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# Global Civil Procedure

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*A "global" civil procedure has emerged and found its way into debates over procedural reform in both international and domestic arenas. Global civil procedure includes the procedural rules, practices, and social understandings that govern transnational litigation and arbitration. A global civil procedure norm is a norm adopted across courts or arbitration providers with the purpose of making that jurisdiction or provider more competitive in attracting transnational litigation or arbitration. Global civil procedure norms are at stake in multiple present trends and debates, including model laws in commercial arbitration, the procedure of international tribunals, the debate over investment dispute resolution, the rise of courts oriented towards international litigation, and sprawling litigation spanning multiple jurisdictions and fora.*

*On a surface level, the values reflected in global civil procedure seem to be roughly the same across jurisdictions. A common language has emerged around competition for litigation business and procedure values such as efficiency, certainty, and impartiality. Yet different legal systems do not necessarily agree on the purpose of various shared elements of global civil procedure. For democracies, for instance, the purpose of procedural reforms might be to facilitate access to justice. Other countries may favor the same reforms because they facilitate top-down administrative control of judges. Surface agreement can submerge divergent logics that may ultimately lead to very different applications of harmonized rules.*

*This Article begins by introducing the concept of global civil procedure, who uses it, and how. Next, it considers several examples of the phenomenon including conflicts of interest rules for adjudicators, aggregation, and discovery or disclosure rules. Finally, it considers the limits of global civil procedure. Although the rhetoric of procedural competition can be heard across systems, procedural values do not necessarily translate both in terms of enduring divisions between legal traditions and in terms of applications by current political regimes.*

## INTRODUCTION

Although procedure scholars once emphasized the uniqueness of American litigation culture, that culture increasingly appears anything but exceptional.[1] Global interdependence has led to the development of global dispute

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1. *See* Aaron D. Simowitz, *Convergence and the Circulation of Money Judgments*, 92 S. CAL. L. REV. 1031, 1031–32 (2019); John C. Coffee Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895, 1899–900 (2017); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 442 (2010); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 51–52 (2009); Richard L. Marcus,

resolution norms, especially in commercial law.[2] Harmonization happens not just in international commercial and investment arbitration, but also in domestic court systems.[3] Global problems come to court in situations as diverse as the Volkswagen emissions scandal, anti-competitive behavior by Amazon, and environmental harm from mining in Zambia.[4] Some jurisdictions are, or seek to become, centers for these types of disputes. Rulemakers want to demonstrate that they have joined the global mainstream. Moreover, when the parties are the same, the lawyers are largely the same, and the things claimants want are available in other countries, approaches to litigation do not easily stop at national borders.[5] The result is global civil procedure.

Global civil procedure includes the procedural rules, practices, and social understandings that govern transnational litigation and arbitration.[6] A global civil procedure norm is a norm adopted across courts or arbitration providers with the purpose of making that jurisdiction or provider more competitive in attracting transnational litigation or arbitration. The reasons why a given jurisdiction or provider adopts a global civil procedure norm will typically combine this idea of global or regional competition with domestic considerations.[7] The norm may have originally developed to respond to the specific needs of a jurisdiction or provider only to eventually take on a life of its own as something that is adopted without specific reference to any sort of competition for cases as simply "common sense." A feature of a

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Review Essay, *Putting American Procedural Exceptionalism in a Globalized Context*, 53 AM. J. COMP. L. 709, 709–10 (2005); Linda S. Mullenix, Reuschlein Lecture, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 4 (2001) ("In the twenty-first century, the impact of technology and globalization will result in legal problems of global reach, and lawyers will be practicing on a world stage.").

2. JOSHUA D. H. KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 3–4 (2013).

3. *See* Pamela Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227, 229 (2020); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 440–43 (2003).

4. David Shepardson, *U.S. Appeals Court Upholds Volkswagen's $10 Billion Diesel Settlement*, REUTERS (July 9, 2018, 12:04 PM), https://www.reuters.com/article/us-volkswagen-emissions/u-s-appeals-court-upholds-volkswagens-10-billion-diesel-settlement-idUSKBN1JZ21G [https://perma.cc/UX9H-52U7]; Aditya Kalra, *Amazon Faces New Antitrust Challenge from Indian Online Sellers: Legal Documents*, REUTERS (Aug. 26, 2020) https://www.reuters.com/article/us-amazon-com-india-exclusive-idUSKBN25M193 [https://perma.cc/3KHD-SUXP]; Vedanta Resources PLC v. Lungowe [2019] UKSC 20, [2019] 2 WLR 1051 (UK).

5. Outcry from Volkswagen diesel consumers who saw class members in other countries being compensated led to changes in Germany's aggregate litigation procedures to permit consumer classes that more closely resemble those in the United States and common law Canada. Uwe Hessler, *German Class Action Lawsuit Over VW Emissions Begins*, DEUTSCHE WELLE (Sept. 30, 2019), https://www.dw.com/en/german-class-action-lawsuit-over-vw-emissions-begins/a-50596406 [https://perma.cc/WQX4-YHT6]. *See also* Coffee, *supra* note 1, at 1914–15 (describing South Korea's legislative adoption of an American-style class action model).

6. This Article does not address mediation, which tends to be less routinized. Arbitration and litigation can both result in an adjudication on the legal merits of the dispute, whereas mediation focuses on the interests of the parties.

7. *See* Bookman, *supra* note 3, at 261–62. On competition in arbitration, *see* ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 45 (2017).

global civil procedure norm is that its very ubiquity becomes an argument in support of it.[8]

This focus on harmonization can be deceptive. Rules that seem to do similar things, for which similar rationales are given, may still ultimately reflect divergent and likely incompatible understandings of what adjudication is for.[9] A common law trained lawyer may refer reflexively to a concept of judicial independence shaped by English history. A Chinese lawyer might conceive of independence primarily in terms of ability to adhere to the central political line without interference from local officials.[10] They need not agree on these deeper conceptual points to agree to a set of rules for conflict of interest claims in administered arbitrations. One challenge for procedure scholars has been just seeing convergence, or admitting that perhaps a jurisdiction's specialness was a bit overstated.[11] If instead the emphasis is on harmonization, the challenge is to identify its limits.

In and out of court, procedure helps lawyers talk to each other about the law. In recognizing the forms and limits of global civil procedure, scholars and reformers can bring greater precision to debates over judicial and arbitral legitimacy and understand the ties between the two. Understanding where agreement already exists and how deep it goes can help procedure scholars and policymakers decide when it is possible to adopt international standards and gauge how meaningful those standards will be in achieving various goals. They can also ask better questions about why a given harmonization is being advanced and who will benefit.

In determining what cases come through the doors and how they are presented, procedure also determines what court, or arbitration, is for.[12] In that sense, procedural harmonization means harmonization in how institutions function. Rulemakers' pursuit of transnational litigation's repeat play-

8. Joshua Karton, *Sectoral Fragmentation in Transnational Contract Law*, 21 U. Pa. J. Bus. L. 142, 167 (2018) (arguing that legal practices become self-sustaining due to network effects); Anthony Ogus, *The Economic Basis of Legal Culture: Networks and Monopolization*, 22 Oxford J. Legal Stud. 419, 420 (2002) (arguing that elements of common legal culture create a network that "reduces the costs of interactive behavior").

9. As Scott Dodson and James Klebba note, very different attitudes to judging persist in common and civil law jurisdictions despite increases in judicial management in common law countries. Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. Int'l & Comp. L. Rev. 1, 14 (2011). The "civil law tradition" itself hardly represents a consistent approach to judging. For instance, Ling Li has argued that despite routinization and professionalization within the Chinese judiciary, PRC courts retain a "double character" as organs of the Party as well as the state. Ling Li, *Political-Legal Order and the Curious Double Character of China's Courts*, 6 Asian J.L. & Soc'y 19, 19 (2019).

10. *See* Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 Am. J. Comp. L. 793, 795 (1997).

11. Previous authors have complained about United States procedure scholarship in particular. *E.g.*, Scott Dodson, *New Pleading, New Discovery*, 158 U. Pa. L. Rev. 441, 469–70 (2010) (noting that the U.S. discussion over pleading and discovery reform was set apart from "the international conversation on civil procedure."). For instance, the jury trial may be used more in some U.S. courts, but the civil jury default is not unique. *See* Courts of Justice Act, R.S.O. 1990, c C-43 s.34 § 108.

12. J. Robert S. Pritchard, *A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of Substantive Law*, 17 J. Legal Stud. 451, 474–475 (1988).

ers, such as multinational corporations, will tune the machinery of litigation to those repeat players' needs.[13] Everyone involved, from the registry to the adjudicators, will be more aware of the concerns these parties bring and of the values important to them.[14] Judges, arbitrators, and law reformers are also unlikely to keep reasoning about procedure in one area distinct from reasoning about the same rule in a different context.[15] Global civil procedure, designed for multinational cases and parties, can thus affect purely domestic cases. Not every jurisdiction will become Delaware, but many might start talking about "efficiency" in documentary disclosures.[16]

Global civil procedure is a product of the same forces as global administrative law.[17] As with administrative law developed by international organizations, procedural law has developed at the international level, in particular with international commercial and investment arbitration.[18] These developments involve formal international bodies such as the U.N. Commission on International Trade Law ("UNCITRAL"), networks of judges, hybrid public-private actors, and private actors like the International Chamber of Commerce ("ICC"). Global civil procedure, however, has a slightly different ambit. National institutions, especially those in certain key jurisdictions, have a larger role to play in defining and implementing what might be termed "global" rules and elaborating on the concepts behind them.[19]

This account of global civil procedure is particularly indebted to recent work on how jurisdictions alter their rules in an effort to compete for arbitration and litigation business, including Erin O'Hara and Larry Ribstein's description of a law market and Pamela Bookman's work on forum shopping and international commercial courts.[20] The law market is a part of the story about why procedural harmonization is desirable and how it occurs.[21] Lawyers can also act as norm entrepreneurs, bringing their procedural sensibili-

13. *See* William J. Moon, *Delaware's New Competition*, 114 Nw. U. L. Rev. 1403, 1443 (2020) (describing this phenomenon in relation to commercial courts); Karton, *supra* note 8, at 186 (describing this phenomenon in relation to arbitration); Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 Vand. J. Transnat'l L. 79, 98 (2000) (same).

14. *See* Brooke D. Coleman, *One Percent Procedure*, 91 Wash. L. Rev. 1005, 1008–09 (2016).

15. *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. 45, 45–48 (2013); Danya Shocair Reda & Nicholas Frayn, *The Prestige Model: Court Reform in Global Context*, 17 (working paper) (on file with author).

16. *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. Rev. 1777, 1813–14 (2015) (discussing "efficiency" in U.S. federal civil procedure); Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 Yale J.L. & Human. 397 (2012) (providing a U.K. perspective on efficiency-based reforms).

17. *Cf.* Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & Contemp. Probs. 15, 17 (2005).

18. *Cf. id.* at 20.

19. *Cf. id.* at 20–23.

20. Erin O'Hara & Larry E. Ribstein, The Law Market (2009); Bookman, *supra* note 3. *See also* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. 481 (2011).

21. *See, e.g.*, John F. Coyle, *Business Courts and Interstate Competition*, 53 Wm. & Mary L. Rev. 1915 (2012).

ties to new settings.[22] The commercial perspective emphasizes elements like efficiency, typically defined as reducing cost and delay.[23] This discourse of international commerce is now the dominant discourse in relation to global civil procedure, but other approaches are possible. One might, for instance, consider what sort of access to process is necessary to allow individuals to vindicate internationally recognized civil, political, and social rights.[24]

The existence of global civil procedure is not news to scholars of arbitration—much of their discussion of principles of private international law revolves around procedural harmonization—including agreement on the importance of "procedural autonomy."[25] Certain procedural norms are said to form part of the "general principles of law" on which arbitrators may draw.[26]

My account differs from the standard one in that it blends litigation and arbitration together rather than treating them as separate.[27] There are several reasons to do so. Under the law market view, providers of arbitration and mediation may be in direct competition with courts for the same users, and on another level, jurisdictions may seek to promote both alternative dispute resolution ("ADR") and courts in order to draw transnational legal business.[28] Courts and arbitrators may also be seized with related matters or be put in the position of judging each other's procedural choices. Arbitrators also seek explicitly to follow trends in court procedure if they refer to general principles of law.[29] These interactions facilitate procedural spread.

Competition for dispute resolution business and the pressure of transnational cases have created norms of global civil procedure without bringing about agreement on procedural values. I make this argument in three parts.

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22. Coffee, *supra* note 1, at 1918; John Flood, *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Legal Practice*, 3 Int'l J. Legal Prof. 169, 175–76 (1996).

23. Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 Or. L. Rev. 1085, 1092 (2012).

24. Mauro Cappelletti, *Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends*, 25 Stan. L. Rev. 651, 652–53 (1973). *See also, e.g.*, Bruno Simma et al., *The Hague Rules on Business and Human Rights Arbitration*, Ctr. for Int'l Legal Coop. (Dec. 12, 2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

25. Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 Vand. J. Transnat'l L. 1313, 1322–23 (2003); *see also* Gary Born, *A New Generation of International Adjudication*, 61 Duke L.J. 775, 776 (2012).

26. *E.g.*, Charles T. Kotuby, Jr. & Luke A. Sobota, General Principles of Law and International Due Process: Principles and Norms Applicable in Transational Disputes (2017) (discussing procedural and substantive general principles); Matti S. Kurkela & Santtu Turunen, Due Process in International Commercial Arbitration 8 (2d ed. 2010) (discussing procedural principles).

27. Pamela K. Bookman, *Arbitral Courts*, 61 Va. J. Int'l L. 2–4 (2020) (forthcoming); Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 Vand. L. Rev. 1119 (2019) (describing the problems with the Supreme Court's treatment of litigation and arbitration as opposites). *See also* Dodson & Klebba, *supra* note 9, at 18; Hiro N. Aragaki, *The Metaphysics of Arbitration: A Reply to Hensler and Khatam*, 18 Nev. L.J. 541 (2018) (arguing against a sharp divide between litigation and arbitration).

28. Bookman, *supra* note 3, at 231.

29. Emmanuel Gaillard, Legal Theory of International Arbitration 53 (2010).

Part I of this Article situates global civil procedure, discussing where global civil procedure comes from and when it is used. Part II uses the examples of conflicts of interest, aggregate litigation, and discovery to demonstrate how global civil procedure norms develop. This list is not an exhaustive list of global civil procedure norms, but instead offers examples that illustrate some of the different ways in which global civil procedure can come into being: through the development of autonomous international rules as well as borrowing from and designing against domestic models. Common law examples are most familiar to me as someone trained primarily in common law who teaches in a common law jurisdiction. Colleagues in other jurisdictions will doubtless have more and better examples from their own legal traditions. Part III discusses the ideologies of global civil procedure, addressing the prevalence of the law market metaphor as well as the limits of seeming consensus. These limits reflect the specificity of the common law conception of the judge as well as differences in a regime's governing ideology. "False friends" in translating between systems are costly to individual clients and reduce the value of broader reform efforts such as the current UNCITRAL investment dispute negotiations. They also represent a missed opportunity for reflection on procedural theory both within and across legal traditions.

## I. What Is Global Civil Procedure

This Part offers a catalogue of the actors involved in making global civil procedure and the scenarios in which it is most likely to appear. Although these actors are diverse in position, many share a share a common trait: They are lawyers. Some act as norm entrepreneurs, bringing familiar rules into new scenarios to better serve their clients alongside their law firms' bottom line. Others work in institutions and governments and seek to compete in a market for legal services. Global civil procedure does not have one origin point and often has a diverse set of actors supporting it. It might, as Part II will discuss, be expressed in international rules, be developed between different—but converging—models, or have originated in one particularly influential reference jurisdiction. The variety of actors and ways in which global civil procedure is used points to one of the reasons why seeming convergence on a type of rule, and even on some reasons to have it, does not signal deeper convergence in procedure values.

Elements of this argument are not new. Arbitrators have long sought to triangulate between procedural traditions. Emmanuel Gaillard in particular is associated with the argument that, in some cases, arbitrators can and should apply substantive or procedure "transnational rules" developed through comparative techniques.[30] Writing on U.S. litigation in the late

30. Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID Rev.—Foreign Inv. L.J. 208, 224 (1995).

1980s, Gary Born and David Westin argued that a "cohesive" body of U.S. domestic law was developing around transnational civil cases.[31] Stephen Burbank responded that such coherence was overstated.[32] He wrote that "international civil litigation" is "a process of cross-fertilization in which (1) doctrine and techniques developed in the context of domestic cases are brought to bear on problems presented in international litigation, and (2) the increased international dimensions of litigation in [U.S.] courts prompt changes in doctrine and techniques, which are then applied in domestic cases."[33]

The latter approaches emphasize the domestic origin of transnational rules. I agree. Global procedural norms often get their start in the domestic practices of one or more legal systems. What distinguishes them is that they are spread through the actual or imagined demands of transnational litigation. Procedure applied in Burbank's first step may not be global at all, it could merely be domestic procedure applied in a transnational case. What makes such a norm truly global is its widespread application through a self-conscious intent to meet the needs of transnational litigants. It might be plausibly picked out by an arbitrator applying the transnational rules method. However, the argument might be less sophisticated, as in "too many of our compatriots are choosing English law instead of having their disputes heard here. If we do X, like London, more will come home" or even "all the modern sophisticated jurisdictions have a rule for X and it is time this province gets with the program." Burbank's second step describes how global civil procedure can spread and influence even purely domestic cases. Here, the "pull" of trans-substantivity Burbank describes in the U.S. federal system may operate to spread global civil procedure beyond its original context.[34] It is not that international cases are treated differently, but that attentiveness to international concerns can produce rule changes affecting all litigants.[35]

Global civil procedure norms might not be adopted only to please foreign parties, nor applied only in transnational cases. However, the widespread use of these norms and their appeal to foreign lawyers and litigants form part of the reason they are adopted. That domestic and international interests are mixed up in the evolution of a rule does not mean the international interests are of no importance. Once adopted, a rule's origins may be forgotten, so a rule adopted in part because it reflects global procedure norms may then be

31. Gary B. Born & David Westin, International Civil Litigation in United States Courts 1 (1988).

32. Stephen B. Burbank, *The World in Our Courts*, 89 Mich. L. Rev. 1456, 1497 (1991) (citing Born & Westin, *supra* note 31) (arguing that "international civil litigation" does not have unifying values and so fails to be "a distinct, cohesive body of law").

33. *Id.* at 1456, 1459.

34. *Id.* at 1466–67.

35. *See* Coleman, *supra* note 14, at 1009 (on role of elite lawyers generally); *see also* Reda & Frayne, *supra* note 15, at 4–6.

used in entirely domestic disputes. In federal systems, one might also expect some local rulemakers to be more attuned to these issues than national ones.

Unity of purpose (however fleeting) in appealing to international parties and unity of norm in terms of the rules produced, however, does not mean unity of values. Thus far, I agree with skeptics of the idea of internationalized procedure. However, global civil procedure need not represent global agreement on procedural values to nonetheless be useful as a way to understand how international consensus on "common sense" comes to be and how it is spread. The pervasive appeal to markets for law and jurisdictional competition is especially striking. It is worth naming this phenomenon—the quiet drumbeat of "competition" and "modernity" heard around many reform efforts. The noise may be faint within the current world superpower, which will draw litigants to its shores by its sheer economic and political heft. In smaller jurisdictions looking to raise their standing in international trade, or those that live by selling their legal services to outsiders, it may be deafening.[36] In a worst case, it might threaten to drown out local access to justice needs.[37]

### *A. Where Does Global Civil Procedure Come From*

Certain repeat players have a heavy hand in shaping global civil procedure. These repeat players include the global corporate clients that many reform efforts aim to please.[38] However, they also include the entire transnational dispute resolution industry that has grown up around them.[39] These players have a strong vested interest in maintaining the sociological legitimacy of their preferred systems even as they may move between different roles within them.[40] These repeat players matter both because they bring demands for familiar procedure to new settings and because those settings may shift their rules preemptively to compete for their business. As procedural consensus gels, it then becomes conventional wisdom, or "best practice." Adopting elements of global civil procedure is a signal both to those already within the jurisdiction and those outside of it that the court or arbitration belongs to a certain club.

36. Bookman, *supra* note 3, at 28–29.
37. Reda & Frayne, *supra* note 15, at 65.
38. O'Hara & Ribstein, *supra* note 20, at 104.
39. Karton, *supra* note 2, at 56–57.
40. For instance, Taylor St. John's work on the ICSID tribunal demonstrates that lawyers within the World Bank were instrumental in developing the tribunal's rules and promoting the use of investment treaties and investment treaty arbitration. Taylor St. John, The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences 25, 124–25, 133–34 (2018).

1. *Lawyers, clients, and funders*

At the most basic level, lawyers travel.[41] They especially travel when they work for the select group of large firms hired by large transnational corporations to pursue or defend large, transnational cases. A New York lawyer trained at Columbia may be staffed on an arbitration in Singapore, where she will work with lawyers from Australia, Singapore, Hong Kong, and the United Kingdom.[42] She may note that the Singaporean and the Hong Konger have slightly different views of their professional identity. A few years later, she may travel to Paris, where she will argue about witness examination with her French colleague. They phone the German counsel for the opposing party to develop a plan for document disclosures.

Wherever she goes, the lawyer will bring with her the lessons of her civil procedure class, which taught her the U.S. Federal Rules of Civil Procedure. She may also remember the New York Civil Practice Law and Rules, even though she now works exclusively in arbitration. These rules shaped her understanding of her own role and that of the adjudicator.[43] More recently in her professional life, she may have become intimately familiar with the rules of the Singapore International Arbitration Centre ("SIAC") and the ICC Arbitration Court. She will bring the experience she has in applying these rules from one arbitration to the next. She will have certain expectations that will shape what procedure she asks for in arbitration as well as how she counsels her clients and prepares her witnesses. If those expectations are not met, she will discuss with colleagues whether to adjust her expectations or challenge the tribunal.[44] Her colleagues will be doing the same.

Since the 1980s, the global market for legal services has been dominated by U.S. and U.K. firms.[45] These firms' lawyers, like the lawyer described above, may move from central offices to offices in other locations.[46] The firms rely in part on expatriation to introduce far-flung offices to common law culture.[47] Even in offices of these firms that are dominated by non-common-law trained lawyers, firm management and structures like practice groups can be used to spread common law approaches.[48] Elite law firms in some large "emerging" economies have challenged U.S. and U.K. dominance, successfully seeking the same multinational clients. These firms still offer much of what clients of big U.S. and U.K. firms will be used to, many

41. *See* Hélène Ruiz Fabri & Joshua Paine, *The Procedural Cross-Fertilization Pull* 18 (MPILux Research Paper Series, 2019).

42. For a detailed description of one such career, *see* John Flood & Peter D. Lederer, *Becoming a Cosmopolitan Lawyer*, 80 Fordham L. Rev. 2513 (2012).

43. Ruiz Fabri & Paine, *supra* note 41, at 5.

44. Karton, *supra* note 2, at 137 (international commercial arbitrators prefer counsel who are sensitive to the other party's legal culture).

45. James R. Faulconbridge et al., *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 Nw. J. Int'l L. & Bus. 455, 457–59 (2008).

46. *Id.* at 484–85.

47. *Id.* at 485–86.

48. *Id.* at 482–83.

of their lawyers have foreign degrees and several have merged with common law competitors.[49]

Other lawyers at our protagonist's firm may advise its large multinational client sued in New York. The firm's lawyers in the London and Hong Kong offices will know when to call in a barrister. When they do, they will be able to call a peer who works mainly with the same types of clients and has the same training as they do. In more peripheral jurisdictions, the elite lawyers may also look for peers with a similar education—on which, more below—or they may take a more condescending attitude. Either way, the lawyers may have to work with local counsel or government lawyers, exchanging information about their procedural expectations and experiences. The firm may, for instance, design and administer a compensation scheme in Papua New Guinea.[50] Local substantive law might be purely local counsel's domain, but our New York lawyer may feel more justified in questioning the local lawyer's decision if she feels the court is treating her client unfairly, which is to say if her procedural expectations are violated.

Multinational law firms serve multinational clients. This client is likely to be a medium to large corporation, which will be advised by a general counsel's office which may have preferred litigation methods. The corporation may also hire lobbyists to press for the same sorts of procedural reforms across jurisdictions.

Geographers who study professional services firms report that "global law firms have had to be active advocates of legislative change that favors their operation and work as servers of transnational corporations."[51] U.K. firm Clifford Chance and American firms DLA Piper and Sullivan & Cromwell have contributed to procedural change in France. Lawyers at these firms reinterpreted existing rules to create something resembling a securities class action, creating pressure for broader legislative change.[52] After several false starts, collective actions for monetary damages came to France in 2014. Although French "group actions" have a different structure than U.S.-style class actions, they provide a mechanism for individual claimants to get damages after liability is determined based on representative claimants as well as a process for collective settlement.[53] The law first covered consumers, and

49. David B. Wilkins, David M. Trubek & Bryon Fong, *Globalization, Lawyers, and Emerging Economies: The Rise, Transformation, and Significance of the New Corporate Legal System in India, Brazil, and China*, 61 HARV. INT'L L. J. 281, 300, 303, 311, 322 (2020). PRC-based King and Wood merged with the Australian Mallesons Stephens and Jacques. Dacheng merged with Dentons. The mergers use a Swiss verein structure that leaves both sides considerable management autonomy.

50. Karen McVeigh, *Canada Mining Firm Compensates Papua New Guinea Women After Alleged Rapes*, GUARDIAN (Apr. 3, 2015, 4:01 PM), https://www.theguardian.com/world/2015/apr/03/canada-barrick-gold-mining-compensates-papua-new-guinea-women-rape [https://perma.cc/EV94-45QK].

51. Faulconbridge et al., *supra* note 45, at 474.

52. *See id.* at 476.

53. Maria José Azar-Baud & Alexandre Biard, *The Dawn of Collective Redress 3.0 in France*, *in* CLASS ACTIONS IN EUROPE: HOLY GRAIL OR A WRONG TRAIL? 1 (A. Uzelac & S. Voet eds., forthcoming 2020).

gradually expanded to other specific areas.[54] The Americans hardly did it alone. Aggregate litigation now has the policy backing of the European Union ("E.U.").[55] Aggregation is attractive to the E.U. in part because it permits enforcement of E.U. law without a large centralized bureaucracy.[56] Multiple transnational actors can influence the adoption of global civil procedure and do so for their own reasons.

Even on the periphery, a multinational corporate defendant may find itself up against plaintiffs who have also called in experts from the centers. Individual local clients may need to bring in foreign lawyers because no one local will take the case, or because they want the credibility of someone from the "center." Lawyers from the center may have special litigation expertise or resources.[57]

NGOs and law school-based legal clinics also work across borders on behalf of international human rights. NGOs that offer legal expertise in relation to transnational problems—such as those engaging with environmental issues and some areas in human rights—may operate in a way similar to the large firms, with central expertise transmitted to local actors.[58] They may also engage directly in strategic litigation.[59] In doing so, they would serve as vectors for approaches to litigation to cross borders and create demand for procedural solutions, such as group litigation, amicus submissions, extensive disclosure, or plaintiff's experts, in new settings.[60] Lobbying from NGOs as

54. *Id.*

55. Coffee, *supra* note 1, at 1901.

56. R. Daniel Kelemen, Eurolegalism: The Transformation of Law and Regulation in the European Union 27 (2011).

57. U.S. lawyers have been heavily involved in both sides of litigation by residents of Lago Agrio, Ecuador, against Chevron, as well as in the ensuring attempts to enforce the resulting Ecuadorian judgment. U.S. lawyers and U.K. barristers were involved in the related investor state arbitration. Chevron Corp. v. Rep. of Ecuador, UNCITRAL PCA Case No. 2009-23; Patrick Radden Keefe, *Reversal of Fortune*, New Yorker (Jan. 9, 2012), https://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe [https://perma.cc/Q838-87WN].

58. *See, e.g.*, *Mission*, Avocats Sans Frontieres, https://www.asfcanada.ca/a-propos/notre-mission [https://perma.cc/RV3G-MCM7] (last visited Aug. 17, 2020); *What We Do*, PILnet, https://www.pilnet.org/about/what-we-do [https://perma.cc/53JU-EN32] (last visited Aug. 17, 2020); *International*, Nat'l Resources Def. Counsel, https://www.nrdc.org/international [https://perma.cc/4M6H-J8LX] (last visited Aug. 17, 2020); *International Reproductive and Sexual Health Law Program*, U. Toronto Fac. L., https://www.law.utoronto.ca/programs-centres/programs/irshl-reproductive-and-sexual-health-law [https://perma.cc/2LV4-7SM9] (last visited Aug. 17, 2020); Avocats Sans Frontieres & Jamaicans for Justice, Strategic Litigation of Human Rights Abuses: A Guidebook for Legal Practitioners from the Commonwealth Caribbean (2014). The manual was funded in part by the E.U..

59. *Strategic Litigation*, Amnesty Int'l, https://www.amnesty.org/en/strategic-litigation/ [https://www.amnesty.org/en/strategic-litigation/] (last visited Sept. 2, 2020); Open Soc'y Just. Initiative, https://www.opensocietyfoundations.org/who-we-are/programs/open-society-justice-initiative [https://perma.cc/ZNW9-D9VJ] (last visited Sept. 2, 2020); *Strategic Litigation*, ESCR-Net, https://www.escr-net.org/strategiclitigation [https://perma.cc/875H-GMQY] (last visited Sept. 2, 2020).

60. *See, e.g.*, Lucas Bastin, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, 30 Arb. Int'l 125 (2014) (discussing amicus submissions in investor state arbitration submitted on behalf of NGOs and other actors); Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 Mich. L. Rev. 1152, 1153–54 (2003) (describing class action litigation by Holocaust victims and discussing how it has served as a model for other groups seeking redress for historical atrocities).

well as governmental actors led the International Centre for Settlement of Investment Disputes ("ICSID"), which administers investor-state arbitrations, to create a process for accepting amicus memorials and to make some hearings available to amici or to the public.[61] Such submissions have subsequently been used by a variety of investment tribunals constituted under other rules as well.[62]

With litigation funders that cover multiple fora, a new type of repeat player has emerged onto the scene. Global competition was a factor in funders' rise. Once funding was allowed in London, other jurisdictions moved to match what the U.K. legal industry could offer.[63] Although ethics rules may prevent funders from directing a case, they may fund cases only in certain fora, driving more parties there. Funders may value efficiency and predictability, but their understandings of these elements may not track those of the parties.[64] Funders might also be more comfortable with procedure they have seen before, and their headquarters may be even more concentrated in global financial centers.

### 2. *Individual adjudicators*

In international arbitration, the adjudicators are often senior lawyers with arbitration practices, the same people that I have described above. To an even greater degree than counsel, those routinely selected as arbitrators are distinguished by their "cosmopolitanism" and international experience.[65] They compete for clients by demonstrating their expertise in transnational commercial disputes through scholarly writing and conferences.[66] An expanding number of international arbitrations has meant an expanding number of arbitrators, but the field continues to be dominated by a small elite.[67] Arbitrators seeking to distinguish themselves emphasize not only substantive, but also procedural proficiency.[68] They worry that they personally, and international arbitration as a whole, will lose market share if the conduct of cases is not "efficient."[69] Their procedural choices are explicitly about serving "what they believe to be the wishes of the parties."[70]

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61. Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT'L & COMP. L.Q. 373 (2010) (describing amicus participation in NAFTA and ICSID tribunals).

62. *See, e.g.*, Bastin, *supra* note 60, at 137–38.

63. Florence Dafe & Zoe Phillips Williams, *Banking on Courts: Financialization and the Rise of Third-Party Funding in Investment Arbitration*, 27 INT'L REV. POL. ECON. 12 (forthcoming 2020).

64. Funders and litigants may have different time horizons and different understandings of the value of their claims. *See* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 732–36 (2005).

65. KARTON, *supra* note 2, at 21, 134.

66. *Id.* at 59.

67. *Id.* at 60.

68. *Id.* at 61.

69. *Id.* at 62.

70. *Id.* at 96.

Retired judges may set up shop as international arbitrators, or be "promoted" to a regional or international court, where their views on procedural fairness may influence each other. Domestic judges travel too. Some judges on domestic courts are foreign. Hong Kong's Basic Law expressly permits non-permanent judges on its Court of Final Appeal who hail from other common law jurisdictions.[71] Current appointees include Baroness Brenda Hale of the U.K. Supreme Court and former Chief Justice Beverly McLachlin of the Supreme Court of Canada.[72] This use of foreign judges continues British colonial practice of moving judges around and also occurs elsewhere in former colonies in the Asia Pacific, Africa, and the Caribbean.[73] In recent years, some jurisdictions outside this tradition, including Dubai and Kazakhstan, have also sought out English judges for commercial courts.[74] Beyond common law courts, foreign judges sit in Liechtenstein and Bosnia and Herzegovina.[75] Additionally, judges have opportunities to meet informally, exchanging views on matters of common interest, including procedural topics.[76]

Judges make procedural rules in at least three ways. Individual courts and even individual judges write internal rules, which may be inspired by and may influence the practice of others.[77] In some jurisdictions, judges sit on permanent or episodic procedure reform commissions like the U.S. Federal Committee on Rules of Practice and Procedure or the Woolf and Jackson

71. Xianggang Jiben Fa art. 82 (H.K.).

72. Kimmy Chung, *Baroness Hale and Beverly McLachlin Become First Female Judges to Join Hong Kong's Court of Final Appeal Despite 'National Interest' Concerns*, S. China Morning Post (May 30, 2018, 7:58 PM), https://www.scmp.com/news/hong-kong/politics/article/2148521/resounding-show-support-lawmakers-baroness-hale-and-beverly [https://perma.cc/KD5P-ZW8J].

73. Rosalind Dixon & Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 7 Colum. J. Transnat'l L. 283, 286–87 (2019).

74. Nicolás Álvaro Zambrana-Tévar, *The Court of the Astana International Financial Center in the Wake of Its Persian Gulf Predecessors*, 12 Erasmus L. Rev. 122, 123 (2019); Press Release, DIFC Courts, Two Former High Court Judges Given Top DIFC Court Roles (May 18, 2018) https://www.difccourts.ae/2016/05/18/two-former-high-court-judges-given-top-difc-courts-roles/ [https://perma.cc/8MDN-G3ZM].

75. Dixon & Jackson, *supra* note 73, at 288.

76. *See, e.g.*, Monica Claes & Maartje de Visser, *Are You Networked Yet: On Dialogues in European Judicial Networks*, 8 Utrecht L. Rev. 100, 107–10 (2012) (describing networks of judges within the E.U.); *Qui Sommes Nous?*, Association des Hautes Juridictions de Cassation des pays ayant en partage l'usage du Français [hereinafter AHJUCAF], https://www.ahjucaf.org/page/pr%C3%A9sentation-delahjucaf [https://perma.cc/E9MT-5CTV] (last visited Aug. 24, 2020) (the AHJUCAF is a network of supreme courts and courts of cassation; their judges are the most likely to make important decisions related to civil procedure); *Vision, Mission and Statutes*, Int'l Comm. of Jurists, https://www.icj.org/about/vision-mission-and-statutes [https://perma.cc/9A3Q-PHLK] (last visited Aug. 25, 2020) (listing the commission's goals including promoting judicial and lawyer independence and access to justice); *Global Constitutionalism Seminar*, Yale Law Sch., https://law.yale.edu/centers-workshops/gruber-program-global-justice-and-womens-rights/global-constitutionalism-seminar [https://perma.cc/6H6N-7PYT] (last visited Aug. 25, 2020) (past editions of the yearly seminar of judges and academics "have considered structural questions about judicial review, precedent, separation of powers, and federalism" all of which have bearing on procedure).

77. *See, e.g.*, Ruiz Fabri & Paine, *supra* note 41, at 11 (describing international court rules); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2020–24 (1989).

Commissions in England. Judges likewise were part of committees that established international commercial tribunals in Germany and France.[78] Judges also make judgments that influence their jurisdictions' rules. The Canadian Supreme Court sought to back up legislative rulemakers in its treatment of the reformed Ontario summary judgment standard in *Hryniak v. Maudlin*.[79] The Canadian court explicitly mentioned competition for arbitration as a factor motivating it to make summary judgment more readily available, with the hopes of decreasing cost so that parties would come back to court.[80] Meanwhile, the European Court of Human Rights forced France to change the role of the Advocate General/*Commissaire du Gouvernement* in appeals in front of the Cour de Cassation and Council of State in the name of facilitating party control.[81]

In the United States, the Supreme Court has made several decisions rendering the federal courts more friendly to foreign corporate defendants.[82] Stephen Burbank cites *Morrison v. National Australia Bank*,[83] which rejected the extraterritorial application of U.S. securities law in a case that involved a foreign plaintiff and foreign defendant purchasing securities on a foreign exchange.[84] The majority of the Court also made it more difficult to bring a securities fraud class action, stating that "some fear [the United States] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."[85] The Court subsequently made it harder to sue foreign defendants in *Goodyear Tires Operations, S.A. v. Brown*[86] and *Daimler AG v. Bauman*.[87] The Supreme Court also attempted to overhaul the federal court pleading standard in *Bell Atlantic Corp. v. Twombly*[88] and *Ashcroft v. Iqbal*[89] when rulemakers had not acted.[90] *Twombly* was driven in large part by concerns about the cost of discovery.[91]

78. Burkhard Hess & Timon Boerner, *Chambers for International Commercial Disputes in Germany: The State of Affairs*, 12 Erasmus L. Rev. 33, 34 (2019); Haut Comité Juridique de la Place Financière de Paris, Préconisations sur la Mise en Place à Paris de Chambres Specialisées Pour le Traitement du Contentieux International des Affaires 68 (2017) (the committee included Guy Canivet, a member of the Constitutional Council).

79. *See* Hryniak v. Mauldin, [2014] 1 S.C.R. 87, paras. 3–5 (Can.).

80. *Id.* at paras. 26–29.

81. Kress v. France [GC], App. No. 39594/98 2001- VI Eur. Ct. H.R. 1.

82. Stephen B. Burbank, *Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. Pa. J. Int'l L. 663, 664 (2012).

83. 561 U.S. 247 (2010).

84. Burbank, *supra* note 82, at 664 (citing *Morrison*, 561 U.S. 247).

85. *Id.* at 666 (citing *Morrison*, 561 U.S. at 270).

86. 564 U.S. 915 (2011).

87. 571 U.S. 117 (2014). *See* Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 677, 682 (2015).

88. 550 U.S. 544 (2007).

89. 556 U.S. 662 (2009).

90. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 22 (2010).

91. Burbank, *supra* note 82, at 668.

The U.S. cases suggest that judges may have incentives to clear their dockets rather than invite in extra work.[92] Judges may nonetheless absorb messages from policymakers and local bars calling for their jurisdiction to be more congenial to certain litigants, especially in a Hong Kong or Delaware that depends on legal business. Moreover, adopting global civil procedure does not always mean more cases, as when a court declines to take jurisdiction for reasons of comity.

Some jurisdictions such as South Korea and Taiwan also prize foreign training for their judges, which may affect their desire to adopt global norms.[93] For instance, judges in the People's Republic of China ("PRC") have observed that recent changes to the rules for judicial administration were inspired by the U.S. federal courts, which they attributed to the fact that several Supreme People's Court judges in charge of reforms had U.S. experience.[94]

### 3. *Law schools and research institutes*

As the above discussion of training and credentials may suggest, law schools play a large role in developing global civil procedure. Their courses in comparative and international law first introduce students to procedures that cross borders, shaping their perception of procedural norms and of their utility in practice.[95] In arbitration, certain schools have traditionally dominated the market for legal talent. Their students are the most likely to receive entry-level job offers in this practice area and their professors may be called on to serve as arbitrators.[96] Mooting competitions now socialize a wider group of students to the norms of international arbitration practice.[97] They serve as another point for disseminating shared procedural knowledge—usually knowledge of the procedural rules of the relevant international body.

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92. Thanks to James Pfander for making this point.

93. *See* David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. Pa. L. Rev. 927, 958–59, 964–70, 980–81, 994–95 (2015) (discussing foreign training of judges and judicial assistants in Japan, South Korea, Taiwan, and Hong Kong).

94. Yueduan Wang, *Overcoming Embeddedness: How China's Judicial Accountability Reforms Make Its Judges More Autonomous*, 43 Fordham Int'l L.J. 737, 748–49 (2020).

95. Ryan M. Scoville, *International Law in National Schools*, 92 Ind. L.J. 1449, 1456–62 (2017) (training in international law is more available in more countries in the world than it was decades ago; it is also more likely to be mandatory); Dianne Otto, *Handmaidens, Hierarchies, and Crossing the Public-Private Divide in the Teaching of International Law*, 1 Melbourne J. Int'l L. 35, 40–41 (2000) (discussing and critiquing the way private international law is presented to students in Australia and the United States).

96. *See* Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 23–25 (1996) (discussing ways in which symbolic capital and an elite, cosmopolitan legal education have historically eased entry into an international arbitration career).

97. *See* Mark R. Shulman, *Moot Court Diplomacy; MEANWHILE*, Int'l Herald Trib. (N.Y.), (2006), at 7 (discussing student networking through the Vis International Commercial Arbitration Moot).

Law students also travel. Students from the periphery often come to the centers to pursue further legal education.[98] Students from the centers likewise may pursue international education if they want to enter transnational disputes work; having studied in multiple countries can boost their chances of being hired.[99]

Although certain fields in certain countries are quite focused on their home jurisdictions, others involve considerable international mobility. Academics who study the areas of law frequently implicated by transnational cases—international law, comparative law, and (international) conflicts of laws—are often among the more mobile. Jindal Global Law School in India and Peking University School of Transnational Law in China make foreign-trained faculty a selling point, offering degrees to a primarily domestic audience of students interested in trade, transnational disputes, and corporate practice.[100]

Additionally, several research institutes now focus on adjudication and procedure. Examples include PluriCourts, affiliated with the University of Oslo, and the Max Planck Institute for Procedural Law in Luxembourg. Ruiz Fabri and Paine, themselves based at the Max Planck, note that institutions such as the "International Law Commission, the Institut de Droit International, and the Hague Academy of International Law" act as "informal gatekeepers" to international practice.[101] These institutions "have hosted in-depth reflections on procedural matters in international adjudication."[102]

### 4. *Intergovernmental Organizations and NGOs*

More formal avenues for procedural dissemination also exist. The UNCITRAL has developed arbitration rules and a widely-used model law on international commercial arbitration.[103] The model law has been adopted by 116 jurisdictions (eighty-three states).[104] UNCITRAL is also the venue for current debates over the future shape of investment arbitration. One of the core issues in this debate is how much investment arbitration ought to resemble domestic courts and whether it ought to feature a permanent corps of arbi-

98. *See, e.g.*, Carole Silver et al., *Globalization and the Business of Law: Lessons for Legal Education*, 17 NW. J. INT'L L. & BUS. 399, 399–400 (2008).

99. KARTON, *supra* note 2, at 135.

100. *About Us*, JINDAL GLOBAL L. SCH., https://jgu.edu.in/jgls/about-us [https://perma.cc/UZL6-DKUA] (last visited Aug. 26, 2020); *History of STL*, PEKING U. SCH. TRANSNAT'L L., https://stl.pku.edu.cn/about/history-of-stl [https://perma.cc/D6JB-5LSM] (last visited Aug. 26, 2020).

101. Ruiz Fabri & Paine, *supra* note 41, at 20.

102. *Id.*

103. *About UNCITRAL*, UNCITRAL, https://uncitral.un.org/en/about [https://perma.cc/N76B-EMQU] (last visited Aug. 26, 2020).

104. *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNCITRAL, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status [https://perma.cc/53XP-YYNL] (last visited Aug. 26, 2020).

trators rather than ad hoc appointments.[105] The Hague Conference on Private International Law has developed multiple treaties relating to topics such as service of process, letters rogatory, and the enforcement of judgments.[106] Its membership comprises eighty-four states and the E.U.[107] Its 1954 Convention on Civil Procedure covers disclosure, security for costs, access to legal aid, access to information, and detention in a civil proceeding.[108] UNIDROIT, the International Institute for the Unification of Private Law, has developed thirty-one Principles of Transnational Civil Procedure in cooperation with the American Law Institute.[109] The UNIDROIT principles offer a basis for local reform efforts aimed at attracting transnational litigation.[110] ICSID, housed in the World Bank Group, has developed its own standard rules for arbitration.[111] The World Bank has also been involved in procedural reform projects, promoting an efficiency driven agenda.[112]

Regional organizations may also influence procedure. The E.U. and International Monetary Fund demanded procedural reforms from several member states as a condition of receiving bailout funds after the 2008 financial crisis.[113] Seventeen states in francophone Africa have formed Organisation pour l'Harmonisation en Afrique du Droit des Affaires ("OHADA"), whose purpose is to unify commercial law between the countries in order to facilitate trade.[114] OHADA has developed several uniform statutes that cover both substantive and procedural law. The uniform arbitration statute went into

105. Anthea Roberts & Taylor St. John, *UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest*, EJIL: Talk! (Apr. 30, 2019), https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest [https://perma.cc/ZJY3-LTJP].

106. Hague Conf. Priv. Int'l L., https://www.hcch.net/en/home [https://perma.cc/43U9-DEMF] (last visited Aug. 28, 2020).

107. *HCCH Members*, Hague Conf. Priv. Int'l L., https://www.hcch.net/en/states/hcch-members [https://perma.cc/FB2F-M8YL ] (last visited Aug. 28, 2020).

108. Hague Convention Relating to Civil Procedure, Mar. 1, 1954, 286 U.N.T.S. 265. The Convention is in force in a number of jurisdictions, of these, only Israel has a significant common law tradition. *See Status Table: 02: Convention of 1 March 1954 on Civil Procedure*, Hague Conf. Priv. Int'l L., https://www.hcch.net/en/instruments/conventions/status-table/?cid=33 [https://perma.cc/4DHT-AR4K] (last visited Aug. 28, 2020).

109. ALI/UNIDROIT Principles of Transnational Civil Procedure (2007).

110. *Overview of ALI/UNIDROIT Principles of Transnational Civil Procedure*, UNIDROIT (May 1, 2013), https://www.unidroit.org/transnational-civil-procedure-overview [https://perma.cc/G93V-RNTR].

111. *ICSID Convention Arbitration Rules*, ICSID, https://icsid.worldbank.org/resources/rules-and-regulations/convention/arbitration-rules [https://perma.cc/GH8L-6NSX] (last visited Oct. 24, 2020).

112. Maria Cecília De Araujo Asperti et al., *Why the "Haves" Come Out Ahead in Brazil? Revisiting Speculations Concerning Repeat Players and One-Shooters in the Brazilian Litigation Setting*, 16 RDU Porto Alegre 11, 23–24 (2016).

113. Memorandum of Understanding on Specific Policy Conditionality at paras 7.6–7.8 (May 17, 2011) (Port.) https://www.imf.org/external/np/loi/2011/prt/051711.pdf [https://perma.cc/2VFH-TP89]; Greece: Letter of Intent, Memorandum of Economic and Financial Policies, Technical Memorandum of Understanding, § 4.5 (Mar. 9, 2012) (Greece), https://www.imf.org/external/np/loi/2012/grc/030912.pdf [https://perma.cc/S4M3-Z5G4].

114. *Présentation générale*, OHADA, https://www.ohada.org/index.php/fr/ohada-en-bref/ohada-presentation-generale [https://perma.cc/Y53V-4LMS] (last visited Oct. 24, 2020).

effect in 2017. OHADA has also proposed a uniform mediation statute, but it has not yet taken effect.[115] OHADA operates a tribunal seated in Abidjan, Cote d'Ivoire, that serves both as an arbitral secretariat and as a court of cassation when national courts have split on the interpretation of a uniform statute.[116]

Beyond litigation, domestic and international NGOs—such as bar associations—often take positions on procedure and may argue for adopting procedure to appeal to international clients. Rule-of-law initiatives may influence legislation and justice administration in ways that lawyers litigating and lobbying on behalf of clients do not because of the more neutral packaging of their proposals and the real or imagined influence of sending states. For instance, the American Bar Association's ("ABA") Rule of Law Initiative ("ROLI") has been involved in the development of ethical standards for judges and lawyers in emerging democracies, often with the backing of the U.S. and host governments.[117] The E.U. has sponsored both internal and external rule of law initiatives.[118]

5. *International courts*

Ruiz Fabri and Paine, as well as Stacie Strong, have tied together developments in international private and public law tribunals in their work on procedural principles in international law. Ruiz Fabri and Paine argue that "procedural cross-fertilization" between tribunals has created "an emerging model of international due process," a set of common principles for what constitutes procedural fairness in the context of international courts and tribunals.[119] Stacie Strong takes the argument one step further, arguing that some principles of international due process now constitute a procedural jus cogens.[120]

International due process and global civil procedure overlap, both in the forces driving their creation, such as the small club of international lawyers, and some of the specific rules. However, I take international due process to include elements that would not be global civil procedure norms, because they are specific to the international context. Likewise, some elements of global civil procedure, such as a norm in favor of allowing some form of aggregation, might not be international due process rules. Depending on

115. *Historique de l'OHADA*, OHADA, https://www.ohada.org/index.php/fr/ohada-en-bref/presentation-ohada-historique [https://perma.cc/QX36-CSWG] (last visited Oct. 24, 2020).

116. *Les acteurs*, OHADA, https://www.ohada.org/index.php/fr/ohada-en-bref/presentation-ohada-les-acteurs [https://perma.cc/2CG4-CW5J] (last visited Aug. 26, 2020).

117. James E. Moliterno, *Exporting American Legal Ethics*, 43 Akron L. Rev. 769, 770–71 (2010).

118. *What is EULEX?*, EULEX Kosovo, https://www.eulex-kosovo.eu/?page=2,16 [https://perma.cc/UE27-G4VB] (last visited Aug. 26, 2020); *Initiative to Strengthen the Rule of Law*, Eur. Comm'n (July 17, 2019), https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en#documents [https://perma.cc/4GKH-TJFD].

119. Ruiz Fabri & Paine, *supra* note 41, at 24–26.

120. S.I. Strong, *General Principles of Procedural Law and Procedural* Jus Cogens, 122 Pa. State L. Rev. 347 (2018).

one's definition, they might not even count as general principles to be followed by international arbitral tribunals.

### 6. *Arbitration providers*

Private arbitral organizations are also sources of standardized procedural rules.[121] Those wishing to use these organizations' services face mandatory requirements. Additionally, though parties may be able to contract around some rules, they may just not find that it is worth it to contract around the vast majority of rules, leaving the organizations with considerable power to set them. These organizations range widely in size and influence, from the well established ICC Secretariat in Paris, founded in 1923, to a raft of regional centers founded in the 1970s, to upstarts such as the Astana Financial Centre's arbitration center.[122] They often pay attention to procedural discussions at the transgovernmental level and may also be contributors to these debates.[123] Moreover, their lobbying will also influence the choices of reformers in the jurisdictions in which they are situated.[124]

Arbitration providers explicitly compete with one another to offer the most desirable procedure.[125] This competition can lead to divergence as providers seek an edge over competitors through procedural innovation. For instance, the ICC's International Court of Arbitration advertises recent innovations, such as its expedited procedure rules, which are applicable to all small value disputes.[126] It highlights its concern with "efficiency."[127] It also notes that its 2017 rules will make "ICC arbitration even more transparent,

121. Kaufmann-Kohler, *supra* note 25, at 1324.

122. *ICC International Court of Arbitration*, ICC, https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration [https://perma.cc/FRK6-FF62]; Badan Arbitrase Nasional Indonesia (BANI Arbitration Center) was founded in 1977. *About Badan Arbitrase Nasional Indonesia (BANI Arbitration Center)*, BANI, https://www.baniarbitration.org/page/detail/2 [https://perma.cc/V7ST-J47Y] (last visited Aug. 18, 2020); The Kuala Lumpur Regional Centre for Arbitration, now Asian International Arbitration Centre, was founded in 1978. *Who We Are*, Asian Int'l Arb. Ctr., https://www.aiac.world/About-AIAC- [https://perma.cc/6WUB-YYDK] (last visited Aug. 18, 2020). The Chamber of Commerce Brazil-Canada established the first arbitration center in Brazil in 1979. *About the CAM*, CAM-CCBC, https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/about-the-cam [https://perma.cc/3C9U-7JZ5] (last visited Aug. 18, 2020). The international arbitration center in Astana, Kazakhstan launched in 2018. *A Global Round-up—Developments in International Arbitration Rules and Laws*, Norton Rose Fulbright Can. LLP (Oct. 2018), https://www.nortonrosefulbright.com/en-ca/knowledge/publications/b5739f47/a-global-round-up—developments-in-international-arbitration-rules-and-laws [https://perma.cc/W58S-5XCW].

123. *See, e.g.*, Pedro Ramirez, *Arbitration Reform Efforts Continue Despite Pandemic*, Kluwer Arb. Blog (Aug. 5, 2020), http://arbitrationblog.kluwerarbitration.com/2020/08/05/arbitration-reform-efforts-continue-despite-pandemic [https://perma.cc/D4LS-H85K] (detailing discussions of reform to commercial and investor state arbitration rules that involve the work of academics, arbitration providers, UNCITRAL, and specific governments).

124. *See* Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 Yale L.J. 2940, 2949 (2015).

125. *See* Karton, *supra* note 2, at 63.

126. Int'l. Chamber of Com. [hereinafter ICC], 2017 Arbitration Rules and 2014 Mediation Rules (2019).

127. *Id.* at 1.

for the Court will provide reasons for a wide range of important decisions, if requested by one of the parties."[128] The American Arbitration Association, which includes an international dispute settlement arm ("AAA-ICDR"), advertises its high settlement rates and how "nearly half of those [settled] cases incur no arbitrator compensation."[129] The Shenzhen Court of International Arbitration ("SCIA") promises "independence," "impartiality," and "innovative mechanisms."[130] It boasts that "[p]arties can get quality and fast dispute resolution service in SCIA while the cost (arbitration fee) is much lower than other international arbitration institutions."[131] The organization attributes this speed to its procedures, which lack a "lengthy pre-hearing process . . . [c]omparing to other international arbitration institutions."[132] Even in emphasizing their differences, however, the organizations seem to assume that arbitration users want similar things, such as quick resolution and low cost.

Competition may also incentivize providers to adopt rules that they believe parties expect to see, leading to convergence. Conforming to procedural trends may be especially important for smaller or newer international arbitration providers. The SCIA, which broke away from the much older China International Economic and Trade Arbitration Commission ("CIETAC") in 2012, makes no mention of the recent unpleasantness and treats CIETAC's history as its own.[133] It touts its "Internationalized Governance Model" with "effective checks-and-balances in decisionmaking, implementation and supervision" as well as lists that include foreign lawyers.[134] In other cases, old and new centers develop joint procedure. The London Centre for International Arbitration ("LCIA"), a well established provider, lent its name and case management expertise to the Dubai International Financial Centre.[135] Even the most established centers must balance promises of a procedural edge with assurances about stability. The ICC promises "the best quality of service . . . because it is delivered by a trusted institution and a process that is recognized and respected as a benchmark of international dispute resolution."[136] The organization states that its rules "follow interna-

128. *Id.* at 2.

129. *What We Do*, Am. Arb. Ass'n [hereinafter AAA], https://www.adr.org/ARBITRATION [https://perma.cc/TS3K-JATF] (last visited Oct. 24, 2020).

130. *Decree of Shenzhen Municipal People's Government*, Shenzhen Ct. Int'l. Arb. (Apr. 23, 2019), http://www.scia.com.cn/En/index/zljz/id/23.html [https://perma.cc/W3V3-W8MR].

131. *Why SCIA*, Shenzhen Ct. Int'l. Arb., http://120.25.66.138/web/doc/view_guide/667.html [https://perma.cc/EMG9-2GZM] (last visited Oct. 1, 2020).

132. *Id.*

133. *Introduction*, Shenzhen Ct. Int'l. Arb., http://www.sccietac.org/en/index/aboutdetail/id/15.html [https://perma.cc/JNL9-VVYY] (last visited Oct. 1, 2020).

134. *See Why SCIA*, *supra* note 131.

135. *Overview*, DIFC-LCIA Arb. Ctr., http://www.difc-lcia.org/overview.aspx [https://perma.cc/HP74-7ZYZ] (last visited Sept. 3, 2020).

136. *Arbitration*, Int'l Chamber Comm., https://iccwbo.org/dispute-resolution-services/arbitration [https://perma.cc/9V37-ER6A] (last visited Sept. 26, 2020).

tional best practice" and are "update[d] . . . regularly."[137] AAA promises "court-and-time-tested rules" with "[w]ell-defined steps [that] move cases from filing to award as quickly and cost-effectively as possible, while ensuring that all parties are treated fairly and equitably."[138]

7. *Reformers (legislatures, commissions, court administration)*

Policymakers have explicitly sought transnational litigation business.[139] For instance, the Mauritius Arbitration Centre emphasizes its jurisdiction's closeness with the global mainstream arbitration procedure. It states that its country's arbitration law is "based on the UNCITRAL Model Law" and that Mauritius has a "special group of Designated International Arbitration Judges[.]"[140] Mauritius, the Centre says, "has recently been listed as the only safe seat of arbitration in the African Union" by the Global Arbitration Review.[141] The U.K. Justice Department advertises the quality of civil justice in London, and its specialized commercial court.[142] The state of New York also explicitly sought to compete with other hubs for arbitration and litigation.[143] It established special commercial courts in Manhattan, making a 1993 pilot permanent in 1995.[144] Additionally, New York takes a liberal approach to personal jurisdiction. The state allows parties with disputes over one million U.S. dollars to consent to its jurisdiction even if they lack the minimum contacts usually necessary to seize New York courts.[145] Likewise, the Dubai International Financial Center, establishing its own common law court system with a mix of local and foreign judges in 2004,[146] does not require a physical connection to Dubai to assert personal jurisdiction.[147] Another example is Singapore, which established the Singapore International Commercial Court in 2015.[148] Singapore's international arbitration center was already a regional hub.[149] The commercial court was to work in combination with it to draw dispute resolution business from throughout Asia.[150] Hong Kong's position within the PRC has been dependent on its status as a

137. *Id.*
138. AAA, *supra* note 129.
139. KARTON, *supra* note 2, at 68–69.
140. *Why Mauritius*, MAURITIUS INT'L ARB. CTR., http://miac.mu/why-mauritius/ [https://perma.cc/B347-ZCWJ] (last visited Sept. 26, 2020).
141. *Id.*
142. Bookman, *supra* note 3, at 16.
143. *Id.* at 25.
144. *Id.* at 23.
145. N.Y. C.P.L.R. § 5-1402 (McKinney 2019).
146. Bookman, *supra* note 3, at 28–29.
147. *Id.* at 29.
148. *Id.* at 32.
149. *Id.*
150. *Id.*

legal services hub.[151] Successive secretaries for justice have sought to sell Hong Kong as a forum to foreign audiences, emphasizing the courts' independence and closeness with familiar, English procedure.[152]

Procedure may be an unfamiliar subject for local legislators, who may turn to "private committees of experts, comprising lawyers from private practice, law professors, interested arbitral institutions, and representatives from other lobbying groups" to draft their laws, "sometimes after consultation with foreign experts."[153] These arrangements may increase the influence of global civil procedure over local choices.

Those outside of common law traditions have also sought transnational litigation business. Paris has long been a destination for arbitration. The French Government worked hard to maintain this position, adopting a new arbitration law and lobbying to keep the ICC's headquarters in Paris.[154] Paris has had an international commercial court since 2010 and added an international commercial appellate chamber in 2018.[155] The courts promise "a procedural revolution" including English language proceedings, and similarities with the common law including oral evidence and greater discovery.[156] The Netherlands and some German jurisdictions have taken a similar approach.[157] The PRC has opened two branches of the China International Commercial Court, which operates as a tribunal of the Supreme People's

151. Gary L. Benton, *The Whispered Conversation: Hong Kong v. Singapore?*, KLUWER ARB. BLOG (Jan. 2, 2019), http://arbitrationblog.kluwerarbitration.com/2019/01/02/whispered-conversation-hong-kong-v-singapore [https://perma.cc/5BWJ-BUYE].

152. Matthew S. Erie, *The New Legal Hub: The Emergent Landscape of International Commercial Dispute Resolutions*, 60 VA. J. INT'L L. 28 (forthcoming 2020); Teresa Cheng, SC, Sec'y for Justice of H.K., Opening Speech at the Inaugural Global Conference – 2019 HCCH Judgments Convention: Global Enforcement of Civil and Commercial Judgments (Sept. 9, 2019) (transcript available at https://www.doj.gov.hk/en/community_engagement/speeches/pdf/sj20190909e1.pdf [https://perma.cc/6ZZ6-Z59G]); Rimsky Yuen, SC, Sec'y for Justice of H.K., Legal and Dispute Resolution: Key for International Trade, (Sept. 17, 2012) (transcript available at https://www.info.gov.hk/gia/general/201509/17/P201509170704.htm [https://perma.cc/R56Y-7ZKT]); Rimsky Yuen, SC, Sec'y for Justice of H.K., Keynote Address at the 19th International Congress of Maritime Arbitrators (May 11, 2012) (transcript available at https://www.info.gov.hk/gia/general/201505/11/P201505110568.htm [https://perma.cc/2HEC-W9EX]); Wong Yan Lung, SC, Sec'y of Justice for H.K., Address at the Arbitration in China Conference held at the Conrad Hotel, Hong Kong, November (Nov. 28, 2005) (transcript available at https://www.doj.gov.hk/en/community_engagement/speeches/pdf/pr20111006e2.pdf [https://perma.cc/M2GJ-ZYTA]); Wong Yan Lung, SC, Sec'y for Justice of H.K., Address at the Third Regional Arbitration Institutes Forum, (transcript available at https://www.info.gov.hk/gia/general/200906/16/P200906160223.htm [https://perma.cc/NVZ8-XJKE]).

153. KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 9 (1993).

154. Emmanuel Gaillard et al., *The International Chambers of the Paris Courts and Their Innovative Rules of Procedure*, SHEARMAN & STERLING (Apr. 23, 2018), https://www.shearman.com/perspectives/2018/04/paris-courts-and-their-innovative-rules-of-procedure [https://perma.cc/CH6T-55TN].

155. Alexandre Biard, *International Commercial Courts in France: Innovation without Revolution?*, 1 ERASMUS L. REV. 24, 24, 27 (2019).

156. *Presentation des chambres commerciales internationals de Paris—CCIP,* COUR D'APPEL DE PARIS, (Feb. 4, 2020), https://www.cours-appel.justice.fr/paris/presentation-des-chambres-commerciales-internationales-de-paris-ccip [https://perma.cc/9Z7R-9UXW]; *see also* Antoine Garapon & Daniel Schimmel, *Renforce les Chambres Internationales par des Standards Commun de Procédure et de Jugement*, DALLOZ AVOCATS at 445, 447 (Sept. 2019).

157. Bookman, *supra* note 3, at 35, 40.

Court.[158] The court has promoted itself as offering judges familiar with international norms, procedural fairness, and transparency.[159]

Those tasked with creating jurisdictions hospitable to transnational litigation may look to global civil procedure norms to achieve their aims. However, reformers not explicitly looking to attract litigants may refer to these norms as well in seeking to understand what best practices or efficiency look like. They may also do so because various interest groups, like corporations and lawyers, have experience with international commercial jurisdictions and favor those procedures.

### B. *How Is Global Civil Procedure Used*

The creators of global civil procedure use it in a variety of settings. They do so by appealing to international standards and cherry-picking examples of the desired standard. Cherry-picking in this scenario has an expressive function, making a statement about the court or tribunal's "place in the world."[160]

#### 1. *International arbitration*

International commercial and investment arbitration is perhaps the most obvious forum in which global civil procedural norms can be observed in the daily workings of adjudication.[161] Arbitration provides parties with the ability to set all their own procedure, without having to bypass court defaults by consent.[162] In reality, however, parties to an arbitration usually choose a set of off-the-shelf rules created by arbitration providers. Arbitrators may actively discourage any reference to national procedure.[163]

Arbitrators will also apply norms of global civil procedure as general principles.[164] Two treatises cover both procedural and substantive general principles. The most recent, by Charles Kotuby and Luke Sobota, discusses notice, jurisdiction, tribunal impartiality and independence, equality of arms, the right to be heard, and res judicata.[165] This treatise aims to update and expand on Bin Cheng's 1953 work on general procedural and substantive principles.[166] Matti Kurkela and Santtu Turunen have further proposed

158. *Id.* at 42–43.

159. *Id.*

160. Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law 23 (2014).

161. *See* Kurkela & Turunen, *supra* note 26.

162. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. Rev. 767, 773–74 (2017).

163. Karton, *supra* note 2, at 123 ("Arbitrators tend to share the goal of creating a coherent, unified global dispute resolution forum that is more than a hodgepodge of national laws, practices, and cultures.").

164. Kotuby & Sobota, *supra* note 26, at 70; Ruiz Fabri & Paine, *supra* note 41, at 13.

165. *See* Kotuby & Sobota, *supra* note 26, at 70.

166. Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (photo. reprint 1987) (1953).

a special *lex proceduralia* for international commercial arbitration.[167] General principles may affect the outcome or the conduct of the arbitration. Arbitrators evaluate the fairness of dispute resolution procedures in the contract and may set aside such procedures if they fail to conform to general principles. They also affect evaluation of claims such as denial of justice in investment arbitration.[168] Some who would employ general principles in arbitration have come up with detailed lists of such principles.[169] Others, notably French arbitrator and theorist Emmanuel Gaillard, eschew lists in favor of case-by-case analysis according to a "comparative law methodology." In either case, general principles are said to derive from broad cross-systemic comparison.[170] Gaillard writes that arbitrators are to capture "trends" in the law, applying rules derived from these trends even when the parties have not asked for them and potentially declining to apply rules that would run counter to these trends.[171]

The general principles theorists are coy about how exactly one distinguishes domestic laws that represent a trend or evolution from those that do not. They agree that consensus is not required, and neither is theirs a natural law theory.[172] Nor do more modern works rely explicitly on a common understanding of what counts as the "civilized nations" even if this concept continues to be referenced in international law.[173] Still, the concept seems to be doing some work. Existing accounts of general principles imagine arbitrators following progressive trends, upholding human rights and punishing corruption.[174]

### 2. *Recognition of judgments and arbitral awards*

Global civil procedure norms affect the circumstances under which a court will find procedural violations so egregious that it must reject a judgment or award. For the majority of jurisdictions, recognition of judgments involves minimum standards of fairness.[175] Proceedings may meet these minimum standards even if they do not conform to all global civil procedural norms. Some norms establish a procedural baseline. Others encompass common practices that are viewed as highly desirable, perhaps modern, practices that adjudicators would believe they ought to adopt for themselves, but

167. KURKELA & TURUNEN, *supra* note 26, at 11.
168. KOTUBY & SOBOTA, *supra* note 26, at 71.
169. Michael Pryles, *Application of the* Lex Mercatoria *in International Commercial Arbitration,* 31 U. N.S.W. L.J. 319, 321 (2008).
170. Gaillard, *supra* note 30, at 224.
171. GAILLARD, *supra* note 29, at 53.
172. Emmanuel Gaillard, *L'ordre Juridique Arbitral: Réalité, Utilité et Spécificité*, 55 MCGILL L.J. 891–907, 902 (2010); KOTUBY & SOBOTA, *supra* note 26, at 23.
173. Statute of the International Court of Justice, art. 38, Oct. 24, 1945, U.N.T.S. I.3.
174. Gaillard, *supra* note 172, at 899.
175. KOTUBY & SOBOTA, *supra* note 26, at 72–73.

that they are not currently ready to impose on others such that no proceeding without them can be considered fair.[176]

Consensus is particularly strong in relation to the recognition and enforcement of arbitral awards, which is governed by the New York and ICSID (Washington) Conventions. The New York Convention lays out a few scenarios in which courts may refuse to recognize an arbitral award because it violates certain basic procedural standards, like allowing both parties to be heard, or going beyond the tribunal's mandate.[177] Parties to arbitrations administered through ICSID can ask ICSID's ad hoc annulment committee to redress procedural failures.[178] The courts "shall" enforce ICSID awards.[179]

Recognition of judgments has been more controversial. Consensus on bases for jurisdiction needed for a broad treaty on the enforcement of civil judgments has proved elusive. However, the 2005 Convention on the Choice of Court Agreements, which relates to forum selection clauses, is now in force for 33 contracting parties and has been signed by the E.U., PRC, and the United States.[180] In 2019, the Hague Conference on Private International Law finalized the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[181] The Convention provides bases for jurisdiction based on contacts with the enforcing state and provides limited reasons for non-enforcement, including violation of public policy, the existence of prior judgments (res judicata), or violation of a forum selection clause.[182]

The few cases in which courts have rejected judgments or awards can reveal areas in which norms are changing to reflect global standards. The *Gao Haiyan v. Keeneye Holdings Ltd.* case in Hong Kong is one example. There, the arbitrator rendered an award on the merits, but before he did so, he attempted to mediate between the two parties, even taking ex parte meetings.[183] The first instance court in Hong Kong found that this combination of mediation and arbitration violated the Hong Kong-Mainland agreement on the enforcement of arbitral awards, the terms of which are substantially similar to the New York Convention.[184] The appeals court reversed, holding that mediation-arbitration did not per se violate the agree-

176. For this distinction in arbitration procedure see KURKELA & TURUNEN, *supra* note 26, at 202.

177. Convention on the Recognition and Enforcement of Arbitral Awards, art. V, June 7, 1959, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1959).

178. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 52(1)(d), Mar. 18, 1965, 4 I.L.M. 524 (1965).

179. *Id.*

180. Convention on Choice of Court Agreements, U.N.T.S. June 30, 2005, entry into force Oct. 1, 2015; Status Table, 37: Convention of 30 June 2005 on Choice of Court Agreements, HAGUE CONF. PRIV. INT'L L. (Sept. 28, 2020), https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 [https://perma.cc/7CQH-Q5V2].

181. Hague Conf. on Priv. Int'l Law [HCCH], Final Act (July 2, 2019).

182. *Id.* arts. 5, 7.

183. Gao Haiyan v. Keeneye Holdings Ltd., [2011] 3 H.K.C. 157, paras. 22–29 (C.F.I.).

184. *Id.* at paras. 50, 71–80, 100.

ment.[185] *Keeneye* is indicative of a shift in how common law courts view the combination of mediation and adjudication.[186] It signaled acceptance of combining these two roles in one adjudicator.[187]

Disclosure rules around conflicts of interest provide another example. Arbitrators often have multiple appointments at once, as well as prior appointments from the same parties or counsel. Multiple appointments may give rise to conflicts of interest from two sources: the arbitrator's relationship with one party, and the arbitrator's prior relationship.[188] The question then becomes which of these conflicts should be waivable.[189]

### 3. *Multiple fora and foreign element cases*

Global civil procedure may also be involved in situations in which the same issues or those related to the same fact scenario are litigated across multiple jurisdictions. The Volkswagen emissions scandal nicely illustrates how global regulatory efforts, in this case an international effort to limit the spread of greenhouse gases, led to global civil litigation exposure. Volkswagen faced consumer class actions in the United States and in Canada, where most provinces structure class actions in a similar way.[190] It also faced group litigation in a dizzying number of other jurisdictions.[191] Other cases have not been brought in multiple fora, but involve foreign elements, such as foreign parties or a foreign location.[192] These elements can land the litigation in an international commercial court, or simply complicate judges' procedural calculations because lawyers and clients import their different expectations.

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185. Gao Haiyan v. Keeneye Holdings Ltd., [2012] 1 H.K.L.R.D. 627 (C.A.).

186. Weixia Gu & Xianchu Zhang, *The* Keeneye *Case: Rethinking the Content of Public Policy in Cross-Border Arbitration between Hong Kong and Mainland China*, 42 H.K. L.J. 1001, 1004 (2012).

187. *See infra* Part II.A.

188. *See* Halliburton Co. v. Chubb Bermuda Insurance Ltd., [2017] EWHC (Comm) 137 (Eng.) (challenge to arbitrator for both sorts of conflict, multiple appointments from one party and simultaneous appointments as a neutral and by an unrelated party, arising out of the Deepwater Horizon incident).

189. *See id.* at [55]–[76] (referring to prior English, UK, and Privy Council cases regarding both arbitrators, Brunei, and UK judges). Ultimately, the court held the conflicts should have been disclosed, but did not create a real possibility of bias in the circumstances. *Id*. at [94]–[100]. *See also* Funke Adekoya, *Global Gas and Refinery Limited and Shell Petroleum Development Company: Is Nigeria Pro or Anti-Arbitration? The Lagos High Court Says that When Challenged, an Arbitrator Should Just Resign*, Kluwer Arb. Blog (May 16, 2020), http://arbitrationblog.kluwerarbitration.com/2020/05/16/global-gas-and-refinery-limited-and-shell-petroleum-development-company-is-nigeria-pro-or-anti-arbitration-the-lagos-high-court-says-that-when-challenged-an-arbitrator-should-just-resign [https://perma.cc/89WD-WVYW] (criticizing a recent Lagos High Court ruling for taking strict approach to conflicts the IBA considers waivable, and therefore being out of the global mainstream).

190. Yvonne Colbert, *Volkswagen Settlements Move Ahead, but Some Owners "Totally Up in the Air"*, CBC (Nov. 3, 2017, 5:00 AM), https://www.cbc.ca/news/business/cars-emissions-scandal-vw-1.4380797 [https://perma.cc/62MF-ZZ3L].

191. Shaping the Transformation Together: Volkswagen Annual Report 2017, Volkswagen AG 177–187 (2018).

192. *See, e.g.*, Maggie Gardner, *"Foreignness"*, 69 DePaul L. Rev. 469, 476–91 (2020) (discussing foreign element cases in U.S. courts).

4. *Civil justice reform initiatives*

Civil justice reform efforts may also align with and invoke global civil procedural norms. The existence of international procedural soft law also fills a gap in local expertise. Jurisdictions can adopt off-the-shelf reforms, such as the UNCITRAL Model Law, rather than struggling to design their own.[193] Moreover, such reforms may be deemed necessary to comply with international procedural obligations. U.S. states as diverse as New York and Oklahoma have established specialized business courts.[194]

With Brexit, several continental European legislatures saw a chance for their courts to compete with London for litigation business.[195] In France, the Minister of Justice asked a special committee to develop a proposal for an international commercial court in Paris.[196] The effort resulted in procedural rules for a specialized international commercial tribunal as well as the similarly specialized division of the court of appeal discussed above.[197] The International Chamber of the Paris Commercial Court took the place of the previous International and European Chamber. Its judges are required to speak English as well as French. Although proceedings are in French, parties may submit exhibits in English without French translation.[198] Foreign parties and their witnesses, experts, and counsel may also use English in front of the tribunal.[199] The rules also offer court-ordered documentary disclosure, as well as the opportunity to use live witness testimony to a greater degree than in other French tribunals.[200]

German policymakers have also engaged in "forum selling" through English-language courts.[201] They were reacting in part to the number of German litigants who had brought high-value commercial disputes to London, hoping to bring those domestic parties back as well as gain market share with international litigants.[202] Working with a group of academics, lawyers, and judges, the Ministry of Justice developed a specialized chamber of the Frankfurt District Court.[203] The Chamber for International Commercial Disputes combines German procedural rules with case management ap-

193. *See* Katherine L. Lynch, The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration 246, 258 (2003).

194. *Id.* at 92.

195. Bookman, *supra* note 3, at 1–3.

196. Gaillard et al., *supra* note 154.

197. *Protocole relatif à la procédure devant la Chambre Internationale de la cour d'appel de Paris*, [hereinafter Protocole du tribunal int'l], Cour d'Appel de Paris, https://www.tribunal-de-commerce-de-paris.fr/media/pdf/protocole_cour_appel.pdf [https://perma.cc/W3RX-2MA6]; *Protocole relatif à la procédure devant la Chambre Internationale du tribunal de commerce de Paris*, Tribunal de Commerce de Paris, https://www.tribunal-de-commerce-de-paris.fr/media/pdf/protocole_tribunal_de_commerce.pdf [https://perma.cc/3S6L-5VZN].

198. Protocole du tribunal int'l, art. 2.3.

199. *Id.* art. 2.5.

200. *Id.* art. 4; Garapon & Schimmel, *supra* note 156, at 447.

201. Hess & Boerner, *supra* note 78, at 33–34, 40.

202. *Id.* at 33.

203. *Id.* at 34.

proaches used in international commercial arbitration.[204] Like the French tribunal, its judges can hear witnesses in English but, unlike their Paris counterparts, they will also conduct hearings in English.[205]

### C. *Buying Procedure on the Law Market*

As the above list suggests, many of the actors involved in shaping global civil procedure are participants in a global or regional market for legal services.[206] Lawyers, clients, and funders are obvious market participants, but the law market also includes adjudicators and policymakers who try to shape their jurisdiction (public or private) in order to compete for legal business. For the law market to influence these individuals and their interactions, a law market does not have to actually exist. Those engaged in procedural engineering simply have to believe that they are competing and that their procedural choices can attract or dissuade litigants. Competition does not necessarily imply innovation aimed at differentiating parties' choices in procedure. Procedural law is successful, according to the law market view, to the extent it attracts cases in an international or regional market. To do so, it does not have to be good procedure by any objective measure;[207] it is more likely to be familiar procedure, that parties or their lawyers will be comfortable working with.[208] As a procedural norm becomes more ubiquitous, adopting it becomes a matter of conventional wisdom, extending the reach of global civil procedure beyond those jurisdictions that compete internationally or regionally for parties.

Erin O'Hara and Larry Ribstein have argued that a market for both substantive and procedural law exists between U.S. states and between states internationally due to the physical mobility of capital.[209] Some jurisdictions are openly in a race to attract corporate litigants with high value cases. As discussed above, competing for these litigants can take the form of general procedural reform, creating special commercial courts, or a commercial list. Competing in the law market may also mean maintaining a reputation as a center for international commercial arbitration, which may be easier than undertaking court reform.[210]

A jurisdiction with favorable procedure might be a desirable place to locate operations likely to draw litigation, like corporate headquarters or an office with many employees, but substantive law considerations may outweigh procedural ones. Procedural law, however, may be an important factor

204. *Id.* at 37.

205. *Id.*

206. *See* KARTON, *supra* note 2, at 56 ("Arbitrators, arbitral institutions, and even states compete with each other for a share of the dispute resolution market.").

207. Stefan Vogenauer, *Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, 21 EUR. REV. PRIV. L. 13, 52–54 (2013).

208. Some evidence exists that this story is correct. *See id.* at 52.

209. O'HARA & RIBSTEIN, *supra* note 20, at 74.

210. *Id.* at 104.

in where legal service providers put their offices.[211] These providers include both large law firms and firms (such as accounting firms) that often provide law-related services. Certain small jurisdictions, such as Delaware, Singapore, and Hong Kong, have thrived off legal business and procedure is part of this strategy. Several jurisdictions described by William Moon in a recent article as "corporate law havens," such as Bermuda and the Cayman Islands, have established special business courts.[212] Moon argues that these courts, which often use foreign lawyers as judges, are designed to compete with Delaware's Chancery Court.[213] For common law jurisdictions like Delaware or Bermuda, deciding more cases also enriches local corporate law, so that competing for litigants can be part of a larger strategy of competing for corporate registration.[214] Procedural law can generate business for the jurisdictions' lawyers both by restricting entry to outside lawyers and by providing procedure that their clients will want.

Corporate litigants are said to value efficiency, both in terms of speed of dispute resolution and the cost of accessing it.[215] Cost and speed are related but distinct, as elements like filing fees and arbitrator pay schedules can increase cost irrespective of speed. Such litigants are also said to prefer broad enforceability for decisions—a victorious party should know that it will be able to collect even if assets are in another jurisdiction.[216] To maintain enforceability, judges and arbitrators must not administer a process so procedurally defective in the eyes of their peers that the results cannot be enforced elsewhere. Moreover, adjudicators and the institutions they are part of have an incentive to offer parties procedures their lawyers have used before.[217] Both of these elements suggest that more desirable procedure will be familiar procedure, unlikely to strike other adjudicators as unfair or to be something that a litigant would never have encountered.[218]

Multinational corporations are not evenly distributed throughout the globe. Businesses' preferences are likely shaped by the legal systems they are familiar with rather than some idea of what system is most efficient in the abstract.[219] The risk of the law market view of global civil procedure is that rulemakers will take "success" on the law market to be indicative of a procedural norm's efficiency or its ability to enhance litigants' trust in the courts, when in fact the ubiquity of a procedural norm means no such thing. To the

211. *See id.* at 75 (arguing that lawyers stand to gain from a law market and may form an interest group capable of arguing for legal reforms that will make a jurisdiction more attractive to their clients) *See also* BERGER, *supra* note 153, at 6 ("modern arbitral proceedings turn out to be a lucrative source of revenue for the economy of the seat.").

212. Moon, *supra* note 13, at 1438.

213. *Id.* at 1439–1440.

214. *See id.* at 1408.

215. O'HARA & RIBSTEIN, *supra* note 20, at 86, 94.

216. *Id.* at 96.

217. *Id.* at 97.

218. *See* Bookman, *supra* note 27, at 49.

219. *Id.*

extent that the adoption of global civil procedure is driven by a small number of private actors, it is unlikely to take into account costs and benefits not internalized by the parties or their lawyers.[220] Litigation timelines set for large corporate litigants may be inscrutable to the sole proprietor. If the most qualified judges sit on the international commercial panel, they may not turn their attention to high-stakes, but comparatively low-value family or administrative suits, to say nothing of criminal law.

Although the discourse of international commerce is often dominant in global civil procedure, it is not the only approach to procedural harmonization. One might look instead to the procedural commitments required by international agreements on human rights. Mauro Cappelletti argued in 1973 that the growing international embrace of rights required certain "fundamental guarantees" for the parties to civil cases and that these guarantees could be seen across different legal systems. Cappelletti's work tied together civil procedure and the protection of rights through new constitutional and international law guarantees.[221] From these sources, Cappelletti identified the right to judicial protection in which that protection was effective and the courts treated litigants fairly.[222] He went on to discuss what these rights might look like in greater detail, uncovering areas of disagreement as to which rules would accomplish these guarantees.[223]

At the moment, the contribution of human rights to procedural harmonization seems to be eclipsed by the law market—competition for transnational business litigation, rather than compliance with human rights instruments, seems to drive many procedural reforms.[224] Still, the human rights element cannot be entirely discounted.[225] Those interested in improving access to justice for a portion of the public also share ideas globally. They too may reach for ubiquity as an argument. For instance, current discussion about online courts includes both those who approach them from a commercial, forum selling perspective, and those trying to make remedies cheaper and more accessible in small-scale disputes.[226] Even business-ori-

220. Thanks to Susan Rose-Ackerman for this point. *See also* Bookman, *supra* note 27, at 41; Moon, *supra* note 13, at 1456 (discussing this problem in relation to corporate law).

221. Cappelletti, *supra* note 24, at 711–15.

222. *Id.* at 668–69.

223. *Id.* at 675–83.

224. *See* Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211 (2005).

225. For instance, the European Court of Human Rights has taken the stance that the European Convention on Human Rights requires a certain amount of procedural harmonization. *See* OLA JOHAN SETTEM, APPLICATIONS OF THE "FAIR HEARING" NORM IN ECHR ARTICLE 6(1) TO CIVIL PROCEEDINGS: WITH SPECIAL EMPHASIS ON THE BALANCE BETWEEN PROCEDURAL SAFEGUARDS AND EFFICIENCY (2016).

226. *Compare AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference*, AM. ARB. ASS'N, https://go.adr.org/covid-19-virtual-hearings.html [https://perma.cc/TV5J-EA6P], *with ICC Guidance Note on Possible Measures Mitigating the Effects of the COVID-19 Pandemic*, ICC CT. ARB. (Apr. 9, 2020), https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic [https://perma.cc/SE9G-5RDL], *and HKIAC Guidelines for Virtual Hearings*, HKIAC (May 14, 2020), https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20

ented fora are not insensitive to concerns of this nature; lawyers employ rights language regularly on behalf of corporate clients and businesses may be sensitive to rights-based critiques that impact consumer behavior and regulation.[227] At times, foreign and local actors might seize on the rhetoric that accompanies globalizing procedural change, on the expectations of foreign parties and the need to compete in the law market, to promote reforms that fit in the human rights mold.[228] Procedural agreement does not entail shared ideology; it is possible for multiple logics for the same set of reforms to operate at once.

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This Part discussed where global civil procedure comes from and how it is used. This set of features suggests elements that scholars should look for when seeking to trace the development of a global civil procedure norm. Law firms, multinational corporations, and litigation funders all bring their procedural preferences with them. They can draw on the work of a network of private and public organizations that have sought to study and develop common norms of procedure. They may find a receptive audience in the adjudicators they are arguing to as well as other procedural policymakers.

These diverse actors bring discussion of global civil procedure norms into diverse contexts: international proceedings, domestic proceedings with foreign elements, judgment and award recognition, and even municipal reform proposals. These proposals rely in part on comparisons, whether to reference jurisdictions familiar because of histories of colonization or their prominence in international trade, or to jurisdictions that might be "aspirational," and which the relevant audience will view as sound. These cherry-picking comparisons drive procedural trends and perceptions of procedural "common sense," leading to adopting of similar norms in an ever-widening variety of contexts.

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Guidelines%20for%20Virtual%20Hearings_0.pdf [https://perma.cc/8PU5-Q6KY], *and Brochure: Online Dispute Resolution—Proven Technology*, Tyler Tech, https://www.tylertech.com/resources/resource-downloads/brochure-online-dispute-resolution-proven-technology [https://perma.cc/ZN78-SYKN] (last visited May 24, 2020), *and with* Elizabeth Raymer, *B.C.'s Civil Resolution Tribunal Keeps 'Doors Open' During Pandemic*, Canadian Law. (Mar. 27, 2020), https://www.canadianlawyermag.com/practice-areas/adr/b.c.s-civil-resolution-tribunal-keeps-doors-open-during-pandemic/328037#:~:text=B.C.'s%20Civil%20Resolution%20Tribunal%20keeps%20'doors%20open'%20during%20pandemic,-CRT%20is%20able&text=IN%20a%20COVID%2D19%20world,inception%2C%20it%20has%20operated%20remotely [https://perma.cc/UZ6L-YQLY].

227. A group of well-respected international lawyers has proposed opening commercial arbitral fora to plaintiffs making rights-based claims against businesses. *See* Simma et al., *supra* note 24.

228. For instance, the Chief Justice of Hong Kong has held out acquittals of protestors as evidence of judicial independence when speaking to commercial audiences. Geoffrey Ma, Hon. C.J., Speech at the International Bar Association Annual Conference 2019, Hong Kong and the Rule of Law: Is it Tangible (Sept. 24, 2019) (transcript available at https://www.ibanet.org/Conferences/seoul-press-centre.aspx [https://perma.cc/BXE8-M3DN]).

Above all, global civil procedure represents procedure that is ubiquitous, familiar to lawyers and clients who come from major international and regional trading centers. It is desirable in part because of this familiarity, which makes it broadly acceptable to foreign parties and to foreign judges who might have to enforce a result.

## II. Some Examples

This Part provides some more concrete examples of where global civil procedure might be found and what it would mean to approach these examples from the perspective of global civil procedure: conflicts of interest, aggregation of claims, and discovery. These case studies also serve to provide a sense of what is at stake in the development and solidification of these norms.

### *A. Conflicts of Interest*

Conflict of interest standards include a set of norms that treaties, rules, and model laws have developed, international institutions have championed, and international consensus has come to accept. Elements of this developing consensus include the view that adjudicators should not have any financial interest in the outcome of the case, but that adjudicators who may have been privy to mediation or settlement efforts still retain their independence. On matters such as enforcement of judgments, domestic courts may take their cues from these international bodies directly. In other instances, such as changes to Ontario pre-trial conference rules, influence may be indirect.

Judicial and arbitrator independence is perhaps the paradigm case for a global civil procedure.[229] Domestic courts have readily recognized the value of international opinion in developing their own standards for recognition and enforcement of foreign judgments and arbitral awards.[230] Ideas about tribunal independence have been elaborated through international soft-law instruments such as the International Bar Association ("IBA") ethical guidelines for arbitrators.[231] The IBA guidelines include a list of possible sources of bias that need not be disclosed (matters like being members of the same professional organization as another arbitrator or counsel), conflicts that must be disclosed but that will be assumed waived if not objected to (during the past three years, the arbitrator served as counsel for one of the parties in an unrelated matter), conflicts that must be disclosed and affirmatively waived (the arbitrator holds shares in one of the parties or an affili-

229. Kotuby & Sobota, *supra* note 26, at 168 ("Today, nearly every nation provides in its written law for an independent judiciary.").

230. Weixia Gu, *Looking at Arbitration Through a Comparative Lens: General Principles and Specific Issues*, 13 J. Comp. L. 164 (2018).

231. The CJEU mentioned these guidelines in its decision on the legality of the CETA tribunal. Opinion 1/17 (Full Court) ECLI:EU:C:2019:341, ¶¶ 238–39 (Apr. 30, 2019).

ate).[232] Some conflicts cannot be waived (identity between party and arbitrator).[233] The investor-state arbitration secretariats at both UNCITRAL and ICSID have released a draft code of conduct for adjudicators.[234] The draft code addresses both sources of personal bias (business and family relationships) and political influence.[235] Notes on this section state: "independence and impartiality are key elements of any system of justice."[236]

This Part discusses two areas of convergence in lawyers' understanding of what a conflict of interest is. Both domestic and international rules draw strict lines around the adjudicator's financial interest in the outcome. These rules reflect the norm that an adjudicator must be seen to be impartial by avoiding a suggestion of bias. The view that financial interest in the outcome can create that suggestion of bias is so pervasive as to be procedural "common sense." It is present in international guidelines and in domestic systems. The second element is more controversial—at least in the common law world. That is that it is not a conflict for the trier of fact to have previously attempted to mediate the dispute.

1. *Financial interest in the outcome*

Lawyers often expect that an impartial adjudicator is one who will not directly receive a benefit or suffer a detriment based on how they decide the case. As long as the decision is public, or available within an interested professional circle, and as long as those people know who the adjudicator is, the adjudicator's reputation is at stake. To that extent, an adjudicator will benefit or suffer. However, a financial interest in the outcome typically presents a conflict of interest. Financial interest takes a variety of forms. The adjudicator might receive a bribe or be blackmailed. The adjudicator might own stock. The adjudicator might receive a raise or a promotion. The adjudicator might gain or lose the necessary funding to keep the lights on and the photocopiers running. Some of these conflicts are waivable; others generally are not.

Arbitration presents a hard case for this principle because arbitrators are often appointed by one or both parties. As such they might be expected to have "latent sympathies" a bit stronger and closer to the case than those of judges.[237] However, the rule against the adjudicator having an interest in the outcome is expressed in provider conflicts rules as well as domestic legislation and decisions related to the enforcement of arbitral awards. These rules are not uniform, but the principle behind them is that adjudicators

232. IBA Guidelines on Conflicts of Interest in International Arbitrations 20–24 (2004) [hereinafter IBA Guidelines] (waivable red list, orange list, or green list).

233. *Id.* at 20 (non-waivable red list).

234. Chiara Giorgetti, Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (2020) [hereinafter ISDS Code].

235. *Id.* at 9.

236. *Id.* at 9–10.

237. Kurkela & Turunen, *supra* note 26, at 117.

should not stand to benefit personally from a decision in favor of one party or another.[238] Although holding shares in a party is a waivable conflict for an arbitration, the IBA Guidelines specify that "justifiable doubt" about the arbitrator's impartiality "necessarily exists . . . if the arbitrator has a significant financial or personal interest in the matter at stake."[239] A significant financial stake is a non-waivable conflict.[240] Under the draft ISDS code of conduct, "any relationship in which there exists a financial interest could create a conflict."[241] Payment can become a problem if arbitrators rely on certain repeat parties for business.[242] The draft ISDS code requires extensive disclosure of the adjudicator's involvement in other cases.[243] In the United States, the National Arbitration Forum ("NAF"), a favored forum of the collections industry, agreed to stop taking consumer arbitrations after an investigation by the Minnesota Attorney General.[244] The NAF's dependence on fees from collections agency plaintiffs appears to have tilted outcomes in their favor.[245]

Judicial ethics are also a consideration in the global litigation market. The issue of an interest in the outcome underlies the choice by the U.S. Congress to create federal trial courts early on in the country's history. The politicians of the time believed that state judges would be biased towards local interests.[246] One reason U.S. commentators still give for this bias is that judges in some states are elected, either directly or through retention elections, and that they rely on local interests for campaign contributions.[247]

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238. *Id.* at 118–19; Kathleen Claussen, *Transjuridictional Ethics in International Commercial Arbitration* (working paper) (on file with author).

239. *See* IBA Guidelines, *supra* note 232, at 8. ("Justifiable doubts" is a term of art from the UNCITRAL Model Law for International Commercial Arbitration.)

240. *Id.* (Explanation to General Standard 2(d)).

241. ISDS CODE, *supra* note 234, art. 5, cmt. ¶ 50.

242. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 146–48 (1968) (bias exists if one party is a regular customer of the arbitrator and the arbitrator fails to disclose this relationship).

243. WORLD BANK, *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, art. 5(c), commentary para 51, (May 1, 2020), https://icsid.worldbank.org/sites/default/files/Draft_Code_Conduct_Adjudicators_ISDS.pdf [https://perma.cc/4TRK-3T59]; Chiara Giorgetti, *ICSID and UNCITRAL Publish the Anticipated Draft of the Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, KLUWER ARB. BLOG, (May 2, 2020), http://arbitrationblog.kluwerarbitration.com/2020/05/02/icsid-and-uncitral-publish-the-anticipated-draft-of-the-code-of-conduct-for-adjudicators-in-investor-state-dispute-settlement/?doing_wp_cron=1592849853.1530580520629882812500 [https://perma.cc/X2AL-VUZ9].

244. Press Release, Minn. Att'y Gen., National Arbitration Forum Barred from Credit Card and Consumer Arbitrations Under Agreement with Attorney General Swanson (July 20, 2009), https://web.archive.org/web/20101031084600/http://www.ag.state.mn.us/Consumer/PressRelease/090720NationalArbitrationAgremnt.asp [https://perma.cc/2SEB-9WN5] (the National Arbitration Forum agreeing to exit the business of credit card and consumer arbitrations due to the institution's conflict of interest in adjudicating the disputes given that it had "extensive ties to the collection industry").

245. *Id.*

246. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and after 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 442 (2007).

247. *See* Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229 (2008).

The fear is that these relationships give an appearance of bias if a judge's jobs could depend on deciding in favor of the local plaintiff or defendant.

A similar concern about judicial independence appears to animate recent PRC attempts to reduce local government control over the judiciary. Most of the funding for local courts has historically come from the local government. This funding structure made it very tempting for the local government to try to influence the outcome of cases in which it, or a major local company, was a litigant.[248] Moreover, judges are part of a hierarchy within their courts. Court leadership can require that a judicial decision be approved by an judicial committee, and can use this mechanism both to insure a correct political line and to protect local officials on whose patronage they depend.[249] Local control means the possibility of competing power centers, which Xi Jinping has tried to counter since assuming control of the party and government.[250] Under Xi, central authorities undertook a series of reforms that had the effect of strengthening both central control and judicial professionalism.[251] The government removed judicial budget decisions from the county and municipal level to the provincial level and substantially increased judicial salaries.[252] The central authorities, through the Supreme People's Court, sought to reduce the power of local court leadership and judicial committees by reducing the frequency with which they would review judges' work.[253] These "accountability reforms" were designed to give judges a form of "independence": more final responsibility for their decisions.[254] The central government has also sought to assert control through new circuit courts. These circuit courts are staffed by judges from the Supreme People's Court, who will presumably be free from local pressure.[255] The use of arbitration in foreign-related commercial disputes and the development of the specialized international commercial court offer other approaches to this problem—removing cases from local courts in instances in which a foreign party might invoke the norm of judicial independence to complain about PRC courts.[256]

248. Zhiqiong June Wang & Jianfu Chen, *Will the Establishment of Circuit Tribunals Break Up the Circular Reforms in the Chinese Judiciary*, 14 Asian J. Comp. L. 90, 98–99 (2019).

249. Wang, *supra* note 94, at 741.

250. *Id.* at 743, 760–62.

251. Taisu Zhang & Thomas Ginsburg, *China's Turn Towards Law*, 59 Va. J. Int'l L. 306, 332 (2019).

252. *Id.* at 333–34.

253. Wang, *supra* note 94, at 748.

254. *Id.* at 753–54.

255. Wang & Chen, *supra* note 248, at 17.

256. *See* Susan Finder, *Supreme People's Court Updates Its Belt and Road Policies*, Supreme People's Ct. Monitor (Jan. 28, 2020), https://supremepeoplescourtmonitor.com/2020/01 [https://perma.cc/ZFV9-U9AY].

2. *Pre-judging the case: adjudicator as mediator*

Just as a consensus has developed around the idea that tribunal independence means lack of financial interest in the outcome for the adjudicator or the tribunal, so too is one developing around the idea that independence does not mean never having prejudged the merits. Increasingly, mediators can also be adjudicators through "med-arb": a combination of mediation under the rules of various arbitration providers. This combination has long existed in arbitration in German-influenced systems. German judges may serve as mediators.[257] Med-arb is common in Japanese domestic arbitration[258] and in arbitration in the PRC.[259]

At one time, the combination was shocking in the common law world because it allows adjudicators to influence the parties with the threat of adverse outcomes and because the adjudicator may learn "too much" about the party to be able to decide the case solely on its legal merits.[260] Common law jurisdictions historically relied on civil juries and thus on continuous trials. All information relevant to the outcome had to be presented to the trier of fact during that trial. The trier of fact would thus come to trial with no prior judgments about the merits of the case. This norm is upheld through everything from the ability to strike jurors with knowledge of the case to the rules that keep settlement negotiations secret from judges. As judicial case management came into vogue, this distinction has blurred, yet attempts to retain it remain.[261] This historical resistance may explain why, despite their role as leading Asian arbitration providers, the Hong Kong and Singapore Arbitration Commissions remain somewhat wary of med-arb. Both have adopted what are called "arb-med-arb" protocols under which the mediator and arbitrator remain separate individuals despite other features of med-arb being available.[262]

Even among common law lawyers, resistance to combining adjudication and mediation in one individual is waning. The IBA Guidelines, which were drafted by lawyers from civil law jurisdictions such as France, as well as common law jurisdictions such as England, New York, and Singapore, allow international commercial and investment arbitrators to "assist the parties in reaching a settlement at any stage in the proceedings," but caution arbitra-

257. *Id.* at 532.

258. Hiroyuki Tezuka & Yutaro Kawabata, *Japan Arbitration Guide*, IBA ARB. COMM. 3 (2018), https://www.jurists.co.jp/sites/default/files/tractate_pdf/en/japan_chapter_tezuka_1203.pdf [https://perma.cc/B5NE-2YS4].

259. Joshua Karton, *Beyond the Harmonious Confucian*, *in* LEGAL THOUGHTS BETWEEN THE EAST AND THE WEST IN THE MULTILEVEL LEGAL ORDER, 519, 525, 532 (Chang-fa Lo et al. eds., 2016).

260. *See id.* at 533–34; *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 430 (1982) (discussing harms from too much pre-trial involvement in terms of traditional due process values).

261. For an argument against med-arb from the perspective of a common law ADR practitioner, see generally Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEG. L. J. 157 (2015) (arguing that med-arb "legalizes" what is supposed to be a more flexible and informal mediation process while compromising arbitrator impartiality).

262. Karton, *supra* note 259, at 536.

tors to get agreement of both parties first.[263] Arbitration rules for the British Columbia Arbitration Centre and Alberta International Commercial Arbitration Centre also allow it.[264] The Hong Kong Arbitration Ordinance explicitly allows med-arb, as do the laws of a majority of Australian states.[265] As these jurisdictions, Hong Kong especially, have significant business from the PRC, the decision is not surprising. The Ontario Court of Appeal confirmed an award that was the product of med-arb in 2007 in *Marchese v. Marchese*.[266] The Hong Kong Court of Appeal did as well in 2011 in *Keeneye*, overriding the public policy concerns raised by the first instance court.[267]

The Canadian experience demonstrates how transnational influences mix with domestic trends. Med-arb developed in labor arbitration in both the United States and Canada, with arbitrators in both countries claiming credit for developing it first.[268] In the United States, as in Canada, calls for greater judicial management that began in the 1980s have led to a situation in which individual judges, who will ultimately be seized as adjudicators in the case, play the role of mediator.[269] Formal recognition has come as well. Ontario's Superior Court Rule 50 requires a pre-trial conference in which judges act as mediators, actively seeking settlement on the eve of trial.[270] However, bench trials are common, leading to a risk that a judge who gets too involved in pre-trial negotiations might no longer be the distant, neutral arbiter the rules imagine. Until 2010, Ontario rules specified that that the pre-trial judge, whose job it is to actively support settlement, including by telling the parties how they might rule, cannot be the trial judge.[271] In 2010, Ontario altered Rule 50 to allow the parties to consent to the pre-trial judge also acting as the trial judge.[272] The format of med-arb has thus come to the local trial courts.

To render decisions that can be accepted by both parties as reflecting legal analysis, rather than some other motive, adjudicators need to be seen as independent. Part of independence is avoiding conflicts of interest, and global civil procedure norms help define what these conflicts are. The norm against having a financial interest in the outcome—either through connection to the parties or hopes of promotion—is quite strong and found in a variety of

263. IBA Guidelines, *supra* note 232, Gen. Standard 4(d).

264. Karton, *supra* note 259, at 537–38.

265. *Id.* at 536, 538.

266. Marchese v. Marchese, [2007] 219 O.A.C. 257 (Can.).

267. Gao Haiyan v. Keeneye Holdings Ltd., [2012] 1 H.K.L.R.D. 627 (C.A.); Gao Haiyan v. Keeneye Holdings Ltd., [2011] 3 H.K.C. 157, para 72 (C.F.I.).

268. Megan Elizabeth Telford, Med-Arb: A Viable Dispute Resolution Alternative 1 (2000), https://irc.queensu.ca/sites/default/files/articles/med-arb-a-viable-dispute-resolution-alternative.pdf [https://perma.cc/445X-76FE]; Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 Willamette L. Rev. 661 (1991).

269. Resnik, *supra* note 260, at 391–403.

270. Courts of Justice Act, R.R.O. 1990, Reg. 194, c. C.43, R. 50.10 (Can. On.) (Aug. 5, 2020).

271. Todd L. Archibald & P. Tamara Sugunasir, Ontario Superior Court Practice 1603 (student ed. 2019).

272. *Id.*

systems. They are part of widely adopted and cited international rules for arbitrators. Places as different as the early United States and modern PRC have seen the value in demonstrating that their judges are free from such conflicts. Contrary to parts of the common law tradition, however, avoiding conflicts does not mean the adjudicator must not have heard much about the case or tried previously to settle it. In their treatment of arbitral awards and in their own court rules, common law jurisdictions have blurred, or removed the line between adjudication and mediation, adopting the approach of counterparts influenced by the German legal tradition.

As the combination of examples in this section suggests, agreement in these areas does not mean all these jurisdictions construe judicial independence in the same way.[273] Consensus on the basic features of judicial independence does not mean consensus on its purpose. What jurists in consolidated democracies might see as a check on government overreach might also be a way to make courts responsive to the "correct" authority.[274]

### *B. Aggregate Litigation*

The previous example illustrates the influence of international arbitration in developing common rules and in moving away from, as well as towards, common law norms. In contrast, aggregate litigation rules have developed from different domestic court systems. Aggregation implicates systemic differences over the desirability of party control and the role of courts, but shows uniformity in its basic aims. The aggregation norm brings with it the idea that it is desirable that courts and lawyers address widespread harms that might not otherwise be litigated. Although the approach to aggregation is different, the idea that a procedural system should include a mechanism for aggregation is widely accepted. Transnational cases and transnational parties have helped to drive demand for aggregation not only in court, but in arbitration. Practices adopted in one sort of forum also influence each other, as with class actions and class arbitration in the United States, and claim buying in Europe.

Aggregate litigation may seem a hard case for global civil procedure driven by a law market. Aggregate consumer, employee, and shareholder litigation allow parties to combine their small claims into large ones. Multinational corporations do not typically favor more liability exposure, so one might expect "law market" forces to restrain aggregation. However, these corporations are not the only actors.[275] Law firms that represent stockholders or victims of antitrust violations are also multinational. Moreover, the presence of multinational corporations creates demand for mechanisms for ac-

273. *See infra* Part III.B.3.

274. For instance, the Chinese judicial reforms seek to insulate judges from local officials, not the goals of central authorities. *See generally* Wang, *supra* note 94 (describing recent reforms).

275. *See* Coleman, *supra* note 14, at 1011 (discussing how aggregate litigation rules benefit elite lawyers and judges in the United States).

countability both in those companies' home jurisdictions and abroad. Both plaintiffs' lawyers and corporate counsel might benefit from sharing strategies for seeking redress and for countering plaintiffs, leading to development of and harmonization in aggregation rules over time.

1. *Convergence in court rules*

Scholars have noted the growth of specific rules for aggregate litigation around the world.[276] U.S. federal class action rules have been both model and anti-model. They served as a model for Brazil, Canadian provinces, Australian states, and the American Arbitration Association.[277] In Europe, the U.S. federal rules have often been an anti-model, helping to spur the development of alternatives including aggregation through claim assignment in Germany and Austria, associational actions in numerous European jurisdictions including France, and the Dutch collective settlement regime.[278] International organizations have also started to participate in shaping class actions. In 2013, the European Commission published a Recommendation on common principles for injunctive and compensatory collective redress mechanisms for violations of rights under E.U. law.[279] Most recently, the EU Parliament adopted a directive on collective redress that will involve significantly more harmonization, especially in cross-border cases.[280] In this example, the content of the rules is in flux, but the ultimate goal of workable aggregation remains the same.

Canadian class actions are supposed to promote three values: access to justice, judicial economy, and behavior modification.[281] This list would not be amiss in describing the appeal of aggregation in global civil procedure.[282] Aggregation does not give plaintiffs access to justice in the sense of giving

276. *See, e.g.*, Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, *in* THE GLOBALIZATION OF CLASS ACTIONS (Deborah R. Hensler, Christopher Hodges & Magdalena Tulibacka eds., 2009).

277. *See* Alyssa S. King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031, 1040 (2017); Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307 (2011); Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 412 (2001).

278. *See* Hensler, *supra* note 277, at 308–09; *see also* Bookman & Noll, *supra* note 162, at 797–803, 810–14; Christian Klausegger, *Austria*, *in* WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 255, 255 (Paul G. Karlsgodt ed., 2012); Harald Koch, *Non-Class Group Litigation Under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355, 359–61 (2001); Danièle Lochak, Trente ans du Contentieux à L'Initiative de Gisti [Thirty years of GISTI-Initiated Litigation], *in* DÉFENDRE LA CAUSE DES ÉTRANGERS EN JUSTICE (Dalloz ed., 2009) (describing associational actions brought by an association for migrant rights under associational standing rules).

279. 2013 O.J. (L 201) 60.

280. Eur. Parl. Doc. P9_TA-PROV (2020) 0316, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0316_EN.html [https://perma.cc/9X89-3UZZ].

281. W. Shopping Ctrs. Inc. v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534 (Can.); Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269, 269–71 (2001). U.S. class actions have a similar rationale; *see, e.g.*, Jan-Krzysztof Dunin-Wasowicz, *Collective Redress in International Arbitration: An American Idea, A European Concept?*, 22 AM. REV. INT'L ARB. 285, 293–94 (2011).

282. *See* Janet Walker, *Who's Afraid of U.S.-Style Class Actions*, 18 SW. J. INT'L L. 509 (2011) (describing why different jurisdictions have adopted aggregate litigation procedures).

most of them control over litigation, but it allows access to compensation that they would not otherwise have. Adjudicators faced with many repetitive claims can also save time by combining them. Certain types of regulatory violations are expensive to document and litigation may be costly. Some injuries may also be small on the individual level even if they are large in the aggregate. These scenarios lend themselves to an aggregation mechanism.

As Richard Nagareda famously argued in relation to the United States, class actions may also be a way to regulate on the cheap.[283] Instead of the government incurring costs of identifying and punishing regulatory violations—private plaintiffs can do so. Aggregation may thus be appealing in scenarios in which the size of the bureaucracy does not fit the size of the problem. Daniel Kelemen makes a similar argument in relation to the E.U.[284] There, Keleman writes, aggregate litigation helped the E.U. regulate without a massive bureaucracy and bypass opaque and intransient national regulators.[285] Brian Fitzpatrick has argued that class actions reflect American democratic values, by reducing reliance on bureaucrats and allowing individuals to participate in regulation.[286] Keleman sees them as having a similar draw in Europe, allowing participation through litigation and the transparency of a public courtroom.[287]

Aggregation in transnational cases also provides one of the rare instances in which both parties are represented by powerful repeat players who "play for rules" by seeking to influence procedure. The plaintiffs' bar in jurisdictions with the most aggregate litigation is specialized. These specialists have the time and inclination to communicate across borders and lobby rulemakers.[288] Their clients may include large shareholders, such as banks, and corporations that seek to make antitrust claims. International rights organizations and practitioners have also helped spread aggregation rules. This spread has happened in two ways. Foreign parties entered U.S. courts with transnational human rights claims.[289] As the United States became a more difficult forum for such suits, parties also found opportunities to use collective litigation abroad.[290] Aggregation may give members of less powerful groups a structure for organizing. It may also provide an avenue for

283. *See generally* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007).

284. KELEMEN, *supra* note 56, at 77–78.

285. *Id.* at 23–27.

286. *See generally* Brian T. Fitzpatrick, *Why Class Actions are Something both Liberals and Conservatives Can Love*, 73 VAND. L. REV. 1147 (2020).

287. KELEMEN, *supra* note 56, at 28; *see also* ANTOINE GARAPON, BIEN JUGER: ESSAI SUR LE RITUEL JUDICIARE 166 (2001) (describing how large-scale conflicts involving state champions or the government directly were traditionally regulated within French bureaucracies rather than in court).

288. KELEMEN, *supra* note 56, at 78 (arguing "leading US class action firms are expanding their European operations in anticipation of litigation opportunities opened up by the reforms").

289. *See* Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301, 301–02 (2007).

290. *See, e.g.*, Vedanta Res. PLC v. Lungowe [2019] UKSC 20 (English suit by 1,826 Zambian villagers against UK-based multinational); *see also* Michela Palmisciano, *Going Dutch: The Effects of Domestic*

getting behavioral changes and compensation from corporations and governments for groups that otherwise would lack access to participation in law or politics. This coalition of for- and non-profit transnational actors, as well as the appeal of regulation on the cheap for governments, may explain why aggregation has spread even though multinational corporations oppose it.

Aggregation is already being studied as global civil procedure. Deborah Hensler (Stanford Law School), Christopher Hodges (Oxford and Erasmus), Ianika Tzankova (Tilburg) have begun a large scale research project comparing collective redress mechanisms in Australia, Belgium, Brazil, Canada, Chile, the PRC, England, Germany, Israel, the Netherlands, the US, and Taiwan.[291] Hensler and Stefaan Voet (KU Leuven) have also started the Global Class Actions Exchange to allow scholars and practitioners to exchange information about developments in collective litigation in their jurisdictions.[292] Their work is specifically aimed at developing metrics that will allow meaningful comparison across jurisdictions and at backing those thin descriptions with "thick" contextual work.[293] These scholars' work has the potential to address methodological debates about how to compare factors such as litigation costs across contexts. It also aggregates information in a way that is designed to be more accessible to rule makers and practitioners and to inform them of its work, bringing them in as research collaborators and organizing conferences.[294] Those involved with this project have also taught class actions comparatively, with Hensler and Tsankoya teaming up with Jasminka Kalajdzic at Windsor University in Ontario.[295] This group later added a German collaborator as well.[296]

Large firm practitioners have taken note. Thomson Reuters, a significant law publisher in the common law world, now offers a Class/Collective Actions Global Guide to its subscribers, with descriptions from 25 countries contributed by 21 firms, including familiar names Morgan, Lewis & Bockius and Latham & Watkins.[297] Baker & McKenzie advertises its expertise in

*Restriction and Foreign Acceptance of Class Litigation on American Securities Fraud Plaintiffs*, 53 B.C. L. Rev. 1847 (2012).

291. *About*, Global Class Actions Exchange, http://globalclassactions.stanford.edu/about [https://perma.cc/D4Q8-JVPX] (last visited Oct. 17, 2020).

292. *Id.*

293. Deborah Hensler, *A Framework for Collaborative Research on Class Actions & Group Litigation*, Global Class Actions Exchange (2008), http://globalclassactions.stanford.edu/content/framework-collaborative-research-class-actions-group-litigation [https://perma.cc/55SN-CEDG]; Agustin Barroilhet et al., Class Actions in Context (Deborah R. Hensler, Christopher Hodges & Ianika Tzankoa eds., 2016).

294. Deborah Hensler, *Reflections on the 5th International Conference on the Globalization of Class Actions*, Global Class Actions Exchange, http://globalclassactions.stanford.edu/content/reflections-5th-international-conference-globalization-class-actions [https://perma.cc/JE2P-PRLJ].

295. *Windsor Law Students Study Comparative Class Action Law with Law Students on Two Continents*, U. Windsor (June 28, 2017), https://www.uwindsor.ca/law/2017-06-22/windsor-law-students-study-comparative-class-action-law-law-students-two-continents (last visited Oct. 24, 2020).

296. *Id.*

297. Users in some jurisdictions can view the guide by signing into Westlaw or Westlaw next and selecting "Practical Law."

"international class and collective action defense."[298] Lawyers at DLA Piper inform potential clients that "the 'global class action,' in which claims are raised in many different fora and discovery shared globally, is now a very real phenomenon."[299] Freshfields Bruckhaus Deringer touts its guide to international class or collective claims.[300] Dechert published a report on "Global Securities Litigation Trends."[301]

As the example of the French rules in Part I suggests, the existence of aggregation in one jurisdiction can put pressure on others to create or expand it. In one well-known example, Ecuadorean plaintiffs seeking compensation from Chevron for pollution in the Amazon rainforest originally tried to bring their case in federal court in New York in order to take advantage of the class action procedure.[302] The case was dismissed for forum non conveniens.[303] The litigants then went to Ecuadorian court, where they tested out new procedures for group environmental litigation.[304]

### 2. *Influence on and influence of arbitration*

Aggregation is another area in which arbitration has come to resemble litigation. Viewing the two together helps put seemingly local debates in a global perspective. The United States has a vigorous class arbitration debate that takes place almost entirely on domestic terms. Within these domestic parameters it is rich with nuance. Participants distinguish state and federal actors and varying attitudes to arbitration from certain courts.[305] The exten-

298. *About our Blog*, Global Class & Collective Actions, http://www.globalclassactionsblog.com/about-our-blog [https://perma.cc/9UTK-G3UU] (last visited Oct. 17, 2020).

299. Christopher M. Young & Timothy Pfenninger, *Local Strategies in Global Class Actions for Product Manufacturers and Distributors*, DLA Piper (Jan. 2, 2019), https://www.dlapiper.com/en/us/insights/publications/2019/01/local-strategies-in-global-class-actions [https://perma.cc/9QJQ-4XBG].

300. Freshfields Bruckhaus Deringer, *The Landscape in 2020 and Beyond*, https://www.freshfields.com/en-gb/our-thinking/campaigns/collective-actions [https://perma.cc/LWB6-3BGF].

301. Dechert LLP, *Global Securities Litigation Trends*, (July 2019), https://www.dechert.com/knowledge/onpoint/2017/11/developments-in-global-securities-litigation.html [https://perma.cc/7SM7-4LQV].

302. Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DePaul L. Rev. 499, 1107 (2014).

303. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002).

304. Sentencia No. 230-18-SEP-CC, Caso No. 0105-14-EP. Corte Constitucional del Ecuador, 145–146-46 (June 27, 2018) (upholding retroactive application of the Environmental Management Act against Chevron); Ley No. 37/1999, 30 July 1999, Ley de Gestión Ambiental [Environmental Management Act], Registro Oficial 245 (Ecuador).

305. Myriam E. Gilles & Gary B. Friedman, *Unwaivable: Public Enforcement Claims and Mandatory Arbitration*, 89 Fordham L. Rev. (forthcoming 2020); Alyssa S. King, *Arbitration and the Federal Balance*, 94 Ind. L.J. 1447 (2019) (discussing areas in which states might still regulate arbitration); David L. Noll, *Arbitration Conflicts*, 103 Minn. L. Rev. 665, 665–71 (2018) (role of federal agencies in regulating arbitration and possible conflicts with the Federal Arbitration Act); Imre S. Szalai, DirecTV, Inc. v. Imburgia*: How the Supreme Court Used a Jedi Mind Trick to Turn Arbitration Law Upside Down*, 32 Ohio St. J. Disp. Resol. 75, 77 (2017) (complaining that the Supreme "Court overrides and alters . . . the intent of Congress in enacting the FAA"); E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 Harv. Negot. L. Rev. 1, 4–5 (2015); Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and*

sive literature is concerned with decisions of state and federal courts and with class arbitration administered by U.S.-based organizations.[306] Conservative majorities on the U.S. Supreme Court struck several blows against class arbitration, limiting arbitrators' ability to order it and enlarging contract drafters' ability to write their way around it.[307] These decisions formed part of a broader retreat from the use of class actions in the United States.[308] Both Americans and their interlocutors could therefore be forgiven for deciding that class arbitration is an embattled, possibly dying, offshoot from the U.S. federal class action rules. However, class arbitration can be understood as a global phenomenon.

Stacie Strong documented class arbitration in Colombia as well as laws allowing collective consumer arbitration in Spain and shareholder arbitration in Germany.[309] Viewing aggregation as a norm of global civil procedure that has emerged both in arbitration and in court ties Strong's work together with Hensler's.

One of the seminal U.S. cases on class arbitration, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, involved an international arbitration concerning violations of U.S. antitrust law in which the three New York-based arbitrators ordered class arbitration under the AAA rules.[310] The Supreme

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*the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1479–80 (2008) (arguing that state supreme courts have used unconscionability in a bid to avoid preemption of their decisions to strike down arbitration clauses by federal law); Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 Cardozo J. Conflict Resol. 509 (2009); Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 Fla. L. Rev. 175 (2002).

306. *See e.g.*, Judith Resnik, Stephanie Garlock & Annie J. Wang, Symposium, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 Lewis & Clark L. Rev. 611, 663–67 (2020) (discussing what information can and cannot be accessed about class and mass arbitration); Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1 (2019) (discussing the fate of class and mass arbitrations under AAA, Judicial Arbitration and Mediation Services, Kaiser Health Care Office of Independent Administration, and ADR Services, Inc. rules as well as proposing litigation strategies for plaintiffs' lawyers); David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 Duke L.J. 1323 (2019) (discussing how federal judges and AAA arbitrators decided whether contracts allow for class arbitration); King, *supra* note 277, at 1031 (discussing the impact of successive Supreme Court decisions on AAA "clause construction" awards deciding whether or not class arbitration is permitted under the contract); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804 (2015) (arguing that class arbitration bans prevent certain types of claims from being heard in any forum); Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration,* 76 U. Cin. L. Rev. 383 (2008) (discussing procedural improvements to class arbitration).

307. *See, e.g.*, Brian T. Fitzpatrick, *The End of Class Actions?,* 57 Ariz. L. Rev. 161, 167 (2015) (doctrinal change suggests corporate defendants will change their contracts to bar class actions, but change has not yet fully occurred); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. Kan. L. Rev. 767, 791 (2012) ("*Concepcion* may be the death knell of arbitral class actions"); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind. L.J. 239, 265 (2012) ("*Stolt-Nielsen* all but assures us that no party to an arbitration agreement can be sued in a class action without its (actual) consent.").

308. Fitzpatrick, *supra* note 307, at 193–95.

309. Stacie Strong, Class, Mass, and Collective Arbitration in National and International Law 16–19 (2013).

310. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 666 (2010).

Court determined that they had exceeded their powers.[311] The Court might have wanted to avoid imposing U.S. procedures on foreign parties. In fact, the U.S. Supreme Court's subsequent reluctance to allow any class arbitration and its willingness to endorse individual arbitration requirements have made the United States something of an outlier as other jurisdictions have passed legislation protecting certain groups.[312]

The tug-of-war between contract drafters and plaintiffs' lawyers has also crossed borders. Fear of class arbitration likely led Uber to alter not only its agreements with U.S. drivers, but also its agreements with drivers in other countries. Its Canadian and Mexican driver agreements both specify arbitration with the ICC's Dutch office.[313] The Canadian Supreme Court held that the arbitration clause was unconscionable based on the cost to an individual of pursuing the remedy.[314] Unlike the Court of Appeal, the Supreme Court did not directly discuss what made court less costly: the presence of aggregate proceedings.[315] Justice Brown, writing in concurrence, stated that the obstacles to arbitration that Uber had created violated public policy by impeding access to justice.[316] This reasoning reflects a main contention in the U.S. arbitration debate.[317] The majority opinion and concurrence cited U.S. journal articles discussing how U.S. Supreme Court jurisprudence allowing individual arbitration requirements in employment cases presented an obstacle to access to justice.[318]

The recently released Hague Business and Human Rights Arbitration Rules have embraced class arbitration. Article nineteen states that "claims with significant common factual and legal features should be heard together" and that the tribunal may adopt "special procedures" to do so.[319] The drafting notes reference U.S. provider class arbitration rules and also suggest a specific rebuke to the U.S. Supreme Court: "this provision intends to set aside the presumption that exists in certain jurisdictions whereby an agreement to arbitrate is construed as a waiver of the right to proceed with a class [or other collective mechanism]."[320]

The U.S. class model is not the only one in international arbitration. The arbitrators in *Abaclat* allowed a "mass" proceeding, avoiding U.S. terminol-

311. *Id.* at 684.

312. *See e.g.*, Consumer Protection Act, S.O. 2002, c 30, Sch. A., §§ (1)-(2), (5), 8(1) (Can.) (arbitration of consumer claims not allowed in Ontario).

313. Uber's operations are registered through a Dutch subsidiary. For discussion of Canada, *see* Heller v. Uber Techs. Inc., [2019] 145 O.R. 3d 81 (Can. Ont. C.A.). For discussion of Uber in Mexico, *see* Martha Pskowski, *Deaths and Injuries Don't Slow Uber Eats' Rapid Expansion in Mexico*, VERGE (July 3, 2019, 9:06 AM), https://www.theverge.com/2019/7/3/20679004/uber-eats-mexico-delivery-courier-death-injury-insurance-expansion [https://perma.cc/ET77-D32X].

314. Uber Techs. Inc. v. Heller, 2020 SCC 16 at para. 98.

315. Heller, 145 O.R. 3d at paras. 68, 85.

316. Uber, 2020 SCC 16 at para. 176.

317. Resnik, *supra* note 306, at 2814–15 (2015).

318. Uber v. Heller, 2020 SCC 16 at para. 39.

319. SIMMA ET AL., *supra* note 24, art. 19.

320. *Id.* at cmt. 2.

ogy.[321] There, a group of Italian bondholders sought to pool their claims against Argentina. The bondholders alleged violation of national treatment rules in the Italy-Argentina bilateral investment treaty ("BIT") after Argentina defaulted on its debt.[322] Their claims were far too low in value to be litigated individually in ICSID proceedings, which tend to be complex, time-consuming, and expensive.[323] The tribunal held that it would be "contrary to the purpose of the BIT, and to the spirit of ICSID" to require some form of additional consent to mass actions "where the BIT covers investments which are susceptible of involving a high number of investors, and where such investments require a collective relief in order to provide effective protection to such investment."[324] The tribunal essentially accepted arguments about effective vindication of rights that failed in the U.S. domestic context.[325] Rejecting the claims, the tribunal wrote, "may equal a denial of justice."[326] The case was appropriate for group resolution because the claims were "homogeneous."[327] The tribunal considered the "mass" arbitration "a sort of a hybrid" between a representative action and aggregate proceedings but was untroubled by fine distinctions.[328] The claimants all originally filed individually, before having the tribunal consolidate their cases and move to test representative claims.[329] "Suffice is [sic] to say" the tribunal wrote, "although various legal systems have developed certain types of collective proceedings, their scope, modalities and effects remain different. . . ."[330] Still, it emphasized the necessity of such proceedings when they were "the only way to ensure an effective remedy."[331] The mass arbitration strategy has now appeared in domestic U.S. arbitrations, with law firms organizing hundreds and even thousands of claim filings.[332]

More commonly in international investment arbitration, distressed debt funds buy up smaller claims against sovereigns. Once these funds, often known as vulture funds, have amassed a large enough number of claims, they can afford to arbitrate or sue (depending on the terms of the debt and existence of any bilateral investment treaties).[333] The original investors re-

321. *Abaclat and Others. v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 515–51 (Aug. 4, 2011), *available at* https://www.italaw.com/cases/35 [https://perma.cc/2WQP-NPY6].

322. *Id.* ¶¶ 1–8.

323. *See id.* ¶ 537.

324. *Id.* ¶ 518.

325. *See* Resnik, *supra* note 306, at 2874–75 (discussing the doctrine of "effective vindication").

326. *Abaclat*, ICSID Case No. ARB/07/5 ¶ 537.

327. *Id.* ¶ 540.

328. *Id.* ¶¶ 480, 485, 488.

329. *Id.* ¶ 486.

330. *Id.* ¶ 484.

331. *Id.*

332. Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, BLOOMBERG, (Feb. 11, 2019, 7:06 PM), https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in [https://perma.cc/YP4U-DL3T].

333. *See generally* Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043 (2004) (discussing the funds).

ceive some compensation, and the government actor that has defaulted on its debt or violated the terms of its investment treaty is still pursued in court or arbitration. This model is a for-profit version of the German and Austrian systems of claim adoption. Germany and Austria allow public interest organizations to sue based on claims that have been assigned by consumers.[334] In Austria, only certain associations have standing to sue.[335] In Germany, ad hoc associations have been created to aggregate claims in certain instances.[336] Cartel Damage Claims, a Brussels-based company with offices in France, Germany, and Luxembourg has made the model E.U.-wide, buying up E.U. antitrust claims and bringing suit.[337] Cartel Damage Claims boasts that it "pioneered the method of aggregating claims" "in the absence of a class action system in Europe."[338] The vulture model has also come to the United States as a result of the difficulty of bringing class arbitrations. A U.S. company has tried to use claim assignments to get around restrictions on class actions in consumer contracts.[339]

The spread of aggregate litigation in its various forms is one of the more familiar stories in comparative procedure research. Thinking in terms of global civil procedure helps tie together the national litigation and arbitration stories. It puts an existing domestic procedure debate, the U.S. class arbitration debate, in new light, recalling the transnational origins of the Supreme Court's anti-class arbitration position in international commercial arbitration. It also points to the continuing transnational significance of U.S. developments, as strategies developed in reaction to U.S. cases go global with U.S. companies like Uber.

The example of aggregation also introduces additional actors in the creation of global civil procedure: parties and their attorneys. In many of the examples described above, aggregation was introduced through rulemaking or legislation, but in *Abaclat*, the tribunal had no existing aggregation mechanism: lawyers asked for one. In the case of claim-buying and joinder of individual claims, entrepreneurial lawyers and funders have taken it upon themselves to aggregate claims in the face of rules that do not contemplate aggregation or are hostile to an American style class action. Lawyers sometimes play a similar role with discovery rules.

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334. In Germany, assigned claims can be enforced for the benefit of the assignor. The organizations that sue are sometimes created for the express purpose of pooling claims. Luidger Röckrath, *Germany*, *in* WORLD CLASS ACTIONS, *supra* note 278 at 241, 244–45; Klausegger, *supra* note 278, at 255.

335. Klausegger, *supra* note 278, at 259–60 (describing the "Austrian-style class action").

336. Harald Koch, *Mass Damages in Europe: Aggregation of Claims, Effective Enforcement and Adequate Representation*, *in* MASS TORTS IN EUROPE: CASES AND REFLECTIONS 157, 165 (Willem H. van Boom & Gerhard Wagner et al. eds., 2014).

337. *Our History*, CARTEL DAMAGE CLAIMS, https://www.carteldamageclaims.com/our-history [https://perma.cc/5FY5-VGJ6] (last visited Sept. 26, 2020).

338. *Id.*

339. *What is Crowdsuit?*, CROWDSUIT, http://crowdsuit.com/what-is-crowdsuit [https://perma.cc/GY2P-RMA7] (last visited Sept. 26, 2020).

### C. Documentary Discovery (or Disclosure)

The conflict-of-interest discussion highlights convergence in international rules and national practice. Rulemakers in this scenario are often quite clear about the need to develop and reflect international consensus to insure the enforceability of awards and judgments. The aggregation discussion reflects agreement at a high level of generality, but with different routes to similar ends. It also introduced new protagonists: entrepreneurial lawyers and litigation funders who may ask for aggregation and, when pressed, build it themselves. The discussion of discovery draws together some of these different threads.

The story is messy in part because discovery rules reflect an enduring fault line in civil procedure: differences in the role of the judge in common law jurisdictions as opposed to more inquisitorial systems. In common law systems, lawyers conduct both oral and written discovery, with judges getting involved only to settle disputes. The scope for disclosure of documents has historically been wide.[340] However, new rules created limits on discovery and room for judges to set those limits. Common law jurisdictions in major trading centers, and further afield, have converged on the proportionality standard as a general principle of civil justice and as a way to limit documentary discovery specifically. Proportionality has been a darling of reform commissions, starting with Lord Harry Woolf's report on Access to Justice, published in the mid-1990s.[341] The advent of "ediscovery" has greatly increased the scope of what can, conceivably, be produced through documentary disclosure.[342] Its potential scope and expense create additional comity concerns, reflected in the blocking statutes some jurisdictions have erected to protect local companies from common law documentary discovery.[343] At the same time, parties and their common law-trained lawyers have been bringing expanded, party-driven discovery into new settings. Arbitration providers, often favorable to party control, have been convinced to allow common law-style discovery, so have some international commercial courts that hope to be their competitors.[344] Outside of this special context, many

340. *See, e.g.*, Cie Financière et Commerciale du Pacifique v. Peruvian Guano Co., [1882] 11 Q.B.D. 55; Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"*, 64 L. & Contemp. Prob. 197, 201–10 (2001).

341. Lord Harry Woolf, Access to Justice: Final Report to the Lord Chancellor on the State of Civil Justice in England and Wales (1996).

342. Geoffrey C. Hazard, Jr., *Civil Procedure in Comparative Perspective*, *in* Common Law, Civil law and the Future of Categories 657, 661–62 (Janet Walker & Oscar G. Chase, eds., 2010) (stating that "[t]he evolution of email has created something of a crisis in American documents discovery" and arguing that one response will be to adopt more civil-law-like limitations); David Bamford, *The Continuing Revolution: Experts and Evidence in Common Law Litigation*, *in* Common Law, Civil law and the Future of Categories, *supra* note 336, at 161, 174 (discussing rising documentary discovery costs in Australia as a result of ediscovery); John T. Yip, *Comment Addressing the Costs and Comity Concerns on International E-Discovery*, 87 Wash. L. Rev. 595, 601–03 (2012).

343. Yip, *supra* note 342, at 622–23.

344. *See supra* Part I; *see infra* Part III.C.2.

jurists have been cool to the idea.[345] Parties desiring to control more discovery in the individual case may also be able to use the U.S. federal courts to bring broad American style discovery into foreign tribunals. The evidence is that they are increasingly doing so.[346]

The story of convergence in discovery/disclosure procedure is thus also about changing judicial role. Even as English and American law firms have brought their norms of party control into international arbitration and business courts, reformers in common law jurisdictions, and in international arbitration, have looked to adjudicators to control time and cost in litigation. The idea that judges could do more to control these elements with greater management powers, that is to say, with more of an inquisitorial role, keeps popping up. One might expect it from civil law-trained lawyers, eager to distinguish their approach and regain "market share," but it comes equally from lawyers and judges in common law jurisdictions themselves. One of the things they most want adjudicators to control is documentary discovery.

### 1. *Proportionality spreads within the common law world*

Even if common law standards of discovery now rule in many international business cases, those standards have been changing so that they no longer present quite as sharp a contrast with the civil law. These changes have been building since at least the 1980s.[347] The rhetoric of cost and delay that gave rise to the proportionality rules, as well as other case management reforms, has been prevalent in common law systems since the mid-1990s.[348] The Woolf report's aims of making justice "proportionate" to the case, chiefly by reducing cost and time to resolution, reflect a central preoccupation of the past twenty five years of common law procedural reform.[349]

Proportionality has been discussed both as an overall requirement and as applied specifically to documentary disclosure.[350] Electronic discovery means

345. *See, e.g.*, Neil Andrews, *Civil Justice's Songs of Innocence and Experience*, 6 I.J.P.L. 103, 119 (2016) (continental European objections to expansion of disclosure).

346. Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2089, 2110–13 (2020).

347. *See* Paul W. Grimm, *Are We Insane: The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 Rev. Litig. 117, 123–33 (2017) (discussing the Federal Rules Committee's 1983, 1993, 2000, and 2006 proposals for discovery amendments).

348. *See* Burbank, *supra* note 82, at 678, 681–83.

349. *Id.*

350. For discovery reform in England and Wales, *see* Rupert Jackson, Review of Civil Litigation Costs: Final Report 393–74 (2009) (discussing need for proportionality in disclosure); Woolf *supra* note 341, ch. 21. For discussion of proportionality in discovery in Australia, *see* Austl. Law Reform Comm., Discovery in Fed. Courts paras. 3.79, 3.88, 3.204, 3.233 (2010). For discussion of proportionality in Canadian provinces, *see* Robert M. Goldschmid, Discussion Paper: Major Themes of Civil Justice Reform (2006); Coulter Osborne, Findings & Recommendations (2007) (last visited Oct. 24, 2020). Discussion in Hong Kong proceeded a bit differently, with the bar largely in favor of retaining an older, broader discovery test than the proportionality test. However, the procedural reform committee convened by the courts still wrote that barristers should consider "economising modifications" as "standard practice." Chief Justice's Working Party on Civil Justice Reform, Civil Justice Reform – Final Report 472–78 (2010).

that it is possible to access vast amounts of relevant information, but the cost of getting that information may not fit what an adjudicator sees as the overall stakes of the case—the amount in controversy or the seriousness of the issue for the parties.[351] The principle has made its way into general procedural considerations and specific discovery rules in many common law jurisdictions. Proportionality is in rule 1.1 of the Civil Procedure Rules of England and Wales and is meant to guide all procedural decisions.[352] In Asia, Hong Kong has also adopted proportionality as a general principle.[353] Its rival commercial jurisdiction, Singapore, recognizes proportionality only in allocating costs.[354] The Australian Uniform Civil Procedure Act does not use the word proportionality, but appears influenced by the concept in its statement that "[t]he overriding purpose of this Act . . . is to facilitate the judge, quick and cheap resolution of the real issues in the proceedings."[355] New Zealand is more explicit: the High Court Rules of 2016 require that discovery be proportionate.[356] Through a 2009 amendment, the Kenyan legislature also added a set of objectives to its Civil Procedure Act reminiscent of the English and Australian versions.[357]

Proportionality has also left its mark on North America. The U.S. Federal Rules Advisory Committee started efforts to limit discovery in the name of proportionality in the 1980s. The Federal Rules Advisory Committee first introduced a balancing test "to deal with the problem of overdiscovery" in 1983, but did not use the term proportionality.[358] These factors were "softened" with subsequent amendments in 1993 and 2000, but returned in 2015, along with the explicit instruction that documentary discovery be "proportional to the needs of the case."[359] The National Committee on State Courts, an influential body in U.S. rulemaking, has recommended that

351. Warman v. Nat'l Post Co., 2010 ONSC 3670, 103 O.R. 3d 174, paras. 44–64, 67–86 (discussing the problem of costly and intrusive ediscovery, surveying Canadian and U.S. cases, and adopting the rule developed by an SDNY magistrate judge in Rowe Entertainment v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002); William Matthewman, *Towards a New Paradigm for E-Discovery in Civil Litigation: A Judicial Perspective*, 71 Fla. L. Rev. 1261, 1269–70 (2019); *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 65–70 (2018).

352. CPR, R 1.1(1) (Eng.).

353. Cap. 4, § 54 O.1A r. 1(c) (H.K.); Peter C.H. Chan & David Chan, *Civil Justice with Multiple Objectives: The Unique Path of Hong Kong's Civil Justice Reform, in* Goals of Civil Justice and Civil Procedure in Contemporary Justice Systems 143, 158 (Alan Uzelac ed., 2013).

354. *See* Jeffrey Pinsler, *Proportionality in Costs*, 23 Sing. Acad. L.J. 125, 130 (2011).

355. *Uniform Civil Procedure Act 2005* (Cth) (Austl.). Most Australian states based their legislation on this act.

356. New Zealand High Court Rules 2016, R 8.2 (N.Z.) (reprint as of Apr. 9, 2020).

357. *See* Civil Procedure Act (2012) Cap. 21 § 1A(1) (Kenya); Elvis Begi Nyanchieo Abenga, *Civil Procedure and Practice in Kenyan Courts: Does the Overriding Objective Principle Necessarily Improve Access to Justice for Litigants?* (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240955 [https://perma.cc/3X8J-Q4XY].

358. Fed R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment (quoting advisory committee's note to 1983 amendment).

359. *Id.*

states also adopt proportionality.[360] Proportionality also appears in the civil procedure rules of all but four Canadian provinces and territories, including the country's major litigation centers of Ontario, Quebec, and British Columbia.[361]

These reforms reflected pressing local needs, such as reducing cost for civil legal aid.[362] However, cost to foreign litigants and the need to compete for legal business also surfaced in several of the reform debates. Both Lords Woolf and Jackson discussed discovery costs in terms of the appeal of English justice to foreign litigants.[363] In the United States, the Duke Conference on Civil Procedure, a gathering of rulemakers and invited academics, highlighted discovery cost in the run up to Federal Rules Committee's decision to adopt proportionality. Speakers stated that U.S. discovery cost was high compared to the rest of the world and called for adopting discovery rules that would reduce the degree to which the federal courts were global outliers.[364] The conference report noted survey data suggesting "that the U.S. litigation system imposes a much greater cost burden on companies than systems outside the U.S. . . . large organizations often face disproportionately burdensome discovery costs . . . ."[365] Lawyers for Civil Justice, a defense-side advocacy group, commissioned the survey.[366] It found that U.S. litigation was more costly than litigation elsewhere and argued that "if the situation [was] left unchecked," then "the United States will be unable to compete effectively in the global marketplace."[367] The report authors singled out discovery as a driver of high costs and suggested proportionality as a solution.[368] Another defense-side heavyweight, the U.S. Chamber of Commerce, had previously made a similar point, stating that "many corporations now choose English law to govern their contracts" and/or include arbitration

360. National Center for State Courts, Call to Action: Achieving Justice for All, Appendix F: The Role of Proportionality in Reducing the Cost of Civil Litigation (2016).

361. Ontario Superior Court Rules R 1.04(1), R 29.2 (both generally and specifically in relation to discovery); New Brunswick Rules of Court R 1.02.1 (general proportionality); Nova Scotia 14.08(3) (disclosure); Quebec Rules of Civil Procedure, Preliminary Provision, ch.III R 18 (general proportionality principle); Manitoba Court of Queen's Bench Procedure R 1.04(1.1) (general proportionality); Saskatchewan Court of Queen's Bench Rules of Procedure R 1-3(4), 5-3(1)(b) (generally and in relation to disclosure); British Columbia, Court Rules Act, Supreme Court Civil Rules R 1-3(2) (general proportionality requirement); Prince Edward Island Rules of Court R 1.04(2) (general proportionality); Yukon Rules of Court R 1(6) (general proportionality). The provinces of Alberta and Newfoundland and Labrador do not have a proportionality rule. Neither do the rules of court for the Northwest Territories, which are also used in Nunavut.

362. Woolf, *supra* note 341, at ch. 7 § 3.

363. *Id.* (expressing concern that cost "adversely affects the reputation of our civil justice system abroad and may be making this country less attractive for overseas investment and as a forum for the settlement of commercial disputes"); Jackson, *supra* note 350, at 274–75, 469.

364. Judicial Conference Advisory Committee on Civil Rules, Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation (2010).

365. *Id.*

366. Lawyers for Civil Justice et al., Litigation Cost Survey of Major Companies, 2010 Conference on Civil Litigation (2010).

367. *Id.* at 3.

368. *Id.* at 7.

clauses due to high legal costs associated with U.S. courts.[369] Some academics have agreed, arguing that English courts had a cost advantage in competing with U.S. ones and that costs of lawsuits "dissuade foreign companies from doing business in the [United States]."[370] Smaller jurisdictions sought to compete with each other. The Victorian Law Reform Commission was concerned about competing with New South Wales for Asian clients and recommended reform of discovery and adoption of proportionality, citing the Woolf Report.[371]

### 2. *Common law inroads in non-common law contexts*

At the same time as common law reformers were fretting that made them uncompetitive, parties and their lawyers were bringing this expansive approach to documentary disclosure into new settings. Lawyers from various civil law traditions have faced demand for disclosure from several sources. First, American, and to some extent U.K., law firms brought their conception of broad, party-controlled discovery with them as they moved into new settings.[372] As these firms became prominent in international commercial arbitration, disclosures became more elaborate. These preferences are reflected in arbitration provider rules and in rules for international commercial courts.[373] The United States has also offered a model of liberal disclosure rules, both through U.S.-based cases with extraterritorial reach and through 28 U.S.C. § 1782, which allows discovery in aid of foreign litigation and at least some forms of arbitration. Although other jurisdictions declined to follow the U.S. model, parties have increasingly sought out U.S. discovery, changing the dynamics of their cases whether local rulemakers approve or not.[374] The discovery expansion story is thus one in which party preferences have sometimes trumped the systemic concerns of rulemakers and adjudicators. The context of this expansion is thus far limited to the sort of high value cases that warrant international arbitration or spending money on U.S. counsel.

The IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules), first published in 1983, are the most commonly cited source of

369. Robert E. Litan, *U.S. Chamber of Commerce Institute for Legal Reform, Through Their Eyes: How Foreign Investors View and React to the US Legal System* 11 (2007), https://www.instituteforlegalreform.com/uploads/sites/1/Chamber_Litan_book_LO_RES.pdf [https://perma.cc/39CF-H4P9].

370. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 574–76 (2010). The narrative was not new; *see, e.g.*, Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity with Our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1, 14 (1992) (citing the need to reign in discovery cost, with Germany and Japan as models).

371. VICTORIAN LAW REFORM COMMISSION, CIVIL JUSTICE REVIEW REPORT 87 (2008).

372. Roger P. Alford, *The American Influence in International Arbitration,* 19 OHIO ST. J. DISP. RESOL. 69, 84 (2003).

373. *Id.*

374. Wang, *supra* note 346, at 2116–20 (2020).

international discovery norms in commercial and investment arbitration.[375] They make some concessions to civil law norms; notably they do not allow discovery of oral evidence. With documents, however, the rules come closer to a common law paradigm. Parties are to exchange documents of their own motion, going to the tribunal only if they have a dispute.[376] Each party makes an initial disclosure. They can then ask for documents not in their possession, as long as the document is "relevant to the case and material to its outcome" but must explain the document's import.[377] This standard requires a bit more upfront work than most common law jurisdictions, which require relevance and proportionality, but need not be conceived of as being that much less expansive. The IBA Rules also use party-appointed experts, another common law feature.[378] The tilt towards common law was enough that lawyers from European civil law traditions wrote up their own rules in 2018.[379] These rules, known as the Prague Rules, take a more inquisitorial approach, with the tribunal leading document production. It remains to be seen if the Prague Rules will have an impact, pulling international arbitration away from a common law paradigm. The creators of new international commercial courts in civil law jurisdictions are still betting that the common law paradigm is what parties want. The Netherlands International Commercial Court, which opened in January 2019, uses the IBA Rules.[380] The International and European Chamber of the Paris Commercial Court gives greater space to oral evidence.[381] These choices follow an earlier shift from a rule that parties did not have to help their opponents by disclosing information to a rule requiring some disclosures in advance of an oral hearing.[382] Outside of Europe, arbitration practitioners in the PRC have also hailed new procedure rules allowing judges to order document production against an opposing party as the "adoption of international practices."[383]

375. Sol Argerich, *A Comparison of the IBA and Prague Rules: Comparing Two of the Same*, KLUWER ARB. BLOG (Mar. 2, 2019), http://arbitrationblog.kluwerarbitration.com/2019/03/02/a-comparison-of-the-iba-and-prague-rules-comparing-two-of-the-same/?doing_wp_cron=1593461487.6610839366912841796875 [https://perma.cc/2NFY-5REK].

376. IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, art. 3.10 (2010), *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx [https://perma.cc/DF8A-LM57].

377. *Id.* art. 3.3–3.4.

378. *Id.* art. 5.

379. *See, e.g.*, RULES ON THE EFFICIENT CONDUCT OF PROCEEDINGS IN INTERNATIONAL ARBITRATION (PRAGUE RULES) (2018), art. 6, https://praguerules.com/prague_rules [https://perma.cc/YWX2-LXYW].

380. Bookman, *supra* note 27, at 26.

381. Alexandre Biard, *International Commercial Courts in France: Innovation without Revolution?*, 12 ERASMUS L. REV. 24, 29 (2019).

382. Peter Gottwald, *Civil Procedure Reform in Germany*, 45 AM. J. COMP. L. 753, 760 (1997).

383. Tianyu Ma & Jean Zhu, New Evidence Rules Allow Document Production in China, KLUWER ARB. BLOG (June 12, 2020), http://arbitrationblog.kluwerarbitration.com/2020/06/12/new-evidence-rules-allow-document-production-in-china/?doing_wp_cron=1598672897.1275699138641357421875 [https://perma.cc/WJ3D-C5QN].

Thanks to a U.S. statute, parties seeking information available in the United States can also shop for expansive discovery rules. Under 28 U.S.C. § 1782, parties can seek discovery in U.S. federal courts in aid of their foreign litigation and arbitration.[384] Most courts have held that the rule applies to investment arbitration as well as litigation, with the appeals courts split on its applicability to international commercial arbitration.[385] A recent study by Andrea Wang demonstrates that demand for U.S. federal discovery in aid of litigation has grown substantially since the 1960s, suggesting that the American model increased in global influence even as defendants decried its lack of proportionality.[386] Between the years 2005 and 2017, use of section 1782 in civil cases "approximately quadrupled."[387] Party requests were in the dozens in 2005, but had risen to around 125 for the year 2017.[388] Motions made under this provision were typically granted and typically uncontested.[389] Wang credits "an increase in awareness and use of § 1782 by law firms, attorneys, and parties" for this growth.[390] Section 1782 motions include requests from tribunals as well as parties, but the number of party requests now exceed tribunal requests.[391]

The availability of U.S. federal discovery, which can impose significant costs on the producing party, has the potential to upend cost structures and judicial controls on evidence production. Historically the U.S. federal rules only required that the requested documentary or oral evidence be relevant.[392] Although the relevant rule now requires proportionality,[393] the U.S. federal courts still allow discovery in situations other systems may not. A foreign tribunal can take the U.S. discovery material into account in its eventual cost awards, but this award may not represent the true amount of costs spent. Furthermore, such an award is typically only made if the matter is resolved in court. Expensive discovery can add considerable pressure to settle out of court, rather than waiting for some future time at which costs might be somewhat shifted.[394] If relevant information is available in the

384. 28 U.S.C. § 1782 (2020).

385. In re Guo, 965 F.3d 96 (2d Cir. 2020); Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020); Abdul Latif Jameel Trans., Ltd. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019); Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT'L L. 127, 135–37 (2012). *See also* Wang, *supra* note 346, at 2115 (parties are increasingly seeking discovery in aid of international commercial arbitration).

386. Wang, *supra* note 346, at 2090–91.

387. *Id.* at 2099.

388. *Id.* at 2114.

389. *Id.* at 2122.

390. *Id.* at 2111.

391. *Id.* at 2109–10. These requests may originally come under the Hague Evidence Convention or letters rogatory but are ultimately executed under § 1782. *Id.* at 2106.

392. Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1086 (2015).

393. FED. R. CIV. P. 26(b)(1).

394. *See* Bell Atl. Tel. Co. v. Twombly, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases.").

United States, section 1782 may defeat attempts to limit litigation cost by limiting discovery.

Civil law trained lawyers working on transnational cases have seen avenues for discovery expand. International arbitrations are often subject to the IBA Rules. Common law discovery has also influenced international commercial courts in civil law jurisdictions. If information can be gotten in the United States, parties and their lawyers can go directly there, bringing common law discovery to their civil law disputes. A modest but increasing number have done so. At the same time, their common law counterparts have seen an even more sweeping change: the widespread adoption of the proportionality standard and with it, the possibility of reduced disclosure and greater judicial control.

Common law jurisdictions' widespread adoption of proportionality rules signals a shift towards greater acceptance of judicial management.[395] The story of proportionality is about convergence in common law standards, and therefore unlike the story of convergence across civil and common law jurisdictions seen with conflicts of interest and aggregate litigation.[396] More meaningful cross-system convergence is visible in international arbitration and commercial litigation, though it is not uncontested. There, civilian-trained lawyers have adopted approaches to document disclosure that are closer to common law rules. However, the Prague Rules are a reminder of the differences that remain and the belief on the part of civil law lawyers that clients may actually prefer their approach. Moreover, discovery practice may remain very divergent even when rules give scope for convergence. As long as discovery in common law jurisdictions is party-controlled, application of proportionality may remain uneven. However, it gives judges greater ability to intervene in discovery than they had before and endorses a civil-law style management paradigm. Likewise, civilian lawyers and adjudicators may be resistant to common law approaches in practice. Still, the door is open to those in civilian jurisdictions to adopt common law influenced disclosure rules for their arbitration, or even seek to bring U.S. discovery into a transnational case.

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The examples of developing norms around adjudicator independence, aggregate litigation, and discovery demonstrate the diverse ways in which a norm of global civil procedure can be created and used. With norms around tribunal independence—banning financial interests—broadly construed, but accepting med-arb, developments at the international level are especially

395. *See* Grimm, *supra* note 347, at 144–48, 187.

396. Quebec is a special case as it is a single civil law jurisdiction in an otherwise common law country and the organization of its courts is very strongly influenced by common law procedure. It is also bound by decisions on Quebec procedural law made by the Canadian Supreme Court.

prominent. Aggregate litigation developed from multiple polls, with representative litigation and claim aggregation as alternatives to the U.S. class action model. Scholars and practitioners have pointed to connections between these domestic developments as the discussion has shifted from whether to aggregate claims to how to do so.[397] Arbitration also offers aggregation, which provides multiple models of dealing with claims. If one approaches aggregation as an element of global civil procedure, developments in litigation and arbitration can be seen together. Aggregation also helps illustrate the many connections between domestic and international developments and between developments in arbitration and developments in court rules. Finally, discovery offers an example of harmonization within, rather than across, legal traditions as well as greater convergence in international commercial cases specifically. These examples also suggest some sources of enduring difference based on regime type and legal tradition.

## III. The Ideolog(y/ies) of Global Civil Procedure (Or What Global Civil Procedure is Not)

Global civil procedure matters as much because of what it obscures as what it reveals. Lawyers know well to look for differences between the common law, with its specific historical origins, and other systems. Other differences, notably over political systems, are less obvious, but may be more important to many of the actors described below. Focus on procedural harmonization can miss deep divergences in why lawyers and rulemakers view the same procedure as desirable. As pressure for harmonization increases and as the harmonized rules themselves become subject to organized, transnational opposition, these divergences may be brought to the fore.

Repeat players "play for rules."[398] Advocates will often argue that their jurisdiction should adopt certain norms to serve certain ends. Thus, global civil procedure is likely to reflect the preferences of certain constituencies. It is especially attractive to jurisdictions seeking to compete in a global or regional market for legal services. It is thus designed to serve the preferences of the lawyers and clients who are "buyers" in this market. Some rulemakers are adopting global procedural standards in hopes of competing in a global law market. Lawyers may use market logic in arguing that others should do the same. The market, however, does not necessarily produce good procedure. It produces familiar procedure that lawyers may prefer because they know how to use it rather than because they think it is good. It also produces procedure that may be skewed toward certain "high end" litigants at the expense of others.[399]

397. *See supra* Part II.B.

398. Mark Galanter, *Why the Haves Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95, 100 (1974).

399. In the U.S. context, see generally Coleman, *supra* note 14.

The idea of a law market provides a common vocabulary that can rest on top of divergent agendas. It is not so much that agendas are hidden as that they may be mutually unintelligible. Common law jurisdictions share a distinct history of British colonization, which has left them with a distinct model of judicial power.[400] Although they may agree to common ethical rules and modify certain traditions, the kinds of things common law lawyers expect from adjudicators may not track the expectations of lawyers trained in the rest of the world. Moreover, the world's leading commercial jurisdictions, which shape civil procedure in international arbitration or offer alternative, domestic venues for transnational litigation, include different legal traditions and both liberal democracies and authoritarian or illiberal regimes. Adopting global civil procedure norms therefore does not denote some sort of broader liberalization.

### *A. Thin Agreement: the Market*

A belief that superior procedure will come from efficient competition in the law market unites makers of global civil procedure.[401] This belief has several tenets. Public and private rulemakers understand themselves to be competing for users, especially repeat players like corporations.[402] These users are said to have certain procedural preferences. Markets show their participants' revealed preferences: what they do with their money is a strong indication of what they actually think. Under this logic, if more market participants are choosing X over Y, that is an indication that X is in some way better. Allowing a market for policy is thus a way to get individual participants the policy they want and drive the creation of better policy. These procedural preferences are in turn held up as efficient because they are preferred by entities that are supposed to maximize efficiency. That a particular procedure is efficient is then presented as a reason that it is good. Procedural reform proposals are replete with references to efficiency, sometimes more narrowly defined as reducing cost and delay, as a valuable goal of procedure.[403]

400. I do not mean to claim that this model is the only one operating in many former British colonies. Depending on the degree to which other legal regimes continued along with the common law, other models of judicial power might be present as well. For instance, Islamic jurisprudence has its own, rich debates about judicial role. *See generally* Christian R. Burset, *Why Didn't The Common Law Follow the Flag?,* 105 VA. L. REV. 483 (2019) (arguing the British colonial authorities used legal pluralism as a tool to promote the economic dependence of certain colonial populations, while extending access to English commercial law in other cases to support commercial development).

401. *See* KARTON, *supra* note 2, at 68–73.

402. *See supra* Part I.

403. *See* Coleman, *supra* note 14. A prime example is the Woolf Report, which heralded a wave of common law procedural reform, first in England and Wales, Hong Kong, Australian states, Canadian provinces, and finally in the U.S. federal rules. *See* WOOLF, *supra* note 341, at § 1, ¶ 2 (discussing the need to control "cost, delay, and complexity" in civil litigation). For examples of other, similar reports, see VICTORIAN LAW, *supra* note 371; OSBORNE, *supra* note 350; GOLDSCHMID, *supra* note 350; CHIEF JUSTICE'S WORKING PARTY, *supra* note 350, ¶ 25.

This framing—that systems are competing in a global or regional market by offering more efficient procedure, is fundamentally neoliberal.[404] It values efficiency, broadly defined, and accepts that competition in a market is the best way to discover and implement efficient procedural practices. Acceptance of this neoliberal thesis is evident also in scholarship that argues that, for instance, the common law dominates the market for business litigation because businesses see it as more efficient rather than, for instance, because of the prominence of the British Empire and the United States in global trade.[405] The neoliberal frame assumes choice and assumes that choice represents revealed preference and that that preference represents efficiency. It has several flaws.

First, litigants (or their lawyers) may not actually prefer procedure that is "better," or more efficient, by whatever metric they want to use. The idea that procedural norms become globalized because they are most efficient contradicts a more likely story, that procedural norms become globalized not because they are the best way to administer civil litigation or arbitration, but because they are familiar to transnational business.[406] Lawyers who want to bring familiar procedure with them may appeal to rulemakers by arguing that they should adopt international standards. Rulemakers may wish to compete for legal business, be "user friendly," and attract the right type of litigant. Even if one does not believe that the market provides users with the "best" procedure, one might believe that harmonization is a good in and of itself because it reduces transaction costs or levels the playing field between local and foreign litigants. This conception of procedure, however, still focuses only on the parties and their needs rather than wider social costs and benefits.

Moreover, not all users of procedure have the same ability to pick and choose. Parties with the ability to contract for jurisdiction or for procedural rules choose.[407] Others do not. If the buyers in the law market are largely contract drafters, then giving the market what it wants means giving thoughtful and well resourced contract drafters what they want. These drafters are multinational corporations, not exclusively, but in large part. More importantly, they are the entities that rulemakers often seem to envision when they tout the business benefits of efficient civil justice. Multinationals are the primary clients of international commercial arbitration providers and about half of the clientele of international investment arbitrations, even if

404. *See* William Davies, *Neoliberalism: A Bibliographic Review*, Theory Culture & Soc'y (Mar. 7, 2014), https://www.theoryculturesociety.org/william-davies-a-bibliographic-review-of-neoliberalism [https://perma.cc/Z4E4-R5LA].

405. On the legal origins debate, *see generally* Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 Am. J. Comp. L. 765 (2009).

406. *See* Bookman, *supra* note 3, at 266 (different ways states might asses the success of procedure in international business courts); Vogenauer, *supra* note 207, at 52.

407. *See* Judith Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 595 (2005).

their home states are the ones choosing investment arbitration in their treaties.

Solicitude towards multinational corporations might not only result in procedures aimed to improve the functioning of adjudication, but also in procedures that make claiming more difficult.[408] Corporations choose their forums in interactions with each other, but may also have some choice in relation to interactions with employees and consumers. Employees and consumers tend to be one-shot players in the legal system, so their opinion might matter less to a rulemaker concerned with the law market.

To the extent global civil procedure favors law choosers in one instance (forming contracts) over another (filing cases) it may not be a force for fairness in a legal system. One may worry less about this skew in the ideal scenario of giants fighting giants having chosen their law. Asymmetric scenarios such as the Uber litigation examined above present more challenges.[409] Still, the story of the global spread of class actions belies the idea that global civil procedure always reflects the preferences of multinationals.

Procedural norms can migrate to new contexts.[410] A procedural change may have come with an explanation for why this procedure is efficient or fair, not just the blunt statement that it is familiar. These logics then justify bringing the same procedural change into new contexts with different types of parties. These shifts do not always go smoothly. Commercial arbitrators' procedural assumptions may not fit the investment context, in which the public law stakes may mean that speed must give way to fuller hearings and confidentiality should no longer be the rule.[411]

National court systems that seek to increase international competitiveness and have few separate tracks for different types of claims (which might roughly, but not fully, correspond to different types of plaintiffs and defendants) might also run into trouble. Procedural reform that aims to bring a jurisdiction in line with global standards may focus too much on "high-end" sophisticated court users at the expense of the median user.[412] Court and arbitral systems likely to include unrepresented parties might need to be especially solicitous of those parties' needs if they wish to ensure equality of arms. Unrepresented parties are unlikely to choose their forum and thus unlikely to drive any "law market" oriented reform. Global civil procedure is likely to leave them out.

Reform inspired by global civil procedure might be contained in, for instance, a commercial court or commercial list, having less direct effect on family court. However, to the extent that procedure is understood to be

408. *See, e.g.*, Moore, *supra* note 392; Benjamin V. Madison, III, *Color-Blind: Procedure's Quiet but Crucial Role in Achieving Racial Justice*, 78 UMKC L. REV. 617 (2010).

409. *See supra* Part II.B.

410. *See* Ruiz Fabri & Paine, *supra* note 41, at 9–11.

411. *See* Roberts, *supra* note 15, at 58–63.

412. Members of the Dutch Parliament expressed precisely this concern when discussing whether to approve an international commercial court. Bookman, *supra* note 27, at 26 (forthcoming).

substantive, ideas and attitudes from one place may pop up in the other. Moreover, there are courts of broad jurisdiction in which the suits of sophisticated parties appear along aside those new to the civil justice system.[413] When a given norm becomes so established as to be a norm of global civil procedure, it can take on a life of its own, so ubiquitous that rulemakers fail to question its application in new contexts. However, rulemakers in many contexts would and should put some values above efficiency or even potential attractiveness of their system to certain litigants.

In this regard, the common neoliberal language of global civil procedure, in which everyone agrees that they are competing in a market for procedure that will best serve the interests of the parties, does not help. Different legal traditions and political systems conceive of legal disputes differently. Awareness of these differences can bring procedural values back into the conversation over procedural convergence.

### *B. Thick Disagreement: Court Role*

As the law market frame suggests, the rhetoric accompanying procedural changes can be strikingly similar. Judges, lawyers, and bureaucrats have invoked and redefined judicial independence across a wide variety of contexts. Proponents of aggregate litigation claim it provides access to justice or deters wrongdoing. International arbitrators and commercial courts from civil law jurisdictions have expanded discovery to meet common law lawyers' expectations and common law jurisdictions have limited discovery in the name of efficiency and proportionality. And all these changes can be explained with reference to the demands of a law market that will reward desirable jurisdictions and providers with more dispute resolution business. Yet this rhetoric has definite limits. As Kun Fan writes of international arbitration, "[e]ven though procedural rules are becoming more standardized and less country-specific, expectations of process differ based on the cultural background of the parties or arbitrators."[414] Chief among these factors is legal culture, specifically the values with which lawyers infuse procedural choices. This section explores two areas in which global civil procedure has not produced agreement: a division specific to the logics of the common law, and a division related to the reigning political regime. Jurisdictions on either side of these divides may well agree on procedure and may cite similar procedure-related reasons. However, the values that underlie their agreement are different.

One dividing line runs between the common law and other legal traditions. The common law countries share history and texts. They share English as one of their legal languages. Many of them shared or still share an

413. Such as the U.S. federal courts.

414. Kun Fan, *"Glocalization" of International Arbitration—Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan*, 11 U. Pa. Asian L. Rev. 243, 254 (2016).

apex court in the Privy Council.[415] The legal practices and habits of thought of the British Empire are distinct from those of other traditions in ways that still matter for thinking about procedure. Other traditions are not uniform and may themselves have distinctive approaches that matter as much as those of the common law, however, I will focus here on the places in which the common law seems to part ways with other major legal traditions.

The second axis for deep disagreement is based on political regime. The counter-majoritarian difficulty, or something like it, is a problem for both common law and civil law democracies. It is not a problem for an authoritarian state, although scholars and officials in that regime may have their own complaints about out-of-control judges. Proceduralists do not really risk losing sight of the common law-civil law division. It is the subject of endless debate and critique. The historical basis for the unity of the "common law world" and the plurality of the civil law is widely understood. The creators and users of global civil procedure are already primed to think about which elements are consonant with their traditions and which represent a break. They may not articulate the role of the judge in quite the same way that this article has done, but they are nonetheless likely to be cognizant of it.

On the other hand, political divisions over the meaning of shared procedure are often more submerged. Framing procedural choices as a matter of responding to market incentives encourages the belief that procedural choices are apolitical. They are not. Procedural choices are always about what role the institution or the adjudicator is to play in relation to litigants and to other social institutions. Comparativists need to be alive to the limits of procedural consensus in order to provide accurate and useful accounts. The users of global procedure themselves must also grasp at least the basics of these dynamics lest they be misled. Agreement on procedure and similarities in legal traditions can be over-read as representing agreement on rule of law values that have to do with the political role of courts. This misreading can lead observers to infuse procedural harmonization with meaning it does not have. False equivalences make for thinner comparative description and ineffective measures of law reform. Worse, they are disorienting for participants in transnational litigation, on the one hand giving rise to false expectations, on the other denying their experiences with the courts.[416]

Division by legal tradition helps explain the ways in which common law judges still approach their jobs differently from their counterparts elsewhere.

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415. For an introduction to the Privy Council, *see* Thomas Mohr, *A British Empire Court' A Brief Appraisal of the History of the Judicial Committee of the Privy Council*, *in* POWER IN HISTORY: FROM MEDIEVAL TO THE POST-MODERN WORLD 125, 125–27 (Anthony McElligott et al. eds., 2011).

416. *See* Cem Tecimer, *Abusive Comparativism: "Pseudo-Comparativist" Political Discourse As a Means to Legitimizing Constitutional Change in Turkey,* VERFASSUNGSBLOG (May 15, 2017), https://verfassungsblog.de/abusive-comparativism-pseudo-comparativist-political-discourse-as-a-means-to-legitimizing-constitutional-change-in-turkey [https://perma.cc/W64C-YWHR] (describing how comparison between liberal democracy and illiberal regimes can be used to deny the experiences of people living under the latter).

Yet it would be a mistake to think of all divergences over judicial role in these terms. Regime type is also relevant, and a lens that includes the Soviet legal tradition better captures some divergences over what judicial independence is supposed to accomplish. Regime type can also explain why agreement on an issue such as the importance of appeals—a growing global norm associated with civil law jurisdictions—might not mean rulemakers have similar goals in mind.

1. *The distinctive position of the common law judge*

One can overstate the distinctiveness of common law. Common law jurisdictions have become more managerial. In common law systems with high numbers of self-represented litigants, judges may step in to steer the proceedings. Although judges in other systems may ideally be much more involved in case management and investigation, the realities of tight court budgets and high caseloads may force some into a more passive posture vis-à-vis the parties. The reality of working conditions in a court may not be that different, or may even defy the ideal types I am about to trade in. Still, the different shape of judicial careers will mean that common law judges will bring a different attitude to the job. This divergence may help explain areas of procedure that have not become global—such as contempt and injunction powers. It can also help practitioners and scholars make sense of the fault lines in current debates.

The common law judge wields the power of the Crown. The historical common law judge literally dispensed the King's justice.[417] In some jurisdictions, the Queen remains the ceremonial head of government.[418] Her portrait hangs in courtrooms and her seal is present on buildings. In the United States, judges' connection to royal authority was severed earlier, but judges are often subject to more politicized appointments, either through confirmation by the legislature or elections, giving the judge a connection to the sovereign people. The merger of common law and equity also gave to common law judges a set of remedies that require moralistic judgments. Historically, these remedies were available in courts with authority to reach beyond the limits of strict legal rules, according to the dictates of conscience.[419] This potent fusion of the ability, and even duty, to offer broad remedies according to one's conscience with the judge's service as the sovereign's representative gives common law judges significant individual authority. Civilian comparativists have noted that this personalized power connects with the common law judge's ability to hold people in contempt of court, not only using

417. Carlo Vittorio Giabardo, *Disobeying Courts' Orders: A Comparative Analysis of the Civil Contempt of Court Doctrine and of the Image of the Common Law Judge*, 10 J. Civ. L. Stud. 35, 54 (2017).

418. *Id.* at 55.

419. John H. Baker, An Introduction to English Legal History 108–09, 114–16 (5th ed. 2019).

fines but also imprisonment.[420] Disobedience to a court order in a common law civil case can be framed in moralistic terms as disobedience to the judge and ultimately the sovereign.[421] By contrast, disobedience to a judgment in the French and German traditions can only result in fines and is more likely to be framed as a wrong against the other party, not the judge or the Queen.[422]

Common law judges also hold a high social position. The common law judiciary is staffed by judges who typically were senior litigators before taking their posts, assisted by clerks who are often temporary employees just out of law school. Full-time judges may be assisted also by "magistrates" or "masters" who may be part-time and who do unpleasant and time-consuming tasks such as resolving discovery disputes. The court employees who count as "judges" are thus fewer in number and more privileged in their position at work.

Judges in other systems often lead a more disenchanted existence.[423] In many jurisdictions, the judiciary is a civil service career that often begins with reaching an exam cutoff. Newer judges may perform functions similar to the research and writing tasks set for clerks,[424] and a judge's career arc may be more gradual and bureaucratic.[425] As the discussion of PRC judges in Part II suggests, the rest of the world is hardly a monolith. I will discuss one example in detail, the French system, but do not mean to suggest that it is representative of "the civil law world" in general. Still, the example gives a sense of just how different judging may be.

The French judge and sociologist, Antoine Garapon, observes that French courts are more formal than common law ones.[426] U.S. courtrooms are often workspaces that can be reconfigured by the lawyers (moving a table or bringing in a projector).[427] The U.S. judge is not central to the proceedings, either in terms of the rules of procedure, or visually in the courtroom, where the well is occupied by lawyers.[428] However, these elements of informality contrast with the relatively greater prestige of the judge.[429] U.S. judges have their personal chambers, which are notably roomier than the spaces occupied

420. Giabardo, *supra* note 417, at 41.

421. *Id.* at 55–57.

422. *Id.*

423. John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition 123–24 (3rd ed. 2007).

424. *See* John Bell, Judiciaries Within Europe: A Comparative Review 24 (2006).

425. The careers of judges in countries that use specialist judiciaries will look very different based on what stream they are in. *Id.* at 20. For instance, recruitment for administrative judges in France is a separate process and civil and criminal judges conduct trials in very different ways. I wish primarily to compare the career of the ordinary civil judge with that of a common law judge who hears civil case as at least part of their docket.

426. Garapon, *supra* note 287, at 151.

427. *Id.* at 152.

428. *Id.* at 154.

429. *Id.*

by their continental counterparts.[430] Many courts also offer separate washrooms and elevators for judges.[431] U.S. press reports discuss judges by name and judges sign their name to reasoned opinions in important cases.[432] French press reports typically refer instead to the actions of the court.[433] Even important French decisions may look like summary dispositions in common law jurisdictions, with no signature and only a few references to give a sense of why the court decided as it did.[434] The judges are "renter[s]" not "proprietor[s]" of their courtrooms.[435] However, Garapon posits that the very insignificance of continental judges also gives them more independence. They neither create nor are bound by precedent, giving them freedom of movement in the individual case.[436]

These sometimes subtle differences in how adjudicators understand their role may make some procedural differences irreconcilable, they may also shape debates over shared procedures, and result in adjudicators that use harmonized procedure in different ways. Commercial arbitration offers one example. International commercial arbitrators compete in part on the basis of their case management skills,[437] and the definition of desirable case management seems to have changed over time. Arbitration businesses has shifted more towards law firms that have their home base in the United States or the United Kingdom.[438] Common law lawyers seem to have brought expectations for more common law style procedure.[439] Arbitral rules have increased the parties' control over procedure and decreased the discretion left to the arbitrator.[440] Party autonomy is a "norm" of international commercial arbitration adhered to even to the detriment of the tribunal's and the parties' interests.[441] That change is the sort of change one might expect if a common law understanding of judging was becoming more prevalent—in line with Garapon's observation that common law judges are less central to proceedings and parties more central.

### 2. *Independence from whom and to do what*

Part II.A above documented broad areas of an agreement over judicial conflicts of interest. This agreement should not obscure the different roles judges still play in different political systems. U.S. commentators, for in-

430. *Id.*
431. *Id.*
432. *Id.* at 154–55.
433. *Id.*
434. *See id.* at 155.
435. *Id.*
436. *Id.* Common law understandings of legal authority are not monolithic. *See, e.g.*, Dan Priel, *Conceptions of Authority and the Anglo-American Common Law Divide*, 65 Am. J. Comp. L. 609 (2017).
437. Garapon, *supra* note 287, at 61.
438. Dezalay & Garth, *supra* note 96, at 37–39.
439. *Id.* at 52–55.
440. *Id.* at 85.
441. *Id.* at 86–87.

stance, have argued that judicial independence and impartiality is about providing a fair process for the parties, so that they maintain control over the elements that will make up the judge's decision.[442] The Court of Justice of the E.U. defined independence as freedom from "external interventions or pressure liable to impair the independent judgment of [tribunal] members and to influence their decisions."[443] This idea seems to go beyond the "lack of personal interest . . . in the outcome" the court also referenced.[444]

Independence can also mean responsiveness to the "right" external interventions. In discussing the socialist legal tradition, Alan Uzelac identified it with an "instrumentalist approach to law."[445] Judges were expected to make decisions supporting prevailing policy.[446] With politics likely to change, for many judges, "the safest way to go forward was to make no decision at all."[447] Inga Markovits notes similar judicial behavior in 1980s East Germany, as well as the state's response, which was to insist on "individual responsibility" for judges.[448] Responsibility here was not what Markovits, an American law professor, would characterize as "independence," but rather responsiveness to legal policy set in Berlin.[449] Judges understood that their perceived independence affected their international reputation and also that it should serve political goals.[450] As Part II.A discussed, independence might take on a similar cast for PRC jurists. Independence from local control might mean that judges advance the goals of a political-legal system by remaining responsive to the priorities of the national Communist Party and not to local bosses' interests.[451] Taisu Zhang and Thomas Ginsburg argue that recent reforms have made the PRC judiciary more professional and that "the Party leadership now seems strongly committed to shoring up the judiciary's institutional independence vis à vis all state and Party entities, but with the major exception of itself."[452] In this sense, recent attempts to increase judicial "accountability" may echo the East German approach.[453]

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442. *See generally* Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367 (2006).

443. *See* Opinion 1/17, *supra* note 231, ¶ 202.

444. *See id.* ¶ 238.

445. Alan Uzelac, *Survival of the Third Legal Tradition?*, *in* COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES, *supra* note 353, at 377, 379–81.

446. *Id.*

447. *Id.* at 383.

448. INGA MARKOVITS, JUSTICE IN LURITZ: EXPERIENCING SOCIALIST LAW IN EAST GERMANY, 170–71, 176 (2010).

449. *Id.* at 176.

450. *Id.* at 178.

451. Yueduan Wang, *The More Authoritarian, the More Judicial Independence? The Paradox of Court Reforms in China and Russia*, 22 U. PA. J. CONST. L. 529, 539 (2020) ("[T]he term 'judicial independence' in this Article focuses more on external interventions from local actors rather than those from the central government.").

452. Zhang & Ginsburg, *supra* note 251, at 336.

453. *See* Wang, *supra* note 94, at 754. Beyond Party dominance, current PRC reforms may also serve a leader's "personal political dominance." Zhang & Ginsburg, *supra* note 251, at 387.

This disconnect occasionally comes to a head in relation to the Hong Kong judiciary. Central government officials have repeatedly taken the position that the judiciary should back the government's political line.[454] Hong Kong judges and senior legal scholars have interpreted the idea that Hong Kong is "executive-led" somewhat differently, requiring deference on the part of judges rather than a change to how they operate within the sphere of their authority.[455] When a central government official stated that judges in Hong Kong were part of the government bureaucracy, implying that they owed the same duties as executive branch civil servants, the local bar issued a statement of its own condemning this view as incompatible with judicial independence.[456] A more recent, and lower stakes, example comes for the IBA conference held in Seoul in September 2019. Geoffrey Ma, the chief justice of Hong Kong, was invited to address a luncheon, giving what much of the room would have considered an anodyne speech highlighting the judiciary's independence.[457] The speech might easily be interpreted as one designed to reassure an audience of commercial lawyers that Hong Kong remained a good jurisdiction in which to litigate and arbitrate disputes despite its recent political turmoil.[458] Some in the audience heard it differently. The AllBright Law Offices, a leading Chinese law firm, was cosponsor of the luncheon. Attendees described how, after Ma's speech, a rep-

454. Greg Torode & James Pomfret, *Hong Kong Judges Battle Beijing Over Rule of Law as Pandemic Chills Protests*, Reuters (Apr. 14, 2020, 7:05 AM), https://www.reuters.com/article/us-hongkong-politics-judiciary-specialre/hong-kong-judges-battle-beijing-over-rule-of-law-as-pandemic-chills-protests-id USKCN21W1C1 [https://perma.cc/9EE3-Y8HC].

455. Rhoda Kwan, *Explainer: Understanding Hong Kong's Debate Around the Separation of Powers and an Executive-led System*, Hong Kong Free Press (Sept. 26, 2020), https://hongkongfp.com/2020/09/26/explainer-understanding-hong-kongs-debate-around-the-separation-of-powers-and-an-executive-led-system [https://perma.cc/GA87-EHDP] (citing Chief Justices Li and Ma and Professors Albert Chen and Johannes Chan of the University of Hong Kong's Faculty of Law).

456. Hong Kong Bar Association, *HKBA White Paper on the Practice of "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region:* Response of the Hong Kong Bar Association, (June 11, 2014) https://www.hkba.org/sites/default/files/White_Paper_Response_eng.pdf [https://perma.cc/2QPQ-AHCU]; *Information Office of the State Council, The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, China Daily (June 10, 2014, 3:55 PM), https://www.chinadaily.com.cn/china/2014-06/10/content_17576281.htm [https://perma.cc/GJ3J-E4LF].

457. Geoffrey Ma, Chief Justice, Hong Kong Court of Final Appeal, Speech at the International Bar Association Annual Conference 2019: Hong Kong and the Rule of Law—Is it Tangible? (Sept. 24, 2019), https://www.hkcfa.hk/filemanager/speech/en/upload/2242/2019.09.24%20-%20International%20Bar%20Association%20Annual%20Conference%202019%20(Seoul,%20Korea)%20(Final).pdf.

458. Ma emphasized a series of propositions that would be uncontroversial in many common law jurisdictions, beginning by stating that "the independence of the judiciary" was a "basic characteristic of the rule of law." *Id.* at paras.4–5. Moreover, Ma said, this independence required that judges be "completely apolitical" and "deal with cases strictly in accordance with law." *Id.* at para. 6. Further emphasizing this similarity, Ma referred to the judicial oath taken by Hong Kong judges to "administer justice without fear or favour," noting that "[t]he judicial oath taken by judges in your own jurisdictions will be to similar effect." *Id.* The "without fear or favour" formulation is indeed common to common law judges. *See, e.g.*, S. Afr. Const., 1996 (as amended by the Constitution of the Republic of South Africa Amendment Act 35 of 1997) sch. 2 § 6 ; Oaths of Office Act, RSNL 1990, c O-2, § 4 (Newfoundland and Labrador); Judicature Act, R.S.N.B. 1973, c J-2, § 3(1) (New Brunswick); The Oaths Act (Jamaica), 1889,§ 9; Promissory Oaths Act 1868 (UK), 31 & 32 Vict, c 27 § 4.

resentative from AllBright rushed to the podium to condemn it.[459] The speech and the reaction it drew represent a rare moment in which the dissensus below a common concept was laid bare.

### 3. *The many meanings of appellate hierarchy*

An emerging animating force in global procedural reforms is the facilitation of an orderly judicial hierarchy. Mirjan Damaška describes a "hierarchical" model of authority marked by "proceedings . . . structured as a succession of stages, unfolding before officials locked in a chain of subordination."[460] Such an idea might seem to be the antithesis of the law market described above, of which party autonomy in choosing law is a central mechanism. One might expect transnational actors to prefer a system that gives them and their clients greater control, with fewer layers of bureaucracy.[461] Some authors tout arbitration as allowing parties a private process to develop a private norm. These authors might wish to resist judicialization, including elements that facilitate oversight and control, because they believe such private norms should be kept separate from the public norms represented by the law in courts.[462] Without that separation, parties will lose flexibility, or the law will be tainted by proceedings that were never meant to serve a law-development purpose, or both.[463]

The contrary interest in control comes from at least two sources. Democrats may be concerned with a generalized version of the counter-majoritarian difficulty: the potential for adjudicators to issue decisions at odds with the majority view on what the law should be and for those decisions to constrain legislative and regulatory options for more representative branches of government.[464] The counter-majoritarian difficulty is present not only in domestic procedure debates, often around public law questions, but also in international economic law.[465] Regimes in which there is a political-legal system, such as present China and the historical Soviet Union, may also support procedures that further hierarchy and control.

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459. Torode & Pomfret, *supra* note 454.

460. Mirjan R. Damaška, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process 56 (1986).

461. Damaška calls this model "coordinate" authority. *Id.* at 65–66.

462. *See* Alan S. Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 Tex. Int'l L.J. 449, 509–14 (2005). For instance, they might oppose efforts to impose rules on arbitrator bias the parties do not want or to publish arbitral awards, both of which might be seen as treating arbitration too much like court. *Id.*

463. I have taken a cautious version of this position in relation to U.S. domestic arbitration, both recognizing the potential need for judicialization and the challenges judicialization poses for common law approaches in U.S. states. *See generally* Alyssa S. King, *Arbitration and the Federal Balance*, 94 Ind. L.J. 1447 (2020).

464. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–23 (1962).

465. On regulatory chill as a result of investment arbitration, *see* Gus Van Harten & Dayna Nadine Scott, *Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada*, 7 J. Int'l Disp. Settlement 92 (2016).

At the UNCITRAL working group on investment arbitration, the E.U. has proposed a new investment court that would have a permanent membership and an appellate body.[466] The E.U. emphasized these issues in proposing an investment court to the UNCITRAL working group, citing: "Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals."[467] The E.U. has also presented this proposal as an outgrowth of procedural rules stating that adjudicators may not have an interest in the outcome of the case.[468] It would give states a greater say in shaping investment law and ground arbitrators' powers in selection processes that allow for democratic input. For the E.U., such a court might answer concerns about regulatory chill—the idea that investment treaties would become an excuse for the E.U. or member-state parliaments not to enact laws and for the various executives not to take actions to protect health, safety and the environment.[469] The Court of Justice of the E.U. recently addressed these fears in its CETA decision, which suggested that the investment court created by that treaty should be understood as having no power to second-guess the E.U. Parliament's policy judgment.[470] Along with control over judicial selection, an appellate process would further this goal by preventing a rogue panel from upsetting the delicate balance envisioned by E.U. judges and negotiators.

These values matter even in international commercial arbitration. Writing in 1965, French arbitration scholar Phillippe Fouchard noted the rise of secretariats in international commercial arbitration. Fouchard stressed the importance of institutional archives, which could serve to establish a "coherent jurisprudence."[471] Publication would make such jurisprudence "coordinated" and "stable."[472] He noted the value of hierarchical control within the ICC, in which the secretariat reviewed awards before they were issued and used selective publication to advance its views on international commercial law.[473] Today, the ICC secretariat continues to review awards.[474]

The PRC has not supported the investment court, but has supported the creation of judicial hierarchy through an appeals mechanism.[475] Such a mechanism would be consistent with rulemakers' preferences for supervision

466. Possible Reform of Investor-State Dispute Settlement, Submission from the European Union and its Member States, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (2019).

467. *Id.* ¶ 6(i).

468. *Id.* ¶ 6(ii)

469. *See* Van Harten & Scott, *supra* note 465, at 96–100, 114–16 (finding truth to this claim in relation to Canada).

470. Opinion 1/17 EU:C:2019:72, ¶ 151.

471. Phillippe Fouchard, L'Arbitrage Commercial International 24 (vol. 2, 1965), 447 (all translations by author).

472. *Id.* at 446.

473. *Id.* at 448.

474. Karton, *supra* note 2, at 67–68.

475. Anthea Roberts & Taylor St. John, *UNCITRAL and ISDS Reform: China's Proposal*, EJIL: Talk! (Aug. 5, 2019), https://www.ejiltalk.org/uncitral-and-isds-reform-chinas-proposal [https://perma.cc/WF3T-68R4].

within a judicial hierarchy and centralized review of foreign-related matters.[476] PRC law gives the country's apex court, the Supreme People's Court, considerable control over the judiciary in general and foreign commercial matters in particular.[477] The concern is not parliamentary, but party and central-government sovereignty.[478] For instance, the China International Commercial Court, which is a chamber of the SPC, is a forum in which to model reforms and approaches to law that are tied to the present government's trade policy and its efforts to have transnational disputes heard in China.[479] Another example is the SPC's supervision system for the enforcement of both foreign arbitral awards and PRC arbitral awards in "foreign-related" cases.[480] The system is meant to ensure consistency in award enforcement and has been valuable as local judicial training has historically been uneven.[481] Such control provides foreigners reassurance that their cases will be subject to scrutiny from well-trained judges, as local courts are of uneven quality. It also ensures a measure of central control.

An approach similar to the PRC's is also present historically. The Soviet Union and its satellite states also promoted the judicialization of arbitral institutions.[482] Fouchard observed that Eastern European arbitration centers were far more judicialized, and it was there that one would "speak openly of 'arbitral jurisprudence.'"[483] Arbitrators for the Czechoslovakian Chamber of Commerce could check with a directorial committee before issuing awards.[484] In the Hungarian Chamber of Commerce, a plenary committee met regularly to resolve inconsistencies between awards issued by different chambers and resolve questions about prior legal rulings. Fouchard wrote that this process happens with "express or tacit consent of the parties," perhaps a nod to a common law commercial norm of party control.[485] The results of these deliberations were applied as "general principles" in future

476. Zhang & Ginsburg, *supra* note 251, at 329; Susan Finder, *Supreme People's Court's New Policy Document on Opening to the Outside World*, SUPREME PEOPLE'S CT. MONITOR (Oct. 8, 2020), https://supremepeoplescourtmonitor.com/2020/10/09/supreme-peoples-courts-new-policy-document-on-opening-to-the-outside-world [https://perma.cc/JNN4-3YQG].

477. Last year's Central Inspection Group report faulted the SPC for insufficient attention to political ideology. Susan Finder, *Central Inspection Group Gives Feedback to the Supreme People's Court (2020 Edition)*, SUPREME PEOPLE'S CT. MONITOR (Jan. 12, 2020), https://supremepeoplescourtmonitor.com/2020/01/12/central-inspection-group-gives-feedback-to-the-supreme-peoples-court-2020-edition [https://perma.cc/CQG7-5AJJ].

478. Zhang & Ginsburg, *supra* note 251, at 370–71.

479. Susan Finder, *Supreme People's Court Updates Its Belt and Road Policies*, SUPREME PEOPLE'S CT. MONITOR (Jan. 28, 2020), https://supremepeoplescourtmonitor.com/2020/01/28/supreme-peoples-court-updates-its-belt-road-policies [https://perma.cc/VG5V-SZ8V].

480. Zhong Jianhua & Yu Guanghua, *Establishing the Truth from Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 J. TRANSNAT'L L. & POL'Y 393, 431, 434–35 (2004).

481. CLARISSE VON WUNSCHHEIM, ENFORCEMENT OF COMMERCIAL ARBITRAL AWARDS IN CHINA 169–70 (2010).

482. *See* Uzelac, *supra* note 445, at 380.

483. FOUCHARD, *supra* note 471, at 629.

484. *Id.* at 449.

485. *Id.* at 450.

arbitrations.[486] This arrangement was a "remarkable" one that "recall[ed] the organization, in France, of the Court of Cassation."[487] It was "destined precisely to avoid contradictory jurisprudence."[488] Eastern European institutions also far surpassed their Western European counterparts in publishing their awards.[489] These awards, Fouchard wrote, "are the frequent object of commentaries, notes, and accounts on the part of jurists attached to the [arbitral] institutions or evenly completely independent [of them]."[490]

One can give a law market spin to this account. The historical version might go something like this: Western businesses going to Eastern Europe, perhaps especially those familiar with continental justice systems, might be said to prefer order and regularity in arbitral awards. With Soviet law at least nominally hostile to capitalism, commercial arbitration might have been an island of bourgeois, capitalist law, tailored to meet Western expectations.[491] Lon Fuller wrote that "Soviet lawyers seem genuinely eager that" a new arbitral tribunal "shall establish a reputation for impartiality and fairness."[492] However, one might wonder whether the directorial committee and plenary chamber functioned more like the present-day PRC judicial committee, which is responsible for making sure that court decisions are both technically and ideologically consistent.[493]

Like members of the ICC secretariat, members of PRC-based secretariats may genuinely believe that supervision contributes to quality and consistency and that foreign commercial parties ought to desire such things. However, the underlying legal traditions that support a hierarchical approach remain distinct. Put extremely broadly, French jurists have developed accounts according to which consistency is important because of the judge's role in relation to representative institutions and the importance of consistent legal rules to facilitating individual liberty and use of markets.[494] Soviet and other jurists in the Marxist-Leninist tradition have developed accounts in which consistent rulings are important because they allow the Party-State

486. *Id.*
487. *Id.*
488. *Id.*
489. *Id.* at 455.
490. *Id.*
491. Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 379 (1978).
492. *Id.*
493. Susan Finder, *Why is Assigning Blame for Wrongful Convictions in China so Difficult?*, SUPREME PEOPLE'S CT. MONITOR (Feb. 22, 2016), https://supremepeoplescourtmonitor.com/2016/02/22/why-is-assigning-responsibility-for-wrongful-convictions-in-china-so-difficult [https://perma.cc/T8BL-TTDK]; Susan Finder, *Where is the Supreme People's Court Headed with Judicial Committee Reform?* SUPREME PEOPLE'S CT. MONITOR (Dec. 21, 2014), https://supremepeoplescourtmonitor.com/2014/12/21/where-is-the-supreme-peoples-court-headed-with-judicial-committee-reform [https://perma.cc/TP43-9ZH5].
494. *See* DAMAŠKA, *supra* note 460, at 33–36, 48–49. *See also* Olivier Dord, *La QPC et le Parlement : une bienveillance réciproque*, [The QPC and the Parliament: a Reciprocal Benevolence], 38 LES NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL 23 (2013) (discussing the relationship between the Constitutional council and Parliament); Dominique Rousseau, *Juger, une profession et une acte citoyen*, [Judging, a Profession and the Act of a Citizen] 323 REVUE PROJET 17 (2011) (describing the judicial function).

to guide legal development so that all sectors of society maintain the correct ideological line.[495] One can thus make an argument for supervision of courts and for a judicial hierarchy in which appeals courts supervise lower ones from both a democratic and an authoritarian perspective.

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Globalization has limits. The similar language and the focus on the needs of "the market" that often accompanies the adoption of global civil procedure norms can sometimes obscure these limits. However, common law judges still have a social position different from judges in other systems. Different expectations will affect how a common law adjudicator wields power, even under the same rules, and in what they may expect of the lawyers before them. Judicial independence turns out to mean different things in different places and the ability to appeal serves different purposes. Global civil procedure is also not a vehicle for deeper harmonization on issues such as democracy, or even liberalism (although market logics have a neoliberal ring). Questions of civil justice administration cut across regime type. Proceduralists who share a commitment to democracy may still disagree about what that commitment means for procedure—should we encourage bottom-up change through creative litigation strategies and active courts, or should we prioritize stability and fidelity to the will of the people expressed in legislation? That debate does not take place on the same ideological terrain as those of colleagues who ask how allowing or discouraging litigation, or reforming their judiciaries' appellate structure, will further the goal of central party control. A full accounting of the phenomenon of global civil procedure must note both the numerous similarities and the few, but deep, divergences in how we think about similar rules. The divergences do not negate the similarities—these ideas are being used, on a global scale, to shape procedural developments. However, proceduralists ought to work with an awareness of where seeming agreement drops off into disagreements due to differences in political ideology.

## Conclusion

This Article has sought to introduce global civil procedure—norms for civil proceedings that have spread across different legal systems and between private and public adjudication, primarily through disputes related to transnational business. It has discussed some of the actors driving the creation of global civil procedure and the scenarios in which it is used. Decisionmakers in both up-and-coming peripheral jurisdictions and major litigation centers are solicitous of the perceived needs of international litigants. Global civil

495. Zhang & Ginsburg, *supra* note 251, at 370–71, 373.

procedure is likely a vehicle for spreading procedure that is familiar to these litigants, but not necessarily procedure that is otherwise desirable.

Through the examples of tribunal independence, discovery, and aggregation, I have sought to explore different ways in which these norms develop and demonstrate ways in which a global civil procedure framing can be useful in thinking through these issues. The examples in this Article are far from the only ones, and far more work remains to be done on what these rules are and where one should draw the boundaries. One might, for instance, argue that aggregation cannot fit with this scheme when there are so many different ways of accomplishing it. Moreover, this Article was common law-heavy in its examples. Jurists from other traditions will likely have other ideas. One might consider the right to appeal, the end of the civil jury and the related blurring of the lines between trial and pretrial, as well as the use of specialized judges.[496] Might global civil procedure norms have now developed around such classic civil law concepts as the equality of arms?[497] The idea's inclusion in such instruments as the UNCITRAL model arbitration law suggests it may be.[498]

Much more work remains to be done as well on the ideology of global civil procedure. These debates happen within systems as well as between them.[499] The study of global civil procedure promises a fuller understanding of their context and stakes. In choosing our cases, we are choosing how the relationship between the public, the courts, and private adjudication will develop, because certain types of adjudicators will become suited to certain types of litigants and processes. Procedure thus expresses values related to the role of courts and helps redefine that role and those values. As globalization continues to bring demand for procedural change, these values must guide lawyers and law reformers in deciding when, and how, to hold the line.

496. *See generally* John Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985) (arguing that U.S. courts could improve their management of cases by adopting some procedures from German courts).

497. Kurkela & Turunen, *supra* note 26, at 186.

498. *Id.* at 187.

499. *See generally* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 Okla. L. Rev. 319 (2008).