

ARBITRATING PUBLIC POLICY: WHY THE BUCK SHOULD NOT STOP AT NATIONAL COURTS

by
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Alternative Dispute Resolution is a mechanism by which states outsource their distribution-of-justice function. A brief look at recent American political tradition shows how alternative dispute resolution gained momentum at the time the political paradigm shifted towards “making the government smaller.” Yet, national courts still have the final say in regard to enforcement of arbitral awards, mainly through the doctrine of public policy. Furthermore, arbitral bodies are overly cautious not to step on aspects of a case with strong public law implications. This Article begins by investigating the underpinning political philosophy of arbitration. I argue—in Part I—that arbitration is a form of political philosophy despite the current narration, which observes it as simple alternative techniques to courts’ procedures. In Part II, I posit that the idea of arbitration challenges the prevailing paradigm of modern statehood, a contention which places it in a structural tension with not only the judicial system but the very notion of modern statehood. Subsequently, by looking at various jurisdictions, this Article analyzes and categorizes the various instances in which arbitral awards are set aside due to violation of public policy under four paradigms. I posit that the holistic approach of courts to public policy produces inefficient and contradictory results. I conclude that arbitral bodies should begin to assess public policy (at least in its public interest sense) through balancing. Following the U.S. Supreme Court case Mitsubishi v. Soler, it is sufficient for an arbitral body to pay due consideration to public policy matters without any need for courts to reconsider the case on merits at the enforcement stage.

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The Dispute Resolution Act was a hollow shell; it was, therefore, an appropriate symbol of the futile effort to establish justice without law, by law.¹

INTRODUCTION

Arbitration, and in general alternative dispute resolution (ADR),² has an inherent unresolved tension. The tension does not come from the

¹ JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 137 (1983).

² ADR refers to negotiation, conciliation, mediation, fact-finding, mini-trial, use of an ombudsman, and arbitration.

Negotiation refers to a non-binding process in which parties with different preferences for the outcome try to reach a joint solution. Negotiation came under U.S. Supreme Court scrutiny in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

Conciliation refers to a non-binding process whereby parties resort to a third party for assistance in reaching an amicable settlement of their disputes. In the United States, courts have confronted it in the context of required statutory conciliation, for example, in family law. See, e.g., *In re Marriage of Penney*, 203 N.W.2d 380, 381–82 (Iowa 1973). The United Nations Commission on International Trade Law has also published a model law for international commercial conciliation: UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE, U.N. Sales No. E.05.V.4 (2002).

Mediation is a procedure “based on the voluntary participation of the parties, in

fact that arbitration offers a different procedure than the parliament-approved one. Nor does it emanate from the fact that arbitrators are not judges. The tension is more profound: Arbitration poses a threat to a crucial aspect of modern statehood, the *distribution of justice*. ADR, advertently or inadvertently, wrests this judiciary function out of the hands of the states.

In the 20th century, and especially following World War II in western countries, states gradually let go of services of which they were once the sole providers. From postal services to military operations, states relinquished functions that were deemed untouchable at previous stages of history.³ Yet, the distribution of justice has remained mainly within states' authority, even in developed countries. After all, the judiciary function, along with executive and legislative functions, was carved into the edifice of modern statehood by its founding fathers, most notably Montesquieu.

which an intermediary (or multiple intermediaries) with no adjudicatory powers systematically facilitate(s) communication between the parties with the aim of enabling the parties to themselves take responsibility for resolving their dispute.” Klaus J. Hopt & Felix Steffek, *Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues*, in *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 3, 11 (Klaus J. Hopt & Felix Steffek eds., 2013).

Fact-finding is an ADR process whereby “a neutral arbitrator draws on information furnished by the parties and makes specific findings with respect to the outstanding factual issues in controversy.” Fact-finding is a common form of ADR in contract disputes of large-scale projects involving complex facts. DON ARNAVAS, *ALTERNATIVE DISPUTE RESOLUTION FOR GOVERNMENT CONTRACTS* 42 (2004).

Mini-trial is a hybrid and non-binding form of ADR procedure in which several elements of other forms of ADR are combined in order to help the disputants come to a joint solution. It borrows various methods from adjudication, arbitration, mediation, and negotiation and has a trial-like proceeding. Mini-trial is best fitted for complex cases involving mixed factual and legal issues. The advantages of mini-trials are: first, they “curtail much of the discovery process,” and second, they “involve high-level business persons early in the dispute resolution process.” It also promises to be cheaper than trial. JOHN W. COOLEY WITH STEVEN LUBET, *ARBITRATION ADVOCACY* 256 (2d ed. 2003).

Resolution through an ombudsman is a form of specialized ADR which deals with “conflicts between the government administration and members of the public.” LINDA C. REIF, *THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM* 16 (2004).

Arbitration is a binding form of ADR in which a neutral person—or a panel—adjudicates between disputants without following the parliament-approved rules of procedure. Arbitration is probably the most common form of ADR.

³ See *HANDBOOK OF WORLDWIDE POSTAL REFORM* (Michael A. Crew et al. eds, 2008); P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003). Other examples of privatization include municipal services, prisons, and family law. See generally Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 *DUQ. L. REV.* 41 (1995); Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 *UCLA L. REV.* 911 (1988); Jana B. Singer, *The Privatization of Family Law*, 1992 *WIS. L. REV.* 1443.

The very notion of modern statehood hinges on this centralization of justice delivery. Furthermore, domestic balance of power has become inextricably linked to a top-down judiciary system. One could hardly imagine a state with a legislative and executive branch without a judiciary to enforce the laws. It is through the judiciary system that the ultimate bureaucracy of states in the Weberian sense shows its teeth.

Although it seems impossible today, history shows us that, for the most part, the judicial function was decentralized. For instance, a brief look at Judaic or Islamic tradition reveals that disputants could select their jurists and would abide by their decisions. The binding nature of the decisions would not come from a centralized judiciary system with sanctioning power. Instead, parties would accept the outcome because they revered the jurist.⁴ The same is true for the decentralized ecclesiastical law, which was enforced by bishops within their dioceses.⁵

Arbitration, and other forms of ADR, is structurally and inherently in constant tension with the notion of modern statehood. Unlike many other functions of states, which, throughout history, have been privatized, justice delivery is embedded in the nature of the states as we know them today. Modern courts' skepticism towards ADR is best encapsulated in the Edward Coke dictum in *Vynior's Case*: "Though one may be bound to stand to the arbitrament yet he may countermand the arbitrator . . . as a man cannot by his own act make such an authority power or warrant not countermandable which by law and its own proper nature is conterminable."⁶

⁴ For instance, in the Islamic tradition, for a long time jurists resisted the centralization of the judiciary. See Jonathan E. Brockopp, *The Essential Shari'ah: Teaching Islamic Law in the Religious Studies Classroom*, in *TEACHING ISLAM* 77, 81 (Brannon M. Wheeler ed., 2003) ("It seems that the very methods of collecting hadith from many individual sources promoted a view of legal authority which enshrined decentralization. This diffusion of authority among a broad base of individual jurists [fuqahā'] made the work of Umayyad and Abbasid caliphs difficult, as they tried to establish a codified form of the law."). Some authors emphasize that even though the Islamic jurists were independent from government, they were mindful of the dynamics of governance and were not immune from the socio-political demands and realities. See KHALED ABOU EL FADL, *REBELLION AND VIOLENCE IN ISLAMIC LAW* 322–23 (2001); ANVER M. EMON, *RELIGIOUS PLURALISM AND ISLAMIC LAW: DHIMMIS AND OTHERS IN THE EMPIRE OF LAW* 183–86 (2012). It was later in the history of Islamic law that, following Modern Europe, the Islamic law system became centralized and bureaucratized. WAEL B. HALLAQ, *AN INTRODUCTION TO ISLAMIC LAW* 112–13 (reprt. 2010).

⁵ See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 116 (1983). Berman believes that the decentralization was "closely related to the decentralized character of the political life of the church. As a rule, bishops were more under the authority of emperors, kings, and leading lords than of popes." *Id.*

⁶ Bruce L. Benson, *How to Secede in Business Without Really Leaving: Evidence of the Substitution of Arbitration for Litigation*, in *SECESSION, STATE & LIBERTY* 243, 257 (David

This Article aims to debunk the widely held belief that arbitration cannot decide matters related to public policy. In a nutshell, I argue that ADR exists as a form of political philosophy despite the current narrative, which frames it as a simple alternative technique to courts' procedures. I then argue that the idea of ADR challenges the prevailing paradigm of modern statehood—a contention which places the idea of ADR in a structural tension with not only the judicial system but also the very notion of modern statehood. This simple, yet widely neglected approach to the idea of ADR leads to crucial theoretical, as well as practical, ramifications. The most important corollary issue of this structural tension is the problem of public policy, which lies at the core of this Article.

In Part I, this Article lays out three theoretical discourses on ADR in order to explicate the underlying urge to arbitrate. It shows that contrary to the prevailing paradigms, the impulse to arbitrate emerges from an often-neglected, resistance-based paradigm. In Part II, I identify four approaches of national courts towards public policy exceptions worldwide. In Part III, I lay out a fresh look at the problem by dissecting the various strands of public policy, employing the *Mitsubishi* case of the U.S. Supreme Court as an example.⁷ This Article argues that not only can arbitral tribunals adjudicate a certain aspect of public policy, which I call the public interest strand, but courts should also enforce the award as long as parties litigate the public interest matter effectively.

I. WHY ARBITRATE: PHILOSOPHY OF ARBITRATION

The ADR literature is replete with suggestions as to its techniques, strategies, and negotiation styles, occasionally coupled with the game-theory rationalization of the system. I posit that the current approach reduces the ADR system to a procedural alternative to the states' court systems. Similar to experts on civil procedure, the ADR specialists aim to foster a discipline concentrated on the minutiae of the various techniques of the alternative procedure. This new discipline has been widely embraced by the business community as well as academia. The backlog of court cases, along with the business community's need for an alternative method, paved the way for the rapid growth of this discipline.⁸

Gordon ed., 1998) (quoting *Vynior's Case*, 4 Eng. Rep. 302 (1609)). The court applied the agency theory to arbitration clauses and decided that a party could revoke the arbitration clause, upon paying for damages if proven. Academics criticized this approach to arbitration. See Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 599–600 (1928).

⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁸ In the United States, the ADR system has undergone three phases. In the first phase, during the 1960s, local justice centers and community-based alternatives emerged. In the second phase (late 1970s) ADR came as a help to the “so-called medical malpractice crisis” through arbitration and screening panels. The last phase was the commercialization of ADR, in which ADR gradually covered a wide variety of

Notwithstanding the increasing growth of the ADR system, one fundamental question has been widely neglected: What is “alternative” about alternative dispute resolution? Following the current literature, should we simply stop at the proposition that it only means alternative procedures and techniques? In pursuit of answering this vexing yet important question, we need to ask ourselves about the underlying reasons that drive people to resort to ADR (and arbitration specifically) versus litigating in court. This Part endeavors to venture into answering these two complex questions. The general theoretical framework of ADR and the idea that arbitration directly shapes the theory of public policy in arbitration come later in this Article.

In short, I argue that the “alternative” feature of ADR poses a threat to the monopoly of the justice distribution of modern states. Therefore, it is structurally at friction with the judiciary system. This new approach to ADR has several implications, one of which is to explicate the erratic reaction of states to ADR worldwide. More important and relevant to our discussion, it guides us as to the best paradigm of the thorny issue of public policy in ADR. This Part challenges the prevalent explanation of the ADR system via liberalism- and rationalism-based theories. It concludes that ADR has an element of resistance, which subsists the system and incentivizes the disputants to continue utilizing it.

A. *Structural Tension*

ADR claims to share an area that modern states conquered a few centuries ago. Centralization of the judiciary system had a crucial impact on creating modern statehood. By some accounts, modern statehood emerged out of the “commitment of regents (republican or monarchical)” in Medieval Europe to provide judicial service.⁹ This process resulted in the homogenization of cross-border statutory codes, such as the standardization of evidence and punishments in penal cases. This came at the expense of private judicial bodies including seigniorial courts and manor courts.¹⁰

The 12th and 13th centuries witnessed the centralization of judicial service through the papal revolution as well as the development of bodies of royal laws.¹¹ Expansion of royal laws marked the consolidation of the

disputes. Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 3–4.

⁹ Chris Thornhill, *Public Law and the Emergence of the Political*, in *AFTER PUBLIC LAW* 25, 30 (Cormac Mac Amhlaigh et al. eds., 2013).

¹⁰ *Id.* at 30–31.

¹¹ BERMAN, *supra* note 5, at 535–36. Various kingdoms in Europe established bodies of royal law with a similar approach as Roman law and canon law, consisting of an interlocking set of rules and institutions. *Id.*

legislative function. In the papal institution, Gregory VII¹² for the first time established the authority of the pope alone to create laws, which was followed by royal institutions in every kingdom of the West to enjoy the power to legislate.¹³ As a result of the centralized legislative body, a professional group of lawyers and judges as well as hierarchical courts with a uniform procedure emerged.¹⁴ Gradually, the judiciary became centralized and top-down.¹⁵

Systemization coupled with rationalization of law in Europe resulted in the creation of a new form of governance. Max Weber believed that no other societies in the world underwent such a transformation, establishing the bedrock of today's bureaucracy as well as the capitalist structure.¹⁶ Pursuant to Weber, the rationality-based approach to law is a precondition to our modern political life and statehood. Bureaucracy—as a central component of modern statehood—cannot be achieved without a formal, rational, as well as systematized law.¹⁷ More importantly, formal

¹² According to Berman, after Gregory VII the church system turned into an institution which can be seen as a predecessor to modern statehood: “After Gregory VII, however, the church took on most of the distinctive characteristics of the modern state. It claimed to be an independent, hierarchical, public authority. Its head, the pope, had the right to legislate, and in fact Pope Gregory’s successors issued a steady stream of new laws, sometimes by their own authority, sometimes with the aid of church councils summoned by them.” *Id.* at 113.

¹³ *Id.* at 535. (“As Gregory VII in 1075 declared for the first time the power of the pope alone ‘to make new laws’ (*condere novas leges*), so thereafter in every kingdom of the West the monarch came to be a ‘maker of laws’ (*conditor legum*, as he was called in Norman Sicily in the mid-twelfth century).”).

¹⁴ *Id.* at 116.

¹⁵ BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 46–77 (1990). For a law-and-economics criticism of the top-down judiciary approach, see Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT’L REV. L. & ECON. 215, 227 (1994) (arguing that law should evolve from social norms that emerge out of appropriate incentive structures, rather than from judges who make laws in light of public policy).

¹⁶ Weber seemed to link the factor of formal and rational administration of law to the calculability of economic activity. In other words, for him, rationalization of law was a prerequisite to a profit-making economy and capitalism. However, he was uneasy about the English common law, as it seemingly did not experience a robust systemization similar to other Western legal systems. See ANTHONY T. KRONMAN, *MAX WEBER* 120–22 (1983).

¹⁷ We should note that the approach of Weber to the concept of law is rather simplistic and similar to the “command theory” of Austin. In his seminal work, *ECONOMY AND SOCIETY*, Weber distinguishes between convention and law and defines law as follows: “An order will be called . . . law if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a staff of people in order to bring about compliance or avenge violation.” MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 34 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978). For a critique of Weber’s approach to the notion of law, see David M. Trubek, *Max Weber on Law and the Rise of Capitalism*,

rationalization of law fosters a form of legitimization for modern statehood, which allows it to legitimately exert domination over its citizens. This internal form of legitimization is in contrast with traditional and charismatic forms of legitimization, as with externally shaped forms of authority. According to Weber, there are three pure types of legitimate domination:

1. Rational grounds—resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority).
2. Traditional grounds—resting on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional authority); or finally,
3. Charismatic grounds—resting on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him (charismatic authority).¹⁸

Hence, modern statehood and governance is inextricably tied with a centralized top-down judiciary. As explained, this new form of domination has been shaped by formalization and rationalization of law.

The ADR system challenges the modern paradigm of justice distribution on multiple grounds. First, ADR eschews the formal component of the legal-rational ground in the Weberian sense. One of the main promises of ADR is to emancipate the parties from the entangling procedural elements of judicial bodies. This reduces the control of states, exercised routinely through formal procedures. Second, the idea of ADR partially rests on charismatic or traditional forms of legitimate domination—borrowing Weber's terminology. All forms of ADR to some degree—with mediation being the highest—hinge on the “the exceptional sanctity, heroism or exemplary character of an individual person”¹⁹ and his or her normative stance. To a lesser extent, most notably in the concept of customary international law at the international level, ADR still values “immemorial traditions and the legitimacy of those exercising authority under them” more than other formal methods of dispute resolution.²⁰ Lastly and more importantly, the idea of ADR runs counter to the centralized as well as top-down judicial approaches of modern statehood. ADR shapes a paradigm in which people can participate in shaping the notion of justice rather than being mere passive subjects of it. It also resembles the decentralized judiciary mechanism prior to the appearance of the modern “leviathan.”²¹

1972 WIS. L. REV. 720, 725–27 (1972).

¹⁸ WEBER, *supra* note 17, at 215; *see also* Trubek, *supra* note 17, at 732.

¹⁹ *See* WEBER, *supra* note 17, at 215.

²⁰ *Id.*

²¹ Hobbes employs the metaphor of the Leviathan, a biblical creature with

This Part identifies three underpinning paradigms of ADR with a focus on arbitration in order to discern the best-fitting approach in light of the structural tension described above. It concludes that the resistance-based paradigm, although widely neglected, aptly describes the “alternative” feature of ADR and paves the way for a fresh look at a variety of crucial issues, including the public policy exception, as will be discussed in subsequent Parts.

B. *Consent-Based*

The consent-based paradigm remains the most prevailing narrative of ADR. It places the emphasis on the “consent” to ADR by parties and their “freedom” to resort to alternative methods for resolving their disputes.²² It is directly linked to a liberal philosophy, asserting that the idea of ADR is a product of parties’ freedom.²³ Parties to a contract could adjust the contractual terms to their needs as long as there is no violation of any mandatory rules. Similarly, they enjoy the freedom to select the governing applicable law. By the same token, they can opt to select a jurisdiction that is competent to hear their potential disputes. The same “philosophy” should apply if instead of choosing a court, they insert an ADR/arbitration clause. Their “freedom” to opt out of the court system is seemingly and plausibly linked to a “liberal” paradigm, stating that parties are free to choose their dispute resolution mechanism as much as they are free to select contractual terms. This view is rampant in the existing literature.²⁴

“greater stature and strength than the natural [man],” to describe modern sovereignty. THOMAS HOBBS, *LEVIATHAN* 7 (1651). The tension is notable in some earlier courts’ decisions. In *Tobey v. County of Bristol*, the court clearly doubted the qualification of arbitration to administer justice: “[A] court of equity ought not to compel a party to submit the decision of his rights to a tribunal, which confessedly, does not possess full, adequate, and complete means, within itself, to investigate the merits of the case, and to administer justice.” 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845).

²² ANDREA MARCO STEINGRUBER, *CONSENT IN INTERNATIONAL ARBITRATION* 12 (2012) (stating that the principal characteristic of arbitration is that it is chosen by parties).

²³ JAN PAULSSON, *THE IDEA OF ARBITRATION* 23 (2013).

²⁴ For instance, most treatises on international commercial arbitration start off their analysis by laying the grounds of arbitration on consent and contract as well as freedom of parties. See, e.g., NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 15 (5th ed. 2009) (“The foundation stone of modern international arbitration is (and remains) an agreement by the parties to submit to arbitration any disputes or differences between them.” (footnote omitted)); I GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 90 (2009) (“International commercial arbitration is a fundamentally consensual means of dispute resolution: unless the parties have agreed to arbitrate, there can be no valid arbitral determination of their rights.”); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 29–30 (Emmanuel Gaillard & John Savage eds., 1999)

The consensual approach to ADR became fortified as the disappointment with court adjudication surged in the second half of the 20th century. The dichotomy between the consensual proceedings versus the adversarial adjudication shaped the prevailing narrative of envisaging the judiciary system. Ultimately, the two enterprises, i.e., ADR and the courts, reached a similar qualitative theme: “[B]oth assume that dispositions based upon the consent of the parties are somehow better than those achieved by adjudication.”²⁵ The decline of faith in adjudication, deriving from a multitude of reasons,²⁶ resulted in the rather widespread acceptance of the consensual approach.²⁷

This paradigm depicts ADR as a technique, shaped by the consent of parties.²⁸ It is “alternative” in the sense that the procedure deviates from the parliament-approved one. Parties could mold the procedure by their consensual agreement as long as they did not violate any mandatory rules of the procedure.²⁹ Under this paradigm, the structural tension, as described above, translates into the friction between consent of parties and public policy of the state. Alternative dispute settlement becomes suspect when dealing with public law and values, a concern that justifies limiting its scope.³⁰ Parties cannot derogate from fundamental norms of the state

(stating that arbitration is contractual by its nature); JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 4 (2003) (“The principal characteristic of arbitration is that it is chosen by the parties. However fulsome or simple the arbitration agreement, the parties have ultimate control of *their* dispute resolution system.”).

²⁵ Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 537 (1986).

²⁶ Some of the reasons are: 1) the increased caseload; 2) the upsurge of disputes between powerful and non-privileged citizens; and, 3) the appearance of complex lawsuits. *Id.* at 525–26. For a criticism of this view on adjudication, see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 41 (1993).

²⁷ Resnik, *supra* note 25, at 538.

²⁸ See, e.g., *Types of ADR Techniques*, U.S. EEOC, <http://eoc.gov/federal/adr/typesofadr.cfm>; see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378–80 (1982) (explaining and critiquing the ever-increasing use of various methods, including ADR, by trial judges to manage their case load).

²⁹ Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 42 (1996) (arguing that the adversarial system cannot be changed by simply modifying procedures, but through true reform resulting from creating an opposite system to courts, e.g., through ADR).

³⁰ See Harry T. Edwards, *Commentary, Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986) (“[I]f ADR is extended to resolve difficult issues of constitutional or public law—making use of nonlegal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties—there is real reason for concern.”); Owen M. Fiss, *Comment, Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (stating that unlike “strangers chosen by parties” in the ADR methods, judges as public officials have the task “not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the

and society—so-called “public policy”—by resorting to the ADR mechanism.³¹

Hence, following this paradigm, institutionalization of alternate methods of settling disputes serves as the most efficient way to resolve the above-mentioned tension.³² This way parties’ consent is easily channeled in preexisting institutions specialized in the ADR techniques while governments can conveniently monitor the practice of ADR in order to assure its compliance with mandatory norms.³³ In summary, this paradigm

Constitution and statutes: to interpret those values and to bring reality in accord with them”); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2637 (1995) (“In adjudication, the law—the residue of political action—receives elaboration and reasoned reconsideration in the light of subsequent cases and controversies that have revealed its weak points. This process is as much a part of political vitality as free elections and legislative debate.”); see also Resnik, *supra* note 25, at 380–86 (arguing that a managerial approach to adjudication has resulted in increased use of ADR which in turn has shifted the judiciary system from the adversarial model and justice endorsed by the U.S. Constitution).

³¹ Followed by this view is the fret over the distinction between private and public disputes. Pursuant to this approach, ADR is merely equipped to tackle private claims. See Edwards, *supra* note 30, at 671–72. This debate stretches today to international arbitration as well. See generally Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT’L L. 367 (2014). The most important international instrument specifying the public policy exception, the so-called “New York Convention,” is Section V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. We will focus on this provision in the next section of this Article.

³² In the existing literature, this phenomenon sometimes is referred to as “mandatory court-annexed ADR,” “nonconsensual ADR,” or “institutionalization” of ADR. See G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34 (1991); John R. Allison, *The Context, Properties, and Constitutionality of Nonconsensual Arbitration: A Study of Four Systems*, 1990 J. DISP. RESOL. 1; Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PA. ST. L. REV. 929 (2004). I prefer the term institutionalization because, *sub silentio*, it includes other terms as well.

³³ Several authors have warned about the consequences of institutionalizing the ADR mechanism. See, e.g., Yarn, *supra* note 32, at 1012 (recounting the story of how arbitration shifted from a conciliatory process to an adjudicative (adversarial) process by the 20th century “through legislation, commercial institutionalization, judicial decisions, and the shifting dispute processing priorities of a changing society”); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 15–17 (1991) (stating that ADR was taken over by the legal system instead of making new changes); Katz, *supra* note 8, at 41 (“Compulsory ADR can evolve quickly into intense pressure to settle—or at least to negotiate. Yet both of these phenomena are highly questionable in terms of judicial ethics and basic litigant rights.”); see also Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 63–66 (2012); Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 874 (2012); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 23–26 (2001).

leads to the institutionalization of ADR, which purportedly strikes the balance between “consent” and “public policy” and reaches a stable compromise. In some instances, some scholars even suggest that arbitration should not be treated as a quasi-judicial dispute resolution, but the award should be treated as “a contract term agreed upon ex ante.”³⁴

The problems with the consent-based explanation of ADR are manifold: it is simplistic, it has led to the government-annexed ADR system, and, finally, it does not offer satisfactory responses to pervasive problems of ADR. This narrative does not satisfactorily explain the reason parties select various methods of ADR in the first place. Disputants do not select an alternative method because they are free to do so. The liberty to opt out of the court system is a necessary condition, yet not a sufficient one. This paradigm seems to furnish a normative stance—i.e., touting ADR because it advances liberty and freedom—rather than an explanation. However, as elaborated earlier, this normative stance has led to the institutionalization of ADR through boilerplates as well as government-annexed programs.³⁵ Since the focal point has been placed on freedom, several schemes have been devised to obtain consent from disputants, either from the commercial community or congested courts. In the long term, therefore, the alternative method becomes part of the existing “litigation game,” rendering it a mainstream method of dispute resolution.³⁶

Additionally, the consent-based paradigm does not offer satisfactory solutions to the long-lasting problems associated with ADR. Most importantly, in relation to the topic of this Article, it does not offer any satisfactory explanation regarding the problem of public policy. It is widely believed that the ADR mechanism cannot adjudicate matters fundamental to states and public interest, giving courts exclusive jurisdiction over these issues. Hence, ADR methods are not equipped to investigate and should not enter into matters related to public policy. ADR does not go beyond alternative techniques, making it an unsuitable venue for addressing vital interests of state and society.

³⁴ Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 504 (2009). Paul Kirgis artfully explains the contract-based model of arbitration in one of his articles: “Arbitration may also be understood as a species of contract. In the contractarian model, the arbitrator is not an adjudicator tasked with finding facts and applying generally applicable legal rules. The arbitrator is instead the parties’ agent, tasked with interpreting their agreement once they reach an impasse.” Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 OR. L. REV. 1, 29 (2006).

³⁵ For a glance at federal court-annexed ADR programs, see *Federal Court-Annexed ADR Programs-at-a-Glance*, U.S. DEPT. OF JUSTICE (June 18, 2014), <http://www.justice.gov/olp/adr/annexedkant.htm>.

³⁶ Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 264–65 (1995).

C. Interest-Based

Interest-based theory probably offers the most convincing apolitical and ahistorical justification for the ADR system. It regards justice as a service and courts as private vendors offering this service. Similar to other markets, if courts fail to meet the market needs, participants will resort to other providers of justice.³⁷ This approach is not typically discussed in the literature on arbitration, yet it serves as an important ground for the literature on bargaining, negotiation, and settlement.³⁸ As explained above, the main focus of this Article is on arbitration vis-à-vis other forms of ADR. Despite its importance, little attention has been paid to the game theory in arbitration. This Section aims to paint its main premises with a broad brush. A thorough discussion of the game theory of arbitration requires a separate article.

The interest-based approach views ADR as a profit-maximizing method. The judicial system cannot offer a wide variety of options and it remains largely a zero-sum game. ADR promises to increase parties' choices by creating a non-zero-sum game that brings more options to the

³⁷ William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236–40 (1979) (stating that a court system has two functions—dispute resolution and rule formulation “as a by-product of the dispute-settlement process”—and arguing that alternative methods to the court system cannot deliver the second function as desired and therefore, the court system still offers the best service on the market).

³⁸ For instance, in the context of negotiation see, for example, JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* 34–36 (2d ed. 2011) (illustrating the game theory behind competitive or adversarial negotiation versus cooperative negotiation); Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 342 (depicting the role of a negotiator as someone who is conducting an information game, aiming to obtain much information while disclosing little information); see also MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 67 (1992) (arguing that the negotiator's task is to add value by understating integrative and distributive components of negotiations); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 33 (1986) (arguing that negotiation involves both claiming value—the distributive task—and adding value—the integrative task); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1790–91 (2000) (rejecting the integrative/distributive dichotomy from the negotiation literature on the grounds that all negotiations add value, and suggesting a “zone definition/surplus allocation” dichotomy instead). Relevant literature attempts to answer the underlying reason parties opt for litigation versus settlement while the former is clearly in their best interest. Scholars have proposed that parties opt for litigation because either one or both of them are unable to predict the outcome of litigation or because the bargaining process has failed. See, e.g., William M. Landes, *An Economic Analysis of Courts*, 14 J.L. & ECON. 61, 98–101 (1971) (discussing criminal courts); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417–20 (1973) (discussing administrative agencies); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 296–97 (1973) (discussing labor–management disputes).

table.³⁹ For example, in an intellectual-property dispute, courts are asked to adjudicate whether a copyright or patent has been infringed. Each side either loses or wins the case. However, upon referral to negotiation, it is conceivable that parties carve out a third solution, which goes beyond the dichotomy of infringement/non-infringement. In other words, in the process of negotiation, with the help of a neutral person, parties are asked to leave the adversarial logic of litigation and devise new ways to resolve their disputes.⁴⁰

The interest-based paradigm could also form an underlying logic for arbitration. In arbitration, parties litigate their disputes before an arbitrator or a panel of arbitrators instead of in front of a judge. Hence, from the outside, arbitration follows an adversarial logic—similar to litigation in courts. Yet this does not tell the entire story. Since arbitrators are not bound by complex and rigid procedural and substantive rules, they can indirectly increase the options of litigants, for instance by employing other methods for assessing damages. This is sometimes referred to as “conventional interest arbitration” in which arbitrators craft an outcome to reach a compromise between parties.⁴¹ The same approach applies for

³⁹ Menkel-Meadow argues that ADR allows parties to break free from what she calls “limited remedial imagination.” By this terms she means that courts are restricted to a few remedies including granting injunctions and awarding damages. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 789–94 (1984). The ADR Local Rules for the Northern District of California state that “[a] hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.” U.S. DIST. COURT, N. DIST. OF CAL., ADR LOCAL R. 6-1 (Sept. 15, 2015), <http://www.cand.uscourts.gov/localrules/ADR#med>.

⁴⁰ Several articles have focused on the benefits of ADR vis-à-vis the court system from the perspective of economics. For instance, Steven Shavell argues that the ex ante agreement to ADR will: 1) reduce the cost of dispute resolution for parties; 2) improve parties’ incentives to implement good performance; and 3) bring about optimal changes in the frequency of disputes brought by parties. Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 5–7 (1995). He does not believe that ex post ADR agreements can yield similar results. Furthermore, he argues that ex post ADR agreements do not enhance social value and, therefore, the public policy of requiring court-annexed ADR is flawed. *Id.* at 3–4; see also Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2248–51 (1993) (showing that even though some of the benefits of resorting to ADR could be captured by ex post ADR agreements, mandatory court-annexed non-binding ADR does not produce similar results); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 388–89 (1986) (arguing that mock trials before a jury will promote settlement but will increase the number of lawsuits as well).

⁴¹ See WILL AITCHISON, INTEREST ARBITRATION 3–4 (2d ed. 2000) (“In general, there are three types of interest arbitration. The first, known as ‘issue-by-issue, last best offer’ arbitration, requires the arbitrator to select the final proposal of one of the

international arbitration because arbitrators have significant discretion in assessing damages.⁴²

Furthermore, even if one argues that arbitration cannot “increase the pie” by widening parties’ options, the possibility of compromise is at the center of arbitration. Following prisoner’s dilemma logic, parties opt for arbitration because, on average, each side gains more compared to litigation in courts. Let’s say parties have a 50/50 chance of winning in court. In arbitration there is a possibility that each party gains 1/3 of what they have demanded. This possibility of compromise is the “Pareto” efficiency⁴³ of disputants’ choices, in which each individual gains, without necessarily making the other party lose. In other words, arbitration serves as an alternative option to the win-lose litigation game.⁴⁴ As Steven Brams

parties on an issue-by-issue basis. The second type, known as ‘total package, last best offer,’ requires the arbitrator to choose between the parties’ final offers on a total package basis. In this form of arbitration, an arbitrator may end up selecting the final offer of one party even though it contains proposals on specific issues that the arbitrator might not normally award. In the third type of interest arbitration, the arbitrator has the authority to fashion an award on an issue-by-issue basis without being limited by the final proposals of the parties.” (footnote omitted)). In some jurisdictions, the scope of arbitration was limited by introducing the final-offer arbitration method, in which the space of maneuver for arbitrators is much limited. See PETER FEUILLE, FINAL OFFER ARBITRATION: CONCEPTS, DEVELOPMENTS, TECHNIQUES 13 (1975) (“Final offer arbitration is a procedure which attempts to increase the parties’ incentives to bargain by retaining the first of these conditions while eliminating the second. Since the arbitrator will not be free to compromise between parties’ positions, the parties will be induced to develop even more reasonable positions prior to the arbitrator’s decision in the hope of winning the award.”).

⁴² In international arbitration, various valuation methods are employed to assess damages: income-based or discounted cash flow (DCF), market-based, asset-based, valuation by reference to amount invested, and hybrid approaches. See SERGEY RIPINSKY WITH KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 192–94 (2008).

⁴³ “The efficient frontier—sometimes called the Pareto Optimal Frontier, after the economist Vilfredo Pareto—is defined as the locus of achievable joint evaluations from which no joint gains are possible.” HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 139 (1982).

⁴⁴ See Robert J. Aumann, *Game Engineering*, in MATHEMATICAL PROGRAMMING AND GAME THEORY FOR DECISION MAKING 279, 282–83 (S.K. Neogy et al. eds., 2008); see also STEVEN J. BRAMS, NEGOTIATION GAMES: APPLYING GAME THEORY TO BARGAINING AND ARBITRATION 98 (rev. ed. 2003) (“One’s faith in the perceived median as a compromise, versus one’s faith in the arbitrator’s judgment, will be the determinant of whether one regards Combined Arbitration, or either Two-Stage or Multistage FOA, as the better arbitration procedure(s) for settling disputes.”). Furthermore, arbitration (especially international arbitration) sometimes is called upon to fill in the shortcomings of the pre-contract negotiation phase. For instance, in long-term gas supply contracts, parties resort to arbitration so that it adjusts the contract in accordance with change of circumstances. This method differs from traditional arbitration. Kyriaki Karadelis, *Is Arbitration Suitable for Resolving Gas Price Disputes?*,

observed, “[a]rbitration need not be by fiat but may cede different kinds of choices to the disputants.”⁴⁵

Rationality lies at the core of the interest-based paradigm. Disputants choose the ADR system because it is in their best interests when employing cost-benefit analyses. The focus of ADR, therefore, should rest on its option-maximizing feature. The alternative feature of ADR hinges on its delivery of new, rational options that courts are incapable or unwilling to offer. An interest-based paradigm provides a satisfactory, non-historical, non-political narrative of the ADR system. However, it fails to envisage ADR as an autonomous institution with its own distinct philosophy. Furthermore, it is not clear whether all disputants opt for ADR simply because it offers more options; not all ADR proceedings result in profit-maximization and not all parties are aware of it.

D. *Resistance-Based*

Rarely discussed is a critical approach to the ADR system. Under this paradigm parties opt for alternative methods neither because they are “free” to do so, nor because they are “rational.”⁴⁶ Parties, instead, prefer ADR methods because they feel they can “participate” in the process of shaping justice. The impression that parties have more control over the procedure is of paramount importance in this paradigm. The recent literature demonstrates that participation in the adjudicative process is the most important factor that parties value, which in turn results in compliance with law and judgments.⁴⁷ Even further, I argue that parties, by par-

GLOBAL ARB. REV. (Apr. 23, 2014), <http://globalarbitrationreview.com/news/article/32591/is-arbitration-suitable-resolving-gas-price-disputes/>. Some authors believe that ascribing the term “win-win” to ADR is inaccurate and will lead to false expectations. See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1872 n.4 (1997).

⁴⁵ BRAMS, *supra* note 44, at 263. Brams believes that arbitrators should make judgments independent of the two sides. *Id.* at 65–66. He furnishes Kissinger’s “shuttle diplomacy” in the Middle East as an example that arbitrators (and negotiators) should be able to fashion a settlement to provide the best outcome. *Id.* at 94–96.

⁴⁶ Some authors adhere to an approach which could be classified under the resistance paradigm. For instance, Jerold S. Auerbach suggests that alternative dispute settlement should derive its sources from communal values instead of law. AUERBACH, *supra* note 1, at 139–45.

⁴⁷ TOM R. TYLER, WHY PEOPLE OBEY THE LAW 164–65 (1990) (showing that people’s participation in procedural justice and decision-making is directly linked to obedience of law); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 176–77 (1988) (“[O]ne of the most potent determinants of the procedural fairness of a social decision-making procedure is the extent to which those affected by the decision are allowed to participate in the decision-making process [S]atisfaction is one of the principal consequences of procedural fairness.”). Other scholars point to the fact that the effect of litigation on non-parties,

participating in a parallel justice system, challenge the monopoly of government over dissemination of justice.

Unlike the interest-based approach, this paradigm views ADR diachronically and within a socio-political context. The structural tension between the formal judiciary and ADR, as described in Section A, lies behind the viability of ADR. Hence, ADR should not submit itself to any forms of institutionalism since it withers the very essence of it. Ad hoc and individualized dispute resolutions best serve the interests of parties as well as society. Creating a subordinate ADR mechanism would attenuate the overall systemic implication desired under this paradigm. The structural tension should subsist by maintaining a robust alternative mechanism, aiming to crack the edifice of top-down and exclusive justice systems.

The resistance to integration with the formal judiciary forms a basis of this paradigm. Contrary to the interest-based approach, ADR is viewed as being part of a larger picture with necessary systemic implications. It is not a mechanism for creating more options within the existing system. It has the potential to revolutionize the very game itself. Borrowing Wittgenstein's terminology, pursuant to the interest-based paradigm, ADR operates under the same "language game," yet offers more options.⁴⁸ ADR, according to the resistance-based approach, aims to define a new language game parallel to the formal judiciary system.

Some authors have attempted to depart from the previous paradigms of ADR and shape what could be aptly called the "post-ADR movement."⁴⁹ A notable example is Bush and Folger's book, *The Promise of Mediation*. After discussing other views on ADR—the satisfaction story,⁵⁰ the social

mainly through rule-making, has a crucial impact on the parties' decision to pursue litigation. See, e.g., Bruce H. Kobayashi, *Case Selection, External Effects, and the Trial/Settlement Decision*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 17, 17–18 (David A. Anderson ed., 1996) (refuting the argument that litigation is a result of failure of bargaining but instead is due to external incentives, mainly its rule-making function); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977) (showing parties will litigate inefficient rules rather than efficient rules).

⁴⁸ See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 7 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., 4th ed. 2010) (1953).

⁴⁹ There was an upsurge in the utilization of ADR starting in the 1970s and 1980s, often referred to as the "ADR Movement." See Laird C. Kirkpatrick, *Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement*, 25 LOY. L.A. L. REV. 837, 837–38 (1992); see also Robben W. Fleming, Lecture, *Reflections on the ADR Movement*, 34 CLEV. ST. L. REV. 519, 519–20 (1986).

⁵⁰ See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 16–18 (1994) (citing WARREN E. BURGER, *DELIVERY OF JUSTICE: PROPOSALS FOR CHANGES TO IMPROVE THE ADMINISTRATION OF JUSTICE* (1990); ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE* (1988); ROGER

justice story,⁵¹ and the oppression story⁵²—they endorse what they call the “transformation story” of mediation. By this account, they mean that the goal of mediation should not simply be to reach an agreement, but to transform people in addition to situations.⁵³ Mediation should be the opposite of adjudication and arbitration, which disempower parties by “taking control of [the] outcome out of the parties’ hands and by necessitating reliance on professional representatives.”⁵⁴ The “transformation story” promises that mediation’s goal is “engendering moral growth and transforming human character, toward both greater strength and greater compassion.”⁵⁵ This way the goal of mediation is not solely placed on “set-

FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987)). The satisfaction narrative refers to a similar paradigm as what is described here as the interest-based paradigm. Under this narrative, endorsed by the post-World War II ADR movement, the ultimate purpose of mediation is to satisfy parties by providing a win-win resolution to their disputes. *Id.* at 16. This story centers on efficiency, which brings about parties’ satisfaction. *Id.* at 17.

⁵¹ BUSH & FOLGER, *supra* note 50, at 18–19 (citing Paul Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, in 1 *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 75 (Richard L. Abel ed., 1982); Raymond Shonholtz, *The Citizens’ Role in Justice: Building a Primary Justice and Prevention System at the Neighborhood Level*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Nov. 1987, at 42). This approach mainly narrates the function of mediation in community disputes. Mediation diverts the attention of parties from their disputes to the bigger picture in which communal interest is best served in the settlement of their disputes. This way parties recognize the larger picture and their mutual enemy. *See id.* at 18. For example, in disputes between co-tenants, block residents, victims of environmental disasters, and consumers, mediation helps them to focus on communal adversaries such as landlords, city agencies, land developers or manufacturers. *Id.* at 19. Wahrhaftig’s work on community mediation and Shonholtz’s piece pioneered this approach.

⁵² BUSH & FOLGER, *supra* note 50, at 22–23. The oppression narrative reveals the structural shortcomings of the mediation movement. It believes that the stronger party can and will take advantage of the mediation proceeding because of the informality as well as its consensual nature. In addition, the mediator’s role remains limited, preventing him or her from intervening in the process to produce more just results. Furthermore, public interest will be harmed since mediation is a private mechanism, producing individualized results without paying due attention to their consequences. Parties such as landlords, manufacturers, employers, and land developers employ mediation “to strike deals behind closed doors that disadvantage consumers and others in ways that will never even come to light.” *Id.* at 23.

⁵³ *Id.* at 29.

⁵⁴ *Id.* at 30–31.

⁵⁵ *Id.* at 27. In practice, the authors identify several methods that mediators can use to follow the transformative approach. The mediator should avoid taking any overarching evaluation of what the dispute is about and should concentrate on each party’s contributions. *Id.* at 192. The mediator should encourage parties’ deliberation and choice making by allowing them to reflect on their demands and to clarify them.

tlement” but on “empowerment and recognition” between parties as well.⁵⁶

Similar to other critical theories, the resistance-based theory runs the risk of being utopian with farfetched ideals. Furthermore, ADR cannot be independent from the judicial system because it depends on it for the enforcement of awards.⁵⁷ However, one should bear in mind that paradigmatic thoughts shape the way we approach each phenomenon. They do not necessarily lead to immediate concrete results. The resistance-based paradigm will affect the way arbitrators as well as policy makers and judges view arbitration, especially because ADR is relatively nascent.

E. Concluding Remarks

This Section aims to demonstrate that ADR is a philosophy and not a mere technique. It identifies three theoretical paradigms in the context of ADR. These paradigms shape the way scholars, practitioners, policy makers, and judges view ADR and its relationship to the judicial system. Below is a summary of the paradigms explained above:

Id. at 194–95. The mediator also should look out for opportunities in which parties consider each other’s positions by having a more sympathetic and positive view. *Id.* at 196. Mediation, as such, has strong critics. See CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT 140–41 (1985); Richard L. Abel, *Introduction*, in 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 51, at 1, 5–8; Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1359; Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 728 (1988); Fiss, *supra* note 30, at 1075–78; Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 (1979).

⁵⁶ BUSH & FOLGER, *supra* note 50, at 200.

⁵⁷ For instance in the context of enforcing international arbitral awards, several courts have emphasized the discretionary nature of relief. See, e.g., *Karaha Bodas Co., v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 367 (5th Cir. 2003) (“Under the Convention, a court maintains the discretion to enforce an arbitral award even when nullification proceedings are occurring in the country where the award was rendered.”); *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 909 (D.D.C. 1996) (“In the present case, the award was made in Egypt, under the laws of Egypt, and has been nullified by the court designated by Egypt to review arbitral awards. Thus, the Court *may*, at its discretion, decline to enforce the award.”).

<i>Paradigms</i>	<i>Ontology</i>	<i>Epistemology</i>	<i>Methodology</i>	<i>Normativity</i>
<i>Consent-based</i>	ADR is a technique	Consent vis-à-vis states' public policy	Institutionalization	Compromise
<i>Interest-based</i>	ADR is a profit maximizer	Non-political, non-historical; Game Theory	Diversification of Options	Rationality
<i>Resistance-based</i>	ADR is a parallel justice system	Historical and political	Ad hoc ADR; independent ADR	Resistance to integration

This discussion reverberates on the issue of public policy in the ADR mechanism. The term “public policy” is used in at least two general senses: 1) the overall policy of the state towards alternative methods of conflict resolution;⁵⁸ and 2) the fundamental norms of states that should not be encroached upon by the ADR system. The above chart serves as an important tool for parsing out the issue of public policy in both senses. Public policy in the second sense will be discussed in the rest of the Article, as it requires detailed analysis.

The overall policy of states towards the ADR system—public policy in the first sense—is heavily influenced by the consent-based paradigm. ADR is perceived as a legal entity constituted by the consent of parties and limited to consensual terms. It is a subordinate—not parallel—method of resolving disputes, which best serves the government and disputants’ interests if institutionalized. Other narratives have remained marginal in courts and in statutes.

The next Part will investigate various courts’ approaches to public policy in the enforcement of awards, and will endeavor to categorize the diverse and incongruent approaches.

⁵⁸ The Supreme Court of the United States has used the term in the first sense several times. *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 340–41 (1986) (rejecting absolute immunity for police based on policy considerations); *Owen v. City of Independence*, 445 U.S. 622, 667 (1980) (Powell, J., dissenting) (“Important public policies support the extension of qualified immunity to local governments.”); *see also* *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (“[T]he same considerations of public policy . . . countenance absolute immunity [for prosecutors] under § 1983.”).

II. WHERE THINGS GO AWRY: THE PARADIGMS OF PUBLIC POLICY IN ARBITRATION

A. *Public Policy Exception*

There is a common thread—public policy—that links many disparate cases: a man who bet on Napoleon’s life,⁵⁹ a man who restricted his ability to trade,⁶⁰ a married man who proposed to a woman pending his divorce,⁶¹ an employee appointed as trustee by an insolvent company to make the company a creditor of itself,⁶² and an arbitral award delivered in favor of a country against the country of the court’s proceedings, despite strained political relations.⁶³ In each case, the court confronted a similar matter: the issue of public policy. In most instances, contracts or awards were found to be unenforceable. While informative, public policy is so pervasive that these cases shed little light on the notion.

It is now common belief that a government’s legislative branch should determine public policy. Many agree with Montesquieu that “[t]he great advantage of representatives is that they are able to discuss public business.”⁶⁴ According to Montesquieu, this “public business” is best served when representatives from each town are elected by the people.⁶⁵ Due to the diversity of opinions, policies emanate from the representative will of people. This “general will” constitutes sovereignty that is indestructible and inalienable.⁶⁶ Setting public policy is both a critical component and manifestation of sovereignty.

Despite public policy being the legislature’s domain, it inevitably arises in judicial cases.⁶⁷ Judges often grapple with potential conflicts between private acts and basic public interests as reflected in precedents and communal values, and especially in statutes. Judges sometimes venture into the area of policy making itself, be it advertently or inadvertently. Some find that this endangers the separation of powers and question the legitimacy of judicially based public policy.⁶⁸

⁵⁹ *Gilbert v. Sykes* (1812), 104 Eng. Rep. 1045.

⁶⁰ *Dyer’s Case*, YB 2 Hen. V, fol. 5, Pasch, pl. 26. (1414).

⁶¹ *Fender v. St. John-Mildmay* [1938] AC 1 (HL).

⁶² *Farmers’ Mart, Ltd. v. Milne* [1915] AC 106 (HL).

⁶³ *Nat’l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819 (D. Del. 1990).

⁶⁴ MONTESQUIEU, *THE SPIRIT OF THE LAWS* 159 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

⁶⁵ *Id.* at 159–60.

⁶⁶ See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 23 (Hafner Press 1947) (1762).

⁶⁷ The most common usage of the term “public policy” in the legal community occurs when a contract, foreign judgment, arbitral award, or foreign law is claimed to violate the public policy of the *lex fori*.

⁶⁸ See R.A. BUCKLEY, *ILLEGALITY AND PUBLIC POLICY* 89 (3d ed. 2013); James D. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 *BROOK. L. REV.* 323, 325

An important exception to enforcement, the principle that arbitral awards should not violate the public policy of the enforcing forum, is carved out in most national and international instruments. The public policy exception entered national legislation from Article V(2)(b) of the New York Convention: “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country.” The exception also appears in Article 34 of the *UNCITRAL Model Law on International Commercial Arbitration*: “An arbitral award may be set aside by the court . . . if . . . the award is in conflict with the public policy of this State.”⁶⁹

In this Part, I employ this exception as the bedrock for surveying and identifying various courts’ reactions to the issue of arbitration and alternative dispute mechanisms. This Section will focus on courts’ reactions in the context of international commercial arbitration as its sample. The reason for utilizing this methodology is twofold. First, in reaching a decision on the public policy exception, courts formulate their approach to public policy as well as to the limits of arbitration; second, thanks to the importance of international arbitration, data from various courts around the globe is available for analysis.

B. National Courts’ Reactions

Courts in various parts of the world have reacted differently to the public policy exception enshrined in the New York Convention. Numerous judgments have attempted to shape jurisprudence on public policy in the context of international arbitration. The reaction of courts in the area serves as an indispensable platform to understand the doctrine of public policy in arbitration. As mentioned in the previous Section, the public policy exception goes to the heart of the structural tension described earlier. The close examination of the courts’ reactions leads us to better comprehend the ADR system in its totality.

There are two ways of approaching the national courts’ reactions: one is simply to address them country-by-country as law firms and aca-

(1971). I do not share this view. In another article I attempt to demonstrate that judicially crafted public policy is not only inevitable but also, in certain categories, within the inherent discretion of the judicial body. Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 685–736 (2016).

⁶⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; U.N. COMM’N ON INT’L TRADE LAW, *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* art. 34, U.N. Sales No. E.08.V.4 (2006), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

demics have done in the past.⁷⁰ As much as this method is helpful for those in the practice of arbitration, it does not let us go far into envisaging a general picture of arbitration and the doctrine of public policy. The second method, which I prefer, is to categorize the various courts' reactions by the subject matter of disputes and the definition put forward in connection with the public policy exception. I found that courts have followed at least four paradigms in implementing the public policy exception. Please note that some national courts might adopt a mix of different paradigms. It is also important to keep in mind that the following paradigms have been harnessed from the approach of courts, not the actual outcome of cases.

1. *Social and Economic Life*

This holistic approach considers the needs of the state as a whole while not restraining itself with juridical analysis of the public policy exception. Under this view, public policy is a pervasive matter, running through the entire critical socio-economic dimensions of a country. Alternative methods of settlement, including arbitration, should not interfere with and disrupt any public aspects. This rests in line with political definitions put forward regarding the notion of public policy. In this approach, public policy encompasses "a projected program of [goals], values, and practices"⁷¹ permeating through various sectors of socio-economic life. In short, it includes all (re)actions of the state towards problems and concerns in society and the economy.⁷²

A paramount example falling under this category is Russia. In a 1998 decision, the Supreme Court of the Russian Federation defined the term "public policy" under Russian law: "Under the term 'public policy' of the Russian Federation one should understand basics of the social formation of the Russian state. The public policy reservation is possible only in specific cases when the application of foreign law could create results inadmissible from the point of the Russian legal mentality."⁷³

The Russian courts did not stop here. In a case before the Federal *Arbitrazh* Court of the Moscow District, the term public policy was further

⁷⁰ See, e.g., U.N. UNCITRAL et al., *1958 N.Y. Convention Guide* (2015), http://www.newyorkconvention1958.org/index.php?lvl=more_results&user_query=*%&autolevell=1&provision=64 (listing cases by country citing article 5(2)(b)).

⁷¹ See GROVER STARLING, *THE POLITICS AND ECONOMICS OF PUBLIC POLICY: AN INTRODUCTORY ANALYSIS WITH CASES* 4 (1979) (quoting HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* 71 (1950)).

⁷² Public policy is a "purposive course of action or inaction followed by an actor or set of actors in dealing with a problem or matter of concern." JAMES E. ANDERSON, *PUBLIC POLICYMAKING: AN INTRODUCTION* 6 (7th ed. 2011); see also JOSEPH STEWART, JR. ET AL., *PUBLIC POLICY: AN EVOLUTIONARY APPROACH* 6 (3d ed. 2008).

⁷³ See ANTON G. MAURER, *THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION: HISTORY, INTERPRETATION AND APPLICATION* 210 (2012).

elaborated. The court declared that enforcement of arbitral awards violates Russian public policy when it would result in acts:

that are directly prohibited by law or harm the sovereignty or the security of the State;

that affect the interests of a large social group;

that are incompatible with the principles of constructing the economic, political and legal systems of the State;

....

that are against the basic principles of the civil State, such as the equality of its members, the inviolability of property and freedom of contract.⁷⁴

This approach equates public policy with the public sphere, i.e., every instance in which “public” life is affected. Not surprisingly, Russian courts have lumped a wide variety of issues under the rubric of public policy, from misapplication of law to “impact on the social and economic situation” of a neighborhood.⁷⁵

China is another country which has adopted a similar language in its legal system. Article 213(3) of China’s 2008 Civil Procedure Law stipulates that the enforcement of arbitral awards is refused if they violate the “social and public interest” of the Republic of China.⁷⁶ However, the picture of enforcement of awards in China in light of public policy defenses is not clear yet. Some Supreme People’s Court judges provided a very political interpretation of this standard of public policy.⁷⁷ Others have narrowed it down by limiting its scope; for instance, a mere breach of mandatory law does not necessarily violate the social and public interest; a mere unfairness or injustice in the process does not amount to a violation of public policy; not all kinds of fraud mean that China’s public policy has been violated; the substantive fairness of the outcome is not pertinent

⁷⁴ *Id.* at 211.

⁷⁵ See Boris Karabelnikov & Dominik Pellew, *Enforcement of International Arbitral Awards in Russia—Still a Mixed Picture*, 19 ICC INT’L CT. ARB. BULL., no. 1, 2008, at 65, 71–72, 72 n.25. In 2003, a federal *Arbitrazh* court refused to enforce an ICC Award on public policy grounds because it would “negatively impact . . . the social and economic situation in Nizhny Novgorod.” *Id.* at 71.

⁷⁶ See CLARISSE VON WUNSCHHEIM, ENFORCEMENT OF COMMERCIAL ARBITRAL AWARDS IN CHINA 282 (2011).

⁷⁷ *Id.* at 283. According to these judges, a violation of public policy occurs where the award “(i) is in violation of the basic principles reflected/regulated in the Constitution or the Four Fundamental Principles of China; (ii) will damage the sovereignty or State security of China; (iii) is in violation of the fundamental rules of Chinese law; (iv) is against the obligations that China undertook in the international treaties that China concluded, or against the public[ly] recognized principle of fairness or justice in international law.” *Id.*

to the discussion of public policy.⁷⁸ However, China has shifted from emphasizing the public policy ground for non-enforcement to refusal of enforcement based on procedural irregularity. Yet, courts in China have broadly interpreted the scope of procedural irregularity, practically disguising the social and public-interest narrative under the rubric of procedural irregularity.⁷⁹

2. *Basic Notions of Morality and Justice*

Under this discourse, morality, as defined by the government, shapes the thrust of public policy. It does not necessarily concern itself with governmental policies or the welfare of society. The center of gravity rests on the idea of protecting morality and justice, which are mainly defined by resorting to the Constitution, Bill of Rights, due process, as well as social morals. The scope of this approach remains fuzzy and imprecise, as concepts of morality and justice are elusive notions. However, the benefit of this discourse is that the only way governmental policies, as well as societal concerns, might fit into the public policy exception is if they are interpreted to constitute basic notions of morality and justice, a matter which is highly unlikely in most instances.

The United States' approach to public policy could serve as an example that falls under this discourse. Before discussing it in depth, it is noteworthy to mention that the United States has experienced three phases in its approach to arbitration. In the beginning, from the mid-1700s to the mid-1800s, the commercial community used arbitration to resolve commercial disputes based on trade practice instead of the common law. The court looked favorably upon this development, yet would refrain from ordering specific performance for future arbitral clauses.⁸⁰ The second phase commenced in the beginning of the 20th century, and culminated in the enactment of the Federal Arbitration Act of 1925.⁸¹ This phase is marked by its espousal of less formalism in the courts in

⁷⁸ *Id.* at 284–85.

⁷⁹ *But see* Friven Yeoh & Yu Fu, *The People's Courts and Arbitration: A Snapshot of Recent Judicial Attitude on Arbitrability and Enforcement*, 24 J. INT'L ARB. 635, 646 (2007) (“[T]he *Mitsui* decision is seen to confirm a prevailing view among many Chinese legal practitioners that the [Supreme People's Court] is loath to permit non-enforcement on this ground save where the offence in question blatantly and obviously violates state sovereignty and security, or basic moral decency.”). In 1971, Germany's Federal Court of Justice adopted similarly broad language in defining public policy: “Recognition of a foreign arbitral award can only be refused if the arbitral proceeding suffered a grave defect which is intolerably at odds with *the fundamental principles of state and economic life.*” See MAURER, *supra* note 73, at 106 (emphasis added).

⁸⁰ Mette H. Kurth, *The Dawning of Arbitration Techniques*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 193–94 (1996).

⁸¹ *See id.* (discussing the United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–13 (2012))).

dealing with arbitration and its endorsement for arbitration as an inexpensive and expedited method of resolving disputes.⁸² The last phase, beginning in the 1970s, was a new movement towards relieving arbitration of the burdensome formalism of courts on a wide range of issues including arbitrability and public policy exceptions. Kurth believes that the Supreme Court responded negatively to this new surge of demands by requiring “strict, unyielding enforcement of arbitration agreements.”⁸³

The U.S. courts generally took a moral and ethical approach to arbitration. In a very early case, *Van Cortlandt v. Underhill*, the Court for the Correction of Errors of New York declared that judges “should be *eagle-eyed* in looking into the proceedings and conduct of the arbitrators, and the acts of the parties, to see that everything has been conducted *fairly, impartially, and honestly*.”⁸⁴

In 1974 a seminal case set the approach to the doctrine of public policy in alternative dispute resolution. The case was brought pursuant to Chapter 2 of Title 9 of the U.S. Code, the U.S. codification of the New York Convention. Société Générale de L’Industrie du Papier (RAKTA), an Egyptian corporation, sought to enforce an arbitral award against the U.S. corporation, Parsons & Whittemore Overseas (Overseas).⁸⁵ The dispute arose out of a contract between the two corporations, in which Overseas promised to construct, start up, and manage for a year a paperboard mill in Egypt. Due to the intense political conditions in the region at the time, which eventually culminated in the Six-Day War, the Egyptian government terminated its relationship with the United States, ordering Americans to leave the country unless they obtained a special visa.⁸⁶ Consequently, Overseas invoked the force majeure clause in the contract, claiming change of circumstances made contract performance impossible. RAKTA initiated an arbitral proceeding for the contract violation and damages. The arbitral panel declared that the force majeure condition existed only for a short period (May 28 to June 30, 1967) and it did not justify unilateral revocation of the contract. Subsequently, RAKTA sought to enforce the award in the United States, which faced multiple legal challenges by Overseas.⁸⁷ One argument set forth by Overseas—relevant to our discussion—was that the enforcement would violate the

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 17 Johns. 405, 421 (N.Y. 1819); *see also* Jackson v. Ambler, 14 Johns. 96, 103 (N.Y. Sup. Ct. 1817) (stating that arbitration should be maintained because even though it does not have technical accuracy, the “ends are mainly honest, and tend to terminate intricate disputes with very little expense to the parties”).

⁸⁵ Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie du Papier (RAKTA), 508 F.2d 969, 971 (2d Cir. 1974).

⁸⁶ *Id.* at 972.

⁸⁷ *Id.*

public policy of the United States.⁸⁸ The Second Circuit responded by stating that public policy should be construed narrowly and that “[e]nforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”⁸⁹

The Second Circuit framework of the public policy exception, under the New York Convention, has set the precedent for subsequent courts’ interpretations in the third phase of the arbitration movement in the United States.⁹⁰ This paradigm keenly distinguishes between national policy and public policy while endeavoring to keep the latter out of the public policy equation.⁹¹ This way, governmental policies, foreign policies, and national policies could only bar awards and judgments from enforcement if they fit in the box of “most basic notions of morality and justice.” As courts have shown, even in the context of arbitration involving countries which have strained relationships with the United States, the U.S. government’s hostile foreign policies do not reach the level of public policy.⁹²

Several other countries have adopted a similar paradigm. Canada’s definition of public policy has been described as “fundamentally offensive to Canadian principles of justice and fairness.”⁹³ In *Beals v. Saldanha*, the Canadian Supreme Court declared in the context of conflict of laws that foreign laws should not be applied against the fundamental morality of the Canadian legal system.⁹⁴ In the case of *Schreter v. Gasmac, Inc.*, the Ontario Court held that “[t]he concept of imposing our public policy on foreign awards is to guard against enforcement of an award which of-

⁸⁸ *Id.* at 973–74.

⁸⁹ *Id.* at 974.

⁹⁰ *See, e.g.*, *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 309 (3d Cir. 2006); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004); *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 71 (D.D.C. 2013); *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987); *Order Denying Motion to Confirm at 25–26, Changzhou AMEC E. Tools & Equip. CP. v. E. Tools & Equip., Inc.*, No. EDCV 11-00354 VAP (DTBx), (C.D. Cal. July 30, 2012), 2012 WL 3106620, *aff’d sub nom. Xuchu Dai v. E. Tools & Equip., Inc.*, 571 F. App’x 609 (9th Cir. 2014).

⁹¹ The Court astutely distinguishes between national policy and public policy. “In equating ‘national’ policy with United States ‘public’ policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy.’” *Parsons*, 508 F.2d at 974.

⁹² *See, e.g.*, *Nat’l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 820–21 (D. Del. 1990); *Ministry of Defense v. Cubic Defense Sys., Inc.*, 665 F. 3d 1091, 1099–1100 (9th Cir. 2011).

⁹³ *See MAURER, supra note 73, at 81.*

⁹⁴ *Beals v. Saldanha* [2003] 3 S.C.R. 416, 419 (Can).

fends our local principles of justice and fairness in a fundamental way.”⁹⁵ English courts have built the notion of public policy on the morality paradigm. New Zealand codified this view on public policy in its Arbitration Act of 1996, adopting the *UNCITRAL Model Law on International Commercial Arbitration*.⁹⁶ It declared that the award is contrary to public policy if “[a] breach of the rules of *natural justice* occurred—(i) During the arbitral proceedings; or (ii) in connection with the making of the award.”⁹⁷ Hong Kong courts have adopted an identical view to that of the court in *Parsons & Whittemore v. RAKTA* and state that enforcement of awards is denied when they violate the forum state’s most basic notions of morality and justice.⁹⁸

3. *Fundamental Principles of Law*

Unlike the holistic approach of the first paradigm, the “fundamental principles of law” discourse adopts a juridical and positivistic approach to public policy. For an issue to fall under the rubric of public policy, it should have a strong basis in laws, regulations, and/or precedents of the state. The courts cannot resort to non-judicial factors, such as insolvency of a neighborhood, to set aside awards based on public policy. Instead the courts not only have to justify their stance on public policy pursuant to law but they also have to make sure it deserves to be denominated as a fundamental principle.

Austria could serve as an illuminating example that links the notion of public policy to the existing positive laws. In a 2005 decision, the Supreme Court of Austria held that the standard for review regarding the public policy exception is whether an arbitral award “is irreconcilable with the fundamental principles of the Austrian legal system.”⁹⁹ The court’s opinion carefully crafts the doctrine of public policy in a way that differs from the moralistic approach of the U.S. legal system on the one hand and the internationalist approach of the French legal system on the other hand.¹⁰⁰ First, it focuses on the “enforcement” feature of public policy by holding that the enforcement of awards—not “the law or legal relation itself”—should be intolerable for the domestic legal system. Second, it enumerates the sources of public policy, deriving from various codes that “[t]he fundamental principles concerned by public policy are espe-

⁹⁵ (1992), 7 O.R. 3d 608, 621 (Can. Ont. Gen. Div.).

⁹⁶ Arbitration Act 1996, sch 1, § 34(6) (N.Z.).

⁹⁷ *Id.* § 34(6)(b) (emphasis added); see also Amokura Kawharu, *The Public Policy Ground for Setting Aside and Refusing Enforcement of Arbitral Awards: Comments on the New Zealand Approach*, 24 J. INT’L ARB. 491, 493 (2007).

⁹⁸ See *Paklito Inv. Ltd. v. Klockner E. Asia Ltd.*, [1993] 2 H.K.L.R. 39, 50 (H.C.); *Hebei Import & Export Corp. v. Polytek Eng’g Co.*, [1999] 1 H.K.L.R.D. 665, 667 (C.F.A.).

⁹⁹ Oberster Gerichtshof [OGH] [Supreme Court] Jan. 26, 2005, 3 Ob 221/04b, reprinted in 30 Y.B. COM. ARB. 421, 428 (2005).

¹⁰⁰ See *infra* subsection II.B.4.

cially the basic principles of the federal constitution, but also [the basic principles] of criminal, private, and procedural law.”¹⁰¹ Finally, the court keenly separates its approach from that of the holistic and teleological view of countries such as Russia by rejecting the importance of the trajectory, reasons, and end goals of awards: “[I]t is not the path followed or the reasons given [in the award] but the outcome of the arbitral award that is decisive to determine whether the award is compatible [with public policy].”¹⁰²

This paradigm of public policy attempts to avoid the natural-law stance of the “basic notions of morality and justice” approach. Instead it creates the doctrine of public policy pursuant to existing laws with the main focus on the “enforcement” of awards versus their objectives or legal merits. Hence, this paradigm could be called a “synchronic” view of public policy versus a historical or “diachronic” approach of other paradigms. Although this paradigm offers a more clear-cut conceptualization of public policy, it fails to provide a theoretical guide as to what could constitute fundamental principles pulling from various and, occasionally, incongruent statutes and provisions.

4. *International Public Policy*

A few countries, following France’s lead, have attempted to frame a new paradigm of public policy in the context of ADR and especially international arbitration. This paradigm aims to differentiate between “domestic public policy” and “international public policy” depending on whether courts are dealing with domestic matters or international awards. Pursuant to this paradigm, international awards should not be subject to vagaries of domestic public policy as they are derived from a different legal order.¹⁰³

The French Code of Civil Procedure explicitly separates the two concepts. Under Article 1520(5), a court’s decision granting recognition or enforcement is only voidable based on a few grounds, one of which is whether “recognition or enforcement is contrary to international public policy.”¹⁰⁴ This stands in contrast to Article 1488 of the same Code regarding domestic awards, which stipulates “[n]o enforcement order may be granted where an award is manifestly contrary to public policy.”¹⁰⁵ The aim is to restrict the unnecessary intervention of domestic public policy in the scene of international arbitration. Not all aspects of domestic pub-

¹⁰¹ OGH Decision, *supra* note 99.

¹⁰² *Id.* (alterations in original).

¹⁰³ Emmanuel Gaillard, a proponent of the paradigm of international public policy, calls it the arbitral legal order. See EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 35–36 (2010).

¹⁰⁴ CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1520(5) (Fr.).

¹⁰⁵ *Id.* art. 1488.

lic policy can constitute international public policy. In the language of the Federal Court of Justice of Germany—another country that endorses this paradigm—international public policy “comprises only such parts of the mandatorily applicable law which will successfully dominate any conflict with applicable foreign law.”¹⁰⁶

Several other jurisdictions have espoused this paradigm by differentiating between national and international public policy. The Swiss Supreme Court delineated international public policy by stipulating that it “consists of fundamental and generally recognised principles” that if not applied “would be contrary to the basic values common to all civilized nations.”¹⁰⁷ Italy serves as another example. The Court of Appeals of Milan embraced a similar doctrine and defined international public policy as a “body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declaration or conventions.”¹⁰⁸ Spain is another jurisdiction which adopted this doctrine, yet with less vague language. Spain’s Supreme Court provided a more clear definition of public policy, limiting it to its constitutional protections against basic procedural irregularities: “Hence, on an international level [public policy] essentially corresponds with the rights and guarantees enshrined in the Constitution in respect of the prohibition to violate due process (*indefensión*) provided in . . . [the] Constitution.”¹⁰⁹

Analyzing the international public policy paradigm is the subject of a separate article, as it has not remained in the area of international commercial arbitration and has crept into other areas including the jurisprudence of state–investor arbitration.¹¹⁰ However, here we will take a brief look at it. Pierre Lalive was among the first scholars who noticed a trend towards this paradigm and endeavored to formulate it. He posits that the concept of public policy in international private law differs from municipal public policy because of the needs and different purposes of each le-

¹⁰⁶ See MAURER, *supra* note 73, at 104. Germany’s Federal Constitutional Court indirectly confirmed this approach. *Id.* at 104–05.

¹⁰⁷ See *id.* at 177. The Swiss Supreme Court confirmed this approach in its subsequent decisions. *Id.* at 177–81.

¹⁰⁸ App. Milan, 4 dicembre 1992 (It.) (Allsop Automatic Inc. v. Tecnoski snc), reprinted in 22 Y.B. COM. ARB. 725, 726 (1997).

¹⁰⁹ See MAURER, *supra* note 73, at 169 (first alteration in original).

¹¹⁰ See, e.g., *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, ¶¶ 245–46 (Aug. 2, 2006), <http://arbitration.org/sites/default/files/awards/arbr-2006-255-1.pdf> (“International public policy consists of a series of fundamental principles that constitute the very essence of the State, and its essential function is to preserve the values of the international legal system against actions contrary to it.” (footnote omitted)); *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, ¶¶ 138–57 (Oct. 4, 2006), <http://www.italaw.com/documents/WDFv.KenyaAward.pdf> (holding that committing bribery and corruption is a breach of international public policy).

gal order.¹¹¹ For him, the concept of international public policy “is made up of a series of rules or principles concerning a variety of domains, having a varying strength of intensity, which form or express a kind of ‘hard core’ of legal or moral values.”¹¹² Lalive argues that the international public policies of states should not apply to the cases involving international matters. He refers to the *Zapata*,¹¹³ *Scherk*,¹¹⁴ and *Mitsubishi*¹¹⁵ cases from the Supreme Court of the United States as examples of the limitations of domestic public policy as well as the positive impact of international public policy in international relations.¹¹⁶

In his view, international public policy is truly international (i.e., transnational) only if it has supranational purposes.¹¹⁷ According to Lalive, examples of transnational public policy could be the doctrine of “*compétence-compétence*” in arbitral proceedings,¹¹⁸ autonomy of the will,¹¹⁹

¹¹¹ Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 257, 260 (Pieter Sanders ed., 1987). Lalive maintains that public policy has both “positive” and “negative” functions. The negative function of public policy occurs when a judgment or an otherwise applicable foreign act is declined to be recognized and enforced in a dispute. In its positive capacity, public policy imposes the application of *lex fori* by means of “unilateral conflict rules.” *Id.* at 263. He bundles the two functions under the title of “international public policy.” *See id.* at 261–64.

¹¹² *Id.* at 264.

¹¹³ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (“We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”).

¹¹⁴ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974) (“A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.”).

¹¹⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (“[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.”).

¹¹⁶ *See* Lalive, *supra* note 111, at 275.

¹¹⁷ Pierre Lalive posits three factors that shape the content of transnational public policy. Public policy might stem from private international law, *lex fori*, and the need to respect the foreign public policy of other states in order to promote international trade. *See id.* at 273.

¹¹⁸ “*Compétence-compétence*” refers to the authority of an arbitrator to decide challenges to his or her own jurisdiction. *See id.* at 300–01.

¹¹⁹ “Autonomy of the will” refers to the freedom of parties to choose by contract the law governing any disputes. *See id.* at 301–04.

the criterion of the closest connection,¹²⁰ and the legitimate expectations of the parties.¹²¹

The formulation of international public policy has stirred controversy among scholars mainly from the common law tradition. Some found it to be too vague and not rigorous enough to be able to create a robust approach to public policy.¹²² Others point out that this paradigm is just a façade and that, at the end of the day, the public policy remains French, German, Italian, etc.—definitely not “international.”¹²³ The objection comes mainly from those who believe that public policy is inextricably linked to statehood and, therefore, that a trans-state public policy is hardly conceivable.

However, I find that the main problem with this paradigm rests in its lack of rigorous theoretical delineation of domestic and international public policy. As I will sketch out in the next Section, distinction between public interest from public morality and security is far more helpful.

C. *Concluding Remarks*

The following table shows the summary of four paradigms of courts’ reaction to the public policy exception:

¹²⁰ “The criterion of the closest connection” refers to the arbitrator’s choice of law based on which law, including international trade principles, is most closely related to the contract. *See id.* at 304–05.

¹²¹ “The legitimate expectations of the parties” refers to the need for an arbitrator to make his or her decision in accordance with the parties’ contract and the authority granted to the arbitrator. *Id.* at 305–06. Other scholars have also taken a stab at formulating the concept of international (or transnational) public policy. For instance, Yves Derains approaches it from a private international law perspective, i.e., in choosing the applicable law. In his theory, transnational public policy determines whether parties can contract around mandatory rules. Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 227, 227–28 (Pieter Sanders ed., 1987). Pierre Mayer takes this discussion to a radical level. He maintains that transnational public policy norms are not imposed on arbitrators, but rather are created by them. Pierre Mayer, *Effect of International Public Policy in International Arbitration?*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 61, 65–66 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

¹²² *See, e.g.*, W. Michael Reisman, *Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration*, in *INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?* 849 (Albert Jan van den Berg ed., 2007). Reisman points out that unlike domestic legislation, in which competing views about public policies are represented in the lawmaking process, there is no such body in international law. In other words, public policies are the result of a legislative mechanism that enjoys transparent participation of a wide-range of groups representing diverse opinions. *See id.* at 851–52.

¹²³ *See* PAULSSON, *supra* note 23, at 209.

<i>Paradigm</i>	<i>Ontology</i>	<i>Methodology</i>	<i>Epistemology</i>
<i>Social and Economic Life</i>	Public Policy Exists Above the Law	Political	Interest of States and Society
<i>Basic Notions of Morality and Justice</i>	Public Policy Exists Above the Law	Natural Law	Moral and Ethics of Society
<i>Fundamental Principles of Law</i>	Public Policy Exists at the Core of the Law	Positivistic	Basic and Well-Established Principles in Laws
<i>International Public Policy</i>	Public Policy Exists at the International Aspect of Law	Internationalist	Basic Principles of Law Applicable to the International Sphere

As surveyed and discussed, courts around the world have adopted various dispositions to interpret the public policy exception enshrined in the New York Convention. None of the paradigms has completely captured the intricacy of the public policy exception, leaving it, advertently or inadvertently, a Pandora's box. Among the four paradigms, the fundamental principle of law remains the most clear-cut with relatively clarified boundaries. Yet, the language employed by courts under each of the paradigms, still far from being transparent, partially results from a lack of robust theory of arbitration vis-à-vis court adjudication.

III. WHO HOLDS THE AUTHORITY: ARBITRAL POWER TO ENTER INTO PUBLIC POLICY MATTERS

A. *Theory of Public Policy in Arbitration*

The unprecedented growth of ADR is transforming the legal scene both domestically and internationally. Domestically, the United States Supreme Court expanded the application of the Federal Arbitration Act to cover almost all disputes with limited court supervision.¹²⁴ In many instances, boilerplate contracts along with legislation prescribing arbitration leave no "alternative" for parties besides ADR. Internationally, with the staggering increase in treaties allowing ADR and transnational contracts using arbitration provisions, institutionalized international courts and national courts rarely adjudicate important transnational disputes.

Against this backdrop, it is only at the enforcement stage of a dispute that arbitration and the court system intersect. It is during enforcement

¹²⁴ See generally 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).

that tensions arise out of the “private” nature of arbitration with “public” policy. Courts use their discretion to set aside private legal arrangements, including arbitral awards, which harm the public and endanger the legal order and society on finding that such awards are contrary to public policy.¹²⁵ In this way, public policy is among a very few control mechanisms available for courts to monitor arbitral proceedings and arbitral awards.

Yet, through time, courts have limited the scope and applicability of the public policy doctrine.¹²⁶ In the famous labor-law related *Misco* case, the Supreme Court declared that the Court of Appeals erred in setting aside the award based on public policy grounds.¹²⁷ For the Court, the public policy exception can be invoked only in situations where it is explicit, meaning that it is “well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”¹²⁸ This statement was a reiteration of *Grace v. Rubber Workers*¹²⁹ that later was reaffirmed in *Eastern Associated Coal Corp. v. United Mine Workers of America*.¹³⁰ The discussion in the preceding Part also sheds light on the tendency towards limited application of the public policy exception.

Two approaches are noticeable in instances where courts are dealing with the issue of public policy and enforcement of arbitral awards. The first approach, which is reflected in Justice Scalia’s concurring opinion in *Eastern Associated Coal*, can be called the objective approach. Under this viewpoint, an award is not enforceable in cases where it is evidently and unmistakably contrary to “actual prohibitions of the law.”¹³¹ The other approach takes a subjective view on the doctrine of public policy. As declared in *Eastern Associated Coal*, “the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.”¹³² These two ostensibly distinct approaches in fact result in the use of a similar legal technique. Discovering the “actual prohibition of the law” which constitutes the public policy exception is an interpretive and judicial task. In order to find out whether an award violates antitrust law, a judge has to dig out the underlying public policy of the statutes related to antitrust. Moreover, by no means is it clear which prohibitions in each

¹²⁵ See generally Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685 (Mar. 2016).

¹²⁶ See David M. Glanstein, *A Hail Mary Pass: Public Policy Review of Arbitration Awards*, 16 OHIO ST. J. ON DISP. RESOL. 297, 299–303 (2001).

¹²⁷ See *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 44–45 (1987).

¹²⁸ *Id.* at 43 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

¹²⁹ *W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983).

¹³⁰ 531 U.S. 55, 57–58 (2000).

¹³¹ *Id.* at 68 (Scalia, J., concurring in the judgment).

¹³² *Id.* at 63 (majority opinion).

statute constitute a mandatory and public policy-related provision that the arbitral award cannot violate. Therefore, probing into instances where an arbitral award violates public policy is inevitably a judicial and interpretive task and might in fact result in “flaccid public policy,” as used derogatorily by Justice Scalia.¹³³

B. *A Tripartite Approach to Public Policy*

The notion of public policy in law remains vague. On the other hand, it remains one of the most powerful doctrines in law which allows courts to trump otherwise binding legal arrangements. A classic example is a situation in which a restraint on one’s ability to trade in a contract becomes effectively a restriction on one’s freedom to conduct trade and business.¹³⁴ In this case, the contract or the provision could be set aside due to its clash with public policy. The potent effect of the notion of public policy requires careful examination and dissection. Prior to the 18th century, courts would employ the notion of public policy—or to be more precise “*encounter common ley*”—in instances where private legal arrangements allegedly would violate communal norms and values.¹³⁵ However, as noted by Knight, 18th-century jurisprudence resulted in the reformulation of the notion of public policy as a notion separate from morality or illegality.¹³⁶ With this development, the modern approach to public policy emerged in which political considerations and states’ policies became a metric for analyzing cases with public policy concerns.¹³⁷

The concept of public policy as we know it today lends itself to at least two main frameworks. It is critical to distinguish between these two when analyzing the usage of the phrase “public policy” in legal scholarship and courts’ opinions, as well as in non-legal fora. In the first sense,

¹³³ See *id.* at 68 (Scalia, J., concurring in the judgment). Whether courts can gauge the terms of an award and its reasoning against the public policy exception remains unresolved in U.S. courts. See Glanstein, *supra* note 126, at 299–301.

¹³⁴ See, for example, the classic case *Mitchel v. Reynolds* in which Lord Macclesfield invalidated a contract that would result in a restraint of trade: “[T]o obtain the sole exercise of any known trade throughout *England*, is a complete monopoly, and against the policy of the law.” (1711) 24 Eng. Rep. 347, 349.

¹³⁵ Knight, a legal historian, considers the 1914 *Dyer’s Case* as one of the oldest cases referring to “*encounter common ley*.” W.S.M. Knight, *Public Policy in English Law*, 38 L.Q. REV. 207, 207 (1922) (citing YB 2 Hen. V, fol. 5, Pasch, pl. 26. (1414)). This case was about a non-compete clause in which John Dyer promised not to use his art for half a year or else the other party could forfeit Dyer’s deposit bond. The court rejected this arrangement. See KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION* 33 (2003).

¹³⁶ Knight, *supra* note 135, at 210 (“The departure lies in the confusion of the principle of public policy with bare immorality and illegality.”).

¹³⁷ For a complete discussion on this topic, see Ghodoosi, *supra* note 125 (manuscript at 10–11).

public policy refers to general policies pursued by the government.¹³⁸ Governments try to achieve certain 'public' goals, such as promoting education, prohibiting drug use, increasing the efficiency of their economies, and protecting basic rights, among many other policies.¹³⁹ In the second usage, public policy refers to mandatory rules emanating from law; governmental policies which could override private legal arrangements. Embedded in the second definition are instances where public policy limits the application of foreign rules in conflict of laws or bars the enforcement of foreign judgments and awards.¹⁴⁰ The focus of this piece is on the second sense of public policy described. Public policy in this Ar-

¹³⁸ Here are some leading definitions in this category: "The term public policy always refers to the actions of government and the intentions that determine those actions." CLARKE E. COCHRAN ET AL., *AMERICAN PUBLIC POLICY: AN INTRODUCTION* 1 (6th ed. 1999); "[W]hatever governments choose to do or not to do." THOMAS R. DYE, *UNDERSTANDING PUBLIC POLICY* 3 (7th ed. 1992); "Stated most simply, public policy is the sum of government activities, whether pursued directly or through agents, as those activities have an influence on the lives of citizens." B. GUY PETERS, *AMERICAN PUBLIC POLICY: PROMISE AND PERFORMANCE* 4 (5th ed. 1999).

¹³⁹ Courts often utilize this meaning of public policy. In *United States v. Procter & Gamble Co.*, the Court confirmed what the dissent characterized as "the strong public policy of preserving the secrecy of grand jury proceedings." 356 U.S. 677, 690 (1958) (Harlan, J., dissenting). In *Owen v. City of Independence*, 445 U.S. 622, 650-53 (1980), and *Malley v. Briggs*, 475 U.S. 335, 340-41 (1986), the Supreme Court favored qualified immunity because of, inter alia, considerations of public policy. Another example is *Mitsubishi Motors Corp. v. Solely Chrysler-Plymouth, Inc.*, in which the Supreme Court declared the law endorsed the public policy in favor of competition. 473 U.S. 614, 639 n.21.

¹⁴⁰ See, e.g., John Bernard Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647, 649 (1985); Herbert F. Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L.Q. 156, 170 (1930); Herbert W. Greenberg, *Extrastate Enforcement of Tax Claims and Administrative Tax Determinations Under the Full Faith and Credit Clause*, 43 BROOK. L. REV. 630, 638 (1977); Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 194 (1932); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 746 (1924); Charles B. Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196, 196 (1935); Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969, 972 (1956); Willis L.M. Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 339 (1952). For more recent discussions, see, for example, Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61, 65 (1996); Thomas G. Guedj, *The Theory of the Lois de Police: A Functional Trend in Continental Private International Law—A Comparative Analysis with Modern American Theories*, 39 AM. J. COMP. L. 661, 665-66 (1991); L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 31-32 (1998); Todd C. Hilbig, Note, *Will New York Recognize Same-Sex Marriage?: An Analysis of the Conflict-of-Laws' Public Policy Exception*, 12 BYU J. PUB. L. 333, 334-36 (1998); Kent Murphy, Note, *The Traditional View of Public Policy and Ordre Public in Private International Law*, 11 GA. J. INT'L & COMP. L. 591, 591-95 (1981).

title refers to situations where private legal acts, e.g., contracts, become unenforceable due to their conflicts with ‘public’ policy deduced from legislation or judge-made rules.¹⁴¹

Due to the importance of the discussion, it is imperative that we design a new multi-faceted approach to the notion of public policy. To this day, public policy remains one of the most important avenues by which arbitral awards are gauged and assessed. Therefore, as I have laid out in detail elsewhere,¹⁴² public policy is not a monolithic concept but rather consists of three important yet intertwined notions: public interest, public morality, and public security.

The public interest strand of public policy concerns itself with the costs and benefits of enforcing a private legal arrangement such as a contract. Enforcing a contract which involves the construction of a factory in an urban area is an instance where the benefit of having a factory is gauged against the cost of pollution for the city. Antitrust cases serve as other good examples explaining this category of public policy. For instance, in *United States v. Microsoft*, the United States brought a case against Microsoft for violation of the Sherman Act on multiple grounds, alleging that Microsoft maintained a monopoly in the market for Intel-compatible PC systems, that it attempted to gain a monopoly in the web-browser market, and that it tied its two products together—i.e., Windows and Internet Explorer—illegally.¹⁴³ On the latter issue (the alleged tying arrangement), the court remanded the balancing task to the district court to evaluate whether the anticompetitive harm of the Java design was outweighed by the efficiencies that resulted from that design for society.¹⁴⁴ In this case, the court analyzed whether Microsoft’s action harmed or benefited the public. Similar to this case, the central method in the public-interest category is balancing the costs and benefits of enforcing a private legal arrangement or an arbitral award.

The public morality strand of public policy refers to cases where enforcing private legal arrangements or arbitral awards would encroach on some established communal morals and values. The Latin maxim *ex turpi causa non oritur actio* best describes this strand of public policy: from dishonorable cause an action does not arise.¹⁴⁵ Courts use public policy in

¹⁴¹ See Ghodoosi, *supra* note 125 at 705.

¹⁴² See *id.* at 723.

¹⁴³ *United States v. Microsoft*, 253 F.3d 34, 45 (D.C. Cir. 2001).

¹⁴⁴ See *id.* at 95 (“[P]laintiffs must show that Microsoft’s conduct was, on balance, anticompetitive. Microsoft may of course offer procompetitive justifications, and it is plaintiffs’ burden to show that the anticompetitive effect of the conduct outweighs its benefit.”).

¹⁴⁵ See David Plessner, *Public Policy in the Law of Contracts*, 29 CENT. L.J. 308, 308 (1889) (“There is no principle of law better settled, more frequently applied and more preservative of the integrity of the law and the good order and best interests of society than that embodied in the maxim [sic] *ex turpi causa non oritur actio.*”); see also

this sense quite often. Some define public policy as the “most basic notions of morality and justice.”¹⁴⁶ Others have invoked this strand of public policy by using terms such as “common sense,” “common conscience,” “public morals,” and alike.¹⁴⁷ The public policy to uphold morals also manifests in the “justice as pure fountain” theory, which insists that a court should not taint itself by lending help to private acts that are injurious to basic public morality.¹⁴⁸

The public security category concerns issues related to the survival of states. As the name suggests, the security and safety narrative constitutes this narrative of public policy. The existence of states rests above all other concerns in this category. For example, courts might find a very profitable contract against public policy if it poses threats to the security of the state involved. An arms sale could serve as a good example. In a series of recent cases, the government of the United States blocked certain in-

Georg Schwarzenberger, *The Conceptual Apparatus of International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 685, 706 (R. St.J. Macdonald & Douglas M. Johnston eds., 1983).

¹⁴⁶ See PAULSSON, *supra* note 23, at 217.

¹⁴⁷ See, e.g., *Nationwide Mutual Ins. Co. v. Riley*, 352 F.3d 804, 807 (3d Cir. 2003) (“[O]nly dominant public policy’ will ‘justify the invalidation of a contract as contrary to that policy,’ manifested by ‘long governmental practice or statutory enactments, or [by] violations of obvious ethical or moral standards.’” (quoting *Eichelman v. Nationwide Ins. Co.*, 711 A.2d 1006, 1008 (Pa. 1998))); *Application of Whitehaven S.F. v. Spangler*, 45 F. Supp. 3d 333, 345 (S.D.N.Y. 2014) (stating that under New York law, “[i]f one party wants to show that a certain act violates public policy that is not the law of the state, then it has to establish that such an act ‘would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal expressed in them’” (quoting *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 688 (N.Y. 1985))); *U.S. Fidelity & Guaranty Co. v. Challenge Constr. Corp.*, 704 F. Supp. 2d 73, 78 (D.P.R. 2009) (“Parties may agree to any terms and conditions so long as they are not contrary to the law, moral, or public order.”); *Deputy v. Lehman Bros., Inc.*, 374 F. Supp. 2d 695, 710 (E.D. Wis. 2005) (“Public policy is a ‘broad concept embodying the community common sense and common conscience.’” (quoting *Eckes v. Keith*, 420 N.W. 2d 417, 419 (Wis. Ct. App. 1988))); *Am. Home Assurance Co. v. Cohen*, 815 F. Supp. 365, 370 (W.D. Wash. 1993) (“the term ‘public policy,’ . . . embraces all acts or contracts which tend clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.” (quoting *LaPoint v. Richards*, 403 P.2d 889, 895 (Wash. 1965))); *In re Cherokee Run Country Club, Inc.*, 430 B.R. 281, 284 (Bankr. N.D. Ga. 2009) (“The courts have held that a contract is not contrary to public policy ‘unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law. . . .’” (quoting *Dep’t of Transp. v. Brooks*, 328 S.E.2d 705, 713 (Ga. 1985))).

¹⁴⁸ See Ghodoosi, *supra* note 125, at 727 (discussing *Collins v. Blantern*, (1765) 95 Eng. Rep. 847, 852).

vestments in the United States¹⁴⁹ because they would pose a threat to national security. These cases involved investments by companies whose major shareholder was allegedly under the control of a foreign country.¹⁵⁰

C. *Supreme Court Decision: Mitsubishi v. Soler*

The stance of the U.S. Supreme Court in the *Mitsubishi* case will serve to summarize our discussion and illuminate the most suitable approach to the thorny issue of public policy. In the case, Mitsubishi brought a suit against an automobile dealer to compel arbitration of a

¹⁴⁹ Currently, the main entity responsible for reviewing foreign direct investment in the United States is the Committee on Foreign Investment in the United States (CFIUS). In 1975, President Gerald Ford established CFIUS. However, it remained a relatively dormant committee due partly to its lack of an enforcement mechanism. In 2007, the CFIUS gained further discretion with the enactment of the Foreign Investment and National Security Act (FISIA). For a brief history of CFIUS, see Paul Connell & Tian Huang, Note, *An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States*, 39 YALE J. INT'L L. 131, 135–38 (2014). FISIA provides wide discretion for the U.S. government, especially in foreign investment in certain sectors such as critical infrastructure, critical technologies, as well as foreign government-controlled transactions that “could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government.” See Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, sec. 2, § 721(a) (4), 121 Stat. 246, 247. The law was passed following two controversial foreign investments in the United States: China National Offshore Oil Corporation’s bid for Unocal in 2005 and Dubai Ports World’s bid to manage terminal operations in 2006. See David Barboza & Andrew Ross Sorkin, *Chinese Oil Giant in Takeover Bid for U.S. Corporation*, N.Y. TIMES (June 23, 2005), <http://www.nytimes.com/2005/06/23/business/worldbusiness/chinese-oil-giant-in-takeover-bid-for-us-corporation.html>; David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), <http://www.nytimes.com/2006/03/10/politics/10ports.html?pagewanted=all>.

¹⁵⁰ In a recent case, President Barack Obama ordered a company, named Ralls Corp., to “divest itself of all interests” in an Oregon wind farm. See *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 306 (D.C. Cir. 2014). The reason was that the merger and acquisition would have potentially posed a threat to the national security of the United States. The acquiring company belonged to Chinese investors, thus allowing the president to review and block the acquisition if necessary to protect national security. *Id.* at 301–02. This is not an isolated case; the United States routinely monitors the transactions that might pose any threats to the security of the United States. The threats can be caused, inter alia, by the possibility of foreign access to certain information or by control of foreign entities over critical infrastructure. See Damian Paletta et al., *Obama Blocks Chinese Firm from Wind-Farm Projects*, WALL ST. J. (Sep. 28, 2012), <http://www.wsj.com/articles/SB10000872396390444712904578024590739979984>. The investors did not back down. For the first time, a company who was denied investment due to foreign-investment-related regulations brought a case against the United States in the U.S. courts. The case is ongoing; the trial court originally dismissed the case, but the U.S. Court of Appeals for the District of Columbia Circuit reversed due to, inter alia, violation of the Due Process Clause. See *Ralls Corp.*, 758 F.3d at 302.

dispute in Japan, in order to collect, *inter alia*, contractual damages and damages related to Soler's failure to fulfill terms of the manufacturer's warranty.¹⁵¹ Soler counterclaimed for a violation of the Sherman Act, the main antitrust statute in the United States.¹⁵² The Court had to decide whether a properly constituted arbitral body pursuant to a valid arbitration clause under the auspices of the New York Convention could adjudicate matters related to competition and antitrust law. The Court eventually answered this question in the affirmative,¹⁵³ yet in reaching this decision, it laid out a theoretical ground pertinent to our discussion.

The Supreme Court's opinion does not limit itself to the consensual approach, as it acknowledges the independence and necessity of international arbitration. The Court keenly observed that courts should be willing to "cede jurisdiction of a claim arising under domestic law" to resolve disputes arising out of an international commercial relationship.¹⁵⁴ It continued by boldly stating that national courts should "subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."¹⁵⁵ This view of international arbitration largely corresponds to the resistance-based paradigm, as it recognizes arbitration as a parallel justice system, not subordinate to national courts.

Contrary to what has been claimed,¹⁵⁶ *Mitsubishi* does not take the internationalist approach but rather, I argue, a positivistic one. A careful look at the decision shows that the Court is not committed to the internationalist view on public policy. In other words, the Court does not seem to be primarily concerned about whether the arbitral proceeding in question is international or domestic. In reaching the decision, the Court clearly investigates the legislative history of the Sherman Act as well as the international obligations of the United States emanating from the New York Convention.¹⁵⁷ Only in this respect and in reconciling the two does the Court hold that "the international character of the controversy makes it arbitrable."¹⁵⁸ This is what Judith Resnik calls "effective vindication" of statutory rights in arbitration.¹⁵⁹ Arbitration can adjudicate matters of

¹⁵¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 618–19, 618 n.2 (1985).

¹⁵² *Id.* at 619–20.

¹⁵³ *See id.* at 628–29.

¹⁵⁴ *Id.* at 638.

¹⁵⁵ *Id.* at 639.

¹⁵⁶ *See* Lalive, *supra* note 111, at 275 ("[T]he famous *Mitsubishi* decision accepts the argument, developed, *inter alia*, in the amicus curiae brief of the American Arbitration Association and decides that, in antitrust matters, the principle of non-arbitrability does not extend to international contracts.").

¹⁵⁷ *See Mitsubishi*, 473 U.S. at 636–38.

¹⁵⁸ *Id.* at 659 (Stevens, J., dissenting) (describing the majority's holding).

¹⁵⁹ Resnik, *supra* note 124, at 2811. She discusses the matter in depth in Part IV of her article. *Id.* at 2874–2931. Resnik ultimately concludes that this approach fails to

public law and policy so long as it is effective in vindicating the rights stipulated in the statutes.¹⁶⁰ In establishing this approach the Court states, “in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”¹⁶¹

The most critical part of the decision is where the Court stipulates that arbitral tribunals serve as qualified venues to vindicate the statutory cause of action. As the dissent notes, the Court had previously recognized the “weighty public interests” underlying the Sherman Act,¹⁶² yet, contrary to its precedent, here held that (international) arbitral tribunals provide “an adequate mechanism” to resolve matters related to public interests.¹⁶³ The only requirement is that “the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”¹⁶⁴

The *Mitsubishi* approach provides one of the most delicately crafted theories of public policy in arbitration. Its stance on arbitration does not restrict itself to the consensual or interest-based approaches, and acknowledges the independence of the institution of arbitration, at least at the international level.¹⁶⁵ Furthermore, it takes a more positivistic ap-

effectively vindicate rights. *Id.* at 2939.

¹⁶⁰ Justice Stevens argued in his dissent that arbitration clauses should not normally be read to cover statutory remedies. *Mitsubishi*, 473 U.S. at 641 (Stevens, J., dissenting).

¹⁶¹ *Id.* at 637 n.19 (majority opinion). For the ramifications of the decision on subsequent cases related to international commercial arbitration, see Donald Francis Donovan, *International Commercial Arbitration and Public Policy*, 27 N.Y.U. J. INT’L L. & POL. 645, 655–57 (1995).

¹⁶² See *Mitsubishi*, 473 U.S. at 651 (Stevens, J., dissenting) (quoting *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972)) (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.”)).

¹⁶³ *Id.* at 636 (majority opinion).

¹⁶⁴ *Id.* at 637.

¹⁶⁵ I agree with Donald Donovan that “if international commercial arbitration is to play the critical role in the international economy of which it is capable, arbitrators cannot shy away from, and courts must be prepared to refer to arbitration, both private and public law claims encompassed by a valid agreement to arbitrate.” Donovan, *supra* note 161, at 657. As Donovan notes, this follows from the *Mitsubishi* decision. However, in order to balance this approach, courts need to be more active reviewing awards at the enforcement stage.

proach than a political or ethical one. Lastly, the Court duly notes that the public-interest category, which mainly involves an economic methodology, could be decided by arbitral tribunals as long as parties litigate the matter effectively.¹⁶⁶

On the other hand, the Court notes that courts retain the authority at the enforcement stage to “ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.”¹⁶⁷ The problem, however, is that the Supreme Court has narrowly construed the reviewability of awards.¹⁶⁸ For instance, in the context of enforcement of labor arbitration, awards violate public policy only if the policies are “well defined and dominant,” and are to be “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”¹⁶⁹ As a result, it is not clear whether the public policy exception could truly serve as an avenue for courts to properly review the awards based on their impact on public interest. In other words, the bold move of the *Mitsubishi* decision towards delegating more authority to arbitration was jeopardized by that fact that courts have practically relinquished the authority to review awards based on the public policy exception.¹⁷⁰ This development is reflected in the *Hall Street Associates* decision in which the Supreme Court limited the reviewability of awards to grounds enumerated in the Federal Arbitration Act.¹⁷¹ This ruling put in-

¹⁶⁶ See *Mitsubishi*, 473 U.S. at 634.

¹⁶⁷ *Id.* at 638.

¹⁶⁸ The Supreme Court ruled in *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 578 (2008), that arbitral awards may only be reviewed based on the grounds listed in the Federal Arbitration Act. See also Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy*, 14 FORDHAM J. CORP. & FIN. L. 579, 599 (2009) (“While the *Hall Street Associates* holding did not specifically mention the public policy exception, the Court’s reasoning invariably questions its continued existence in the context of arbitration awards, as the FAA does not include a ‘void against public policy’ standard.”).

¹⁶⁹ *Eastern Associated Coal Corp. v. United Mine Workers of America*, 121 S. Ct 462, 464 (2000) *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1995); *United Paperworkers Int’l Union, AFL-CIO v. Misco*, 484 U.S. 29, 43 (1987).

¹⁷⁰ Originally, some scholars expressed doubts about the scope of this ruling especially in matters of punitive damages over which courts claimed exclusive authority. See, e.g., Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 264 (1987). However, later the Supreme Court in the *Mastrobuono* decision declared that an arbitral panel had the authority to award compensatory and punitive damages even though the applicable law (New York law, in this case) prohibited arbitrators from awarding punitive damages. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995) (“[T]he best way to harmonize the choice-of-law provision with the arbitration provision is to read ‘the laws of the State of New York’ to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators.”).

¹⁷¹ See *Hall St. Assocs.*, 552 U.S. at 578.

to question the viability of judicially created avenues for the review of arbitral awards including, for instance, “a manifest disregard of law or violation of public policy.”¹⁷² Since then, in order to balance the Supreme Court decision, some state courts have argued that common law and state statutory grounds for review remain open to parties.¹⁷³ In summary, the scope of reviewability of arbitral awards has become extremely narrow.¹⁷⁴

Yet, even after the *Hall Street Associates* decision, the public policy exception should remain a ground for reviewability of awards. Regarding the public policy exception in the enforcement of domestic awards, the 1996 decision of the Supreme Court is relevant. In *Doctor’s Associates, Inc. v. Casarotto*, the Supreme Court declared that the defenses applicable in contract law “such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.”¹⁷⁵ Section 2 of the Federal Arbitration Act declares that arbitration clauses are valid “save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁷⁶ Undoubtedly, the public policy exception is an ingrained common law defense against enforcement of contracts. Thus, even if the *Hall Street Associates* decision negates all non-explicit FAA review grounds (contractually and judicially created), the public policy exception defense exists as a common law defense in contract law.

CONCLUSION

There is a pressing need for an arbitration overhaul; this Article aims to be a critical step towards it. The principal objective of this Article is to re-conceptualize the concept of arbitration theoretically and to argue that it can and should adjudicate a certain category of public policy, i.e., the public interest strand. Our view towards the problem of public policy pivots on the way we frame arbitration. Ideally, arbitration is and should be a “parallel justice system” which provides an “alternative” account of public interest. It is not clear why a court would be more aptly fit to determine the interests of the populace than a more specialized panel of arbitrators. In fact, states have long held a monopoly on determining

¹⁷² Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929, 932 (2010).

¹⁷³ James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 781–85 (2009) (citing *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 605 (Cal. 2008)) (holding that, in California, parties could contract for judicial review of arbitration awards for legal error).

¹⁷⁴ See Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 137–43 (2011).

¹⁷⁵ 517 U.S. 681, 687 (1996) (citing 9 U.S.C. § 2 (1994)).

¹⁷⁶ 9 U.S.C. § 2.

public interest. It is time to open the door for competition so that more diversified accounts of what constitutes public interest can emerge.