as in commercial arbitration.").

171 Public Policy Search, KLUWER ARBITRATION, http://www.kluwerarbitration.com (search for the phrases "international public policy," then "transnational public policy," "ordre public international," and "ordre public transnational.").

172 Professor Catherine Kessedjian finds "the most difficult part" of the inquiry is about transnational public policy. Catherine Kessedjian, *Transnational Public Policy*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 857, 866 (Albert Jan van den Berg ed., 2008).

elsewhere,[173] courts, tribunals, and scholars have tried to shape this theory based on three paradigms. The first paradigm is shaped around the idea that mandatory rules and public policy are derived from common international values. Under this approach, courts and tribunals should apply only supervening norms if there is "a strong and legitimate interest to justify the application of such a law in international arbitration." By emphasizing the fiction that the arbitration clause is autonomous and independent, the proponents of this view assert that even the law applicable to the contract cannot impose its mandatory norms. Under this view, common international values are the only acceptable limitation on arbitration.[174] An illuminating example is a case involving U.S. RICO[175] claims where the tribunal stated that the treble damages stipulated in the RICO statute[176] "is specific to the United States and is not found either in other national legal systems or in international arbitrations." In another case, the tribunal stated that the role of public policy in international arbitration is against the predictability of international commerce and should be limited to "state interests."[177]

In the second paradigm, the national courts decide what rules of their domestic public policy apply in the international context. In other words, under this approach, national courts can selectively apply certain norms of mandatory nature as they deem appropriate to the transnational disputes that come before them. The French and Swiss courts have long emphasized the French and Swiss notion of

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173 INTERNATIONAL DISPUTE RESOLUTION, *supra* note 37, at 119–28.

174 Following several tribunals, some scholars call this the "shared-values-test." BRUNNER, *supra* note 71, at 274; Case No. 6320 of 1992, 20 Y.B. Comm. Arb. 98–99 (ICC Int'l Ct. Arb.). In the case, a non-U.S. party seeks RICO damages from the defendant, a U.S. party, because of the mandatory nature of the RICO statute and its trumping nature over *lex contractus*. *Id.* The tribunal finds that no "strong and legitimate interest of the United States" is present in the case to justify the application of the RICO statute. *Id.*; *see also* Case No. 8938 of 1996, 24 Y.B. Comm. Arb. 177 (ICC Int'l Ct. Arb.) ("It has also been held that in international matters an arbitration clause is allowed per se in virtue of the general principle of its autonomy, an independent rule which gives efficacy to the arbitration clause independent of the law applicable to the contract and to the parties to the contract, with the sole limitation of international public policy, in particular as to the arbitrability of the dispute.").

175 Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961–1968 (1970).

176 One of the remedies stipulated in the statutes is that the injured party "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ." *Id.* § 1964.

177 JOANNA JEMIELNIAK, LEGAL INTERPRETATION IN INTERNATIONAL COMMERCIAL ARBITRATION 208 (2014).

international public policy.[178] As noted by a scholar, the international public policy is "confined to the violation of really fundamental conceptions of legal order in the country concerned."[179] By resorting to this approach, national courts as well as tribunals have restricted their supervision and reviewability of arbitral awards. In one case, a Swiss court did not find that corruption that occurred in another jurisdiction was against Swiss international public policy.[180] In another case, the tribunal did not apply Spain's Civil Procedure Code because it is not "part of Spanish international public policy."[181]

The third paradigm is shaped around the idea that transnational public policy norms are created independently from national laws. More importantly, these norms are derived from *lex mercatoria* or transnational commercial norms.[182] This view claims that arbitrators, free from national laws and policy, can apply norms emanating from commercial needs "on a case-by-case" and "ex post facto" basis, without necessarily bothering with the "interests of the territorial communicates" whose norms and laws are directly or indirectly

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178 Stephen M. Schwebel & Susan G. Lahne, *Public Policy and Arbitral Procedure*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 206 (Pieter Sanders ed., 1987).

179 Pieter Sanders, *Commentary*, *in* SIXTY YEARS OF ICC ARBITRATION, A LOOK AT THE FUTURE 364 (1984). He believes "for the sake of international commercial arbitration the distinction between domestic and international public policy is of great importance" and that is related to the prevailing thought that international public policy is "more restricted" than national public policy. *Id.*

180 The agreement between the French company and Hilmarton also stipulated that the latter would "coordinate administrative matters" with Algiers officials. In the ensured arbitration that was seated in Geneva, the tribunal found that the agreement violated Algerian mandatory rules (i.e., ban against corruption). Société Hilmarton Ltd. v. Société Omnium de Traitement et de Valorisation, Case No. 92-15.137, 20 Y.B. Comm. Arb. 663 (Mar. 23, 1994). The Swiss Court, however, rejected the argument by the arbitral tribunal as "arbitrary" and found that such an agreement would not violate public policy of Swiss law. *Id.* A synopsis is also available at http://newyorkconvention1958.org/index.php?lvl=notice_display&id=140 [https://perma.cc/56LC-85NM] (last visited Oct. 15, 2019). In another ICC case, the tribunal applied the Swiss law approach to the case because "the attitude of Swiss law towards secret commission agreements is in accordance with international public policy." Case No. 6248 of 1990, 19 Y.B. Comm. Arb. 132 (ICC Int'l Ct. Arb.). In that case, a party violated its fiduciary duty by promising to influence the principal's decision in exchange for remuneration. *Id.* Even though Swiss law was the governing law, the tribunal had to show that the violation was part of the international public policy of Switzerland. *Id.*

181 Case No. 5485 of 1987, 14 Y.B. Comm. Arb. 164 (ICC Int'l Ct. Arb.).

182 *See generally* KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA (1999); Alec Stone Sweet, *The New* Lex Mercatoria *and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627 (2006).

affected by the decision.[183] This view espouses the notion that international arbitration is not linked to any national jurisdiction,[184] is bound by transnational laws and norms,[185] and is limited only by transnational public policy.[186] This paradigm is similar to the common international values paradigm discussed above. However, it differs as it seeks to structure its norms not based on what is common among nations but what is best for the need of the international business community. For instance, the case discussed at the outset of this Article is illuminating.[187] In that case, a Maine corporation entered into a contract with a Belgian corporation related to construction of a factory in Bulgaria. An arbitration proceeding ensued after the Belgian company became insolvent. The claimant requested, *inter alia*, to pierce the corporate veil of the parent company. The sole arbitrator decided that the applicable law to the contract, New York law, did not apply in that case because the issue involved a third party (i.e., parent company). The law of the place of arbitration was also irrelevant because typically such laws are chosen without "any particular connection to the parties."[188] After rejecting the relevance of these laws, the sole arbitrator decided to find the law that "best fits the need

183 W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION & ARBITRATION 138–39 (1992) ("*Lex mercatoria* is a claim by certain members of the business community and arbitrators to break free of that process and to determine, for themselves and often on a case-by-case and sometimes ex post facto basis, what law and policy they will apply, without regard to the interests of the territorial communities that may thereby be affected.") [hereinafter SYSTEMS OF CONTROL]; *see also* Mayer, *supra* note 164, at 64–65 (rejecting that *lex mercatoria* is a legal system because it does not have a power of coercion and sanction).

184 JEMIELNIAK, *supra* note 177, at 203; Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 INT'L & COMP. L.Q. 358, 368 (1981) ("[T]he binding force of an international award may be derived . . . without a specific national legal system serving as its foundation."); *see also* K. Lipstein, *Conflict of Laws Before International Tribunals (ii)*, 29 TRANSACTIONS GROTIUS SOC'Y 51, 62 (1943) ("[I]nternational tribunals possess no *lex fori* in matters of private law. The *lex fori* of international tribunals consists of international law as developed by custom and treaties.").

185 Emmanuel Gaillard, *Thirty Years of* Lex Mercatoria*: Towards the Selective Application of Transnational Rules*, 10 ICSID REV. 208, 223 (1995); Gilles Cuniberti, *Three Theories of* Lex Mercatoria, 52 COLUM. J. TRANSNAT'L L. 369, 373–74 (2014). Some scholars believe that *lex mercatoria* does not have practical significance anymore. Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 523 (2005).

186 Gaillard, *supra* note 185, at 223 ("[A]rbitrators are free to retain a truly transnational conception of international public policy.").

187 ARNALDEZ ET AL., *supra* note 28, at 562–63.

188 *Id.* at 563.

of international business community."[189] On this premise, the sole arbitrator found a "unique and ideal opportunity" to apply "what is increasingly referred to as *lex mercatoria*."[190]

### *C. The Contractual View of Arbitration*

Alongside creating a pro-arbitration policy and limiting the national courts' reviewability based on public policy, courts, tribunals, and scholars have espoused the idea that arbitration is merely a contractual creation. Arbitration "is a matter of contract," as Justice Kavanaugh wrote in a recent U.S. Supreme Court decision.[191] The contractual view of arbitration limits the mandate of arbitrators to a simple task of resolving the contractual dispute before them and stripping the process from any moral, ethical, and public policy considerations. Arbitration is nothing but an extension of the contracts between parties, and arbitrators can act only as gap-fillers.[192]

Parties, and in the same vein the arbitrators adjudicating the cases, need to "vindicate [] contractual expectations—independent of any full inquiry into the moral and political legitimacy" of the contracts and arbitration.[193] The contractual view of arbitration is directly at odds with any policymaking by arbitral bodies. By this view, an arbitral tribunal cannot "rest[] its decision on [] public policy argument" and "impose its own policy preference."[194]

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189 The arbitrator briefly looked over the laws of New York and Belgium and quickly concluded that these two legal systems, if applicable, would reach the same result: "Even though the tribunal considers that it is preferable to apply the principles of international commerce dictated by the needs of the international market, it comes to the conclusion that the result is the same regardless of the application of New York Law, Belgian Law or of international principles." *Id.* at 564.

190 *Id.* The tribunal referred to *Dow Chemical v. Isover Saint Gobain*, (ICC Case No. 4131 1982) and *Westland Helicopters Limited v. AOI*, (ICC Case No. 38791/AS) as precedents, which lifted the corporate veil invoking international principles. ARNALDEZ ET AL., *supra* note 28, at 565.

191 Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019) (citing Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010)).

192 *See generally* Alan Scott Rau, *"Gap Filling" by Arbitrators*, UNIV. OF TEX. SCH. OF LAW (2014) (arguing that the Supreme Court's limitation of arbitrators to gap-fillers will create a cramped and disingenuous adjudication by arbitrators).

193 Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contrac*t, 59 DEPAUL L. REV. 431, 468 (2010).

194 Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 663 (2010); *see also* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (declaring that an arbitrator's task is merely to interpret contracts and not make public policy).

The contractual view of arbitration has paved the way for courts to construct a narrow and limited supervisory power for themselves. The U.S. Supreme Court "model[s] arbitration on adjudication" and thereby "expand[s] its scope" while emphasizing "arbitration's contractual roots in order to relax the law's scrutiny of the actual arbitral process."[195] As noted by scholars, despite the courts' emphasis on the contractual and consensual view of arbitration, the reality of the *nature* of arbitration is more complex. The nature of arbitration varies at least between "arbitration as gap-filling," based on the contractual view of arbitration, and "arbitration as judging."[196] The contractual view of arbitration was coupled with the view that arbitration is just another neutral forum with a special procedure.[197]

The contractual view of arbitration can be traced back to the *Mitsubishi* decision. Relying on a series of labor arbitration cases, the U.S. Supreme Court announced in *Mitsubishi* that the "parties' intentions control" over issues of arbitrability (and even public policy) similar to "any other contract."[198] This led to a body of law that "is driven by the same notions of party autonomy."[199] For example, in *Volt*, the U.S. Supreme Court framed legitimacy of arbitration by stating that arbitration "is a matter of consent, not coercion."[200] The contractual view of arbitration also led the Supreme Court to limit class

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195 Markovits, *supra* note 193, at 434. Professor Markovits suggests that "[a] better approach disaggregates arbitration into its third-party, judging type, which can then be assimilated to adjudication, and its first-party, gap-filling type, which can then be assimilated to contract." *Id.* at 435.

196 *Id.* at 433.

197 Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."). Other Supreme Court decisions have also echoed the idea that arbitration is just another forum selection. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 630–31 (1985); *Stolt-Nielsen S.A.*, 559 U.S. at 698; Equal Emp't Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 295–96 (2002); Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 199–201 (2000); Vimar Seguros y Reaseguros v. M/V Sky Reefer, 515 U.S. 528, 533–34 (1995); Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 289 (1995) (Thomas, J., dissenting); Rodriguez de Quijas v. Shearson, 490 U.S. 477, 482–83 (1989); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 36–37 (1988) (Scalia, J., dissenting); Shearson v. McMahon, 482 U.S. 220, 255 (1987).

198 *Mitsubishi Motors Corp.*, 473 U.S. at 626 (citing Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960)).

199 George A. Bermann, *Ascertaining the Parties' Intentions in Arbitral Design*, 113 PENN ST. L. REV. 1013, 1013 (2009) (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995)); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989).

200 *Volt Info. Scis., Inc.*, 489 U.S. at 479.

action waivers in arbitration because "private arbitration agreements" should be "enforced according to their terms."[201]

Arbitral tribunals have also adopted the contractual view of arbitration in cases involving matters of public policy. One tribunal emphasized that the arbitration clause at issue was enforceable due to the parties' autonomy—even "independent of the law applicable to the contract" and with "the sole limitation of international public policy."[202] Another tribunal held that the "parties' intention" can limit warranties to "those provided in the Contract," which can be "in lieu of all others, 'whether statutory, expressed or implied.'"[203]

The contractual view of arbitration is in tension with the doctrine of public policy as applied by arbitral tribunals.[204] The contractual view of arbitration is premised on the notion that the will of the parties results in arbitration. Arbitration, in this view, cannot impose itself and expand its reach to adjudicate broader public policy that encompasses the unwilling parties.[205] Moreover, in the context of mandatory and large-scale consumer and employment contracts, the contractual view of arbitration in the domestic setting has led to "degradation" and "undervalu[ation] of private law since consent and will of the parties have eroded as the center of contract arbitration agreements."[206] This

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201 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (citing *Volt Info. Scis., Inc.*, 489 U.S. at 478).

202 Case No. 8938 of 1996, 24 Y.B. Comm. Arb. 177 (ICC Int'l Ct. Arb.).

203 Case No. 6320 of 1992, 20 Y.B. Comm. Arb. 103 (ICC Int'l Ct. Arb.).

204 Markovits, *supra* note 193, at 483 ("The first-party arbitration of statutory claims therefore does not, as critics commonly suppose, reflect an encroachment of contract on adjudication; rather, it reflects an encroachment of contract on legislation, and in particular, on the authority of the democratic process that produces legislation.").

205 *Id.* at 486.

> Accordingly, a party may always dispute that she had the intention to be bound in a particular manner, and this claim must always, ultimately, be heard by the law—that is, by a court or other third-party tribunal. To be sure, if the court or tribunal determines that the contracting party intended to have a first-party arbitrator fill in the gaps in her intentions, then that arbitrator may set to work. But the first-party arbitrator, being merely a creature of the contracting party's intentions, cannot possibly bootstrap herself into the third-party, legal obligation on which contractual solidarity depends. Contractual solidarity simply cannot get going without third-party supervision because the point of view of the contract cannot subsist save in a third-party medium.

In another piece, I argue that arbitration should be an avenue for adjudication of public policy matters under courts' supervision. *See Arbitrating Public Policy*, *supra* note 21.

206 Resnik, *supra* note 29, at 2810. ("[T]hrough a designated dispute resolution system to be an enforceable 'contract' undervalues private law, rightly admired for facilitating cooperative agreements, reflecting the will of the participants able to tailor obligations to

holds true for other forms of arbitration as well, particularly in matters involving public policy (e.g., statutory rights).

In this view, some scholars and practitioners suggest that the tribunal should apply only those public policy norms that are established, objective, and high stakes (with the likelihood of being challenged before national courts).[207] Regardless of whether such objective public policy is easily discernible, this view also aims to relieve the arbitral tribunals from engaging or litigating matters of less established public policy.

Lastly, it is important to note the irony of the contractual view of arbitration: despite the push toward arbitration by enforcing a contract according to its terms, the courts have simultaneously limited the available contractual defenses.[208]

## CONCLUSION

Courts are celebrating reducing their workload while increasingly more disputes are adjudicated through the private dispute resolution mechanism. As a result, many domestic disputes and almost all transnational commercial disputes are resolved behind closed doors. Against this backdrop, the legal infrastructure for dispute resolution gave courts the ability to review the process of private dispute resolution, albeit very restrictedly. One of the limited substantive avenues to review arbitral decisions is public policy.

Drawing on novel empirical research from the last three decades, this Article shows, however, that courts generally do not apply or even engage this limited reviewability power. Similarly, courts have not developed any systematic or predictable approach to their reviewability based on public policy. For example, in the context of international commercial arbitration, in 1985 the U.S. Supreme Court ruled in *Mitsubishi* that it would "condemn[]" arbitration agreements "as against public policy" if such agreements amounted to "prospective

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their particular needs.") (citing to MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 10–28 (2013)).

207 JAN PAULSSON, THE IDEA OF ARBITRATION 136–37, 229 (2013); *see also* Farshad Ghodoosi, Book Note, *Recent Publications*, 39 YALE J. INT'L L. 301, 400 (2014) (reviewing JAN PAULSSON, THE IDEA OF ARBITRATION (2013)).

208 "The Court, therefore, has rejected saving clause salvage where state courts have invoked generally applicable contract defenses to discriminate 'covertly' against arbitration." Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1645 (2018) (Ginsburg, J., dissenting) (citing Kindred Nursing Ctr. Ltd. v. Clark, 581 U.S. 1 (2017)); Resnik, *supra* note 29, at 2876.

waiver of party's right to pursue statutory remedies."[209] Following this ruling, though, the Court has not advanced a more structured approach to public policy but has moved in the opposite direction, further limiting this avenue of reviewability.[210] The U.S. Supreme Court's lack of "structured safeguards"[211] is an example of the global trend toward judicial reviewability of domestic and international arbitration.

The story is similar in arbitral tribunals. Courts and arbitral tribunals alike have reduced, decentralized, and diffused the role that public policy could play in safeguarding global private dispute resolution. In light of the data shown here, this Article argues that the prevailing narrative about legitimacy (and even supremacy) of arbitration has led to courts' extremely limited reviewability. With the case study of the United States as the leading jurisdiction behind globalization, this Article argues that the tripartite system of pro-arbitration policy, international public policy doctrine, and the contractual view of arbitration has left the courts and tribunals skeptical and even inimical to any public policy review.

Elsewhere, I have argued for a more structured approach toward public policy and advanced that both courts and arbitral tribunals should embark on a more active role in adjudicating matters of public policy.[212] Similar to *Mitsubishi*, the courts should set out more clear parameters for courts' substantive review of arbitral awards. This would make arbitration more transparent while enabling courts to protect public interest in business disputes. The pro-arbitration bias has called for a narrow and restrictive interpretation of public policy.[213] This approach, as shown in the data above, has created incongruent decisions and has not resulted in lowering the number of challenges based on public policy. A haphazard approach toward public policy makes it "the 53rd card in the deck" and an "unruly horse."[214] In effect,

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209 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).

210 *See generally* Chukwumerije, *supra* note 9.

211 Resnik, *supra* note 29, at 2809 ("[T]he [United States Supreme] Court has spun off decision making without imposing structured safeguards.").

212 *The Concept of Public Policy in Law*, *supra* note 23, at 700–01; *Arbitrating Public Policy*, *supra* note 21, at 258–69.

213 BORN, *supra* note 27, at 3421.

214 SYSTEMS OF CONTROL, *supra* note 183, at 854–55; JAN PAULSSON, THE IDEA OF ARBITRATION 131 (2013) ("*Richard v. Melish* tells us nothing about what it would actually take for a contract to be held to contravene public policy. Therefore it is useless as authority; everyone can agree that unruly horses should not be ridden, but that leaves the debate at square one.").

the current approach to public policy resembles starry nights where it is hard to predict when the next shooting star passes. Sporadic cases, similar to shooting stars, affect the outcome of cases dealing with public policy but with no systematic approach. The data above suggest a disharmony in which public policy arguments are rising, while courts—and to a lesser degree arbitral tribunals—do not engage such arguments in a systematic way, if at all. The courts and arbitral tribunals should develop a more coherent *jurisprudence constante* for their reviewability discretion that's not simply based on a permissive approach toward arbitration. Until then, the data suggest that the last safeguard of national courts has fallen. Unless there is an overhaul of national courts' reviewability of transnational dispute resolution, this trend will continue.