LITIGATION, ARBITRATION, AND THE TRANSNATIONAL SHADOW OF THE LAW

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INTRODUCTION

That arbitration has replaced litigation as the leading method of transnational dispute resolution has become a cliché. But like many clichés, neither its empirical basis nor its broader implications are entirely clear. From the perspective of actual or prospective disputants, the choice between litigation and arbitration, while often difficult, generally boils down to an analysis of a fairly standard set of characteristics that distinguish these two dispute resolution techniques. You cannot, for example, pick your judge, but you can pick your arbitrator; litigation comes with preexisting rules of civil procedure, whereas the parties can tailor their own rules for governing the arbitral process; and in contrast to the transparency of litigation, steps can be taken to keep arbitral proceedings confidential. Arbitration also is potentially faster and less costly than litigation. The implications of litigation versus arbitration are, in other words, relatively clear from a disputant-oriented perspective.

As important as these considerations are for transnational lawyering, this article instead provides a governance-oriented perspective on transnational litigation and transnational arbitration.

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1. See, e.g., A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 225 (2003) ("Most trade experts would agree that private arbitration has eclipsed national adjudication as the preferred method for resolving international commercial disputes."); RICHARD GARNETT, HENRY GABRIEL, JEFF WAINCYMER & JUDD EPSTEIN, A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 1 (2000) ("Arbitration is the dominant method of resolving private party disputes in international commerce.").

2. See, e.g., GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: PLANNING, DRAFTING AND ENFORCING 5-15 (1999) (enumerating the distinguishing characteristics of transnational arbitration and transnational litigation, and proposing general guidelines for selecting the appropriate dispute resolution method).

3. Id. at 7-8; GARNETT ET AL., supra note 1, at 12-13.
Governance-oriented analysis of transnational law has two central features. First, it focuses on the implications of transnational law not only for particular disputants, but also for the behavior of transnational actors more generally. To help explore these implications, I take Robert Mnookin and Lewis Kornhauser’s well known “shadow of the law” metaphor—used by them to elucidate the influence of divorce law and court decisions on the behavior of divorcing couples “outside the courtroom”—and extend it to transnational law and transnational activity. I will refer in this article to the “transnational shadow of the law” to highlight the influence that domestic law and domestic courts have on transnational activity, including transnational arbitration. Second, the governance-oriented approach involves not only doctrinal analysis of transnational law, but also descriptive, causal, and normative analysis of transnational law in action—including how judges actually decide cases.


5. I use the term “transnational” to describe actors or activities with connections to more than one state. Those connections can be territorial, when the activity or its effects touch the territory of more than one state, or they can be based on legal relationships between a state and the actors engaged in or affected by that activity, such as nationality or citizenship. In international law and international relations theory, the term “international” technically refers to interactions between unitary states. I use the term “transnational” to include nonstate actors within the scope of this article. Following Jessup, I define “transnational law” as the body of law “which regulates actions or events that transcend national frontiers,” a concept meant to embody both public and private international law and explicitly including domestic legal rules that apply to transnational activity. PHILIP C. JESSUP, TRANSNATIONAL LAW 1-2, 70, 106 (1956).


8. Whytock I, supra note 4, at 167-68; Whytock II, supra note 4, at 257; See generally
From a governance-oriented perspective, litigation and arbitration are not only distinct methods of transnational dispute resolution. They also provide foundations for two different forms of global governance: transnational judicial governance and transnational private governance.\footnote{Roscoe Pound, \textit{Law in Books and Law in Action}, 44 AM. L. REV. 12, 15 (1910) ("[I]f we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.").} From this perspective, the relationship between litigation and arbitration not only affects the micro-level decisions of individual disputants regarding the dispute resolution method that best advances their respective interests. It also has implications for global governance, that is, for how and by whom the rules of transnational activity are prescribed, applied, and enforced.\footnote{For a detailed definition and theoretical and empirical analyses of transnational judicial governance, see Whytock II, \textit{supra} note 4.}

This article explores these implications in three parts.\footnote{See ANNE METTE KJAER, \textit{GOVERNANCE} 10 (2004).} First, I explain the concept of transnational judicial governance, describing the role of domestic court decisionmaking in the regulation of transnational activity. Next, I explain the concept of transnational private governance, and argue that transnational arbitration is an example of this form of governance. I then turn to the relationship between litigation and transnational judicial governance on the one hand, and arbitration and transnational private governance on the other hand. I point to empirical evidence suggesting that the conventional wisdom may overestimate the extent to which transnational arbitration has replaced litigation. And I argue that arbitration is only partially autonomous from transnational judicial governance. Domestic courts perform a governance support function for transnational arbitration,\footnote{The focus here is on U.S. courts.} and except in narrow circumstances in which private enforcement is possible on the basis of reputational sanctions, transnational arbitration itself operates in the transnational shadow of the law.

I conclude by drawing attention to the complexity of the relationship between transnational judicial governance and transnational arbitration. On the one hand, judicial monitoring of
transnational arbitration is minimal; on the other hand, arbitration generally depends on domestic courts for enforcement. This raises a variety of normative concerns, including whether transnational arbitration can adequately respond to the negative externalities of cross-border commercial activity.

I. TRANSNATIONAL JUDICIAL GOVERNANCE

From the perspective of an actual or prospective disputant, litigation is one option among others for resolving transnational disputes which carries with it particular advantages and disadvantages for each of the disputants. From a governance-oriented perspective, however, transnational litigation is the foundation of a form of global governance, whereby judges make decisions that not only directly affect the parties to particular disputes, but also indirectly regulate the behavior of actors who engage in activity in the transnational shadow of the law. I call this form of governance “transnational judicial governance.”

At the core of transnational judicial governance are two allocative functions—one jurisdictional, the other substantive—that domestic courts perform in the course of transnational litigation. Jurisdictionally, domestic courts allocate governance authority over transnational activity. As international relations scholar Miles Kahler puts it, first and prior to all other questions about global governance is “Who governs?”

Domestic courts help answer this question. For example, by making subject matter jurisdiction and forum non conveniens decisions, they help allocate adjudicative authority among states. And by making international choice-of-law decisions, they allocate prescriptive authority. Domestic courts also help allocate governance authority between public and private actors. For example, they do so when they decide whether to enforce transnational arbitration agreements and arbitral awards.

13. I sketch my concept of transnational judicial governance only briefly here. For a more comprehensive discussion, see Whytock II, supra note 4, ch. 1. See also Christopher A. Whytock, Domestic Courts and Global Governance (Aug. 11, 2006), http://ssrn.com/author=386558.


15. Of course, these allocative functions correspond to several important branches of private international law. However, the governance-oriented approach emphasizes not only what private international law doctrine says, but what the domestic courts applying it actually do—that is, it focuses on how they actually allocate governance authority.
In addition to the allocation of governance authority, domestic courts perform a substantive allocative function: they allocate rights and resources among transnational actors. It is well understood that the allocation of rights and resources among litigants is a general judicial function. However, it is only recently that scholars have started to focus on the implications of this function for transnational activity. For example, “transnational public law litigation” is litigation in which “[p]rivate individuals, government officials, and nations sue one another directly, and are sued directly, in a variety of judicial fora, most prominently domestic courts,” based on rights derived from both domestic and international law. When these cases result in the award of compensatory or punitive damages, domestic courts are allocating economic resources among state and nonstate actors. More fundamentally, these decisions implicate basic values of safety and human dignity. In “transnational regulatory litigation,” domestic courts apply explicitly regulatory domestic legal rules to transnational activity, thus allocating rights and resources among the participating actors. More broadly, as Hannah Buxbaum argues, these cases not only close gaps in international regulation, but also “give domestic courts a role in the transnational process of articulating and defending global norms.”

“Transnational private litigation” involves claims based on private law, including the law of torts, property, and...

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16. See, e.g., Martin Shapiro, From Public Law to Public Policy, or the “Public” in “Public Law,” 5 Pol. Sci. & Pol. 410, 413 (1972) (adopting the definition of politics as the authoritative allocation of values, and arguing that judicial decisionmaking plays a central role in domestic political processes precisely because law is an important instrument of value allocation).

17. Harold Hongju Koh, Transnational Public Law Litigation, 100 Yale L.J. 2347, 2348-49 (1991). In the United States, these suits are typically based on the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (providing that federal district courts have jurisdiction over any civil action brought by an alien for a tort committed in violation of international law), as interpreted by the Second Circuit of the U.S. Court of Appeals in Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

18. However, plaintiffs that are successful in transnational public law litigation against states or state officials rarely are able to fully collect compensation. See id. at 2368 (“[N]o Filartiga-type plaintiff has apparently collected full compensation for his injuries . . . .”).

19. These are among the values identified by Myres McDougal as being allocated by the authoritative decisionmaking that constitutes international law. Myres S. McDougal, Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry, 4 J. Conflict Resol. 337, 343, 349 (1960).


21. Id. at 254.
contracts. These fields of private law—although generally not explicitly regulatory—are nevertheless policy instruments by which states authoritatively allocate economic rights and resources. By applying private law principles in transnational litigation, domestic courts help implement these allocative policies transnationally. As Robert Wai argues, the function of private law is “not simply facilitation of transactions, but also compensation for harms and social regulation of transnational conduct.”

Importantly, both the jurisdictional and substantive allocative decisions made by domestic courts in transnational litigation have shadow effects—that is, effects on the behavior of transnational actors “outside the courtroom.” By publishing these decisions, domestic courts provide information about how they are likely to make similar decisions under similar circumstances in the future, thus influencing the strategic behavior of transnational actors who acquire this information. For example, decisions allocating adjudicative and prescriptive authority affect transnational forum shopping by litigants. They can also affect predictability regarding which state’s rules apply to particular transnational activity, thus influencing levels of compliance, and arguably influencing international regulatory competition as well. Substantively, judicial allocation of rights and

23. See Shapiro supra note 15, at 413 (arguing that private law is just as much an instrument of authoritative value allocation as “public” or “regulatory”). See also Martin Shapiro, Public Law and Judicial Politics, in Political Science: The State of the Discipline II 365, 366 (Ada W. Finifter ed., 1993) (The ‘private’ law of property and contract authoritatively allocates most of the values in a capitalist society.”).
25. See Mnookin & Kornhauser, supra note 6, at 951, 972-73 (discussing the shadow of the law in the context of domestic divorce cases).
26. See Alec Stone Sweet & Thomas L. Brunell, Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community, 92 Am. Pol. Sci. Rev. 63, 64 (1998) (“When a judge decides, the lawmaking effect of the decision is always twofold. First, in settling the dispute at hand, the judge produces a legal act that is particular (it binds the two disputants) and retrospective (it resolves an existing dispute). Second, in justifying the decision, the judge signals that she will settle similar cases similarly in the future; this legal act is a general and prospective one (it affects future and potential [disputants]).”)
27. See Whytock II, supra note 4, at 25-8.
28. Id.
resources also has implications that extend beyond particular cases.  

Thus, domestic courts help define the shape, size, and content of the transnational shadow of the law. Marc Galanter refers to “the radiating effects of courts,” explaining that:

The contribution of courts to resolving disputes cannot be equated with their resolution of those disputes that are fully adjudicated. The principal contribution of courts to dispute resolution is the provision of a background of norms and procedures, against which negotiations and regulation in both private and governmental settings takes place. This contribution includes, but is not exhausted by, communication to prospective litigants of what might transpire if one of them sought a judicial resolution.

The important point here is that these radiating effects extend beyond borders.

II. ARBITRATION AS TRANSNATIONAL PRIVATE GOVERNANCE

Disputant-oriented analysis focuses on the advantages and disadvantages of arbitration relative to litigation for particular disputants involved in particular transnational interactions. From a governance-oriented perspective, however, arbitration is not only an alternative method of dispute resolution, but also an example of an alternative form of global governance: transnational private governance. “[T]ransnational private governance” is the governance of transnational activity by nonstate or “private” actors. It involves cooperation by nonstate actors “in order to establish rules and standards of behaviour . . . . Non-state actors not only formulate norms, but often also have a key role in their enforcement.” Thus,

29. For example, in transnational public law litigation, judges are not only resolving particular disputes, but also “declaring (or not declaring) international norms that litigants transport to other fora for use in political bargaining. Harold Hongju Koh, Transnational Public Law Litigation, 100 YALE L. J. 2347, 2395 (1991). Similarly, transnational regulatory litigation not only binds the litigants, but also can “enable national courts to participate in implementing effective regulatory strategies for global markets.” Buxbaum, supra note 20, at 316. For its part, transnational private litigation “might be able to introduce [new] policy values (sometimes through new policy actors) into political negotiations or decision making in other venues, domestic or international.” Wai, supra note 24, at 250.


31. Andreas Nölke & Jean-Christophe Graz, Limits to the Legitimacy of Transnational
transnational private governance “goes much further than traditional lobbying in allowing private actors an active role in regulation itself.”\textsuperscript{32}

In contrast to transnational judicial governance, where the governors are public officials and the law of the forum state (or the law of a foreign state to which the forum state’s choice-of-law principles point) ordinarily provides the applicable rules, arbitration can be understood as a form of private governance. The arbitrator is a private individual who does not act as a government representative. More fundamentally, the arbitral process is itself the result of private agreement, the disputants generally being free to select the arbitrator and applicable procedural and substantive rules. These rules may include nonstate rules or customs.\textsuperscript{33}

Whereas legal scholars typically study arbitration from a disputant-oriented perspective,\textsuperscript{34} political scientists are beginning to examine it from a governance-oriented perspective. For example, Alec Stone Sweet argues that the \textit{Lex Mercatoria}—which he defines as “the body of substantive law and dispute resolution rules and procedures,” including arbitration, that govern transnational trading relations—\textsuperscript{35}—is an increasingly important form of transnational private governance:

Over the past four decades, the transnational business community has successfully built a private system of transnational governance: the new \textit{Lex Mercatoria}. The actors

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\textsuperscript{32} Id.

\textsuperscript{33} BORN, supra note 2, at 2.

\textsuperscript{34} But see Thomas E. Carbonneau, \textit{The Ballad of Transborder Arbitration}, 56 U. MIAMI L. REV. 773, 773-74 (2002) (arguing that international commercial arbitration (ICA) “has had an enormous impact upon . . . the structuring of a de facto international legal system, and the development of a substantive world law of commerce. In a word, ICA has been a vital engine in the creation of a transborder rule of law”); and YVES DEZALAY & BRYANT G. GARTH, \textit{DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER} 3 (1996) (tracing the emergence of a global system of private justice to “new kinds of courts”—international commercial arbitration—and a special body of ‘law’—the so-called \textit{lex mercatoria”).

who operate this system—firms, their lawyers, international arbitrators, and legal academics—have evolved, and use, ‘a-national’ principles of contract and a system of private ‘courts’ to organize and regulate cross-border commercial exchange.\footnote{36}

The main point is that arbitration is not only an alternative form of dispute resolution, but also part of an alternative form of global governance—transnational private governance.

III. ESCAPING THE TRANSNATIONAL SHADOW OF THE LAW?

Taking a governance-oriented perspective, I have argued that litigation and arbitration are not only alternative methods of transnational dispute resolution, but also foundations for two alternative forms of global governance: transnational judicial governance and transnational private governance. This argument raises fundamental questions: To what extent are transnational actors using arbitration to circumvent state regulation of their activity? To what extent, in other words, are they using arbitration to escape the transnational shadow of the law? And what are the implications for global governance? Are we witnessing the privatization of global governance, a shift from transnational judicial governance (and other forms of public governance) to transnational private governance?

I will venture no definitive answer here. Nevertheless, I will attempt to make some modest progress by elucidating two related issues that need more attention if we are to develop a sound understanding of the relationship between litigation and transnational judicial governance on the one hand, and arbitration and transnational private governance on the other. First, how extensive is the trend from litigation to arbitration in transnational dispute resolution? Second, what is the relationship between domestic courts and arbitration? To the extent arbitration depends on domestic courts

\footnote{36. Stone Sweet, \textit{Transnational Governance}, supra note 35, at 627. See also CUTLER, supra note 1, at 183 ("The expansion of privatized dispute settlement through private, delocalized, and transnationalized international commercial arbitration is [] part of a corporate strategy to further disembed commercial law and practice from the "public" sphere and to reembed them in the "private" sphere, free from democratic and social control. The devolution of authority to resolve disputes and to enforce agreements to the private sphere through the increasing legitimacy of private arbitration, and the reassertion of merchant autonomy as the substantive norm, are perfecting this reconfiguration of political authority."); SHAPIRO & STONE SWEET, supra note 35, at 292 ("[T]he \textit{Lex Mercatoria} is rapidly emerging as a relatively comprehensive system of governance. . . ."); Stone Sweet, \textit{Islands}, supra note 35, at 334.}
for its effectiveness as a system of transnational private governance, the shift from litigation to arbitration might actually vindicate the importance of transnational judicial governance—in particular its governance support function—and suggest that it might not be so easy after all for transnational actors to fully escape the transnational shadow of the law.

A. Trends in Transnational Litigation and Transnational Arbitration

First, to what extent is arbitration replacing litigation as a method of transnational dispute resolution? In disputes arising between parties without preexisting relationships, arbitration is not likely to replace arbitration. As Gary Born notes,

Almost all international arbitrations occur pursuant to arbitration clauses contained in commercial contracts. It is, of course, possible for parties to agree to submit an existing dispute to arbitration, and this sometimes happens....

Typically, however, it is difficult to negotiate a submission agreement [or “compromis”] once a concrete dispute has arisen and litigation tactics have been explored. 37

For example, individual plaintiffs in transnational tort suits are unlikely to have an ex ante arbitration agreement with the defendant, and often will prefer the broad discovery rules and jury available with litigation. Thus, litigation is likely to remain an important method for resolving tort disputes arising from the negative externalities of transnational activity.

Regarding transnational commerce, on the other hand, the conventional wisdom is that arbitration has virtually replaced litigation. 38 Garnett et al. assert that “[a]rbitration is the dominant method of resolving private party disputes in international commerce.” 39 According to Thomas Carbonneau, “[t]he status of arbitration as the procedure of choice in transnational commerce can no longer be seriously challenged.” 40

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37. BORN, supra note 2, at 37.
38. See, e.g., CUTLER, supra note 1, at 225 (”[M]ost trade experts would agree that private arbitration has eclipsed national adjudication as the preferred method for resolving international commercial disputes.”); Walter Mattli, Private Justice in a Global Economy: From Litigation to Arbitration, 55 INT’L ORG. 919, 920 (2001) (“Lawyers and judges agree that there is now clear evidence of something of a world movement . . . towards international arbitration.”).
39. GARNETT ET AL., supra note 1, at 1.
40. Thomas Carbonneau, The Remaking of Arbitration: Design and Destiny, in LEX
There is, however, an emerging contrarian view. Theodore Eisenberg and Geoffrey Miller find that “large corporate actors do not systematically embrace arbitration. International contracts include arbitration clauses more than domestic contracts, but also at a surprisingly low rate. . . . [C]orporate representatives believe that litigation can add value over arbitration.” And as Thomas Stipanowich concludes in a survey of empirical research on the relationship between litigation and arbitration: “As for litigation, to paraphrase Mark Twain, the rumors of its demise are greatly exaggerated.”

Unfortunately, little data is available for assessing these divergent views. On the transnational judicial governance side of the ledger, litigation continues to be alive and well, at least in the United States. 253,273 civil cases were filed in the U.S. district courts in 2005, and an estimated 16.6 million were filed in U.S. state courts in the same year. Moreover, overall civil litigation rates increased in the last decade in both the federal and state judicial systems.

The problem is that litigation rates in general do not necessarily reflect transnational litigation rates in particular. In fact, an empirical study by Kevin Clermont and Theodore Eisenberg shows that the

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43. See id. at 1 (noting that a “fundamental problem” faced by scholars studying the relationship between litigation and various forms of alternative dispute resolution like mediation and arbitration is the “paucity of useful, reliable information”). See also Eisenberg & Miller, supra note 41, at 345 (“Little information exists about arbitration clause incidence in sophisticated contracts . . . .”)


46. In 1995, 248,355 civil cases were filed in U.S. federal district courts; in 2005, 253,273 were filed. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, supra note 44, at Table 4.4.

47. Civil litigation in state courts increased by fifteen and five percent between 1996 and 2005 for limited jurisdiction and unified/general jurisdiction courts, respectively. National Center for State Courts, supra note 45, at 12.
rate of one type of transnational litigation—alienage jurisdiction cases—is declining. Using data collected by the Administrative Office of the United States Courts, they show that the number of alienage cases—that is, cases over which the U.S. district courts have jurisdiction because the dispute is between “citizens of a [U.S.] State and citizens or subjects of a foreign state”\(^\text{48}\)—has substantially declined since 1986.\(^\text{49}\) Might it be that this decline is due to a shift from litigation to arbitration?\(^\text{50}\)

But this is only a small piece of the transnational litigation picture. Clermont and Eisenberg exclude from their analysis cases involving foreign nations.\(^\text{51}\) Moreover, aside from the information on alienage cases, the Administrative Office data does not distinguish transnational litigation from purely domestic litigation. Consequently, the Clermont and Eisenberg study does not identify transnational litigation in U.S. federal district courts on jurisdictional grounds other than alienage, such as diversity cases between two U.S. citizens involving activity with a transnational dimension, and federal


\(^{50}\) A simultaneous decline in transnational litigation rates and rise in transnational arbitration rates would at least circumstantially support the proposition that there has been a shift from public to private forms of global governance. However, such evidence would not be conclusive. It also would be necessary to demonstrate a relationship between these trends. Even with perfect data on transnational litigation and transnational arbitration rates over time, this would be difficult because of the non-fungibility of litigation and arbitration. Some disputes are unlikely to be arbitrated at all—take, for example, tort claims involving parties having no a priori relationship and therefore no preexisting arbitration agreement. Changes in the rate of this type of litigation would not imply changes in arbitration rates. Conversely, there may be some disputes that would not be likely to be litigated even without the option of arbitration—for example, disputes with insufficient value to justify the time or expense of litigation. Since such disputes will not be litigated anyway, changes in the rates of arbitration of such disputes would not imply changes in litigation rates. In addition, litigation and arbitration do not exhaust the available alternatives for transnational dispute resolution. Shifts to (or away from) negotiation or mediation may help explain changes in the rates of litigation and arbitration. Most fundamentally, interpretation of the data is difficult due to the lack of measures of the underlying causes of disputes: changes in litigation or arbitration rates may be due to overall changes in the rate of disputing, not changes in the popularity of one dispute resolution method or another.

question cases involving a non-U.S. party or otherwise involving transnational activity.

Furthermore, though most litigation in the United States is filed in state rather than federal courts, the Administrative Office data does not include state court cases. This means that inferences based on the Administrative Office data run the risk of grossly underestimating the total volume of transnational litigation in U.S. courts, and inaccurately describing overall transnational litigation trends. For now, it is difficult to do more than speculate about whether transnational litigation in general is characterized by the same trends that characterize alienage cases in the U.S. federal district courts.

As for transnational private governance, “systematic knowledge of arbitration is thin” and available data on arbitration rates is mixed. On the one hand, it seems undeniable that the popularity of arbitration increased dramatically over the course of the last century. As Stone Sweet notes:

The number of arbitral centers that handle transnational business disputes has grown at an astounding pace. In 1910, there were ten arbitration houses; there were over 100 by 1985; and today there are more than 150. . . . At the [International Chamber of Commerce], the oldest, biggest, and most important such institution, traders filed some 3,000 disputes for arbitration during the 1920 to 1980 period, more than 3,500 during the 1990s, and 5,250 during the 1996 to 2005 period (footnote omitted). By 2004, the annual number of filings exceeded 550, and the annual number of awards rendered exceeded 350. Stone Sweet estimates that seventy percent of the cases filed with the

52. See, e.g., ROBERT A. CARP, RONALD STIDHAM & KENNETH L. MANNING, JUDICIAL PROCESS IN AMERICA 67 (7th ed. 2007) (“The lion’s share of the nation’s judicial business exists at the state, not the national, level. The fact that judges adjudicate several hundred thousand cases a year is impressive; the fact that state courts handle several million in a year is overwhelming . . . .”). In 2005, 253,273 civil cases were filed in the U.S. district courts. Id. at 47.

53. Eisenberg & Miller, supra note 41, at 348.

54. Stone Sweet, Transnational Governance, supra note 35, at 636 see also Carbonneau, supra note 34, at 796 (noting that the American Arbitration Association’s International Center for Dispute Resolution has administered more than 1,000 arbitration cases and has an annual caseload approach 400); Mattli, supra note 38, at 920 (“The number of arbitration forums has grown from a dozen or so in the 1970s to more than one hundred in the 1990s, and the caseload of major arbitral institutions has more than doubled during the same period.”).
ICC are “inter-regional” in the sense that the parties are based on different continents,\textsuperscript{55} and states that “[t]oday, far more than 90 percent of all transnational commercial contracts contain an arbitration clause.”\textsuperscript{56}

On the other hand, a series of recent empirical studies indicates that arbitration in general—and transnational arbitration in particular—might not be as pervasive as some observers suggest. In 1997, Cornell University conducted a survey study on the use of alternative dispute resolution by Fortune 1000 companies.\textsuperscript{57} Although 41.6 percent of respondents reported that they used arbitration “occasionally” to resolve disputes, only 20.6 percent reported that they used arbitration “very frequently” or “frequently,” and 37.7 percent reported that they did so “rarely” or “not at all.”\textsuperscript{58}

Another study, conducted by Theodore Eisenberg and Geoffrey Miller, analyzed more than 2,800 contracts filed with the Securities Exchange Commission in 2002, and found “[l]ittle evidence ... to support the proposition that [public companies] routinely regard arbitration clauses as efficient or otherwise desirable contract terms.”\textsuperscript{59} Only 11 percent of contracts contained arbitration clauses.\textsuperscript{60} Twenty percent of international contracts—those involving a non-U.S. party—had arbitration clauses, which is higher than the overall rate, but nevertheless in “contrast[] with predictions that arbitration is the dispute resolution mechanism in international contractual settings, and that the vast majority of international contracts provide for binding arbitration.”\textsuperscript{61}

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\item \textsuperscript{55} Stone Sweet, \textit{Transnational Governance}, supra note 35, at 636; see also Born, \textit{supra} note 2, at 47 (noting that most of the ICC’s cases are international disputes).
\item \textsuperscript{56} Stone Sweet, \textit{Transnational Governance}, supra note 35, at 635 (citing Klaus Peter Berger, \textit{The Creeping Codification of the Lex Mercatoria} 111 (1999)); see also Eisenberg & Miller, \textit{supra} note 41, at 347 (citing a study finding that from 1993 to 1996, fifteen of seventeen international joint venture agreements filed with the U.S. Securities and Exchange Commission included arbitration clauses, and another finding that more than eighty percent of private international contracts have arbitration clauses).
\item \textsuperscript{57} See Stipanowich, \textit{supra} note 42, at 880 tbl.19.
\item \textsuperscript{58} See id. (illustrating results of the survey of 600 respondents). Although most respondents reported some use of alternatives to litigation, mediation—not arbitration—“was far and away the preferred ADR process.” Id. at 881. However, the study does find that 31.9 percent of companies surveyed think that the presence of a non-U.S. party is a reason for picking arbitration. See Stipanowich, \textit{supra} note 42, at 883 tbl.23.
\item \textsuperscript{59} Eisenberg & Miller, \textit{supra} note 41, at 335.
\item \textsuperscript{60} Id. at 350-52.
\item \textsuperscript{61} Id.
\end{itemize}
There are at least two possible explanations for the divergent findings about arbitration. One is that perceptions about the pervasiveness of arbitration may be driven at least in part by assumptions that overstate or over-generalize the benefits of arbitration relative to litigation, and therefore exaggerate the attraction of arbitration for transnational actors.\footnote{For example, arbitration is not necessarily faster and cheaper than litigation; it is “seldom cheap” and “seldom speedy.” \textit{Born}, \textit{supra} note 2, at 7-8. For these reasons, among others, “there is growing dissatisfaction with arbitral adjudication.” Thomas E. Carboneau, \textit{Arbitral Justice: The Demise of Due Process in American Law}, 70 Tul. L. Rev. 1945, 1959 (1996). Moreover, arbitrators lack coercive powers over third parties to compel their appearance as witnesses or as third-party defendants. And even if the absence of a right of appeal is time-saving, it “means that a wildly eccentric, or simply wrong, arbitral decision cannot be corrected.” \textit{Born}, \textit{supra} note 2, at 7. Perhaps most importantly, most of the advantages of arbitration are not generic to disputants; rather, the characteristics of arbitration are advantageous or disadvantageous relative to those of litigation depending on the disputants’ respective strategic interests—which cannot be assumed to be in alignment. As one leading expert on transnational litigation and arbitration puts it, “It would be imprudent to prescribe a single dispute resolution mechanism for all transactions or parties. There are too many variables, which counsel in different directions in different transactions for different parties.” \textit{Id.} at 5. Corporate lawyers know that “the decision to include an arbitration provision in a commercial contract is complex and cannot be determined across the board.” Eisenberg & Miller, \textit{supra} note 41, at 350; see also Carboneau, \textit{supra} note 34, at 1959 (“Unless the structure of arbitration is radically altered, it is not a suitable adjudicatory mechanism for every type of claim. One of the presumably lasting lessons of the alternative dispute resolution (ADR) movement is precisely that there is no universal device for dispute resolution.”).} But a more intriguing explanation for the divergent data on arbitration trends might be that there is indeed an emerging arbitration-based system of transnational private governance, but one in which U.S. parties do not participate as widely as European parties. Given the historical role of the United States in promoting transnational litigation,\footnote{See, e.g., Carboneau, \textit{supra} note 34, at 782 (“[W]hen Wall Street lawyers finally accepted the primacy of arbitration in transborder commercial litigation, an even greater volume of international commercial litigation migrated from domestic courts to transborder arbitral tribunals.”); Mattli, \textit{supra} note 38, at 921 (“In the United States, for example, the legal counsels of major corporations have spearheaded the recent trend away from . . . court proceedings toward . . . ADR.”).} this would be surprising indeed. Yet the studies cited by Stone Sweet, which imply that arbitration is the norm in transnational dispute resolution, are largely European studies. In contrast, the Cornell University and Eisenberg and Miller studies, which suggest that arbitration is not so widespread, are essentially U.S. studies: the former is based on the practices of Fortune 1000 companies, which are U.S. companies,\footnote{See \textit{Fortune 500 Directory: FAQ Definitions and Explanations}, http://money.cnn.co-} and the latter is based on an analysis of
contracts filed with the U.S. Securities and Exchange Commission.\textsuperscript{65} Data collected by Walter Mattli on the origin of parties in ICC arbitration cases provides some additional support for the plausibility of this conjecture: since 1974, approximately fifty to sixty percent of the parties involved in ICC arbitration were from Western Europe, whereas only approximately ten to thirteen percent were from North America.\textsuperscript{66}

B. The Relationship between Litigation and Arbitration

Even if transnational arbitration has substantially replaced transnational litigation, this would not necessarily imply a decline in the importance of transnational judicial governance and an escape from the transnational shadow of the law. Whether to draw these conclusions would depend on the relationship between domestic courts and transnational arbitration, particularly the extent to which transnational arbitration as a system of private governance itself depends on foundations provided by domestic courts.

The architects of the modern system of transnational arbitration themselves recognized the foundational role of domestic courts, both as facilitators and monitors of the system. As Thomas Carbonneau puts it, “Sovereign state cooperation was indispensible to instituting the process. [Transnational commercial arbitration] needed the approbation of states to benefit from municipal courts’ status of legitimacy and their authority in order to function effectively as a transborder system.”\textsuperscript{67} In terms of facilitation, Articles II and III of the New York Convention establish a general rule requiring domestic courts to enforce arbitration agreements and arbitral awards. Articles II and V provide mechanisms for judicial monitoring of the system.

\textsuperscript{65} The Eisenberg and Miller study separately analyzes international contracts—those involving at least one U.S. party. Eisenberg & Miller, supra note 41, at 351 tbl. 3. But even contracts between U.S. and non-U.S. parties are likely to be influenced by U.S. business practices.

\textsuperscript{66} Mattli, supra note 38, at 940 tbl. 2. It is possible, however, that the higher participation rate of Western European parties could reflect the Western European headquarters of the ICC or a greater supply of disputes involving Western European parties.

\textsuperscript{67} Carbonneau, supra note 34, at 774-75.
through limited review of arbitration agreements and awards. Under Article II, a domestic court may review an agreement to arbitrate to determine whether “the said agreement is null and void, inoperative or incapable of being performed.” For its part, Article V permits a domestic court to decline enforcement of an arbitral award if it determines that “the subject matter of the difference is not capable of settlement by arbitration under the law of that country” or “the recognition or enforcement of the award would be contrary to the public policy of that country.”

Over time, however, transnational arbitration appears to have acquired a considerable degree of autonomy from the state. Today, “proponents of the Lex Mercatoria argue that state authorities have largely ‘relinquished their authority to regulate’ transnational contracting and arbitration, permitting both ‘to function autonomously’ in what is, in effect, an ‘a-national’ way.”

But what is the extent of this autonomy? According to what Stone Sweet calls the “traditionalist” view, arbitration fundamentally depends on states—particularly for enforcement. Carbonneau argues that transnational arbitration depends critically on a uniform law of arbitration “implemented by courts with the discipline of consistency and predictability.” Similarly, W. Michael Reisman argues that “[p]rivate international commercial arbitration depends, for its effectiveness, on substantial and predictable governmental and intergovernmental support. . . . There are many opportunities to frustrate an arbitration. National courts are the critical defense line

68. See generally Stone Sweet, Transnational Governance, supra note 35. But see W. Michael Reisman, Systems of Control in International Adjudication and Arbitration 139 (1992) (“International commercial arbitration is a form of private international dispute resolution based on a network of public international agreements. It is neither self-sustaining nor autonomous . . . .”)


70. Stone Sweet, Transnational Governance, supra note 35, at 637 (“Traditionalists tend to portray the Lex Mercatoria as a set of practices enabled by states. In their view, over time states have granted, within realms constructed through treaty law and national statute, more rather than less contractual autonomy to transnational economic actors, while retaining ultimate regulatory authority over these practices.”)

71. Carbonneau, supra note 34, at 801-03. See also id. at 807 (“[A] laissez-faire state policy in conjunction with universal contract law principles and the codification of basic regulatory principles through international instruments constitute the legal foundation for the process of ICA.”).
against such efforts.” According to Robert Wai:

[I]nternational commercial arbitration still relies very much on the support of national legal systems. The ultimate authority for arbitration procedures is that they are recognized and supported by national legislative and judicial processes. Without the power of state legal systems behind them, a party who expects to do poorly in the arbitration will have no incentive to comply and may seek recourse to national legal systems. Consequently, international commercial arbitration operates very much ‘in the shadow of the law,’ and national laws continue to impose important limits.

Indeed, it is hard to imagine that U.S. withdrawal from the New York Convention or, slightly less dramatically, a U.S. Supreme Court shift toward broad interpretation of the Convention’s exceptions to the general rule of judicial enforcement of arbitral awards, would not significantly affect arbitration as a system of transnational private governance.

In theory, however, enforcement might not have to depend solely on state authority. As some scholars have noted, private enforcement of arbitration agreements and arbitral awards may be possible based on reputational sanctions. 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 that 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.

72.  REISMAN, supra note 68, at 107.


75.  See Charny, supra note 74, at 393 (“[L]oss of reputation among market participants” is a type of nonlegal sanction, whereby “[t]he promisor develops a reputation for reliability among
The problem is that reputational sanctions are likely to be effective in only a narrow set of circumstances. For example, there must be a mechanism for disseminating information about parties’ behavior—information is, after all, the link between behavior and reputation. 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 such a mechanism, other actors do not necessarily have this knowledge, leaving A’s general reputation unharmed. One important value associated with arbitration—confidentiality—makes it particularly challenging to satisfy the information requirement. 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. There must also be a process for distinguishing valid and invalid reasons for noncompliance with arbitration agreements and arbitral awards, for only noncompliance which is understood by a community as unjustified is likely to harm a party’s reputation. In addition, parties

market participants who are potential transactors. If the promisor improperly breaches his commitments, he damages his reputation and thereby loses valuable opportunities for future trade.”); Kenneth A. Shepsle, *Institutional Equilibria and Equilibrium Institutions*, in *THE SCIENCE OF POLITICS* 51, 71 (Herbert F. Weisberg ed., 1986) (“A reputation for honest dealings enhances one’s ability to enter into new cooperative ventures. . . . [I]f A reneges on his promise [to B], the prospect of B ever doing business again with A declines precipitously. Indeed, if A develops a reputation for reneging, then even those agents who have never been personally victimized by A will not enter into coalitions with him.”).


77. *See*, e.g., Charny, *supra* note 74, at 418 (“One key to effective reputational controls is a system for transmitting relevant information to market participants and for providing the expertise necessary to evaluate that information.”); Shepsle, *supra* note 75, at 72 (noting that the difficulty of indentifying cheaters reduces the effectiveness of reputational sanctions); Stone Sweet, *Islands*, *supra* note 35, at 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.”). A modern solution to this problem might be a web-based system for disseminating information, but it is difficult to imagine how such a system could effectively operate in support of reputational sanctions without foregoing confidentiality, which is one of the characteristics that make arbitration attractive in the first place.

78. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1862-63 (2002) (“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.”).

79. As Shepsle explains, “Cheating is not dichotomous (cheat, not cheat) and there are many forms of opportunistic behavior. Legislator A, for example, pledges loyalty to his party,
must have a time horizon that is sufficiently long for them to incorporate the possibility of lost future business opportunities into their decisionmaking.  

All of this suggests that outside the shadow of the law, transnational arbitration is likely to be an effective form of global governance only in relatively small, well-defined, and enduring communities, in which the parties have long time horizons and are able to monitor each other closely. Elsewhere, transnational judicial governance is likely to continue playing an important role, with domestic courts performing a governance support function by making themselves available for enforcement of arbitration agreements and arbitral awards.

except on matters of conscience or constituency. But who is to determine when the exceptional circumstance has arisen?" Shepsle, supra note 75, at 72. Similarly, noncompliance with an agreement to arbitrate is not dichotomous: under the New York Convention, noncompliance is not “cheating” if, for example, the agreement to arbitrate “is null and void, inoperative or incapable of being performed” (Article II(3)), if the party lacked capacity to enter the agreement (Article V(1)(a)), if the arbitral decision was on a matter beyond the scope of the agreement (Article V(1)(c)), if the arbitral process was not in accordance with the agreement (Article V(1)(d))—all of which may be matters of good faith disagreement in particular cases. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, July 6, 1988, arts. II,V, available at http://www.uncitral.org/pdf/1958NYConvention.pdf.; See also Charny, supra note 74, at 418 (“One key to effective reputational controls is a system for transmitting relevant information to market participants and for providing the expertise necessary to evaluate that information.”) (emphasis added); Guzman, supra note 78, at 1861-62 (noting that “minor violations have less reputational impact that major ones, good reasons for the violation may reduce reputational harm of a violation, and lack of clarity regarding the scope of an obligation reduces the reputational harm of violating it”).

See Robert D. Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U. PA. L. REV. 1643, 1659 (1996) (“The problem of cooperation is solvable in many repeated games when players commit to an enduring relationship, provided that they can observe each others’ moves and they do not discount the future too heavily.”) (emphasis added).

81. See Benson II, supra note 74, at 97 (“In general, a close-knit community of transactors can often offer private benefits and impose private sanctions that are sufficient to make arbitration a jurisdictional choice, thereby avoiding the shadow of the law. In the total absence of such a community . . . , arbitration may still survive if the state sanctions it as a procedural option.”); Charny, supra note 74, at 418-19 (“Collective reputational enforcement should work well in markets in which single, third-party decisionmakers wield nonlegal sanctions—that is, in markets limited to a small, homogenous group of individuals who are in frequent contact and thus can share relevant information. These markets are, of course, relatively rare. Conversely, mass markets based on reputational bonds are feasible only with technology that conveys information cheaply to a large group of transactors, such as computers used to monitor creditworthiness or mass media used in advertising.”); Stone Sweet, Islands, supra note 35, at 325 (“Where contractants are not strangers, that is, where a pool of potential traders enjoys ongoing, face-to-face relations with each other within a shared normative framework, collective action problems and Prisoner’s Dilemmas are more easily overcome.”).
Even if domestic courts facilitate transnational arbitration by providing enforcement support, it is undeniable that domestic courts have, to a substantial degree, emancipated the arbitration process from judicial monitoring. For example, the U.S. Supreme Court has narrowly construed the grounds for non-enforcement of arbitration agreements and arbitral awards, such as the public policy and non-arbitrability exceptions.\(^{82}\)

But how closely does lower court practice conform to the Supreme Court’s pro-arbitration policy? A recent study concludes that in an increasing number of cases, lower courts are refusing to enforce arbitration agreements by finding them unconscionable under state contract law, at least in noncommercial cases.\(^{83}\) Does such a trend exist in cases involving transnational arbitration? An affirmative answer would suggest that the conventional wisdom may underestimate the autonomy of transnational arbitration from judicial monitoring, whereas a negative answer would support that wisdom. By seeking an answer based on systematic empirical evidence, scholars can improve their understanding of the relationship between transnational judicial governance and transnational arbitration. As Roscoe Pound put it, we need to understand not only law in books, but also law in action.\(^{84}\)

**CONCLUSION**

Governance-oriented analysis of transnational law focuses not only on the implications of law for individual disputants in particular cases, but also for transnational activity more generally. It focuses not only on transnational legal rules, but also on how courts actually

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84. See Pound, supra note 8, at 15 (“If we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.”).
apply those rules. It aims, in other words, to understand the transnational shadow of the law and transnational law in action. When one shifts from a disputant-oriented perspective to a governance-oriented perspective, the relationship between transnational litigation and transnational arbitration takes on new significance. This relationship not only has implications for the micro-level decisions of individual disputants regarding the dispute resolution method that best advances their respective interests. It also has implications for global governance, that is, for how and by whom the rules of transnational activity are prescribed, applied, and enforced.

By focusing on the empirical and theoretical limitations of various claims about the relationship between domestic courts and transnational arbitration, this article surely has muddied rather than cleared the water. But the analysis nevertheless leads to several propositions that can serve as focal points for further research.

First, transnational arbitration is partially, but not completely, autonomous from transnational judicial governance. On the one hand, transnational arbitration has become increasingly autonomous from judicial monitoring—although at least one recent study suggests that the lower U.S. federal courts might not fully embrace the Supreme Court’s laissez-faire attitude toward arbitration.⁸⁵ On the other hand, transnational litigation to an important extent still relies on domestic courts for enforcement.⁸⁶ This does not mean that arbitration agreements and arbitral awards necessarily go unheeded without judicial recourse. Rather, because of the strong pro-enforcement policy embodied by U.S. Supreme Court precedents, transnational actors expect that domestic courts ordinarily will enforce these agreements and awards, and are therefore more likely to comply with them voluntarily.⁸⁷

It is more by creating this knowledge than by providing enforcement in particular cases that domestic courts support arbitration as a system of transnational private governance. And it is in this sense that not only disputants, but also the system of transnational arbitration itself, operate in the transnational shadow of

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⁸⁵. See supra notes 83-84, and accompanying text.
⁸⁶. See supra notes 66-81, and accompanying text.
⁸⁷. However, if transnational actors believe that lower courts are not as adamantly pro-arbitration as the U.S. Supreme Court, this knowledge may not be so certain, and one might expect rates of compliance without judicial recourse to decline.
domestic law. From a governance-oriented perspective, then, shifts from litigation to arbitration may in fact vindicate transnational judicial governance, by suggesting that even if it is not playing the same direct transnational dispute resolution role that it once did, the importance of its governance support function is increasing.

Second, it follows that transnational arbitration is probably better characterized as a “mixed” rather than a purely private form of governance. Governance involves the setting, application, and enforcement of rules. Insofar as transnational arbitration involves the application by a nonstate arbitrator of privately set rules (such as lex mercatoria), and the private enforcement of the resulting arbitral awards, it can be understood as a system of private governance. But purely private forms of transnational arbitration are probably rare. For one thing, in practice, private actors often select state law as the governing law. The most fundamental challenge for a truly autonomous system of private governance is, however, enforcement. Private enforcement may be possible on the basis of reputational sanctions, but only under particular circumstances which are not likely to exist except within relatively small and enduring communities. Therefore, as just discussed, transnational arbitration generally continues to rely on domestic court enforcement, and to that extent, it retains an important public dimension.

88. See Reisman, supra note 68, at 9 (“[T]he assistance of national courts is necessary for enforcement and . . . the expectation of the probability of that enforcement is a key factor in ‘voluntary’ compliance.”); Wai, supra note 73, at 267 (noting that transnational arbitration relies very much on the support of domestic legal systems, and arguing that “international commercial arbitration operates very much ‘in the shadow of the law.’”).

89. For that matter, transnational judicial governance also is a mixed public-private form of governance. Although public officials (judges) apply the rules, the rules are typically state rules, and enforcement (if necessary) is by the state, private litigants are ordinarily the ones that initiate the transnational litigation process. See Shapiro and Stone Sweet, supra note 35, at 293 (“litigants activate courts”).

90. See, e.g., Kjaer, supra note 10, at 10 (defining governance as “the setting of rules, the application of rules, and the enforcement of rules”).

91. See, e.g., Anne-Marie Slaughter, International Law in a World of Liberal States, 6 EUR. J. INT’L L. 503, 519 (1995). One prominent practitioner advises against selecting “lex mercatoria” as applicable law: “Except in unusual cases, these formulations should be resisted. There is much academic debate, but little judicial authority, about what they mean, and there are doubts about how widely they are enforceable (e.g., English courts in particular have expressed reservations). 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.” Born, supra note 2, at 121.

92. See supra notes 73-81 and accompanying text.
This suggests that beyond separate studies of litigation and arbitration, future research should focus on the complex relationship between these forms of transnational dispute resolution and the global governance mechanisms—transnational judicial governance and transnational private governance—that they support. At the heart of the relationship is a paradox: arbitration both provides a partial escape mechanism from, and substantially relies upon, the transnational shadow of domestic law. A better understanding of this relationship promises to shed light on broader questions about the relationship between public and private authority in global governance.\textsuperscript{93}

Third, from a governance-oriented normative perspective, it is precisely this “odd relationship between the public and private”\textsuperscript{94}—this combination of minimal judicial monitoring and strong judicial support—that raises concerns.\textsuperscript{95} As A. Claire Cutler argues:

Curiously, national government officials are participating in the expansion of the private sphere and the neutralization and insulation of international commercial concerns from public policy review. However, this insulation is incomplete, for state authority over the enforcement of private settlements has been strengthened as states undertake the binding commitment to enforce foreign arbitral awards. State authority has thus been curtailed in the settlement of substantive commercial legal issues and disputes, but expanded in the enforcement of the

\textsuperscript{93} As Tim Büthe puts it, claims about the rise of private authority leave open a number of important questions: “What is the role of the state in this empowerment of private actors? And can states take back the authority thus granted to private actors? Does the increase in private authority have a lasting effect on the role of states in international governance?” Tim Büthe, Governance Through Private Authority: Non-State Actors in World Politics, 58 J. INT’L AFF. 281, 284 (2004).

\textsuperscript{94} Carrie Menkel-Meadow, Do the “Haves” Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR, 15 OHIO ST. J. ON DISP. RESOL. 19, 31 (1999) (“[S]ome have argued that the state has, in effect, privatized the dispute resolution system, providing an odd relationship between the public and private dimensions of the legal system.”).

\textsuperscript{95} More generally, Cutler et al. argue that “we should be concerned about the increase in private international authority on a number of counts. First, what does this mean for the continued functioning and existence of the state itself? Second, who gets to participate in making decisions given that corporations are not democracies? Third, are the rules the private sector establishes fair and equitable, incorporating mechanisms for access and accountability?” A. Claire Cutler, Virginia Haufler & Tony Porter, The Contours and Significance of Private Authority in International Affairs, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 333, 369 (A. Claire Cutler Virginia Haufler & Tony Porter eds., 1999).
final awards.96

According to Cutler, “At the heart of these transformations is the global mercatocracy, an elite association of public and private organizations engaged in the unification and globalization of transnational merchant law”97 seeking to “free [transnational commercial activity] from democratic and social control,”98 in furtherance of a “neoliberal” ideological agenda99 and representing not a “globalization of legal culture” but rather a “globalization of localized US commercial culture and practices.”100

While arguing that “[i]t is inaccurate and unfair to criticize international arbitration as a ‘Northern’ mechanism that silences or muffles the diversity of the world community,”101 Carbonneau agrees that “[p]rivately funded, nonpublic, nonnormative alternatives are simply not an adequate substitute for the public mission of the law.”102 For his part, Robert Wai argues that internationalist private law reforms—including legal support for a shift from state-based litigation to private arbitration103—have “increased the autonomy of transnational business actors without an equivalent increase in transnational regulation,”104 enabling “the transnational liftoff of international business transactions from national regulatory

96. CUTLER, supra note 1, at 226.
97. Id. at 180-81.
98. Id. at 183.
99. Id. at 227. See also Nölke & Graz, supra note 31, at 18-19 (“[T]ransnational private governance is not only supported by neoliberalism, but can also be viewed as its supporter, by contributing to its stabilization. In other words, they are mutually reinforcing. . . . Neoliberalism as an economic program is not equally benevolent to all parts of the business community. It generally favours big, transnationally mobile companies, in particular capital investors. The same can be stated for transnational private governance. One overriding concern . . . is that such governance particularly favours large and well-established multinational companies, in particular those from North America and the European Union (citation omitted).”).
100. CUTLER, supra note 1, at 235 (italics omitted). For other accounts of the rise of transnational arbitration, see DEZALAY & GARTH, supra note 34, and Wai, supra note 73.
103. See Wai, supra note 73, at 220-22. Wai focuses principally on “the role of state actors—in particular legislators and courts—in promoting or acquiescing in the ‘transnational liftoff’ of arbitration and the use of non-state norms for resolving transnational civil and commercial disputes.” See id. at 222.
104. Id. at 273.
oversight.”

According to Wai, the underlying “goals of commerce, cooperation, and cosmopolitan fairness are important, but they can exclude other worthwhile policy objectives such as distributive justice, democratic political governance, or effective transnational regulation.” Thus, at least one leading scholar of ADR argues that “the time may be ripe—at both the transborder and domestic levels—to refine the basis for the exercise of judicial supervision in arbitration . . .”

Underlying these particular concerns is a more general concern about negative externalities: that private arbitration fails to address the negative consequences that disputants’ transnational activity may have on third parties. Thus, it might seem sensible for the presence or absence of negative externalities to inform judicial review of arbitral awards, perhaps in the context of the New York Convention’s existing public policy exception to the enforcement of arbitral awards. However, such an approach would be difficult to reconcile with the Supreme Court’s very narrow reading of the Convention’s exceptions to enforcement, and would likely be controversial in light of the widespread understanding that the success of arbitration is largely due to this narrow reading.

105. Id. at 212.
106. Id. at 231.
107. Carbonneau, supra note 34, at 818. See generally id. at 821-22 (“A possible statutory provision . . . might read: An international arbitral award can be denied recognition and/or enforcement in the requested jurisdiction if the reviewing court determines . . . that the arbitrators failed to follow or observe a material part or provision of the arbitration agreement relating to choice-of-law, damages, or the agreement’s scope of application.”); Carbonneau, supra note 101, at 1206-08 (proposing “a new form of public regulation of the arbitral process and of arbitrators” focused on the professional skills of arbitrators).
108. Robert Cooter refers to the more general problem of spill-over: “In some circumstances, state enforcement of social norms is unfair. Some norms that are good for one community are bad for another community. For example, one community may develop a norm that externalizes cost on another community, or one community may develop a norm that inhibits competition from another community. Such a norm is unfair from the viewpoint of the community harmed by it. The state cannot justify enforcing a norm that harms one community on the grounds that it arose from a consensual process in another community.” Cooter, supra note 80, at 1684.
109. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b), June 10, 1958, 330 U.N.T.S. 38. For example, the absence of negative externalities might favor enforcement of arbitral awards, while their presence—unless adequately addressed in the award—might favor non-enforcement.
110. Such a proposal would also raise difficult questions about how judges would determine whether arbitral awards in particular cases address the problem of negative externalities. Perhaps most problematic, because judicial review of arbitral awards is initiated by one or more
Finally, what do we really know about transnational litigation and transnational judicial governance, transnational arbitration and transnational private governance, and the relationships between them? This article suggests that we may know less than we think. But it also suggests that it is important to learn more. Doing so will require us to rely not only on anecdotes and intuition, but also systematic empirical evidence. Using governance-oriented analysis, we need to focus not only on transnational law in books—including the domestic and international law of arbitration—but also transnational law in action.

Mnookin and Kornhauser concluded their seminal article as follows: “Theoretical and empirical research concerning how people bargain in the shadow of law should provide us with a richer understanding of how the legal system affects behavior, and should allow a more realistic appraisal of the consequences of reform proposals.” Likewise, research on how actors bargain in the transnational shadow of domestic law—including bargaining over arbitration itself—should improve our understanding of transnational activity, including the role of both domestic courts and private arbitrators in governing that activity.

of the private disputants themselves, it is likely that the number of awards actually reviewed based on a “negative externalities” principle would represent only a small portion of the total number of awards in cases involving negative externalities.

111. Mnookin & Kornhauser, supra note 6, at 997.