



WORLD  
& ARBITRATION  
& MEDIATION  
REVIEW

2008  
VOLUME 2, No. 5

INSTITUTE FOR  
TRANSNATIONAL ARBITRATION



THE CENTER FOR AMERICAN  
AND INTERNATIONAL LAW



# THE ARBITRATION-LITIGATION RELATIONSHIP IN TRANSNATIONAL DISPUTE RESOLUTION: EMPIRICAL INSIGHTS FROM THE U.S. FEDERAL COURTS

*Christopher A. Whytock\**

## I. INTRODUCTION

This article explores two important dimensions of the relationship between transnational arbitration and litigation. First, what is the relationship between arbitration and litigation as alternative methods of transnational dispute resolution? Some scholars and practitioners argue that arbitration has largely replaced litigation as the method of choice for transnational dispute resolution.<sup>1</sup> But others suggest that this view may overestimate the ascendance of arbitration and underestimate the continued importance of litigation.<sup>2</sup> Second, what is

---

\* Associate Professor of Law, University of Utah S.J. Quinney College of Law. I thank Artemis Vamianakis, Daniel Burton, and Amanda White for outstanding research assistance.

<sup>1</sup> See, e.g., Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* 23 (Thomas E. Carbonneau ed., revised vol. 1998) (“[t]he status of arbitration as the procedure of choice in transnational commerce can no longer be seriously challenged”); Pierre Lalive, *Transnational (or Truly International) Public Policy in Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 257, 293 (Pieter Sanders ed. 1987) (referring to arbitration as “‘the’ ordinary and normal method of settling disputes of international trade”), cited in Christopher R. Drahozal & Richard W. Naimark, *Empirical Perspectives on International Commercial Arbitration*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 25, 36 (Christopher R. Drahozal & Richard W. Naimark eds. 2005).

<sup>2</sup> See, e.g., Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 *DEPAUL L. REV.* 335, 352 (2007) (finding that there is a “paucity of arbitration clauses, even in international contracts”); Michael McIlwrath & Roland Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution*, 74 *ARB.* 3, 10 (2008) (noting a “[m]ovement towards courts and away from international arbitration” and “a real reluctance [among in-house counsel] to resolve disputes through international arbitration where it can be

the role of domestic courts in the transnational arbitration system? While some observers argue that transnational arbitration can operate independently from domestic legal institutions,<sup>3</sup> others emphasize arbitration's reliance on those institutions.<sup>4</sup>

The answers to these questions matter for practice, policy, and theory. Practically, the answers matter for the dispute resolution choices of transnational actors and their lawyers. If arbitration has largely replaced litigation as a method of transnational dispute resolution, and if arbitration operates largely without the added costs of judicial involvement, the implication might be drawn that arbitration is presumptively the better choice. On the other hand, if litigation continues to be widely used, the implication might instead

---

avoided," and raising the concern that "the lack of corporate satisfaction means [international arbitration] will not grow as much or as quickly as its potential would otherwise allow"); Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP. & INT'L L. 449, 451 (2008) (arguing that "the conventional wisdom may overestimate the extent to which transnational arbitration has replaced litigation").

<sup>3</sup> See, e.g., Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EURO. PUB. POL'Y 627, 637 (2006) (citing THOMAS CARBONNEAU, *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* (1997)) ("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") [hereinafter, Stone Sweet, *Transnational Governance*]; see also Bruce L. Benson, *Arbitration in the Shadow of the Law*, in NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW Vol. 1 93, 95 (1998); Alec Stone Sweet, *Islands of Transnational Governance*, in ON LAW, POLITICS, AND JUDICIALIZATION 323, 325 (Martin Shapiro & Alec Stone Sweet eds., 2002) [hereinafter Stone Sweet, *Islands*].

<sup>4</sup> See, e.g., 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 . . ."); Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 267 (2001-02) ("[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.").

be that the appropriate method of transnational dispute resolution ultimately depends on the circumstances, and that litigation remains appropriate in many of those circumstances. In terms of policy, efforts to reform arbitration might seem more urgent if many parties still prefer litigation, or if judicial involvement in the transnational arbitration system is either excessive or insufficient to ensure adequate monitoring of the system's integrity. Theoretically, our understanding of how transnational actors resolve disputes is at stake, as is our understanding of the interaction between private and public forms of transnational dispute resolution.

So far, however, much of what lawyers and scholars understand about the relationship between transnational arbitration and litigation is not based on systematic empirical evidence.<sup>5</sup> This is not surprising: little existing data is available to clarify this relationship, and new data is costly and difficult to obtain. The result is considerable uncertainty about the validity of contending claims about the status of arbitration and litigation.

This article's goal is to shed empirical light on the arbitration-litigation relationship in transnational dispute resolution by making the most of currently available data from the U.S. federal courts. Part II begins by seeking clues about the extent to which arbitration has replaced litigation as a method of transnational dispute resolution. To that end, it analyzes data on transnational litigation in the U.S. federal courts and transnational arbitration in the world's leading arbitral institutions. This data has not previously been analyzed comparatively. Part II thus provides new evidence regarding relative trends in these two dispute resolution methods. The analysis suggests that transnational litigation rates have been declining while transnational arbitration rates have been increasing. However, the analysis also shows that litigation continues to be a widely used method of transnational dispute resolution, even in contract disputes. For example, from 2000 to 2005, the number of transnational contract cases filed in the U.S. district courts alone was roughly the same as

---

<sup>5</sup> Cf. Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?* 3 (Aug. 11, 2008) (available at <http://ssrn.com/abstract=1147697>) (calling for "systematic study of changes in the use of arbitration clauses over time" rather than relying on evidence that "consists largely of anecdotes"). For a leading effort to address this empirical gap, see TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 25, 36 (Christopher R. Drahozal & Richard W. Naimark eds. 2005).

the number of transnational cases filed for arbitration with the American Arbitration Association and the International Chamber of Commerce combined.<sup>6</sup> Simply put, arbitration has yet to fully eclipse litigation; to the contrary, both arbitration and litigation remain important methods of transnational dispute resolution.

The article next assesses judicial involvement in transnational arbitration through post-award litigation. To do so, it uses an original dataset of 199 published U.S. federal court decisions in cases involving arbitral awards covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).<sup>7</sup> Part III uses the dataset to estimate post-award litigation rates. Although some observers argue that it is generally unnecessary to seek judicial enforcement, the results suggest that there is actually considerable judicial involvement at the post-award stage of the transnational arbitration process.

Using the same dataset, Part IV analyzes the rate at which U.S. federal courts enforce arbitral awards covered by the New York Convention in order to evaluate whether the judicial involvement discussed in Part III tends to support or undermine transnational arbitration.<sup>8</sup> Prior scholarship suggests that non-enforcement is rare. However, the results indicate that the enforcement rate in published decisions since 1970 is less than 75 percent, and has decreased from approximately 83 percent in the 1990s to about 68% in the 2000s.<sup>9</sup> On the one hand, this finding may be discouraging from the perspective of one important arbitral value: the finality of awards. On the other hand, it may be encouraging from the perspective of scholars and practitioners who are calling for enhanced judicial monitoring of the integrity of the transnational arbitration system. Because enforcement rates in published court decisions are not necessarily the same as enforcement rates in unpublished court

---

<sup>6</sup> See *infra* Table 1 and accompanying discussion.

<sup>7</sup> The full text of the New York Convention is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

<sup>8</sup> For a broader discussion of the role of domestic courts in supporting or hindering arbitration and other transnational private institutions, see Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TULANE L. REV. pt. II.C.2 (forthcoming 2009).

<sup>9</sup> See *infra* Tables 4 and 5 and accompanying discussion.

decisions, it is uncertain whether Part IV's findings can be generalized to U.S. federal court decisions overall. But published decisions merit special attention because they can influence the dispute resolution behavior of transnational actors beyond the parties to particular disputes, and disproportionately affect public perceptions of transnational arbitration.

To develop a sound understanding of transnational dispute resolution, it will be necessary to reach far more precise and certain conclusions about the arbitration-litigation relationship. This, in turn, will require analysis of additional, more costly, and more difficult-to-obtain data. By providing clues based on currently available data, this article provides a point of departure for that endeavor.

## II. TRANSNATIONAL LITIGATION AND ARBITRATION RATES

Some scholars argue that arbitration has substantially replaced litigation as a method of transnational dispute resolution.<sup>10</sup> However, little data is available for assessing that view. A recent empirical study revealed surprising low levels of arbitration clauses in the international contracts of U.S. public companies.<sup>11</sup> But that study neither captures arbitration trends over time<sup>12</sup> nor compares transnational arbitration rates to transnational litigation rates. This Part seeks to shed brighter empirical light on comparative trends in transnational litigation and transnational arbitration.

Specifically, this Part explores the relationship between arbitration and litigation as alternative methods of transnational dispute resolution. This relationship matters for practice, policy, and theory. Insofar as arbitration has replaced litigation, one might reasonably conclude that arbitration is presumptively the better method for resolving transnational disputes. Insofar as litigation persists,

---

<sup>10</sup> See *supra* note 1.

<sup>11</sup> Eisenberg & Miller, *supra* note 2, at 350-352 (finding that only 20% of international contracts—defined as contracts including a non-U.S. party—contain arbitration clauses).

<sup>12</sup> Drahozal & Wittrock, *supra* note 5, at 3 (arguing that “static examinations of the use of arbitration clauses” such as the Eisenberg & Miller study “do not show ‘flight’—i.e., that parties who previously agreed to arbitration are now switching to litigation”). The Drahozal & Wittrock study compares the incidence of arbitration clauses over time, but in franchise agreements rather than international contracts.

however, the implication is that the appropriate method depends on the circumstances, and that in some cases litigation continues to offer advantages to transnational actors.<sup>13</sup> From a policy perspective, whether and how urgently arbitration should be promoted as an alternative to litigation depends on this relationship. Any reform efforts aimed at improving transnational arbitration would seem more urgent if litigation remains an important competitor than if arbitration has already substantially replaced litigation. Theoretically, the relationship has implications for scholars' efforts to understand whether the rise of arbitration is part of a broader shift from public to private forms of transnational governance.<sup>14</sup> To examine this relationship, this Part undertakes a comparative analysis of data on transnational litigation in the U.S. federal courts and transnational arbitration in the world's leading arbitral institutions.

#### A. *The Data*

As an indicator of transnational litigation rates, this Part uses Federal Judicial Center data on the annual number of alienage cases terminated in the U.S. district courts.<sup>15</sup> Alienage cases are cases over which the federal courts have subject matter jurisdiction because the action "is between . . . citizens of a [U.S.] State and citizens or subjects of a foreign state."<sup>16</sup> They are transnational in the sense that

---

<sup>13</sup> See, e.g., GARY B. BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* 4-15 (2d ed. 2006) (outlining the "numerous considerations" that should affect the choice between arbitration and litigation and arguing that "[i]t would be highly 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"); RICHARD GARNETT, HENRY GABRIEL, JEFF WAINCYMER & JUDD EPSTEIN, *A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION* 11 (2000) ("[t]here is no dispute settlement method that is optimal in all situations").

<sup>14</sup> See, e.g., Stone Sweet, *Transnational Governance* and Stone Sweet, *Islands*, *supra* note 3 (arguing that arbitration can be understood as a form of transnational private governance); see also Whytock, *supra* note 2 (comparing arbitration as a form of transnational private governance to transnational judicial governance).

<sup>15</sup> FEDERAL JUDICIAL CENTER, *FEDERAL COURT CASES: INTEGRATED DATABASE SERIES 1992-2005*. This database incorporates data collected by the Administrative Office of the U.S. Courts, and is available from the Inter-University Consortium for Political and Social Research at <http://www.icpsr.umich.edu>.

<sup>16</sup> See 28 U.S.C. §1332(a)(2) ("[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of a [U.S.] State



they involve parties of different nationalities. However, alienage cases are not the only type of transnational litigation in U.S. courts. In the U.S. federal courts, there are also transnational diversity cases between citizens of different U.S. states which arise out of activity with connections to one or more foreign states, or involve foreign citizens as additional parties;<sup>17</sup> suits involving foreign sovereigns;<sup>18</sup> and suits over which there is federal question,<sup>19</sup> admiralty,<sup>20</sup> or

---

and citizens or subjects of a foreign state”). To identify alienage cases, I used the Federal Judicial Center database’s *residence* variable, which is a two digit number. The first digit indicates whether the plaintiff is a foreign citizen and the second indicates whether the defendant is a foreign citizen. I counted a case as an alienage case only if the plaintiff is a foreign citizen and the defendant is a U.S. citizen, or if the plaintiff is a U.S. citizen and the defendant is a foreign citizen. I did not count foreign sovereigns as “foreign citizens” for purpose of this analysis.

<sup>17</sup> 28 U.S.C. §1332(a)(1) (“[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States”); 28 U.S.C. §1332(a)(3) (providing jurisdiction over suits between “citizens of different States and in which citizens or subjects of a foreign state are additional parties”).

<sup>18</sup> See 28 U.S.C. §1332(a)(4) (“[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States”); 28 U.S.C. §1330 (“[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603 (a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement”); 28 U.S.C. §1351 (“[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against: (1) consuls or vice consuls of foreign states; or (2) members of a mission or members of their families (as such terms are defined in section 2 of the Diplomatic Relations Act”).

<sup>19</sup> 28 U.S.C. §1331 (“[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”). Thus, the data does not include transnational litigation involving agreements to arbitrate or arbitral awards under the New York Convention. See 9 U.S.C. §203 (“[a]n action or proceeding falling under the [New York] Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy”).

<sup>20</sup> 28 U.S.C. §1333 (“[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled; (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize”).

bankruptcy jurisdiction,<sup>21</sup> or jurisdiction based on the Alien Tort Statute.<sup>22</sup> There also is transnational litigation in U.S. state courts.<sup>23</sup> Therefore, even if the alienage case data captures a large portion of transnational litigation in the United States, overall transnational litigation rates are almost certainly higher.<sup>24</sup> Although the Federal Judicial Center data does not identify these other types of transnational litigation, alienage litigation rates are useful as an indicator of minimum transnational litigation rates in the United States.

To estimate transnational arbitration rates, this Part uses data collected by the Hong Kong International Arbitration Centre (HKIAC) on the number of cases filed with 11 different international arbitral institutions.<sup>25</sup> The HKIAC has collected this data since 1992.

---

<sup>21</sup> 28 U.S.C. §1334 (“[e]xcept as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11”).

<sup>22</sup> 28 U.S.C. §1350 (“[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

<sup>23</sup> Litigation rates are far higher in U.S. state courts than in U.S. federal courts. *Compare* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS Table S-7 (2007) (available at [http://www.uscourts.gov/judbus2006/complete\\_judicialbusiness.pdf](http://www.uscourts.gov/judbus2006/complete_judicialbusiness.pdf)) (253,273 civil cases were filed in the U.S. district courts in 2005) *with* NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 27 (2006) (available at [http://www.ncsconline.org/D\\_Research/csp/2006\\_files/EWSC-2007WholeDocument.pdf](http://www.ncsconline.org/D_Research/csp/2006_files/EWSC-2007WholeDocument.pdf)) (an estimated 16.6 million cases were filed in U.S. state courts in the same year). Based on this comparison, one might hypothesize that there is even more transnational litigation in state courts than federal courts. However, there is reason to question this hypothesis: It is likely that plaintiffs (particularly foreign plaintiffs) prefer the federal courts for transnational litigation, and that defendants (particularly foreign defendants) will frequently seek removal of state court transnational suits to federal court. Unfortunately, there appear to be no data on transnational litigation in states courts that can be used to test these propositions systematically.

<sup>24</sup> *Cf.* GEORGE A. BERMAN, TRANSNATIONAL LITIGATION 71 (2003) (“Article III contemplates federal court jurisdiction of claims ‘arising under’ federal law (commonly known as ‘federal question’ jurisdiction). Although many cases that we would consider to be transnational do in fact arise under the US Constitution, a federal statute or a treaty, not all of them do. . . . Diversity jurisdiction (especially ‘alienage jurisdiction,’ covering suits between a US national and a non-national) will encompass a good many transnational disputes, but, again, certainly not all.”).

<sup>25</sup> HONG KONG INTERNATIONAL ARBITRATION CENTRE, STATISTICS: INTERNATIONAL ARBITRATION CASES RECEIVED (available at [http://www.hkiac.org/HKIAC/HKIAC\\_English/en\\_statistics.html](http://www.hkiac.org/HKIAC/HKIAC_English/en_statistics.html)). The included institutions are the American

Because these data include cases filed with all of the major international arbitral institutions—including the American Arbitration Association (AAA), the International Chamber of Commerce (ICC), and the London Court of International Arbitration (the LCIA)—they likely capture a substantial portion of transnational arbitration.

It is only a rough estimate of overall worldwide transnational arbitration rates, however. First, because the data do not include *ad hoc* transnational arbitration—that is, transnational arbitration that does not take place under the auspices of a preexisting arbitral institution—they understate overall worldwide transnational arbitration rates.<sup>26</sup> Second, the HKIAC data on filings with a number of arbitral institutions—including the ICC, the LCIA, the China International Economic and Trade Arbitration Commission (CIETAC), and the British Columbia International Commercial Arbitration Centre (BCICAC)—include domestic arbitrations,<sup>27</sup> which means the data overstate transnational arbitration rates in those institutions.

### B. *Analysis*

The results are presented in Figure 1 and Table 1. Regarding trends over time, two findings are immediately clear. First, the annual rate of U.S. alienage cases has declined sharply since 1992, from 4,374 to

---

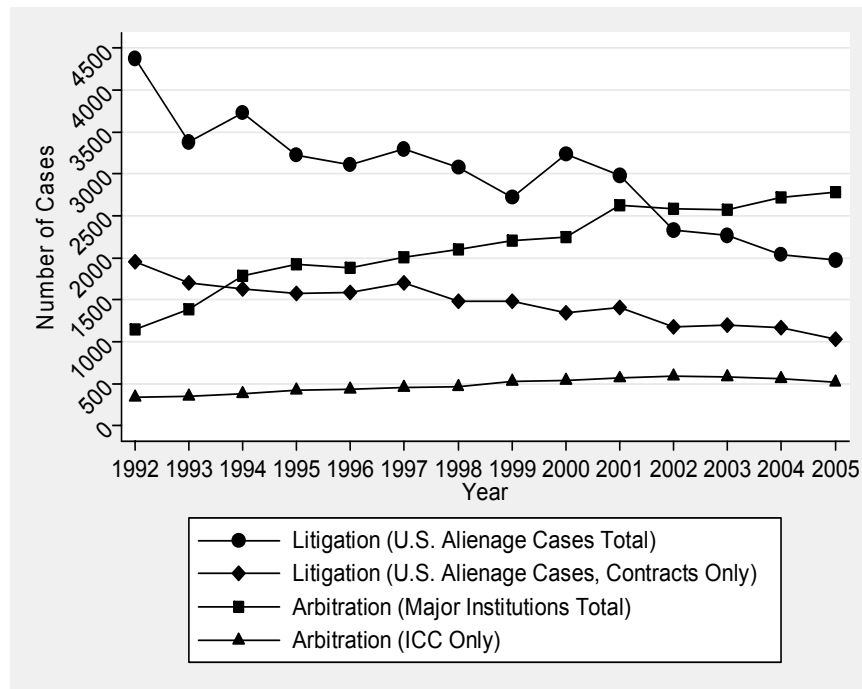
Arbitration Association (AAA), the British Columbia International Commercial Arbitration Center (BCICAC), the China International Economic and Trade Arbitration Commission (CIETAC), the HKIAC, the International Chamber of Commerce (ICC), the Japan Commercial Arbitration Association (JCAA), the Korean Commercial Arbitration Board (KCAB), the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Portions of this data are also available in DRAHOZAL & NAIMARK, *supra* note 5, at app. 1.

<sup>26</sup> See *id.* at 7 (“data from a particular arbitration institution (or arbitration institutions as a whole) necessarily fail to give a complete picture of international arbitration practice because they exclude *ad hoc* arbitrations—proceedings not administered by an arbitration institution”). There do not appear to be any existing data on *ad hoc* transnational arbitration rates. Impressions about the extent of *ad hoc* arbitration relative to institutional arbitration run the gamut, with some observers opining that *ad hoc* arbitrations are few compared to institutional arbitrations, others suggesting that *ad hoc* and institutional rates are likely similar, and still others thinking that there may be far more *ad hoc* than institutional arbitration. *Id.* at 7, n. 28.

<sup>27</sup> See HONG KONG INTERNATIONAL ARBITRATION CENTRE, *supra* note 25.

1,976, with some indication that the rate may be starting to stabilize at about 2,000. Transnational actors continue to use litigation frequently, but not as frequently as before. Second, the aggregate annual rate of filings with the world's major international arbitral institutions has increased steadily since 1992, from 1,148 to 2,785. Insofar as trends in alienage litigation roughly follow overall transnational litigation trends and trends in institutional arbitration roughly follow overall transnational arbitration trends, the data indicate that litigation is decreasingly used and arbitration increasingly used as a method of transnational dispute resolution. The data suggest that these trends were already under way in the early 1990s; however, Figure 1 and Table 1 show that it was only in 2002 that institutional arbitration rates surpassed U.S. alienage litigation rates. Moreover, taken as a whole, litigation seems to have been prevalent during the period between 1992 and 2005: there were a total of 41,758 U.S. alienage cases, and 29,996 cases in the major arbitration institutions.

**Figure 1. Transnational Litigation and Transnational Arbitration Rates, 1992-2005**



To what extent is there a relationship between U.S. alienage litigation's decline and institutional arbitration's rise? On the one hand, the rise in arbitration rates might be attributable to arbitration of transnational disputes that previously would have been litigated; that

is, transnational arbitration may indeed be replacing transnational litigation. This probably explains a significant portion of the growth of transnational arbitration. But for two reasons, replacement seems to be only a partial explanation. First, arbitration and litigation are not entirely fungible. For some disputes, arbitration may be inappropriate; changes in litigation rates of such disputes would not necessarily imply changes in arbitration rates, because such disputes are not likely to be arbitrated anyway.<sup>28</sup> For other disputes, litigation may be inappropriate; changes in arbitration rates of such disputes would not necessarily imply changes in litigation rates, because such disputes are not likely to be litigated anyway.<sup>29</sup> Second, litigation and arbitration do not exhaust the available alternatives for transnational dispute resolution. Therefore, changes in litigation and arbitration rates may be partly due to changes in negotiation, conciliation, or mediation rates.<sup>30</sup> In summary, the litigation decrease and arbitration increase appear strikingly correlated, but the extent to which they are causally related is unclear.

Beyond general trends, what inferences can be drawn from the data regarding the relative importance of these two methods of transnational dispute resolution? For several reasons, interpretation is difficult. First, the comparison is between transnational litigation in one country (the United States)—indeed, only one type of transnational litigation in that country (alienage litigation in the U.S. federal courts)—and worldwide institutional arbitration rates. Even if the U.S. federal courts attract a disproportionate amount of the world's transnational litigation, and even if there is a substantial amount of *ad hoc* transnational arbitration, this comparison might be biased in favor of arbitration. Therefore, as an additional point of reference, Figure 1 and Table 1 also present arbitration rates in what is arguably the leading international arbitral institution, the ICC.

---

<sup>28</sup> For example, tort litigation arising without a preexisting relationship between the disputants is unlikely to lead to arbitration because the disputants lacked an opportunity to enter an *ex ante* arbitration agreement. Therefore, one would not necessarily expect changes in tort litigation rates to have an impact on arbitration rates.

<sup>29</sup> For example, highly technical disputes arising out of contractual relationships, in connection with which confidentiality is essential, foreign enforcement of the resulting judgment is likely to be necessary, and both sides are seeking a neutral forum, are unlikely to be litigated.

<sup>30</sup> In addition, increases in 28 U.S.C. §1332's amount in controversy requirement in 1988 and 1996 may have contributed to the decline of alienage litigation rates.

Second, the likelihood of arbitration is higher in disputes arising from pre-existing relationships such as contracts, because the disputants have an opportunity to enter an *ex ante* arbitration agreement. Disputants can also agree to arbitration after disputes arise, but this is less common.<sup>31</sup> The likelihood of arbitration is thus lower in disputes, such as many tort disputes, that arise outside the context of a preexisting relationship. For this reason, a comparison with alienage litigation rates in contract disputes is arguably more appropriate than a comparison with alienage litigation rates overall. To facilitate this comparison, Figure 1 and Table 1 separately present alienage litigation rates in contract cases.<sup>32</sup>

Using these alternative measures, Figure 1 and Table 1 show that alienage contract litigation rates in the U.S. federal courts are about twice the ICC arbitration rate, and that the difference between these rates has remained relatively steady since the early 2000s, ranging from about 500 to 600 cases annually. Moreover, as Table 1 shows, from 2000 to 2005, U.S. alienage contract litigation rates were roughly the same as ICC and AAA arbitration rates combined. Taken together, these findings suggest that litigation and arbitration are both important methods of transnational dispute resolution in contract cases. They also show that, so far at least, transnational contract litigation in the U.S. federal courts continues to outpace transnational arbitration in individual international arbitral institutions such as the ICC and the AAA. However, as Figure 1 clearly indicates, the total arbitration rate in the world's major arbitral institutions far exceeds the alienage litigation rate in contract cases in the U.S. federal courts.

---

<sup>31</sup> See BORN, *supra* note 13, at 37 (“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.”).

<sup>32</sup> By far most of these cases are categorized by the Federal Judicial Center (FJC) as “other contract actions,” but there are also a large number of insurance and negotiable instrument cases. The FJC also separately tracks marine contract, overpayment and enforcement of judgment actions, and certain loan default actions, but these are not common in alienage cases. The FJC data do not include real estate disputes—including disputes over leases or foreclosures—as contract disputes. See FEDERAL JUDICIAL CENTER, *supra* note 15.

**Table 1. Transnational Litigation in the U.S. District Courts and Transnational Arbitration Rates in Major Arbitral Institutions, 1992-2005**

Year	(A) Alienage Litigation (Total)	(B) Arbitration (Major Institutions Total)	Litigation- Arbitration Differential (A-B)	(C) Alienage Litigation (Contracts)	(D) Arbitration (ICC)	Arbitration (AAA)	Alienage Litigation (Contracts) - Arbitration (ICC) (C-D)
1992	4374	1148	3226	1957	337	204	1620
1993	3386	1392	1994	1704	352	207	1352
1994	3725	1784	1941	1626	384	187	1242
1995	3228	1926	1302	1581	427	180	1154
1996	3108	1878	1230	1591	433	226	1158
1997	3297	2003	1294	1700	452	320	1248
1998	3078	2104	974	1482	466	387	1016
1999	2725	2206	519	1480	529	453	951
2000	3230	2251	979	1344	541	510	803
2001	2984	2628	356	1410	566	649	844
2002	2334	2589	-255	1179	593	672	586
2003	2275	2577	-302	1201	580	646	621
2004	2038	2725	-687	1171	561	614	610
2005	1976	2785	-809	1036	521	580	515
Total	41758	29996	11762	20462	6742	5835	13720

Notes: This table compares the aggregate number of alienage litigation cases in the U.S. District Courts (column A) to the aggregate number of arbitration cases filed in eleven of the world's major arbitral institutions (the AAA, BCICAC, CIETAC, HKIAC, ICC, JCAA, KCAB, KLRCA, LCIA, SIAC, and SCC) (column B). It also compares the number of alienage litigation contract disputes in the U.S. District Courts (column C) with the number of arbitration cases filed with the ICC (column D) and the AAA.

Because the data are limited to only one type of transnational litigation in one country's federal courts, and because the data do not include *ad hoc* transnational arbitration, it is difficult to generalize to overall transnational litigation and transnational arbitration rates worldwide. For example, it is unclear whether the U.S. alienage litigation data understate overall worldwide transnational litigation rates to a greater extent than the institutional transnational arbitration rate understates overall worldwide transnational arbitration rates. Assuming that this difference exceeds the difference between the U.S. alienage litigation rates and the institutional arbitration rates presented in Table 1 (255, 302, 687 and 809 cases for the years 2002 through 2005, respectively, as set forth in the A-B column), then one could conclude that, in those years, litigation continued to outpace arbitration as a method of transnational dispute resolution worldwide.<sup>33</sup> This assumption does not seem unreasonable; but until more data are available, this must ultimately remain a matter of speculation.

In summary, there has been a decline in U.S. alienage litigation rates in general and U.S. alienage litigation rates in contract cases in particular. Meanwhile, arbitration rates in the world's leading arbitral institutions have increased. The extent to which these trends are causally related is unclear; but the evidence is not inconsistent with the hypothesis that arbitration is replacing litigation as a method of transnational dispute resolution. Nevertheless, the evidence also reveals that litigation continues to be used frequently as a method of transnational dispute resolution, including in contract cases. It appears that, even as transnational arbitration rates have increased, transnational litigation remains important.

### III. POST-AWARD LITIGATION IN THE U.S. FEDERAL COURTS

Part II examined the relationship between arbitration and litigation as alternative methods of transnational dispute resolution. This Part focuses on another important dimension of the relationship between arbitration and litigation: judicial involvement in the transnational arbitration process through post-arbitral award litigation.

---

<sup>33</sup> Regarding contract disputes in particular, it would be necessary to make an assumption about the extent to which U.S. alienage contract litigation rates underestimate worldwide contract litigation rates.



A. *Post-Award Litigation and the Transnational Arbitration Process*

The three principal types of post-award litigation are proceedings to confirm, vacate, and enforce arbitral awards. Proceedings to confirm or vacate an award may only be brought in a court of the state in which or under the law of which the award was made (the “state of origin”).<sup>34</sup> The purpose of a confirmation proceeding is to convert an arbitral award into a judgment of the confirming court, rendering it enforceable in the state of origin.<sup>35</sup> Conversely, the purpose of a proceeding to vacate (or “set aside”) an arbitral award is to render the award unenforceable in the state of origin.<sup>36</sup> The purpose of an enforcement proceeding is to enforce an arbitral award in a state other than the state of origin, presumably a state in which the award debtor has assets.<sup>37</sup>

---

<sup>34</sup> See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS* 465 (1994) (noting that “the [New York] Convention has been held by U.S. courts and other authorities to permit actions to vacate to be brought in either the arbitral situs or the country under whose laws the award was made” and referring to such a forum as the “country of origin”); BERMANN, *supra* note 24, at 405 (“The national courts of the arbitral situs have an important, and indeed exclusive, role to play in two types of procedure: the vacatur and confirmation of awards rendered locally.”).

<sup>35</sup> See *id.* (noting that “[m]ost jurisdictions—the U.S. among them—provide a procedure whereby an award rendered locally may be ‘confirmed.’ By confirmation is basically meant a reduction of the award to judgment, so that it has the same executory force and effect as a judgment of a local court.”); BORN, *supra* note 34, at 462 (“If an arbitral award is confirmed by a U.S. court, . . . the [Federal Arbitration Act] provides that it becomes a judgment of the confirming court. That judgment has the same effect as any other U.S. civil judgment and may be enforced as such.”).

<sup>36</sup> See BERMANN, *supra* note 24, at 406-407 (“If vacated, the award becomes unenforceable in the arbitral situs.”); BORN, *supra* note 34, at 463 (“If the action [to vacate] is successful, then the award is ‘vacated’ (or ‘annulled’); it ceases to have legal effect and cannot subsequently be confirmed or otherwise relied on in the forum.”).

<sup>37</sup> See MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 203-204 (2008) (“[T]he award creditor may seek recognition and enforcement of the award in a jurisdiction where assets of the . . . award debtor are located.” If the enforcement action is successful, “the award creditor may use whatever methods are normally used to collect the amount of the award, for example by seizing assets in accordance with legal procedures in the enforcing jurisdiction.”).

Under the New York Convention, there is a general presumption that each contracting state shall enforce “foreign” and “non-domestic” arbitral awards.<sup>38</sup> For purposes of the Convention, foreign awards are arbitral awards made in a foreign state.<sup>39</sup> However, the New York Convention leaves the definition of “non-domestic” up to the contracting states.<sup>40</sup> Under U.S. law, non-domestic awards are awards arising out of relationships entirely between U.S. citizens but which involve “property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”<sup>41</sup> In a proceeding to enforce a foreign or non-domestic award in U.S. courts, the award debtor may argue that the award should not be enforced for one of the reasons specified in the New York Convention.<sup>42</sup>

Post-award litigation brings courts into the arbitration process; but the consequences of judicial involvement are mixed.<sup>43</sup> On the one hand, post-award litigation can benefit transnational arbitration. At a macro level, post-award litigation gives courts an opportunity to monitor the integrity of the arbitration system. At a micro level, post-award litigation gives disputants an opportunity to seek judicial review—albeit a review of strictly limited scope—an opportunity

---

<sup>38</sup> See New York Convention art. III (“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.”).

<sup>39</sup> See New York Convention art. I(1) (“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . .”).

<sup>40</sup> See New York Convention art. I(1) (stating that the Convention “shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought”).

<sup>41</sup> 9 U.S.C. §202.

<sup>42</sup> The exceptions are set forth in articles V and VI of the New York Convention. “Thus, the losing party has two opportunities to challenge an award: first, in the court of the situs [in proceedings to vacate] and, second, in the court where the prevailing party is attempting to enforce the award against the assets of the losing party.” MOSES, *supra* note 37, at 194.

<sup>43</sup> Another important incidence of judicial involvement in the transnational arbitration process which this article does not address is litigation to enforce agreements to arbitrate.

that otherwise would be missing in most cases given the lack of an ordinary arbitral appellate process.<sup>44</sup> In these ways, judicial involvement can enhance the legitimacy and attractiveness of arbitration. On the other hand, excessive judicial involvement would be detrimental to the transnational arbitration system. Post-award litigation adds time and expense to the arbitration process, thus reducing its efficiency. Too much post-award litigation would undermine basic arbitral values such as finality of awards and ease of enforcement, thus reducing the attractiveness of arbitration as an alternative to litigation.<sup>45</sup> Perhaps more fundamentally, excessively high post-award litigation rates might indicate that the arbitration process has insufficient legitimacy to induce voluntary compliance and insufficient private mechanisms for enforcement of arbitral awards without recourse to the courts. Thus, an important challenge for the transnational arbitration system is to achieve adequate but not excessive levels of judicial involvement. So far, however, we know very little about post-award litigation rates. This Part provides some clues, using data on post-award litigation in the U.S. federal courts.

### B. *The Data*

The results of prior assessments of post-award litigation rates vary widely. On the one hand, the general sense among arbitration scholars seems to be that voluntary compliance rates are high and that post-award litigation is often unnecessary.<sup>46</sup> A 2007-2008

---

<sup>44</sup> See MOSES, *supra* note 37, at 4 (noting lack of a right of appeal).

<sup>45</sup> See *id.* at 3 (noting that “the likelihood of obtaining enforcement” is one of the two most significant advantages of arbitration and explaining that “[a]n arbitration award is generally easier to enforce internationally than a national court judgment because under the New York Convention, courts are required to enforce an award unless there are serious procedural irregularities, or problems that go to the integrity of the process”). See also BORN, *supra* note 13, at 6 (“it is generally (but not always) true that . . . arbitral awards are more easily and reliably enforced in foreign states than . . . foreign court judgments”).

<sup>46</sup> See, e.g., BORN, *supra* note 34, at 459-460 (“Most awards do not require either judicial enforcement or confirmation, because they are voluntarily complied with.”); BORN, *supra* note 13, at 115 (“Parties sometimes refuse to honor international arbitration awards against them, although anecdotal evidence suggests that this occurs less frequently than with foreign court judgments.”); MOSES, *supra* note 37, at 202 (“In many instances, a losing party will voluntarily comply with an arbitration award, so that enforcement proceedings will not be necessary.”).

survey of the experiences and attitudes of corporations toward transnational arbitration appears to provide some support for this view. The results indicate that only 19 percent of respondents had experienced an outcome in which an arbitral award was followed by enforcement proceedings or other post-award litigation.<sup>47</sup> On the other hand, a 2003 survey on the post-award experience of claimants in 205 transnational arbitration cases filed with the AAA between 1999 and 2002, reveals considerable levels of post-award judicial involvement. In 100 cases, the claimant prevailed and the award debtor eventually complied fully or partially with the award.<sup>48</sup> Of those 100 cases, there was judicial confirmation of the award in 68 cases and judicial enforcement in 12 cases.<sup>49</sup> Even then, full compliance was the result in only 74 of the 100 cases, while there was partial compliance in 4 cases and the parties renegotiated the award in 22 cases. Of the remaining 105 cases, the award debtor failed to comply in 35 cases; a court vacated the award in one case; 51 cases were still pending in a court action;

---

<sup>47</sup> School of International Arbitration, Queen Mary, University of London & PriceWaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices 2008*, at 6 (2008) (available at [http://www.pwc.co.uk/eng/publications/international\\_arbitration\\_2008.html](http://www.pwc.co.uk/eng/publications/international_arbitration_2008.html)). The survey also indicated that 49% of respondents had experienced an outcome in which an arbitral award was followed by voluntary compliance, 25% had experienced settlement without an arbitral award, and 7% had experienced settlement with an arbitral award by consent. The study summarizes these findings by stating that “81% of disputes are resolved without the intervention of a national court.” *Id.* However, the findings do not appear to support that statement because the relevant survey question (as described in the report) was not framed in terms of the percentage of disputes leading to different outcomes, but rather whether the organization has experienced such an outcome (“Has your organization experienced the following outcomes of arbitration?”). *Id.* Moreover, the survey does not appear to have asked respondents about the frequency of confirmation proceedings, which would be a significant omission, particularly in light of Naimark & Keer’s findings (based on parties in specific arbitration cases rather than general corporate experience and attitudes) that there was judicial confirmation in 68 of 100 cases in which the award debtor complied fully or partially.

<sup>48</sup> Richard W. Naimark & Stephanie E. Keer, *Post-Award Experience in International Commercial Arbitration*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 269, 271 (Christopher R. Drahozal & Richard W. Naimark eds. 2005).

<sup>49</sup> *Id.*

and the claimant lost in 18 cases.<sup>50</sup> Thus, there is considerable uncertainty about post-award litigation rates.

In an effort to reduce this uncertainty, this Part uses an original dataset based on a search of the Westlaw database for all U.S. federal court decisions since 1970 involving the confirmation or enforcement of arbitral awards covered by the New York Convention.<sup>51</sup> The dataset includes proceedings involving awards covered by the New York Convention and made in the United States (including confirmation proceedings and proceedings to vacate), and proceedings involving foreign awards (which technically are enforcement proceedings);<sup>52</sup> and it includes 145 U.S. District Court

---

<sup>50</sup> *Id.* As the authors note: “A total of 35 cases reported non-compliance with the award. Fifty-one cases were unresolved at the time of the survey and were pending in a court action of some type. Those 51 cases tended to be the most recently awarded matters and had not, therefore, sufficiently ‘ripened’ to demonstrate a final result. While we have no further data on the final outcomes of those 51 cases it seems likely that they will eventually show the same patterns of post-award results as the other 154 cases [i.e. compliance in 118 cases, non-compliance in 35 cases, award vacated in 1 case].” *Id.*

<sup>51</sup> 1970 is the year the United States implemented the New York Convention with the entry into effect of Chapter 2 of the Federal Arbitration Act. The enforcement decisions included in the dataset were identified in three steps. First, a Keycite search was performed on October 10, 2008 in Westlaw for “9 U.S.C. §207”, with “Document Type” limited to “Highest Court” and “Other Courts.” Section 207 is the provision of the Federal Arbitration Act (the “FAA”) that authorizes U.S. courts to hear enforcement proceedings and requires them to enforce an award “unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention.” This search resulted in 299 hits. Second, the following query was made in the Westlaw “All Cases” database: “(((“NEW YORK CONVENTION” /P ARBITRA!) (CONVENTION /S “FOREIGN ARBITRAL AWARD”)) & ((ART! /3 (V 5) /P CONVENTION)) % ((9 /2 (USC U.S.C.) /2 207) (9 /2 (USCA U.S.C.A.) /2 207) (“FEDERAL ARBITRATION ACT” FAA F.A.A.) /5 207))”. This query was aimed at identifying decisions involving arbitral awards covered by the New York Convention which refer to one or more of the exceptions to enforcement specified in Article V of the Convention, but which do not include references to Section 207 of the FAA. This search resulted in 93 hits. Third, the results from the two queries were combined and then screened to identify and discard duplicate decisions and decisions that were not in fact decisions to confirm (or not confirm) or enforce (or not enforce) arbitral awards covered by the New York Convention. Screening was performed by a law student research assistant in consultation with the author.

<sup>52</sup> See BERMANN, *supra* note 24, at 406 (“The term ‘confirmation’ in the US is not accurately used when applied to awards issued on the territory, or under the *lex*

decisions and 54 U.S. Court of Appeals decisions, for a total of 199 decisions.<sup>53</sup>

This empirical strategy avoids some of the shortcomings of survey studies, including reliance on impressions and attitudes of respondents and assumptions about the validity of the underlying survey instruments. The dataset used in this Part has its own limitations, however, two of which merit special attention. First, the data only indicate minimum post-award litigation rates, because they include only published decisions, and only some decisions are published. Nevertheless, using assumptions about publication rates, it is possible to make reasonable estimates about the range within which overall post-award litigation rates are likely to fall. Second, the data only indicate absolute post-award litigation rates. It is unclear whether changes in these rates would reflect different patterns of judicial involvement, or simply changes in underlying arbitration rates. After all, other things being equal, one would expect more arbitration to result in more post-award litigation.

### C. *Analysis*

Since 1970, approximately 45 U.S. Court of Appeals enforcement decisions involving arbitral awards covered by the New York Convention have been published in the *Federal Reporter*;<sup>54</sup> but the vast majority of U.S. Court of Appeals decisions are not published in

---

*arbitri*, of a foreign jurisdiction. Such awards require judicial ‘recognition’ and/or ‘enforcement.’”).

<sup>53</sup> It is likely that the dataset includes substantially all published enforcement or “confirmation” proceedings in the U.S. federal courts involving foreign arbitral awards covered by the New York Convention. However, the search might not have captured all decisions where the issue was strictly whether an enforcement decision should be “adjourned” under Article VI of the New York Convention pending the outcome of “an application for the setting aside or suspension of the award [that] has been made to a competent authority” of the country in which, or under the law of which, that award was made, because some of these decisions might refer to neither Section 207 of the FAA nor Article V of the Convention. Moreover, some decisions involving non-domestic awards made in the United States and covered by the New York Convention might not have been captured by the search queries, since such decisions might be resolved under Chapter 1 of the FAA without referencing Section 207 of the FAA or Article V of the Convention.

<sup>54</sup> The remaining 9 appellate court decisions were published in Westlaw but not in the *Federal Reporter*.

the *Federal Reporter*.<sup>55</sup> Therefore, the overall number of decisions is almost certainly greater than 45. The overall number of decisions can be estimated using data on publication rates in the U.S. Courts of Appeals. Until the 1970s, the courts of appeals published “a substantial majority” of their opinions in the *Federal Reporter*.<sup>56</sup> But, by the late 1970s, the publication rate had fallen to 50 percent and, by the late 1980s, the rate had fallen to 33 percent.<sup>57</sup> According to the Administrative Office of the U.S. Courts, the publication rate had fallen to 16.5 percent in 2007.<sup>58</sup> As an example, given 4 decisions published in the *Federal Reporter* in the 1980s and a 33 percent publication rate, the estimated total number of decisions for that decade would be 12.<sup>59</sup>

---

<sup>55</sup> Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 72 (2001) (noting that nearly 80% of all U.S. appellate court dispositions on the merits are unpublished).

<sup>56</sup> *Id.* at 75.

<sup>57</sup> *Id.*

<sup>58</sup> JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR tbl. S-3 (2008), available at <http://www.uscourts.gov/judbususc/judbus.html>. See also Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 126 (2002) (“The publication rate for even the heavily published decisions of the federal courts of appeals has dipped from almost 50% in 1976 to just over 20% in 2000.”).

<sup>59</sup> This figure is calculated as follows: Total Decisions\*Publication Rate=Total Published Decisions; Total Decisions=Total Published Decisions/Publication Rate; so for the 1980s, Total Published Decisions=4/.33=12.

Table 2. Published and Estimated Total Enforcement Decisions (U.S. Courts of Appeals)

Circuit	1970s			1980s			1990s			2000-2008			Overall Est. Total
	Total Published	Pub. Rate	Est. Total	Total Published	Pub. Rate	Est. Total	Total Published	Pub. Rate	Est. Total	Total Published	Pub. Rate	Est. Total	
DC	0	.50	0	0	.33	0	0	.39	0	2	.42	5	
1	0	.50	0	0	.33	0	1	.52	2	1	.47	2	
2	2	.50	4	3	.33	9	7	.29	24	7	.2	35	
3	0	.50	0	0	.33	0	0	.17	0	2	.14	14	
4	0	.50	0	0	.33	0	0	.1	0	1	.08	13	
5	1	.50	2	0	.33	0	2	.24	8	2	.12	17	
6	0	.50	0	0	.33	0	1	.19	5	1	.17	6	
7	0	.50	0	0	.33	0	2	.47	4	3	.42	7	
8	0	.50	0	0	.33	0	0	.42	0	0	.37	0	
9	0	.50	0	1	.33	3	1	.17	6	2	.13	15	
10	0	.50	0	0	.33	0	0	.26	0	0	.25	0	
11	0	.50	0	0	.33	0	1	.15	7	2	.11	18	
Total	3		6	4		12	15		56	23		132	

Notes: This table estimates the total number of U.S. Court of Appeals enforcement decisions involving arbitral awards covered by the New York Convention for the circuits indicated in the rows and the decades indicated in the columns. The estimated total numbers of decisions (presented in the "Est. Total" columns) were calculated using the total number of decisions published in the *Federal Reporter* (indicated in the "Total Published" columns) and the assumed publication rates (indicated in the "Pub. Rate" columns).



Using this method, Table 2 estimates that there have been 206 U.S. Court of Appeals enforcement decisions involving arbitral awards covered by the New York Convention.<sup>60</sup> To show the basis for calculating these estimates, Table 2 also presents the number of decisions published in the *Federal Reporter*, estimated publication rates for the 1970s and 1980s,<sup>61</sup> and circuit-by-circuit publication rates for the 1990s and 2000s.<sup>62</sup>

---

<sup>60</sup> To the extent U.S. federal court decisions regarding confirmation or enforcement of arbitral awards covered by the New York Convention are published at a lower rate than U.S. appellate court decisions overall, this analysis may underestimate post-award litigation (or vice versa). This former possibility is a particularly significant risk. Prior studies on federal court publication rates suggest that decisions are more likely to be published in cases that are complex and novel. See C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 120 (1996) (“the greater the complexity and/or novelty of the case, the greater the likelihood that it would be offered for publication by the judges”); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 *LAW & SOC’Y REV.* 1133, 1150 (1990) (“As we predicted . . . , the cases with published decisions tend to be more complex as evidenced by a number of different factors,” including the thickness of the case file, the number of plaintiffs, factual complexity, the amount in controversy.). But post-award confirmation and enforcement proceedings are generally understood as being simple and straightforward. See, e.g., Susan Wiens & Roger Haydock, *Confirming Arbitration Awards: Taking the Mystery out of a Summary Proceeding*, 33 *WM. MITCHELL L. REV.* 1293, 1294 (“[W]hen parties seek confirmation, they do not relinquish the efficiency they gained through arbitration because the confirmation process is as simple and straightforward as the arbitration itself and, of course, much simpler than litigation.”); *Hewlett-Packard, Inc. v. Berg*, 867 F. Supp. 1126, 1130-1131 (D. Mass. 1994) (“[enforcement proceedings] are meant to be summary in nature. . . . The decisions of the [arbitral] panel cannot be reviewed for errors in law or fact.”). Therefore, a reasonable approach would be to treat these estimates as estimates of the minimum number of relevant decisions.

<sup>61</sup> The publication rate estimates for the 1970s and 1980s are from Merritt & Brudney, *supra* note 55, at 75.

<sup>62</sup> The publication rates for the 1990s and 2000s are based on Table S-3 of the annual statistical reports of the Administrative Office of the U.S. Courts, available at <http://www.uscourts.gov/judbususc/judbus.html>. Table S-3 tracks year-by-year the percent of published and unpublished U.S. Courts of Appeals opinions or orders filed in cases terminated on the merits after oral hearings or submissions on briefs. Because circuit-by-circuit data is not available for 1990-1996, the publication rates for the 1990s were calculated using the average rates for 1997-1999; and because 2008 data is not yet available, the publication rates for 2000-2008 were calculated using the average rates for 2000-2007.

Turning to the district courts, since 1970, approximately 63 U.S. District Court enforcement decisions involving arbitral awards covered by the New York Convention have been published in the *Federal Supplement* and approximately 145 have been published in the Westlaw database.<sup>63</sup> However, like appellate court decisions, only a small portion of district court decisions are published. It is therefore again necessary to use data on publication rates to estimate the total number of district court decisions.

According to Rowland and Carp, “less than 5 percent of all district court opinions ever appear in print.”<sup>64</sup> In a study of the Minnesota federal district court between 1982 and 1984, Olson found that the overall Lexis publication rate was 5.3 percent for civil cases, and 2.9 percent for contract cases in particular.<sup>65</sup> Levin defines publication as “available on Westlaw or Lexis” and concludes that “[e]ven using this broad definition, only between 5% and 20% of substantive opinions are published, and virtually no procedural orders are.”<sup>66</sup> Swenson notes that “[f]ederal district court judges release fewer than 20 percent of their written opinions for publication” in Westlaw or Lexis.<sup>67</sup> In another study, Siegelman and Donohue found that, in seven districts between 1973 and 1987, Lexis publication rates averaged 8.1 percent.<sup>68</sup> The same study suggested that publication rates may be increasing.<sup>69</sup> However, Clermont and Eisenberg state

---

<sup>63</sup> The number of decisions in the Westlaw database include the decisions published in the *Federal Supplement*.

<sup>64</sup> ROWLAND & CARP, *supra* note 60, at 16. It is unclear whether their reference to “in print” refers to the *Federal Supplement* only or includes decisions published in electronic databases.

<sup>65</sup> Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 788-790 (1992). Because most transnational arbitration is based on arbitration clauses in transnational contracts, it is likely that many, if not most, district court decisions regarding confirmation or enforcement of transnational arbitral awards would be included in the contract case category.

<sup>66</sup> Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. \_\_\_, 13 (forthcoming 2008) (available at <http://ssrn.com/abstract=1006101>).

<sup>67</sup> Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 122 (2004).

<sup>68</sup> Siegelman & Donohue, *supra* note 60, at 1143 tbl. 1.

<sup>69</sup> *Id.* at 1140 (defining the publication rate as the percentage of cases appearing in LEXIS, and noting an increase in the publication rate for employment discrimination cases in the Northern District of Illinois between 1974-1986).

that “[m]ost district court opinions and decisions . . . still do not appear in print or in Westlaw.”<sup>70</sup> In summary, it appears that publication rates since the 1970s have ranged from approximately 3 percent to 20 percent, with *Federal Supplement* publication rates presumably lower—perhaps much lower—than Westlaw publication rates since Westlaw includes not only all decisions published in the *Federal Supplement* but also decisions that are not published in the *Federal Supplement*.<sup>71</sup>

Table 3 shows that estimates of the total number of decisions could range from 630 to 2,900, depending on two factors: (1) whether the estimate is based on the number of decisions published in Westlaw or the number of decisions published in the *Federal Supplement* and (2) the assumed publication rate.<sup>72</sup> The table indicates the number of decisions published in each source by decade (for

---

<sup>70</sup> Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1559, n. 10 (2008). In another study, Lizotte analyzed publication rates in 8 districts for grants of summary judgment motions in 2000, and found that 12% were published in either the *Federal Supplement* or *Federal Rules Decisions* and 40% were available in Westlaw or Lexis. Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 124-125, 130 (2007). However, because publication rates vary by case type, it is unclear whether these figures represent publication rates in general. See, e.g., Siegelman & Donohue, *supra* note 60, at 1143 tbl. 1 (in the districts and period covered by the study, the publication rate in employment discrimination cases was 21.7%, whereas the rate in civil cases overall was 8.1%). One possible reason for higher publication rates for certain types of cases is that those cases are on average more complex and novel. See *id.* at 1150 (“As we predicted . . . , the cases with published decisions tend to be more complex as evidenced by a number of different factors,” including the thickness of the case file, the number of plaintiffs, factual complexity, the amount in controversy.).

<sup>71</sup> As Lizotte explains, Lexis and Westlaw generally publish most of the decisions received from the district courts, regardless of whether they are published in the *Federal Supplement*. Lizotte, *supra* note 70, at 132-133. As illustrated by his data on summary judgment grants, this can result in very large differences between *Federal Supplement* publication rates (12% in his study) and Lexis/Westlaw publication rates (40% in his study).

<sup>72</sup> Because the existing studies suggest that Westlaw publication rates are at least 5%, and do not indicate that *Federal Supplement* publication rates are as high as 20%, the cells in Table 3 that correspond to these combinations of factors are left empty. If included, the high-end estimate would increase to 4,833 decisions (3%, 145 decisions published in Westlaw) and the low-end estimate would decrease to 315 decisions (20%, 63 decisions published in *Federal Supplement*).

example, N=51 under Westlaw for the 1990s indicates that there were 51 relevant decisions published in Westlaw during that period). The assumed publication rates are indicated in the publication rate (“Pub. Rate”) column.<sup>73</sup>

**Table 3. Published and Estimated Total Enforcement Decisions (U.S. District Courts)**

Pub. Rate	1970s		1980s		1990s		2000-2008		Total	
	Westlaw	F.Supp.	Westlaw	F.Supp.	Westlaw	F.Supp.	Westlaw	F.Supp.	Westlaw	F.Supp.
	N=7	N=6	N=18	N=12	N=51	N=18	N=69	N=27	N=145	N=63
3%	N/A	200	N/A	400	N/A	600	N/A	900	N/A	2100
5%	140	120	360	240	1020	360	1380	540	2900	1260
10%	70	60	180	120	510	180	690	270	1450	630
20%	35	N/A	90	N/A	255	N/A	345	N/A	725	N/A

Notes: This table estimates the total number of U.S. District Court enforcement decisions involving arbitral awards covered by the New York Convention in the decades indicated in the columns. The number of decisions published in Westlaw and the *Federal Supplement* are indicated in the “Westlaw” and “F.Supp.” columns for each decade. The assumed publication rates are indicated in the “Pub. Rate” column. The resulting estimates of the total number of decisions are presented in the rows across from the assumed publication rates. For each decade, estimates are calculated based on both the number of decisions published in Westlaw and the number of decisions published in the *Federal Supplement*.

To help determine which Table 3 estimates are most plausible, they were compared to an estimate based on an analysis of appeal rates and the number of appellate court decisions. Only a small percentage of district court decisions are appealed. Therefore, to generate 206 U.S. Court of Appeals enforcement decisions involving arbitral awards covered by the New York Convention, there must be a substantially larger number of underlying district court decisions. Prior studies indicate that the rate at which district court judgments entered without trial are appealed and the appeal results in a decision on the merits is approximately 10 percent.<sup>74</sup> In my post-award litigation dataset,

<sup>73</sup> As with appellate court decisions, to the extent U.S. federal court decisions regarding confirmation or enforcement of arbitral awards covered by the New York Convention are published at a lower rate than U.S. federal court decisions overall, this analysis would underestimate post-award litigation (or vice versa). As discussed above, if courts are more likely to publish complex and novel cases, and arbitral award enforcement cases are generally understood as simple and routine, a reasonable approach would be to interpret estimates based on publication rates to be estimates of the minimum number of relevant decisions. *See supra* note 70.

<sup>74</sup> *See* Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMP. LEG. STUD. 659, 664 tbl. 1 (2004) (10.2% of district court judgments without trial are appealed and result in the appeals court entering an order affirming or reversing the district court from 1987-1995). The rate for contract cases in particular (which likely include a substantial number of arbitration cases) also appears to be around 10%. *Id.* at 674 fig. 5.

approximately 15 percent of district court enforcement decisions were appealed.<sup>75</sup> Based on an appellate rate of between 10 and 15 percent and an estimated 206 U.S. Court of Appeals enforcement decisions, there would be an estimated 1,373 to 2,060 U.S. District Court enforcement decisions involving arbitral awards covered by the New York Convention.<sup>76</sup> This supplemental analysis suggests that the actual number of district court decisions is likely in the middle range of the estimates presented in Table 3. Combining the two analyses, a reasonable estimate of the actual number of U.S. District Court decisions regarding the confirmation or enforcement of arbitral awards covered by the New York Convention since 1970 is between roughly 1,200 and 2,100.

Table 3 also shows that post-award litigation appears to be increasing over time. The estimated number of U.S. Court of Appeals enforcement decisions involving arbitral awards covered by the New York Convention doubled from the 1970s to the 1980s; increased almost five-fold from the 1980s to the 1990s; and has already doubled from the 1990s to the still-not-completed 2000s. The number of U.S. District Court enforcement decisions involving arbitral awards covered by the New York Convention appears to have doubled from the 1970s to the 1980s, roughly doubled again from the 1980s to the 1990s, and increased by at least one-third to one-half from the 1990s to the still-not-completed 2000s. However, without a better understanding of changes in district court publication rates over time, the extent of the upward trend in the district courts is uncertain. To the extent publication rates have increased over time, Table 3 would overstate the increase in total decisions, and to the extent publication rates have decreased over time, Table 3 would understate the upward trend.

Together with the evidence presented in Part II, this Part's evidence suggests that a significant portion of the increase in post-award litigation rates may be due to increases in transnational arbitration rather than increased per-arbitration rates of judicial involvement. As discussed in Part II, institutional arbitration rates

---

<sup>75</sup> 21 of 145 U.S. district court enforcement decisions in my dataset were appealed. An additional 3 decisions were appealed on issues other than the enforcement decision.

<sup>76</sup> This estimate is calculated as follows: District Court Decisions\*Appeal Rate=Appeals; District Court Decisions=Appeals/Appeal Rate; District Court Decisions=206/.10=2,060 (assuming a 10% enforcement rate) or 206/.15=1,373 (using a 15% enforcement rate).

have increased steadily. Transnational arbitration cases under the auspices of the AAA have doubled from the 1990s to 2000-2008. In the same period, ICC arbitrations have increased by approximately 20 percent and arbitrations in the major arbitral institutions overall have increased by approximately 40 percent.<sup>77</sup> Meanwhile, U.S. District Court enforcement decisions involving arbitral awards covered by the New York Convention increased by approximately 35 to 50 percent,<sup>78</sup> and U.S. Court of Appeals decisions appear to have more than doubled.<sup>79</sup> The implication is that some, but not all, of the increase in post-award litigation rates in the U.S. federal courts can probably be explained by parallel increases in transnational arbitration rates.<sup>80</sup>

---

<sup>77</sup> See HONG KONG INTERNATIONAL ARBITRATION CENTRE, *supra* note 25 (providing filing rates in the major international arbitral tribunals). Because data are unavailable for 1990 and 1991, I assumed 200, 330 and 1,100 (the approximate numbers for 1992) arbitrations in the AAA, ICC and the major arbitral institutions overall, respectively, for those years. Because data are not yet available for 2008, and because the court decisions included in my dataset include only a portion of 2008, I used 50% of the 2007 figures to estimate arbitrations through the middle of 2008.

<sup>78</sup> See *supra* Table 3. Using decisions published in Westlaw, there was a 35% increase (from 51 in the 1990s to 69 in the 2000-2008 period), and using decisions published in the *Federal Supplement*, there was a 50% increase (from 18 in the 1990s to 27 in the 2000-2008 period).

<sup>79</sup> See *supra* Table 2 (the increase was from an estimated 56 total decisions in the 1990s to an estimated 132 decisions in the period 2000-2008). The increase in the number of decisions published in the *Federal Reporter* was from 15 in the 1990s to 23 in the period 2000-2008, representing a roughly 50% increase; but due to differing publication rates across circuits, this figure may not be as reliable as the figure based on the estimated total decisions.

<sup>80</sup> A comparison of arbitration rates and post-award litigation rates in two five-year periods yields similar results. Comparing the five-year period between 1995 and 1999 and the five-year period between 2000 and 2004, the number of cases filed in the major arbitral institutions increased by 26%; the number of U.S. Court of Appeals enforcement decisions involving awards covered by the New York Convention and published in the *Federal Reporter* increased by 27%; the estimated overall number of such Court of Appeals decisions increased by 95%; the number of U.S. District Court enforcement decisions involving awards covered by the New York Convention published in the *Federal Supplement* increased by 70%; and the number of such District Court decisions published in Westlaw increased by 23%. All of these comparisons are consistent with the proposition that part of the increase in post-award litigation is due to increases in transnational arbitration; but the higher estimates of post-award litigation increases suggest that there are also other reasons for the increase.

Overall, these findings indicate that there is a considerable amount of post-award litigation involving arbitral awards covered by the New York Convention. Whether there is too much post-award litigation is more difficult to determine, particularly in the absence of data on the underlying number of foreign and non-domestic arbitral awards. Assuming that at least some transnational arbitration is bound to result in post-award litigation, high post-award litigation rates may simply reflect high arbitration rates. Nevertheless, the findings suggest that disputants often seek judicial involvement in the transnational arbitration process, and that courts therefore often have an opportunity to monitor the integrity of the arbitration system. At the same time, the findings do not suggest that there is necessarily excessive judicial involvement.<sup>81</sup> The findings also suggest that post-award litigation may be increasing. These trends might be interpreted as reflecting decreasing levels of legitimacy and private enforcement capacity of the transnational arbitration system, but they may also reflect increased opportunities for judicial monitoring which could work to enhance the system's legitimacy and increase the attractiveness of arbitration as a method of transnational dispute resolution.

#### IV. ENFORCEMENT RATES IN THE U.S. FEDERAL COURTS

Part III suggests that an important dimension of the arbitration-litigation relationship in transnational dispute resolution is the role of domestic courts in post-award litigation. But does this judicial involvement tend to support or undermine transnational arbitration? On the one hand, domestic courts can provide support by creating opportunities for judicial monitoring of system integrity and disputant access to judicial review, which in turn might enhance the legitimacy of the transnational arbitration system. On the other hand, excessive

---

<sup>81</sup> One point of reference is transnational arbitration under the auspices of the AAA. Between 1990 and 2008, there were an estimated 7,753 transnational arbitration cases in the AAA and 1,500 U.S. District Court enforcement decisions involving arbitral awards covered by the New York Convention—roughly one post-award enforcement action for every five transnational arbitration cases in the AAA. Of course, not every district court decision involves a AAA arbitral award (in my dataset, approximately 10% of decisions in which an arbitral institution was identified involved an award made pursuant to a AAA arbitration), and not all AAA arbitrations that result in post-award litigation result in litigation in U.S. courts (however, the Naimark and Keer study discussed above suggests that AAA arbitrations frequently result in post-award litigation, *see supra* notes 48-50 and accompanying text). If post-award litigation rates were truly excessive, however, one might expect this ratio to be higher.

judicial involvement would risk undermining the system by increasing dispute resolution time and expenses, and possibly by reducing the flexibility and privacy of arbitration as a dispute resolution process. Beyond these basic tradeoffs, however, the consequences of judicial involvement ultimately depend on the willingness of courts to confirm and enforce arbitral awards.<sup>82</sup> As a step toward understanding these consequences, this Part examines judicial enforcement rates for arbitral awards covered by the New York Convention.

A. *Enforcement of Arbitral Awards Under the New York Convention*

A major goal of transnational arbitration is the finality of arbitral awards.<sup>83</sup> Consistent with this goal, a basic premise of the system is the supposed pro-enforcement bias of the New York Convention.<sup>84</sup> Article III of the Convention states the general rule that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the [Convention].” Article V spells out a series of exceptions to this general rule:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
  - (a) The parties to the agreement [to arbitrate] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

---

<sup>82</sup> Hereinafter, I will refer to confirmation and enforcement as “enforcement.” *But see supra* notes 34-37 and accompanying text (explaining the technical differences between confirmation and enforcement).

<sup>83</sup> *See* MOSES, *supra* note 37, at 193 (“One of the touted advantages of an arbitration is finality of the award . . .”).

<sup>84</sup> *See, e.g.,* BORN, *supra* note 13, at 10 (noting that the New York Convention helps create a “‘pro-enforcement’ regime, with only limited grounds for denying recognition to an arbitral award”); MOSES, *supra* note 37, at 3 (“The New York Convention is considered to have a pro-enforcement bias . . .”).



- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
  - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Moreover, according to Article VI, “[i]f an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.”

By enforcing arbitral awards, domestic courts can promote finality in two ways.<sup>85</sup> First, from a disputant-oriented perspective, they do so by enforcing awards for particular award creditors against particular award debtors in particular disputes. Second, from a broader governance-oriented perspective, domestic courts can promote finality by enforcing arbitral awards at a high rate in their published enforcement decisions. By doing so, they not only enforce specific awards, but they also send a signal to transnational actors in general that award debtors are unlikely to prevail in efforts to avoid enforcement, thus reducing the likelihood that award debtors will challenge arbitral awards in court in the first place.<sup>86</sup> In contrast, if judicial enforcement rates are too low, domestic courts can undermine finality not only in particular cases, but also—to the extent enforcement decisions are published—by increasing the expectations of transnational actors in general that domestic courts are likely to decline enforcement of arbitral awards, which in turn may increase post-award litigation and thus possibly reduce the attractiveness of arbitration as a method of dispute resolution.

Enforcement in individual cases is obviously important, but enforcement rates in published decisions are likely to have

---

<sup>85</sup> In theory, enforcement of arbitral awards might not have to depend on courts. For example, some scholars argue that purely private enforcement may be possible based on reputational sanctions. *See generally* Benson, *supra* note 3, at 95; Stone Sweet, *Transnational Governance*, *supra* note 3, at 325. However, reputational sanctions are likely to be effective in only a narrow set of circumstances. *See* Whytock, *supra* note 2, at 467-468 (explaining the conditions necessary for effective reputational enforcement).

<sup>86</sup> *See* Christian Bühring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 25, 37 (Christopher R. Drahozal & Richard W. Naimark eds. 2005) (“Although there are no data available on *why* parties comply voluntarily, it is plausible to assume that an effective enforcement mechanism operates as a strong motivation.”); Whytock, *supra* note 2, at 470 (“[T]ransnational arbitration to an important extent still relies on domestic courts for enforcement. 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. 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.”). For a more general discussion of the governance-oriented perspective, see Whytock, *supra* note 8, pt. III.

disproportionately strong systemic effects on transnational arbitration by affecting the likelihood of compliance without any judicial involvement at all. If the proposition that most disputes are settled in the “shadow of the law” rather than in court applies to disputes over arbitral awards,<sup>87</sup> then the aggregate impact of published decisions on the transnational arbitration system is probably greater than that of unpublished decisions, even if the latter are more numerous. Furthermore, because transnational actors generally have access to published but not unpublished decisions,<sup>88</sup> the former will influence perceptions of transnational arbitration whether or not they are representative of the latter. Other things being equal, judicial involvement should tend to support the transnational arbitration system if enforcement rates are sufficiently high, but risk undermining the system if these rates are too low—particularly in published decisions.

#### B. *The Data*

Existing scholarship generally suggests that enforcement rates are high. As Born argues, “[i]n the vast majority of reported decisions under Article V of the [New York] Convention, courts have enforced foreign arbitral awards. . . . Although there are instances where international arbitral awards have been denied enforcement, these cases are the exception rather than the rule.”<sup>89</sup> In addition, in a multi-

---

<sup>87</sup> See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950-51, 968 (1979); see also Martin Shapiro, *Courts*, in HANDBOOK OF POLITICAL SCIENCE: GOVERNMENTAL INSTITUTIONS AND PROCESSES 321, 329 (Fred I. Greenstein & Nelson W. Polsby eds., 1975) (“[L]egalized bargaining [or negotiation] under the shadow supervision of an available court . . . is not purely mediatory, because the bargain struck will depend in part on the ‘legal’ strength of the parties, that is, predictions of how each would fare in court.”). For an application of the “shadow of the law” concept to transnational activity, including transnational arbitration, see Whytock, *supra* note 8, pt. II.

<sup>88</sup> See Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 SO. CAL. INTERDISC. L.J. 67, 96-97 (2004) (noting that an unpublished decision “is, more or less, a letter from the court to the parties familiar with the facts . . . [which] is not written in a way that will be fully intelligible to those unfamiliar with the case”) (citing *Hart v. Massanari*, 266 F.3d 1155, 1176, 1178 (9th Cir. 2001)); Levin, *supra* note 66, at 11 (“[U]npublished district court opinions are not meaningfully available for review and study by anyone.”).

<sup>89</sup> BORN, *supra* note 13, at 115. See also MOSES, *supra* note 37, at 3 (arguing that “[m]ost courts will interpret the permissible grounds for non-enforcement quite narrowly, leading to the enforcement of the vast majority of awards”).

country review of court decisions reported in the Yearbook Commercial Arbitration between 1976 and 2007, van den Berg concludes that worldwide enforcement rates are approximately 90 percent.<sup>90</sup> On the other hand, in a survey of general corporate counsel conducted in 2007 and 2008, only 44 percent of respondents reported that efforts to enforce arbitral awards usually resulted in full recovery of arbitral awards.<sup>91</sup>

To shed additional light on enforcement rates in the U.S. federal courts, each decision in the dataset described in Part III was coded based on whether it was a decision to enforce the arbitral award in full or not.<sup>92</sup> If the decision was to enforce in full, the decision was coded as “yes;” otherwise, the decision was coded as “no.” The rationale for this coding rule is that U.S. courts fail to further the goal of finality of arbitral awards not only when they definitively decide that an award should not be enforced at all, but also when they enforce an award only in part, or when they decline to make a definitive ruling on enforcement pending further district court proceedings or parallel proceedings in a foreign court.<sup>93</sup>

---

<sup>90</sup> See Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18 ICC INT’L COURT OF ARB. BULL. 1, 35 (2007) (available at [http://www.arbitration-icca.org/media/0/12125877992500/2007\\_icc\\_bulletin\\_aj\\_van\\_den\\_berg\\_denials\\_of\\_enforcement.pdf](http://www.arbitration-icca.org/media/0/12125877992500/2007_icc_bulletin_aj_van_den_berg_denials_of_enforcement.pdf)) (finding that out of approximately 700 enforcement decisions by domestic courts, only 10 percent refused enforcement). The Yearbook does not report all enforcement decisions. *Id.* at 1. Therefore, it is unclear whether the enforcement rate in decisions reported in the Yearbook is similar to, greater than, or less than in enforcement decisions overall.

<sup>91</sup> PRICEWATERHOUSECOOPERS, *supra* note 47, at 12. Forty percent reported that they usually recovered at least 75% of the award. *Id.* The survey results do not indicate the extent to which less-than-full recovery is a result of less-than-full judicial enforcement, but survey-related interviews suggest that lack of assets on the part of the award debtor is the main reason. *Id.* The survey was based on online questionnaires completed by 82 respondents in 2007 and 2008, and 47 interviews conducted in 2008. *Id.* at 18-19.

<sup>92</sup> Coding of enforcement decisions was performed by law student research assistants and verified by the author. A preliminary analysis suggests that enforcement rates may be substantially higher for awards made in the United States (an estimated 88% for such awards compared to 68% for non-U.S. awards). This hints at the possibility that arbitral awards made in the United States may fare better in U.S. courts than those made outside the United States. Moreover, if, as suggested above, awards made in the United States are underrepresented in the dataset, the dataset might underestimate overall enforcement rates.

<sup>93</sup> An alternative coding scheme might focus not so much on the extent to which courts promote the goal of finality, but rather on final decisions themselves. Such

Applying this coding rule, decisions coded as “yes” include not only district court decisions enforcing an arbitral award in full, but also appellate court decisions affirming such district court decisions, and appellate court decisions reversing district court decisions not to enforce and remanding them with instructions to enforce. District court decisions coded as “no” include decisions not to enforce at all, decisions to enforce only partially, and decisions under Article VI of the New York Convention to stay enforcement proceedings pending the outcome of parallel foreign proceedings to vacate or set aside an award.<sup>94</sup> Appellate court decisions coded as “no” include decisions affirming such district court decisions, and appellate court decisions reversing district court decisions (except reversals accompanied by instructions to enforce).<sup>95</sup>

It is important to reemphasize that the dataset includes only published U.S. federal court decisions—that is, decisions appearing in the *Federal Reporter*, the *Federal Supplement*, or the Westlaw database. The analysis can therefore directly reveal enforcement rates in published decisions. Because these decisions are likely to have a disproportionately important impact on the transnational arbitration system, they merit special attention.<sup>96</sup> But because published decisions are not necessarily representative of unpublished decisions, this Part’s analysis can only provide clues about overall enforcement rates.

---

a coding scheme would separately count partial enforcements, and exclude decisions to stay because such decisions are not final. Results using this alternative final decisions coding scheme are reported in the text below for comparison purposes.

<sup>94</sup> As a result, one appellate court decision and five district court decisions resulting in partial but not full enforcement were coded as “no.” In addition, two appellate court decisions and seven district court decisions resulting in a stay of proceedings pending the outcome of parallel foreign vacatur proceedings were coded as “no” because they were not decisions to enforce.

<sup>95</sup> As a result, appellate court decisions coded as “no” include not only five decisions reversing and remanding district court decisions to enforce, but also one decision reversing and remanding a decision not to enforce (without instructions to enforce), and one two-part decision which affirmed a district court decision to enforce and reversed and remanded a district court decision not to enforce (without instructions to enforce).

<sup>96</sup> See *supra* notes 87-88 and accompanying text.

### C. Analysis

The results are presented in Table 4. The full enforcement rate in published U.S. federal court decisions involving awards covered by the New York Convention is 73.9 percent. In the U.S. District Courts, the rate is 77.2 percent, and in the U.S. Courts of Appeals, the rate is 64.8 percent. In 3.0 percent of decisions (3.5 percent in the U.S. District Courts, 1.9 percent in the U.S. Courts of Appeals), the court either partially enforced an award or stayed enforcement proceedings. In the remaining 23.1 percent of decisions (19.3 percent in the U.S. District Courts, 33.3 percent in the U.S. Courts of Appeals), the court decided that the award should not be enforced.

**Table 4. Enforcement Rates (U.S. District Courts and U.S. Courts of Appeals)**

Award Fully Enforced?	Court Type		Total
	District Court	Appellate Court	
Yes	112 (77.2%)	35 (64.8%)	147 (73.9%)
No	33 (22.8%)	19 (35.2%)	52 (26.1%)
Total	145 (100.0%)	54 (100.0%)	199 (100.0%)

Notes: This table presents the rates at which U.S. federal courts fully enforce arbitral awards covered by the New York Convention in published decisions between 1970 and 2008.

On the one hand, these results confirm that, at least in published decisions, U.S. federal courts enforce arbitral awards covered by the New York Convention more often than not. On the other hand, the enforcement rates might be unexpectedly low in light of the general sense that domestic courts enforce a vast majority of arbitral awards.<sup>97</sup> One might question whether these enforcement rates are sufficiently high from the perspective of finality and the New York Convention's supposed pro-enforcement bias, and whether they truly signal to transnational actors that judicial challenges to arbitral awards will

<sup>97</sup> This finding challenges the author's assumption in earlier work that courts primarily play a facilitating role in transnational arbitration, and have largely abdicated their supervisory role. *See* Whytock, *supra* note 2, at 469 ("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.").

rarely be successful. If, based on published decisions, award debtors perceive that in roughly 25 percent of cases they will be able to avoid or delay full enforcement, it would not be surprising to find a significant amount of post-award litigation. Moreover, these results may indicate that the U.S. federal courts are lagging behind the rest of the world: The enforcement rates are significantly lower than van den Berg's 90 percent multi-country finding, which also was based on analysis of published decisions.<sup>98</sup>

As Table 5 indicates, full enforcement rates in published U.S. federal court decisions increased from approximately 72 percent in the 1970s-1980s period to approximately 83 percent in the 1990s, and then dropped to approximately 68 percent in the 2000s.<sup>99</sup> Enforcement in published decisions was more likely in the 1990s and less likely in the 2000s compared to the other periods.<sup>100</sup> Much of this movement is due to changes in district court enforcement rates. After increasing from 64 percent in the 1970s-1980s period to approximately 90 percent in the 1990s, the district court enforcement rate dropped to 73 percent in the 2000-2008 period.<sup>101</sup> Meanwhile, the appellate court enforcement rate has remained roughly level since the 1990s.

---

<sup>98</sup> See van den Berg, *supra* note 90 at 35.

<sup>99</sup> Pearson chi-squared tests indicate that the difference between the 1990s and the 2000s is statistically significant at traditionally accepted levels of confidence ( $p=.030$ ), but not the difference between the 1970s-1980s period and the 1990s ( $p=.187$ ).

<sup>100</sup> A bivariate logit test with enforcement as the dependent variable and a dummy variable for the 1990s as the independent variable results in a positive coefficient ( $p=.035$ ), and a substantive estimate that enforcement was 14.2% more likely in the 1990s than the other periods (with a 95% confidence interval of 2.2% to 26.1%). Much of this difference appears to be driven by district court enforcement decisions: when the same logit test is restricted to the district courts, the result is again a positive coefficient ( $p=.009$ ), with the estimated substantive effect now 20% (and a 95% confidence interval of 7.7% to 32.3%). The same test (with both the district and appellate courts) using a dummy variable for the 2000s as the independent variable results in a negative coefficient ( $p=.072$ ), and estimates that enforcement was 11.3% less likely in the 2000s than in the other periods (with a 95% confidence interval of -23.4% to .008%)—results which are not quite statistically significant at a 95% level of confidence.

<sup>101</sup> Pearson chi-squared tests indicate that these differences are statistically significant ( $p=.006$  for the difference between the 1970s-1980s period and the 1990s, and  $p=.016$  for the difference between the 1990s and 2000s).

**Table 5. Enforcement Rates over Time (U.S. District Courts and U.S. Courts of Appeals)**

Type of Court	1970s-1980s	1990s	2000-2008	Total
U.S. District Courts	16/25 (64.0%)	46/51 (90.2%)	50/69 (72.5%)	112/145 (77.2%)
U.S. Courts of Appeals	7/7 (100.0%)	9/15 (60.0%)	19/32 (59.4%)	35/54 (64.8%)
Total	23/32 (71.9%)	55/66 (83.3%)	69/101 (68.3%)	147/199 (73.9%)

Notes: This table compares the rate at which U.S. federal courts fully enforced arbitral awards covered by the New York Convention in published decisions over three periods: the 1970s-1980s, the 1990s, and the 2000-2008 period.

Award debtors invoked almost all of the New York Convention's exceptions to enforcement with some frequency, including Article V(1)(a) (incapacity of a party or invalidity of the arbitration agreement),<sup>102</sup> Article V(1)(b) (lack of proper notice or inability of a party to present its case),<sup>103</sup> Article V(1)(c) (award beyond scope of the submission to arbitration),<sup>104</sup> Article V(1)(e) (award set aside or not yet binding),<sup>105</sup> Article V(2)(b) (award contrary to public policy),<sup>106</sup> and Article VI (pending action to set aside in state of origin).<sup>107</sup> These exceptions can be understood as accounting for a substantial portion of post-award litigation in published decisions; but only two individual exceptions account for more than 3 percent of non-enforcement decisions: Article V(1)(e) (which was a ground for non-enforcement in an estimated 3.5 percent of decisions) and Article VI (which was a ground for non-enforcement in an estimated 4.5 percent of decisions). This suggests that no single exception is disproportionately leading to non-enforcement.

<sup>102</sup> This exception was raised by the award debtor in an estimated 19% of cases.

<sup>103</sup> This exception was raised by the award debtor in an estimated 25% of cases.

<sup>104</sup> This exception was raised by the award debtor in an estimated 21% of cases.

<sup>105</sup> This exception was raised by the award debtor in an estimated 13% of cases.

<sup>106</sup> This exception was raised by the award debtor in an estimated 29% of cases.

<sup>107</sup> This exception was raised by the award debtor in an estimated 8% of cases.



As discussed above, published decisions may merit special attention; but it is well known that most court decisions are not published and that published decisions are not necessarily representative of court decisions in general.<sup>108</sup> Therefore, one must use caution if one wishes to generalize this Part's findings to unpublished enforcement decisions.<sup>109</sup> Regarding absolute enforcement rates, the risk is that judges may be more likely to publish decisions to enforce than decisions not to enforce (in which case the findings would overstate enforcement rates in unpublished decisions) or vice versa (in which case they would understate enforcement rates in unpublished decisions). Prior research on judicial publication patterns suggests that publication rates are likely higher for decisions which create or criticize law than for "more mundane applications of law;"<sup>110</sup> higher for decisions involving particularly complex and difficult legal and factual issues,<sup>111</sup> measured, for example, by the thickness of the case file, the dollar amount at stake, or the number of plaintiffs;<sup>112</sup> higher for decisions that highlight legal issues that the market or the judge deems to be important;<sup>113</sup> higher for decisions favoring plaintiffs rather than defendants<sup>114</sup> and reversals rather than affirmances;<sup>115</sup> and higher for decisions that lean in the judge's ideologically preferred direction.<sup>116</sup>

---

<sup>108</sup> See Clermont & Eisenberg, *supra* note 58, at 125-126 (noting that published decisions are a small and skewed sample of judicial decisions).

<sup>109</sup> For a more detailed discussion of the conditions under which the unrepresentativeness of published court decisions is likely to create biased descriptive and causal inferences, see Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 NEW YORK UNIVERSITY LAW REVIEW pt. V.B (forthcoming 2009) (available at <http://ssrn.com/author=386558>).

<sup>110</sup> Lizotte, *supra* note 70, at 146.

<sup>111</sup> *Id.*; ROWLAND & CARP, *supra* note 60, at 121; Siegelman & Donohue, *supra* note 60, at 1150.

<sup>112</sup> *Id.* at 1150 *et seq.*

<sup>113</sup> Lizotte, *supra* note 70, at 146; Olson, *supra* note 65, at 797.

<sup>114</sup> Lizotte, *supra* note 70, at 146.

<sup>115</sup> Clermont & Eisenberg, *supra* note 58, at 126.

<sup>116</sup> David S. Law, *Judicial Ideology and the Decision to Publish: Voting and Publication Patterns in Ninth Circuit Asylum Cases*, 89 JUDICATURE 1, 2, 6 (2006).

Taking these factors into account, insofar as enforcement is more mundane than non-enforcement, one might speculate that decisions to enforce would be underrepresented in published decisions.<sup>117</sup> On the other hand, because decisions to enforce favor claimants, one might speculate to the contrary: that decisions to enforce would be overrepresented in published decisions. There is not a statistically significant difference between enforcement rates in decisions published in the *Federal Reporter* or the *Federal Supplement* on the one hand, and decisions that appear only in Westlaw on the other hand,<sup>118</sup> but this does not necessarily mean that there is no such difference when compared to decisions that are not published at all. It is not clear whether other factors would systematically favor publication of decisions to enforce or decisions not to enforce.

Even if enforcement is more (or less) likely in published decisions than unpublished decisions, it may still be possible to generalize the findings regarding trends over time to unpublished decisions if the difference between enforcement rates in the two sets of decisions does not significantly vary across the time periods being analyzed.<sup>119</sup> For example, if enforcement rates were 10 percent higher (or lower) in published than unpublished decisions in the 1970s/1980s, 1990s, and 2000s, estimates of absolute enforcement rates based on the published decisions would overstate (or understate) absolute enforcement rates in unpublished decisions, but the percentage changes in enforcement rates across those time periods would be the same.

In summary, this Part's findings suggest that at least in published decisions, U.S. federal courts might not enforce arbitral awards

---

<sup>117</sup> See, e.g., DRAHOZAL & NAIMARK, *supra* note 5, at 264 (noting that “courts would seem much less likely to report decisions enforcing awards than decisions denying enforcement (because enforcement generally is routine)”).

<sup>118</sup> Pearson chi-squared tests of enforcement rates depending on publication in the official reporter are as follows: U.S. Courts of Appeals (66.7% if no, 64.4% if yes, p=.899), U.S. District Courts (79.3% if no, 74.6% if yes, p=.507), combined (78.0% if no, 70.4% if yes, p=.221).

<sup>119</sup> In other words, the unrepresentativeness of published opinions leads to selection bias in causal inferences if two conditions are satisfied: (1) a criterion used to select the sample upon which those inferences are based (whether a decision was published) is a cause of the dependent variable (whether the judge enforces an arbitral award) and (2) that criterion is correlated with an explanatory variable of interest (the time periods), but is not itself included as an explanatory variable in the model. See Whytock, *supra* note 109, at pt. IV.D.1.b.

covered by the New York Convention at a level that is fully consistent with transnational arbitration's goal of finality and the Convention's supposed pro-enforcement bias. However, higher-than-expected non-enforcement rates may indicate that judges take their role as monitors of the transnational arbitration system's integrity—a role contemplated by the New York Convention itself<sup>120</sup>—more seriously than is widely believed. The findings also suggest that enforcement rates are higher in the U.S. District Courts than in the U.S. Courts of Appeals, and that enforcement rates may have changed over time—in particular, enforcement rates in published U.S. District Court decisions appear to have declined significantly since the 1990s. To speculate, perhaps this downward trend reflects efforts by the district courts to bring themselves more in line with appellate court enforcement patterns—but given the U.S. Supreme Court's strong pro-enforcement policy, this would be somewhat puzzling. Because the decisions analyzed in this Part are more likely than unpublished decisions to influence the behavior of actual and prospective disputants beyond the parties to particular enforcement proceedings, they are especially important for the overall health of the transnational arbitration system. However, before these findings can be generalized with confidence to unpublished enforcement decisions, further research will be necessary to determine the extent to which enforcement rates differ in published and unpublished decisions.

## V. CONCLUSION

This article has pursued empirical insights from the U.S. federal courts to shed light on the relationship between transnational arbitration and litigation. Although definitive results will require collection and analysis of additional data, this article's analysis suggests several preliminary conclusions. Regarding the relationship between arbitration and litigation as alternative methods of transnational dispute resolution, the results confirm that arbitration in the world's leading arbitral institutions has been increasing, while alienage litigation in the U.S. District Courts has been decreasing. However, the extent to which these trends reflect replacement of litigation with arbitration is unclear. The results also suggest that litigation continues to be a widely-used method of transnational dispute resolution—even in disputes arising out of contractual relationships, in which the parties could have agreed to arbitration *ex*

---

<sup>120</sup> See *infra* note 122.

*ante*. The evidence suggests that, even as transnational arbitration has grown in importance, it has yet to fully eclipse transnational litigation. Although it may go against the grain of some pronouncements about the dominance of transnational arbitration, the conclusion that litigation continues to be widely used is consistent with the view that there is no one-size-fits-all method of transnational dispute resolution, and that the choice between arbitration and litigation ultimately depends on the circumstances.<sup>121</sup>

This article also highlighted another important dimension of the relationship between arbitration and litigation: judicial involvement in the transnational arbitration process through post-award litigation. Because most federal court decisions are not published, it is difficult to estimate overall post-award litigation rates. However, by combining information about published U.S. federal court decisions involving arbitral awards covered by the New York Convention with assumptions about publication rates, Part III was able to narrow the range within which overall post-award litigation rates are likely to fall. More precise results will require additional data. Nevertheless, the results seem to indicate considerable judicial involvement in the post-award phase of the transnational arbitration process.

Finally, the article analyzed enforcement rates in published U.S. federal court decisions involving awards covered by the New York Convention to evaluate whether judicial involvement tends to support or undermine the transnational arbitration system. Although it is uncertain whether the results of this analysis can be extended to unpublished decisions, the results provide preliminary evidence suggesting that the U.S. federal courts usually enforce these awards, but that enforcement rates may be lower than commonly believed. The results also raise the question of whether prevailing enforcement rates in the U.S. federal courts are high enough to fulfill transnational arbitration's promise of finality of awards, and whether they conform to the pro-enforcement policies of the New York Convention and the U.S. Supreme Court. More troubling from the perspective of finality of arbitral awards is that enforcement rates—at least in published

---

<sup>121</sup> See, e.g., BORN, *supra* note 13, at 4-15 (outlining the advantages and disadvantages of transnational litigation and transnational arbitration and the circumstances in which one may be preferable to the other, and stating that “[i]t would be highly 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.”).

decisions of the U.S. District Courts—appear to have declined since the 1990s. On the other hand, from the perspective of some critics of transnational arbitration, lower-than-expected enforcement rates might be good news, suggesting that courts have not entirely abdicated their supervisory role in the transnational arbitration system.<sup>122</sup> In fact, judicial supervision—including judicial willingness to decline enforcement of arbitral awards when one of the New York Convention’s exceptions apply—may help compensate for what some commentators and consumers of dispute resolution services perceive to be a disadvantage of arbitration: the lack of a right of appeal.<sup>123</sup> From this perspective, the trends in judicial enforcement rates suggested by this article may be a welcome sign that the U.S. federal courts are improving the balance between finality and judicial supervision in a manner that might reinforce rather than undermine the status of arbitration as a leading method of transnational dispute resolution.

---

<sup>122</sup> This supervisory role is implied by Article V of the New York Convention (which authorizes courts to refuse enforcement of arbitral awards under specified circumstances) and Article VI (which allows courts to defer enforcement proceedings if proceedings to set aside or suspend an award are pending in a court in the state of origin), as well as Section 207 of the FAA (which authorizes a court to decline enforcement if “it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention”).

<sup>123</sup> See BORN, *supra* note 13, at 6 (“Dispensing with appellate review reduces both litigation costs and delays. On the other hand, it also means that a wildly eccentric, or simply wrong, arbitral decision cannot be corrected.”); MOSES, *supra* note 37, at 4 (“[T]he lack of any right of appeal may be a benefit in terms of ending the dispute, but if an arbitrator has rendered a decision that is clearly wrong on the law or the facts, the lack of ability to bring an appeal can be frustrating to a party.”). See also Rebecca Callahan, *Arbitration v. Litigation: The Right to Appeal and Other Misperceptions Fueling the Preference for a Judicial Forum*, *bepress Legal Series Paper 1248*, at 31, 49 (2006) (available at <http://law.bepress.com/expresso/eps/1248>) (finding in a survey of approximately 400 business lawyers in Southern California that “the overwhelming majority of attorneys surveyed—84 percent—prefer litigation over arbitration 50 percent of the time or more,” and that a major reason for this preference is the availability of appellate review in litigation). To comply with Chapter 2 of the FAA, this supervisory role of U.S. courts must, with respect to foreign arbitral awards, be limited to the application of the exceptions to enforcement set forth in the New York Convention. With respect to non-domestic awards made in the United States, judicial supervision might also take place through application of the provisions of Chapter 1 of the FAA.

**CHRISTOPHER A. WHYTOCK**

Christopher A. Whytock, associate professor of law at the University of Utah S.J. Quinney College of Law, received his J.D. and M.S.F.S. from Georgetown University, and his Ph.D. from Duke University. His research focuses on transnational litigation, conflict of laws, international and comparative law, and foreign relations law. Professor Whytock's publications include *Myth of Mess? International Choice of Law in Action*, forthcoming in the *New York University Law Review*, and *Domestic Courts and Global Governance*, forthcoming in the *Tulane Law Review*, both of which are available at <http://ssrn.com/author=386558>. Professor Whytock can be reached at [whytockc@law.utah.edu](mailto:whytockc@law.utah.edu).