

Arbitration Exceptionalism

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Table of Contents

Introduction	2
I. Arbitration and Litigation as a Zero-Sum Game	7
A. <i>Arbitration Is Good Because Litigation Is Bad</i>	9
B. <i>The Rise of Arbitration Exceptionalism</i>	12
II. The Contradictions Underlying Arbitration Exceptionalism	18
A. <i>Arbitration Depends on Litigation</i>	19
B. <i>How Different Are Litigation and Arbitration?</i>	22
C. <i>Choosing Between Arbitration and Litigation</i>	23
D. <i>Of Substitutes and Complements</i>	26
III. Contrasts: Arbitration and Litigation Outside the Federal Courts	27
A. <i>New York</i>	27
B. <i>UK</i>	29
C. <i>Russia</i>	30
IV. Getting From the Zero-Sum Game Approach to Complementarity	32
A. <i>Promoting Complementary</i>	32
B. <i>The Role for U.S. Courts</i>	35
1. Roll Back Litigation Isolationism	35
2. Roll Back <i>Stolt-Nielsen</i>	36
3. Regulate and Support International Commercial Arbitration.....	37
4. Special role for states / state courts? Especially New York?	38
Conclusion	38

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Introduction

In recent decades, U.S. courts have become increasingly anti-litigation,¹ while at the same time, increasingly pro-arbitration.² These attitudes may at first seem perfectly consistent with each other. If arbitration and litigation are opposite forms of dispute resolution, then of course being in favor of one means being opposed to the other.³ These attitudes make sense insofar as arbitration addresses the shortfalls of litigation, for example, being speedy and efficient,⁴ where litigation is slow and wasteful. In addition, both positions seem to favor large corporate businesses, who supposedly disdain litigation but adore arbitration.

Many scholars have documented each of these trends separately⁵ and criticized them for a plethora of reasons.⁶ I have argued elsewhere that the anti-litigation trend is especially strong, pernicious, and self-defeating in the transnational litigation context.⁷

This Article examines these rising barriers to transnational litigation in U.S. courts—a trend I have called litigation isolationism—in relation to the Supreme Court’s growing love affair with arbitration, and in particular the effects of these two trends on the interaction between U.S. courts and international commercial arbitration. It argues that the view of litigation and arbitration as antagonists is wrong-headed. Instead, litigation and arbitration of international commercial disputes should be viewed as having a relationship that is both complementary and competitive. By embracing this view, U.S. courts would better serve their stated pro-arbitration policies.

Instead, the combination of the anti-litigation and pro-arbitration developments has yielded a uniquely American phenomenon that I will refer to as “arbitration exceptionalism.” Arbitration exceptionalism is not about unusual American extensions of pro-arbitration policies into unwarranted areas⁸ or unusual American practices in international arbitration.⁹ Instead, it

¹ [string cite].

² See, e.g., Imre Szalai, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (2013); Christopher Leslie, *The Arbitration Bootstrap*, 94 *TEX. L. REV.* 265, 301 (2015).

³ See, e.g., Michael A. Helfand, *Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm*, 124 *YALE L.J.* 2994 (2015); Szalai, *supra* note __; Leslie, *supra* note __.

⁴ See Brooke Coleman, *The Efficiency Norm*.

⁵ On the pro-arbitration trend: __. On the anti-litigation trend: __.

⁶ See, e.g., Resnik; Glover; etc.

⁷ Pamela K. Bookman, *Litigation Isolationism*, *STANFORD L. REV.*

⁸ Those have been examined elsewhere. See Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 *LOY. U. CHI. INT’L L. REV.* 81 (2012).

⁹ As George Bermann has noted, the particulars of U.S. interpretation and application of the New York Arbitration Convention have some distinctive features, but they are not so completely “dissonant with prevailing international understandings” as to impair the Convention’s functioning or wreak other havoc. George Bermann, *American Exceptionalism in International Arbitration*, *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS* 1, 21 (2011), http://booksandjournals.brillonline.com/content/books/b9789004231269_002.

is about the clash of American procedural exceptionalism,¹⁰ federal courts' backlash against it,¹¹ and the Supreme Court's purported enthusiasm for arbitration. U.S. courts' adoration of arbitration stands in stark contrast to their frequent denigration of the system of U.S. litigation.¹² Together, those views have informed countless Supreme Court decisions over the past few decades. They have important implications for U.S. courts' role in supporting international commercial arbitration and in the market for international commercial dispute resolution.

Examination of this phenomenon reveals that the seemingly consistent anti-litigation and pro-arbitration trends in fact butt heads at several points. Arbitration exceptionalism is based on a fundamentally flawed vision that litigation and arbitration exist in a zero-sum game, rather than in a relationship that should be complementary as well as competitive. The flaws underlying this arbitration-is-good-because-litigation-is-bad view have contributed to unappreciated legal developments that directly undermine the Supreme Court's stated pro-arbitration policy.

This Article focuses on the context of international commercial arbitration in order to home in on the Court's pro-arbitration policy in its most legitimate form.¹³ Scholars have criticized the Supreme Court's pro-arbitration decisions over the past few decades for enforcing arbitration clauses in consumer contracts and other contracts of adhesion, where parties' consent to arbitration is doubtful and companies can use arbitration clauses to circumvent class actions, prevent plaintiffs from asserting state and federal statutory rights to court access, and enforce other clauses that might otherwise be deemed unconscionable.¹⁴ U.S. courts' extension of their embrace of arbitration beyond the business-to-business context is exceptional to the United States, as Amy Schmitz has documented,¹⁵ and troubling.¹⁶

The U.S. attitude toward international commercial arbitration, however, is typical in some ways. The United States, like many nations, has embraced arbitration as a vital part of

¹⁰ See Richard Marcus, *American Exceptionalism*, in GOALS FOR CIVIL LITIGATION, GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS 123 (Alan Uzelac, ed., 2014); Richard Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709 (2005).

¹¹ Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 Tex. L. Rev. 1097, 1108 (2006); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 Geo. Wash. L. Rev. 353, 368 (2010); Subrin & Main, *supra* note ____.

¹² See, e.g., *Twombly* (describing discovery as unnecessarily costly and in terrorem).

¹³ Like Dammann and Hansmann, this Article is concerned "only with disputes between merchants and not with litigation in general," and focuses on "litigation in which all parties consent to employing the foreign court, either by means of a choice of forum clause in their original contract or by mutual agreement after their dispute arises." Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 6 (2008).

¹⁴ *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 301 (2015).

¹⁵ Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 81 (2012).

¹⁶ See, e.g., Judith Resnik; J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052 (2015), etc.

ensuring predictability and orderliness in international commerce.¹⁷ But it could do more; its antagonism toward domestic litigation is a thorn in the side of its pro-arbitration policy. Part of promoting that policy further requires correcting the mistaken view that arbitration and litigation are sworn enemies.

This Article brings together literature about the relationship between national courts and international commercial arbitration,¹⁸ about raising barriers to court access in U.S. courts in general¹⁹ and in transnational cases in particular,²⁰ and about the unintended ramifications of these developments on U.S. courts' pro-arbitration policies.²¹ In advocating complementarity between litigation and arbitration, the Article provides a partial response to those who argue global commercial litigation should overtake arbitration,²² and those who argue international commercial arbitration should overtake litigation.²³

This Article begins by examining U.S. judicial attitudes towards litigation when courts are discussing arbitration. Part I reveals what seems to be a contempt for litigation—which is consistent with scholarly analysis of anti-litigation developments²⁴—and an appreciation of arbitration as the potential solution to the problems of litigation.²⁵ The history of these attitudes can be traced back to the 1970s, when Chief Justice Burger prominently criticized Americans for seeing litigation as a cure-all for society's ills at the same time that the Supreme Court began reversing previous judicial antipathy towards enforcing forum selection clauses and arbitration clauses. These pro-arbitration trends began in the international commercial arbitration context, where arguments in favor of promoting arbitration are probably at their peak, and concerns about lack of consent to arbitration are easiest to monitor. The Court focused on the importance

¹⁷ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (“A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”).

¹⁸ See, e.g., S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. Disp. Resol. 1, 4 (2012); W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 Am. Rev. Int'l Arb. 5, 34 (2010); Luca G Radicati di Brozolo, *The Impact of National Law and Courts on International Commercial Arbitration: Mythology, Physiology, Pathology, Remedies and Trends*, [2011] Paris J. Int'l Arb. 663.

¹⁹ [string cite]

²⁰ *Litigation Isolationism*; Childress, N.C. L. Rev.; Noll, Stan. J. Complex Litig.

²¹ Silberman & Simowitz, *What Hath Daimler Wrought*, N.Y.U. L. Rev.

²² Jens Dammann, Henry Hansmann, *Globalizing Commercial Litigation*, 94 Cornell L. Rev. 1 (2008) (arguing that public litigation has important advantages over arbitration for international commercial disputes, and proposing “adjustments in legal culture” to pave the way for national courts to attract more foreign litigants).

²³ Giles Cuniberti, *Fordham J. Int'l L.*

²⁴ See, e.g., Subrin & Main; Burbank & Farhang; Arthur Miller.

²⁵ See *infra* Part I.A.

of enforcing arbitration clauses for issues like promoting international trade, protecting international comity, and preserving predictability in the international legal system.

A vision emerged of arbitration, especially international commercial arbitration, as a replacement for flawed domestic courts. Part II explains, however, that underlying these attitudes seems to be a fundamental misunderstanding of the way that arbitration and litigation interact. Arbitration relies on national law and national courts to function and to have legitimacy. Though most arbitrations do not end up calling upon national courts for assistance, there are many points from enforcing arbitration clauses to recognizing and enforcing judgments (and several in between) where courts may be called upon.²⁶ In addition, transsubstantive procedural rules that apply to all kinds of litigation, like personal jurisdiction and forum non conveniens, can dictate the extent to which courts are available to play these important roles in supporting arbitration. Thus, when these kinds of rules and other court-access doctrines are limited, so too is the availability of courts to support arbitration.

Supreme Court rhetoric seems to paint arbitration and litigation as opposite alternatives for dispute resolution that are not only presented in “good guy” vs. “bad guy” lights, but also differing in their particulars like night and day. In fact, however, international commercial arbitration is routinely criticized for becoming increasingly similar to litigation. The choice of arbitration in international commercial contracts is presumed to be an easy and clear-cut one, but empirical research into the extent to which businesses actually choose arbitration, especially in the United States, tells a mixed story.

These underlying misunderstandings have had a real impact on Supreme Court jurisprudence about arbitration. In the 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International*,²⁷ the Supreme Court took some highly unusual steps in reviewing an arbitral tribunal’s decision to allow an arbitration to proceed on a class basis. It meddled in a pending arbitration before the arbitral panel had rendered a final award and reversed the arbitrators’ determination of a question that the parties had agreed to entrust to the arbitrators (not the courts). The Supreme Court justified this extraordinary step by arguing that the arbitrators had “exceeded their authority” by permitting arbitration to proceed on a class basis, but offered almost no guidance on what “exceeding authority” would mean in future contexts. These steps garnered substantial criticism from both the dissent and from commenters for undermining the arbitral process both in that case and more generally.²⁸

Most interestingly for our purposes, the decision hinged significantly on the majority’s view that the parties’ original arbitration clause indicated they were choosing arbitration-not-litigation, and the arbitrators’ decision was ultra vires because it allowed class arbitration, which turned arbitration into a process that looked and smelled too much like litigation. The

²⁶ See Korzun & Lee; *infra* ___.

²⁷ 559 U.S. 662 (2010).

²⁸

decision shows the pernicious effects of understanding arbitration and litigation as stark opposites rather than competing but complementary systems of dispute resolution.

This zero-sum game attitude toward litigation and arbitration is not the only way to be supportive of international arbitration. Part III draws on comparative analysis to examine other approaches. Many other jurisdictions—from New York and the UK, and increasingly throughout Europe and into Asia—combine liberal enforcement of arbitration clauses and enforcement and recognition of arbitral awards with national legal systems that encourage access to international litigation. Several European countries, particularly in the wake of Brexit, are developing English language international commercial courts, seeking to offer competitive national court alternatives for international commercial disputes. Many of these same countries strive to be at the top of the list of choices for arbitral seats. New York State has been a forerunner in this market for a long time—both in terms of promoting its commercial division²⁹ and its prominence as a seat for international arbitration.³⁰

By contrast, Russia is an example of a country that has embraced outsourcing law—through forum selection, arbitration, and choice-of-law clauses, among other things—to the detriment of the development of its national courts. The Russian example shows that excessive reliance on private property protections available only to the rich, without a corresponding embrace of domestic legal systems, can further entrench a society with a weak judiciary and weak rule of law.

Building on the understanding that arbitration depends on litigation, even while judicial rhetoric undermines it, reveals a need for litigation to do more to support arbitration.³¹ Part IV discusses how courts and commentators should think about the complementary and competitive relationship between litigation and arbitration. It then provides a number of pragmatic suggestions for how to translate those attitudes into legal policies and doctrines. U.S. courts should first recognize the effects of narrowing judicial access on their pro-arbitration policies. Areas such as personal jurisdiction and forum non conveniens may need to be revised in order to provide better support to international arbitration as well as to shore up the potential for U.S. courts to compete in the market for international commercial dispute resolution. Second, courts should reconsider the situations in which they intervene in arbitration. *Stolt-Nielsen* is a prominent example of an opportunity for correction. But there are other questions about how litigation can be used in the shadow of arbitration to help support the legitimacy of that institution while simultaneously building and promoting the legitimacy of the judicial system itself. In the final sections, the Article considers a few different possible

²⁹ Cite transcript of anniversary event of commercial division, with judges and high-profile business lawyers singing the praises of the courts and judges.

³⁰<https://nyiac.org/> (“Welcome to NYIAC: The Place to Be for International Arbitration”).

³¹ See *infra*, Part IV.

instances where courts could do more—or less—to interfere with arbitration in a way that would support the legitimacy of both systems.

I. Arbitration and Litigation as a Zero-Sum Game

Commentators often discuss litigation and arbitration as dueling options for dispute resolution.³² Some state the options neutrally, explaining the pros and cons of each without stating a preference.³³ Litigation is discussed as being “procedurally rigorous but expensive” while arbitration is thought to be “faster and cheaper but with fewer procedural safeguards.”³⁴ On this neutral view, one would assume that parties bargaining in arm’s length transactions might select one or the other depending on the circumstances. Arbitration and litigation compete with each other,³⁵ but the presence of both yields a better world than one in which there were only one.

Many litigants, lawyers, and even courts, however, explain the arbitration-litigation divide as a zero-sum game.³⁶ According to this view, arbitration can and should displace litigation as a dispute resolution mechanism (at least in certain circumstances).³⁷ Moreover, arbitration is

³²

³³ See, e.g., Michael A. Helfand, *Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L. J. 2992, X (2015).

³⁴ Michael A. Helfand, *Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L. J. 2992, X (2015). See also Julie K. Bracker & Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 COLUM. BUS. L. REV. 1, 2 (2003) (explaining the differences between arbitration and litigation and how those differences can be seen as strengths or weaknesses). “[M]ost of these advantages have substantial negative implications as well.” In exchange for speed, most arbitral decisions do not include a written opinion. The expert arbiters may not be experts in the law, “and in any event are not bound to follow the law at all.” *Id.* at 2-3. Limits in discovery are exchanged for the ability to develop facts. “[J]udicial review is extremely limited in scope and extraordinarily deferential to arbitrators,” raising “the threat of permanent harm from repeat player bias and other fairness concerns.” *Id.* at 3.

³⁵ E.g., Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, X (2010) (“[A]rbitration and litigation are substitutes for each other. Providers of arbitration services—individual arbitrators and administering institutions like the American Arbitration Association—compete with providers of litigation services—courts established by state governments and the federal government—as if they are selling competing products”).

³⁶ Cf. Richard Marcus, *Misgivings About American Exceptionalism: Court Access as a Zero-Sum Game*, REVISITING PROCEDURAL HUMAN RIGHTS: FUNDAMENTALS OF CIVIL PROCEDURE AND THE CHANGING FACE OF CIVIL JUSTICE (Alan Uzelac & C.H. Van Rhee Eds., Intersentia 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3042903.

³⁷ See Daniel Markovits, *Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 433 (2010) (articulating, and criticizing, this commonly assumed “displacement thesis”); Gilles Cuniberti, *Beyond Contract—the Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT’L L.J. 417, X (2009). Several scholars, of course, have challenged the conception that arbitration and litigation are opposite sides of the same dispute resolution coin. See, e.g., Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30–31 (1979) (contesting that litigation’s only or even primary purpose is dispute resolution); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 445 (1982) (same); see also Alexandra Lahav [In Defense of Litigation book

an attractive mechanism for resolving disputes in large part because litigation is such an unattractive one.³⁸ When scholars praise arbitration as offering “speed, economy, informality, technical expertise, and avoidance of national fora,”³⁹ the contrast between arbitration and litigation is not subtle. Implicit, and sometimes explicit, in this positive view of arbitration is a negative view of litigation—as slow, inefficient, overly formal, inexpert, and, particularly in the international context, potentially biased in favor of its nationals.⁴⁰ In a preeminent study of international arbitration stakeholders, the two most valuable characteristics of arbitration were the enforceability of awards and the ability to avoid certain legal systems and national courts.⁴¹

This zero-sum-game narrative is particularly prevalent in the context of international commercial arbitration, an area where the benefits of arbitration (as opposed to domestic court litigation) seem clearest and the problems arising from lack of consent to arbitration seem least likely to occur.⁴² Gilles Cuniberti has suggested that international commercial arbitration be the default in international commercial contracts;⁴³ a leading treatise suggests that there is no longer

(2017)]. And some scholars contest that dispute resolution is arbitration’s only purpose, at least in some contexts. *See, e.g.,* Helfand, *The Religious Arbitration Paradigm*, X YALE L. J. X, X (2015).

³⁸ *See, e.g.,* Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, CATO INST. 1 (2002), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa433.pdf> (“Arbitration is a private-sector alternative to the government court system. Compared with litigation, arbitration is typically quick, inexpensive, and confidential. It generally operates in a commonsense way, without all of the legal jargon and procedural maneuvering that go on in court. Unlike judges, arbitrators are chosen by the parties to the dispute. Cases are resolved by respected professionals with technical, as well as legal, expertise.”).

³⁹ George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. INT’L L. 1, 2 (2012); *see also* Edna Sussman _____.

⁴⁰ The concept is not new. When the London commercial arbitration tribunal was first inaugurated in 1892, one commenter wrote: “this Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.” Hensler & ___ (quoting E. Manson, *The City of London Chamber of Arbitration*, 9 LAW QUARTERLY REVIEW 86 (1893)). Anecdotes about cases like *Loewen* drive these fears. *See* William Dodge, *Loewen v. United States: Trials And Errors Under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563, X (2002). But modern studies do not substantiate them. *See* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122-23 (1996) (survey showing the opposite).

⁴¹ QUEEN MARY UNIVERSITY OF LONDON, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 6 (2015), <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>.

⁴² Litigation enthusiasts, however, are rarely anti-arbitration in all contexts. Rather, in U.S. debates at least, they tend to object to enforcing arbitration clauses in contexts like contracts of adhesion, where it does not appear that both parties have consented to arbitration; or in other contexts where people believe the rights being adjudicated are public and therefore worthy of a public forum for adjudication. *See* Hensler & ___ (describing the debates in domestic, international commercial, and investor-state arbitration).

⁴³ Cuniberti, *supra* note ____.

any debate that international commercial arbitration is a superior dispute resolution mechanism to litigation.⁴⁴

This Part will first explore the prevalence of the view that arbitration is good because litigation is bad. It demonstrates that courts themselves often assume this position as a jumping off point for their analysis in arbitration cases. It then charts the United States' trajectory toward arbitration exceptionalism.

A. Arbitration Is Good Because Litigation Is Bad

Around the world, courts' attitudes toward arbitration—especially international commercial arbitration—has liberalized greatly in the past few decades.⁴⁵ The United States is no exception.⁴⁶ What's unusual about the U.S. experience is the way in which those attitudes toward international arbitration have (1) bled into attitudes toward arbitration in other (domestic) contexts through the judicial expansion of the Federal Arbitration Act (FAA)⁴⁷—an issue that has received extensive scholarly attention and criticism⁴⁸—and (2) developed hand-in-hand with a

⁴⁴ Redfern, *supra* note X, at § 1.129 (“At one time, the comparative advantages and disadvantages of international arbitration versus litigation were much debated. For one of the most effective, and certainly the most entertaining, critiques of arbitration see Kerr, ‘Arbitration v litigation: The Macao Sardine case’, in Kerr, *As Far As I Remember* (Hart, 2002), Annex. That debate is now over: opinion has moved strongly in favour of international arbitration for the resolution of international disputes.”).

⁴⁵ See Luca G Radicati di Brozolo, *Arbitration, International Commercial*, in 1 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 87-97 (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio, eds. 2017) (“The New York Convention’s pro-arbitration bias has unleashed a competition amongst national legal systems. As a result of this, and of the influence of the UNCITRAL Arbitration Model Law (United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration as adopted on 21 June 1985, and as amended on 7 July 2006, UN Doc A/40/17 and A/61/17; →Arbitration, (UNCITRAL) Model Law), the past decades have witnessed a surge in the pro-arbitration attitude of states and a convergence, and in some respects almost a de facto harmonization, amongst national arbitration laws.”); Gilles Cuniberti, *Beyond Contract—The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT’L L.J. 417, 418–19 (2009) (“The steps taken by many jurisdictions to liberalize their laws of arbitration certainly reflect to a certain extent a willingness, if not an eagerness to attract as much arbitration as possible within their borders in order to take advantage of the invisible benefits that may come with this activity. There is clear competition at the international level In Europe, a match of giants opposes France and Switzerland, with the United Kingdom as a runner-up. Judges in each of these jurisdictions are very much aware of the moves made in favor of arbitration by the courts of other jurisdictions, and try to be at the forefront of the liberalization of arbitration. Jurisdictions willing to enter into the market try to take radical steps to market themselves.”).

⁴⁶ See, e.g., Daniel Markovits, *Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 433 (2010) (calling the federal courts “arbitration enthusiasts” and the Supreme Court one of “arbitration’s most enthusiastic defenders”).

⁴⁷ See, e.g., Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 270 (2015); Schmitz, *American Exceptionalism in Commercial Arbitration* _____.

⁴⁸ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, X (1982); Glover _____. For prominent critiques of binding predispute arbitration, especially in the consumer and employment

growing antagonism toward domestic litigation.⁴⁹ This Article attempts to isolate the second issue from the first. To do so, it focuses mainly on the international commercial context.

There are plenty of reasons for courts around the globe and in the United States to support parties' freedom to choose to resolve their disputes through arbitration. For example, supporting the ability to arbitrate champions party autonomy, provides predictability, supports structure and orderliness in commercial transactions, and promotes international trade.⁵⁰ In the international commercial context, the argument in favor of arbitration is especially strong: It enables parties from different nations to choose a neutral and expert arbiter for potential disputes and, if the arbitration clause will be enforced, to create some much-desired predictability.⁵¹ It is no wonder that the Supreme Court's major shifts to enforcing arbitration and forum selection clauses occurred in cases involving international commercial contracts, with the Court explaining that that context weighed heavily in favor of enforcing the parties' choices in those contracts.⁵²

contexts, see, for example, Richard M. Alderman, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005). For contrary views, see, for example, Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695; Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549 (2008); and Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-64 (2006).

⁴⁹ The antagonism toward domestic litigation focuses primarily on litigation that seeks to enforce regulatory policies through profit-motivated lawyers. See JACK COFFEE, ENTREPRENEURIAL LITIGATION; Chamber of Commerce; [more]. The judicial endorsement of these attitudes, however, has occurred primarily through transsubstantive procedural reform. See BURBANK & FARHANG, RIGHTS AND RETRENCHMENT. As such, it has the potential to affect and limit even the kinds of litigation that pro-business interests like the Chamber of Commerce should want to preserve. See, e.g., O'Hara O'Connor & Drahozal, *Tex. L. Rev.* (article about arbitration clauses in innovation contracts that preserve court access rights). There is some evidence that the effect of procedural limitations on court access have a substance-specific effect—cutting down on entrepreneurial tort litigation or discrimination claims, for example, but preserving a path for contract disputes—but the empirical data is difficult to assess. [Alexander Reinert, *Measuring the Impact of Plausibility Pleading*, 101 U. Va. L. Rev. 2117 (2015); studies explaining why examining the impact of Twombly / Iqbal is so hard; Bill Hubbard. Cf Maria Glover on transsubstantivity and R23 in Penn symposium].

⁵⁰ See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, X (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, X (1972). Some might also argue that courts appreciate that arbitration limits their work load. *But cf.* [case saying courts can't order arbitration sua sponte].

⁵¹ See, e.g., Bermann, *supra* note X, at X; Cuniberti, *supra* note X, at X; Sussman, *supra* note X, at X. There are also arguments in favor of arbitration that go beyond its role as a dispute resolution mechanism. See Helfand, *supra* note X, at X (questioning that that's arbitration's only purpose); Markovits, *supra* note X, at X (similar). *But see* Dammann & Hansmann, *supra* note X, at X (arguing that arbitration affords less predictable results because arbitrators want to provide a resolution that pleases both sides rather than following more predictable legal reasoning).

⁵² See *infra* Part I.B; *Scherk*, 417 U.S. at 515 (finding it "significant ... and ... crucial" that the contract

One might be surprised, however, that courts—the stage for litigation—would advocate that arbitration is a good choice because litigation is a bad one. Some separation-of-powers theories suggest that courts would have incentives to collect and expand their power,⁵³ not relinquish their jurisdiction in the face of forum selection and arbitration clauses while throwing litigation under the bus. And some commenters suggest that courts have reputational and other incentives to try to sell themselves as favorable fora, at least for certain kinds of disputes.⁵⁴ According to many accounts, “[n]ational courts are depicted as defending their jurisdictions to decide disputes with a center of gravity within their sovereign borders against overreaching or encroachment by international arbitral tribunals.”⁵⁵

Indeed, there is a robust and growing market of courts and arbitral tribunals competing for complex international business dispute resolution.⁵⁶ London and New York have been leaders in this market for over 100 years.⁵⁷ In the past few years (and some in the past few months), France, Germany, the Netherlands, Dubai, Singapore, and many other jurisdictions have entered the ring with specialized national courts that focus on international commercial disputes.⁵⁸ Particularly in the wake of Brexit, which may compromise London’s role as the forum-of-choice for forum selection clauses in international contracts,⁵⁹ several other European countries have taken steps to open their own English-language international commercial courts.⁶⁰ U.S. federal courts have not embraced a similar opening for expansion.⁶¹

Ten years ago, Professors Damann and Hansmann advocated more globalized commercial litigation through increased recognition of forum selection clauses and enforcement of foreign awards.⁶² In that time, the United States has endorsed a liberal view towards these bookends that support transnational litigation in domestic courts abroad, but have also been cutting down on transnational litigation at home.⁶³ Meanwhile, U.S. courts have been embracing

involved was a “truly international agreement”); *The Bremen*, 407 U.S. at X.

⁵³ Cf. Darryl Levinson, *Empire Building Government in Constitutional Law*, X HARV. L. REV. X (2005).

⁵⁴ See Klerman & Reilly, *Forum Selling*, X U.S.C. L. REV. X, X (YEAR).

⁵⁵ Korzun & Lee, *supra* note X, at 312 (citing Alan Scott Rau, *Crossing the Threshold: Arbitral Jurisdiction After BG Group* ___, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492627).

⁵⁶ See *infra* at __ (describing a number of foreign countries discussing opening English-language international commercial courts, particularly post-Brexit).

⁵⁷ See *infra* __.

⁵⁸ See Shayna Posses, *Paris Launches New International Dispute Division*, LAW360 (Feb. 13, 2018, 8:11 PM), <https://www.law360.com/articles/1012042/paris-launches-new-international-dispute-division>; [add or cross-reference citations from Part IV].

⁵⁹ See Vogenauer.

⁶⁰ *Id.*; Georgia Antonopoulou and Eris Themeli, *The Domino Effect of International Commercial Courts in Europe—Who’s Next?*, CONFLICT OF LAWS.NET, (Feb. 20, 2018). <http://conflictoflaws.net/2018/the-domino-effect-of-international-commercial-courts-in-europe-whos-next/>.

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⁶² Damann & Hansmann, *Globalized Commercial Litigation*, X CORNELL L. REV.

⁶³ See Bookman, *Litigation Isolationism*.

arbitration not just as a way to validate party choice and support an international dispute resolution structure that values predictability and promotes trade, but also as a “better” substitute for that dastardly alternative, U.S. litigation.⁶⁴

This negative view of U.S. litigation is consistent with what Subrin and Main have called the “Fourth Era in U.S. Civil Procedure”—an era in which “litigation is often perceived as a nuisance, trials are a mistake, and judicial case management is a catholicon.”⁶⁵ Steve Burbank and Sean Farhang have documented the “counterrevolution against federal litigation” that has developed largely through Supreme Court procedural jurisprudence clamping down on private enforcement of federal rights through federal litigation over the past several decades.⁶⁶

As I have written elsewhere, the judicial antagonism toward litigation is particularly strong in cases involving foreign parties or events on foreign soil.⁶⁷ U.S. courts have been erecting barricades to such transnational litigation that can be even higher than the rising barriers that plaintiffs generally face in the “Fourth Era.”⁶⁸ This antagonism has developed largely in the area of private enforcement of federal rights.⁶⁹ But because courts have established these barriers to entry and the anti-litigation stance through transsubstantive procedural rules that apply in all kinds of cases, they also impact other perhaps unintended areas of litigation.⁷⁰

B. The Rise of Arbitration Exceptionalism

The evolution of arbitration-litigation antagonism dates back to the 1970s, when U.S. courts began enforcing forum selection and arbitration clauses in the international commercial context. In *The Bremen v. Zapata Off-Shore Co.*, the Supreme Court addressed the validity of a forum selection clause in an international towage contract.⁷¹ The lower courts had held that the forum selection clause was unenforceable, “reiterating the traditional view of many American courts that ‘agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.’”⁷²

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⁶⁵ Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 502 (2016).

⁶⁶ BURBANK AND FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* X (2017).

⁶⁷ Pamela K. Bookman, *Litigation Isolationism*, X STAN. L. REV. X, X (2015).

⁶⁸ Pamela K. Bookman, *Litigation Isolationism*, X STAN. L. REV. X, X (2015).

⁶⁹ Burbank & Farhang.

⁷⁰ See *infra* ____.

⁷¹ 407 U.S. 1 (1972).

⁷² *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 6 (1972) (citing *Carbon Black Exp., Inc. v. The Monrosa*, 254 F.2d 297, 300 (5th Cir. 1958)).

The Supreme Court reversed, setting the stage for favorable treatment of forum-selection clauses that has been strengthened over time.⁷³ The Court explained that “in international trade, commerce, and contracting,” parties’ ability to bind themselves by contract to an acceptable forum is vital to eliminating the uncertainty and inconvenience that would “arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where [the parties] might happen to be found.”⁷⁴ Reversing the previous U.S. judicial position that had disfavored forum selection clauses, the Court noted that doing so “accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world.”⁷⁵ Since then, the policy in favor of supporting parties’ choice of fora—whether courts or arbitral tribunals—has grown increasingly robust.⁷⁶ Perhaps most notably, the Supreme Court endorsed an almost blanket enforcement policy for forum selection clauses in valid contracts.⁷⁷

Notably, in its efforts to support American businesses’ expansion into international commercial transactions, the Court in *The Bremen* also acknowledged the value of the U.S. courts. It recognized that both American and “foreign businessmen prefer ... to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter.”⁷⁸ The American and German companies that were parties to the contract at issue in *The Bremen* had designated the London Court of Justice as that neutral forum.⁷⁹

In its rhetoric, *The Bremen* demonstrated that enforcing parties’ forum choices that opt-out of U.S. courts need not simultaneously denigrate U.S. courts. Only two years later, however, the Court in *Scherk v. Alberto-Culver Co.* took that extra step.⁸⁰ The case involved an arbitration clause in an international commercial contract.⁸¹ Enforcing the arbitration award, the Court also seized the opportunity to malign American litigation.⁸² Again explaining why forum-selection clauses, including arbitration clauses, are “an almost indispensable precondition to achievement of the

⁷³ See *Carnival Cruise; Atlantic Marine*.

⁷⁴ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–14 (1972).

⁷⁵ *Id.* at 11–12. “The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.... 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.” *Id.* at 9.

⁷⁶ See, e.g., Leslie, *supra* note X, at X.; IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* __ (2013).

⁷⁷ See *Atlantic Marine* (S.Ct.); Robin Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, X HASTINGS L.J. X (2015).

⁷⁸ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11–12 (1972).

⁷⁹ *The Bremen*, 407 U.S. at 3.

⁸⁰ 417 U.S. 506 (1974) (contract between German citizen and Illinois corporation provided that any disputes arising out of the contract would be referred to arbitration before the International Chamber of Commerce in Paris and governed by Illinois law).

⁸¹ *Id.* at __.

⁸² *Id.* at __.

orderliness and predictability essential to any international business transaction,” the Court noted that this was especially true because “such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.”⁸³ In other words, arbitration is important because it enables parties *to avoid courts*.

Indeed, the Court explained the purpose of the Federal Arbitration Act of 1924 in these terms. Relying on the legislative history of the statute,⁸⁴ the Court said that the Act was specifically intended “to allow parties to avoid ‘the costliness and delays of litigation.’”⁸⁵ Arbitration was thought to be able to “largely eliminate[]” that cost and delay.⁸⁶ This anti-litigation purpose, the Court has now held in multiple contexts, prevails over Congress’s intent in other statutes to provide claimants with their day in court,⁸⁷ and over many areas of state law.⁸⁸

The anti-litigation forces behind the Court’s growing love affair with arbitration were not hidden. Scholars have noted that a likely motivator “was the Court’s view that litigation had become excessive and needed to be curtailed.”⁸⁹ Starting in the 1970s, Chief Justice Burger, who often expressed concern with judicial workload pressures, consistently criticized “‘litigiousness’” and linked it to a “‘mass neurosis ... [that] leads people to think courts were created to solve all the problems of society.’”⁹⁰ At the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 1976, the Chief Justice’s “chief message” “was that the ‘litigation explosion would have to be controlled.’”⁹¹ This message was consonant with “the business community’s growing dissatisfaction with the legal system.” It was not just “conservative” or “pro-business” justices, however, who pushed the pro-arbitration agenda in the Courts.⁹²

⁸³ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

⁸⁴ Commentators have noted that the course of developing this robust FAA, “the Court’s reading of legislative history [of the FAA] appears selective.” Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 327-328 & n.156 (2013).

⁸⁵ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (citing H.R.Rep.No.96, 68th Cong., 1st Sess., 1, 2 (1924); S.Rep.No.536, 68th Cong., 1st Sess. (1924)).

⁸⁶ *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985).

⁸⁷ *Mitsubishi, etc.*

⁸⁸ See *Southland _____*. *But see* [O’Connor’s dissent] (saying that the legislative history plainly does not suggest that congress intended the FAA to preempt state law).

⁸⁹ Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1429 (2008).

⁹⁰ Burbank & Farhang [2014? Article]

⁹¹ Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1429 (2008).

⁹² See David L. Noll (forthcoming).

To be sure, anti-litigation sentiments were not the only factor driving the expansion of the FAA—but they tell a significant part of the story, and their influence has important ramifications. To this day, the Supreme Court speaks of arbitration as though it is a solution to the problem that is litigation.

Over the past few decades, as the Court has expanded and strengthened the strong federal policy in favor of choice-of-forum and arbitration clauses to preempt state law, court-access to enforce federal statutory rights, and more, the Court has made clear that this policy “applies with special force in the field of international commerce.”⁹³ When comparing litigation and arbitration, the Court did not shrink from demonizing the former.⁹⁴ Instead of simply explaining why arbitral tribunals could be trusted to handle complex antitrust issues, for example, the Court’s reasoning centered on the “intractability” of the “monstrous proceedings” that characterize U.S. antitrust litigation.⁹⁵

This rhetoric extends to considerations of domestic arbitration in consumer contexts as well, but the Court does not seem to differentiate such situations from the international commercial context where its fealty to arbitration began. In *AT&T v. Concepcion*, the Court ruled that the FAA preempted California courts’ doctrine that class arbitration waivers in consumer contracts were unconscionable.⁹⁶ In doing so, the Court emphasized the FAA’s dual purpose of enforcing arbitration clauses on their terms *and* “allow[ing] for efficient, streamlined procedures tailored to the type of dispute” were in sync in this case.⁹⁷ The Court explained that “the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”⁹⁸

⁹³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see id.* at 629 (reasoning that “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”).

⁹⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (“the monstrous proceedings that have given antitrust litigation an image of intractability”); *see also id.* (“it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies”).

⁹⁵ *Id.* at 633.

⁹⁶ 563 U.S. 333 (2011).

⁹⁷ *Id.* at __.

⁹⁸ *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-345 (2011). The Court further reasoned that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.... And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.” *Id.*

In emphasizing these two purposes, the Court distinguished an earlier decision, *Dean Witter Reynolds v. Byrd*, in which the enforcement of an arbitration clause had led to bifurcated proceedings in arbitration over the arbitrable claims and in court over the non-arbitrable ones.⁹⁹ In *Dean Witter*, the Court had enforced the arbitration clause even though it led to less “expeditious resolution of claims” because it considered enforcing arbitration clauses to be the foremost goal of the FAA.¹⁰⁰ In *Concepcion*, by contrast, it considered enforcement of the arbitration clause to also further the goal of expeditious resolution of claims.¹⁰¹

The pro-arbitration policy triumphs over all. If the more expeditious resolution of claims could be found through litigation (for example, where both arbitrable and non-arbitrable claims could be consolidated into one action), the Court reasoned, then federal arbitration policy is against that approach because the FAA’s “principal objective” is enforcing arbitration agreements.¹⁰² So the arbitration clause is enforced (and the dispute is bifurcated into arbitrable and non-arbitrable parts). On the other hand, where the more expeditious resolution would be through arbitration—as the Court would almost always conclude these days, now that there are no longer areas of the law or federal statutory rights that are immune from arbitration¹⁰³—then the clause would also be enforced, as the Court adjudged in *Concepcion*.¹⁰⁴ This is the robust nature of the Court’s pro-arbitration doctrine: Heads, I win; tails, you lose.

As is evident from this analysis, the Court’s analysis of expeditiousness only makes sense when one compares arbitration to litigation, which, the Court implies, is inefficient, not streamlined, overly formal, costly, and slow.¹⁰⁵

The flaws of the arbitration-litigation dichotomy were perhaps most apparent in the 2010 *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.* decision. The Court there took the highly unusual step of overturning the decision of an arbitral panel.¹⁰⁶ The contract at issue was a charter party¹⁰⁷ with an arbitration clause that did not say anything about class arbitration.¹⁰⁸ After the DOJ found *Stolt-Nielsen* guilty of antitrust violations, many charterers filed a putative class action in federal court.¹⁰⁹ After the Second Circuit found that the charter parties had enforceable arbitration clauses that required arbitration of their antitrust claims, the charterers filed a demand for class

⁹⁹ *Concepcion*.

¹⁰⁰ *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

¹⁰¹ *Concepcion*.

¹⁰² *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

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¹⁰⁴ *Concepcion*.

¹⁰⁵ Cf. *Concepcion*.

¹⁰⁶ 559 U.S. 662 (2010).

¹⁰⁷ A charter party is a contract between a vessel owner and the “charterer” (or renter) by which the vessel is rented out for a specific time or journey. <http://www.brighthubengineering.com/seafaring/21133-maritime-law-of-charter-parties-and-the-carriage-of-goods-by-sea/>.

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¹⁰⁹ 559 U.S. at 688 (Ginsburg, J., dissenting).

arbitration of those claims.¹¹⁰ Stolt-Nielsen contested the charterers' "right to proceed on behalf of a class, but agreed to submission of that threshold dispute to a panel of arbitrators."¹¹¹ The panel's clause-construction award "decided unanimously—and only—that the 'arbitration claus[e] [used in the parties' standard-form shipping contracts] permit[s] this ... arbitration to proceed as a class arbitration."¹¹²

Stolt-Nielsen then petitioned the Southern District of New York to vacate the clause-construction award on the ground that "the arbitrators [had] exceeded their powers."¹¹³ The Second Circuit held that the parties were bound by an arbitration clause,¹¹⁴ and an arbitral panel including Ken Feinberg and other luminaries¹¹⁵ held that the clause permitted the arbitration to proceed on a class basis.¹¹⁶

The Supreme Court overturned the arbitrators' decision, holding that the arbitrators had indeed "exceeded their powers."¹¹⁷ Arbitrators cannot possibly infer an agreement to class arbitration from parties' consent to arbitration, Justice Alito explained, because class arbitration makes arbitration too much like litigation.¹¹⁸ Since arbitration clauses represent parties' choice that arbitration is superior to litigation, that choice couldn't possibly include the agreement to be bound by an arbitration proceeding that looks so much like litigation—and arbitrators may not infer such an agreement from silence.¹¹⁹ The whole point of arbitration, the Court seems to shout, is to *opt out* of litigation.¹²⁰ Expeditiousness, once again, be damned—since the multitude of charterers suing Stolt-Nielsen were left to proceed through arbitration on an individual basis.

¹¹⁰ 559 U.S. at 688 (Ginsburg, J., dissenting).

¹¹¹ 559 U.S. at 688 (Ginsburg, J., dissenting).

¹¹² 559 U.S. at 689 (Ginsburg, J., dissenting).

¹¹³ *Id.* (citing FAA § 10(a)(4)).

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¹¹⁵ See Brief for Resp. 8-9.

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¹¹⁷ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 (2010).

¹¹⁸ *Id.*

¹¹⁹ "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685–86 (2010) (citations omitted).

¹²⁰ The Court walks this conclusion back somewhat in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), which involved a contract "pursuant to the rules of the American Arbitration Association," where the arbitrator interpreted that clause (rather than the parties' stipulated "silence") to allow class arbitration. Justice Alito concurred, though he would have reversed had he reviewed the arbitrator's decision *de novo*, and he doubted whether the class arbitration would bind absent class members, which, he thought, should advise future arbitrators to find that similar clauses would not permit class arbitration. *See id.* at 573 (Alito, J., concurring).

Stolt-Nielsen demonstrates the pathologies of arbitration exceptionalism—the danger of the simultaneous derogation of litigation and exultation of arbitration backed by the mindset that arbitration’s virtues derive from litigation’s evils. The signature features of a pro-arbitration policy, which the Supreme Court purports to embrace,¹²¹ include liberal enforcement of arbitration clauses, liberal recognition and enforcement of final arbitral awards, and otherwise staying out of arbitrators’ way.¹²² A pro-arbitration policy typically would not include permitting interlocutory judicial appeal of interim arbitral decisions and or second-guessing arbitrators’ determinations of arbitration clauses they were tasked with interpreting.¹²³ As Justice Ginsburg’s dissent points out, however, these are the signature features of the Court’s decision in *Stolt-Nielsen*.¹²⁴

II. The Contradictions Underlying Arbitration Exceptionalism

There are four main assumptions built into the zero-sum-game attitudes about international commercial arbitration. First, the positive depiction of arbitration that excludes and preempts any kind of litigation seems to assume that arbitration exists independently from litigation. But this is far from true. In fact, arbitration depends on the existence of strong courts to enforce arbitration clauses and arbitral awards and to play other roles assisting the proper functioning of arbitration. (Indeed, *Stolt-Nielsen* belies a deep reliance on judicial review of arbitral proceedings.) Second, the descriptions of arbitration as faster or less expensive or more efficient do not bear out in modern, increasingly complex international commercial arbitration. Third, it is unclear whether arbitration is indeed as popular as the courts seem to think it is. Of course, in the given case, arbitration was included in the contract (assuming a valid contract where the parties actually agreed to arbitration), but that does not necessarily reveal anything about the broader state of arbitration or attitudes towards it. Reading arbitration clauses as a litigation-opt-out clause because of parties’ presumed fear and loathing of litigation is therefore inappropriate. Finally, the description of arbitration as a dispute resolution option superior to litigation assumes that the two are substitutes rather than complements, which has troubling implications discussed in Part II.

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¹²⁴ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 692 (2010) (Ginsburg, J., dissenting) (“No decision of this Court, until today, has ever approved immediate judicial review of an arbitrator’s decision as preliminary as the ‘partial award’ made in this case.”); *id.* at 694 (“The question under that provision is “whether the arbitrators had the power, based on the parties’ submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue.”).

A. Arbitration Depends on Litigation

Arbitration relies on a strong underlying network of national judicial systems.¹²⁵ Without national courts, it is unlikely international arbitration would function at all, save for some instances where reputational incentives suffice to coerce losing parties into complying with arbitral awards.¹²⁶ This reliance is fundamental to the institutional and legal structure of international commercial arbitration. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), the “touchstone treaty on international commercial arbitration,” obligates the over 150 ratifying countries¹²⁷ to honor arbitration agreements and recognize and enforce arbitral awards.¹²⁸ National courts do most of this work.¹²⁹ Not only do national courts develop the national law, such as New York law, applied in most arbitrations, but such courts may “intervene directly” before, during, or after arbitral proceedings.¹³⁰ Most fundamentally, courts enforce arbitration clauses and recognize and enforce arbitral awards. But they also issue interim measures to preserve the status quo pending arbitration,¹³¹ assisting with the taking of evidence, and in other ways. Korzun and Lee have cataloged eleven types of judicial interventions in international commercial arbitration.¹³² As they

¹²⁵ Korzun & Lee, *supra* note __.

¹²⁶ *Id.*; cf. W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT’L ARB. 5, 6 (2010) (questioning “how much voluntary compliance with large adverse awards would occur if there were no courts in the background poised to enforce them?”).

¹²⁷ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (listing parties to the NY Convention).

¹²⁸ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; United Nations Commission on International Trade Law (UNCITRAL), Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (listing ratifying states); Korzun & Lee, *supra* note X, at 309 & n.2.

¹²⁹ William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 656 (1989) ((national law “gives arbitration its legally binding character”). See also Whytock, *Duke Int’l L.J.*; Radicati di Brozolo, *supra* note X, at X (“National law ... remains the ultimate standard for the solution of all problems related to arbitration.”).

¹³⁰ Vera Korzun & Thomas H. Lee, *An Empirical Survey of International Commercial Arbitration Cases in the US District Court for the Southern District of New York, 1970-2014*, 39 FORDHAM INT’L L.J. 307, 308–09 (2015).

¹³¹ Korzun & Lee, *supra* note X, at 323. (“The US litigation equivalents are preliminary injunctions, temporary restraining orders, and pre-trial attachments of assets. The need to go to court for interim measures had once been considered the Achilles’ heel of international arbitration, since arbitral tribunals used to be incapable of ordering and enforcing interim measures.”)

¹³² Korzun & Lee, *supra* note X, at 317 (“(1) enforcement of the arbitration agreement (Article 8); (2) court issuance of interim measures (Articles 9 and 17 J); (3) appointment of arbitrators and related measures (Articles 11(3) and 11(4));²³ (4) adjudication of a challenge of an arbitrator following an unsuccessful challenge under the arbitration agreement or before the arbitral tribunal (Article 13(3)); (5) adjudication of

demonstrate, the “project of international arbitration actually is ... a hybrid private-public model.”¹³³

Korzun and Lee’s study of such “border crossings” reveals that such requests for interference seem to be the exception rather than the norm.¹³⁴ Some studies suggest that such requests are on the rise,¹³⁵ or that they are more prevalent in the United States.¹³⁶ Nevertheless, they remain rare.¹³⁷ But the argument that arbitration relies on national law and national courts does not depend on the quantity of times that courts intervene in arbitration,¹³⁸ any more than the quantity of jury trials dictates the effect of the possibility of a jury trial on rules of procedure and evidence, settlement practices, and other areas of legal practice in the United States. Arbitration operates in the shadow of litigation.¹³⁹

Courts sometimes acknowledge arbitration’s reliance on courts and litigation.¹⁴⁰ But despite the “strong federal policy” in favor of arbitration, courts seem to give little thought to the effects that clamping down on litigation could have on arbitration. This may be because at first

the termination of the arbitrator's mandate in cases of failure or impossibility to act by an arbitrator (Article 14); (6) adjudication of a preliminary ruling by an arbitral tribunal upholding its own jurisdiction (Article 16(3)); (7) recognition and enforcement of interim measures issued by an arbitral tribunal (Articles 17 H and 17 I); (8) court assistance to arbitral tribunals in taking evidence (Article 27); (9) setting aside of arbitral awards (Article 34); and (10) recognition and enforcement of arbitral awards (Articles 35 and 36)” and (11) “litigation in national courts to obtain evidence or otherwise to aid attachment of the assets of an award debtor within the relevant jurisdiction”) (parentheticals refer to articles of the UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. GAOR, 40th Sess., Supp. No. 17, Annex I, U.N. Doc. A/40/17 (Dec. 11, 1985), amended by G.A. Res. 61/33, U.N. GAOR, 61st Sess., Supp. No. 17, U.N. Doc. A/61/17 (Dec. 4, 2006)).

¹³³ Korzun & Lee, *supra* note X, at 313.

¹³⁴ See Korzun & Lee, *supra* note X, at X (surveying such border crossings since the US adoption of the NY Convention and being surprised by the low number of cases).

¹³⁵ S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 7 (2012) (suggesting such litigation is on the rise in the United States and the UK); cf. Korzun & Lee (finding that these requests level off).

¹³⁶ Strong, *supra* note X, at X.

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¹³⁸ The studies are informative, but ultimately may underreport, for example, if requests for judicial interference are not accompanied by a written opinion catalogued by Westlaw or Lexis Nexis. See ____ McCuskey, *Submerged Precedents* ____; ____ Hoffman, *Docketology* ____.

¹³⁹ Korzun & Lee, *supra* note X, at X (“The reality ... is that international arbitration always operates in the shadow of national courts.”).

¹⁴⁰ See, e.g., *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 542 (1995) (O’Connor, J., concurring in the judgment) (noting that court retains jurisdiction over a case while an arbitration proceeds, in contrast to a “true foreign forum selection clause[]”, which would divest domestic courts of jurisdiction).

glance these two trends seem complementary. The promotion of arbitration and the limiting of litigation are both touted as pro-business and pro-party autonomy.¹⁴¹

But anti-litigation trends, and particularly litigation isolationism—the recent trend of placing heightened barriers to that litigation are particularly strong in the context of transnational litigation¹⁴²—threaten the pro-arbitration agenda that the Supreme Court has developed through the FAA. Litigation isolationism is characterized by the growth of four areas of the law that limit access to U.S. courts in transnational cases: the narrowing of personal jurisdiction,¹⁴³ the expansion of forum non conveniens,¹⁴⁴ the growth of international comity,¹⁴⁵ and the strengthening of the presumption against extraterritoriality.¹⁴⁶ Many of the decisions that make up the backbone of litigation isolationism emerged in the context of controversial human rights litigation under the Alien Tort Statute,¹⁴⁷ and indeed, the trends seem to target especially entrepreneurial litigation in “foreign cubed” cases with foreign plaintiffs, foreign defendants, and involving foreign conduct.¹⁴⁸

But like other anti-litigation trends, litigation isolationism is made up of transsubstantive developments.¹⁴⁹ Accordingly, changes to these doctrines and canons have had what can only be assumed to be unintended consequences. The narrowing of personal jurisdiction threatens to undermine courts’ jurisdiction over foreign entities in suits to recognize or enforce international arbitration clauses¹⁵⁰ or arbitral awards¹⁵¹ or to assist in the collection of evidence.¹⁵² At least one decision in the Second Circuit refused to enforce an arbitral award for lack of personal jurisdiction over the losing party.¹⁵³ Continuing a trend of increasing use of forum non conveniens, the Second Circuit has also twice dismissed arbitral recognition and enforcement requests on that basis.¹⁵⁴ It could also be possible for a strong proponent of international comity abstention to try to apply it

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¹⁴² Bookman, *supra* note X, at X.

¹⁴³ *Id.* at X.

¹⁴⁴ *Id.* at X.

¹⁴⁵ *Cf.* In re Vitamin C Antitrust litigation (pending before Supreme Court; not addressing the comity issue). *See generally* Maggie Gardner (forthcoming article on international comity abstention).

¹⁴⁶ *See* Bookman, *supra* note X, at X.; Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 AJIL UNBOUND 57, X (2016).

¹⁴⁷ *See* Daimler _____; Kiobel _____; [fnc ATS cases]. *But see* Sinochem _____.

¹⁴⁸ *See* Morrison _____.

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¹⁵⁰ *See* Korzun & Lee, *supra* note X, at 320 (discussing kinds of cases in which parties seek to enforce arbitration clauses).

¹⁵¹ *See* Sonera _____; Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought*, 91 N.Y.U. L.REV. 345, X (explaining why this should not be the result of Daimler v. Bauman).

¹⁵² *See, e.g.*, Gucci _____ [cases requiring specific PJ for issuance of subpoenas under 1782].

¹⁵³ *See* Sonera _____.

¹⁵⁴ *See* Figuereido _____; Monegasque _____.

to decline to exercise jurisdiction in a case where a court was tasked with supporting arbitration.¹⁵⁵ (It seems unlikely that the presumption against extraterritoriality would be marshaled to interpret the FAA not to apply extraterritorially, since the intent to codify the New York Convention is so clear, but one could imagine a strict textualist reading of certain provisions that would prevent application of the statute to international arbitration.)

Admittedly, the Second Circuit decisions just mentioned received much criticism¹⁵⁶ and are largely regarded as outliers.¹⁵⁷ But they have precedential effect and are not outrageous extensions of recent legal trends.¹⁵⁸ It should not be surprising that narrowing access to U.S. courts through trans-substantive procedural measures that have exacerbated effects in the transnational sphere could easily spill over into limiting courts' ability to play an active role in supporting international arbitration. Indeed, this spillover is part of the reason why these decisions have received so much criticism.¹⁵⁹ Because the threat is real, scholars have begun to suggest ways to work around the seemingly strict principles underlying litigation isolationism to protect a strong federal policy in favor of arbitration (and to comply with obligations under the New York Convention).¹⁶⁰

Arbitration depends on litigation. A robust pro-arbitration federal policy therefore should respect and protect the litigation that supports that arbitration. Instead, the seemingly consistent pro-arbitration and anti-litigation trends that courts have promoted over the past few decades may be poised to undermine each other.

B. How Different Are Litigation and Arbitration?

For decades, courts have lauded arbitration for being faster and more efficient than litigation.¹⁶¹ In the United States, this rhetoric began in the international commercial context¹⁶² and has spread widely to many others.¹⁶³ But it is almost common knowledge that high stakes international arbitration, especially in the United States, is becoming increasingly similar to domestic litigation.¹⁶⁴ The time and expense of arbitration are increasing; “parties have imported

¹⁵⁵ [LOOK FOR CASES LIKE THIS]

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¹⁵⁷ RESTATEMENT (THIRD) U.S. LAW OF INT'L COMM. ARB. § 4-29(a) (2015) (“An action to confirm a U.S. Convention award ... is not subject to a stay or dismissal in favor of a foreign court on forum non conveniens grounds.”).

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¹⁶⁰ Silberman & Simowitz, *supra* note X, at X.

¹⁶¹ See *supra* Part I.B.

¹⁶² Scherk v. Alberto-Culver Co., 417 U.S. 506, X (1974).

¹⁶³ See, e.g., AT & T Mobility LLC v. Concepcion, 563 U.S. 333, X (2011)

¹⁶⁴ Blackaby et al., *supra* note X, at §1.119 (“Arbitration was supposed to be the solution for international companies seeking to resolve disputes without expensive and drawn-out court battles. But it is starting to look more like the problem ... Arbitration of international commercial disputes has taken on

American-style discovery, including voluminous document exchange, interrogatories, and depositions into what was traditionally envisioned as a streamlined presentation of evidence followed by swift decision-making.”¹⁶⁵ Some distinctions of course remain, importantly easy enforceability of arbitral awards and the possibility of confidentiality in arbitration.¹⁶⁶

Some judicial arguments in favor of arbitration, therefore, may perhaps be better placed on other kinds of alternative dispute resolution mechanisms, including experimentation with different kinds of mediation.¹⁶⁷ More importantly, exclusive reliance on the pro-arbitration policies of the FAA inadequately supports party autonomy and consent to alternatives to litigation for dispute resolution.¹⁶⁸ And none of these values—the support of arbitration, party autonomy, or experimentation with dispute resolution—is advanced by constricting U.S. courts’ personal or subject matter jurisdiction.¹⁶⁹ One could easily imagine a litigation system that endorses these values while also allowing broad access to U.S. courts for enforcing and supporting parties’ chosen dispute resolution alternatives.

C. Choosing Between Arbitration and Litigation

The Court has offered conflicting descriptions of businesses’ desires when it comes to dispute resolution. The Court has said both that foreign and U.S. businessmen of course prefer “to have disputes resolved in their own courts,”¹⁷⁰ and also that arbitration clauses are essential to protect against unfair and inefficient domestic courts.¹⁷¹ Which of these accounts is accurate?

It is widely claimed that arbitration is the dispute resolution mechanism of choice among international businesses.¹⁷² The empirical evidence among U.S. businesses, however, is less clear.

many of the characteristics of litigation in US Courts. And this has upset many companies that rely on arbitration to resolve cross-border business disputes.”); Hensler & __, NEV. L. REV. (forthcoming) (citing Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 895 (2004)) (“[C]ommercial arbitration in the United States has also become more like litigation in recent years.”); Gerald Phillips, *Is Creeping Legalism Infecting Arbitration?* DISP. RESOL. J., 37, 38 (Feb.-Apr. 2003).

¹⁶⁵ Hensler & __, NEV. L. REV. (forthcoming) (citing Remy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the “Judicialization” of International Arbitration*, 25 THE AM. REV. OF INT’L ARB 223 (2014) and Karen Willcutts, *Arbitration: Still and Effective Method of Resolving Business Disputes?*, March 3, 2016 <http://www.dallasbar.org/book-page/arbitration-still-effective-method-resolving-business-disputes>).

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¹⁷⁰ *The Bremen*, 407 U.S. at 11-12.

¹⁷¹ See *supra* Part I.A. for a discussion of *Concepcion* and *Stolt-Nielsen*.

¹⁷² Margaret L. Moses, *Introduction to X*, PRINCIPLES AND PRACTICES OF INTERNATIONAL ARBITRATION (2nd ed., 2012, (“Today, international commercial arbitration has become the norm for dispute resolution in most international business transactions.”); Radicati di Brozolo, *supra* note X, at X; Redfern, *supra* note X, at § 1.129 (“At one time, the comparative advantages and disadvantages of international arbitration

The studies on how much U.S. businesses actually use arbitration among themselves have mixed results.¹⁷³ The preeminent study from 10 years ago suggests that U.S. corporations may use arbitration less than one might think, and that they use it primarily in consumer and employment contracts, but not in business-to-business contracts.¹⁷⁴ Scholars explain this discrepancy by suggesting that perhaps, among themselves, businesses understand the value of litigation—for example, that it affords more in-depth discovery (and thus access to factual development) and the opportunity for appellate review.¹⁷⁵ Subsequent studies, however, have questioned whether the contracts surveyed were appropriately representative, and show that the use of arbitration clauses is in fact rampant in many business sectors.¹⁷⁶ Still other studies suggest that certain kinds of businesses particularly value court access in certain contexts and specifically craft arbitration clauses with judicial opt-outs for certain kinds of disputes.¹⁷⁷

Another possibility is that international arbitration is more prevalent among foreign or international companies than with U.S.-based companies.¹⁷⁸ If that is true, it would further debunk the notion that arbitration is so valuable and necessary because it allows U.S. businesses to opt-out of the evils of *American* litigation.¹⁷⁹

versus litigation were much debated. For one of the most effective, and certainly the most entertaining, critiques of arbitration see Kerr, ‘Arbitration v litigation: The Macao Sardine case’, in Kerr, *As Far As I Remember* (Hart, 2002), Annex. That debate is now over: opinion has moved strongly in favour of international arbitration for the resolution of international disputes.”).

¹⁷³ Chris Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. INT’L COMP. L. 449 (2009).

¹⁷⁴ See also Ted Eisenberg in *Judicature* (2008) (quoted in Lahav book in introduction).

¹⁷⁵ Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV 335 (2007) (finding, contrary to the authors’ initial hypotheses, that both domestic and international contracts between sophisticated parties have a low rate of arbitration); Charles W. Tyler, *Lawmaking in the Shadow of the Bargain: Contract Procedure As A Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560, 1566–67 (2013) (summarizing the literature after the Eisenberg and Miller study questioning the study’s results).

¹⁷⁶ Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433 (2010); Whytock, *supra* note X, at X. Drahozal and Ware contend that “[b]ecause the litigation process receives government subsidies, ... the fact that a contract does not include an arbitration clause does not indicate that litigation is more efficient than arbitration, but only that parties prefer a subsidized dispute resolution process to an unsubsidized one.” Drahozal & Ware, *supra* note X, at 435-436.

¹⁷⁷ Erin O’Hara O’Connor & Christopher R. Drahozal, *The Essential Role of Courts for Supporting Innovation*, 92 Tex. L. Rev. 2177, X (2014).

¹⁷⁸ Whytock, *supra* note X, at X; see QUEEN MARY UNIVERSITY OF LONDON, *supra* note X, at X (90% of respondents, corporate counsel who actively use international commercial litigation, name arbitration as their preferred dispute resolution mechanism).

¹⁷⁹ Some studies suggest that businesses find it particularly important to preserve their right to access U.S. courts. See Erin O’Hara O’Connor & Christopher R. Drahozal, *The Essential Role of Courts for Supporting Innovation*, 92 Tex. L. Rev. 2177, 2180-811 (2014).

It may be simply that whether to include an “arbitration clause in a contract is a difficult decision.”¹⁸⁰ As noted earlier, litigation and arbitration offer different pros and cons.¹⁸¹ Indeed, sometimes the pros are the cons: limited discovery reduces time and costs, but limits fact finding; an expert arbitrator may know the business well but not the law. One of the most attractive attributes of arbitration is its enforceability, as guaranteed by the New York Convention.¹⁸² Such enforceability, it should be noted, is a function of international law, not an immutable characteristic.¹⁸³ If the United States and others sign on to the Hague Convention on Choice of Courts Agreements,¹⁸⁴ then court judgments may be able to compete evenly with arbitration on the enforceability front.¹⁸⁵

The fact that the choice may be more nuanced complicates questions about what parties are choosing when they include arbitration clauses that are ambiguous as to their scope or the procedures they include. What should the defaults be? Contrary to Justice Alito’s opinion in *Stolt-Nielsen*,¹⁸⁶ it is not obvious that a “silent” arbitration clause is the equivalent of a litigation-opt-out clause. That defies the increasingly common knowledge that arbitration is becoming more and more like litigation, incorporating discovery, lengthy briefing, and sometimes even appellate review.¹⁸⁷ Had the issue in *Stolt-Nielsen* not been about the use of class arbitration, but rather about an application to a court to order interim measures or discovery pursuant to section 1782,¹⁸⁸ how would the Court have directed the arbitrators to determine the incorporation of these litigation tools into the arbitration? Would the question of whether the arbitration clause allowed for such discovery have been for the arbitrators or the court to decide? Arbitration clauses should not lose their force the more that the chosen arbitral forum has litigation-like characteristics.

¹⁸⁰ Julie K. Bracker, Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 COLUM. BUS. L. REV. 1, 3 (2003).

¹⁸¹ Julie K. Bracker, Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 COLUM. BUS. L. REV. 1, 32–33 (2003); internal cross-reference.

¹⁸² Parties to the Hague Choice of Court Convention (2005) agree to recognize exclusive forum selection agreements, stay proceedings outside the chosen court, and recognize judgments by the chosen court. See <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> (full text of treaty). The United States has signed but not ratified the Convention. [Cites]

¹⁸³ See Dammann & Hansmann.

¹⁸⁴ [explanatory footnote]

¹⁸⁵ Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 33, X (2008). Dammann and Hansmann recognize that the Hague Convention, which still has not gained traction (and the United States does not look ready to sign on), remains insufficient. *Id.* at 48 (“[T]he Hague Convention is an important step in the right direction. Yet, even if it were ratified by a significant number of countries, which remains problematic, it would still be insufficient to ensure that extraterritorial litigation becomes generally available at the global level.”).

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D. Of Substitutes and Complements

The zero-sum view of litigation and arbitration also raises important questions about how international commercial arbitration interacts with the development of judicial institutions.

In the investment arbitration context, there are two accounts of the relationship between international investment arbitration and litigation: one is that the two fora complement each other, potentially allowing the two to compete in a “race to the top” to provide the best possible dispute resolution mechanism.¹⁸⁹ In more sanguine accounts, however, the relationship between international investment arbitration and domestic litigation is one of substitution: the arbitral forum provides a substitute for domestic legal institutions, obviating the need for developing countries to indeed develop such institutions because they can outsource them instead.¹⁹⁰

In the international commercial arbitration context, litigation and arbitration can of course serve as substitutes for each other, the healthier institutional relationship is for litigation and arbitration to be complements. This both enables litigation to support arbitration where necessary and facilitates something like a race to the top between the two institutions.¹⁹¹

As discussed in Part II, the complementary account seems to describe the relationship between international commercial arbitration and litigation in New York and the UK, at least pre-Brexit. (There is, as yet, no indication that Brexit will undermine the UK’s prominence as a seat of arbitration, in large part because of the important role of international law and the New York Convention in enforcing arbitral awards around the world.¹⁹²) The substitution dynamic, however, seems to describe the relationship between litigation and international commercial arbitration (and other mechanisms for outsourcing dispute resolution) in Russia.

Arbitration exceptionalism—that is, the interaction of federal courts’ negative and constraining attitudes toward U.S. litigation and their strong “pro-arbitration” policies—threatens to make commercial arbitration and litigation strictly substitutes and undermine their complementary relationship. In a purely substitute role, completely private protection of property rights can propel the strength of a growing oligarchy, which can use its wealth to opt out of a court system.¹⁹³ Such opting out can erode a court system. As discussed below, this is the dynamic as several scholars explain it in Russia.¹⁹⁴ It is important to prevent a decline into a substitution dynamic; suggestions for how to do so are discussed in Part IV.

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¹⁹⁰ Paul B. Stephan, *International Investment Law and Municipal Laws: Substitutes or Complements?*, X CAPITAL MARKETS L. REV., X, 368 (2014).

¹⁹¹ [describe race to the top.]

¹⁹² By contrast, many other EU countries are vying to replace London courts’ role as the preeminent choice for forum selection clauses, as it is unclear how UK judgments will be enforced in the EU post-Brexit.

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¹⁹⁴ See *infra* Part III.C.

III. Contrasts: Arbitration and Litigation Outside the Federal Courts

To understand what the U.S. federal courts could look like with a different attitude toward arbitration, this Part looks to the relationship between arbitration and the courts in New York, the United Kingdom, and Russia. Both New York and UK courts are friendly to arbitration and yet have managed to create a supportive, complementary relationship between litigation and arbitration. [These attitudes have been driven by both the courts and the legislatures.] In Russia, on the contrary, the poor judicial infrastructure and failure of the rule of law have not stood in the way of much domestic and international business in part because oligarchs and other Russian business interests could outsource their legal needs via forum selection clauses and arbitration clauses.¹⁹⁵ This outsourcing has enriched many oligarchs while also keeping much of the complex commercial dispute resolution out of Russian courts—which has deprived the Russian courts of an important diet on which they could have otherwise tried to cultivate the rule of law.¹⁹⁶

These comparisons shed light on the unique contradictions inherent in America’s arbitration exceptionalism. New York and the UK present examples of common law legal systems very similar to (and indeed, overlapping with) the federal system where the judiciaries have taken an active stance in promoting themselves as centers for international commercial dispute resolution as well as seats of international arbitration.¹⁹⁷ Russia provides a particularly stark contrast. While there are many more differences between the U.S. and Russian legal systems,¹⁹⁸ the Russian model provides a cautionary tale for how not to rely on arbitration and other kinds of legal outsourcing to replace litigation and compromise troubled judicial institutions.

A. New York

For almost 100 years, New York has been positioning itself as the forum of choice for contract law disputes, whether in courts or in arbitration.¹⁹⁹ In 1920, New York led the charge of adopting statutes that allowed pre-dispute arbitration and eliminated the “rule of revocability” that had rendered arbitration clauses unenforceable.²⁰⁰ The business lobbyists who pushed for the New York statute then campaigned for the Federal Arbitration Act, which was enacted in 1925,

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¹⁹⁸ [Explain relevant differences]; see *infra* Part III.C.

¹⁹⁹ See, e.g., Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 *CARDOZO L. REV.* 2073, X (2009); Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 *CORNELL L. REV.* 1, 17–18 (2008). [replace with better support]; *id.* at 35–36 (discussing New York’s development of contract law aimed at making it more predictable and therefore more attractive as a choice for international commercial disputes).

²⁰⁰ Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 *CARDOZO L. REV.* 2073, 2085 (2009).

and similar statutes in a variety of other states.²⁰¹ New York has long been “extraordinarily receptive to enforcing contracts that select New York as the provider of law or forum, even in cases where there are few or no other connections between New York and the contract or the parties.”²⁰² New York courts vigorously enforce arbitration clauses, forum selection clauses, and choice-of-law clauses.²⁰³

At the same time as they champion party choice, however, New York courts also have been *expanding* their jurisdiction to consider business disputes.²⁰⁴ New York statutes grant jurisdiction in cases relating to any contract worth over a million dollars where foreigners designate New York in their choice of law and choice of forum clauses.²⁰⁵ These statutes were enacted in response to New York Bar Association committee reports recommending “affirmative measures to attract foreign business by providing ready access to a competent forum for dispute resolution” and to compete with other international business centers.²⁰⁶

In 1995, New York established a commercial division of the state courts dedicated to resolving business disputes in an expert and efficient manner.²⁰⁷ On its website, the New York Supreme Court commercial division (its trial level court dedicated to disputes) explained its mission: “to improve the efficiency with which [commercial] matters were addressed by the court and, at the same time, to enhance the quality of judicial treatment of those cases.”²⁰⁸ The court engages in some self-promotion.²⁰⁹

In short, New York has been writing the playbook for how to compete in the market for contractual disputes: they support arbitration and party autonomy strongly, and simultaneously situate their local courts both as desirable venues for dispute resolution and as supporters of arbitration.²¹⁰ Thus, they are vying both for their courts to be chosen in forum-selection clauses and for their cities to be chosen as seats of arbitration. Federal law developments, however, such as the Supreme Court’s constricting of personal jurisdiction, have hampered New York’s efforts

²⁰¹ Miller & Eisenberg, *supra* note __, 2085–86. (“New York arbitration advocates thus sought to “spread the benefits of [the New York statute] to all States, all trades and all industries compassed within our national life.”).

²⁰² Miller & Eisenberg, *supra* note __, 2087.

²⁰³ See, e.g., *Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 233 (1990) (citing *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408 (1982)) (“[I]t is the policy in New York to encourage resolution of disputes through arbitration, particularly conflicts arising in the context of international commercial transactions.”); see also Miller & Eisenberg, *supra* note X, at 2089-90.

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²⁰⁶ Miller & Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2091 (2009).

²⁰⁷ *Id.*

²⁰⁸ <https://www.nycourts.gov/courts/comdiv/history.shtml>.

²⁰⁹ <https://www.nycourts.gov/courts/comdiv/history.shtml>.

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to compete effectively in this market and to support arbitration and international litigation to its fullest extent.

B. UK

The UK story is much like New York's. London, the UK government, and the UK bar all appreciate the importance of welcoming both litigation and arbitration and enforcing party choice broadly, and have done so for over a century. The Justice Department advertises UK courts and UK law as an important export.²¹¹ They express with pride that foreign parties participate in a "staggering 80% of cases" in London's specialized Commercial Court.²¹²

Before Brexit, studies indicated that British law and British courts were a favorite among European companies in choice of law and choice of forum clauses, and that London was a favorite seat of arbitration.²¹³ It is still unclear whether Brexit will shrink litigation in UK courts. UK judgments may no longer be easily enforceable around EU.²¹⁴ Some law firms have begun to propose amending forum-selection clauses to protect against circumstances post-Brexit that don't allow for easy enforcement of UK judgments.²¹⁵ Many are assuming that the UK will work something out with the EU to make enforcement relatively straightforward, but there's no real telling what will happen.²¹⁶

Observers suggest that as a choice of forum, the UK may be somewhat imperiled, particularly depending on how Brexit is implemented, but that London's prominence as a seat of arbitration is unlikely to change.²¹⁷ This is in part because recognition of British court judgments were regulated by EU law, which will have to be adjusted or replaced in the wake of Brexit, whereas recognition of arbitral awards is governed by a preexisting and unaffected international regime, the New York Convention.²¹⁸

²¹¹ THE LAW SOCIETY OF ENGLAND AND WALES, ENGLAND AND WALES: THE JURISDICTION OF CHOICE X (YEAR), <http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf> ("The Ministry of Justice is committed to supporting the legal sector's success on the international stage. I am therefore delighted to introduce this brochure by the Law Society promoting England and Wales as the jurisdiction of choice for the resolution of disputes arising all over the world.").

²¹² THE LAW SOCIETY OF ENGLAND AND WALES, *supra* note X, at 5.

²¹³ See Queen Mary, *supra* note X, at X; Vogenauer_____.

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Moreover, the uncertainty surrounding what will happen with respect to conflict of law rules post-Brexit may compromise one of British law's most attractive attributes: stability and predictability.²¹⁹ But British support for arbitration seems to go undeterred.²²⁰

C. Russia

Russia is a prime example of a society that lacks faith in courts,²²¹ which is one contributing factor to the weak (non-existent) rule of law in that country. Russia is also a classic example of a place where arbitration and litigation seem to operate as substitutes more than complements.²²²

The legal landscape in Russia is of course different from that in the United States.²²³ A ruling oligarchic class exerts tremendous influence and the Russian economy and private wealth are highly concentrated.²²⁴ These businesses have tended to outsource their legal needs in three ways: (1) by creating foreign companies, either as trading entities or holding companies; (2) choosing non-Russian law to govern their important contracts; and (3) selecting foreign fora or arbitration to resolve disputes arising from those contracts, often choosing London as a court or arbitral seat.²²⁵

These are common tactics in international business.²²⁶ Indeed, some commenters advocate that, in light of the difficulty of judicial reform, businesses engage in such outsourcing and countries with stronger judicial systems should make themselves available to provide those legal and judicial services.²²⁷ But scholars of the Russian legal system warn that when oligarchs manipulate forum choice to their advantage, often circumventing Russian law, they deprive the Russian courts of the opportunity to pursue reform.²²⁸

In short, the interaction between the institutions of international arbitration and party autonomy and the Russian judicial system is so imbalanced that it takes away incentives for judicial reform. This is consistent with the interests of the oligarchic ruling class in Russia, who have the resources to invest in private protection of their property rights.²²⁹ They therefore may be affirmatively opposed to promoting strong institutions and property rights protections

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²²¹ Hendley _____; cf. [cite statistics about faith in courts in the US and UK.]

²²² Delphine Nougayrede, *Outsourcing Russian Law* __ (2013); Gulnaz Sharafutdinova & Karen Dawisha, *The Escape from Institution-Building in a Globalized World: Lessons from Russia*, 15 Cambridge Core 361, X (2017).

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²²⁴ See Nougayrede, *supra* note X, at 386.

²²⁵ See Nougayrede, *supra* note X, at 386.

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²²⁷ See, e.g., Damann & Hansmann, *supra* note X, at X.

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because their resources position them “to take advantage of institutional unpredictability and the potential redistributive opportunities that might emerge.”²³⁰ Thus, oligarchs manipulate forum choice to their advantage, often circumventing Russian law. When they want good, reliable law to protect their own interests, they use holding companies and forum selection clauses to secure UK law.²³¹ But that still leaves the Russian legal system vulnerable to exploitation, with little incentive to reform into a more reliable system.²³²

On the other hand, recent political science research reveals an increased use of domestic courts at least with respect to domestic Russian disputes.²³³ Jordan Gans-Morse has demonstrated that since the collapse of the Soviet Union, Russian firms’ reliance on violence, corruption, and law to enforce property rights has evolved dramatically.²³⁴ Interestingly, over the past two decades, firms have come to prefer law as an enforcement mechanism over the other two options, notwithstanding continuing inefficiencies and corruption in the Russian courts.²³⁵ Gans-Morse’s conclusion is that law plays an extensive role in the Russian business world, and that that role has increased in the past two decades.²³⁶ He attributes this development to increased *demand* for legal services, not to improved supply of domestic legal institutions.²³⁷

Nevertheless, the situation on the ground, while perhaps improving, is still precarious. While Gans-Morse’s research suggests that Russian courts seem to be working better and providing more satisfactory experiences for users in many low-profile cases, corruption and a lack of faith in the rule of law persists.²³⁸ Nougayrede and Sharafutdinova and Dawisha fault the high levels of legal outsourcing by Russian *international* firms with the weakness of judicial reforms,²³⁹ which Gans-Morse’s research does not refute.²⁴⁰ High-profile cases remain subject to

²³⁰ Sharafutdinova & Dawisha, *supra* note X, at 365 (citing economist Konstantin Somin); *id.* (“Furthermore, high inequality might be inimical to high-quality institutions and secure property rights because the ruling elite in such contexts is able to appropriate a disproportionate share of the aggregate investment at the expense of the rest of the population since they control both market entry and any policy-making that would affect redistribution.”).

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²³² JORDAN GANS-MORSE, PROPERTY RIGHTS IN POST-SOVIET RUSSIA 7 (2017) (“Polishchuk and Saavateev (2004) and Sonin (2003) demonstrate that given high levels of economic inequality and weak state institutions, richer and more powerful firms have the incentive to pay for private protection while seeking to maintain the weakness of formal institutions. This environment allows them to guard their own assets while expropriating weaker citizens’ wealth.”). [check this quote]

²³³ JORDAN GANS-MORSE, PROPERTY RIGHTS IN POST-SOVIET RUSSIA X (2017).

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²³⁵ JORDAN GANS-MORSE, PROPERTY RIGHTS IN POST-SOVIET RUSSIA 181 (2017).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

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²⁴⁰

political manipulation, and even the oligarchs are not protected by the courts.²⁴¹ The interaction between legal outsourcing and judicial institutions in Russia thus provide a cautionary tale: too much outsourcing may undermine the legitimacy of judicial institutions or compromise the capacity for reform. Concentrated wealth leads to a preference for private protection, which only the wealthy can afford, leaving the less well-off to fend for themselves.

IV. Getting From the Zero-Sum Game Approach to Complementarity

[Note: The following subsections are under consideration for inclusion as possible payoffs for the paper and appear in rough draft or outline form. I am especially eager for your feedback on how to proceed with this part.]

We have now examined the attitudes toward litigation and arbitration that can undermine stated pro-arbitration policies in Parts I and II. Part III explored alternatives that demonstrate how positive attitudes toward litigation can strengthen pro-arbitration policies, while excessive outsourcing threatens the ability of judicial institutions to thrive. Building on this analysis, this Part turns to prescriptions. Section A discusses about how to think about the relationship between litigation and arbitration and the importance of viewing that relationship as complementary. Section B offers suggestions how U.S. courts should actualize that conception in different doctrinal areas either with respect to procedure and jurisdiction of courts generally or with respect to when courts should intervene in arbitration, and when they shouldn't.

A. Promoting Complementary

Thus far, we have seen how some courts and commenters see arbitration and litigation as competing, incompatible options for dispute resolution. These actors sing arbitration's praises in terms that distinguish arbitration from litigation.

But we have also seen that these impressions are based on misconceptions and misunderstandings of arbitration, litigation, and the relationship between them. As discussed above, where arbitration and domestic legal institutions are positioned as complements in competition with each other, that competition can lead to a "race to the top,"²⁴² maximizing the

²⁴¹ See Yukos _____.

²⁴² Larry Ribstein & Erin O'Hara O'Connor, *The Law Market* 157 ("Proponents of regulatory competition will make the argument ... that ... outsourcing ... [Russian law] showed sensible business management by Russian economic actors intent on maximizing their own economic outcomes, avoiding dysfunctional institutions, mitigating political risk, and therefore contributing to overall prosperity. This type of argument is grounded in the general belief that regulatory competition between countries creates benefits and that jurisdictional arbitrage must be encouraged. In defense of offshore financial centers, some scholars write that "the rule of law is all too scarce in today's world and jurisdictions that specialize in providing it to others provide a valuable service that needs to be recognized."). Law is viewed here as a public good which, if not rendered properly by Russian lawmakers and courts to the Russian public, can be rendered to the same Russian public by foreign lawmakers and courts. Jurisdictions providing such

value of both systems to potential users.²⁴³ Having “both credible domestic institutions and credible international options” should create a positive business environment for both domestic and international business ventures and investment.²⁴⁴ Complete reliance on outsourcing through arbitration and forum selection clauses, on the other hand, could deprive the judiciary of an important constituency for reform. But a lack of judicial support for arbitration would undermine this important competition and compromise values such as party autonomy, promotion of international trade, and predictability.²⁴⁵

In short, it seems almost obvious that national legal systems in general, and U.S. courts in particular, should seek to maximize their support for international commercial arbitration. Indeed, U.S. courts often profess to do this, and many foreign jurisdictions with strong rule of law principles likewise support and engage in strongly pro-arbitration policies.²⁴⁶

What is perhaps less obvious is that a strong and accessible national court system is also key to a pro-international commercial arbitration policy. New York and the UK—some of the current world leaders in the supply of law, legal services, and judicial and arbitral fora for dispute resolution—have long recognized this synergy, providing liberal access to both courts and liberal enforcement of party forum choices in order to attract the business of dispute resolution.

But arbitration and litigation need not be foes. To the extent they compete, this can be a healthy and productive competition—but only if courts are participating in the competition. Before discussing how U.S. courts can be made to participate more actively,²⁴⁷ this Section will lay out the benefits of this competition between courts and arbitral tribunals for international commercial dispute resolution.

There is little doubt that this competition is happening. Arbitral centers are vying to be the forum selected in international commercial contracts. [Discuss competition for dispute resolution among (for-profit) international arbitration centers like ICC, etc.]

Some national courts are also participating in this competition. And they are vying to be the forum selected in many of the same international commercial contracts. Some countries

services are viewed as exporters not of legal, incorporation, or dispute adjudication services, but of justice and rule of law. A variation on the same idea is that regulatory competition from foreign jurisdictions reduces the control of autocratic governments over domestic economic activity and helps the formation of “rival centers of power.” Nougayrede, *supra* note X, at 60.

²⁴³ Stephan, *supra* note X, at 368.

²⁴⁴ Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT’L REV. L. & ECON. 107, 118 (2005).

²⁴⁵ See *supra* __ (reasons why arbitration is good).

²⁴⁶ See Cuniberti, *supra* note X, at X (discussing French law that supports arbitration even more strongly than U.S.); [cite 150+ parties to New York Convention].

²⁴⁷ See *infra*, Part IV.B.

promote their courts with advertising, suggesting they believe they are competing for the business of litigation.²⁴⁸ This is its own kind of “forum selling.”²⁴⁹ For example, [to be fleshed out:]

- France is adopting an English language international commercial court that may recognize common law precedent.²⁵⁰
- The Netherlands is gearing up to establish an *English language* court in 2018 with broad subject matter jurisdiction over “commercial” disputes.²⁵¹
- Germany has long been debating an English language commercial court option.²⁵²
- Belgium²⁵³
- Dubai established the “Dubai International Financial Center” (DIFC)
- Doha created the “Qatar International Court and Dispute Resolution Center” (QICDRC)
- Singapore set up the “Singapore International Commercial Court” (SICC).
- Note that the competition, like regulatory competition, tends to be among an elite set of developed, Western countries.

These nations [all adopt the UNCITRAL rules?] and their courts are generally favorable to arbitration. At the same time, they seek to make their home courts hospitable to international commercial litigation.

Given the nature of our federal system, it seems natural that some U.S. states may choose to participate actively in this competition.²⁵⁴ Federal courts, however, have a number of levers with which they can control and limit the extent of that participation, including the Supreme

²⁴⁸ [Cite Vogenauer, UK Justice Dept materials; Trey Childress, NC L Rev.]

²⁴⁹ Cf. Klerman and Reilly, Forum Selling, USC L. Rev.

²⁵⁰ See *supra* [discussing French international commercial courts]; Stacie Strong email, 11/13/17, http://ibfi.banque-france.fr/fileadmin/user_upload/banque_de_france/HCJP/Rapport_07_A.pdf; <https://www.transnational-dispute-management.com/news/20170530PR.pdf>.

²⁵¹ See <https://netherlands-commercial-court.com/>.

²⁵² 2010 report: <https://www.paulhastings.com/docs/default-source/PDFs/1528a922df6923346428811cff00004cbded.pdf>; Bill expired, but was reintroduced in 2014: <http://www.disputeresolutiongermany.com/2014/07/english-language-in-german-courts-any-progress/> (expressing skepticism that the bill will pass); May 2015 – proposed bill: <http://www.fgvw.de/en/news/archive-2015/the-introduction-of-english-as-an-official-language-in-german-courts>. As of January 2017, news was that the bill could move forward. *English courts abroad – Germany waits to move forward*, Julian Sayerer interviews Dr Barbara Mayer, <http://blogs.lexisnexis.co.uk/dr/english-courts-abroad-germany-waits-to-move-forward/>.

²⁵³ Reuters, *Brexit drives Belgium to set up English-language commerce court*, <https://www.reuters.com/article/us-britain-eu-belgium-court/brexit-drives-belgium-to-set-up-english-language-commerce-court-idUSKBN1CW1U8> (Oct. 27, 2017); see also, e.g., <https://legalknowledgeportal.com/2017/11/02/brussels-international-business-court/>; <https://www.lexology.com/library/detail.aspx?g=f101059a-3678-4797-8ee0-54c7a0487fc2> (it’s going to be a hybrid national court that looks like arbitration);

²⁵⁴ See John Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915 (2004).

Court's interpretation of the FAA, which has preemptive effect in state courts, and the constitutionalized doctrine of personal jurisdiction.

[Discuss and contrast EU rules on PJ with respect to enforcement of judgments; discuss What Hath Daimler Wrought?]

Arbitration exceptionalism yields a U.S. judicial system that purports to be pro-arbitration, but also is in some ways self-defeating. In practice, the courts interfere with arbitration in ways that potentially undermine the international arbitration system and faith in U.S. judicial support for that system.²⁵⁵ Backlash against American procedural exceptionalism in the form of anti-litigation and isolationist developments have curbed courts' capacity to compete with foreign courts and arbitral tribunals for international commercial disputes. And a focus on the antagonistic relationship between litigation and arbitration can lead U.S. courts to disrupt the essential judicial support for arbitration. Unwarranted judicial interference can undermine the functionality and legitimacy of international arbitration. To be sure, the line between appropriate judicial support and unwarranted judicial interference can sometimes be hard to draw. But recognizing the distinction is important; and at the extremes, the two should not be difficult to differentiate. The next Section discusses in more practical terms how to draw that line in service of allowing U.S. state and federal courts to compete actively in the market for international commercial dispute resolution while also providing full-throated support to sustain the institution of international commercial arbitration. These two goals are not contradictory.

B. The Role for U.S. Courts

"Forum selling" is a maligned term in the tort context, but it receives much more favorable reception in the context of the market for forum selection and arbitration clauses. [Discuss generally the markets for contracts and for fora. This may need to come earlier.]

1. Roll Back Litigation Isolationism

[Summarize why litigation isolationism is bad: cuts off access to courts even for kinds of transnational litigation that US courts should want to hear; undermines some of the stated goals, like separation of powers and international comity.]

Litigation isolationism has its defenders. Many of its constituent parts can be understood as positively affecting U.S. courts in a way that make them more attractive for international business disputes. That is, these developments may reflect or reveal a U.S. court system that is trying to compete in this international marketplace. As mentioned, several Supreme Court decisions that make up the litigation isolationist trend were decided in the context of cases where foreign plaintiffs sued foreign companies for aiding and abetting human rights abuses in foreign

²⁵⁵ See, e.g., Stolt-Nielsen; other examples.

countries.²⁵⁶ The viability of such cases in U.S. courts was highly controversial and wildly unpopular with international businesses. So was the exceptionally broad scope of general personal jurisdiction, which partially enabled the viability of the ATS cases, but which the Supreme Court recently cabined by limiting general jurisdiction to the forum or fora where the defendant is “at home.”²⁵⁷ Undoubtedly, some if not all parts of the anti-litigation trends were seen not as a closing off of courts, but as a correction for overbreadth of access.²⁵⁸

But these developments have overcorrected. Not only have these decisions undermined some of the very goals they set out for themselves, as I have argued elsewhere,²⁵⁹ but they also threaten to undermine the courts’ pro-arbitration policies [as discussed above].

- Discuss specific personal jurisdiction
- Discuss forum non conveniens
- Other procedural issues? International comity?

2. Roll Back *Stolt-Nielsen*

Pro-arbitration policy is usually depicted as enforcing parties’ choices.²⁶⁰ It also relies heavily on consistency and predictability. This is where recent Supreme Court precedents such as *Stolt-Nielsen* undermine the supposedly pro-arbitration policy—in the international commercial context—professed by U.S. courts.²⁶¹ The Court there intervened too early, too deeply, and in a way that compromised the arbitrators’ decision, the parties’ agreement to have the question resolved by the arbitrators, and systemic faith in U.S. judicial support for international arbitration.

As relevant here, these failings were directly connected to the Court’s perception of the strong distinctions between litigation and arbitration and of the benefits and detriments of the two processes as being part of a zero-sum game. The arbitrators exceeded their authority, the Court argued, because interpreting an arbitration clause to permit class arbitration would render the arbitral process too much like litigation. Such decisions undermine not only U.S. courts’ pro-arbitration policy, but also their stature (as well as New York’s stature) in the international market for contract law and dispute resolution. That the decision leaves wide open the question of what

²⁵⁶ See, e.g., *Kiobel*; *Daimler*.

²⁵⁷ *Goodyear*; *Daimler*.

²⁵⁸ See, e.g., Scott Dodson, article about convergence of pleading standards.

²⁵⁹ *Litigation Isolationism*.

²⁶⁰ See, e.g., Correll & Szczepanik, *supra* note X, at X (“[W]hat is the proper line of demarcation between proper court involvement in the aid of arbitration and impermissible interference with the autonomy of the private system selected by the parties? In our view, that line is simply this: vindicating the parties’ contractual obligations.”).

²⁶¹ [Cite *Stolt-Nielsen*]. Thomas E. Carbonneau noted that “[t]he ruling was unexpected and completely inconsistent with the basic thrust of the Court’s decisional law on arbitration.” Thomas E. Carbonneau, *The Assault on Judicial Deference*, 23 AM. REV. INT’L ARB. 417, 418 (2012).

it means for an arbitral panel to “exceed its authority” and declines to address the open question of whether and under what circumstances arbitral decisions can be set aside as being in “manifest disregard of the law” perpetuates further uncertainty.²⁶²

[Incorporate review of literature criticizing (and defending) *Stolt-Nielsen* and describing its after-effects.]

Prescriptions:

- Better definition of “exceed authority” [comparative analysis?]
- Nix “manifest disregard”

3. *Regulate and Support International Commercial Arbitration*

The role for courts in overseeing arbitration is a delicate balance. As Professor Reisman has explained:

Too much autonomy for the arbitrators creates a situation of moral hazard. If abuses occur—and the theory of moral hazard holds that they are more likely to in the absence of controls—national courts will become increasingly reluctant to grant what amounts to a preferred, fast-track enforcement of awards. But too much national judicial review that begins to approximate appeal will transfer real decision power from the arbitration tribunal ... to a national court whose party neutrality may be significantly less. Each of these possible developments would ultimately reduce the attractiveness of arbitration as a preferred means of private dispute resolution.²⁶³

The New York Convention seeks to navigate between this Scylla and Charybdis.

Some specific measures to consider:

- Courts can support arbitration without badmouthing litigation. Rhetoric matters.
- Professor Reisman warns against judicial developments like the anti-arbitration injunction, which, he contends, “poses a serious threat to the efficacy of the international commercial arbitral system.”²⁶⁴
- A general rule of thumb could be that court intervention should strive to support the legitimacy and integrity of the international arbitration system.
 - o This rule of thumb substantiates and justifies the list of “border crossings” in the NY Convention and the UNCITRAL rules.

²⁶² [Describe debate over “manifest disregard” standard.]

²⁶³ W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 *Am. Rev. Int'l Arb.* 5, 12 (2010).

²⁶⁴ Reisman & Iravani, *supra* note __, 34.

- Serious thought should be given to courts' role in reviewing arbitral awards when there are allegations of ethical violations by parties or arbitrators.²⁶⁵
 - To be sure, arbitrators are first in line to monitor parties and counsel for unethical conduct. But they do not have the availability of sanctions.
 - There is some dispute over how big a problem ethical issues are in international arbitration and whether the problem is unique to international arbitration. Regardless of the answers to these questions, there is a need for some infrastructure for protecting against ethical abuses. Even outlier incidents can compromise the legitimacy of the entire system.
 - Some have suggested oversight at the arbitrator or arbitral institutional level, but the incentives there are skewed in favor of doing nothing, since arbitrators want to be selected again by parties in the future.
- Discuss set-asides at the seat and U.S. courts' willingness to examine due process in other countries' proceedings?
- Vera Korzun and Tom Lee suggest that, in light of the limited use of court jurisdiction over arbitrator appointments and challenges that is permitted by the FAA, the UNCITRAL Model Law, and most major non-UNCITRAL statutes, "perhaps more might be done to incorporate alternative appointment procedures into institutional rules. With respect to challenges, it seems to us prudent and better policy to keep this at the institution or tribunal level rather than leave room for resort to courts. And, to serve parties who choose ad hoc arbitrations, institutions should fine-tune 'a la carte' rules that allow parties to invoke them solely for issues involving the appointment or challenge of arbitrators."²⁶⁶
- Korzun and Lee also raise the question of how to regulate the potential for abuse where parties who have agreed to arbitration use courts excessively?²⁶⁷

4. *Special role for states / state courts? Especially New York?*

Conclusion

²⁶⁵ See 2/6/18 email: "GAR reported that the majority of a SIAC tribunal censured lawyers from one of the most prominent international arbitration practices in the world for unethical conduct. The 2-1 award in *Lao People's Democratic Republic v. Lao Holdings*, by Judge Rosemary Barkett and W. Laurence Craig, reportedly found that the lawyers had attempted "a fraud on the tribunal" by repeatedly relying on a "false and misleading" document produced by their client."; Catherine Rogers, *Ethics in International Arbitration* (2014) ("the lack of ethical regulation is regarded as a potential crisis that can threaten the legitimacy of international arbitration").

²⁶⁶ Korzun & Lee, *supra* note __, 350–51.

²⁶⁷ Korzun & Lee, *supra* note __, 351 ("there appears to be a handful of persistent-objector litigious parties that attempt to get into national court as often as they can. Although abusive border crossings do not happen very often, there could--and should be--more attention paid to how national laws and institutional rules could be amended or designed to deter this sort of behavior."")