

# DIVERSITY AND UNIFORMITY IN INTERNATIONAL ARBITRATION LAW

*Christopher R. Drahozal\**

## INTRODUCTION

The benefits of diversity (defined broadly as variety or variation)<sup>1</sup> are widely recognized. Diversity of team members is associated with increased creativity (albeit also with increased conflict).<sup>2</sup> As stated by Katherine W. Phillips of the Columbia Business School: “Diversity . . . encourages the search for novel information and perspectives, leading to better decision making and problem solving.”<sup>3</sup> The Supreme Court has held that “diversity is a compelling state interest that can justify the use of race in university admissions,” finding that “numerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.”<sup>4</sup> Scientists emphasize the value of diversity for biological systems. “The diversity of life forms . . . is the greatest wonder of this planet,” says E.O. Wilson,<sup>5</sup> and “must be treated more seriously as a global resource, to be indexed, used, and above all, preserved.”<sup>6</sup> And “[d]iversity is

---

\* John M. Rounds Professor of Law, University of Kansas School of Law; Board of Directors, Arbitrator Intelligence, Inc. This Essay is based on my inaugural Glenn P. Hendrix lecture, sponsored by the Atlanta International Arbitration Society and given at Emory Law School on March 24, 2016.

<sup>1</sup> *Diversity*, MERRIAM-WEBSTER (11th ed. 2012) (“the condition of having or being composed of different elements: variety”).

<sup>2</sup> See, e.g., Elizabeth Mannix & Margaret A. Neale, *What Difference Makes a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. PUB. INT. 31, 32 (2005) (“[U]nderlying differences, such as differences in functional background, education, or personality, are more often positively related to performance—for example by facilitating creativity or group problem solving—but only when the group process is carefully controlled.”); Günter K. Stahl et al., *Unraveling the Effects of Cultural Diversity in Teams: A Meta-Analysis of Research on Multicultural Work Groups*, 41 J. INT’L BUS. STUD. 690, 702 (2010) (“More diverse teams experienced the process gain of increased creativity, but also the process loss of increased conflict.”).

<sup>3</sup> Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), <http://www.scientificamerican.com/article/how-diversity-makes-us-smarter/>.

<sup>4</sup> *Grutter v. Bollinger*, 539 U.S. 306, 325, 330 (2003) (internal quotation marks omitted).

<sup>5</sup> E.O. Wilson, *Editor’s Foreword*, in BIODIVERSITY, at v (E.O. Wilson ed., 1988).

<sup>6</sup> E.O. Wilson, *The Current State of Biological Diversity*, in BIODIVERSITY 3 (E.O. Wilson ed., 1988). *But see* DONALD S. MAIER, WHAT’S SO GOOD ABOUT BIODIVERSITY: A CALL FOR BETTER REASONING ABOUT NATURE’S VALUE 344 (2012) (“Some kinds of diversity are good, but others are bad; and some are very, very bad. So it is for biodiversity. Therefore, one must take care to identify ‘just the right kind’ of biodiversity—the kind that does, indeed, have great value. But what is ‘the right kind?’”).

the staff of economic life.”<sup>7</sup> Product differentiation (i.e., diversity) not only satisfies varied consumer preferences<sup>8</sup> but “brings with it improvements in products that generate economic progress.”<sup>9</sup>

But when it comes to legal rules, diversity is not so highly valued. Instead, uniformity is the favored goal.<sup>10</sup> American lawyers study the Uniform Commercial Code and numerous other uniform statutes promulgated by the Uniform Law Commissioners (with occasional help from the American Law Institute).<sup>11</sup> Internationally, the U.N. Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT) likewise support the uniformity of legal rules.<sup>12</sup> The leading instruments of international arbitration law—the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration—both are widely touted for the uniformity they have brought to

---

<sup>7</sup> Sherwin Rosen, *Markets and Diversity*, 92 AM. ECON. REV. 1, 1 (2002) (“Interpersonal differences in tastes and talents, whether naturally endowed or environmentally produced, give us the unique ‘propensity to truck, barter, and trade’ that improves standards of living.”).

<sup>8</sup> U.N. ECON. COMM. FOR EUR., ECONOMIC SURVEY OF EUROPE, 2004 NO. 1, at 145, U.N. Sales No. E.04.II.E.7 (2004) (“The existence of many consumers with either different tastes over product variants or individual preferences for variety implies a preference for variety in aggregate demand subject to horizontal product differentiation.”).

<sup>9</sup> E.g., Randall G. Holcombe, *Product Differentiation and Economic Progress*, 12 Q.J. AUSTRIAN ECON. 17, 18–19 (2009) (“[P]roduct differentiation is the engine of economic progress.”).

<sup>10</sup> To be sure, there are those, such as legal pluralists, who emphasize the value of diversity in legal rules. As Graf-Peter Calliess and Insa Buchmann explain: “Instead of perceiving legal diversity as a problem, which has to be solved, legal pluralists seek to uphold a state of legal hybridity by devising non-hierarchical procedures in which the voices of different communities can be heard.” Graf-Peter Calliess & Insa Buchmann, *Global Commercial Law Between Unity, Pluralism, and Competition: The Case of the CISG*, 21 UNIFORM L. REV. 1, 10–11 (2016); see, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1155 (2007). But the pluralist voice in international arbitration law has been relatively muted, making only occasional appearances in the scholarship. For exceptions, see JAN PAULSSON, *THE IDEA OF ARBITRATION* 38 (2013) (“The pluralistic thesis is perhaps most simply described as the perception that a multiplicity of legal orders may ensure the efficacy of arbitration.”); Stavros L. Brekoulakis, *International Arbitration Scholarship and the Concept of Arbitration Law*, 36 FORDHAM INT’L L.J. 745, 786 (2013) (“One of the main goals of the article was to look into scholarship on legal pluralism and connect it with arbitration law.”). My take in this article is closer to what Calliess and Buchmann call the “paradigm of regulatory competition” than legal pluralism. Calliess & Buchmann, *supra*, at 11–16; see, e.g., ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 17 (2009); Erin O’Hara O’Connor, *The Role of the CISG in Promoting Healthy Jurisdictional Competition for Contract Law*, 21 UNIFORM L. REV. 41, 43 (2016).

<sup>11</sup> See generally *Acts*, UNIF. LAW COMM’N, <http://uniformlaws.org/Acts.aspx> (last visited Jan. 22, 2017) [hereinafter *Acts*, UNIF. LAW COMM’N]; *UCC Final Act Information*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=UCC%20Final%20Act%20Information> (last visited Jan. 22, 2017).

<sup>12</sup> *Welcome*, UNCITRAL, <https://www.uncitral.org/> (last visited Jan. 30, 2017); *History and Overview*, UNIDROIT, <http://www.unidroit.org/about-unidroit/overview> (last visited Jan. 30, 2017).

arbitration law.<sup>13</sup> And, as I will discuss later, commentators continue to urge more uniformity rather than less when proposing reforms to international arbitration law.<sup>14</sup>

Uniformity of legal rules clearly has benefits, and widespread adherence to the New York Convention and adoption of the UNCITRAL Model Law have been beneficial to individual States and the international community as a whole.<sup>15</sup> But in this Essay, I argue for greater openness to the benefits of diversity (rather than uniformity) in the legal rules that govern international arbitration. The easy benefits of uniformity have already been obtained, meaning that the marginal benefits of greater uniformity are more limited. At the same time, the costs of uniformity (or, stated otherwise, the benefits of diversity) are at their greatest when national arbitration laws remain diverse. Rather than simply seeking more uniformity, the goal should be to aim for the optimal degree of uniformity, recognizing that some diversity in international arbitration laws is beneficial.

Part I provides an overview of uniformity in international arbitration law. Part II examines the extent to which the New York Convention, the UNCITRAL Model Law, and the Federal Arbitration Act each preserve some degree of diversity in international arbitration law, while Part III discusses the benefits of diversity in legal rules. Part IV concludes, arguing in favor of the optimal uniformity (or optimal diversity, as the case may be) of international arbitration law.

---

<sup>13</sup> My focus in this Essay is on diversity of legal rules, not diversity of participants in the process. Certainly the field of international arbitration has been criticized for a lack of diversity among arbitrators. *E.g.*, Louise Barrington & Rashda Rana SC, *Dealing with Diversity in International Arbitration*, 4 *TRANSNAT'L DISP. MGMT.* (2015); Susan D. Franck et al., *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration*, 53 *COLUM. J. TRANSNAT'L L.* 429, 431, 468 (2015). Efforts are underway to enhance that diversity. *See, e.g.*, *ArbitralWomen: The International Network of Women in Dispute Resolution*, ARBITRALWOMEN, [www.arbitralwomen.com](http://www.arbitralwomen.com) (last visited Jan. 22, 2017); *About Arbitrator Intelligence*, ARBITRATOR INTELLIGENCE, [www.arbitratorintelligence.org/about/](http://www.arbitratorintelligence.org/about/) (last visited Jan. 22, 2017) (“By promoting transparency and making sources of information about arbitrators more readily and equally available, *Arbitrator Intelligence* aims . . . to create better opportunities for new and diverse arbitrators.”). But there remains a long way to go.

<sup>14</sup> *See infra* Part I.

<sup>15</sup> For example, in addition to increased uniformity, the Model Law offers a low-cost way for countries without well-developed legal regimes governing international arbitration to update their arbitration laws. *See* Christopher R. Drahozal, *Regulatory Competition and the Location of International Arbitration Proceedings*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION* 111, 113 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) [hereinafter Drahozal, *Regulatory Competition*].

## I. SEEKING UNIFORMITY IN INTERNATIONAL ARBITRATION LAW

International efforts to unify private law date back to the start of the 20th century (if not earlier). As described by Graf-Peter Calliess and Insa Buchmann:

At the beginning of the 20th century the success of the monumental 19th century codifications was still vivid in the academic class and their enthusiasm pressed the idea of international unification of private law readily ahead . . . . Although the early efforts were clearly confined to Europe, over the years the focus was broadened and wide-reaching international unification projects were fostered, ringing in a period of rising universalism.<sup>16</sup>

Calliess and Buchmann explain that while international conventions were the original choice of instrument for unification, the costs of the treaty process led to “the development of more flexible instruments” like “[m]odel laws and other soft law instruments.”<sup>17</sup> The terminology of choice became harmonization rather than unification (although I usually will speak more generically of uniformity).<sup>18</sup>

In the early days of unification efforts, the benefits from uniformity were taken as given. As Lord Justice Kennedy stated at the time: “The certainty of enormous gain to civilised mankind from the unification of law needs no exposition.”<sup>19</sup> Thus, “[i]nternational legal harmonization became more or less an end in itself in the sense that the question was not whether international unification should be strived for, but only how this was to be achieved.”<sup>20</sup>

Today, there is a recognition that the benefits of uniformity need to be identified, if not quantified. The primary benefit of uniformity is that it reduces

---

<sup>16</sup> Calliess & Buchmann, *supra* note 10, at 10–11.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> David Leebron argues that “[t]he term ‘harmonization’ is something of a misnomer insofar as it might be regarded as deriving from the musical notion of harmony, for it is difference, not sameness, that makes for musical harmony.” David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, in *1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?* 41, 43 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

<sup>19</sup> Lord Justice Kennedy, *The Unification of Law*, 10 J. SOC’Y COMP. LEGIS. 212, 214 (1910). Actually, Lord Justice Kennedy did go on to provide some exposition on why uniformity would be beneficial: “Conceive the security and the peace of mind of the shipowner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of movable property, and of civil wrongs is practically identical with that of his own country.” *Id.*

<sup>20</sup> Calliess & Buchmann, *supra* note 10, at 4.

transaction costs, thereby facilitating deals.<sup>21</sup> If national laws are uniform, parties do not need to spend time and money investigating how laws of countries differ and how those differences might affect their relationship. With uniform national laws, parties also do not need to bargain over applicable law. The resulting reduction in the costs of transacting should result in parties entering into more deals, although the magnitude of those benefits is uncertain and quantifying them is not easy.

Efforts to unify the law continue, both domestically and internationally. Domestically, the stated purpose of the Uniform Law Commission (ULC)<sup>22</sup> is “to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.”<sup>23</sup> The ULC’s web page lists 167 uniform or model laws it has promulgated,<sup>24</sup> some of which (such as the Uniform Commercial Code) have been adopted by almost every American jurisdiction.<sup>25</sup> Thirty-nine states and the District of Columbia adopted the original Uniform Arbitration Act (promulgated in 1955),<sup>26</sup> while eighteen states plus D.C. (with substantial overlap) have adopted the revised Uniform Arbitration Act (promulgated in 2000).<sup>27</sup>

Internationally, UNCITRAL was established in 1966 with a “mandate to further the progressive harmonization and unification of the law of international trade.”<sup>28</sup> UNCITRAL’s uniformity efforts—both unification and

---

<sup>21</sup> See *id.* at 5 (“[T]his function has lately been redefined in terms of its capacity to reduce transaction costs.”).

<sup>22</sup> *About the ULC*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Jan. 30, 2017) (“The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws), established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”).

<sup>23</sup> UNIFORM LAW COMMISSION CONST. art. 1, § 1.2. Indeed, the ULC cites transaction cost savings when describing the “benefits the Uniform Law Commission provide[s].” *Frequently Asked Questions*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions> (last visited Jan. 22, 2017) (“The ULC’s work simplifies individuals’ lives and facilitates business transactions by providing consistent rules and procedures from state to state.”)

<sup>24</sup> *Acts*, UNIF. LAW COMM’N, *supra* note 11.

<sup>25</sup> *Uniform Commercial Code Locator*, LEGAL INFO. INST., <https://www.law.cornell.edu/uniform/ucc> (last visited Jan. 22, 2017).

<sup>26</sup> GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 164 (2d ed. 2014).

<sup>27</sup> *Legislative Fact Sheet—Arbitration Act (2000)*, UNIF. LAW COMM’N, [http://uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20\(2000\)](http://uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(2000)) (last visited Jan. 22, 2017).

<sup>28</sup> *FAQ – Origin, Mandate and Composition of UNCITRAL*, UNCITRAL., [http://www.uncitral.org/uncitral/en/about/origin\\_faq.html](http://www.uncitral.org/uncitral/en/about/origin_faq.html) (last visited Jan. 22, 2017).

harmonization—have been wide-ranging,<sup>29</sup> with arbitration law among its biggest successes. UNCITRAL promulgated its Model Law on International Commercial Arbitration in 1985 (and issued an amended version in 2006).<sup>30</sup> Drafters of the Model Law asserted that “the main purpose of the work on the present topic was to achieve the highest possible uniformity in commercial arbitration throughout the world.”<sup>31</sup> In recommending that States “give due consideration to the Model Law,” the U.N. General Assembly emphasized the “desirability of uniformity of the law of arbitral procedures.”<sup>32</sup> The U.N. General Assembly reiterated that language when recommending adoption of the 2006 amendments to the Model Law, asserting that adoption “would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes.”<sup>33</sup> Over 102 jurisdictions in seventy-two countries have adopted arbitration laws based on the UNCITRAL Model Law.<sup>34</sup> Commentators have described the Model Law as being “highly successful in establishing ‘uniform standards of arbitral procedure.’”<sup>35</sup>

---

<sup>29</sup> *UNCITRAL Texts and Status*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts.html](http://www.uncitral.org/uncitral/en/uncitral_texts.html) (last visited Jan. 22, 2017).

<sup>30</sup> U.N. COMM’N ON INT’L TRADE L., *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, WITH AMENDMENTS AS ADOPTED IN 2006*, U.N. DOC. A/40/17, U.N. Sales No. E.08.V.4 (2006) [hereinafter *UNCITRAL MODEL LAW*].

<sup>31</sup> *Summary Records of the 306<sup>th</sup> Meeting*, [1985] 16 Y.B. U.N. Comm’n Int’l Trade Law 403, U.N. DOC. A/CN.9/SER.A/1985 (statement of Mr. Bonell, Italy); see also *Summary Records of the 331<sup>st</sup> Meeting*, [1985] 16 Y.B. U.N. Comm’n Int’l Trade Law 504, U.N. DOC. A/CN.9/SER.A/1985 (statement of Mr. Voken, Observer for Switzerland) (“[T]he hope was that at some future date the principles of arbitral procedural law in many countries would be, if not identical, considerably harmonized by the influence of the Model Law.”).

<sup>32</sup> G.A. Res. 40/72, ¶ 6 (Dec. 11, 1985).

<sup>33</sup> G.A. Res. 61/33, ¶ 5 (Dec. 4, 2006) (“[R]ecommend[ing] that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”).

<sup>34</sup> *UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006: Status*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited Jan. 22, 2017) [hereinafter *UNCITRAL Model Law Status*].

<sup>35</sup> Fernando Mantilla-Serrano & John Adam, *UNCITRAL Model Law: Missed Opportunities for Enhanced Uniformity*, 31 U. NEW S. WALES L.J. 307, 308 (2008); see JULIAN D.M. LEW, LOUKAS A. MISTELIS, & STEFAN M. KROLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 27 (2003) (“It became increasingly clear that some uniformity was needed to reflect the commonly accepted standards for international arbitration. The benchmark event in this respect was the introduction of the UNCITRAL Model Law of 1985. The concepts of party autonomy and the supportive role of courts to the arbitration process are the basis of the Model Law.”).

Even before the UNCITRAL Model Law, the New York Convention<sup>36</sup> likewise was intended to increase the uniformity of the law governing international commercial arbitration. As stated by Gary Born:

An essential objective of the Convention was uniformity: like the drafters of other international treaties, the Convention's drafters sought to establish a single uniform set of international legal standards for the enforcement of arbitration agreements and arbitral awards.<sup>37</sup>

The New York Convention has over 156 state parties,<sup>38</sup> and “is generally acclaimed to have been the most successful treaty in the field of international private law.”<sup>39</sup>

## II. CONTINUED DIVERSITY IN INTERNATIONAL ARBITRATION LAW

While the New York Convention and the UNCITRAL Model Law have both significantly increased the uniformity of international arbitration law, commentators continue to call for further unification (or harmonization).<sup>40</sup> For example, Fernando Mantilla-Serrano and John Adam contend that “UNCITRAL missed opportunities to enhance ‘uniform standards of arbitral procedure,’” citing in particular the lack of uniformity of arbitrability standards

<sup>36</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S. 3 (entered into force June 7, 1959) [hereinafter New York Convention].

<sup>37</sup> GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 48 (2012).

<sup>38</sup> *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Jan. 22, 2017).

<sup>39</sup> Albert Jan van den Berg, *Some Practical Questions Concerning the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, in UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 212, 212 (2005); see Michael John Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43, 49 (1989). Mustill describes the New York Convention as the “most effective instance of international legislation in the entire history of commercial law.” *Id.*

<sup>40</sup> In 1999, UNCITRAL identified thirteen possible topics for “future work in the area of international commercial arbitration.” See U.N. Comm'n on Int'l Trade Law, Note by the Secretariat on Possible Future Work in the Area of International Commercial Arbitration, U.N. Doc. A/CN.9/460, ¶¶ 32–34 (Apr. 6, 1999); see Gerold Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration? The 1998 Freshfields Lecture*, 15 ARB. INT'L 211, 213–36 (1999) (“Many issues need to be addressed . . .”); Albert Jan van den Berg, *The 1958 New York Arbitration Convention Revisited*, in ARBITRAL TRIBUNALS OR STATE COURTS: WHO MUST DEFER TO WHOM? 125, 131–32 (Jan. 2001) (ASA Special Series No. 15) (“I submit that a number of other topics could be considered as well. I list below those which I believe to require review in some form or another . . .”). It has addressed several of the topics—e.g., conciliation, the writing requirement, and interim measures.

and rules governing confidentiality of arbitration proceedings.<sup>41</sup> Maria Pilar Perales Viscasillas likewise argues for uniform arbitrability standards, stating that “work by UNCITRAL in the area of arbitrability of commercial disputes would help to fill an important gap in the [Model Law] and to achieve desired uniformity, international consensus, and legal certainty in the arbitration world.”<sup>42</sup> Hamid G. Gharavi has urged that the standards for set-aside or annulment proceedings be unified (and, indeed, that an international court be created to apply the standards).<sup>43</sup>

That commentators continue to argue for more uniformity highlights that diversity remains in international arbitration law. The next three sections describe the extent of that diversity—under the New York Convention, the UNCITRAL Model Law, and, in the United States, the Federal Arbitration Act (FAA).

### A. *Diversity and the New York Convention*

The New York Convention has brought important uniformity to international arbitration law by providing a broad rule of enforceability of arbitration agreements and by standardizing the grounds for refusing recognition or enforcement of foreign arbitral awards.<sup>44</sup> But at the same time, as stated by Albert Jan van den Berg, the Convention “does not give an all-embracing regulation of international commercial arbitration.”<sup>45</sup> Instead, it preserves a substantial role for diverse national laws.

---

<sup>41</sup> Mantilla-Serrano & Adam, *supra* note 35, at 317.

<sup>42</sup> Maria Pilar Perales Viscasillas, *Is a Uniform Arbitrability Rule Needed at an International Level?*, KLUWER ARB. BLOG (Jan. 5, 2016), <http://kluwerarbitrationblog.com/2016/01/05/is-a-uniform-arbitrability-rule-needed-at-an-international-level/>.

<sup>43</sup> HAMID G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 171–91 (2002); Hamid G. Gharavi, *Achievements and Limits of the UNCITRAL Model Law’s Annulment Regime*, in THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: 25 YEARS 135, 144 (Ass’n for Int’l Arb. ed., 2010) [hereinafter Gharavi, *Achievements and Limits*] (advocating for “unification as opposed to harmonization of national laws by way of an international convention, together with the establishment of an extra-territorial court in charge of the application of these norms”); see Dana H. Freyer & Hamid G. Gharavi, *Finality and Enforceability of Foreign Arbitral Awards: From “Double Exequatur” to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity*, 13 ICSID REV. FOREIGN INV. L.J. 101, 122 (1998) (“Efforts should . . . be made to harmonize the grounds for setting aside awards, which the current framework fails to address.”).

<sup>44</sup> New York Convention, *supra* note 36, arts. II, III, & V; see BORN, *supra* note 26, at 105 (“[T]he Convention’s provisions prescribe uniform international rules that . . .”).

<sup>45</sup> ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 394 (1981).



Thus, while the New York Convention requires contracting States to refer parties to arbitration unless the arbitration agreement is “null and void, inoperative or incapable of being performed,” national law defines those grounds for refusing to enforce the agreement.<sup>46</sup> Likewise, although the Convention sets out the exclusive grounds for denying recognition or enforcement of awards, it again commonly defines those grounds by using national law:<sup>47</sup> i.e., it uses national law to define when the arbitration agreement is invalid,<sup>48</sup> when a “subject matter is not capable of settlement by arbitration,” and when enforcing an award would be contrary to public policy.<sup>49</sup> The Convention does not regulate the grounds for vacating international arbitration awards in the arbitral seat.<sup>50</sup> And the New York Convention contains no provisions at all regulating the arbitration process (other than indirectly through the grounds for denying recognition and enforcement of awards).<sup>51</sup>

In short, the New York Convention preserves a substantial degree of diversity in national arbitration laws. Indeed, if it were otherwise, the UNCITRAL Model Law would not have been necessary in the first place.

### *B. Diversity and the UNCITRAL Model Law*

As with the New York Convention, an important reason for the promulgation of the Model Law was to enhance the uniformity of international

---

<sup>46</sup> RESTATEMENT OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 2–13.

<sup>47</sup> Indeed, one reason the Uniform Commercial Code is not in fact uniform is that it relies on state common law to resolve issues not addressed in the Code. *See* U.C.C. § 1–103(b) (AM. LAW INST. & UNIF. LAW COMM’N 1972) (“Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity . . . supplement its provisions.”); *see* Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity*, in CORNELL REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 21, 23 (1995) (“Although the UCC is considered by many to be successful, its record is a disappointment if measured by the extent to which courts treat it as a ‘true code’ and by the degree of uniformity achieved.”).

<sup>48</sup> New York Convention, *supra* note 36, art. V(1)(a) (“[T]he law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made . . .”).

<sup>49</sup> *Id.* art. V(2)(a), (b).

<sup>50</sup> *Id.* art. V(1)(e); *see* VAN DEN BERG, *supra* note 45, at 394 (“For example, it does not apply to the action for the setting aside of awards, international as they may be, which action is left to the arbitration law of the country of origin.”).

<sup>51</sup> By comparison, the Panama Convention provides that unless the parties agree otherwise, “the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.” *See* Inter-American Convention on International Commercial Arbitration art. 3, Jan. 30, 1975, 1438 U.N.T.S. 249; Inter-American Commercial Arbitration Commission Rules of Procedure, 22 C.F.R. pt. 194, app. A (1975) (as amended Apr. 1, 2002).

arbitration law. But even with the widespread enactment of the Model Law, much diversity remains in national arbitration laws.<sup>52</sup>

First, a number of major countries in international arbitration have not adopted the Model Law.<sup>53</sup> Stavros Brekoulakis and Laurence Shore identify “several crucially important arbitration jurisdictions—Switzerland, France, England, the United States, Sweden, and the Netherlands, to name a few—that are not model law jurisdictions.”<sup>54</sup> No doubt the Model Law may have influenced revisions to the arbitration laws of some of those countries (although certainly not the FAA, which has not recently been revised),<sup>55</sup> but important elements of diversity remain in arbitration laws.

Second, of those countries that have adopted the Model Law, many have made non-uniform changes upon enactment.<sup>56</sup> For example, a number of countries and U.S. states have changed the default number of arbitrators from three to one.<sup>57</sup> Changes to the provisions addressing court review of arbitral awards are common.<sup>58</sup> According to Hamid G. Gharavi, “only one third [of the States purporting to have adopted or taken inspiration from the Model Law] have more or less faithfully adopted the provisions of Article 34 of the Model Law.”<sup>59</sup> The rest are divided between jurisdictions that provide either more extensive or less extensive court review of awards.<sup>60</sup> Other commonly modified or added provisions include ones dealing with procedures for challenging arbitrators, interim measures ordered by the arbitral tribunal,

---

<sup>52</sup> See, e.g., KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 299 (2003) (“While the Model Law has been very influential in the reform of many national arbitration laws, it is fair to say that it has not resulted in the degree of harmonization and unification of arbitration procedure first envisaged by its drafters.”).

<sup>53</sup> Stavros Brekoulakis & Laurence Shore, *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985/2006*, in CONCISE INTERNATIONAL ARBITRATION 581, 582 (Loukas Mistelis ed., 2010).

<sup>54</sup> *Id.*; see also BORN, *supra* note 26, at 139 (“[T]he world’s leading international arbitration centers have generally not adopted the UNCITRAL Model Law.”).

<sup>55</sup> 9 U.S.C. §§ 1–307 (2016). The Federal Arbitration Act was last revised in 1990. *Id.*

<sup>56</sup> See generally PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 53–136 (2d ed. 2004) (providing overview of Model Law with non-uniform changes); PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS ch. 12 (3d ed. 2010). Binder provides “charts [that] demonstrate graphically how each article of the Model Law on International Commercial Arbitration was adopted into the national arbitration laws of the 80 officially recognized Model Law jurisdictions.” *Id.*

<sup>57</sup> See BINDER, *supra* note 56, tbl. 12-011 (identifying Model Law jurisdictions that have changed the default number of arbitrators to one); see also *infra* Part III.A.

<sup>58</sup> See generally SANDERS, *supra* note 56, at 53–136.

<sup>59</sup> Gharavi, *Achievements and Limits*, *supra* note 43, at 137.

<sup>60</sup> *Id.*

consolidation of related proceedings, substantive rules applicable to the dispute, and arbitral immunity.<sup>61</sup>

Third, many of the provisions of the Model Law set out default rules rather than mandatory rules.<sup>62</sup> As a result, parties can change those rules by contract. In such circumstances, even though the statutory provisions are uniform, the actual practice may not be (of course, the fact that parties can contract around the uniform provisions reduces the loss of individualized fit that otherwise results from uniformity, as described in the next section).<sup>63</sup>

### C. *Diversity and the Federal Arbitration Act*

As a practical matter, state law has played a relatively minor role in international arbitration in the United States. Chapters Two and Three of the FAA grant federal courts subject matter jurisdiction over international arbitration cases and permit parties to remove cases filed in state court to federal court.<sup>64</sup> So most international arbitration cases in the United States end up in federal court. But for those that do not (and the parties can waive the right to removal if they wish),<sup>65</sup> the extent of uniformity depends on the extent to which the FAA preempts state law.

The Supreme Court has held that § 2 of the FAA, which makes arbitration agreements “valid, irrevocable, and enforceable,” applies in state court and preempts conflicting state laws.<sup>66</sup> The extent to which the rest of the FAA, including Chapter Two, which implements the New York Convention, also applies in state court is unresolved. Although some commentators have argued that the FAA should be construed to preempt all state arbitration law,<sup>67</sup> the

---

<sup>61</sup> Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 *ARB. INT’L L* 4, 13, 15, 17, 35–35 (1995); see also LYNCH, *supra* note 52, at 299 (listing areas in which “diversity persists at the doctrinal level within international commercial arbitration”). Since the Sanders article was published, UNCITRAL has revised the Model Law to include provisions on arbitral interim measures, which have not been widely adopted. UNCITRAL MODEL LAW, *supra* note 30, arts. 17A–17I; see BINDER, *supra* note 56, tbl. 12-018.

<sup>62</sup> See generally *UNCITRAL Model Law Status*, *supra* note 34.

<sup>63</sup> See *infra* Part III.A.

<sup>64</sup> 9 U.S.C. §§ 203, 205, 302 (2016).

<sup>65</sup> See 14B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3721, at 97 (4th ed. 2009) (“The modern view . . . is that, in advance of suit, a defendant can contractually waive his right to remove to federal court an action brought against him in a state court, unless the Constitution or a federal statute grants the federal courts exclusive jurisdiction over that action.”).

<sup>66</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

<sup>67</sup> 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 10.8.2.2, at 10:84 (Supp. 1999) (“[T]he better course would be for the Supreme Court to hold that where the FAA governs a case, state arbitration law is entirely preempted . . .”).

Supreme Court seemingly has rejected that view, stating that the FAA does not “reflect a congressional intent to occupy the entire field of arbitration.”<sup>68</sup>

Under at least one possible view of FAA preemption, state arbitration laws would continue to apply, to a substantial degree anyway, to state court proceedings dealing with international arbitrations. Thus, the Supreme Court has suggested in dicta that sections three and four of the FAA do not apply in state court (although it has not yet so held).<sup>69</sup> By their terms, the provisions of FAA Chapter One (other than § 2) appear to apply only in federal court: they apply to “any United States district court,”<sup>70</sup> “the United States court in and for the district wherein the award was made,”<sup>71</sup> or “the courts of the United States”<sup>72</sup>—all of which mean only federal courts.<sup>73</sup> Likewise, the provisions of FAA Chapters Two and Three also by their terms apply only in federal court.<sup>74</sup> On this view, the scope of FAA preemption might be limited to state laws that either directly or indirectly undercut the enforceability of the parties’ arbitration agreement (contrary to FAA § 2), leaving a potentially significant role for state arbitration law, at least in state courts.<sup>75</sup> Again, the potential for at least some degree of diversity remains.

### III. THE BENEFITS OF DIVERSITY (OR THE COSTS OF UNIFORMITY) IN INTERNATIONAL ARBITRATION LAW

Previously, I highlighted the central benefit of uniformity of legal rules: it reduces transaction costs and facilitates deals.<sup>76</sup> But uniformity also has costs: it results in a loss of individualized fit (like any “one size fits all” product) and may reduce the amount of legal innovation.<sup>77</sup> As I use the terms here, note that the costs of uniformity are the benefits of diversity (and vice versa): diversity

---

<sup>68</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989).

<sup>69</sup> *Southland*, 465 U.S. at 16 n.10.

<sup>70</sup> 9 U.S.C. § 4 (2016).

<sup>71</sup> *Id.* § 10.

<sup>72</sup> *Id.* § 3.

<sup>73</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 29 n.18 (1984) (O’Connor, J., dissenting).

<sup>74</sup> *See, e.g.*, 9 U.S.C. § 203 (“The district courts of the United States”); *id.* §§ 206–207, 303 (“court having jurisdiction under this chapter”); *cf. id.* § 205 (permitting removal of a case “pending in a state court”).

<sup>75</sup> For an overview of varying theories of FAA preemption, see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 *IND. L.J.* 393, 417–20 (2004).

<sup>76</sup> *See supra* Part I.

<sup>77</sup> Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 *J. LEGAL STUD.* 131, 137–41 (1996).

enhances the individualized fit of laws and legal innovation at the expense of increased transaction costs.

### A. *Diversity and Individualized Fit of Legal Rules*

If all parties had identical preferences for legal rules, there would be little benefit to parties for different jurisdictions to have different rules.<sup>78</sup> A single, uniform rule would suffice (as long as the single rule matched the parties' preferences, of course). An important benefit of diversity in arbitration law is the recognition that not all parties have identical preferences for arbitration rules and procedures—in other words, that arbitration law is a “heterogeneous legal product.”<sup>79</sup> My focus will be on the differing preferences of the parties, but States may also have differing preferences (over what claims should be arbitrable, the grounds on which awards should be vacated, and the like).<sup>80</sup>

A few examples illustrate the point:

First, parties have different preferences for the means of dispute resolution in the first instance. As the data in Table 1 indicate, the use of arbitration clauses in international contracts varies depending on the type of contract, ranging from five percent for a sample of credit commitments to seventy-one

---

<sup>78</sup> Anthony Ogus calls these “homogeneous legal products”—“those as to which there is unlikely to be a significant variation in preferences as between market actors in different jurisdictions.” Anthony Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 INT'L & COMP. L.Q. 405, 410 (1999).

<sup>79</sup> Cf. *id.* at 416 (“[C]itizens in different jurisdictions may have different preferences regarding the level of protection to be imposed and the price to be paid for it.”); see LYNCH, *supra* note 52, at 306 (“There may in fact be an enriching effect of the diversity of national arbitration practices and procedures since after all, the international business community is not a homogenous body. Such diversity may allow the practice of arbitration to be adapted to meet the respective needs of transnational economic actors.”); Erin O’Hara O’Connor, *The Limits of Contract Law Harmonization*, 33 EUR. J.L. & ECON. 505, 516 (2012) (“In all of these contexts, a diverse array of choices benefits the parties because it enhances the parties’ abilities to find the proper fit between their activities and the procedural and substantive laws that are applied to disputes that might arise from these activities.”).

<sup>80</sup> See Souichirou Kozuka, *The Economic Implications of Uniformity in Law*, 12 UNIFORM L. REV. 683, 688 (2007) (“In reality, the policy preferences of States are more likely to diverge than to coincide.”). Note that to the extent provisions in arbitration statutes are default rules, parties can contract around those rules and adopt ones instead that match their preferences. See Christopher R. Drahozal & Erin O’Hara O’Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1948–49 (2014) [hereinafter Drahozal & O’Hara O’Connor, *Unbundling Procedure*]. Of course, contracting around default rules is itself a cost, and not all rules in arbitration statutes are default rules. *E.g.*, *Hall Street Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576, 578 (2006) (holding that party agreements to expand court review of awards are not enforceable under the FAA).

percent for a sample of joint venture agreements.<sup>81</sup> Even when the parties otherwise agree to arbitration, they may still prefer certain disputes be resolved in court and carve out those disputes from their arbitration agreement. As shown in Table 2, the use of carve-outs in international arbitration agreements varies widely.<sup>82</sup> But a significant proportion of a sample of international contracts with at least one U.S. party included carve-outs, most commonly for claims for injunctive relief.<sup>83</sup>

	Arbitration Clause	Sample Size
Credit commitment	5.0%	n=20
Merger agreement	18.6%	n=43
Asset purchase agreement	30.4%	n=46
Technology contract	57.8%	n=64
Licensing agreement	63.6%	n=11
Joint venture agreement	71.0%	n=31

	At Least One Carve-Out	Sample Size
Technology contract, cross-border	66.7%	n=9
Technology contract, both non-U.S.	3.6%	n=28
Joint venture agreement	20.0%	n=31

Second, parties have different preferences for the number of arbitrators, typically preferring either one or three. Figure 1 summarizes data from the International Chamber of Commerce (ICC) International Court of Arbitration from 2002-2013, which show that roughly forty percent of ICC arbitrations during that period involved sole arbitrators.<sup>84</sup> The remainder had three-

<sup>81</sup> See Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 465-66 (2010); 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, 351 (2007); Drahozal & O'Hara O'Connor, *Unbundling Procedure*, *supra* note 80, at 1975.

<sup>82</sup> See Drahozal & O'Hara O'Connor, *Unbundling Procedure*, *supra* note 80, at 1975-78; see also Erin O'Hara O'Connor & Christopher R. Drahozal, *The Essential Role of Courts for Supporting Innovation*, 92 TEX. L. REV. 2177, 2188-93 (2014).

<sup>83</sup> See Drahozal & O'Hara O'Connor, *Unbundling Procedure*, *supra* note 80, at 1975-78.

<sup>84</sup> The sources for the data reported in Figure 1 are the 2002 *Statistical Report*, ICC INT'L CT. ARB. BULL., Spring 2003, at 7, 10-11; 2003 *Statistical Report*, ICC INT'L CT. ARB. BULL., Spring 2004, at 7, 10; 2004 *Statistical Report*, ICC INT'L CT. ARB. BULL., Spring 2005, at 5, 8; 2005 *Statistical Report*, ICC INT'L CT.

arbitrator tribunals.<sup>85</sup> Variations in international arbitration rules<sup>86</sup> and statutes<sup>87</sup> reflect these differing preferences.

---

ARB. BULL., Spring 2006, at 5, 8; *2006 Statistical Report*, ICC INT'L CT. ARB. BULL., Spring 2007, at 5, 8; *2007 Statistical Report*, 19 ICC INT'L CT. ARB. BULL., no. 1, 2008, at 5, 8–9; *2008 Statistical Report*, 20 ICC INT'L CT. ARB. BULL., no. 1, 2009, at 5, 9; *2009 Statistical Report*, 21 ICC INT'L CT. ARB. BULL., no. 1, 2010, at 5, 9; *2010 Statistical Report*, 22 ICC INT'L CT. ARB. BULL., no. 1, 2011, at 5, 11; *2011 Statistical Report*, 23 ICC INT'L CT. ARB. BULL., no. 1, 2012, at 5, 11; *2012 Statistical Report*, 24 ICC INT'L CT. ARB. BULL., no. 1, 2013, at 5, 11; *2013 Statistical Report*, 25 ICC INT'L CT. ARB. BULL., no. 1, 2014, at 5, 10. Prior to 2001, the ICC reported the actual number of arbitration proceedings it administered with either a sole arbitrator or a three-arbitrator tribunal. *E.g.*, *2000 Statistical Report*, ICC INT'L CT. ARB. BULL., Spring 2001, at 5, 8 (“Approximately half of the cases submitted to the ICC Court in 2000 were referred to a sole arbitrator and half to three arbitrators.”); *see* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 149 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (summarizing ICC data in table 2). Beginning with its 2001 Statistical Report, however, the ICC no longer reported the number of cases involving sole arbitrators or three-arbitrator tribunals. *See* *2001 Statistical Report*, ICC INT'L CT. ARB. BULL., Spring 2002, at 5, 9–10. Instead, it now reports the number of arbitrators that the ICC Court appointed or confirmed to serve as sole arbitrators, presiding arbitrators on three-arbitrator tribunals, or co-arbitrators on three-arbitrator tribunals. *See, e.g.*, *2013 Statistical Report*, 25 ICC INT'L CT. ARB. BULL., no. 1, 2014, at 10.

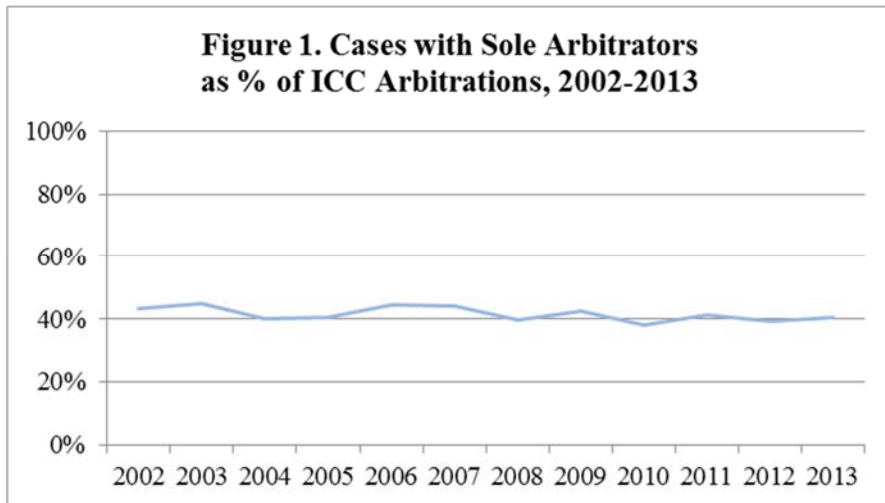
The percentages shown in Figure 1 are calculated by taking the number of appointments or confirmations of sole arbitrators and dividing it by the sum of the number of sole arbitrators and the number of presiding arbitrators. The number of sole arbitrators appointed or confirmed is used as a proxy for the number of arbitrations involving a sole arbitrator; the number of presiding arbitrators appointed or confirmed is used as a proxy for the number of arbitrations involving a three-arbitrator tribunal. The number is only a proxy because a sole or presiding arbitrator may need to be replaced, so that more than one might be appointed or confirmed for any single case. Alternatively, the total number of presiding arbitrators and co-arbitrators appointed or confirmed could be divided by three to estimate the number of arbitrations involving a three-arbitrator tribunal. Using that technique, the percentage of cases with sole arbitrators is slightly lower than shown in Figure 1, ranging from 37.3% to 43.1%.

To illustrate, the ICC reported that in 2012 it appointed or confirmed 215 sole arbitrators, which comprised 16.5% of all arbitrators (including co-arbitrators) appointed or confirmed by the ICC that year. *See* *2012 Statistical Report*, 24 ICC INT'L CT. ARB. BULL., no. 1, 2013, at 5, 11. It also appointed or confirmed 335 presiding arbitrators for three-arbitrator tribunals. *Id.* The percentage of cases with sole arbitrators for that year is calculated as  $215/(215+335) = 39.1\%$ .

<sup>85</sup> *See supra* note 84.

<sup>86</sup> *Compare* INT'L CTR. FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) art. 11 (2014) (“If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the Administrator determines in its discretion that three arbitrators are appropriate because of the size, complexity, or other circumstances of the case.”), *with* UNITED NATIONS COMM’N ON INT’L TRADE LAW, UNCITRAL ARBITRATION RULES (AS REVISED IN 2010) art. 7(1) (“If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.”).

<sup>87</sup> *Compare, e.g.*, CONN. GEN. STAT. § 50a–110(2) (2015) (“Failing such determination, the number of arbitrators shall be three.”), *with* GA. CODE ANN. § 9-9-31 (2014) (“The parties shall be free to determine the number of arbitrators, and if no determination is stated, the number of arbitrators shall be one.”); *see supra* Part II.B.



Third, parties have different preferences for the extent of court review of arbitration awards. Some parties prefer more court review than provided in the UNCITRAL Model Law, for instance, and some prefer less.<sup>88</sup> I am not aware of any recent published empirical data on how the differing preferences for court review are reflected in international arbitration agreements.<sup>89</sup> Anecdotes suggest that there are differing preferences, but it is not clear how widely held those preferences are. Again, these differing preferences are reflected in arbitration laws, with some permitting expanded review,<sup>90</sup> some permitting waiver of review,<sup>91</sup> and others, like the FAA, permitting neither.<sup>92</sup>

<sup>88</sup> See William Park, *Why Courts Review Arbitral Awards*, in *LAW OF INTERNATIONAL BUSINESS AND DISPUTE IN THE 21ST CENTURY* 595, 605 (R. Briner et. al eds., 2001).

<sup>89</sup> For older data, see Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, ICC INT'L CT. ARB. BULL., Dec. 1990, at 14, 16–21.

Article 24 of the ICC Rules provides that ‘the arbitral award shall be final’ and the parties are deemed to waive their right to any appeal insofar as such waiver can validly be made. Despite this language, in 1987 some 49 arbitration clauses (21%), and in 1989 56 clauses (26%) specifically provided, in essence, that the award issued is to be “Final and binding upon the Parties who agree to waive all right of appeal thereon.”

*Id.*

<sup>90</sup> See *Cable Connections, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 589 (Cal. 2008); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 87 (Tex.), *cert. denied*, 132 S. Ct. 455 (2011).

<sup>91</sup> See, e.g., GA. CODE ANN. § 9-9-56(e) (2014) (“Where none of the parties is domiciled or has its place of business in this state, they may, by written agreement referencing this subsection, limit any of the grounds for recourse against the arbitration award under this Code section, with the exception of paragraph (2) of subsection (b) of this Code section.”); Code of Civil Procedure, Book IV, Arbitration, Decree No. 2011-48 art.



Finally, two idiosyncratic features of American arbitration law—features that are inconsistent with uniform international practice—may reflect differing preferences for arbitration practices and have underappreciated benefits to parties. Contrary to international practice, U.S. law permits arbitrators to make unreasoned awards, simply stating the result of the case without any explanation.<sup>93</sup> Certainly, requiring reasoned awards can result in higher quality awards, as having to articulate the reasons behind a result may help arbitrators avoid erroneous or sloppy decisions. But such benefits are not free. One downside of reasoned awards is, of course, the added cost. Another downside is that the award with all its detail may become public when a party enforces it in court, even if the arbitrators have issued a protective order or the parties have entered into a confidentiality agreement.<sup>94</sup> By comparison, if an unreasoned award were to become public, much less of the parties' private information would be revealed.

Also contrary to international practice, U.S. law continues to permit party-appointed arbitrators to be non-neutral, that is, to act as an advocate for the party that appointed them.<sup>95</sup> As Catherine Rogers has argued, such party-

---

1522 (Jan. 13, 2011), *reprinted in* 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, at France: Annex I – 14 (Bosman ed., May 2011); Swiss Private International Law Act, art. 192 (Dec. 18, 1987), *in* 5 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, at Switzerland: Annex II – 5 (Bosman ed., Mar. 2008).

<sup>92</sup> See *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 578 (2006) (holding that FAA does not permit parties to contract for expanded review of awards); *Katz, Nannis & Solomon, P.C. v. Levine*, 46 N.E.3d 541, 547–48 (Mass. 2016) (same as to Massachusetts arbitration law); see also RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-24(a) (“Parties may not by agreement reduce or eliminate the grounds for vacating or denying confirmation of a U.S. Convention award or for denying recognition or enforcement of a foreign Convention award . . .”).

<sup>93</sup> Compare, e.g., AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES: COMMERCIAL ARBITRATION RULES r. 46(b) (2013) (amended 2014) (“The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.”) with INT’L CENTRE FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES: INTERNATIONAL ARBITRATION RULES art. 30(1) (June 1, 2014) (amended July, 1 2016) (“The Tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given.”).

<sup>94</sup> See, e.g., *Redeemer Comm. of Highland Credit Strategies Funds v. Highland Capital Mgmt, L.P.*, No. 1:16-CV-02668, 2016 WL 2606403, at \*5 (S.D.N.Y. 2016) (“Highland has offered no ‘countervailing factors’ or ‘higher values’ that would override the presumption of public access to the materials attached to the instant motion to vacate the arbitration award.”) (protective order issued by arbitrators); *Robert Bosch GmbH v. Honeywell Int’l Inc.*, No. 14-CV-9432(PKC), 2015 WL 128154, at \*1 (S.D.N.Y. Jan. 6, 2015) (“A party to an arbitration proceeding that is subject to confirmation proceedings in a federal court cannot have a legitimate expectation of privacy in all papers pertaining to the arbitration because the party should know of the presumption of public access to judicial proceedings.”).

<sup>95</sup> See *Sphere Drake Ins., Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002) (“As far as we can see, this is the first time since the Federal Arbitration Act was enacted in 1925 that a federal court has set

appointed arbitrators can play an important “Devil’s advocate” role in avoiding tribunal groupthink, and thus may be “an important structural feature of international arbitral tribunals.”<sup>96</sup> The persistence of these particularly American practices, despite international disapproval, suggests that some parties benefit from them, even if perhaps most would not.

Overall, then, the evidence suggests that parties in fact do have varying preferences for legal rules. Continued diversity of arbitration laws can provide better individualized fit than a single, uniform law.

### *B. Diversity and Legal Innovation*

Diversity also fosters innovation in legal rules, while uniformity has the opposite effect. Certainly a uniform rule may be innovative when adopted. But given the vagaries of the uniform lawmaking process, once the uniform law is promulgated future innovations are slow to appear.<sup>97</sup> The limited revisions to the UNCITRAL Model Law appeared in 2006, over twenty years after the original.<sup>98</sup> The Revised Uniform Arbitration Act was promulgated forty-five years after the original Uniform Arbitration Act.<sup>99</sup>

By definition, to innovate requires departure from an existing rule.<sup>100</sup> A single country may do so at a lower cost than multiple countries. If the innovation is successful, other countries may adopt it. If not, the costs of the mistake are lower than if the innovation was adopted more broadly (and certainly less than if the uniform law provision is unsuccessful). This is the “states as laboratories” model of U.S. federalism described most famously by Justice Brandeis: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the

---

aside an award because a party-appointed arbitrator on a tripartite panel, as opposed to a neutral, displayed ‘evident partiality.’ The lack of precedent is unsurprising, because in the main party-appointed arbitrators are *supposed* to be advocates.”); AM. ARB. ASS’N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES: NOTES ON NEUTRALITY ¶ 1 (2004) (“[P]arties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations.”).

<sup>96</sup> See CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION ¶¶ 8.51–8.61 (2014).

<sup>97</sup> Kozuka, *supra* note 80, at 694 (“Once a uniform law is adopted, it will be difficult for States to deviate from it.”).

<sup>98</sup> See UNCITRAL MODEL LAW, *supra* note 30.

<sup>99</sup> See *Legislative Fact Sheet—Arbitration Act (2000)*, *supra* note 27.

<sup>100</sup> Rodolfo Sacco, *Diversity and Uniformity in the Law*, 49 AM. J. COMP. L. 171, 174 (2001) (“Without variation we would not have progress, for progress is itself variation. Human beings desire progress, as well as variation; if we accept variation we must also accept diversity.”).

country.”<sup>101</sup> Countries likewise learn from the successes and failures of other countries.<sup>102</sup>

Competition among jurisdictions for arbitration business provides the incentive for this sort of innovation in international arbitration law. “Jurisdictional competition for facilitating arbitration began in the late nineteenth century and has intensified in recent decades,”<sup>103</sup> as Erin O’Hara and Larry Ribstein explain:

[S]tates compete to attract the arbitration proceedings as well as the commercial contracts that arbitration facilitates. Industry experts, existing arbitration associations, and other potential arbitrators all benefit from laws that make it easier and more appealing for contracting parties to arbitrate in their jurisdictions. With lawyers routinely representing the parties and often rendering the decisions, demand for their services continues to increase. This encourages lawyers to lobby in state legislatures for arbitration-friendly laws.<sup>104</sup>

(Courts compete with arbitration as well. For example, judges often cite the need to compete with arbitration for commercial cases as the reason for creating specialized business courts.<sup>105</sup>)

---

<sup>101</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)

<sup>102</sup> *See, e.g.,* Alvin K. Klevorick, *Reflections on the Race to the Bottom*, in 1 *FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?* 464 (Jagdish Bhagwati & Robert E. Hudec eds., 1996):

A second reason for permitting diverse standards to coexist and for not imposing uniformity on all countries derives from our collective uncertainty about what the correct standard is. In the face of such uncertainty, imposing a uniform standard risks subjecting all countries to the wrong requirement. It also removes the possibility of learning, from experimentation with diverse standards, both what the immediate effects of different standards are and how economic agents respond to them.

*Id.*

<sup>103</sup> O’HARA & RIBSTEIN, *supra* note 10, at 99.

<sup>104</sup> *Id.* at 101; *see also* Horst Eidenmüller, *Regulatory Competition in Contract Law and Dispute Resolution*, in *REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION* 1, 2–5 (Horst Eidenmüller ed., 2013); Drahozal, *Regulatory Competition*, *supra* note 15, at 174–76; James Harmoush, *Colorado’s Second Renaissance: Adopting the UNCITRAL Model Law on International Commercial Arbitration*, 93 *DENVER U.L. REV. ONLINE* 111, 131 (2016) Mr. Harmoush argues that Colorado should adopt the UNCITRAL Model law because “Colorado could become a leader in bringing international commercial arbitration, if not international business, in the Rocky Mountain region.”

<sup>105</sup> *See* Christopher R. Drahozal, *Business Courts and the Future of Arbitration*, 10 *CARDOZO J. CONFLICT RESOL.* 491, 492–93 (2009).

The web page of the Atlanta International Arbitration Society (Atlas) provides a nice illustration of how jurisdictions compete for international arbitration business.<sup>106</sup> The web page highlights that Georgia has:

- “Arbitration-Friendly Courts”: “The Eleventh Circuit U.S. Court of Appeals, which is based in Atlanta, has a consistent track record of applying the FAA in a manner that is most friendly to international arbitration.”<sup>107</sup>
- “A Positive Legislative Framework”: “In 1988, Georgia became one of the first jurisdictions in the world to enact substantial portions of the [UNCITRAL Model Law]. . . . In 2012, Georgia also adopted most of the 2006 amendments to the UNCITRAL Model Law. . . , also incorporat[ing] a number of non-UNCITRAL Model Law provisions representing international best practice.”<sup>108</sup>
- “Free Choice of Counsel and Arbitrator”: “Georgia is one of only a small handful of U.S. states that expressly permit parties to select counsel and arbitrators of their choice in arbitration proceedings, including attorneys not licensed in any U.S. jurisdiction.”<sup>109</sup>

As touted by Atlas, Georgia’s legislative framework justifiably can be called innovative. By using the UNCITRAL Model Law as its starting point, the Georgia International Arbitration Code obtains some of the benefits of uniformity. But the Code then also seeks to gain the benefits of diversity by departing from the Model Law in several interesting ways: by expanding the subpoena powers of arbitrators,<sup>110</sup> by expressly authorizing the parties to agree to consolidated arbitrations,<sup>111</sup> and by permitting parties to agree (when none are domiciled or have their principal place of business in Georgia) to contract out of the vacatur grounds specified in the Code.<sup>112</sup>

Delaware has been even more innovative when adopting new arbitration laws (applicable to both domestic and international arbitration) in recent years. In 2009, Delaware adopted a system of Court of Chancery arbitration, in which

---

<sup>106</sup> *Supportive Legal Framework*, ATLANTA INT’L ARB. SOC’Y, <http://arbitrateatlanta.org/supportive-legal-framework/> (last visited Jan. 22, 2017).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> GA. CODE ANN. § 9-9-49 (2014).

<sup>111</sup> *Id.* § 9-9-46(d).

<sup>112</sup> *Id.* §9-9-56(e) (excluding nonarbitrability and public policy).

its highly regarded Court of Chancery judges could sit as arbitrators in private proceedings.<sup>113</sup> Details about the case would become public only if the parties appealed the award to the Delaware Supreme Court.<sup>114</sup> But the U.S. Court of Appeals for the Third Circuit held that the Court of Chancery arbitration scheme unconstitutionally denied the right of public access to the courts.<sup>115</sup>

Thereafter, in 2015, Delaware adopted the Delaware Rapid Arbitration Act (DRAA), with a purpose of “giv[ing] Delaware business entities a method by which they may resolve business disputes in a prompt, cost-effective, and efficient manner.”<sup>116</sup> As long as one party is a Delaware corporation (and other statutory prerequisites are met), the parties can engage in an expedited arbitration under the DRAA.<sup>117</sup> The statute includes a number of provisions designed to speed up the arbitration process, most notably a provision that sets strict time limits for the arbitrator to issue an award, limits the number of extensions (to one), and reduces the arbitrator’s fees (by up to 100%) if the award is late.<sup>118</sup>

Of course, not all innovation is successful or valuable. As noted above, Delaware Court of Chancery arbitration was held unconstitutional by the Third Circuit (which certainly is not a mark of success).<sup>119</sup> It is too early to tell whether parties will opt to arbitrate under the Georgia International Arbitration Code or the Delaware Rapid Arbitration Act (only a handful of material contracts filed with the SEC have agreed to DRAA arbitration since the statute was enacted).<sup>120</sup> But to the extent innovation is valuable—and we generally

---

<sup>113</sup> DEL. CODE ANN. tit. 10, § 349(a) (2016).

<sup>114</sup> *Id.* § 349(b).

<sup>115</sup> Del. Coal. for Open Gov’t, Inc. v. Strine, 733 F.3d 510, 521 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

<sup>116</sup> DEL. CODE ANN. tit. 10, § 5802.

<sup>117</sup> *See id.* § 5803(a).

<sup>118</sup> *Id.* §§ 5806(b), 5808(b), (c).

<sup>119</sup> *See supra* text accompanying note 115.

<sup>120</sup> As of July 6, 2016, the following four material contracts provided for arbitration under the DRAA. *See* TCV V, L.P. et al. and Nine Ten Partners LP, Purchase Agreement, art. V, § 5.10 (May 16, 2016), <https://www.sec.gov/Archives/edgar/data/1274664/000119312516593304/d195753dex99d.htm> (“The parties hereby agree to arbitrate any and all disputes arising under or related to this agreement . . . under the Delaware Rapid Arbitration Act”); Ninestar Holdings Co. et al. and Apex Tech. Co., Agreement and Plan of Merger, art. VIII, § 8.13(b) (Apr. 19, 2016), <https://www.sec.gov/Archives/edgar/data/1001288/000119312516547245/d183925dex21.htm> (“[A]ll such disputes shall be exclusively resolved by final and binding arbitration under the Delaware Rapid Arbitration Act”); NetApp, Inc. and SolidFire, Inc. et al. and Shareholder Rep. Services LLC, Agreement and Plan of Merger, art. X, § 10.10(a) (Dec. 18, 2015), <https://www.sec.gov/Archives/edgar/data/1002047/000119312515409103/d85307d8k.htm> (“[A]ny claim hereunder . . . shall be settled by final and binding arbitration conducted by arbitration under the Delaware Rapid Arbitration Act”); Ener-Core, Inc.

believe that it is—diversity is more likely to promote innovation than uniformity.

#### CONCLUSION: OPTIMAL UNIFORMITY (OR OPTIMAL DIVERSITY)

This Essay has sought to provide a counterbalance to the frequent push for greater uniformity in international arbitration law. The New York Convention and the UNCITRAL Model Law both have made international arbitration law more uniform, and that increased uniformity no doubt has benefitted parties and the system of international arbitration as a whole. But in deciding whether to make further reforms to international arbitration law, policymakers must do more than simply accept that uniformity has benefits. Rather, they must evaluate what the marginal benefits of additional uniformity are, given the degree of uniformity already achieved. And while uniformity benefits parties by reducing the costs of transacting, it also has costs: the loss of individualized fit of laws and reduced legal innovation. The overall question for policymakers, then, is what is the optimal uniformity (or optimal diversity) of international arbitration law?<sup>121</sup> That is a question this Essay cannot even begin to answer.

---

Indemnification Agreement, art. V, § 5.1 (Nov. 5, 2015), [https://www.sec.gov/Archives/edgar/data/1495536/000121390015008193/fs12015a4ex10i\\_enercoreinc.htm](https://www.sec.gov/Archives/edgar/data/1495536/000121390015008193/fs12015a4ex10i_enercoreinc.htm) (“Alternatively, Indemnitee, at Indemnitee’s option, may seek an award in arbitration to be conducted pursuant to the Delaware Rapid Arbitration Act.”).

<sup>121</sup> Klevorick, *supra* note 102, at 463 (“Supposing, then, that there is a race to the bottom, is the fixing of a uniform standard in each area of concern—environment, labor, competition policy, and so on—the optimal response? Put the opposite way, what is the optimal diversity of standards, and is the answer none?”).