

Private Ordering and International Commercial Arbitration

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I. INTRODUCTION

The literature on private ordering examines how parties use extralegal means—most commonly reputational sanctions—to enforce contracts. As described by Barak D. Richman, private ordering “compares the efficiencies of private (extralegal) contract enforcement with the more traditional use of public law and state-run courts.”¹ A series of studies by Lisa Bernstein illustrates a paradigm case of private ordering – trade associations that use industry arbitrators (private judges) to adjudicate disputes, with the arbitrators’ awards typically enforced by the threat of extralegal sanctions such as expulsion from the association.² In the trade associations studied by Bernstein, the merchants opted out of the public court system and instead chose to have their disputes resolved by private judges applying industry trade rules.

With its focus on private legal systems, the private ordering literature sets up a seeming dichotomy between public court adjudication of disputes, applying publicly created laws, and private arbitral adjudication of disputes, applying privately developed rules. Trade association arbitrations fit neatly into the latter category;³ public courts fit almost as neatly into the former. But while the dichotomy highlights the cases of most interest in the private ordering literature, it is too simple. It gives the appearance of an all-or-nothing choice—all public dispute resolution or all private dispute resolution—when in fact hybrid choices are common.

This article seeks to add to the private ordering literature in two ways. First, it argues in Part II that international commercial arbitration, while sometimes cited as an example of private ordering, is in fact—a hybrid case—with important elements of public involvement supplementing the use of a private decision maker. International

1. Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2329 (2004).

2. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) [hereinafter Bernstein, *Merchant Law (NGFA)*]; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter Bernstein, *Cotton Industry*]; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *Diamond Industry*]; Lisa Bernstein, *The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999); Lisa Bernstein, *Private Commercial Law*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 108 (Peter Newman ed., 1998) [hereinafter Bernstein, *Private Commercial Law*]; Lisa Bernstein, *The NGFA Arbitration System at Work* (Mar. 15, 2007), available at <http://www.ngfa.org/pdfs/NGFAARBITRATIONSTUDY.pdf> [hereinafter Bernstein, *NGFA Arbitration*].

3. For an exception, see *infra* text accompanying notes 23-25.

commercial arbitration, as distinguished from trade association arbitration, is nonspecialized arbitration between private parties involved in international commercial transactions.⁴ In the overwhelming number of cases, parties to international arbitration agreements reject the option of having their dispute resolved under privately developed commercial rules, the so-called new Law Merchant or *lex mercatoria*. Instead, they choose to have their dispute resolved under publicly created laws.⁵ Moreover, unlike parties in trade association arbitrations, parties in international commercial arbitrations often turn to the courts for aid in enforcing awards.⁶ Too often, international arbitration is grouped with trade association arbitration in ways that blur the important distinctions between the two. Not all arbitration is alike, and not all parties that agree to arbitrate opt out of the legal system altogether.

Second, in Part III, this article examines attributes of international transactions that help explain party choice among these different mechanisms of resolving disputes. It considers four attributes: (1) distance—geographic, as well as cultural and political—between the parties; (2) the complexity of the good or service; (3) the clarity of the applicable national law; and (4) the importance of speedy resolution of disputes. Trade association arbitration is most likely to be used for transactions in simple goods, although less likely in international transactions involving greater distances than domestic transactions. International commercial arbitration is the more likely choice for international transactions, except in cases in which the applicable law is clear or emergency relief is likely to be needed. In such cases, parties are more likely to choose litigation in national courts. The attributes thus prove useful in explaining differences in the choice of enforcement mechanism across various types of international transactions. Whether they are as useful in explaining variation among businesses engaged in similar transactions awaits further work.

II. PRIVATE ORDERING AND DISPUTE RESOLUTION

The private ordering literature identifies and analyzes cases in which parties have established private legal systems for governing their behavior and resolving their disputes. For autonomous merchants,⁷ as

4. See CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 45 (1996) (“although [specialized arbitrations] doubtlessly are international, commercial, and arbitrations, they are commonly not covered by the general literature on international commercial arbitration”).

5. See *infra* text accompanying notes 33-40.

6. See *infra* text accompanying notes 41-46.

7. An important initial question, of course, is “whether transactions will occur between autonomous agents or within a vertically integrated firm (alternatively coined

noted above, the private ordering literature “compares the efficiencies of private (extralegal) contract enforcement with the more traditional use of public law and state-run courts.”⁸ In other words, in its simplest form, the private ordering literature posits a dichotomous choice between public courts and private legal systems.⁹ Public courts, with judges selected and hired by the government, make decisions based on statutory or common law enforced by the government. By comparison, a private legal system is “a non-governmental institution intended to regulate the behavior of its members.”¹⁰ The paradigm example of a private legal system is trade association arbitration, as discussed in the next section.¹¹

As others have noted,¹² treating the choice as dichotomous—between public courts and wholly private legal systems—is an oversimplification. Expanding the choice to two dimensions illustrates several hybrid possibilities, as Table 1 illustrates. The horizontal dimension is the decision maker¹³—either public or private—while the vertical dimension is the source of the rules applied by the decision maker—again, either public or private.¹⁴ The public courts are in the upper left corner of the table, with a public decision maker, the judge, applying publicly created rules—codes, statutes, or common law rules. The lower right hand corner of the table defines private legal systems, such as trade association arbitration—with private decision makers applying privately created rules. The other two corners identify hybrid

the ‘make-or-buy question’).” Richman, *supra* note 1, at 2329. Vertically integrated firms have internalized the dispute resolution process and have no need to establish or participate in a private legal system for those disputes.

8. *Id.* at 2329.

9. See Omri Yadlin, *A Public Choice Approach to Private Ordering: Rent-Seeking at the World’s First Futures Exchange*, 98 MICH. L. REV. 2620, 2620 (2000) (noting varying definitions of “private ordering”).

10. Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL’Y REV. 1, 4 (2004).

11. For a theory of the formation of private legal systems, see *id.* at 6 (“suggesting a theory of how (and which) institutions evolve into PLSs”); Amitai Aviram, *Regulation by Networks*, 2003 BYU L. REV. 1179, 1181-82 (2003).

12. *E.g.*, Aviram, *supra* note 10, at 4 n.3 (“Though usually discernable, the dichotomy between public and private legal systems is not always a clear one. Some PLSs have a significant public backing and are very similar to public legal systems. . . . Conversely, some public legal fora defer to private ordering (e.g., arbitration proceedings), and some public legal fora compete with other legal fora, and thus act more like PLSs.”).

13. Of course, “[n]ot all systems of private law have private judges or arbitrators.” Richman, *supra* note 1, at 2339 n.33. My focus here is on those that do.

14. Further dimensions could be added—such as the extent of private versus public enforcement of decisions.

cases—with public decision makers applying privately created rules and private decision makers applying publicly created rules.¹⁵

Table 1. Private Ordering and Dispute Resolution		
	Public Judges (Courts)	Private Judges (Arbitrators)
Publicly Created Rules	Courts applying common law of contracts or torts	
Privately Created Rules		Trade association arbitrations applying trade rules

The next two sections of this article examine in more detail trade association arbitration and international commercial arbitration for purposes of considering the extent to which they are properly characterized as private legal systems.

A. Trade Association Arbitration

The paradigm case of private ordering is trade association arbitration of the sort studied by Lisa Bernstein.¹⁶ According to Bernstein, “[p]rivate commercial law exists in over fifty industries, including diamonds, grain, feed, independent films, printing, binding, peanuts, rice, cotton, burlap, rubber, hay and tea.”¹⁷ Although the details of the arbitration systems vary,¹⁸ some commonalities emerge. First, the decision maker is a private party, not a state employee—usually an employee of a company in the industry.¹⁹ Second, in resolving disputes, the arbitrators commonly apply codified industry trade rules rather than

15. For another perspective on possible hybrid cases, see Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002).

16. See the articles cited *supra* note 2. The trade association arbitrations studied by Bernstein predominantly involve disputes among businesses engaged in domestic transactions, rather than businesses engaged in international transactions, with some exceptions. *E.g.*, Bernstein, *Diamond Industry*, *supra* note 2, at 119.

17. Bernstein, *Private Commercial Law*, *supra* note 2, at 108.

18. See Bernstein, *NGFA Arbitration*, *supra* note 2, at 5-27.

19. Bernstein, *Private Commercial Law*, *supra* note 2, at 108 (“The arbitrators who decide cases in merchant tribunals are esteemed members of their trade.”); Bernstein, *NGFA Arbitration*, *supra* note 2, at 13-14; Bernstein, *Cotton Industry*, *supra* note 2, at 1728; see also Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 859-60 (1961); William H. Knull, III, & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT’L ARB. 531, 557 (2000).

publicly created rules (or industry norms or usages of trade).²⁰ Third, arbitration awards are typically enforced through extralegal sanctions, such as publicity or threat of expulsion from the trade association.²¹ Only rarely do parties go to court to enforce awards in trade association arbitrations.

Notably, not all trade associations resolve disputes through private legal systems.²² Eric A. Feldman has described dispute resolution among Japanese merchants participating in the tuna auction at the Tokyo Central Wholesale Market.²³ Unlike the merchants studied by Bernstein, the Tokyo tuna merchants resolve disputes in a government-sponsored, albeit highly specialized, court.²⁴ As Feldman explains, “The Tuna Court thus defies predictions that members of close-knit merchant groups will reject formal, public courts and laws in favor of informal group norms. Instead, formal law-bound procedures play a central role in the interactions of tuna traders and govern their management of disputes.”²⁵ Thus, even among trade associations—the paradigm case of private ordering—not all dispute resolution systems are alike, and not all parties opt for private legal systems.

B. *International Commercial Arbitration and the New Law Merchant*

International commercial arbitration—as the source of the “new Law Merchant” or *lex mercatoria*—also is identified as an example of a private legal system.²⁶ Bruce L. Benson cites the new Law Merchant as

20. Bernstein, *Private Commercial Law*, *supra* note 2, at 108-09; Bernstein, *Merchant Law (NGFA)*, *supra* note 2, at 1777-82; Bernstein, *NGFA Arbitration*, *supra* note 2, at 27-28; Bernstein, *Cotton Industry*, *supra* note 2, at 1731-34.

21. Bernstein, *Private Commercial Law*, *supra* note 2, at 108 (“In most industries, however, it is rarely necessary for a party to seek judicial enforcement of an award. Merchant tribunals are able to place their own pressures on the parties to comply promptly with their decisions.”); Bernstein, *Cotton Industry*, *supra* note 2, at 1737-38 (concluding it “is rarely necessary” to seek enforcement of awards in court; instead threat of expulsion is “usually sufficient to induce merchants to promptly comply with arbitration decisions unless they are bankrupt or in severe financial distress”); Bernstein, *Diamond Industry*, *supra* note 2, at 129 (“In practice, however, it is rarely necessary for a party to a [New York Diamond Dealers Club] arbitration to seek confirmation of a judgment.”).

22. See generally Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 CALIF. L. REV. 313 (2006).

23. *Id.*

24. *Id.*

25. *Id.* at 358.

26. See generally Harold J. Berman & Felix J. Dasser, *The “New” Law Merchant and the “Old”: Sources, Content, and Legitimacy*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 53 (Thomas E. Carbonneau ed., rev. ed. 1998).

an illustration of “the spontaneous evolution of commercial law.”²⁷ According to Benson, “[t]he law that dominates international trade through the use of arbitration, increasingly referred to as *lex mercatoria*, is customary law.”²⁸ The choice of terminology is not accidental: the new Law Merchant often is likened to the medieval Law Merchant.²⁹ As Peter Leeson states: “Modern international commerce is an outgrowth of *lex mercatoria*, or the ‘Law Merchant,’ a complex polycentric system of customary law that arose from the desire of heterogeneous traders in the late 11th century to engage in cross-cultural exchange.”³⁰

Arbitration certainly is widely used as a means of resolving international commercial disputes, although the frequency varies depending on the type of contract.³¹ As a result, private judges play an important role in resolving disputes arising out of international contracts. But the evidence does not support treating international commercial arbitration as a private legal system, based on a body of private commercial law and separate from national governments.³²

27. Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 644 (1989).

28. Bruce L. Benson, *To Arbitrate or To Litigate: That Is the Question*, 8 EUR. J. L. & ECON. 91, 95 (1999) (internal citation omitted).

29. See Berman & Dasser, *supra* note 26, at 53.

30. Peter T. Leeson, *Contracts Without Government*, 18 J. PRIV. ENTER. 35, 46 (2003); see also LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 39 (1983) (“The fear of a proliferated Law Merchant has led to the growth of a new Law Merchant, closely resembling its medieval forefather.”); Bruce L. Benson, *Customary Law as a Social Contract: International Commercial Law*, 3 CONST. POL. ECON. 1, 2 (1992) (“International commercial law is still largely independent of nationalized legal systems, retaining many of the basic (though modernized) institutional characteristics of the medieval Law Merchant.”).

31. Some types of international contracts only rarely include arbitration clauses. For example, in a sample of contracts studied by Eisenberg & Miller, only 5.0% of credit commitments and 18.6% of merger agreements involving a non-U.S. party included arbitration clauses. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 352 table 4 (2007). By comparison, 63.6% of international licensing agreements and 30.4% of international asset sale purchase agreements included arbitration clauses. *Id.* And almost 90% of a sample of international joint venture contracts included an arbitration clause. CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 59 (2005).

32. Historians and others have challenged the traditional view that medieval merchant courts and the medieval Law Merchant constituted a private legal system. See Charles Donahue, Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT’L L. 21, 36 (2004) (stating that “[a] century of research has shown” this traditional conception to be “a considerable exaggeration”); Emily Kadens, *Order within Law, Variety within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT’L L. 39, 40 (2004) (“The law merchant was not a systematic law; it was not standardized across Europe; it was not synonymous with commercial law; it was not merely a creation of merchants without vital input from governments and

While I would not go so far as to call the new Law Merchant a “myth,”³³ the available empirical evidence indicates that parties and arbitrators ordinarily rely on national law and not the *lex mercatoria* in resolving disputes. As Piero Bernardini concludes:

Suffice it to say that the plethora of scholarly writings on the subject would not appear to have been matched by an equivalent interest on the part of international operators when choosing the law to govern their contractual relations, or international arbitrators when deciding on the rules to apply to the merits of a case in the absence of a choice by the parties.³⁴

I have summarized the evidence in detail elsewhere,³⁵ and will highlight a few key points here. First, as Table 2 shows,³⁶ only in a small fraction of cases do parties contract for application of privately created rules of decision in ICC arbitrations.³⁷ Second, although a large proportion of

princes.”); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEG. STUD. 447, 452-53 (2007) (“While there is undoubtedly some law outside the state, in all likelihood, a truly anational law merchant does not, nor did it ever, exist. Law merchant proponents commit exactly the mistake for which they criticize their opponents: they construct reality to make it fit their theories.”); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval “Law Merchant,”* 21 AM. U. INT’L. L. REV. 685, 695 (2006) (“[T]here is no suggestion in the fair court rolls of an autonomous legal order that spanned the continent; there might have been mercantile laws and customs, but no Romantic law merchant.”); see also Albrecht Cordes, *The Search for a Medieval Lex Mercatoria*, 2003 OXFORD U. COMP. L. FORUM 5; Oliver Volckart & Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 S. ECON. J. 427 (1999). I take no position on this historical debate.

33. Peter T. Leeson, *One More Time with Feeling: The Law Merchant, Arbitration, and International Trade*, INDIAN J. ECON. & BUS. 29 (2007) (special issue) (referring to “handful of Law Merchant deniers” who treat the *lex mercatoria* as a “myth”).

34. Piero Bernardini, *International Arbitration and A-National Rules of Law*, ICC INT’L CT. ARB. BULL., Fall 2004, at 58, 63.

35. Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 536-44 (2005); see also Felix Dasser, *Mouse or Monster? Some Facts and Figures on the lex mercatoria*, in GLOBALISIERUNG UND ENTSTAATLICHUNG DES RECHTS 129, 139-45 (Reinhard Zimmermann ed., 2008)

36. As the ICC reported for 2007: “In 79.8% of the contracts giving rise to disputes referred to ICC arbitration in 2007, the parties had specified the law applicable to the merits. They opted for State laws in all but three contracts. The three exceptions provided for the application of the UNIDROIT Principles of International Commercial Contracts, the United Nations Convention on Contracts for the International Sale of Goods (CISG), and the law of the Organization for the Harmonization of Business Law in Africa (OHADA).” *2007 Annual Statistical Report*, ICC INT’L CT. ARB. BULL., Spring 2008, at 5, 12.

37. Drahozal, *supra* note 35, at 536-44; Dasser, *supra* note 35, at 139-41 (“The final tally of references to a *lex mercatoria* [in clauses giving rise to ICC arbitrations] is somewhere between 12 and 15 cases, i.e., approximately 0.3%”). Thus, the evidence appears inconsistent with Alec Stone Sweet’s assertion that “the *Lex Mercatoria* is increasingly being selected as the controlling law in contracts by traders and arbitrators.”

parties in a sample of joint venture agreements contracted for application of “general international commercial practices,” in virtually all of those cases the new Law Merchant applied only when there was no “published and publicly available” national law on point.³⁸ In other words, the new Law Merchant applied only in the absence of national law, not in lieu of national law. Third, arbitration awards appear “only rarely” to rely on the *lex mercatoria* instead of national law.³⁹ Thus, international arbitration largely is a procedural substitute for national courts; international arbitrators generally apply national law, not some autonomous body of private commercial law.

Table 2. Applicable Law in ICC Arbitration Clauses⁴⁰

	2003	2004	2005	2006	2007
National Law	80.4%	79.1%	79.3%	82.7%	79.3%
Other Rules	1.2%	1.3%	1.7%	2.0%	0.5%
Applicable Law Not Specified	18.3%	19.6%	19.0%	15.3%	20.2%

Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL’Y 627, 634 (2006). A partial explanation for the differing view may be definitional. In the international arbitration literature, the phrase “*lex mercatoria*” is ambiguous. As Craig et al., explain:

Lex mercatoria seems to mean different things to different people. . . . [T]he various notions may usefully be distinguished and grouped under three headings. First, the most ambitious concept of *lex mercatoria* is that of an autonomous legal order, created spontaneously by parties involved in international economic relations and existing independently of national legal orders. Second, *lex mercatoria* has been viewed as a body of rules sufficient to decide a dispute, operating as an alternative to an otherwise applicable national law. Third, it may be considered as a complement to otherwise applicable law, viewed as nothing more than the gradual consolidation of usage and settled expectations in international trade.

W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 35.01, at 623 (3d ed. 2000). Rather than one of the broader meanings, it may be that Stone Sweet is referring to the *lex mercatoria* in this third sense. In fact, international commercial arbitrators do consider trade usages in making decisions (the narrowest meaning of the *lex mercatoria*) although typically not prior dealings between the parties. Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 36 VAND. J. TRANSNAT’L L. 79, 121-32 (2000).

38. Drahozal, *supra* note 35, at 540-42.

39. *Id.* at 542-43 (quoting CRAIG ET AL., *supra* note 37, at 338 n.62 (in turn quoting Yves Derains & Sigvard Jarvin, *Cour d’Arbitrage de la Chambre de Commerce Internationale*, 113 J. DU DROIT INT’L 1094, 1138 (1986))); Dasser, *supra* note 35, at 144-45 & 157 Annex (finding thirty-eight awards “covering a time frame of more than half a century” in which arbitrators applied the *lex mercatoria* in the absence of a party agreement); Felix Dasser, *Lex Mercatoria—Critical Comments on a Tricky Topic*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 189, 191-97 (Richard P. Appelbaum et al. eds., 2001).

40. 2003-2007 Annual Statistical Reports, ICC INT’L CT. ARB. BULL. (2004-2008).

Moreover, extralegal sanctions are not the exclusive means by which international arbitration awards are enforced. While it appears that most international arbitration awards are complied with voluntarily,⁴¹ the available empirical evidence suggests that public courts nonetheless play an important role in the process. Naimark and Keer studied a sample of American Arbitration Association international arbitration awards and found the following:⁴²

- Of 205 cases studied, 100 awards had been fully or partially complied with, 35 were not complied with, and 51 cases were unresolved and pending in a court action. In another 18 cases, the claimant lost the case.⁴³
- Of the 100 awards that had been complied with, “26 respondents attributed compliance to negotiation after the award, 61 attributed compliance to voluntary action by the parties after the award, 12 attributed compliance to court ordered enforcement, and one attributed compliance to a letter demand for compliance sent after the award.”⁴⁴
- “The data also show that 67 of the awards were confirmed by a court and one was confirmed with some alteration of the terms of the award.” Those 67 awards presumably included the 12 with court-ordered enforcement, plus “some of the 26 cases renegotiated, as well as some of the 61 cases voluntarily complied with.”⁴⁵

Although the results are not definitive, and the data are limited to international arbitrations administered by a single institution, they

41. The ICC has estimated that over 90 percent of its awards are complied with voluntarily. Pierre Lalive, *Enforcing Awards*, in 60 YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 318, 319 (1984). But the empirical basis for that estimate is not provided, and some have questioned its soundness. Volckart & Mangels, *supra* note 32, at 432 n.22 (“[T]his figure is based on verbal statements of the Court of Arbitration of the ICC or of experts. The confidentiality of arbitration proceedings makes exact statistical surveys impossible.”).

42. Richard W. Naimark & Stephanie E. Keer, *Post-Award Experience in International Commercial Arbitration*, in DRAHOZAL & NAIMARK, *supra* note 31, at 269.

43. *Id.* at 270-71.

44. *Id.* at 271.

45. *Id.*

nonetheless suggest that parties use the courts to assist in collecting international arbitration awards in a sizable number of cases.⁴⁶

Based on the available empirical evidence, then, international commercial arbitration cannot fairly be described as a private legal system that operates like the trade association arbitrations studied by Bernstein. Parties only rarely contract for application of privately created commercial law, and courts appear to play an important role in the enforcement of international arbitration awards.

III. ATTRIBUTES OF INTERNATIONAL TRANSACTIONS AND CHOICE AMONG CONTRACT ENFORCEMENT MECHANISMS

This part offers some comments on party choice among various mechanisms for enforcing international contracts. In other words, when do parties opt out of the public legal system for a private legal system, such as trade association arbitration, and when do they choose instead international commercial arbitration or litigation in the national courts? It first identifies key attributes of international transactions and then uses those attributes to help explain party choice among these alternative contract enforcement methods.⁴⁷

A. *Attributes of International Commercial Transactions*

Several attributes of international transactions help explain and predict party choice among means of contract enforcement.⁴⁸ Obviously the attributes discussed below are interrelated, and the list is not

46. As Naimark and Keer put it, “[t]he sample seems to show arbitration in a partnership with the courts in a good number of cases, given the awards that were confirmed into judgments by the court.” *Id.* at 274.

47. In addition, parties might vertically integrate and internalize the dispute resolution function. Richman, *supra* note 1, at 2330. For simplicity’s sake, I do not consider this other alternative here.

48. *Id.* at 2338 (“the nature of the underlying transaction will consistently determine the superior method of enforcement”); Oliver E. Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, 36 ADMIN. SCI. Q. 269, 277 (1991) (“The discriminating alignment hypothesis to which transaction-cost economics owes much of its predictive content holds that transactions, which differ in their attributes, are aligned with governance structures, which differ in their costs and competencies, in a discriminating (mainly, transaction-cost-economizing) way.”); see also Fabrice Lumineau & Joanne Oxley, *The Determinants of Dispute Resolution Mode in Inter-Firm Contracts* 7-9 (Sept. 26, 2007), available at <http://imio.haas.berkeley.edu/WilliamsonSeminar/oxley100407.pdf> (proposing reconciliation of law-and-economics and transaction-cost-economics approaches to contractual complexity and dispute resolution).

exclusive.⁴⁹ Nonetheless, the attributes provide at least a starting point for analysis.

1. Distance Among Parties

By distance among the parties, I mean not only strict geographic distance, i.e., how far apart the parties are, but also cultural distance, i.e., how culturally homogeneous the parties are, and political distance, i.e., whether the legal systems of the countries in which the parties are located are similar.⁵⁰

Distance is important in choice of enforcement mechanism for several reasons. Increased geographical distance makes reputational sanctions less effective. Information flows less readily and repeat dealings are less common.⁵¹ Increased cultural distance may also reduce the effectiveness of reputational sanctions as well as the ability of parties to organize groups in the first place.⁵² Increased political distance may affect the neutrality of the dispute resolution forum. A party may not be willing to subject itself to the court system of another party for fear of bias.⁵³ In addition, increased political distance may affect the legal enforceability of decisions of courts and arbitrators because the legal regime governing the enforceability of international arbitration awards differs from that governing foreign court judgments.⁵⁴

2. Product or Service Complexity

Simple products are things like grain and natural resources.⁵⁵ Complex products are things with many characteristics, such as machinery or a power plant.⁵⁶ The complexity of the product or service matters for several reasons.

49. See, e.g., Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (and Not Use) Arbitration Clauses?* (Mar. 19, 2009).

50. Avinash Dixit, *Trade Expansion and Contract Enforcement*, 111 J. POL. ECON. 1293, 1295 (2003) (using “concept of ‘distance,’ which may be geographic or socioeconomic, between traders”).

51. *Id.* (“Traders more distant from each other are less likely to meet and less likely to hear the news of each other’s trading experiences.”).

52. E.g., Frank A.G. den Butter & Robert H.J. Mosch, *Trade, Trust, and Transactions Costs* 2 (Oct. 2003) (Tinbergen Institute Research Paper TI-2003-082/3) (analyzing “cultural and institutional distances”).

53. BÜHRING-UHLE, *supra* note 4, at 136; GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 72 (3d ed. 2009).

54. BÜHRING-UHLE, *supra* note 4, at 136; BORN, *supra* note 53, at 78.

55. Daniel Berkowitz, Johannes Moenius, & Katharina Pistor, *Legal Institutions and International Trade Flows*, 26 MICH. J. INT’L L. 163, 169 (2004).

56. Daniel Berkowitz, Johannes Moenius, & Katharina Pistor, *Trade, Law, and Product Complexity*, 88 REV. ECON. & STAT. 363, 365 (2006).

First, product complexity affects the frequency of party interactions and the amounts at stake in a dispute. Parties dealing with simpler products are likely to have more routine, repeat transactions and smaller amounts at stake in those transactions. Such parties will be better able to organize into trade associations and to use reputational sanctions to enforce contracts.⁵⁷

Second, complexity affects the difficulty of verifying performance under the contract and the degree of contract standardization. For complex products, contract performance may be more difficult to verify and contracts less standardized.⁵⁸ Even for simple products, and perhaps particularly for simple products, industry expert arbitrators may be able to verify performance when public court judges cannot. As Avinash Dixit explains:

Matters like the quantities and time of delivery of the component are recorded and easily verifiable; therefore a contract that specifies the firm's payment to the component supplier as a function of these matters can be written and enforced by the government's civil courts. But a specialized arbitrator may be able to verify more subtle aspects of quality and fit of the component; then a contract that conditions payment on such aspects may become feasible under arbitration.⁵⁹

Third, more complex transactions may provide more opportunities for renegotiation during performance. Thus, according to Oliver Williamson, "[t]he economics of governance treats simple market exchange as a special case and features ongoing transactions for which adaptations (of both spontaneous and intentional kinds) are needed."⁶⁰

57. See Aviram, *supra* note 10, at 25 ("A reader familiar with antitrust scholarship may notice the similarity between these criteria and the criteria that facilitate collusion among firms. This is no coincidence, as cartels exhibit one form of behavior regulation: they discipline firms to maintain their prices and outputs at a level maximizing the collective's profits. A cartel fails if it is unable to enforce its mandates—the same enforcement problem that other, socially beneficial PLSs face."). Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 298 (7th ed. 2007) (listing "homogeneity of product" as factor increasing likelihood of collusion in market).

58. Berkovitz et al., *supra* note 55, at 169 ("The simpler and more standardized the type of product, the more complete the contract and the easier verification of breach of contract.").

59. Avinash Dixit, *Arbitration and Information* 2 (Nov. 26, 2003), available at <http://www.princeton.edu/~dixitak/home/arbitration.pdf>. For an alternative approach, examining the choice between private dispute resolution (including arbitration, negotiation, and mediation) and court adjudication, see Lumineau & Oxley, *supra* note 48, at 13.

60. Oliver E. Williamson, *The Economics of Governance*, 95 AM. ECON. REV. PAPERS & PROC. 1, 15 (2005). Indeed, Williamson criticizes Dixit's approach, which focuses on the verifiability advantages of trade association arbitration over the courts, as "a truncated statement of the purposes served by this mode of governance. For many

3. Legal Uncertainty

Legal uncertainty obviously is a broad concept and could apply to any number of characteristics of a transaction.⁶¹ This article emphasizes the clarity of the publicly created law, including common law as developed by the courts. If the publicly-created law is clear, parties may prefer to have any dispute, particularly disputes likely to involve relatively undisputed facts, resolved by the public courts.⁶² In such a case, the expertise of arbitrators will be of relatively little value, while the limited court review of arbitration awards would mean that any error by the arbitrator is likely to go uncorrected.⁶³

4. Costs of Delay in Resolving Disputes

How critical is fast action in resolving a dispute? For perishable goods, fast action can be critical in determining whether the goods conformed to the contract.⁶⁴ Moreover, for goods sold in bulk, returning defective products is impractical and monetary allowances must be made instead.⁶⁵ In such cases, the advantage of expert industry arbitrators, as

transactions, arbitration also provides a forum with greater give-and-take, which promotes cooperation, continuity, and mutual gains. . . ." *Id.* at 14.

61. Walter Mattli, *Private Justice in a Global Economy: From Litigation to Arbitration*, 55 INT'L ORG. 919, 940-44 (2001) (relying on "[u]ncertainty about the state of the world" to explain the choice between ad hoc and institutional arbitration in international transactions).

62. Jens C. Dammann & Henry B. Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 34 (2008); William W. Park, *Arbitration in Banking and Finance*, 17 ANN. REV. BANKING L. 213, 216 (1998).

63. See 9 U.S.C. § 10 (2009); *Burchell v. Marsh*, 58 U.S. 344, 349 (1854) ("If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside, either in law or fact.").

64. DEREK KIRBY JOHNSON, INTERNATIONAL COMMODITY ARBITRATION 3 (1991) ("In the case of cocoa beans, the arbitrators each take a handful of beans and cut them in half with a knife to assess the internal mould, insect damage, 'slateyness' and other defects which their trained eyes detect. For rice, each arbitrator takes a handful of up to 50 grains and physically counts how many are broken, chipped, black or coloured, compared with the total, and thus arrives at the percentage of defective grains."); Derek Kirby Johnson, *Commodity Trade Arbitration*, in HANDBOOK OF ARBITRATION PRACTICE 267, 273-74 (Ronald Bernstein ed., 3d ed. 1998) (Commodity trade arbitrations "are based on the original 'look-sniff' arbitrations for quality and/or condition which were and are such an important feature of commodity trading.").

65. JOHNSON, INTERNATIONAL COMMODITY ARBITRATION, *supra* note 64, at 2 (explaining that for international commodity transactions, "returning the goods is impractical"); Johnson, *Commodity Trade Arbitration*, *supra* note 64, at 274 ("Goods shipped in bulk from far off origins could not be sent back if they were not to the liking of the buyer, so each trade quickly developed a system of experts in each commodity who could say whether or not goods were as required by the contract, or, if not, in what respect they fell short, and what should be the measure of damages.").

in trade association arbitrations, is substantial. For some more complex contracts, such as merger agreements, immediate action, such as the grant of a temporary restraining order, can be essential for effective dispute resolution.⁶⁶ Courts are best suited to act without delay in such cases. The arbitrators must be appointed before they can grant interim relief, by which point the benefits of emergency relief may be lost.⁶⁷

B. Choice Among Enforcement Mechanisms: Trade Association Arbitration, International Commercial Arbitration, or Litigation in National Courts

Examining these attributes of international commercial transactions provides insights into party choice of the mechanism for dispute resolution. The three options considered here are trade association arbitration, international commercial arbitration, and litigation in national courts.

1. Trade Association Arbitration

As a general matter, one would expect trade association arbitration to be most prevalent for simple goods. Such goods are more likely to involve repeat transactions, enhancing party ability to organize and the value of reputational sanctions. The informational advantages and speed of decision-making of industry expert arbitrators likewise are most pronounced in such cases.

The empirical record is consistent with these predictions. Trade association arbitrations in fact are most common for simple goods or services—typically, although not exclusively, commodities such as food stuffs and metals.⁶⁸ In trade association arbitrations, disputes typically

66. Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum*, 59 VAND. L. REV. 1975, 1982 (2006) (“disputes in merger contracts often will be resolved through equitable relief (for example, a motion for preliminary injunction”). Courts may be willing to grant interim relief in support of international commercial arbitrations. BORN, *supra* note 53, at 2028-29. But when the availability of interim relief substantially overlaps with the merits, doing so involves much greater costs.

67. STEPHEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* 8 (2002) (“Parties choose not to arbitrate for any number of reasons, including . . . [d]ifficulty in acquiring preliminary relief”); Drahozal & Ware, *supra* note 49; *see also* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 78-79 (2008) (noting that “[a]rbitration providers . . . have responded to this difficulty by establishing readily available panels to rule on emergency requests, but that option appears to be used only rarely”).

68. *See supra* text accompanying note 17.

arise out of standardized transactions⁶⁹ with a relatively small amount at stake.⁷⁰ Arbitrators in trade association arbitrations are industry specialists, who have substantial informational advantages over judges and generalist arbitrators.⁷¹

Because international transactions involve greater distances, both geographically and culturally, trade association arbitration is likely to be less common for international transactions than for domestic ones. Reputational enforcement mechanisms will be less effective because of fewer repeat dealings and more costly transmission of information. Moreover, groups will be less homogenous, again making organization and enforcement more difficult.

Empirical evidence appears to bear out the supposition that trade association arbitration is less common in international transactions. As Berkowitz et al. found:

There are numerous trade associations specializing in different product categories. Most international trade associations, however, do not offer quasi-legal services. We surveyed eighty-two international trade associations, but found only three that offered dispute resolution to their members, GAFTA, the Coca Association of London, and the Liverpool Cotton Association.⁷²

Moreover, among the international trade associations that have arbitration systems, reputational enforcement systems are less effective. According to Berkowitz et al., rather than relying on expulsion or

69. Bernstein, *Merchant Law (NGFA)*, *supra* note 2, at 1817 (“grain and feed transactions are so standardized that the facts of any particular case are likely to be close to the archetypical transaction contemplated by the drafters of the trade rules”).

70. To illustrate, the largest NGFA award studied by Bernstein was for \$138,000. Bernstein, *Merchant Law (NGFA)*, *supra* note 2, at 1817 (from years 1975-1990). Although the amount at stake in NGFA arbitrations is larger in more recent years, it remains relatively small. A review of NGFA arbitration awards from 2007 finds one award in which the claimant sought \$1.7 million and recovered \$1.1 million (with the arbitrators rejecting a counterclaim for \$458,000) and one in which the claimant recovered \$1.3 million, but otherwise no claim larger than \$500,000 and a number of claims for less than \$50,000. See NGFA, *Arbitration Decisions: Nos. 2000 to Present*, <http://www.ngfa.org/arbitration-decisions.cfm> (last visited Mar. 24, 2009).

71. See *supra* text accompanying notes 58-59.

72. Berkowitz et al., *supra* note 55, at 173-74 (also finding that “[f]ew international commodities exchanges have active arbitration tribunals that resolve disputes among buyers and sellers of such commodities. They typically offer such services to their own members or to brokers: not, however, to the ultimate buyers and sellers of the commodities traded on the exchange.”); Johnson, *Commodity Trade Arbitration*, *supra* note 64, at 268 (“There are in the very nature of things a wide variety of commodities, and therefore a very large number of trade associations to promote the interests of those particular trades. However, not all of the trades represented by associations in the United Kingdom have provisions for arbitration and of those that do, there are some whose facilities are little used.”).

blacklisting, GAFTA “refers disputes over the arbitration awards to English courts.”⁷³ Other international trade associations, such as the international cotton trade associations, maintain lists of firms that do not comply with arbitration awards. But those trade associations have struggled with enforcing their arbitration awards, and now appear to be seeking greater governmental involvement in award enforcement.⁷⁴

2. International Commercial Arbitration

Greater distances will tend to favor international commercial arbitration over trade association arbitration for the converse of the reasons stated above. Longer distances make information transmission more difficult and reduce the likelihood of repeat business.⁷⁵ Distance—of the political sort—also provides key advantages for international commercial arbitration over litigation in national courts. Parties may prefer not to litigate in the home courts of the other party to the contract, and, in many cases, international treaties make international arbitration awards more enforceable than foreign court judgments.⁷⁶

Further, international commercial arbitration is more likely to be used for complex products than for simple products: complex products involve fewer repeat dealings and less advantage of industry expertise. Again, the empirical reality is consistent with these predictions. In international commercial arbitration, disputes often arise out of non-standardized transactions with very high stakes.⁷⁷ Moreover, international commercial arbitrators tend to be generalists, rather than

73. Berkowitz et al., *supra* note 55, at 174.

74. See Committee for International Co-operation Between Cotton Associations (CICCA), *Current Issues: The Sanctity of Contracts*, www.cicca.info/currentIssues.html (last visited Mar. 24, 2009) (describing level of defaults on arbitration awards as “intolerable situation” and asserting that “CICCA and its membership is clear that for arbitration to work it must be governed by national law”: “[w]hat perhaps is needed to help reduce the level of defaulters, is a partnership between Governments and the cotton industry”).

75. See *supra* text accompanying notes 51-52.

76. See *supra* text accompanying notes 53-54.

77. In 2005, for example, over 22% of ICC arbitrations involved more than \$10 million in dispute, and 4.2% had more than \$100 million in dispute. *2005 Statistical Report*, ICC INT’L CT. ARB. BULL., Spring 2006, at 5, 12.

industry experts.⁷⁸ Even so, they may have more industry expertise than public court judges.⁷⁹

3. National Court Litigation

So when will parties use litigation rather than arbitration in international transactions? The above transaction attributes suggest that clarity of national law is an important factor in party choice of national courts, along with the greater availability of emergency relief.⁸⁰

The available empirical evidence is consistent with the foregoing suppositions. Eisenberg and Miller examined a sample of “material” contracts filed with the SEC and found only 20.6% of the international contracts included arbitration clauses.⁸¹ Consistent with the importance of distance, that percentage was more than double the percentage of domestic U.S. contracts with arbitration clauses.⁸² But that percentage is still well below some estimates in the international arbitration literature.⁸³ An important reason is the type of contracts involved in the

78. See Stephen R. Bond, *The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 N.W. J. INT'L L. & BUS. 1, 5 (1991) (reporting that 95% of arbitrators in ICC arbitrations are legal professionals); Jacques Werner, *The Trade Explosion and Some Likely Effects on International Arbitration*, J. INT'L ARB., June 1997, at 5, 10 (“Arbitral justice in international commercial cases is almost always rendered by business lawyers in private practice, and sometimes by academics.”).

79. Dixit quite correctly distinguishes international commercial arbitration from trade association arbitration. See Dixit, *supra* note 59, at 3 (“[Arbitration is] often used in international trade because at least one party does not have enough knowledge of the other country’s laws, or fears that the other country’s courts may be corrupt or biased in favor of the home party. In this paper I am not concerned with this aspect.”). By comparison, some commentators blend the two together, despite important differences between the two. See Benson, *supra* note 28, at 93 (“[T]here are many potential sources of arbitration of international business disputes. A large number of *international trade associations* have their own conflict resolution procedures, using arbitrators with special expertise in trade matters of concern to association members. . . . Other traders rely on the *ICC’s arbitration institution*. ICC arbitrators are experts in international commerce. . . .”) (emphasis added); Bruce L. Benson, *International Economic Law and Commercial Arbitration*, in ECONOMIC ANALYSIS OF LAW: A EUROPEAN PERSPECTIVE (Aristides N. Hatzis ed., forthcoming 2009) (“[I]nternational arbitrators generally intentionally ‘denationalize’ their awards and attempt to make them acceptable by showing their consistency with accepted behavior of the relevant business community. Contracts might expressly state that the practices and usages of a particular commercial community (e.g., a *trade association*) should be applied or this may simply be understood. Practices and usage (business custom) provide the default rule, at any rate. . . . *Bernstein’s examination of the systematic rejection of state-created law by the diamond industry in favor of its own internal rules . . . provides a very revealing example. . . .*”) (emphasis added).

80. See *supra* text accompanying notes 62-63, 66-67.

81. Eisenberg & Miller, *supra* note 31, at 353 Table 4.

82. *Id.*

83. E.g., KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 8 & n.62 (1993) (“About ninety percent of international economic contracts contain an arbitration

Eisenberg and Miller sample. Those contracts—typically involving corporate transactions or commercial financing—are ones in which national law, at least U.S. national law, is relatively clear. Also important is the need for emergency relief in disputes arising out of corporate mergers and similar transactions, a remedy for which arbitration is not well suited.⁸⁴

IV. CONCLUSION

Both trade association arbitration and international commercial arbitration often are cited as examples of private ordering. But international commercial arbitration differs in important ways from trade association arbitration. Parties to international commercial arbitration agreements typically do not contract for application of privately created law (the new Law Merchant or *lex mercatoria*); instead, in the substantial majority of cases they agree to the application of national law. Moreover, courts play an important role in the enforcement of international arbitration awards, even in cases in which the parties “voluntarily” comply with awards. In short, not all arbitration is alike, and international commercial arbitration more correctly should be seen as a hybrid case and not a purely private legal system.

Several attributes of international transactions are important in understanding party choice among these and other methods of resolving disputes. Parties dealing in simple, as opposed to complex, products and services are more likely to form trade associations and use trade

clause.”) (citing ALBERT JAN VAN DEN BERG, *ARBITRAGERECHT* 134 (1988)). Gary Born addresses such estimates as follows:

This [90%] figure lacks empirical support and is almost certainly substantially inflated: in reality, significant numbers of international commercial transactions—certainly much more than 10% of all contracts—contain either forum selection clauses or no dispute resolution provision at all. It is probably true that, in negotiated commercial (not financial) transactions, where parties devote attention to the issue of dispute resolution, and where the parties possess comparable bargaining power, arbitration clauses are more likely than not to be encountered. This remains a highly impressive endorsement of arbitration, and permits one to fairly say that international arbitration is the preferred means for contractual dispute resolution, but more ambitious statistical claims are unsustainable.

BORN, *supra* note 53, at 71.

84. Drahozal & Ware, *supra* note 49. Another factor that is important at least in domestic cases is whether the dispute has very high stakes—i.e., whether it is a so-called “bet the company” case. See Center for Public Resources, ADR Suitability Screen, item 5 (1998) (discouraging use of arbitration when “a vital corporate interest or ‘bet the company’ case [is] involved that requires the full panoply of procedural protection afforded by court and full appeal rights”). That factor seems to be less important in international transactions, as shown by the very high stakes in some international arbitrations, see *supra* note 77, presumably because of concerns about home court bias and enforceability of awards.

association arbitration, although less likely in international than domestic transactions. Greater distance between the parties (geographic, as well as cultural and political) makes international commercial arbitration a more common choice. Parties tend to prefer courts when the governing national law is clear and when emergency relief is likely to be important in resolving disputes. Thus, the identified attributes help explain the choice of the mechanism for resolving disputes across different types of international transactions. Whether they are as useful for explaining choice of dispute resolution mechanism across different firms engaged in similar transactions awaits future work.