

# KEYNOTE ADDRESS: ARBITRATION AND THE FREEDOM TO ASSOCIATE

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## I. INTRODUCTION

This conference is in the nature of a homecoming for me. Some twenty years ago, my first law review article was published by the *Georgia Journal of International and Comparative Law*.<sup>1</sup> As the academics in the audience will know, your first law review article is a little like your first girlfriend or boyfriend—it is something you never forget. I am therefore especially grateful for the opportunity that Professor Peter “Bo” Rutledge and his colleagues have given me to return home and attend this conference. It is also a distinct honor to be asked to deliver the conference’s keynote address, particularly following so many stimulating comments by the other speakers and participants in the audience.

In this address, I would like to take a step back and discuss international arbitration with a higher degree of abstraction than that of earlier speakers. I would like to look not at the details of the New York Convention and the Federal Arbitration Act (FAA), but instead at why arbitration has flourished (especially internationally), what private and public objectives and values arbitration serves, and what those values suggest about some of the pending efforts to revise the existing treaty and legislative frameworks for international arbitration.

## II. THE CONTINUED POPULARITY OF INTERNATIONAL ARBITRATION

I would like to begin with the observation that we have already heard—but that is important to underscore—that international arbitration has become increasingly popular in recent decades. You have heard some statistics, e.g., the American Arbitration Association (AAA) reporting 700 new international cases filed last year for the first time.<sup>2</sup> Other leading arbitral institutions—including the International Court of Arbitration of the International Chamber of Commerce (ICC),<sup>3</sup> the London Court of International Arbitration (LCIA),<sup>4</sup> the International

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<sup>1</sup> See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987).

<sup>2</sup> See American Arbitration Association, AAA’s 2008 Caseload Up 8 Percent (Apr. 20, 2009), <http://www.adr.org/sp.asp?id'35937> (reporting that 703 cases were filed with the International Centre for Dispute Resolution, the AAA’s international division, in 2008).

<sup>3</sup> 2008 Statistical Report, 20 ICC CT. BULL. 5 (2009); 2006 Statistical Report, 18 ICC CT. BULL. 5 (2007).

<sup>4</sup> See ADRIAN WINSTANLEY, DIRECTOR GENERAL’S REPORT ON CASEWORK (Nov. 2008), [http://www.lcia.org/NEWS\\_folder/news\\_archive7.htm](http://www.lcia.org/NEWS_folder/news_archive7.htm) (reporting an increase in disputes filed

Centre for the Settlement of Investment Disputes (ICSID),<sup>5</sup> and various regional centers—have also reported similar increases in caseloads in recent years. If we look back over the past two decades or so, this has not been a temporary or short-lived phenomenon; rather, there has been a sustained and dramatic increase in the number of international arbitrations that have been conducted over a substantial number of years.<sup>6</sup>

It is difficult to estimate exactly how many international arbitrations are conducted annually or precisely how substantial an increase has occurred over the past decades. A starting point is provided by the annual statistics for the main arbitral institutions in the United States and Europe—the ICC, the AAA, and the LCIA. These statistics indicate a robust and growing body of international arbitrations. In 1993, these institutions reported roughly 1,300 arbitrations. In 2007, the number was 3,200.<sup>7</sup> This is a remarkable increase in percentage terms—and those figures do not capture the very significant increase in arbitrations at national and regional centers around the world—such as the Singapore International Arbitration Centre,<sup>8</sup> the Vienna International

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with the LCIA from 2006–2008).

<sup>5</sup> INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID ANNUAL REPORT 2008, at 3, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType'ICSIDPublicationsRH&actionVal'ViewAnnualReports&year'2008\\_Eng](http://icsid.worldbank.org/ICSID/FrontServlet?requestType'ICSIDPublicationsRH&actionVal'ViewAnnualReports&year'2008_Eng).

<sup>6</sup> See generally TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH, app. 1, at 341 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) [hereinafter TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION] (compiling research on the number of cases filed from 1993–2003 with various arbitration tribunals); see also Arbitration Institute of the Stockholm Chamber of Commerce, Statistics, <http://www.sccinstitute.com/?id'23700> (last visited Nov. 17, 2009) [hereinafter SCC Statistics]; Hong Kong International Arbitration Centre, About the HKIAC: Statistics, [http://www.hkiac.org/show\\_content.php?article\\_id'9](http://www.hkiac.org/show_content.php?article_id'9) (last visited Nov. 17, 2009) [hereinafter HKIAC Statistics] (listing case statistics for HKIAC and other arbitration tribunals, such as the China International Economic and Trade Arbitration Commission).

<sup>7</sup> Illustrated in the following statistics are the number of cases filed with each of the listed arbitral institutions between 1993–2007: TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION, *supra* note 6, app. 1, at 341 (providing data on cases filed with international arbitration institutions from 1993–2003); TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION, *supra*, app. 2, at 344 (providing data on ICC arbitrations from 1921–2003); 2 J. GILLIS WETTER, THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE 123–24 (1979) (reporting statistics on cases filed with the American Arbitration Association from 1975–1977); SCC Statistics, *supra* note 6; HKIAC Statistics, *supra* note 6.

<sup>8</sup> See Singapore International Arbitration Centre, Facts and Figures: Statistics, <http://www.siac.org.sg/facts-statistics.htm> (last visited Nov. 18, 2009) (reporting case administration increases at SIAC from 2000–2008).

Arbitration Centre,<sup>9</sup> and many others—which play an increasingly important role in international dispute resolution.

These figures also do not take into account the dramatic increase in ad hoc arbitrations in specialized commercial sectors, such as insurance and reinsurance, construction, maritime disputes, or commodities, which use either specialized arbitral institutions or ad hoc arbitration. Nor do these figures take into account ICSID and bilateral investment treaty disputes, which have increasingly been the subject of arbitration in the past decade. ICSID's caseload a decade and a half ago was essentially moribund, but it currently administers between 50 and 100 cases a year.<sup>10</sup>

### III. REASONS FOR THE POPULARITY OF INTERNATIONAL ARBITRATION

Why is it that parties choose to arbitrate their international disputes? There are a few tried and true explanations for this phenomenon.

Most of you have heard the comment that arbitration is quicker and cheaper than litigation.<sup>11</sup> Many of you have also heard the retort that arbitration is

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<sup>9</sup> For a listing of statistics on the International Arbitral Centre of the Austrian Federal Economic Chamber, see HKIAC Statistics, *supra* note 6. For general information about the Centre, see International Arbitral Centre of the Austrian Federal Economic Chamber, [www.wko.at/arbitration](http://www.wko.at/arbitration) (last visited Nov. 18, 2009). For further commentary, see FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, *THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA* (2009).

<sup>10</sup> Stanimir A. Alexander, 20 *ICSID REV.: FOREIGN INV. L.J.* 648 (2005) (reviewing *INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES* (Karl P. Sauvent & Jörg Weber eds., 2001)) (“The first year in which more than five ICSID cases were registered was 1997. At the end of 1997, the number of pending cases was 14; at the end of 2001, it was 37; and at the end of 2003, there were 64 pending cases. As of August 2005, ICSID’s website listed some 95 pending cases between investors and host states—well over half of which have been filed in since 2003.”). As of November 2009, there were 121 pending cases. ICSID, List of Pending Cases <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last visited Nov. 18, 2009).

<sup>11</sup> See 1 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 84–86 (2009); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 *IND. L.J.* 425, 438–40 (1988) (discussing the “speed and efficiency” of the arbitral process); U.N. COMM’N ON INT’L TRADE L., EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT, *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985: WITH AMENDMENTS AS ADOPTED IN 2006*, at 27, U.N. Sales No. E.08.V.4 (2008) (noting that the “the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process”); Nat’l Conf. of Commissioners on Unif. State Laws, Proposed Revisions of the Uniform Arbitration Act (Draft), prefatory note, at 2 (1999), available at <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbam99.pdf> (“[T]he underlying reason many parties choose

actually slower and more expensive than most alternatives.<sup>12</sup> In truth, for those who have had experience with different forms of international dispute resolution, international arbitration is—as a general matter—often quicker and less expensive than litigation.<sup>13</sup> When account is taken of the delays resulting from court backlogs (in many jurisdictions), appellate proceedings, discovery, and other procedural aspects of national court litigation, international arbitration typically produces a final resolution of disputes more quickly and efficiently than litigation. That advantage is even more pronounced when the possibilities of jurisdictional disputes, parallel proceedings, and obstacles to recognition of foreign judgments are taken into account.

There are obviously examples of cases where international arbitration is slower and more expensive than litigation of particular disputes. These instances do not, however, alter the general experiences with arbitration of international disputes. Cases involving lengthy arbitral proceedings not infrequently reflect the fact that in some disputes the parties desire a full, and necessarily time-consuming, opportunity to present their cases to the arbitral tribunal; that is most obvious in complex international commercial disputes with numerous disputed factual and legal issues, where there are good reasons to devote a substantial amount of time to the merits of the parties' disputes, in order to permit informed and just decision-making. In these sorts of cases, the procedural flexibility of international arbitration permits parties and arbitrators to proceed in a more deliberate and searching manner than in less complex cases. That process takes time, but it is time that the parties want to be devoted to the resolution of their dispute—rather than delays produced by court backlogs or parallel proceedings.

International arbitration is also attractive because it provides a mechanism for centralizing dispute resolution in a single forum. A peculiar risk of international disputes is that of parallel proceedings in different national

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arbitration is the relative speed, lower cost, and greater efficiency of the process . . . .").

<sup>12</sup> *Blue Tee Corp. v. Koehring Co.*, 999 F.2d 633, 634 (2d Cir. 1993) ("This appeal . . . makes one wonder about the alleged speed and economy of arbitration in resolving commercial disputes."); Robert Layton, *Arbitration in International Commercial Agreements: The Noose Draws Tighter*, 9 INT'L LAW. 741, 745 (1975); James Lyons, *Arbitration: The Slower, More Expensive Alternative?*, AM. LAW., Jan.–Feb. 1985, at 107; Linda Silberman, *International Arbitration: Comments from a Critic*, 13 AM. REV. INT'L ARB. 9 (2002).

<sup>13</sup> Christian Bühring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes: Advantages of Arbitration*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION, *supra* note 6, at 25, 32, 35; William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238 (1979); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 6 (1995).

courts, with one party's claims being heard in one place and the other party's claims being heard in a different place.<sup>14</sup> International arbitration allows all the parties' disputes to be put in a single centralized forum where a single, uniform decision can resolve these disputes. That is of particular interest to commercial parties.<sup>15</sup> At the same time, arbitration typically will not permit the joinder or intervention of non-parties, which may well not permit resolution of all related disputes in a single forum—a result which is at least theoretically possible in some national court proceedings.<sup>16</sup>

Another reason for the popularity of international arbitrations is the pro-arbitration legal framework that developed states and, increasingly, other states have adopted.<sup>17</sup> As a consequence, international arbitration enjoys an “enforceability premium,” at both the agreement stage and the decision stage, compared to the mechanism available in most judicial proceedings.

We are here in part to celebrate the fiftieth anniversary of the New York Convention—which has now been adopted by some 140 states around the world. That celebration is appropriate, because the Convention provides an extraordinarily effective and robust legal framework for giving effect to international arbitration agreements and international arbitral awards.<sup>18</sup> In particular, Article II of the Convention commands Contracting States to recognize international arbitration agreements, subject only to enumerated

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<sup>14</sup> GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1–4, passim* (4th ed. 2007); ALBERT V. DICEY, JOHN H. MORRIS & LAWRENCE COLLINS, *DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS passim* (14th ed. 2006).

<sup>15</sup> 1 BORN, *supra* note 11, at 84–86.

<sup>16</sup> Jurisdictional and other obstacles may well also preclude centralized resolution of such disputes in national courts. In principle, however, the mandatory joinder and intervention possibilities in national courts will be superior to those available in most arbitrations.

<sup>17</sup> 1 BORN, *supra* note 11, at 201.

<sup>18</sup> ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 1 (1981); *see also* Richard J. Graving, *Status of the New York Arbitration Convention: Some Gaps in Coverage but New Acceptances Confirm its Vitality*, 10 ICSID REV.: FOREIGN INV. L.J. 1, 3 (1995) (describing the New York Convention as the “mortar in the edifice of international commercial arbitration”); Michael J. Mustill, *Arbitration: History and Background*, J. INT'L ARB., June 1989, at 43, 49 (describing the New York Convention as arguably the “most effective instance of international legislation in the entire history of commercial law”); Steven Schwebel, *A Celebration of the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 12 ARB. INT'L 83, 85 (1996); J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 AM. REV. INT'L ARB. 91, 93 (1990) (describing the New York Convention as the “single most important pillar on which the edifice of international arbitration rests”).

defenses, while Articles III and V of the Convention obligate Contracting States to recognize international arbitral awards, again subject only to enumerated defenses.

At the same time, legislation has been enacted in national jurisdictions around the world which gives expansive effect to the New York Convention. Chapter 2 of the FAA, in this country, is a leading example of such legislation. Elsewhere, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration has increasingly been adopted to underpin the New York Convention and to give effect to its two central commands: that Contracting States recognize and enforce international arbitration agreements and arbitral awards.<sup>19</sup>

It is fair to say that legislation now exists in all developed states which faithfully and effectively implements the New York Convention, and that this legislation is, for the most part, given expansive effect by courts in those states. In addition, and importantly, the last twenty years have seen an increasing number of developing and other states, which historically had not embraced either international or domestic arbitration, adopting either the UNCITRAL Model Law or other arbitration instruments, as well as acceding to the New York Convention, the ICSID Convention, and other international instruments.<sup>20</sup> At the same time, courts in these states have begun to adopt notably pro-enforcement approaches to issues arising under the Convention—in some instances, approaches that are more supportive of the arbitral process than those in many early adherents to the Convention.<sup>21</sup> Although by no means perfect, particularly in more recent adherents to the New York Convention, it

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<sup>19</sup> 1 BORN, *supra* note 11, at 115–21.

<sup>20</sup> *Id.* at 147. For example, some fifty jurisdictions have adopted legislation based on the UNCITRAL Model Law as of mid-2008. For an updated list of jurisdictions, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html). At time of publication, UNCITRAL cited the following jurisdictions as having adopted legislation based on the Model Law: Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bermuda, Bulgaria, Cambodia, Canada, Chile, China (Hong Kong and Macau Special Administrative Regions), Croatia, Cyprus, Denmark, Egypt, Estonia, Germany, Greece, Guatemala, Hungary, India, Iran, Ireland, Japan, Jordan, Kenya, Korea, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Paraguay, Peru, Philippines, Poland, Russia, Scotland, Serbia, Singapore, Slovenia, Spain, Sri Lanka, Thailand, Tunisia, Turkey, Uganda, Ukraine, Venezuela, Zambia and Zimbabwe, as well as the U.S. states of California, Connecticut, Illinois, Louisiana, Oregon, and Texas.

<sup>21</sup> *See, e.g.,* Shin-Etsu Chemical Co. v. Aksh Optifibre Ltd, *reprinted in* 31 Y.B. Com. Arb. 747 (2006); Sumito v. Antig Inv. Pte Ltd, [2009] SGCA 41 (Sing. Ct. of Appeal).

is fair to say that the implementation of Articles II, III, and V of the Convention by courts in Contracting States tends to be good.

In contrast to experience under the Convention, the enforcement of forum selection clauses and national court judgments tends to be materially more problematic in many jurisdictions. In many instances, the enforcement of international forum selection clauses and/or foreign judgments is governed entirely by domestic law, which often reflects parochial protections for local nationals; at the same time, the absence of recognized international standards increases the risk of favoritism towards local parties, which is mitigated in matters arising under the Convention's international standards. In sum, the comparative robustness and efficacy of the international legal framework for international arbitration, in contrast to available alternatives, has been an important reason for the popularity of arbitration as a means for resolving international disputes.<sup>22</sup>

There is no guarantee that international arbitration will always retain this relative advantage over other forms of dispute resolution. The Hague Conference on Private International Law's draft Convention on Choice of Court Agreements would provide improved international standards for the enforcement of international forum selection agreements—if it were ratified by significant numbers of states. Even then, however, the Convention's limitations and exceptions would leave the enforceability of forum selection clauses subject to significant uncertainties and afford international arbitration agreements and arbitral awards a substantial “enforceability premium,” as compared with international forum selection agreements.<sup>23</sup>

International arbitration also provides a means of dispute resolution that can be—and often is—neutral as between the parties. When U.S. and Japanese, or Russian and German, parties conclude a commercial contract, neither is particularly receptive to the prospect of litigation in its counter-party's home courts. Those concerns are often rooted in sound concerns about the neutrality of local courts in international disputes. International arbitration provides parties with the option of resolving their dispute in a neutral geographical

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<sup>22</sup> The evidence is in part anecdotal. *See, e.g.*, Bühring-Uhle, *supra* note 13, at 25, 31, 35 (one of the “two most significant advantages and presumably the two most important reasons for choosing arbitration as a means of international commercial dispute resolution [is] . . . the superiority of its legal framework with treaties like the New York Convention guaranteeing the international enforcement of awards”); PRICEWATERHOUSECOOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 6–7 (2008) [hereinafter PWC REPORT], available at [http://www.pwc.co.uk/pdf/PwC\\_International\\_Arbitration\\_2008.pdf](http://www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf).

<sup>23</sup> 1 BORN, *supra* note 11, at 76–78; BORN & RUTLEDGE, *supra* note 14, at 442, 459, 1017.

location (i.e., a state other than that where either of the parties is based) before a tribunal chaired by someone who does not share either party's nationality. This removes a principal basis for concerns about bias in international dispute resolution; it also provides an advantage that is less easily replicated by forum selection clauses, where selection of courts unrelated to either party often raise issues of language, suitability of procedural rules, and the like.

These reasons—relative efficiency and cost, centralization of dispute resolution, enforceability, neutrality, and expertise—go a considerable distance in explaining the popularity of international arbitration. But these are not the only reasons that lead parties to choose to arbitrate, nor the only reasons that nations, in particular free and democratic societies, have given effect to international and domestic arbitration agreements. Indeed, these are not necessarily the most important reasons for the historic popularity of arbitration as a mode of dispute resolution.

#### IV. ARBITRATION AS AN ASPECT OF PARTY AUTONOMY AND ASSOCIATIONAL FREEDOM

At its most basic level, arbitration is an expression of party autonomy. When parties agree to arbitrate their disputes, they select a particular mechanism for dispute resolution—a contractual and consensual mechanism that grants very broad freedom to the parties to define the manner of dispute resolution and to minimize the role of third parties (including the state) in that dispute resolution process. This aspect of arbitration—the parties' dominant role in defining their own dispute resolution process—is essential to understanding why parties arbitrate and why nations have adopted pro-arbitration international instruments and legislation which encourages the use of arbitration to resolve disputes.

The means by which parties resolve disputes is a fundamentally important aspect of their underlying contractual (or other) relationship; it is no less important than the parties' decision to enter into a contractual relationship or the manner in which parties structure and conduct that relationship. The parties' relationship—whether pursuant to a contract or other kind of relationship—is designed to endure through good times and bad times. It needs to endure, not just in the warm afterglow of signing the contract and of closing the deal, but also after problems and disputes inevitably arise. If those disputes cannot be resolved in a way that is consistent with the parties' underlying relationship, then that relationship will itself be compromised.

It is elementary that arbitration permits parties to agree upon virtually all aspects of dispute resolution.<sup>24</sup> Under the New York Convention, and most developed national legal systems, parties are free to agree upon the arbitral procedures (as also noted above), upon the arbitral seat, upon the identities of the arbitrators, upon the confidentiality of the proceedings, and upon a vast range of other aspects of the dispute resolution process.<sup>25</sup>

If the parties desire a fast-track arbitration, one that is over and done within three months, they can agree to that.<sup>26</sup> If the parties desire a documents-only arbitration, because they do not want to incur significant expense in having their dispute resolved, they can agree to that.<sup>27</sup> If the parties want a construction arbitration with a highly specialized mechanism before a specialized tribunal, they can agree to that.<sup>28</sup> This flexibility is in contrast to national court procedures where parties typically are in a court of general jurisdiction, and the idea that the parties can pick the particular judge (or prescribe the qualifications of the judge) who will resolve their dispute is anathema.<sup>29</sup>

This wide scope for party autonomy leaves it to the parties to define the character of “their” dispute resolution mechanisms. In particular, it allows parties to select means of dispute resolution that exclude otherwise responsible governmental institutions and applicable judicial procedures and instead adopt mechanisms aimed at preserving the parties’ underlying commercial relationship.

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<sup>24</sup> Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 534 (2005) (“[P]arties can experiment with dispute resolution - cutting and tailoring, shaping and adapting different processes to meet their own particular needs . . .”); Stipanowich, *supra* note 11, at 433–35 (discussing the advantages of arbitration including flexibility and informality).

<sup>25</sup> I BORN, *supra* note 11, at 92–101.

<sup>26</sup> *Special Section: Fast-Track Arbitration*, 2 AM. REV. INT'L ARB. 137 (1991); Hans Bagner, *Expedited Arbitration Rules: Stockholm and WIPO*, 13 ARB. INT'L 193 (1997); Dana H. Freyer, *Getting 'Fast-Track' Arbitration: Pre-Dispute Agreements and Post-Dispute Techniques*, in LIBER AMICORUM MICHEL GAUDET 104 (1999); Michael Mustill, *Comments on Fast-Track Arbitration*, J. INT'L ARB., Dec. 1993, at 121.

<sup>27</sup> ROBERT M. MERKIN, *ARBITRATION LAW*, at 15.3 (Louis Flannery ed., 2004 & Update 2007); ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, at 6-104 (4th ed. 2004).

<sup>28</sup> Paul Hobeck, Volker Mahnken & Max Koebke, *Time for Woolf Reforms in International Construction Arbitration*, 2008 INT'L ARB. L. REV. 84.

<sup>29</sup> Bühring-Uhle, *supra* note 13, at 25, 33; Toby Landau, *Composition and Establishment of the Tribunal (Articles 14 to 36)*, 9 AM. REV. INT'L ARB. 45 (1998); PWC REPORT, *supra* note 22, at 5.

It is no coincidence that arbitration traces many of its roots to trade associations, commercial guilds, and religious associations. In each of these settings, the members of a community chose to have disputes with other people in that community resolved by a mechanism of their own choice and design. Parties in these contexts did so because they desired to minimize the effects of their disputes on their underlying and shared community. At a fundamental level, parties agreed to arbitrate in these contexts because they wanted maximum autonomy and control over the resolution of their disputes and, in particular, wanted to ensure that the resolution of these disputes did not disrupt or damage their underlying relationship, out of which their disputes arose.

The same objectives are present—albeit less starkly—in more typical commercial contractual settings. Parties to contracts in particular commercial industries (e.g., insurance and reinsurance, oil and gas, commodities, financial services, transport, maritime) very frequently agree to arbitrate pursuant to mechanisms that are developed by and for those industries.<sup>30</sup> Equally, parties in other types of commercial arrangements (e.g., joint ventures, project finance) take care to draft and tailor their dispute resolution mechanism specifically to suit their particular relationship. Importantly, in making all of these decisions to utilize arbitration as a means of dispute resolution, parties act to define and structure not just their dispute resolution mechanism, but also their underlying relationship itself; they act to safeguard their shared association with one another against the disputes which will inevitably arise and against the process of dispute resolution. Parties choose arbitration not just because of its characteristics as a dispute resolution mechanism, but because of their ability jointly to determine how the process of dispute resolution will affect their underlying relationship with one another.

Developed states have long given binding legal effect to these expressions of party autonomy and associational freedom through agreements to arbitrate—in substantial part precisely because arbitration agreements are expressions of party autonomy and associational freedom. Indeed, when one considers the jurisdictions that have been most hostile over the years to arbitration, they have been the jurisdictions that have been most hostile towards other types of freedoms and, in particular, the freedom of private parties to associate with one another.

The treatment of arbitration in France provides an excellent illustration of this point. In the immediate aftermath of the French Revolution, one of the principal articles of the Constitution of Year One guaranteed the right to

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<sup>30</sup> 1 BORN, *supra* note 11, at 78–81.

arbitrate.<sup>31</sup> The first act of the French National Assembly after the Revolution was to include a guarantee that the right of the citizens to have their disputes settled by arbitrators of their choice would not be violated in any way. This might be regarded as a fairly unusual initial step for a constitutional document (addressing what is arguably a fine point of civil procedure). But when one considers arbitration as an expression of party autonomy and associational freedom, this was not a surprising step at all. Rather, it was seen to be, and was, an important step in securing liberty, equality, and fraternity which was rightly one of the initial guarantees adopted by the French Constitution.

Unfortunately, the French experience is important not just for this point, but also because of what happened next. Like many other aspects of the French Revolution, the revolutionaries soon turned on their initial decision regarding arbitration.<sup>32</sup> Only a few years later, in 1806, the Napoleonic Code adopted an absolutist conception of state judicial authority, which largely rejected the use of arbitration, invalidating agreements to arbitrate future disputes in virtually all contexts, except a very narrow range of commercial partnership disputes.<sup>33</sup> That action was motivated by the stated view that arbitrators provided a brand of justice that was inferior to that of French courts and that, even if parties wished to arbitrate, they were nonetheless required to have their disputes resolved by national judges, in national courts, and according to national procedures.<sup>34</sup>

It took another eighty years for this aspect of French law to be changed. In part because of the Geneva Protocol and Geneva Convention, France reformed its arbitration statutes, both domestically and internationally in the 1920s. Those revisions again gave effect to the associational liberties that had been

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<sup>31</sup> FRENCH CONSTITUTION OF THE YEAR I, art. 86 (ratified June 24, 1793) (“The right of the citizens to have their disputes settled by arbitrators of their choice shall not be violated in any way whatsoever.”).

<sup>32</sup> RENÉ DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 90 (1985). This perception apparently arose from the use of compulsory arbitration in a wide range of civil disputes (including domestic relations, inheritance, and similar areas). J.-J. Clère, *L’Arbitrage Révolutionnaire: Apogée et Déclin d’une Institution (1790–1806)*, 1981 *REV. ARB.* 3, 21–23.

<sup>33</sup> Articles 1003 to 1028 of the 1806 Code of Civil Procedure introduced an extremely unfavorable legal regime for arbitration. See MATTHIEU DE BOISSÉSON, *LE DROIT FRANÇAIS DE L’ARBITRAGE INTERNE ET INTERNATIONAL* 1118–11 (2d ed. 1990); Clère, *supra* note 32, at 3; DAVID, *supra* note 32, at 90.

<sup>34</sup> One commentator observes: “ [A]ll the provisions of the [Napoleonic Code] do appear to reflect, so to speak, a hatred of arbitration agreements and provide evidence of a secret desire to eliminate their existence.” DAVID, *supra* note 32, at 90 (quoting Bellot); see also 1 BORN, *supra* note 11, at 38–39.

guaranteed in the Constitution of Year One, but subsequently abandoned. More recently, France ratified the New York Convention and adopted legislation (supported by expansive judicial interpretations) which is arguably among the most pro-enforcement in the world.<sup>35</sup>

A second historical example is Germany. Through the Middle Ages, the trade guilds in German-speaking Europe had been important commercial institutions, with arbitration playing a substantial role in the functioning of those institutions. Later, during the 19th century, the local civil procedure codes of German states (e.g., Bavaria and Prussia) guaranteed the right to arbitrate and generally gave effect to arbitration agreements.<sup>36</sup> Indeed, German courts rendered decisions a century ago on issues such as the separability doctrine that read remarkably like the U.S. Supreme Court's recent decision in *Buckeye*.<sup>37</sup>

That approach to arbitration changed in the 1930s, when the National Socialists came to power in Germany. Along with taking control of all aspects of life, the National Socialists curtailed the use of arbitration in both domestic and international matters.<sup>38</sup> Much like the Napoleonic Code, the rationale for this action was the view that centralized state control over all aspects of life, including dispute resolution, was essential. In 1933, it was observed in the *Guidelines of the Reich Regarding Arbitral Tribunals* that "from a state-political point of view a further spread of arbitration would shatter confidence in state jurisdiction and the State itself."<sup>39</sup> One contemporary commentator approved the declaration, adding "that the national-socialist state rejects—contrary to liberals' views—arbitral tribunals" altogether.<sup>40</sup> Again, it was totalitarian ideology, jealous of private autonomy and associational freedoms that was hostile to arbitration and agreements to arbitrate—which was seen as an explicit threat to government control.

Post-war Germany abandoned these views about the necessity for state control of dispute resolution and re-embraced both international and domestic arbitration. Post-war German legislation and court decisions gave broad effect

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<sup>35</sup> 1 BORN, *supra* note 11, at 121–25.

<sup>36</sup> ALFRED VON LINDHEIM, DAS SCHIEDSGERICHT IM MODERNEN CIVILPROCESSE 17 (1891).

<sup>37</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447–48 (2006).

<sup>38</sup> Walter Raeke, *Dienst am Recht*, 65 JURISTISCHE WOCHENSCHRIFT 3 (1935); E. Kuntze, *Schiedsgericht oder Rechtsprechung durch die Gerichte des Staates*, 63 JURISTISCHE WOCHENSCHRIFT 649 (1934); Karl Blomeyer, *Betrachtungen über die Schiedsgerichtsbarkeit*, in FESTGABE ZUM SIEBZIGSTEN GEBURTSTAG VON LEO ROSENBERG 59 (1949).

<sup>39</sup> *Richtlinien des Reiches über Schiedsgerichte*, 95 DEUTSCHE JUSTIZ 52, 821 (1933).

<sup>40</sup> Kuntze, *supra* note 38, at 653.

to agreements to arbitrate and arbitral awards.<sup>41</sup> Likewise, Germany ratified the New York Convention and, more recently, adopted the UNCITRAL Model Law, returning to its historic traditions of giving vigorous effect to agreements to arbitrate and recognizing arbitral awards.

There are contemporary examples of countries that do not embrace arbitration. Those examples include recent decisions by several states to withdraw from ICSID, or other international instruments providing for international arbitration. They also include the difficulties that have been encountered in enforcing international arbitration agreements and awards in states that reject the notion of open market economies.

Although there are counter-examples, it is fair to conclude that free societies have generally permitted and encouraged arbitration, while totalitarian regimes have historically disfavored or prohibited arbitration. That can be seen in historical developments in France and Germany, as well as in contemporary experiences around the world today.

This observation returns us to one of the underlying reasons that arbitration is chosen by parties and given effect and encouraged by states. As we have seen, that is because arbitration is often an expression of party autonomy and associational liberty, aimed at structuring and securing the parties' underlying relationship or community. The choice of arbitration as a means to resolve disputes entails private citizens choosing between themselves how they want disputes about their underlying relationship to be resolved—precisely so that their underlying relationship can be preserved. From this perspective, arbitration is an expression of private parties' desires to control, to the maximum extent possible, the nature and character of their underlying relationship, to minimize the potentially deleterious impact of disputes on that relationship, and to structure their own dispute resolution process in a manner that strengthens and preserves their relationship.

It is therefore not surprising that this exercise of private autonomy and associational freedom has been seen, from the Napoleonic Code to the Reich's Guidelines for Arbitral Tribunals to the decisions of a few states to reject arbitration as a means of international dispute resolution, as a threat to totalitarian regimes. The parties' very endeavor to structure their underlying relations with one another, and to define the manner of dispute resolution, conflicts with the objective of totalitarian states to control all aspects of life. Conversely, the control of the manner in which parties resolve their dispute, not only enables the totalitarian state to control the dispute resolution process,

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<sup>41</sup> 1 BORN, *supra* note 11, at 47–121.

but permits the state to insert itself into and control the parties' underlying relationship.

In contrast, free societies have characteristically not merely permitted, but sought affirmatively to encourage and facilitate, the autonomy of private parties to resolve their disputes by arbitration. That can best be seen in the actions of developed states during the twentieth century (embracing the Geneva Convention and Protocol and, later, the New York Convention) and by the increasing willingness of other states to adopt these instruments as their economic and political systems were liberalized during the last three decades of the twentieth century. These states have permitted and encouraged arbitration in part for precisely the same reasons that they have encouraged other forms of voluntary associations and freedoms—namely, because of an abiding commitment to these freedoms as essential aspects of a free and democratic society.

#### V. FOUNDATIONAL DOCUMENTS OF ARBITRATION IN COMPARISON TO CONSTITUTIONS

It is useful now to return briefly to the legal regime that is the subject of this conference—the New York Convention—and to the FAA, which gives effect to the Convention in the United States. In particular, given the central importance of party autonomy and associational liberty to the arbitral process, it is useful to consider the principal provisions of the New York Convention and the FAA in constitutional terms, aimed at protecting associational freedom, as well as at securing efficient and enforceable dispute resolution mechanisms.

Both the New York Convention and the FAA are remarkably constitutional in many respects. Both instruments are short, couched in broad, abstract language.<sup>42</sup> We can compare the terms of the Due Process Clause to the terms of, for example, section 2 of the FAA, which provides only that arbitration agreements will be given effect in the same way as other contracts. Articles II and V of the New York Convention are similarly brief and broadly worded.

There are other structural similarities between the New York Convention, the FAA, and many national constitutions. All of these instruments have been legislatively approved by super-majorities. The New York Convention has now been adopted by 144 countries around the world, and the FAA was adopted unanimously by the U.S. Congress in 1925. Less clearly, the

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<sup>42</sup> *Id.* at 101.

UNCITRAL Model Law appears headed towards attaining either universal status (akin to that of the New York Convention) or at least towards playing a dominant role in defining the contents of national arbitration legislation.<sup>43</sup>

Further, like national constitutions, the New York Convention and most national arbitration statutes play comparable roles in mediating between private autonomy (or liberty) and governmental regulatory interests. Most fundamentally, Article II of the New York Convention and section 2 of the FAA guarantee the parties' right to agree to resolve their disputes by arbitration—thereby both safeguarding and encouraging the exercise of private autonomy, in a manner akin to constitutional safeguards of private rights against governmental intrusion. Other provisions of the Convention and the FAA give similar effect to the parties' freedom to select arbitrators, arbitral procedures, and similar matters. Given this, Article II and section 2 can properly be understood as guarantees of party autonomy and associational freedom—singling out arbitration agreements as forms of contracts entitled to particular respect by national courts.

The fact that developed states give effect to private arbitration agreements as an expression of associational liberty does not afford parties unlimited freedom with respect to their arbitration agreement. The parties' freedom to arbitrate does not mean that there is no role for state regulation of the subjects of arbitration or the specification of arbitral procedures, any more than that other forms of liberty are unlimited. Under both the New York Convention and national arbitration legislation, there are limits to the validity of arbitration agreements (paralleling those applicable to other forms of contracts),<sup>44</sup> to the types of disputes which may be arbitrated (under the so-called "non-arbitrability doctrine"),<sup>45</sup> and to the parties' freedom to select arbitral procedures.<sup>46</sup>

But, like national constitutions, which mediate between private rights—whether it is the freedom to associate, freedom to speak, or freedom to do something else—and governmental interests, the New York Convention and the FAA provide a framework for striking the balance between associational interests and regulatory interests. These instruments provide the general

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<sup>43</sup> For example, England did not expressly adopt the UNCITRAL Model Law, but its arbitration legislation (the Arbitration Act, 1996) was based closely on the Model Law.

<sup>44</sup> 1 BORN, *supra* note 11, at 580–625.

<sup>45</sup> *Id.* at 766–841.

<sup>46</sup> *Id.* at 569.

outlines and framework for determining when private parties may agree to arbitrate particular subjects, what procedures they may adopt, and so forth.<sup>47</sup>

In another of the parallels between a constitution, on the one hand, and the New York Convention and the FAA, on the other, it has been mostly by common law development that those instruments have been articulated. This can be seen, for example, in the judicial development of the non-arbitrability doctrine in the United States and France.<sup>48</sup> It can also be seen through the general absence of specific legislative rules regarding mandatory arbitral procedures, coupled with reliance on case-by-case development of judicial standards governing the subject.<sup>49</sup> In each instance, national courts have articulated the boundaries between private autonomy and governmental regulation of the arbitral process through common law decisions, looking to the underlying purposes and objectives of arbitration—in much the same fashion that other constitutional freedoms are developed.

## VI. CONCLUSION

What does all this tell us about the questions we have been discussing at this Conference—whether we should amend the New York Convention or amend the FAA? If one considers the New York Convention and FAA as instruments with a constitutional character, guaranteeing both the autonomy of parties to arbitrate and important aspects of their associational liberty, one ought to be hesitant to tinker with them. Most national constitutions are not easily or readily amended, precisely because they safeguard long-standing and important private freedoms which should not lightly be altered in the face of shifting political climates. Equally, courts in most jurisdictions find ways, through the development of case law, to address the lack of modern terms or modifications in constitutional texts, and to deal with both changing times and changing problems. In my view, these considerations argue powerfully for restraint and moderation in adopting changes to instruments which express fundamental freedoms, which have provided the basis for the development of substantial and carefully-articulated bodies of judicial authority and which have withstood the test of time.

If one is not going to legislatively revise the New York Convention or the FAA, that does not mean that defects in the implementation of either

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<sup>47</sup> *Id.* at 571–609.

<sup>48</sup> *Id.* at 766–85.

<sup>49</sup> *Id.* at 82–103.

instrument must be ignored. On the contrary, the courts, academia, and the forthcoming ALI Restatement are both free and obliged to explain, articulate, and reformulate the law as commercial circumstances and problems change. There is ample room in the existing text of the Convention, and the FAA, to adapt both to changing commercial and other circumstances, without undoing the vital importance that both instruments play in contemporary international commercial affairs and in the associational freedoms of private parties.