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**Arbitrator Selection and Regulatory Competition
in International Arbitration Law**

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I. Introduction

“Supply-side” explanations for regulatory competition emphasize the importance of interest group politics in driving the competitive process.¹ For example, Delaware lawyers benefit from the state’s favored position in American corporate law, and have an incentive to support legislation that maintains that position. The returns to lawyers from the state’s dominant position are substantial. One recent study estimates that “Delaware’s status as incorporation haven” resulted in “additional lawyer income of \$165 million and additional lawyer revenues of \$227 million” for Delaware lawyers in 2001.²

By contrast, no one country has a dominant position in international arbitration law. Instead, countries have competed actively – and successfully –to attract international arbitration business by enacting laws favorable to arbitration.³ A number of interest groups are likely to benefit from the arbitration business the new laws attract: arbitration institutions, which earn fees for administering arbitration proceedings; local lawyers, who earn fees from representing parties in arbitration; and hotels, which charge for conference rooms and accommodations. But, as one commentator has concluded, “the major beneficiaries [of new arbitration laws] are good local arbitrators.”⁴

This paper examines empirically the effect of enacting a new or revised arbitration statute on the selection of international arbitrators. It considers various ways

* Thanks to Ted Juhl, Laura Hines, Beth Garrett, and participants at the Annual Meeting of the Midwestern Law & Economics Association (2002), for helpful comments and discussions.

¹ See Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999, 1009 (1994); see also Jonathan R. Macy & Geoffrey P. Miller, *Toward an Interest Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 498-509 (1987); John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards*, 8 CARDOZO L. REV. 759, 762-64 (1987).

² Marcel Kahan & Ehud Kaman, *The Myth of State Competition in Corporate Law*, 55 STANFORD L. REV. 679 (2002). The authors conclude, however, that “[t]he benefits other states and their lawyers could expect to receive from an increase in legal business are of much lower magnitude and provide at most weak incentives to compete for incorporations.” *Id.*

³ See Christopher R. Drahozal, *Regulatory Competition and the Location of International Arbitration Proceedings* (University of Kansas School of Law Working Paper 2003) (finding a statistically significant increase in the number of International Chamber of Commerce arbitration proceedings held in a country following enactment of a new or revised arbitration statute).

⁴ Luke Nottage, *The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery*, 16 ARB. INT’L 53, 56 (2000).

in which arbitrators may benefit from a new arbitration law. Parties may prefer to select arbitrators from the country in which the arbitration proceeding is held because of their expertise in the country's arbitration law (which governs the conduct of the arbitration proceeding). Thus, any increase in arbitration proceedings following enactment itself likely benefits local arbitrators. In addition, enactment of a new arbitration statute might make it more likely that local arbitrators will be selected in proceedings held in the enacting country, because the changed legal regime makes local arbitrators' expertise more valuable than it otherwise would be. Finally, enactment might make it more likely that arbitrators in the enacting country will be selected for arbitration proceedings elsewhere. Successfully lobbying for a new arbitration statute may signal that arbitrators in the country have the sort of managerial or consensus-building skills that would make them effective arbitrators.

The paper uses cross-sectional data to estimate models of the selection of presiding and party-appointed arbitrators in arbitration proceedings administered by the International Chamber of Commerce ("ICC") in 2000. The principal empirical findings are threefold.

First, there is a strong relationship between the number of arbitration proceedings held in a country and the number of arbitrators selected from the country. Thus, as expected, an increase in arbitration proceedings held in a country following enactment of a new arbitration law almost certainly benefits prospective arbitrators in the country. Second, the rate at which local arbitrators are selected for arbitration proceedings held in a country increases after enactment of a new arbitration law. Enactment thus benefits local arbitrators not only by increasing the number of proceedings in the country, but also by increasing the selection of local arbitrators in those proceedings. Third, the rate at which local arbitrators are selected for arbitration proceedings held in other countries does not appear to increase after enactment of a new arbitration law, with the possible exception of presiding arbitrators in countries that have enacted the UNCITRAL Model Law on International Commercial Arbitration. The evidence thus provides little or no support for the theory that enactment of a new arbitration statute serves as a signal of arbitrator quality.

Part II discusses the selection of arbitrators in ICC arbitration proceedings. Part III considers in more detail how arbitrators may benefit from modernization of a country's arbitration law. Part IV presents the empirical results. Part V concludes.

II. Selection of Arbitrators in International Commercial Arbitration

International commercial contracts commonly contain an arbitration clause, providing for a third party neutral or neutrals – the arbitrators – to resolve any dispute.⁵

⁵ KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 8 & n.62 (1993) (citing ALBERT JAN VAN DEN BERG ET AL., ARBITRAGERECHT 134 (1988)); Gerald Aksen, *Arbitration and Other Means of Dispute Settlement*, in INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH

Although subject to increasing competition from national arbitration institutions, the International Chamber of Commerce (“ICC”) remains the “central institution” in international commercial arbitration.⁶ The ICC Court of International Arbitration (supported by its Secretariat) provides administrative services for parties involved in international arbitration proceedings, and has promulgated rules to govern in proceedings it administers.⁷

A defining characteristic of arbitration is that the parties select the arbitrators. Indeed, “in international arbitration, the choice of arbitrators may be the single most important task parties face.”⁸ This part first describes the procedures by which international arbitrators commonly are selected, and then identifies key factors that parties and the ICC Court consider in deciding who to select.

A. Arbitrator Selection Under the ICC Rules of Arbitration

The default rule under the ICC Rules is for a sole arbitrator to resolve the dispute, unless the parties agree otherwise or the ICC Court determines that three arbitrators should be appointed.⁹ Slightly under half of ICC arbitrations filed in 2000 involved a sole, presiding arbitrator; the rest involved a three-arbitrator panel.¹⁰ Parties can nominate a sole arbitrator jointly, subject to confirmation by the ICC Court.¹¹ If the parties cannot agree on the sole arbitrator, the ICC Court appoints the arbitrator based on a proposal by one of its National Committees.¹² In 2000, 77% of sole arbitrators were

FOREIGN INVESTORS IN THE U.S. AND ABROAD 287, 287 (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990) (“In today’s world the dispute resolution mechanism will invariably be arbitration”).

⁶ YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE* 45 (1996); see also Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 79, 99-100 (2000) (describing competition and listing other leading international arbitral institutions).

⁷ International Chamber of Commerce, Rules of Arbitration (in force from 1 January 1998) [hereinafter ICC Rules].

⁸ W. MICHAEL RESIMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION* 640 (1997). Cf. Soia Mentschikoff & Ernest A. Haggard, *Decision Making and Decision Consensus in Commercial Arbitration*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* (June Louin Tapp & Felice J. Levine eds., 1977) (domestic arbitration) (“who the arbitrator is in terms of expertise and prior experience is the single most important factor in both the decisional and the consensus processes”).

⁹ ICC Rules, *supra* note ___, art. 8(2).

¹⁰ *2000 Statistical Report*, ICC INT’L CT. ARB. BULL., Spring 2001, at 8.

¹¹ ICC Rules, *supra* note ___, art. 9(2).

¹² *Id.* art. 9(3). The ICC has seventy National Committees, “which serve as an interface between the [ICC] members and the ICC headquarters in Paris.” W. LAURENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* § 2.02, at 17 (3d ed. 2000).

appointed on the basis of National Committee proposals, 19% by agreement of the parties, and 4% directly by the ICC Court.¹³

For three-arbitrator panels, each party typically nominates one arbitrator and the two co-arbitrators nominate the presiding arbitrator, who serves as the chair of the panel. Under the ICC Rules, the ICC Court must confirm all party nominations. If either party fails to nominate an arbitrator, or if the procedure chosen by the parties does not result in the nomination of a presiding arbitrator, the ICC Court appoints the arbitrator, ordinarily on the proposal of a National Committee.¹⁴ For three-member tribunals, 96 percent of co-arbitrators (commonly referred to as party-appointed arbitrators) were nominated by the parties in 2000.¹⁵ For presiding arbitrators, 58 percent were nominated by party-appointed arbitrators or by the parties themselves.¹⁶

B. Selecting International Arbitrators

Commentators on international arbitration practice identify a variety of factors that parties and the ICC Court consider in selecting international arbitrators. Obviously, these factors play out differently in different cases and for different parties. Nonetheless, the literature consistently identifies the factors discussed below as among the most important.

One initial point: in examining arbitrator selection, it is necessary to distinguish between the selection of party-appointed arbitrators and the selection of presiding arbitrators. As explained above, party-appointed arbitrators are nominated by one party without agreement of the other party. A party-appointed arbitrator must be independent of the nominating party,¹⁷ but is selected unilaterally by that party. By comparison, both parties (or at least both party-appointed arbitrators¹⁸) must agree on the presiding

¹³ 2000 Statistical Report, *supra* note __, at 8.

¹⁴ ICC Rules, *supra* note __, arts. 8(4), 9(3).

¹⁵ 2000 Statistical Report, *supra* note __, at 8.

¹⁶ *Id.*

¹⁷ ICC Rules, *supra* note __, art. 7(1) & (2); see Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395, 397-400 (1998).

¹⁸ Although ethical rules generally proscribe *ex parte* contacts between arbitrators and parties, the rules permit party-appointed arbitrators to consult with the party that appointed them on selection of a presiding arbitrator. See International Bar Association, *Ethics for International Arbitrators* art. 5.2 (1986); Bishop & Reed, *supra* note __, at 426 (“The practice in international arbitration is to allow party-appointed arbitrators to consult with counsel for their appointing parties about the acceptability of potential candidates for the third arbitrator”).

arbitrator.¹⁹ Thus, the following discusses the selection of party-appointed arbitrators and presiding arbitrators separately.

1. Party-Appointed Arbitrators

Parties no doubt seek to select a party-appointed arbitrator who will view their position on the merits favorably.²⁰ But they are constrained in doing so by rules requiring international arbitrators to be independent of the parties²¹ and by rules restricting the ability of parties to discuss the merits of the case with prospective arbitrators.²² As a result, in selecting a party-appointed arbitrator, parties will consider the arbitrator's general reputation and factors such as the following:

- Nationality. According to Bishop and Reed, “when parties appoint their own arbitrators, they will often favour an arbitrator of their own nationality or at least of common cultural or jurisprudential background.”²³ Parties may use the nationality of the arbitrator as a proxy for the arbitrator's views on the merits of a case, or as evidence that the arbitrator understands the legal system in which the party operates. Alternatively, parties may prefer a party-appointed arbitrator who is a national of the country whose arbitration law governs the arbitration proceeding (ordinarily the place of arbitration) or the country whose substantive law governs the dispute.²⁴ In either case, the arbitrator's experience with a legal system central to the proceeding is an important reason for his or her selection.

¹⁹ When the ICC Court selects the presiding arbitrator (with or without the aid of its National Committees), the Court has a strong incentive to take into account both parties' interests in making the appointment.

²⁰ As one international lawyer has put it: “what I am really looking for in a party nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias.” Martin Hunter, *Ethics of the International Arbitrator*, 53 *ARBITRATION* 219, 223 (1987).

²¹ See *supra* text accompanying note ___.

²² Bishop & Reed, *supra* note ___, at 423-25.

²³ *Id.* at 401.

²⁴ Stephen R. Bond, *The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 *N.W. J. INT'L L. & BUS.* 1, 6 (1991):

While no statistics are yet available, the general impression of the author is that parties from developing countries and Eastern Europe have traditionally placed considerable importance on proposing a co-arbitrator of their own nationality while Western parties place more priority on proposing a co-arbitrator with a particular expertise in the applicable law, the field of law concerned (construction, high-tech, etc.) or a general expertise in arbitration regardless of nationality.

- Experience and training. Parties generally will prefer arbitrators with more experience and better training.²⁵ As Dezalay and Garth explain, “[t]he attorneys for the parties well understand that the ‘authority’ and ‘expertise’ of arbitrators determine their clout within the tribunal.”²⁶
- Professional qualifications. Although not required by the ICC Rules, the vast majority of party-appointed arbitrators selected in ICC arbitration proceedings are legal professionals.²⁷
- Linguistic ability. Parties ordinarily prefer an arbitrator “with an adequate working knowledge of the language in which the arbitration is to take place.”²⁸ Requiring translation of all written documents and oral proceedings, while sometimes done, increases the cost of the proceeding substantially, as well as increasing the risk of an erroneous award.

2. Presiding Arbitrators

For the selection of presiding arbitrators, many factors are the same as for party-appointed arbitrators. Parties (and the ICC Court) look for experienced and well-trained arbitrators, with appropriate professional qualifications and language skills.²⁹ There are important differences, however.

First, although the ICC Rules permit a party to select a party-appointed arbitrator who is a national of the same country as the party, Article 9(5) of the ICC Rules provides that “[t]he sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties.”³⁰ The rule adds that “in suitable circumstances” the presiding arbitrator “may be chosen from a country of which any of the parties is a national,” a provision that tends to be used only in narrow circumstances unlikely to

²⁵ E.g., ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 205-08 (3d ed. 1999).

²⁶ DEZALAY & GARTH, *supra* note __, at 8-9. The importance of “authority” and “clout” may explain why ICC arbitration is (or at least is perceived to be) dominated by a few, elite arbitrators, often described as a “club” or “mafia.” *See id.* at 10. *But see* Jan Paulsson, *Ethics, Elitism, Eligibility*, *J. INT’L ARB.*, Dec. 1997, at 13, 19 (arguing that such perceptions “lack a solid evidentiary basis”); *see also* DEZALAY & GARTH, *supra* note __, at 47.

²⁷ Bond, *supra* note __, at 5 (“at least 95% of the arbitrators proposed by the parties themselves are lawyers, professors of law, in-house counsel, or other legal professionals”).

²⁸ REDFERN & HUNTER, *supra* note __, at 206-07; *see also* Bond, *supra* note __, at 7.

²⁹ *Cf.* David E. Bloom & Christopher L. Cavanagh, *An Analysis of the Selection of Arbitrators*, 76 *AM. ECON. REV.* 408 (1986) (selection of labor arbitrators in the United States) (“employer and union preferences tend to be at least moderately similar”).

³⁰ ICC Rules, *supra* note __, art. 9(5).

create even an appearance of favoring one of the parties.³¹ Indeed, the ICC may avoid appointing presiding arbitrators from neighboring countries “to avoid any appearance of national bias.”³²

Second, presiding arbitrators are more likely to be nationals of the place of arbitration than are party-appointed arbitrators.³³ Because the law governing the arbitration proceeding ordinarily is the law of the place of arbitration,³⁴ it is particularly useful for the presiding arbitrator to be from the country where the arbitration proceeding takes place. Indeed, when the ICC Court selects a presiding arbitrator, it ordinarily turns to the National Committee of the place of arbitration for proposals.³⁵

Third, consensus-building skills and “managerial ability”³⁶ are more important for presiding arbitrators than for party-appointed arbitrators. As Stephen Bond, the former Secretary General of the ICC Court has written:

Today’s arbitrations are sufficiently complex and hard-fought to require sole arbitrators and chairpersons who can ‘manage’ the arbitration in every sense of the term. They must be able to inspire and lead the co-arbitrators,

³¹ *Id.*; see CRAIG ET AL., *supra* note __, § 12.03, at 193 & n.15; Thomas H. Webster, *Selection of Arbitrators in a Nutshell*, 19 J. INT’L ARB. 261, 264 (2002) (“Under ICC practice, if you choose a co-arbitrator with the nationality of the other party and the other party picks an arbitrator with the same nationality, ICC will consider that there is no objection to having a chairman with the same nationality.”).

³² CRAIG ET AL., *supra* note __, § 13.05(iii), at 224.

³³ In many cases, the parties agree on the place of arbitration, often in their original contract. See *2000 Statistical Report*, *supra* note __, at 10 (“The place of arbitration was chosen by the parties in 82% of the cases registered in 2000, and by the Court in the remaining 18%). Even when the parties do not agree on the place of arbitration, the ICC Court determines the place of arbitration *before* “ask[ing] the National Committee of that country to propose an arbitrator.” CRAIG ET AL., *supra* note __, § 2.05, at 27.

³⁴ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 413 (2d ed. 2001).

³⁵ As Craig et al. explain:

In choosing the National Committee to propose the chairman or sole arbitrator, the Court most frequently looks to the place of arbitration, particularly if the site was agreed by the parties. A party having accepted a venue can hardly raise an objection to the appointment of a presiding arbitrator from that country. Even where the Court has chosen the place of arbitration, it usually looks to the National Committee there. The reason is that the presiding arbitrator should be aware of any particularities of local law and procedures which might affect the arbitration.

CRAIG ET AL., *supra* note __, § 12.03, at 192; see also *id.* § 2.03(i), at 21; *id.* § 2.05, at 27.

³⁶ Bond, *supra* note __, at 10.

tread the very thin line between laxity and undue delay on the one hand and dictatorial, unreasonable demands on the other.³⁷

Of course, identifying arbitrators with such abilities and skills can be difficult.

Fourth, in selecting presiding arbitrators, parties and the ICC Court often look for arbitrators with what Bond calls “legal internationalism”: an appreciation of “the various different national legal systems and the reasons for the differing assumptions, presumptions, expectations and demands of the parties.”³⁸

III. Regulatory Competition and International Arbitrators

This part considers the effect of competition among countries to attract international arbitration business on the selection of international arbitrators. That such competition occurs has been well documented. Pieter Sanders has noted that “[m]odernization of arbitration laws is inspired by the desire to make arbitration more attractive to its users. A certain competition between countries to attract arbitration to be held in their country can be noted.”³⁹ According to Klaus Peter Berger, new arbitration laws serve as “‘marketing strategies’ intended to send a signaling effect to the international arbitration community of the userfriendliness of their legal environment and of the quality of services offered in these jurisdictions.”⁴⁰

Supporters of new arbitration laws contend that enactment will provide significant economic benefits to the enacting country.⁴¹ Estimates by supporters of the magnitude of

³⁷ *Id.*; see also Webster, *supra* note __, at 272 (“Particularly in a complex arbitration or in one in which counsel is uncooperative, one needs a chairman who will be able to manage the procedure with regard to (1) the parties, (2) the other members of the tribunal, and (3) the requirements of the relevant arbitration rules and applicable law.”).

³⁸ Bond, *supra* note __, at 10; see also REDFERN & HUNTER, *supra* note __, at 207.

³⁹ Pieter Sanders, *Arbitration*, in 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE, at 12-29 (Mauro Cappelletti ed. 1996).

⁴⁰ BERGER, *supra* note __, at 6 & n.55.

⁴¹ As to Ireland’s enactment of the UNCITRAL Model Law on International Commercial Arbitration, for example, see Press Release, O’Donoghue Publishes Bill Designed to Attract International Inward Investment to Ireland (Oct. 2, 1997) <www.irlgov.ie:80/justice/Press%20Releases/Press-97/pr-0210b.htm> (quoting John O’Donoghue, Minister for Justice, Equality and Law Reform”); Debates of the Houses of the Oireachtas on Arbitration (International Commercial) Bill, 1997: Second Stage <www.irlgov.ie:80/debates/s14may98/sect2.htm> (“[The bill] will strengthen Ireland’s position and I believe we will succeed in securing a great deal of international business here as a result of it”) (remarks of Mrs. Taylor Quinn); *id.* (“a modern arbitration law, for which the Bill provides, has the potential to attract valuable arbitration business to this State”) (remarks of Miss M. Wallace, Minister of State and the Department of Justice, Equality and Law Reform).

such benefits, however, have proven unreliable.⁴² In a previous paper, I sought to quantify in part the economic benefits that countries obtain from enacting a new arbitration law. That paper found a statistically significant increase in the number of ICC arbitration proceedings held in a country after enactment of a new or revised arbitration statute.⁴³ The magnitude of the increase was small in absolute terms (on average fewer than two new proceedings per year in each country in the entire sample, and at most eight new proceedings per year in each major arbitration country), but relatively large in percentage terms (an increase of roughly 18 percent over the mean).⁴⁴ Because the paper (due to data limitations) was unable to consider arbitrations administered by institutions other than the ICC or non-administered (ad hoc) arbitration proceedings, its estimates likely reflect the minimum increase that results.

Which interest groups in a country are likely to benefit from the increase in arbitration business? Identifying the beneficiaries of arbitration laws is important to developing a “supply-side” explanation for regulatory competition among arbitral venues.⁴⁵ Just as “state competition to supply law may be driven by lawyers rather than legislatures,”⁴⁶ competition among arbitral venues to attract arbitration business may be driven by arbitrators rather than legislatures as well. As one commentator has stated: “[a]lthough arbitral institutions stand to gain from additional fees for more arbitrations administered by them, and local lawyers even more so (subject to the trend towards allowing representation also by foreign lawyers), the major beneficiaries [of new arbitration laws] are good local arbitrators.”⁴⁷

Local arbitrators may benefit in several ways from enactment of a new arbitration law. First, the number of arbitration proceedings held in a country generally increases following enactment. All else equal, parties prefer an arbitrator who is a national of the place of arbitration. As a result, when the number of arbitration proceedings held in a country increases, the number of arbitrators selected who are nationals of that country likely will increase as well.

⁴² According to Dezalay and Garth:

In England, the partisans of reform of arbitration estimated that millions of pounds were being lost to London and its legal profession from the fact of legislation perceived by their foreign counterparts as too restrictive and costly. The same individuals today admit that the estimates, widely reported by the press, were complete inventions.

DEZALAY & GARTH, *supra* note ___, at 299 n.21.

⁴³ Drahozal, *supra* note __.

⁴⁴ *Id.*

⁴⁵ Ribstein, *supra* note ___, at 1009.

⁴⁶ Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1212 n.37 (2000). *But see* Kahan & Kamar, *supra* note ___, at ___.

⁴⁷ Nottage, *supra* note ___, at 56.

Second, parties may be more likely to select a local arbitrator in an arbitration proceeding held in an enacting country than they were before. Selecting a local arbitrator may be even more important after enactment of a new arbitration statute than before, at least for some period of time. Arbitrators in the enacting country have the earliest opportunity to become familiar with the new law, and, indeed, may have been instrumental in drafting it. Further, local arbitrators likely will have better information about how courts have begun to apply the statute, given that court proceedings ancillary to arbitration hearings may not result in published opinions.⁴⁸

Third, parties may be more likely to select an arbitrator from an enacting country in an arbitration proceeding held in another country than they were before. Enactment of a new arbitration law may signal that arbitrators who are nationals of the country are of higher quality than prospective arbitrators who are nationals of other countries.⁴⁹ Signaling behavior is plausible in the market for international arbitrators because of the limited information available to parties selecting arbitrators.⁵⁰ Indeed, one would expect arbitrators to seek to signal their quality to parties. One way prospective arbitrators might signal their quality is by authoring articles or by speaking at conferences. Another might be by lobbying (successfully) for enactment of a new arbitration statute, which could signal that local arbitrators have managerial or consensus-building skills that are superior to arbitrators from other countries.⁵¹

The next part of the article tests for these possible benefits of new arbitration statutes to local arbitrators.

⁴⁸ Cf. Michael A. Klausner, *A Comment on Contract and Jurisdictional Competition*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 349, 355 (F.H. Buckley ed., 1999) .

⁴⁹ See generally A. MICHAEL SPENCE, *MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES* 5-30 (1974); Michael Spence, *Job Market Signaling*, 87 *Q.J. ECON.* 355 (1973). For empirical studies of education as a signal, see, e.g., James W. Albrecht, *A Procedure for Testing the Signalling Hypothesis*, 15 *J. PUB. ECON.* 123 (1981); John G. Riley, *Testing the Educational Screening Hypothesis*, 87 *J. POL. ECON.* S227 (1979).

⁵⁰ See CRAIG ET AL., *supra* note __, § 16.06, at 311-18 (confidentiality); Bishop & Reed, *supra* note __, at 423-25 (limitations on arbitrator interviews).

⁵¹ Cf. ELISABETH R. GERBER, *THE POPULIST PARADOX* 23-25 (1999) (interest groups support or oppose initiatives to signal policy positions to legislature).

V. Empirical Results

A. Sample and Variables

The sample consists of all countries with an arbitration statute in force in 2000, as listed in *Smit's Guides to International Arbitration*.⁵² It is uncertain whether countries not listed are ones without arbitration statutes, or whether attempts to obtain the country's statute were unsuccessful. As a result, however, the sample will tend to include those countries with more accessible arbitration laws. A total of 120 countries are in the sample, from which a handful are excluded due to missing data.

Table 1 summarizes the variables. The dependent variable ARBPTY is the number of party-appointed arbitrators selected from the country during the year. The dependent variable PRESARB is the number of presiding arbitrators (either sole arbitrators or chairs of three-arbitrator panels) selected from the country during the year. In its published data, the ICC does not distinguish between arbitrators nominated by the parties and arbitrators appointed by the ICC Court. Thus, PRESARB includes the total number of presiding arbitrators selected from the country, both those nominated by agreement of the parties and those appointed by the ICC Court. Similarly, ARBPTY includes the total number of party-appointed arbitrators selected from the country, both those nominated by the parties and those appointed by the ICC Court (although the latter are relatively rare).

The data consist of aggregate numbers of arbitrators selected during an entire year. Data on the nationality of arbitrators in individual arbitration proceedings is not published by the ICC, and the ICC Rules restrict access to such data.⁵³ Thus, the results and conclusions here necessarily are limited by the available data.

The independent variables are as follows:

PARTIES: The number of parties from the country, either as claimant or respondent, involved in ICC arbitration proceedings filed during the year. For party-appointed arbitrators, I expect a positive sign on the coefficient for PARTIES. Parties likely prefer party-appointed arbitrators of the same nationality, and the ICC Rules permit such selections. For presiding arbitrators, however, I expect the sign on PARTIES to be negative because the ICC Rules ordinarily forbid presiding arbitrators to be of the same nationality as either of the parties. On the other hand, given the aggregate nature of the data, there may be a positive relationship if parties from two countries tend to pick presiding arbitrators from the other. For example, if parties from the UK tend to pick German presiding arbitrators, and parties from Germany tend to pick British presiding

⁵² H. SMIT & V. PECHOTA, 1 SMIT'S GUIDES TO INTERNATIONAL ARBITRATION: NATIONAL ARBITRATION LAWS TL-1 to TL-19 (2001).

⁵³ ICC Rules, *supra* note __, app. II, art. I(3) (permitting only "researchers undertaking work of a scientific nature on international trade law to acquaint themselves with awards and other documents of general interest").

arbitrators, the coefficient on PARTIES might have a positive sign even if the relationship in any individual arbitration were negative.

SMREGION: The number of parties from other countries in the same region as the country (using regions as defined by the ICC) involved in ICC arbitrations, either as claimant or respondent, filed during the year. For party-appointed arbitrators, I expect a positive sign, because a party likely would prefer an arbitrator from the same region. For presiding arbitrators, the prediction is less clear. The ICC Rules do not preclude appointment of presiding arbitrators from the same region, but the ICC Court at least on occasion has avoided such appointments (which might result in a negative sign). Or parties may substitute arbitrators from the same region in lieu of arbitrators of the same nationality (which would result in a positive sign). Another complication is that the regions defined by the ICC may not correspond to party preferences. As a result, the prediction here is uncertain.

SITETOT: The total number of ICC arbitration proceedings held in the country during the year. Because the place of arbitration is an important consideration in the selection of both party-appointed and presiding arbitrators (albeit likely more important for the latter), I expect a positive coefficient on SITETOT. This variable is important in determining the extent to which prospective arbitrators benefit from new arbitration laws. Given the previous finding that the number of ICC arbitration proceedings increases in a country after it enacts a new arbitration statute, a positive sign on SITETOT would indicate that prospective arbitrators likely benefit from the new law.

STAT1985, UNCITRAL, YRSSTAT, and STATSITE: STAT1985 is a dummy variable equaling one if the country's arbitration statute was enacted in 1985 or later, and zero otherwise. The year 1985 is chosen because that is the year in which UNCITRAL promulgated its Model Law on International Commercial Arbitration, the prototypical "modern" arbitration law. Countries for which STAT1985 equals one thus are defined as countries with a modern arbitration law. The categorization is inexact, however, as some arbitration statutes enacted before 1985 could nonetheless be "modern" statutes because of the sorts of provisions they contain, and not all post-1985 statutes necessarily are "modern" ones. Any attempt to classify all the arbitration statutes in the sample based on what provisions they contain would be extremely difficult because the statutes for many of the countries in the sample are not readily available, at least not in translated form.⁵⁴ UNCITRAL is a dummy variable that equals one if the country has enacted the UNCITRAL Model Law and zero otherwise. It provides an alternative proxy for whether a country has enacted a modern arbitration law, one that is underinclusive but not overinclusive. The UNCITRAL variable also differentiates between countries that have enacted a "model" arbitration law, which has or will be enacted by other countries in substantially identical form, and those that have not. STAT85SITE is an interaction term that is the product of STAT and SITETOT. If a country has enacted a new arbitration

⁵⁴ However, of the countries in the sample that have enacted a new or revised arbitration statute in 1985 or later, close to half have enacted the UNCITRAL Model Law. A number of the remainder readily can be classified as having enacted "modern" arbitration laws.

law, STAT85SITE equals the total number of ICC arbitration proceedings held in the country during the year. If the country has not enacted a new arbitration statute, STAT85SITE equals zero. YRSSTAT is the number of years since the country enacted a new or revised arbitration statute, counting the year of enactment as one.

The interaction term STAT85SITE measures the extent to which enactment of a new arbitration statute affects the relationship between the number of arbitration proceedings held in a country (SITETOT) and the selection of arbitrators from the country. If enactment increases the likelihood that parties will select a local arbitrator for proceedings held in the country, the coefficient on STAT85SITE should be positive.

By contrast, enactment might increase the likelihood that parties will select arbitrators from an enacting country for proceedings held elsewhere. If so, the number of arbitrators selected should increase after enactment but the increase would be unrelated to the number of proceedings in the country. Such an effect should result in a positive sign on the variable STAT1985. The prediction for the UNCITRAL variable is the similar, although perhaps for a different reason. Arbitrators in a country that has enacted the UNCITRAL Model Law may be more likely to be selected for arbitrations held elsewhere, if their experience under the Model Law in one country is transferable to other countries.

Finally, YRSSTAT attempts to capture whether the effect of enactment on arbitrator selection changes over time. A negative coefficient on YRSSTAT would suggest that the benefits to local arbitrators decline as the number of years since enactment increases.⁵⁵

GNIPC: Gross national income per capita, at purchasing power parity rates in current international dollars. Because of the larger amount of economic activity, wealthier countries likely have a larger pool of experienced international arbitrators. Thus, I expect a positive sign on the coefficient on GNIPC.

POPULATION: Total population of the country. The prediction for this variable is uncertain. A country with a larger population, all else equal, may have a larger pool of prospective arbitrators. On the other hand, smaller countries may be perceived as neutral, and thus may specialize in providing arbitrators (particularly presiding arbitrators) to resolve international commercial disputes.

Data Sources. Annual ICC statistical reports contain data on the nationalities of presiding and party-appointed arbitrators, as well as on the number of ICC arbitrations in each country in the sample, the number of parties to ICC arbitrations from the country,

⁵⁵ Although the number of arbitrators often is addressed in the arbitration clause, the identity of the arbitrators is not. Thus, parties select arbitrators after a dispute has arisen, presumably taking into account the statutory scheme in place at that time. Stated otherwise, there should be no lag between enactment of an arbitration statute and any affect on arbitrator selection, unlike that which affects party decisions on the location of the arbitration proceeding. *See* Drahozal, *supra* note __.

and the number of parties from other countries in the same region.⁵⁶ The source for national arbitration laws is *Smit's Guides to International Arbitration*.⁵⁷ UNCITRAL publishes a list of countries that have enacted the Model Law on International Commercial Arbitration.⁵⁸ Data on gross national income and population comes from the World Bank web site.⁵⁹

B. Results

Summary statistics for the sample are reported in Table 2. The mean number of party-appointed arbitrators selected from countries in the sample is 3.375, with a minimum of 0 and a maximum of 48. The mean number of presiding arbitrators selected from countries in the sample is 3.342, with a minimum of 0 and a maximum of 77. The mean number of presiding and party-appointed arbitrators is similar because roughly half of ICC arbitrations involve a sole arbitrator (and thus no party-appointed arbitrators),⁶⁰ which offsets the greater number of party-appointed arbitrators in three-arbitrator panels.

ARBPTY as dependent variable. Results from OLS regressions using ARBPTY as the dependent variable are reported in Table 3.⁶¹ As expected, the coefficient on PARTIES has a positive sign, with the coefficient ranging from 0.181 to 0.185 and statistically significant at the .01 significance level. The coefficients on SMREGION, GNIPC, and POP are not statistically significant.

Among the statutory variables, the coefficients on both SITETOT and STATSITE are positive and statistically significant at the .01 significance level. The coefficient on SITETOT ranges from 0.218 to 0.227, while the coefficient on STATSITE ranges from 0.249 to 0.261. The results suggest a substantial increase in the rate at which local party-appointed arbitrators are selected in arbitration proceedings held in a country that has enacted a new arbitration law. Before enactment, an additional arbitration proceeding corresponds with the selection of from 0.22 to 0.23 additional party-appointed arbitrators from the country. After enactment, an additional arbitration proceeding corresponds with the selection of 0.48 additional party-appointed arbitrators from the country. The

⁵⁶ 1994-2000 Statistical Reports, ICC INT'L CT. ARB. BULL., Spring 1995-Spring 2001.

⁵⁷ SMIT & PECHOTA, *supra* note __, at TL-1 to TL-19; *see also* INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, I-IV INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (2001).

⁵⁸ United Nations Commission on International Trade Law, Status of Conventions and Model Laws (last updated Jan. 6, 2003) <www.uncitral.org/English/status/status-e.htm>.

⁵⁹ *See* <www.worldbank.org>.

⁶⁰ 2000 Statistical Report, *supra* note __, at 8.

⁶¹ Because of the possibility of censoring due to the number of times ARBPTY equals zero in the sample, the models also were estimated using Tobit regression. The Tobit results do not differ materially from the OLS results and so are not reported.

coefficients on the other statutory variables – STAT1985, UNCITRAL, and YRSSTAT – are not statistically significant.

PRESARB as dependent variable. Results from OLS regressions using PRESARB as the dependent variable are reported in Table 4.⁶² The following are the central results.

First, the coefficient on PARTIES has a negative sign (as predicted) but is not statistically significant. By contrast, the coefficient on SMREGION has a positive sign and is of marginal statistical significance (although very small in magnitude). These findings are consistent with the view that parties select presiding arbitrators not from their own countries (which is precluded by the ICC Rules) but from other countries in the same region.

Second, the coefficient on POPULATION is highly significant and has a negative sign. The prediction for the variable was unclear. The results here suggest that, all else equal, nationals of small countries are more likely to be selected as presiding arbitrators than are nationals of large countries, perhaps because they are perceived to be more neutral.

Third, the results for the statutory variables are comparable to, albeit somewhat greater in magnitude than, the results for party-appointed arbitrators (as expected). The coefficients on STAT1985 and YRSTAT are not statistically significant, while the coefficients on SITETOT and STATSITE are positive and highly significant. The results indicate (1) a strong relationship between the number of arbitration proceedings in a country and the number of presiding arbitrators selected from the country; and (2) a substantial increase in the rate at which presiding arbitrators from a country are selected in local arbitration proceedings after the country has enacted a new arbitration law. Before enactment, an additional arbitration proceeding corresponds with the selection of from 0.48 to 0.49 additional presiding arbitrators from the country. After enactment, an additional arbitration proceeding corresponds with the selection of 0.86 additional presiding arbitrators from the country. These magnitudes compare favorably to the cross-sectional estimates for party-appointed arbitrators: the estimated coefficients are larger for presiding arbitrators than for party-appointed arbitrators, which is in line with the expectation that it is more important for presiding arbitrators to be from the place of arbitration than for party-appointed arbitrators.

The coefficient on the UNCITRAL dummy variable has a positive sign in all the models and in some (but not others) is statistically significant at the .10 significance level. Although the evidence is weak, it provides some support for the possibility that

⁶² I used Tobit regression here as well because of the possibility of censoring. *See supra* note _____. The estimates differed from the OLS estimates in only two material respects: (1) the coefficients on POP had the opposite sign and were not significant; and (2) the coefficient estimates for UNCITRAL were larger (ranging from 2.3 to 2.9) and all were statistically significant, either at the .10 or .05 significance levels.

arbitrators from a country with a new arbitration statute are more likely to be selected in arbitrations held elsewhere as well. Any such effect is limited to presiding arbitrators in countries that enacted the UNCITRAL Model Law, and may be due to the greater transferability of expertise under the Model Law to other jurisdictions. But more research needs to be done before drawing any firm conclusions.

VI. Conclusion

This paper provides evidence that prospective arbitrators are important beneficiaries of regulatory competition among arbitral venues. The supply of new arbitration laws thus may be driven, at least in part, by arbitrators. International arbitrators in a country that enacts a new arbitration statute benefit in at least two ways from enactment. First, they benefit from the additional proceedings the law attracts, as there is a strong relationship between the number of arbitrations held in a country and the number of arbitrators selected from that country. Second, they benefit from being selected more frequently for arbitration proceedings held in the country than they were before enactment. The paper finds only weak support, however, for the possibility that arbitrators are more likely to be selected for arbitration proceedings in other countries following enactment of a new arbitration law in their home country. The only evidence of such an effect is limited to presiding arbitrators in countries that have enacted the UNCITRAL Model Law, and is of marginal statistical significance.

TABLE 1

VARIABLE DEFINITIONS

Dependent Variables	
PRESARB	Number of presiding arbitrators (either sole arbitrators or chairs of a panel of arbitrators) appointed from the country during year
ARBPTY	Number of party-appointed arbitrators (co-arbitrators) appointed from the country during year
Independent Variables	
PARTIES	Number of parties from the country involved in ICC arbitration proceedings during year
SMREGION	Number of parties from other countries in the same region as the country (as defined by the ICC) involved in ICC arbitration proceedings during year
SITETOT	Number of ICC arbitration proceedings held in the country during year
YRSSTAT	Number of years since the country enacted a new or revised arbitration statute, with the year of enactment counted as one
STAT1985	Dummy variable equaling one if the country enacted a new or revised arbitration statute in 1985 or later and zero otherwise
UNCITRAL	Dummy variable equaling one if the country has enacted the UNCITRAL Model Law and zero otherwise
STATSITE	$STAT1985 * SITETOT$
GNIPC	Gross national income (formerly gross national product) per capita, at purchasing power parity rates in current international dollars
POP	Total population of country (000)

TABLE 2

SUMMARY STATISTICS

	Observ.	Mean	Std. Dev.	Minimum	Maximum
Dependent Variables					
ARBPTY	120	3.375	8.932	0	48
PRESARB	120	3.342	10.042	0	77
Independent Variables					
PARTIES	120	10.717	24.915	0	172
SMREGION	120	163.858	188.207	3	652
SITETOT	120	3.367	12.201	0	84
STAT1985	119	0.521	0.502	0	1
STATSITE	119	2.487	10.055	0	84
YRSSTAT	120	20.717	21.321	0	96
GNIPC	112	9698.64	9500.60	460	45,410
POP	120	35,330.14	100,092.7	68	1,015,923

TABLE 3

IMPACT OF NEW OR REVISED ARBITRATION STATUTE ON
SELECTION OF PARTY-APPOINTED ARBITRATOR (ARBPTY)

Independent Variables					
Constant	0.752 (1.42)	0.230 (0.92)	0.150 (0.73)	0.151 (0.72)	0.106 (0.49)
PARTIES	0.185*** (13.03)	0.184*** (12.86)	0.184*** (12.78)	0.184*** (12.83)	0.181*** (16.10)
SMREGION	-0.0005 (-0.27)	-0.0005 (-0.25)	-0.0006 (-0.32)	-0.006 (-0.31)	
SITETOT	0.218*** (7.58)	0.222*** (7.51)	0.225*** (7.37)	0.225*** (7.41)	0.227*** (9.11)
STAT1985	-0.6655 (-1.09)	-0.265 (-0.63)			
UNCITRAL	0.128 (0.25)	0.140 (0.28)	0.003 (0.01)		
STATSITE	0.261*** (10.86)	0.256*** (10.36)	0.251*** (9.67)	0.251*** (9.70)	0.249*** (10.24)
YRSSTAT	-0.013 (-1.41)				
GNIPC	-3.26 e-06 (-0.08)	5.10 e-08 (0.00)	9.48 e-07 (0.02)	9.88 e-07 (0.03)	
POP	-1.25 e-06 (-1.11)	-1.12 e-06 (-0.95)	-1.15 e-06 (-1.00)	-1.15 e-06 (-0.99)	
R-squared	0.9580	0.9576	0.9575	0.9575	0.9573
Observations	111	111	111	111	111

Note: t-statistics are in parentheses, using White standard errors

* Significant at .10 significance level

** Significant at .05 significance level

*** Significant at .01 significance level

TABLE 4

IMPACT OF NEW OR REVISED ARBITRATION STATUTE ON
SELECTION OF PRESIDING ARBITRATOR (PRESARB)

Independent Variables				
Constant	-1.141 (-1.76)	-0.729** (-2.40)	-0.675** (-2.24)	-0.520** (-2.25)
PARTIES	-0.006 (-0.17)	-0.005 (-0.15)	-0.005 (-0.14)	
SMREGION	0.005* (1.72)	0.005* (1.72)	0.006* (1.77)	0.007*** (3.28)
SITETOT	0.490*** (8.17)	0.487*** (8.13)	0.484*** (8.09)	0.480*** (31.49)
STAT1985	0.494 (0.79)	0.179 (0.46)		
UNCITRAL	1.104 (1.64)	1.100 (1.64)	1.188* (1.81)	1.257* (1.78)
STATSITE	0.370*** (8.67)	0.0374*** (8.78)	0.377*** (8.70)	0.382*** (12.87)
YRSSTAT	0.010 (0.92)			
GNIPC	0.00005 (0.71)	0.00005 (0.68)	0.00004 (0.68)	
POP	-3.82e-06*** (-3.20)	-3.93 e-06*** (-3.14)	-3.90 e-06*** (-3.17)	-4.27 e-06*** (-2.74)
R-squared	0.9435	0.9433	0.9433	0.9428
Observations	111	111	111	111

Note: t-statistics are in parentheses, using White standard errors

- * Significant at .10 significance level
- ** Significant at .05 significance level
- *** Significant at .01 significance level