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The Case of Transnational Commercial Arbitration***

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PRIVATE REGULATION IN THE GLOBAL ECONOMY

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Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration

Christopher A. Whytock

Abstract

Scholars of international relations and global governance are increasingly interested in the transnational commercial arbitration system. So far, they have tended to characterize the system as a form of private global governance. However, using a combination of empirical and legal analysis, this article draws attention to the critical role of the state in the transnational commercial arbitration system, and shows that both rule-making and enforcement in the system depend largely on interactions between private and public actors. By treating arbitration as a form of private governance, scholars run the risk of obscuring these interactions and hindering their understanding of how transnational economic activity is governed. This article therefore argues for a modest reorientation of global governance scholarship on transnational commercial arbitration in a direction that focuses more closely on private-public interaction. More broadly, this article suggests that understanding interactions between private and public actors is a key to understanding global governance in general, and it raises doubts about the analytical desirability of a sharp distinction between private and public forms of global governance.

KEYWORDS: private governance, IPE, regulation

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1. Introduction

Scholars of global governance are increasingly interested in transnational commercial arbitration—the binding resolution of transnational commercial disputes by private third-party decision makers.¹ The emerging interdisciplinary scholarship on the transnational commercial arbitration system has the potential to make important contributions to our understanding of global governance. The system offers dispute resolution services that are widely used by transnational actors, and it provides a process for the interpretation and enforcement of contracts, which are the backbone of transnational commerce. By understanding arbitration, scholars can better understand the governance of transnational commerce.

The study of transnational commercial arbitration also can shed new light on the role of private actors in global governance, thus contributing to the continuing efforts of scholars of international relations to move beyond traditional state-focused analysis.² Two questions have traditionally been at the core of social science scholarship on governance: Harold Lasswell’s “who gets what” question³ and Robert Dahl’s “who governs” question.⁴ Transnational commercial arbitration involves private third parties (arbitrators) answering the “who gets what” question in disputes between transnational commercial actors. It is therefore natural to think of transnational commercial arbitration as a system of global governance in which private actors are the “governors.”⁵ Various scholars have therefore characterized transnational commercial arbitration as a form of private global governance.⁶

In this article, I use a combination of empirical and legal analysis to draw attention to the critical role of the state in the transnational commercial arbitration system, and I show that both rule-making and enforcement in the system depend largely on interactions between private and public actors. Conceptually, arbitration does not fit neatly into established categories of “private” or “public” governance. By treating arbitration as a form of private governance, scholars run the risk of obscuring the role of the state and its interactions with private actors,

¹ E.g. Cutler 1995, 2001, 2003; Gal-Or 2008; Mattli 2001; Stone Sweet 2002, 2006.

² E.g. Büthe 2004; Cutler *et al* 1999; Graz & Nölke 2008; Hall & Biersteker 2002.

³ Lasswell 1936; Caporaso *et al* 2008, 406.

⁴ Dahl 1961.

⁵ On the concept of “global governors,” see Avant *et al* (2010).

⁶ E.g. Gal-Or 2008, 219 (discussing arbitration as part of the “formal institutionalization of transnational private governance”); Mattli 2001, 919 (discussing transnational commercial arbitration as a “private international institutional arrangement”); Stone Sweet 2006, 628 (discussing transnational commercial arbitration as part of “a private system of governance for transnational business”); Whytock 2008a, 457 (describing transnational arbitration as part of “transnational private governance”).

thus hindering their understanding of how transnational economic activity is governed. I therefore argue for a modest reorientation of global governance scholarship on the transnational commercial arbitration system, according to which scholars would conceptualize the system as a mixed private-public form of governance and place more emphasis on understanding private-public interaction in the system. A broader implication of the article's analysis is that understanding private-public interaction is a key to understanding global governance in general.⁷

Part 2 provides an overview of transnational commercial arbitration as a system of global governance. Any system of governance must provide for the setting of rules and their enforcement.⁸ The remainder of the paper thus analyzes several different types of data to shed empirical light on who makes the rules in the transnational commercial arbitration system, and who enforces them. Part 3 shows how private and public actors together make not only the rules governing the overall system, but also the procedural and substantive rules governing particular arbitral proceedings. Next, Part 4 shows how both private and public actors help mitigate enforcement problems in the transnational commercial arbitration system. These problems include enforcement of agreements to arbitrate, as well as enforcement of arbitrators' decisions. Throughout the article, I complement the empirical analysis with insights from legal scholarship that recognizes the system's hybrid nature, scholarship which may be useful for scholars of global governance interested in transnational commercial arbitration.⁹ I conclude by drawing out some of the broader implications of the analysis.

2. Transnational Commercial Arbitration and Global Governance

2.1 An Overview of the Transnational Commercial Arbitration System

Arbitration is a method of dispute resolution whereby two or more parties ("disputants") submit their dispute to a third-party decision maker (the "arbitrator"). The party initiating arbitration is the "claimant," and the other party is the "respondent." Arbitration has four defining characteristics. First, the arbitrator is a private actor selected by the disputants themselves, or in accordance with a procedure agreed in advance by the disputants. Often, there are several arbitrators. Second, arbitration is consensual. An arbitrator cannot resolve a dispute unless the disputants have agreed to have the arbitrator resolve that

⁷ Similarly, Bartley argues that "scholars of private regulation should abandon the image of global standards bypassing the state and transcending old configurations of power and instead attend to the fascinating ways in which standards are filtered, renegotiated, or compromised as they enter particular political economies" (2010, 38).

⁸ Kjaer 2004, 10.

⁹ For an especially useful entry point to this legal scholarship, see Drahozal 2009.

dispute.¹⁰ Third, in arbitration, the disputants are for the most part free to choose the procedural and substantive rules governing the dispute resolution process.¹¹ Fourth, the arbitrator's final decision—called an “award”—is binding on the disputants. When the claimant prevails, the award typically takes the form of an order that the respondent (now the “award debtor”) pay a certain sum of money to the claimant (now the “award creditor”).

A comparison with two leading alternatives to arbitration—mediation and litigation—helps clarify these four characteristics. First, like arbitration, mediation and litigation involve third parties. Like an arbitrator, a mediator is a private actor. In contrast, the third party in litigation is a state actor (a judge). Second, like arbitration, mediation is consensual. Litigation, however, is non-consensual: once one disputant (the plaintiff) initiates the litigation process, the other disputant (the defendant) may be bound by the judge's decision even without its consent. Third, in contrast to arbitration and mediation processes, which are generally governed by rules agreed upon by the disputants, state law determines the rules governing litigation procedures.¹² Fourth, whereas arbitrators' and judges' decisions are legally binding, mediators do not make binding decisions.

Transnational commercial arbitration involves the arbitration of disputes arising out of commercial activity having connections to more than one state. These connections may be territorial, when the activity or its effects touch the territory of more than one state; or they may be based on legal relationships between a state and the actors engaged in or affected by that activity, such as citizenship.¹³ Investor-state arbitration—the arbitration of disputes between a state and a foreign investor in that state—is generally treated as a distinct form of transnational arbitration, and is not discussed in this article.

There are two basic types of transnational commercial arbitration: “institutional” and “ad hoc.” In institutional arbitration, the disputants select an existing private arbitral institution to administer the arbitration process. Along

¹⁰ Under some circumstances, an arbitration agreement between two or more parties may also be binding on other parties based on legal theories such as agency and the “group of companies” doctrine. Blackaby and Partasides 2009, 99-105; Born 2009, 1142. In general, once arbitration has begun, a party does not have a right to stop the proceedings unilaterally. If a party fails to participate in the proceedings, it runs the risk of a default award being entered against it. Blackaby and Partasides 2009, 524.

¹¹ This freedom is subject to mandatory provisions of law. See Born 2009, 1765.

¹² I use the term “state” to refer a nation-state, not a territorial subunit thereof such as a “state” of the United States.

¹³ I use the adjective “transnational” instead of “international” because the latter technically refers only to states and their relations with each other, and does not include private actors. Nye & Keohane 1971, 330-332. Thus, by transnational activity, I mean activity engaged in by state and/or non-state actors having legal or territorial connections to more than one state.

with that selection, the disputants often select the procedural rules developed by that institution. Among the leading transnational arbitral institutions are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA).¹⁴ In ad hoc arbitration, the parties do not select an arbitral institution to administer the arbitration process, and instead make their own administrative arrangements.

As noted above, arbitration depends on the disputants' consent. This consent can be given either before or after a dispute arises. Many transnational contracts include ex ante arbitration clauses. A typical example of such a clause is the one suggested by the ICC: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." Disputants may also agree after a dispute arises to submit that dispute to arbitration. However, once a dispute has arisen, litigation will often offer significant advantages to at least one of the disputants, making ex post agreements to arbitrate difficult to reach. For this reason, while transnational commercial arbitration is a common method for resolving disputes related to contractual relationships, it is likely to be relatively rare in disputes between parties who are not in preexisting contractual relationships.¹⁵

2.2 The Role of Arbitration in the Governance of Transnational Commerce

The transnational commercial arbitration system performs several closely related functions in the governance of transnational commerce. First, by offering a mechanism for third-party interpretation and enforcement of contracts, it provides a means by which transnational actors can enhance the credibility of their commitments to each other.¹⁶ Second, by providing a process for filling gaps in contracts, arbitration can mitigate the incomplete contracting problems routinely faced by transnational commercial actors.¹⁷ Third, the transnational commercial arbitration system offers dispute resolution services that can help transnational actors manage the costs of conflict in commercial relationships.¹⁸

¹⁴ A list of all the acronyms used in this article can be found in the appendix.

¹⁵ Born 2006, 37; Moses 2008, 17.

¹⁶ On the importance of third-party enforcement for credible commitments and, hence, for contracting, see North 1993. See also Stone Sweet 2002, 324-326.

¹⁷ Blackaby & Partasides 2009, 536f.

¹⁸ Ashenfelter 1998, 88.

Alternatively, these functions may be performed by domestic courts.¹⁹ However, arbitration is widely understood to have a number of advantages over litigation as a method of transnational commercial dispute resolution. Arbitration may offer a more neutral alternative to litigation in a court of a disputant's home country. Whereas state-made rules govern the litigation process, arbitration is a flexible process that the disputants themselves can tailor to their needs. While litigation ordinarily is public, the disputants can agree to keep arbitral proceedings confidential. Perhaps most importantly from the perspective of disputants, it is generally easier to enforce an arbitral award issued in one country against the assets of an award debtor in another country than it is to do so with a judgment of a court.²⁰

But arbitration is not without its disadvantages. Although it was once considered a speedier and less expensive method of transnational commercial dispute resolution, this perception may be eroding.²¹ Moreover, there generally is no right to appeal an arbitrator's decision. Another disadvantage is that arbitrators lack the coercive power of the state that courts can use to compel disputants and third parties to produce information relevant to the dispute. However, arbitrators may draw adverse inferences from a disputant's refusal to make available relevant information, and in some countries (including the United States) judicial enforcement of arbitral orders to produce evidence is available.²² Finally, because of its consensual nature, arbitration ordinarily cannot be imposed on a person who is not a party to the arbitration agreement.²³

2.3 The Empirical Importance of Transnational Commercial Arbitration

Ex ante arbitration clauses are common in transnational commercial contracts. However, their frequency is difficult to estimate. One observer claims that more than ninety percent of all transnational commercial contracts contain an arbitration clause,²⁴ while another argues that the actual frequency of arbitration clauses is substantially lower.²⁵ According to a recent empirical analysis, only twenty percent of the transnational contracts of U.S. public companies filed with the United States Securities and Exchange Commission (SEC) contain arbitration

¹⁹ For a discussion of the role of domestic courts in global governance, see Whytock 2009. For a discussion of the factors influencing transnational actors' selection of arbitration versus litigation from the perspective of rational institutional design theory, see Mattli 2001.

²⁰ Born 2009, 78.

²¹ McIlwrath & Schroeder 2008.

²² Blackaby & Partasides 2009, 318f; Born 2009, 1919-1929.

²³ Blackaby & Partasides 2009, 39, 99-106.

²⁴ Berger 1999, 111.

²⁵ Born 2009, 71.

clauses.²⁶ However, this analysis has been criticized as suffering from selection bias because contracts filed with the SEC may often be precisely the sorts of contracts for which arbitration is least appropriate.²⁷

Even if the frequency of arbitration clauses is difficult to estimate, dispute resolution trends suggest that transnational commercial arbitration is increasingly widespread, as shown in Figure 1. The annual rate of filings with the world's major international arbitral institutions has increased steadily from 1,148 in 1992 to more than 3,700 in 2008.²⁸ Similar data is not available for ad hoc arbitration. While some observers speculate that ad hoc arbitrations are few compared to institutional arbitrations, others suggest that institutional and ad hoc arbitration rates are similar, and still others conjecture that ad hoc transnational arbitrations may in fact outnumber institutional transnational arbitrations.²⁹

One benchmark for assessing transnational commercial arbitration trends in the leading arbitral institutions is to compare them to transnational contract litigation trends in the U.S. federal district courts. To estimate transnational contract litigation trends, I analyzed data collected by the Administrative Office of the United States Courts on civil lawsuits filed each year in the district courts.³⁰

²⁶ Eisenberg & Miller 2007, 350-352.

²⁷ Drahozal & Ware 2010, 460.

²⁸ HKIAC 2009. The arbitral institutions included in this count are the AAA, the ICC, and the LCIA, as well as the China International Economic and Trade Arbitration Commission (CIETAC), Hong Kong International Arbitration Centre (HKIAC), the Japan Commercial Arbitration Association (JCAA), the Korean Commercial Arbitration Board (KCAB), the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Singapore International Arbitration Centre (SIAC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the British Columbia International Commercial Arbitration Centre (BCICAC). Because the data collected by the Hong Kong International Arbitration Centre does not include ad hoc transnational commercial arbitration, and because data for some institutions include domestic as well as transnational arbitrations, these trends are an imperfect measure of overall transnational commercial arbitration rates.

²⁹ Drahozal & Naimark 2005, 7.

³⁰ The Administrative Office of the United States Courts (AO) data is part of the Federal Court Cases: Integrated Database Series, available from the Inter-University Consortium for Political and Social Science Research (<http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072>). Specifically, I analyzed contract claims over which the subject matter jurisdiction of the U.S. federal courts is based on the fact that the dispute is between a citizen of a U.S. state and a citizen of a foreign country (i.e., alienage jurisdiction), as contained in the AO's annual civil terminations data. To extract these cases from the data, I used the *residence* variable (which indicates the citizenship of the parties) and the *nature of suit* variable (which identifies the type of dispute being litigated, including contract disputes). I excluded two types of claims categorized by the AO as "contract claims"—Miller Act claims and stockholder suits—since they are unlikely to be subject to transnational arbitration, and their inclusion would thus risk biasing the comparison in favor of litigation. One disadvantage of the civil terminations data is that the record for a case (including its filing date) does not appear in that data until the case has terminated (that is, until proceedings have come to an end due to settlement, judgment, or otherwise). Cases filed in earlier years but

Of course, transnational contract litigation in the U.S. federal district courts is just part of overall transnational commercial litigation worldwide. However, similar data is not available for transnational commercial litigation in U.S. state courts and courts in other countries.

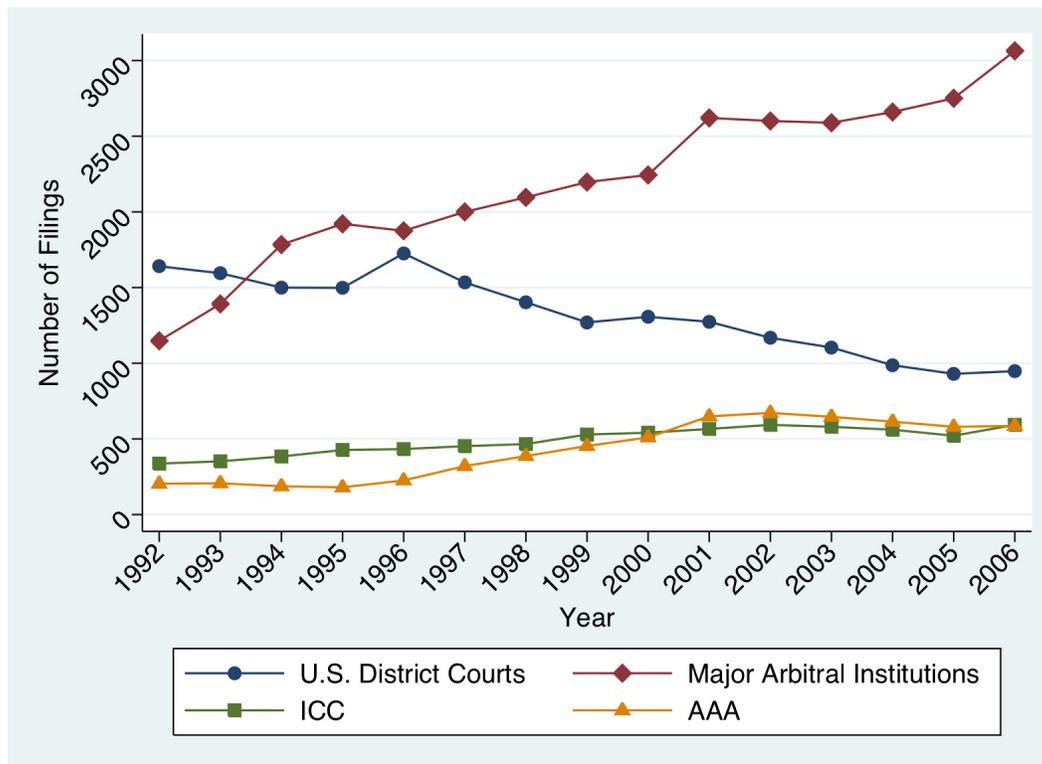


Figure 1
Filings in U.S. Courts and Major Arbitral Institutions

Using this benchmark, Figure 1 shows that, as transnational commercial arbitration filings in the world’s leading arbitration institutions have been increasing, transnational contract litigation filings in the U.S. federal district courts have been decreasing. In 1994, the total number of arbitration filings in the world’s leading arbitration institutions surpassed the number of transnational contract litigation filings in the U.S. federal district courts for the first time; and by 2006 the former

which have not yet terminated will be missing from the data. Because lawsuits often last multiple years, this lag is likely to be particularly significant in the more recent years for which data is available. Therefore, to mitigate bias in favor of arbitration, I present results only through 2006. For more details on this data, see Whytock (2008b). However, because Whytock (2008b) analyzes terminations of claims while this article analyzes filings, the exact results differ.

was substantially higher than the latter. As of 2006, the annual number of transnational commercial arbitration filings in each of the two most prominent arbitral institutions—the AAA and the ICC—was still individually lower than the annual number of transnational contract litigation filings in the U.S. federal district courts. However, if current trends continue, the AAA and the ICC each will soon be resolving more transnational commercial disputes than the U.S. federal district courts.³¹

In summary, transnational commercial arbitration is an increasingly widespread form of global governance. The upward trend in the number of disputes filed in the world's leading arbitral institutions is particularly striking when compared to the downward trend in transnational contract disputes filed in the U.S. federal district courts.

3. Rule-Making in Transnational Commercial Arbitration

The rules of the transnational commercial arbitration system include rules governing the system as such—for example, rules regarding the enforcement of arbitration agreements and arbitral awards—as well as procedural and substantive rules governing particular arbitral proceedings. Who makes these rules? Scholars have tended to treat the transnational commercial arbitration system as a private form of global governance. However, through a combination of international treaties and domestic law, states—working closely with private organizations—have played a fundamental role in making the rules governing the system. These rules provide critical, if qualified, support for transnational commercial arbitration. Private actors play a leading role in determining which rules govern particular arbitral proceedings—but here, too, the state plays an important role by supplying rules that private disputants frequently choose. Private-public interactions thus pervade both dimensions of rulemaking.

3.1 The Rules Governing the Transnational Commercial Arbitration System

The most important transnational commercial arbitration treaty is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention).³² Although made by states, the New York Convention is a product of private-public interaction. The ICC—a nongovernmental organization—produced the first draft, which the United

³¹ The extent to which these trends are causally related is unclear; see Whytock 2008b, 48f.

³² This paper does not discuss two other important transnational commercial arbitration treaties: the Inter-American Convention on International Commercial Arbitration (known as the Panama Convention), and the European Convention on International Commercial Arbitration.

Nations Economic and Social Council (ECOSOC) then revised; and the 45 state participants at the United Nations Conference on Commercial Arbitration finalized the convention in 1958.³³ As one arbitration expert puts it, the convention “provides what amounts to a universal constitutional charter for the international arbitral process, whose sweeping terms have enabled both national courts and arbitral tribunals to develop durable, effective means for enforcing international arbitration agreements and arbitral awards.”³⁴ As another puts it, the convention “is the foundation on which the whole of the edifice of international arbitration rests.”³⁵

Article II of the New York Convention establishes a general rule that signatory states shall recognize written arbitration agreements “concerning a subject matter capable of settlement by arbitration.” It also requires the domestic courts of signatory states, at the request of a party to an arbitration agreement, to refer the parties to that agreement to arbitration “unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

Article III establishes a general rule that signatory states shall recognize and enforce arbitral awards. Article V specifies a series of exceptions to this general rule, allowing refusal of enforcement “at the request of the party against whom it is invoked,” if that party proves to the competent authority where enforcement is sought that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

³³ Born 2009, 93f.

³⁴ Born 2009, 92f.

³⁵ Kerr 1997, 127. See also Reisman 1992.

Article V also allows refusal of enforcement “if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

As one measure of the breadth of state support for these foundational rules of the transnational commercial arbitration system, I gathered data on the number of states that have become parties to the New York Convention over time.³⁶ As Figure 2 shows, the number increased from nine in 1960, to fifty-five in 1980, to 124 in 2000. As of 2009, the New York Convention had entered into force in 144 of the 192 members of the United Nations. These results suggest broad and steadily increasing state support for the rules favoring enforcement of arbitration agreements and arbitral awards.

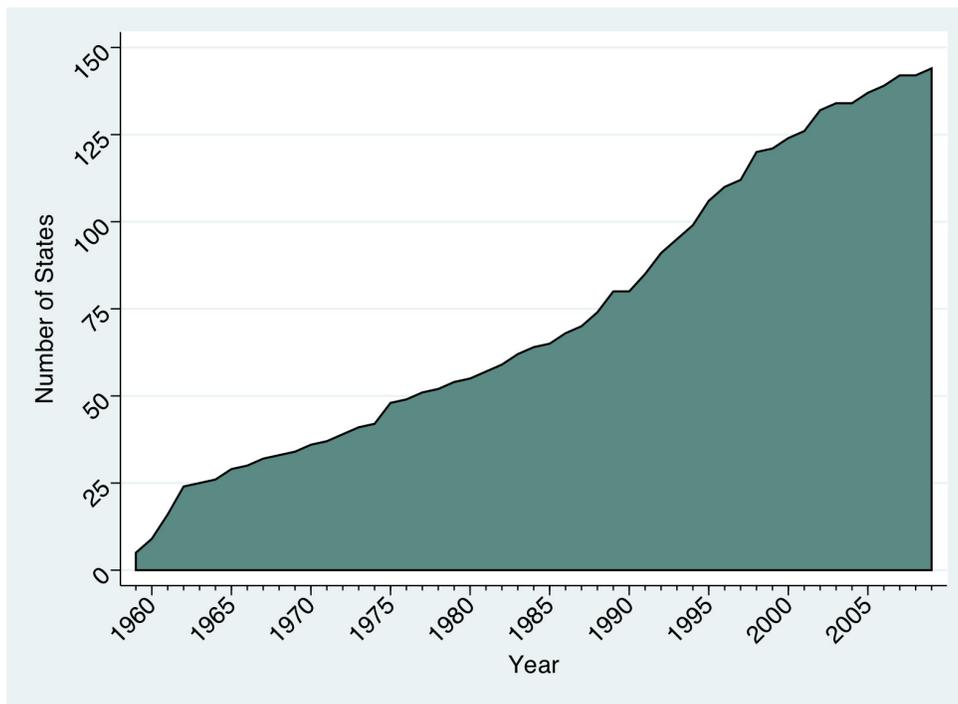


Figure 2
Cumulative Number of State Parties to New York Convention,
by Year of Entry into Force

³⁶ The source of my data is the table of signatories to the New York Convention maintained by the United Nations Commission on International Trade Law (UNCITRAL). See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed December 15, 2009).

In addition, individual states have enacted domestic laws providing for domestic judicial enforcement of arbitration agreements and arbitral awards. For example, in the United States, Section 206 of the Federal Arbitration Act (FAA) authorizes U.S. courts to order arbitration in accordance with an arbitration agreement covered by the New York Convention.³⁷ Section 207 of the FAA requires U.S. courts to enforce an arbitral award covered by the New York Convention “unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.” In addition to the FAA, the U.S. Supreme Court has announced a variety of important rules governing the enforcement of arbitration agreements and arbitral awards by U.S. courts, and is generally considered to have a strong pro-arbitration policy.

Other states have also adopted domestic laws governing transnational commercial arbitration. For example, some states have adopted domestic legislation based on the United Nations Commission on International Trade Law’s (UNCITRAL) Model Law on International Commercial Arbitration, which, among other things, provides for enforcement of arbitration agreements and arbitral awards.³⁸ Although the Model Law was produced by an intergovernmental entity—UNCITRAL—it was developed in consultation with private experts and arbitral institutions, and is thus, like the New York Convention, a result of private-public interaction.³⁹ The UN General Assembly has encouraged states to consider the Model Law, but there is no requirement that states adopt it—it is only a model upon which states may base domestic legislation. Thus, its legal status depends on state legislative action.

As another measure of the breadth of state support for the rules governing the transnational commercial arbitration system, I gathered data on the number of states that have enacted legislation based on the Model Law.⁴⁰ As Figure 3

³⁷ The full text of Section 206 is as follows: “A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.”

³⁸ Moses 2008, 64. Under Article 8(1) of the Model Act, “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.” Article 35 states the general rule that arbitral awards shall be enforced, and Article 36 specifies exceptions to enforcement. The Model Law was amended in 2006. Article 34 specifies the circumstances in which a court may set aside an arbitral award.

³⁹ United Nations Commission on International Trade Law 2006, vii.

⁴⁰ The source of my data is UNCITRAL’s list of national legislation based on the Model Law. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (accessed December 15, 2009). This count does not include nine U.S. states (California,

shows, the number has increased steadily from one in 1986, to thirty-five in 2000, to a total of sixty-one as of 2008. This trend suggests increasingly widespread state support for the transnational commercial arbitration system.

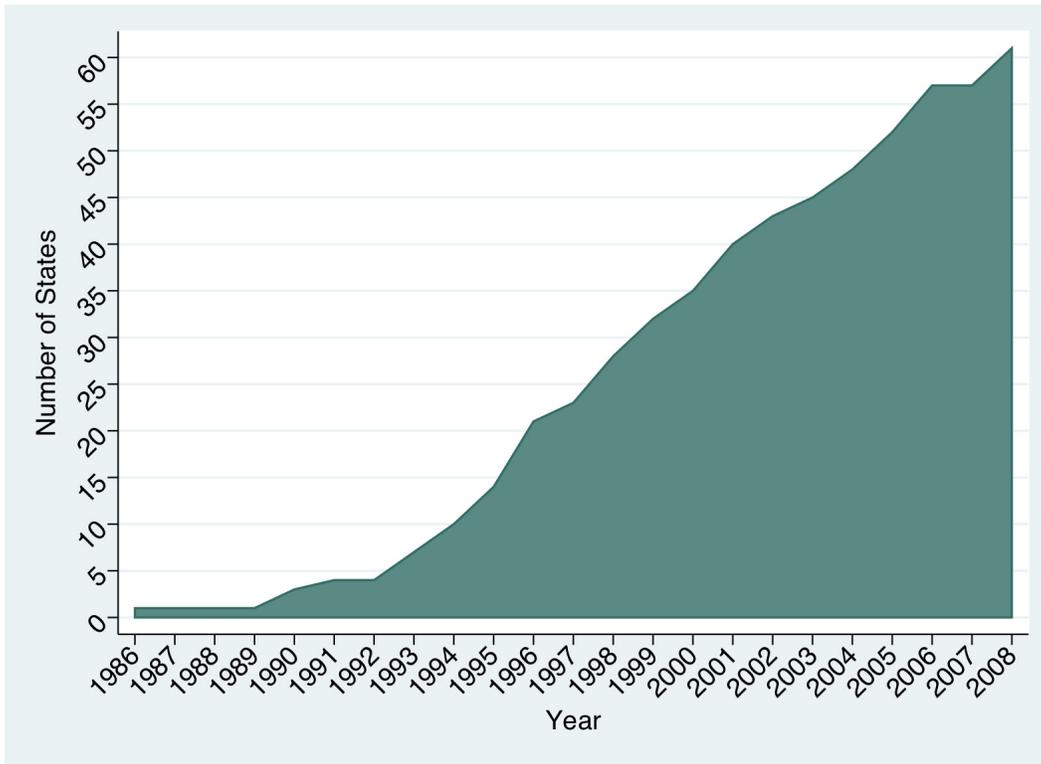


Figure 3
Cumulative Number of States
with Domestic Legislation Based on UNCITRAL Model Law, by Year

In summary, the basic rules governing the transnational commercial arbitration system—including the rules governing the enforcement of arbitration agreements and arbitral awards—are a result of private-public interaction. States have demonstrated broad support for those rules through increasingly widespread adoption of international and domestic legal instruments such as the New York Convention and legislation based on the UNCITRAL Model Law.

Connecticut, Illinois, Louisiana, Oregon, and Texas), each of which have enacted legislation based on the Model Act.

3.2 *The Rules Governing Particular Arbitrations*

While states have enacted rules providing foundations for the transnational commercial arbitration system, private actors play the leading role in specifying the rules governing particular arbitral proceedings. These include both procedural rules, which specify how an arbitral proceeding should be conducted, and substantive rules, which are applied to the activity of the disputants that gave rise to the dispute.

One of the defining features of transnational commercial arbitration is the ability of the disputants themselves to specify the applicable procedural rules, subject to any mandatory provisions of the law of the state in which the arbitration takes place.⁴¹ Procedural rules cover matters such as the number and selection of arbitrators, the place and language of the arbitral proceedings, the written submissions and oral arguments that the disputants are allowed to make, the presentation of evidence, and the testimony of witnesses. In theory, disputants can create their own procedural rules from scratch. In practice, however, they generally specify an existing set of procedural rules, adopting them either in their entirety or with modifications.

The world's leading private arbitral institutions have developed various sets of procedural rules. When disputants opt for institutional arbitration, they typically will also opt for the procedural rules of the administering institution. For example, for arbitrations administered by the AAA's International Centre for Dispute Resolution (ICDR), the disputants will ordinarily select the ICDR's own procedural rules.⁴² When the disputants select an arbitral institution's procedural rules, those rules are private in a double sense: they were produced by a private institution rather than a state, and they are selected by agreement of the disputants rather than imposed by law.

Even disputants who opt for ad hoc arbitration will not necessarily create their own procedural rules from scratch. They, too, will often select an existing set of rules, such as the UNCITRAL Arbitration Rules.⁴³ UNCITRAL developed these rules in consultation with private arbitral institutions, and then formally adopted them. The United Nations General Assembly then passed a resolution recommending their use and widespread distribution.⁴⁴ These rules are thus a product of private-public interaction—namely, between an intergovernmental organization (UNCITRAL) and various private arbitral institutions.

⁴¹ Blackaby & Partasides 2009, 180.

⁴² In fact, the ICDR's model arbitration clause includes selection of its International Arbitration Rules. See <http://www.adr.org/si.asp?id=4945> (last accessed August 27, 2010).

⁴³ These rules, adopted by UNCITRAL on April 28, 1976, are available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (last accessed August 27, 2010).

⁴⁴ United Nations General Assembly Resolution 31/98, December 15, 1976.

Whereas procedural rules govern the arbitral process, substantive rules govern the activity of the disputants that gave rise to the dispute. The arbitrator is expected to determine whether the respondent's behavior violated the applicable substantive rules and, if so, to issue an award in favor of the claimant.⁴⁵ Disputants may specify the applicable substantive rules by including a choice-of-law clause in their contracts. Disputants may specify private rules, including transnational commercial customs, which are sometimes referred to as "lex mercatoria" or "transnational law." Or they may specify public rules, such as the national law of a particular state, or hybrid rules.

Hybrid substantive rules include the UNIDROIT Principles of International Commercial Contracts. UNIDROIT—the International Institute for the Unification of Private Law—is an intergovernmental organization that aims to facilitate global harmonization of commercial law.⁴⁶ To develop its Principles of International Commercial Contracts, UNIDROIT worked closely with private actors, including lawyers and legal scholars, with the goal of providing "a system of rules especially tailored to the needs of international commercial transactions."⁴⁷ Thus, like UNCITRAL's procedural rules, the UNIDROIT Principles are a product of private-public interaction. The UNIDROIT Principles are not legally binding, and they have not been adopted as state law. However, disputants sometimes select them as a source of substantive rules.

As one measure of the relative importance of public, private, and hybrid sources of substantive rules, Table 1 presents the rates at which disputants have selected national law rather than other sources in ICC arbitrations between 2003 and 2008.⁴⁸ The data shows that national law is the most widely used source of substantive rules in ICC arbitrations. In approximately eighty percent of ICC arbitrations between 2003 and 2008, the parties specifically selected national law, and in only approximately one to three percent of ICC arbitrations did the parties select other sources.⁴⁹ These figures suggest that the substantive rules applied in transnational commercial arbitration are usually drawn from public rather than private or hybrid sources. Similar data would have to be collected for non-ICC arbitrations in order to reach more certain conclusions.⁵⁰

⁴⁵ In practice, the award may be mixed, with some elements favoring the claimant, and others favoring the respondent. Thus, there will not necessarily be clear winners and losers.

⁴⁶ See <http://www.unidroit.org/dynasite.cfm?dsmid=84219> (last accessed August 27, 2010).

⁴⁷ International Institute for the Unification of Private Law 1994, viii.

⁴⁸ The source of my data is the annual statistical reports of the ICC contained in the ICC's *International Court of Arbitration Bulletin*. See Drahozal 2009, 1039, Table 2 (compiling 2003-2007 data); ICC 2009, 12 (2008 data).

⁴⁹ When the disputants fail to specify the applicable substantive law, the arbitrator ordinarily will do so. See Blackaby and Partasides 2009, 230f.

⁵⁰ Drahozal 2009, 1039.

Table 1
Source of Substantive Rules Selected by the Parties in ICC Arbitrations

	2003	2004	2005	2006	2007	2008
National Law	80.4%	79.1%	79.3%	82.7%	79.3%	84.0%
Other Source	1.2%	1.3%	1.7%	2.0%	0.5%	3.0%
No Selection	18.3%	19.6%	19.0%	15.3%	20.2%	13.2%

Source: Annual Statistical Reports of the ICC, from *International Court of Arbitration Bulletin*, var. years.

Other studies also suggest that the use of private sources of substantive rules is relatively infrequent.⁵¹ It appears that a principal reason why transnational commercial actors avoid these sources is that they tend to consider them too vague to provide meaningful behavioral guidance.⁵² As one expert practitioner of transnational commercial arbitration explains:

There is much academic debate, but little judicial authority, about what [non-national choice-of-law clauses] mean, and there are doubts [about] how widely they are enforceable Save where there is some powerful countervailing reason, business enterprises should not expose themselves to the uncertainties or expenses that participation in this scholastic debate could entail.⁵³

⁵¹ E.g. Dasser 2008, 131 (finding a total of only 79 cases in which a non-national legal standard was applied in arbitration, 32 of which also involved application of a national law); Drahozal 2005, 540 (finding that 26.7%, or four of fifteen, international joint venture agreements publicly filed with the United States Securities and Exchange Commission between 1993 and 1996 contained arbitration clauses referring to either “international legal principles and practices” or “general international commercial practices”). Nevertheless, one study suggests that there is at least fairly widespread awareness of the use of private and hybrid sources of substantive law in transnational commercial arbitration. E.g. Berger *et al* 2001, 96, 104 (survey study of in-house counsels, attorneys, arbitrators and other persons working in the field of international business law finding that 42% of respondents, of which a disproportionate number were Swiss or German, were aware of the use of non-state law in transnational commercial arbitration).

⁵² Drahozal 2008, 671.

⁵³ Born 2006, 124.

Even if the rules applied in transnational commercial arbitration have primarily public sources, they are privately determined insofar as the disputants themselves (or, in some cases, the arbitrators) decide which rules will govern. Here, again, private-public interaction plays an important role in transnational commercial arbitration.⁵⁴

In summary, states play a leading role in providing the foundations for the transnational commercial arbitration system. For their part, private actors play a leading role in determining the rules governing particular arbitral proceedings. In both areas of rule-making, there is substantial private-public interaction.

4. Enforcement in Transnational Commercial Arbitration

The principal enforcement problems in transnational commercial arbitration involve *ex ante* arbitration clauses and arbitral awards. Parties often include an arbitration clause in their transnational contracts. Their decision to do so is a private choice, and may be based on a mutual belief that arbitration would be preferable to litigation in the event of a dispute. Alternatively, the arbitration clause may have resulted from bargaining: the parties may disagree about the desirability of arbitration, but the party opposing arbitration may accept the arbitration clause in exchange for concessions from the party preferring arbitration. In this sense, transnational actors' "forum shopping" decisions are often a result of bargaining rather than simple rational choice.

In either case, after a dispute arises or becomes likely, a party may conclude that it will be more likely to win (or likely to win more or lose less) in litigation than in arbitration. For example, a claimant may conclude *ex post* that it is more likely to win if it is able to present its case to a jury, or if it is able to add claims against additional parties that are not bound by the arbitration clause—all of which generally is possible in litigation but not arbitration. Such *ex post* assessments not only reduce the likelihood of *ex post* agreement to submit disputes to arbitration, but also increase the likelihood that a party will pursue litigation even if there is an *ex ante* arbitration clause. For example, the party may argue that the arbitration clause is invalid or does not cover the type of dispute that has arisen.⁵⁵

Even if both parties follow their arbitration agreement and refrain from litigation, and the arbitrator issues an award in favor of the claimant and against the respondent, the respondent may fail to comply with the award. For example,

⁵⁴ O'Hara and Ribstein (2009) usefully describe the interactions between states that supply legal rules and private actors that choose them as a "law market."

⁵⁵ Bermann 2003, 374.

the arbitrator may issue an award requiring the respondent to make a monetary payment to the claimant, but the respondent may refuse to pay.

A combination of private and public processes mitigates enforcement problems like these. For example, private enforcement of arbitration agreements and arbitral awards using reputational sanctions can enhance rule-following in transnational commercial arbitration.⁵⁶ The logic is as follows: If an actor's reputation for keeping its commitments is good, that reputation will increase the actor's opportunities for entering profitable transactions with other actors who are aware of that reputation. If the reputation is bad, it will decrease those opportunities. Therefore, an actor's reputation for keeping its commitments is a valuable asset. The actor has an incentive to keep its commitments—including agreements to arbitrate and abide by arbitral awards—because noncompliance will harm that reputation.⁵⁷ Insofar as an actor desires to enter arbitration agreements in the future and avoid litigation, that actor will have a particularly strong incentive to foster a good reputation for complying with arbitration agreements and arbitral awards.⁵⁸

However, reputational sanctions are likely to be effective only under certain conditions. For example, there must be a mechanism for disseminating information about parties' behavior—information is, after all, the link between behavior and reputation.⁵⁹ If A breaches an agreement to arbitrate with B, or refuses to comply with the resulting arbitral award, B obviously has knowledge of this, but absent a broader information-dissemination mechanism, other actors do not necessarily have this knowledge, potentially leaving A's general reputation unharmed.⁶⁰ One important value associated with arbitration, and often required by the disputants' agreement—confidentiality—makes it particularly challenging to satisfy the information requirement with respect to compliance with arbitral awards. Confidentiality aside, as the size of a community increases, it becomes increasingly difficult for any given actor to keep track of the conduct and reputations of others. For these reasons, private enforcement is most likely to

⁵⁶ Benson 1998, 95; Stone Sweet 2002, 325.

⁵⁷ Shepsle 1986, 71.

⁵⁸ Private enforcement based on reputational sanctions likely plays an especially important role in enhancing rule-following by arbitrators. After all, arbitrators depend on disputants for employment, and disputants are unlikely to hire arbitrators with reputations for partiality, inefficiency, or infidelity to the rules set by the disputants.

⁵⁹ See Stone Sweet 2002, 325 (“This solution, of course, depends entirely on the organization of information and monitoring capacities, a collective good that, given the myriad costs involved, may or may not be generated by the traders themselves.”).

⁶⁰ See Guzman 2002, 1862f (“The extent to which a violation is known by the relevant players affects the reputational consequences of the violation. Obviously, if a violation takes place, but no other state has knowledge of it, there is no reputational loss. The reputational consequences will also be less if only a small number of countries know of the violation.”).

play a significant role in rule-following in relatively small, well-defined, and enduring communities, in which the parties are able to monitor each other and are likely to have repeated interactions. The implication is that the transnational commercial arbitration system—which operates at a global scale—probably cannot rely primarily on reputational sanctions to mitigate enforcement problems.

Enforcement problems in transnational commercial arbitration have also been addressed by domestic courts. They help solve these problems both by enforcing arbitration agreements and arbitral awards in particular cases, and by discouraging noncompliance in the first place by signaling to transnational commercial actors that judicial enforcement is likely. First, when one party to an arbitration agreement fails to abide by that agreement, the other party can seek judicial enforcement of the agreement.⁶¹ And when a party against whom an arbitral award has been issued fails to comply with that award, the other party can seek judicial enforcement of that award. As discussed above, states have provided the foundations for judicial enforcement through international and domestic law. However, judicial enforcement is privately triggered in the sense that it depends on a request from one of the disputants.

In addition, domestic courts can support the rules governing transnational commercial arbitration by refusing to enforce arbitration agreements or arbitral awards that are inconsistent with those rules. For example, they can support the rule that arbitration requires the consent of the disputants by refusing to enforce arbitration agreements that are null and void as the result of fraud.⁶² Similarly, they can support the rule that disputants must have notice of arbitral proceedings and an opportunity to present their cases by refusing to enforce awards that result from proceedings in which a disputant received no such notice or had no such opportunity.⁶³ And they can support the rule that arbitrators shall not exceed the scope of authority granted to them by the disputants and permitted by law by refusing to enforce awards that exceed that scope.⁶⁴

⁶¹ Domestic courts can use a variety of methods to enforce an arbitration agreement, including an order compelling arbitration, an order dismissing or staying litigation of disputes that are covered by an arbitration agreement, or an “anti-suit injunction” prohibiting a party from filing or proceeding with litigation of such a dispute in a foreign court. For a detailed analysis of the various methods used by domestic courts to enforce transnational commercial arbitration agreements, see Born 2009, chap. 7.

⁶² See the exception to enforcement in Article II(3) (“unless [the court] finds that the [arbitration agreement] is null and void, inoperative or incapable of being performed”).

⁶³ See the exception to enforcement in Article V(1)(b) of the New York Convention (“The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”)

⁶⁴ Blackaby & Partasides 2009, 314f, 598. See, for example, the exception to enforcement in Article V(1)(c) of the New York Convention (“The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . .”).

Empirical evidence suggests that domestic courts play a significant role in the enforcement of awards following transnational commercial arbitration. For example, a survey on the post-award experience of claimants in 205 transnational commercial arbitrations in the AAA between 1999 and 2002 reveals considerable levels of post-award judicial involvement. In 100 cases, the claimant prevailed and the award debtor eventually complied fully or partially with the award.⁶⁵ Of those one hundred cases, there was judicial confirmation of the award in sixty-eight cases and judicial enforcement in twelve cases.⁶⁶ Even then, full compliance was the result in only seventy-four of the one hundred cases, while there was partial compliance in four cases and the parties renegotiated the award in twenty-two cases. Of the remaining 105 cases, the award debtor failed to comply in thirty-five cases; a court vacated the award in one case; fifty-one cases were still pending in a court action; and the claimant lost in eighteen cases.⁶⁷ A more recent study estimates that the U.S. federal district courts have been called upon hundreds of times to enforce arbitral awards covered by the New York Convention.⁶⁸

Second, domestic courts mitigate enforcement problems by signaling to transnational commercial actors that they are likely to enforce arbitration agreements, arbitral awards, and the rules governing the transnational commercial arbitration system.⁶⁹ Other things being equal, the higher the perceived probability of judicial enforcement, the higher the probability that transnational actors will comply before actual judicial enforcement is necessary. After all, as the probability of judicial enforcement increases, the willingness of a party to incur the costs needed to resist enforcement should decrease.⁷⁰ This perceived probability is largely a function of the prior published enforcement decisions of

⁶⁵ Naimark & Keer 2005, 271.

⁶⁶ Naimark & Keer 2005, 271.

⁶⁷ Naimark & Keer 2005, 271. As the authors note: “A total of 35 cases reported non-compliance with the award. Fifty-one cases were unresolved at the time of the survey and were pending in a court action of some type. Those 51 cases tended to be the most recently awarded matters and had not, therefore, sufficiently ‘ripened’ to demonstrate a final result. While we have no further data on the final outcomes of those 51 cases it seems likely that they will eventually show the same patterns of post-award results as the other 154 cases [i.e. compliance in 118 cases, non-compliance in 35 cases, award vacated in 1 case].” Naimark & Keer 2005, 271.

⁶⁸ Whytock 2008b, 63-67.

⁶⁹ See Drahozal 2009, 1040 (“While it appears that most international arbitration awards are complied with voluntarily, the available empirical evidence suggests that public courts nonetheless play an important role in the process.”); Whytock 2008a, 470 (“Transnational [arbitration] to an important extent . . . relies on domestic courts for enforcement.”).

⁷⁰ This is a simple extension of the basic economic model of the decision to litigate. According to that model, a plaintiff will only file a claim if the expected value of the claim (which equals the probability that the plaintiff will win (p) times the amount of recovery if it wins (w)), less the costs of suit, is greater than zero. The so-called “filing condition” is thus $(p*w)-c>0$. Bone 2003, 34.

domestic courts. The higher the rate of enforcement in those decisions, the higher the perceived probability of future enforcement. Thus, perhaps even more important than judicial enforcement in particular cases is the *expectation* of judicial enforcement in potential future cases. A disputant's rule-following behavior thus depends significantly on the anticipated behavior of domestic courts—namely, the disputant's expectations about whether a domestic court will enforce an arbitration agreement or arbitral award if the disputant fails to comply with it. This impact of domestic court decisions on the behavior of transnational actors beyond the parties to particular disputes is an example of the “transnational shadow of the law.”⁷¹

To shed empirical light on judicial signaling regarding the enforcement of arbitral awards, I created a dataset of all U.S. federal district court decisions between 1970 and 2008 published in the Westlaw database involving enforcement of arbitral awards covered by the New York Convention.⁷² I coded each decision based on whether it was a decision to enforce the arbitral award in full or not. If the decision was to enforce in full, the decision was coded as “yes”; otherwise, the decision was coded as “no.”⁷³

Table 2
Enforcement Rates of Arbitral Awards Covered by the New York Convention

<i>Award Fully Enforced?</i>	<i>Number of Decisions</i>	<i>Percentage of Decisions</i>
Yes	112	77.2%
No	33	22.8%
Total	145	100.0%

Note: This table presents the rate at which the U.S. federal district courts have fully enforced arbitral awards covered by the New York Convention in published decisions between 1970 and 2008.

⁷¹ Whytock 2009, 29f.

⁷² The search was conducted on October 10, 2008. For details regarding the dataset, see Whytock 2008b, 57f.

⁷³ Occasionally, awards are partially enforced or enforcement decisions are stayed pending the outcome of parallel foreign proceedings to vacate or set aside an award. I coded these decisions as “no,” indicating that there was not full enforcement. For coding details, see Whytock 2008b, 72f.

The results, presented in Table 2, show that between 1970 and 2008, the U.S. federal district courts have fully enforced arbitral awards covered by the New York Convention at an estimated rate of 77.2 percent in their published decisions.⁷⁴ The signal that appears is that attempts to resist enforcement are more likely than not to fail. It is more by creating these expectations than by providing enforcement in particular cases that domestic courts support the transnational commercial arbitration system.⁷⁵

At the same time, my findings suggest that the U.S. district courts are also sending the signal that they do not automatically enforce arbitral awards, but are instead willing to perform a monitoring role, as the New York Convention allows them to do, to evaluate whether particular arbitral proceedings are consistent with minimal due process standards and public policy.⁷⁶ This willingness may not only enhance the perceived legitimacy of the transnational commercial arbitration system, but also help address the concerns of some practitioners about the lack of a right of appeal in arbitration.⁷⁷

By preventing domestic courts from performing their monitoring role in the transnational commercial arbitration system, states risk eroding the system's legitimacy. For example, a law adopted by Belgium in 1985 barred review of arbitral awards by Belgian courts in arbitrations not involving Belgian citizens or businesses located in Belgium. As Moses explains: "It was believed at the time that this would increase the number of arbitrations in Belgium. In fact, however, the law had the opposite effect. Businesses were not drawn to a system with no possible court review. It appeared instead that businesses were avoiding Belgium

⁷⁴ In 3.5% of published decisions, the U.S. district courts either partially enforced the award or stayed enforcement proceedings. Whytock 2008b, 72f. Based on the theory that judges are less likely to publish mundane decisions and the assumption that judges view enforcement of arbitral awards to be the norm, it is possible that the overall enforcement rate, including in unpublished decisions, is higher than in published decisions. See Drahozal and Naimark 2005, 264.

⁷⁵ Whytock 2008a, 470f.

⁷⁶ See e.g. New York Convention, Article V(1)(a) ("Recognition and enforcement of the award may be refused . . . [if] . . . [t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case"), Article V(1)(d) (allowing refusal to recognize or enforce an arbitral award when "the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place"), and Article V(2)(b) ("Recognition and enforcement of an arbitral award may . . . 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.").

⁷⁷ Born (2006, 6) summarizes the tradeoff: "Dispensing with appellate review reduces both litigation costs and delays. On the other hand, it also means that wildly eccentric, or simply wrong, arbitral decisions cannot be corrected." Callahan (2006, 31, 49) has found that a major reason for preferring litigation over arbitration is the availability of appellate review in litigation.

as a place of arbitration.”⁷⁸ Belgium therefore amended the law in 1998, allowing parties to opt out of judicial review, but no longer barring such review.⁷⁹

In summary, both private actors and state actors help mitigate enforcement problems in the transnational commercial arbitration system. Private actors do so by applying reputational sanctions. States, through their domestic courts, do so by enforcing arbitration agreements and arbitral awards in particular disputes, and fostering expectations of enforcement in potential future disputes.

5. Conclusion

Although global governance scholars have tended to treat the transnational commercial arbitration system as a private form of global governance, this article has shed light on the role of the state in that system. Specifically, I have argued that both rule-making and enforcement in the system depend largely on interactions between private and public actors. Therefore, I suggest that scholars treat the transnational commercial arbitration system as a mixed private-public form of governance and devote more effort to understanding private-public interaction in the system.

An improved understanding of private-public interaction in transnational commercial arbitration will help scholars contribute more effectively to the solution of difficult normative problems and theoretical puzzles. Normatively, the question of private-public interaction goes to the heart of hopes and fears about the transnational commercial arbitration system. On the one hand, scholars have noted that by reducing the reach of state control over transnational business, the system can decrease transaction costs and increase private autonomy in transnational commercial relations.⁸⁰ On the other hand, scholars have expressed concern that by freeing transnational business actors from state-based legal regulation, the system may unduly prioritize facilitation of transnational business transactions over other objectives of public policy such as distributive justice and the regulation of the negative externalities of transnational business activity.⁸¹ But the extent to which these hopes and fears reflect reality depends largely on the nature and extent of state involvement in the transnational commercial arbitration system. Thus, by improving our understanding of private-public interaction in

⁷⁸ Moses 2008, 57.

⁷⁹ Moses 2008, 57.

⁸⁰ See, e.g., Mattli 2001, 921; Stone Sweet 2006, 627.

⁸¹ See, e.g., Cutler 2003, 226. As Wai (2002, 212, 231) puts it in an important law review article, by contributing to “the transnational liftoff of international business transactions from national regulatory oversight,” the transnational commercial arbitration system may undermine “worthwhile policy objectives such as distributive justice, democratic political governance, or effective transnational regulation.”

transnational commercial arbitration, we can improve our understanding of both its promises and perils.

A better understanding of private-public interaction is also necessary to solve one of the central puzzles of the transnational commercial arbitration system: What explains state support for that system? Broad support was not inevitable. States could have instead attempted to preserve transnational litigation in domestic courts as the dominant method of transnational commercial dispute resolution and a leading instrument of state governance of transnational commercial activity. From a traditional state-focused perspective on world politics, this alternative would have seemed most likely. Why would states encourage a system of global governance in which they substantially share power with private actors? One theory emphasizes private political pressure on states to support arbitration as a transnational dispute resolution alternative to litigation,⁸² while another emphasizes economic competition among states to attract transnational arbitration business.⁸³ Central to both accounts are interactions between private and public actors. By exploiting cross-national and temporal variation in states' adoption of the various domestic and international legal instruments that support the transnational commercial arbitration system, and with careful historical process tracing, scholars can begin refining and empirically testing these theories.

Finally, while my primary goal in this article is to nudge global governance scholarship on transnational commercial arbitration in a direction that more strongly focuses on private-public interaction, this article also has implications for the study of global governance more generally. Descriptively, the article raises the possibility that there may not be purely private (or, for that matter, purely public) forms of global governance. Analytically, even though it is important to understand the distinct roles of private and public actors in global governance, the article raises doubts about the desirability of a sharp conceptual distinction between private and public forms of global governance. Scholars who insist too strongly on this distinction run the risk of obscuring important interactions between private and public actors. Theoretically, this article implies that accounts of global governance processes—including rule-making and enforcement processes—will remain incomplete if they lack an account of how private and public actors interact in those processes.

⁸² E.g. Born 2009, 49f.; Dezalay & Garth 1996, 43f.

⁸³ O'Hara & Ribstein 2009, 98-101.

Appendix: List of Acronyms

AAA:	American Arbitration Association
ECOSOC:	United Nations Economic and Social Council
FAA:	U.S. Federal Arbitration Act
ICC:	International Chamber of Commerce
ICDR:	International Centre for Dispute Resolution of the American Arbitration Association
LCIA:	London Court of International Arbitration
UNCITRAL:	United Nations Commission on International Trade Law
UNIDROIT:	International Institute for the Unification of Private Law

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