The U.S. Arbitration-Litigation Paradox

The U.S. Supreme Court is well-known for its liberal pro-arbitration policy. In *The Arbitration-Litigation Paradox*, forthcoming in the Vanderbilt Law Review, I argue that the U.S. Supreme Court's supposedly pro-arbitration stance isn't as pro-arbitration as it seems. This is because the Court's hostility to litigation gets in the way of courts' ability to support arbitration—especially international commercial arbitration.

This is the arbitration-litigation paradox in the United States: On one hand, the U.S. Supreme Court's hostility to litigation *seems* to complement its pro-arbitration policy. Rising barriers to U.S. court access in general, and in particular in transnational cases (as I have explored elsewhere), seems consistent with a U.S. Supreme Court that embraces arbitration as an efficient method for enforcing disputes. Often, enforcement of arbitration clauses in these cases leads to closing off access to courts, as Myriam Gilles and others have documented.

But there's a problem. As is perhaps obvious to experts, arbitration relies on courts—for enforcing arbitration agreements and awards, and for helping pending arbitration do what it needs to do. So closing off access to courts can close access to the litigation *that supports* arbitration. And indeed, recent Supreme Court cases narrowing U.S. courts' personal jurisdiction over foreign defendants have been applied to bar arbitral award enforcement actions. Courts have also relied on forum non conveniens to dismiss award-enforcement actions.

That's one way in which trends that limit litigation can have negative effects on the system of arbitration. But there's

another way that the Court's hostility to litigation interacts with its pro-arbitration stance, and that's in the arbitration cases themselves.

The Supreme Court has a busy arbitration docket, but rarely hears international commercial arbitration cases. Instead, it hears domestic arbitration cases in which it often states that the "essence" of arbitration is that it is speedy, inexpensive, individualized, and efficient—everything that litigation is not.

(As an aside, this description of the stark distinction between arbitration and litigation is widely stated, but it's a caricature. The increasingly judicialized example of international commercial arbitration shows this is demonstrably false. As practiced today, international commercial arbitration can be neither fast, nor cheap, nor informal.)

But in the United States, arbitration law is mostly trans-substantive. That means that decisions involving consumer or employment contracts often apply equally to the next case involving insurance contracts or international commercial contracts.

In the paper, I argue that the Court's tendency to focus on arbitration's "essential" characteristics, and to enforce these artificial distinctions between arbitration and litigation, can be harmful for the next case involving international commercial arbitration. It could undermine the likelihood of enforcement of arbitration awards where the arbitral procedure resembled litigation or deviated from the Court's vision of the "essential virtues" of arbitration.

To prevent this result, I argue that any revisions of the U.S. Federal Arbitration Act should pay special attention not only to fixing the rules about consumer and employment arbitration, but also to making sure that international commercial

arbitration is properly supported. In the meantime, lower federal courts should pay no heed to the Supreme Court’s seeming devotion to enforcing false distinctions between arbitration and litigation, particularly in the international commercial context.