THE PROSPECTIVE EVOLUTION OF INTERNATIONAL COMMERCIAL ARBITRATION

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THE AMERICANIZATION OF INTERNATIONAL ARBITRATION

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ABSTRACT

"It is a curious fact that the Americanization of international arbitration is a topic that is often felt but is rarely discussed." Roger P. Alford

Similar to Alford's sentiments, the shift towards arbitration in the United States alone is a phenomenon often felt, but feebly interrogated. Law schools across the nation continue to operate under the premise of judicial decision-making grounded in "rights protection."[2] Yet, there is a clear shift towards arbitration as the preferred procedural process, with over 303,999 cases resolved by way of arbitration in 2019 alone.[3] While this brief note does not seek to interrogate the shift towards arbitration as much as it intends to examine the impact of American arbitration on international commercial arbitration generally, that shift, as you will see, looms in the background of any and all analysis of arbitration in the United States.

I will begin by briefly noting the origins- and current regime of international commercial arbitration in the United States so to address the impact of its arbitration law and arbitral institutions on arbitration globally. I will then offer thoughts on the prospective evolution of international arbitration in the United States and how that may change the directions of legal procedural processes both in the United States and abroad.

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[2] *See, e.g.* Thomas E. Carbonneau, *Revolution in Law Through Arbitration, The Eighty-Fourth Cleveland-Marshall Fund Visiting Scholar Lecture*, 56 CLEV. ST. L. REV. 233, 233 n.3 (2008), *available at* https://engagedscholarship.csuohio.edu/clevstlrev/vol56/iss2/3 ("judicial decision-making has shifted from rights protection to guaranteeing access to some form of adjudication. As a result, law and adjudication have become less sacramental.")

[3] *See American Arbitration Association*, ADR.ORG, https://adr.org/ (last visited Dec. 28, 2019).

I. ORIGINS- AND CURRENT REGIME OF INTERNATIONAL ARBITRATION IN THE USA

As arbitration flourishes as the choice for commercial disputes, there is no doubt that the United States has become a newfound hub for arbitration. It was not always this way, however. The Federal Arbitration Act (FAA) of 1925 established a steady road to an increasingly pro-arbitration policy, in three chapters, that shows itself in case-law as: when in doubt, favor arbitration.[4] The first chapter of the FAA establishes the framework for arbitration seated in the U.S. and provides the grounds for enforceable arbitration agreements and awards, while the second and third chapters implement the 1958 New York Convention and 1975 Panama Conventions, respectively. The strictly pro-arbitration policy does not lack in its own confusion, however, because of its basis in an otherwise federalist system. The FAA has largely remained unchanged since its nascence and has thus, left a substantive amount of discretion in interpreting arbitration law in the United States to the Supreme Court.

One such source of confusion in U.S. arbitration law due to a lack of amendment lies in the term "arbitrability." Arbitrability is the susceptibility of a case to be resolved by way of arbitration. In order to define the parameters of this susceptibility, the Supreme Court has distinguished between "procedural" and "substantive" arbitrability, wherein the former concerns itself with "prerequisites such as time limits, notices, laches, estoppel, and other conditions" and the latter, with a court's decision.[5]

The benefits to arbitration remain unmatched for commercial entities, however, which inspires the aforementioned pro-arbitration policy despite any real judicial framework. Arbitration allows parties to customize their dispute resolution by choosing the venue, applicable procedural law, and an expert adjudicator who may be more familiar with the intricacies of the dispute, among other benefits. There is a commitment to secrecy that is not found in the common court and the single, binding, and final resolution of a dispute through arbitration is the precise source of criticism that inspires the flock towards arbitration. Without the federal

[4] *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration …").

[5] *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (distinguishing between "issues of substantive arbitrability [which] are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, [which] are for the arbitrators to decide.") (citations omitted).

rules of civil procedure that would otherwise govern litigation, arbitration is governed by the procedural rules that each side agrees upon.

The FAA paved the way for case law in the United States that would eventually shape a stronger pro-arbitration policy than ever—counseling against "even the mildest interference by courts in the conduct of U.S.-seated arbitrations."[6]

II. THE IMPACT OF U.S. ARBITRATION LAW AND U.S. ARBITRAL INSTITUTIONS IN THE WORLD OF ARBITRATION

Assessing the impact of U.S. arbitration law begins by assessing what characterizes U.S. law: civil procedure. The adversarial form of litigation in which procedural tools are employed by advocates to advance arguments in a distinct style distinguishes the United States from other countries—and this feature inevitably slipped, in some capacity, into global arbitral institutions.

Because the Rules of Arbitration for the International Chamber of Commerce are so brief,[7] American lawyers had tremendous flexibility in bringing American trial procedures with them. This came specifically in the form of document production for discovery and cross-examinations "to confront adverse witnesses."[8] Critics refer to these added procedures as costly in both time and expense, defining them as the source of the "Americanization" of arbitration. Yet, while there is truth to such criticism, it may be more accurate to acknowledge the incorporation of aspects of American trial procedure as one country's influence on arbitration. Far from inheriting *solely* American practice, global arbitral institutions maintain classic procedural tools while assimilating facets of each major country's influence on arbitration.[9]

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[6] *See* Laurence Shore, Tai-Heng Cheng, Jenelle E. La Chuisa, Lawrence Schaner, and Mara V.J Senn, INTERNATIONAL ARBITRATION IN THE UNITED STATES 1, 320 (2018).

[7] George M. von Mehrem and Alana C. Jochum, *Is International Arbitration Becoming Too American?*, 2 Global Bus. L. Rev. 47, 51 (2011) *available at* https://engagedscholarship.csuohio.edu/gblr/vol2/iss1/6.

[8] *Id.*

[9] Philip J. McConnaughay, INTRODUCTION TO INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA 1, xxix (2002). In support of his assertion, McConnaughay reports that from 1995 to 2000, China's leading international arbitration commission, CIETAC, received 4,200 new international commercial arbitrations and the Hong Kong International Arbitration Centre (HKIAC) received 1,394, totaling 5,594. *Id.* Note: interrogatories and depositions are not included.

III. THE PROSPECTIVE EVOLUTION OF INTERNATIONAL ARBITRATION IN THE USA

Apart from being a source of revenue,[10] international arbitration is the natural response to the increase in "trade, investment, and supply-chain relationships" that hope to live free of potential biases from domestic fora.[11] The California Supreme Court may have briefly lost sight of this when deciding *Birbrower*, wherein attorneys not admitted to the bar of a certain state are not only ineligible to recover attorney's fee but also, may be fined for unauthorizing practice of law.[12]

Since *Birbrower* over two decades ago, however, the California Legislature unanimously passed Senate Bill 766. Under SB 766, non-California lawyers are able to represent parties in international arbitration proceedings in California, bringing California to the arbitration table. As home to Silicon Valley – and even aside from big technology, home to some of the largest companies in the world – California's SB 766 will bring a swath of arbitration proceedings to its terrain.

While California may certainly work in tandem with New York as the home to arbitration for technology and privacy concerns, reserving trade and investment disputes for New York, California may very well be the next major hub of arbitration. Already, it has received massive interest in being an arbitration destination. SB 766 will transform that interest into a revenue. It thus becomes all the more important, internationally, to understand and confront the ways in which the Americanization of arbitration would take place.

[10] *See* ICC (INTERNATIONAL CHAMBER OF COMMERCE), *ICC Arbitration Figures Reveal New Record for Awards in 2018*, https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/.

[11] DAILY JOURNAL, *International Arbitration Finally Comes to California*, Howard B. Miller, https://www.dailyjournal.com/mcle/330-international-arbitration-finally-comes-to-california.

[12] *See generally*, *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119 (1998).