International Arbitration’s Public Realm
Catherine A. Rogers*

To the casual observer, international arbitration and domestic arbitration might seem to be Siamese twins, identical, co-joined at birth, and laboriously separated later. Under this view, once detached, these two siblings went on to pursue the same job in different locales, but each would always retain the genealogy, matching features, and, most importantly, common purpose of its severed other half. This conflation of domestic and international arbitration has resulted in scholarly neglect of the differences between the two1 and judicial confusion about the legal regimes that govern them.2

More recently, the misperception of shared paternity has become increasingly perilous for international arbitration as defects attributed to domestic arbitration have raised calls for potentially radical reforms that would also affect international arbitration. Under this view, corporations use it to preclude consumers, patients and employees from presenting combining their efforts in class actions, from presenting their claims to sympathetic

* Professor of Law, Penn State Law, Pennsylvania, and Università Commerciale Luigi Bocconi, Milan, Italy. I would like to thank Arthur Rovine for his exceptional efforts in organizing the conference that led to this paper, the other members the panel on which it was presented—George Berman, Ben Shephherd and Tom Stipanowich—and members of the audience who contributed questions and comments.


2 Similarly, courts have been known to directly apply the FAA and domestic arbitration standards to international awards, which should instead be reviewed under the standards of the New York Convention. See Lucy Reed & Phillip Riblett, Expansion of Defenses to Enforcement of International Arbitral Awards in U.S. Courts?, 13 SW. J.L. & TRADE AM. 121, 122 (2006) (discussing the potential for “mission creep” if U.S. courts apply the domestic “manifest disregard” standard to international awards).
juries, from obtaining extensive discovery that may increase their chances of success, and from potentially receiving punitive damages. More ardent critics also charge that domestic arbitration is inherently problematic because it permits repeat players to evade mandatory statutory law, retards legal developments, undermines democratic lawmaking, and ultimately imposes substantively biased outcomes on less sophisticated parties through contracts of adhesion. Collectively, these critiques of domestic arbitration could be interpreted as suggesting that domestic arbitration seeks to obviate or even subvert the public interests and the public realm. The thesis of this chapter is that, in contrast to criticisms of domestic arbitration, international arbitration has a vibrant public realm. International arbitration has the potential to produce public goods and to go beyond simply promoting resolution of disputes, but also international cooperation, transnational governance, and development of the international rule of law.

THE PUBLIC SIDE OF PRIVATE

International arbitration is often assigned to the “private” side of the dubious public-private divide. International arbitration, which often goes under the

9 See Robert Wai, Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization, 40 COLUM. J. TRANSNAT’L L. 209 (2002). I have made similar arguments about the public side of international arbitration and how it affects the professional obligations of interna-