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CONTRACTING OUT OF NATIONAL LAW:
AN EMPIRICAL LOOK AT THE NEW
LAW MERCHANT

*Christopher R. Drahozal**

INTRODUCTION

Arbitration is the dispute resolution mechanism of choice in international commerce.¹ By agreeing to arbitrate, parties contract out of national court systems. They agree to have any dispute resolved by a private judge or judges (the arbitrators), whose award is binding on the parties and subject to limited court review.² The reasons most commonly given for why parties agree to arbitrate are the neutrality of the arbitral forum and the treaty regime governing enforcement of international arbitration awards³—what I would call “procedural” rea-

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* Professor of Law, University of Kansas School of Law. I appreciate helpful discussions with and comments from Jack Coe, Bryant Garth, Michael Moser, Rusty Park, Frank Partnoy, Catherine Rogers, and Steve Ware, and from participants at the Annual Meeting of the European Association of Law and Economics in Zagreb, Croatia. An earlier version of this paper was presented at the Annual Meeting of the Association of American Law Schools in Atlanta, Georgia, on January 3, 2004.

1 See, e.g., Gerald Aksen, *Arbitration and Other Means of Dispute Settlement*, in INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD 287, 287 (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990) (“In today’s world the dispute resolution mechanism will invariably be arbitration”); Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 293 (Pieter Sanders ed., 1987) (“International arbitration is now known to be ‘the’ ordinary and normal method of settling disputes in international trade.”).

2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 791–94 (2d ed. 2001); ALAN REDFERN & MARTIN HUNTER, LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 9-34 to 9-41 (student ed. 2003).

3 CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 136, 140, 141–43 (1996) (reporting survey results on why parties agree to arbitrate).

sons for arbitration. In addition, some commentators cite “substantive” reasons for agreeing to arbitrate. Bruce Benson, for example, while recognizing the importance of procedural reasons, argues that “arbitration may also provide a mechanism for assuring that the contracting parties’ preferred substantive law is applied.”⁴ Competition to be selected by parties gives arbitrators a stronger incentive than public court judges to enforce the provisions of the parties’ contract, including the parties’ contractual choice of law.⁵

A hotly debated topic in the international arbitration literature is the ability of parties to contract to have their dispute resolved without consideration of any national law whatsoever—on the basis of “general principles of international trade law,” the “*lex mercatoria*,” the “new law merchant,” “transnational commercial law,” or the like. In this Article, I will use the phrases “new law merchant” and “transnational commercial law” interchangeably to refer to such a-national legal principles. An extensive scholarly literature explores the theory of transnational commercial law and seeks to derive its governing principles from international arbitration awards and other sources.⁶ Arbitration rules permit parties to contract for application of transnational law to resolve their disputes,⁷ and national courts have enforced awards made by arbitrators on the basis of transnational law.⁸

trate); see William W. Park, *Arbitration Avoids ‘Hometown Justice’ Overseas*, NAT’L L.J., May 4, 1998, at C18.

4 Bruce L. Benson, *To Arbitrate or Litigate: That Is the Question*, 8 EUR. J.L. & ECON. 91, 92 (1999).

5 See Bruce H. Kobayashi & Larry E. Ribstein, *Contract and Jurisdictional Freedom*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 325, 329 (F.H. Buckley ed., 1999) [hereinafter FALL AND RISE]. For an analysis of competition in the market for international arbitrators, see Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 79, 106–07 (2000).

6 For general discussions of the new law merchant, see KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE *LEX MERCATORIA* (1999); W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION §§ 35.01–.04 (3d ed. 2000); *LEX MERCATORIA AND ARBITRATION* (Thomas E. Carbonneau ed., rev. ed. 1998); CLIVE M. SCHMITTHOFF, INTERNATIONAL TRADE USAGES 43–73 (1987); Rt. Hon. Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, 4 ARB. INT’L 86, 86–119 (1988). See generally Transnational Law Database, available at <http://www.tldb.de> (last visited Sept. 27, 2004) (collecting references on transnational commercial law).

7 See, e.g., RULES OF ARBITRATION art. 17(1) (Int’l Chamber of Commerce 1998); see CRAIG ET AL., *supra* note 6, § 37.01(i), at 319–20.

8 See, e.g., *Norsolor S.A. v. Pabalk Ticaret Ltd.* (Oberster Gerichtshof [OGH] [Supreme Court] 1982) (Aus.), reprinted in 9 Y.B. COMM. ARB. (Int’l Council for Commercial Arbitration) 159, 159–61 (1984).

Benson cites transnational commercial law as an example of “the spontaneous evolution of customary law.”⁹ Customary law, Benson contends, is superior to publicly produced law because “[p]olitically dictated rules are not designed to support the market process; in fact government made law is likely to do precisely the opposite.”¹⁰ Customary law, and in particular the new law merchant, enables commercial parties to avoid inefficient national laws that are the product of rent seeking, just as the medieval “merchant community actually developed its own law in order to avoid the inefficiencies and political nature of royal law and government (e.g., common law) courts.”¹¹

Others take a more critical view of transnational commercial law. They characterize the new law merchant as one aspect of the “lawlessness” of international commercial arbitration,¹² which permits parties to “usurp[] the governing law and the controls that a particular national community deems necessary for commercial transactions occurring within its space.”¹³ Consistent with this view, Thomas E. Carbonneau and François Janson predict:

At the end of the day, transborder adjudication will be guided by the dictates of the marketplace and the international commercial community and completely exempt from the reach of sovereign national authority. Law will be generated within the confines of a fully privatized system that is unaccountable to any public organization or process. Arbitrators, lawyers, arbitral institutions and law firms will become the de facto government and the courts of international trade and commerce.¹⁴

On this view, parties contracting for application of transnational law undercut the regulatory authority of national governments and may result in the underenforcement of national law.

Implicit in the views of both supporters and critics of the new law merchant is an empirical assumption: that a significant number of parties contract for application of transnational law in lieu of national law in their international commercial contracts. This Article exam-

9 Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 644 (1989); Benson, *supra* note 4, at 111.

10 Benson, *supra* note 9, at 661.

11 *Id.* at 660.

12 See, e.g., Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A ‘Second Look’ at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 471–72 (1999).

13 W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 138 (1992).

14 Thomas E. Carbonneau & François Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 TUL. J. INT’L & COMP. L. 193, 221–22 (1994).

ines that assumption empirically and finds little support for it. Only a small percentage of parties provide for application of transnational commercial law in their arbitration clauses. Even when parties do rely on transnational law, they often do so to supplement rather than displace national law. Thus, as stated in one leading international arbitration commentary: "For all of its intellectual fascination, the debate over *lex mercatoria* to date does not appear to have had more than a marginal impact on the practice of international arbitration, and this is even more true of the attitudes and conduct of parties to international contracts."¹⁵

Part I provides an overview of the history of the law merchant and its relationship to present-day transnational law. Part II sets out a model of contractual choice of law in international contracts. Part III presents empirical evidence on the extent to which parties contract for application of transnational commercial law. Part IV explores in a very tentative way why so few parties contract out of national law in international arbitration. Part V suggests that the extensive legal scholarship on the new law merchant may reflect signaling behavior by prospective arbitrators. The Article concludes by highlighting parallels between the new law and the arbitration of statutory claims in domestic American arbitration.

I. THE LAW MERCHANT, OLD AND NEW

A number of scholars trace the origins of the new law merchant to medieval times, to the resolution of merchant disputes by medieval fair and market courts.¹⁶ During the eleventh and twelfth centuries, commercial activity began to expand, and along with it, the need for governing rules. "It was then," Harold J. Berman has stated, "that the basic concepts and institutions of modern Western mercantile law—*lex mercatoria* ('the law merchant')—were formed, and, even more important, it was then that mercantile law in the West first came to be

15 CRAIG ET AL., *supra* note 6, § 35.01, at 625 (footnotes omitted).

16 See, e.g., LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 39 (1983) ("The fear of a proliferated Law Merchant has led to the growth of a new Law Merchant, closely resembling its medieval forefather.") (endnotes omitted); Bruce L. Benson, *Customary Law as a Social Contract: International Commercial Law*, 3 CONST. POL. ECON. 1, 2 (1992) ("International commercial law is still largely independent of nationalized legal systems, retaining many of the basic (though modernized) institutional characteristics of the medieval Law Merchant."); Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265, 269 (2003) ("The twenty-first-century Law Merchant is global and technologically driven. Yet it displays, quite imperfectly, a number of Law Merchant features.").

viewed as an integrated, developing system, a *body* of law.¹⁷ Courts made up of merchants themselves adjudicated disputes, applying universal commercial customs and enforcing decisions by threat of boycott and expulsion.¹⁸ According to Bruce Benson, “[v]irtually every aspect of commercial transactions in Europe was governed for several centuries by this privately produced, privately adjudicated and privately enforced body of law.”¹⁹

Or so the standard story goes. Other scholars, however, have questioned this historical perspective. One objection is not so much to the history itself as to the relevance of the history to discussions of the new law merchant. As Albrecht Cordes has stated:

The question whether an old *Lex mercatoria* existed 350 or 700 years ago can do little to influence the outcome of a dispute about the theoretical and practical value of a 21st century law of merchants as a separate body of law which is not linked to any domestic law.²⁰

But the history has been challenged as well. Emily Kadens summarizes the contrary view:

The evidence strongly suggests that Berman’s classic account is at least partly inaccurate in almost every respect. The law merchant was not a systematic law; it was not standardized across Europe; it was not synonymous with commercial law; it was not merely a creation of merchants without vital input from governments and princes.²¹

17 HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 333 (1983).

18 *Id.* at 341–42; TRAKMAN, *supra* note 16, at 11 (“The most viable mercantile practices were enforced in the Law Merchant so that local practices were undermined where they diverged from the Law Merchant.”); Benson, *supra* note 4, at 118–19 (“By the end of the twelfth century all important principles of commercial law were international in character, providing alien merchants with substantial protection against potential discrimination under local laws, including local customs”) (citations omitted).

19 Bruce L. Benson, *Law Merchant*, in 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 500, 500 (Peter Newman ed., 1998) [hereinafter *PALGRAVE DICTIONARY*]; see also Benson, *supra* note 4, at 119 (“[B]y the early thirteenth century various communities of traders could turn to the Law Merchant as an integrated system of principles, concepts, rules and procedures.”).

20 Albrecht Cordes, *The Search for a Medieval Lex Mercatoria*, 2003 OXFORD U. COMP. L. FORUM 5, ¶ 19 (last visited Oct. 25, 2004), at <http://ouclf.iuscomp.org/articles/cordes.shtml>.

21 Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT’L L. 39, 40 (2004).

Instead, she describes the “medieval law merchant as a layer of laws and practices that included legislative mandates, broad-reaching customs, and narrow trade usages,” which “begins to look very much like modern commercial law.”²² On this view, “the merchant law of medieval Europe was never some magnificent private legal system that permitted merchants to achieve great efficiencies by leaving them alone to pursue market opportunities.”²³ Instead, from the beginning it was “a symbiosis of practices and legislation.”²⁴

Cordes likewise has challenged the universal nature of the medieval law merchant. He argues that general rules of transnational law at the time “can be detected only by choosing to focus on overly general issues”—issues so general as to have little practical significance.²⁵ At the same time, Cordes says, the historical comparative law research necessary to demonstrate the existence of general principles of law rather than merely trade-specific or regional practices has not been done.²⁶

Oliver Volckart and Antje Mangels contend that merchant guilds, at least in the early Middle Ages, were more successful at regulating transactions within the guild than transactions between guilds.²⁷ Although the “elder mercantile guilds” of that period did supply rules governing transactions among members, they found it “extremely difficult . . . to enforce institutions regulating nonsimultaneous transactions between them and members of another guild or outsiders.”²⁸ Instead, the guilds were important, not because they developed a body of universal commercial law, but because they provided physical security—i.e., “armed help against assailants.”²⁹

I do not attempt to resolve these competing views of the medieval law merchant in this paper (although I certainly share the skepticism as to the relevance of history to the current status of the new law

22 *Id.* at 63.

23 *Id.*

24 *Id.*

25 Cordes, *supra* note 20, ¶ 24.

26 *Id.* ¶ 15 n.26.

[O]n the one hand there are comparative studies which do not prove the dogma of universal trade law but take it for granted and use it as a starting point. On the other hand, we have local or regional studies which are not aimed to lead to results on a larger scale.

Id.

27 Oliver Volckart & Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 S. ECON. J. 427, 437 (1999).

28 *Id.* at 442.

29 *Id.*

merchant). Instead, the historical debate is useful for my purposes in two respects.

First, it highlights the ambiguity of the phrase “law merchant,” an ambiguity that persists today. As used in modern international arbitration practice, the phrase “law merchant” or “*lex mercatoria*” has at least three possible meanings, as described by Craig et al.:

Lex mercatoria seems to mean different things to different people [T]he various notions may usefully be distinguished and grouped under three headings. First, the most ambitious concept of *lex mercatoria* is that of an autonomous legal order, created spontaneously by parties involved in international economic relations and existing independently of national legal orders. Second, *lex mercatoria* has been viewed as a body of rules sufficient to decide a dispute, operating as an alternative to an otherwise applicable national law. Third, it may be considered as a complement to otherwise applicable law, viewed as nothing more than the gradual consolidation of usage and settled expectations in international trade.³⁰

I am concerned with the first two meanings here (under which the new law merchant operates as a substitute for national law), rather than the third (under which trade usages supplement national law). Trade usages and industry-specific norms are an important part of transnational dispute resolution, as I have argued elsewhere.³¹ Many arbitration statutes and arbitration rules direct arbitrators to resolve disputes on the basis of trade usages (although not course of dealing or course of performance),³² and the available evidence suggests that

30 CRAIG ET AL., *supra* note 6, § 35.01, at 623.

31 See Drahozal, *supra* note 5, at 110–32.

32 See, e.g., CODE CIVIL [C. CIV.] art. 1496 (Fr.), *reprinted in* 2 INT’L COUNCIL FOR COMM. ARBITRATION, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, at France: Annex I-10 (Jan Paulsson ed., 2004) (“In all cases he shall take the usages of the trade into consideration.”); U.N. COMM’N ON INT’L TRADE LAW, MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 28(4), U.N. Doc. A/40/17, U.N. Sales No. E.95.V.18 (1985) (“In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”); INT’L ARBITRATION RULES art. 28(2) (Am. Arbitration Ass’n 2003) (“In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.”); ARBITRATION RULES art. 53 (China Int’l Econ. & Trade Arbitration Comm’n 1998) (“The arbitration tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness.”); RULES OF ARBITRATION art. 17(2) (Int’l Chamber of Commerce 1998) (“In all cases, the arbitrator shall take account of the provisions of the contract and the relevant trade usages.”);

arbitrators frequently rely on trade usages in international arbitration awards.³³ Thus, the question examined here is whether parties contract for application of general legal principles (not just trade usages) instead of national laws as a basis for resolving disputes.

Second, the history distinguishes between dispute resolution within local merchant guilds and dispute resolution among merchants in different guilds, which is similar to the accepted distinction today between trade association arbitration and international commercial arbitration. My interest here is not in the sort of trade association arbitration processes studied by Lisa Bernstein, where in fact merchants do contract out of the legal system (including national law) and typically rely on extra-legal sanctions to enforce contract obligations.³⁴ Instead, I focus on what in common usage is called "international commercial arbitration": nonspecialized arbitration between private parties involved in international commercial transactions.³⁵ The literature on the new law merchant largely (although not exclusively)³⁶ looks to international commercial arbitration rather than trade association arbitration,³⁷ as do I.

II. CONTRACTING OUT OF NATIONAL LAW IN INTERNATIONAL CONTRACTS

This Part extends a basic model of the decision to arbitrate or litigate to the parties' choice of governing law in international con-

see also Drahozal, *supra* note 5, at 111–21 (setting out tables summarizing laws and rules providing for arbitrators to consider trade usages).

33 *See* Drahozal, *supra* note 5, at 121–32.

34 *See, e.g.*, Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999); *see also* Lisa Bernstein, *Private Commercial Law*, in 3 PALGRAVE DICTIONARY, *supra* note 19, at 108, 108 ("Private commercial law exists in over fifty industries including diamonds, grain, feed, independent films, printing, binding, peanuts, rice, cotton, burlap, rubber, hay and tea.").

35 *See, e.g.*, BÜHRING-UHLE, *supra* note 3, at 45 (stating that "although [specialized arbitrations] doubtlessly are international, commercial, and arbitrations, they are commonly not covered by the general literature on international commercial arbitration").

36 *See, e.g.*, Benson, *supra* note 19, at 507 (referring both to trade association arbitration and international commercial arbitration).

37 YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 3 (1996); REDFERN & HUNTER, *supra* note 2, ¶ 2-60, at 118–20.

tracts, including the new law merchant.³⁸ Under the model, parties choose between arbitration and litigation so as to maximize the net difference between deterrence benefits (i.e., benefits from deterring harms caused by breach of contract) and the costs of the dispute resolution process. As applied to contractual choice of law, parties will choose the applicable law (including transnational law) that likewise maximizes the net difference between deterrence benefits and dispute resolution costs. Thus, parties will contract to have their disputes resolved under the new law merchant if the deterrence benefits from contracting out of national law (that is, the benefits of avoiding costly national laws) exceed the likely costs of relying on transnational law (in the form of uncertainty over the governing legal rule).

A. *Basic Model: The Choice Between Arbitration and Litigation*

The following discussion sets out a simple model of the choice between arbitration and litigation. The model focuses on pre-dispute, rather than post-dispute, agreements to arbitrate because the vast majority of international arbitration proceedings arise from pre-dispute agreements.³⁹ It assumes that the parties deciding whether to agree to arbitration are sophisticated and well-informed. In the case of international contracts, that seems likely to be a reasonable assumption in most cases.

The starting point is that court litigation is the default: the parties' dispute will be resolved in arbitration only if they so agree. Arbitration may differ from litigation in two main ways. First, the process costs of arbitration may be higher or lower than the process costs of litigation. Although statements that arbitration is cheaper and faster than litigation in court are common, in international arbitration no convincing evidence exists to suggest that is the case.⁴⁰ Second, the outcome in arbitration may be different from the outcome in court. The claimant may be more or less likely to prevail (and for greater or lesser amounts) in arbitration than in court. The respondent may expect to pay more or less in damages to the claimant, such that the change in expected outcome results in a transfer from one party to the other. In addition, the change in expected outcome may alter the

38 See Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209 (2000); see also Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 551–54 (2003); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995).

39 Stephen R. Bond, *How to Draft an Arbitration Clause*, ICC INT'L CT. ARB. BULL., Dec. 1990, at 14, 15.

40 See, e.g., BÜHRING-UHLE, *supra* note 3, at 138, 143–56.

parties' behavior under the contract. To the extent the expected damages in arbitration are closer to the amount required for optimal deterrence of wrongful conduct, arbitration will result in deterrence benefits to the parties as a whole, and vice versa.

Under the model, parties will agree to arbitrate so long as (1) the net change in process costs and deterrence benefits from arbitration is greater than zero—i.e., so long as the marginal benefit from agreeing to arbitrate exceeds the marginal cost; and (2) if arbitration does not make both parties better off, the party that is better off makes a transfer payment (in the form of adjustments to the price or other contract terms) to the other party sufficient to induce that party to agree to arbitrate.⁴¹ In international contracts, the parties may well be uncertain as to which party will initiate litigation if a dispute should arise. If so, the parties would be able to make a mutually beneficial exchange by each giving up the right to sue in its own home court. In such a case, no transfer payment would be necessary.⁴²

B. *The Model as Applied to Contractual Choice of Law*

The parties' choice of governing law, like the choice between arbitration and litigation,⁴³ involves possible trade-offs between deterrence benefits and dispute resolution costs. I assume that the parties choose the law to govern their contract that provides the greatest net difference between the deterrence benefits of the legal rules and the process costs of determining and applying those rules. Larry Ribstein has identified a number of benefits to parties from enforcing their contractual choice of law.⁴⁴ These benefits provide the basis for a positive analysis of the parties' choice.

41 For differing scenarios in which parties could be expected to agree to arbitrate, see Drahozal & Hylton, *supra* note 38, at 553–54.

42 Christopher R. Drahozal, *'Unfair' Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 746–47.

43 Similarly, the choice among the procedures to be followed in arbitration also involves possible trade-offs. See *id.* at 752–53 (“If the savings in dispute-resolution costs from limiting discovery exceed the reduced deterrence benefits, and the individual is compensated for any reduction in expected compensation, the individual is better off agreeing to arbitration.”).

44 See Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 247–55 (1993) [hereinafter Ribstein, *Choosing Law by Contract*]; see also Erin Ann O'Hara & Larry E. Ribstein, *Conflict of Laws and Choice of Law*, in 5 ENCYCLOPEDIA OF LAW & ECONOMICS 631, 643–47 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000), available at <http://allserv.rug.ac.be/~gdegeest/9600book.pdf>. For other writings on the law and economics of choice of law, see MICHAEL J. WHINCOP & MARY KEYES, *POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS* (2001); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002); Erin Ann O'Hara, *Opting Out of Regulation: A*

First, contractual choice of law may permit parties to avoid mandatory rules in national laws.⁴⁵ From a normative perspective, this may or may not be beneficial. If the law protects third parties, permitting the parties to contract around the law might make society as a whole worse off. If the law imposes undue or unnecessary costs on the parties to the contract, however, society as a whole might be better off if the parties can avoid those costs by choosing a different governing law. As a positive matter, parties could use choice-of-law clauses as an inexpensive way to exit jurisdictions to avoid costly national laws.⁴⁶

Second, contractual choice of law avoids uncertainty. By specifying a particular governing law, parties avoid uncertainty over what law the court or arbitration tribunal will apply in the event a dispute arises. Uncertainty in applicable law is costly in two ways. First, “[u]ncertainty at the time of contracting means that the parties cannot easily determine the standard of conduct to which they should conform or how to price contract rights and duties.”⁴⁷ Second, “[u]ncertainty about choice of law at the time of litigation can increase both the costs and frequency of litigation.”⁴⁸ Ribstein addresses the parties’ decision whether to include a choice-of-law clause in their contract. But the same concerns may help explain not only whether parties specify a governing law, but also which law the parties specify. The more developed the relevant national law, the less uncertainty there will be in determining the governing legal standards, which may result in greater deterrence benefits and lower dispute resolution costs for the parties.

Third, parties can use choice-of-law clauses to protect against post-contractual opportunism by one party seeking changes in the law.⁴⁹ As Geoffrey P. Miller explains, choice of law can function as a pre-commitment device:

Public Choice Analysis of Contractual Choice of Law, 53 VAND. L. REV. 1551 (2000); Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000); Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363 (2003); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989); Michael E. Solimine, *The Law and Economics of Conflict of Laws*, 4 AM. L. & ECON. REV. 208 (2001).

⁴⁵ Ribstein, *Choosing Law by Contract*, *supra* note 44, at 248–49. In addition, Ribstein explains, “[c]ontractual choice of law may reduce costs by supplying standard-form contract terms, even if the parties otherwise could avoid these terms by customized contracting, because such contracting may be costly.” *Id.* at 250.

⁴⁶ Kobayashi & Ribstein, *supra* note 5, at 326–27.

⁴⁷ Ribstein, *Choosing Law by Contract*, *supra* note 44, at 253.

⁴⁸ *Id.* at 254.

⁴⁹ *Id.* at 254–55.

Choice-of-law . . . provisions can be understood as mechanisms of precommitment that benefit both parties *ex ante*. By adopting such a provision, the parties ensure that A will not behave opportunistically *ex post*, since it will not be in A's interest to do so. A gets no benefit from seeking recourse from the political system because the contract with B will be determined under the law . . . of another state in which A has no influence. A choice-of-law . . . provision functions similarly to a bond posted by A committing it not to engage in opportunistic behavior *ex post*.⁵⁰

On this theory, one would expect choice-of-law clauses to be especially useful in contracts between a private party and a foreign sovereign.

Extending the basic model described above to contractual choice of law, the parties will choose the governing law that maximizes deterrence benefits net of dispute resolution costs. As between equally well-developed national laws (i.e., laws with an equal amount of uncertainty as to how they apply), parties will choose the national law with the lowest-cost mandatory rules (as between the two parties to the contract). But parties may prefer a better-developed (i.e., more certain) national law with more costly mandatory rules to a less well-developed (i.e., less certain) national law with less-costly mandatory rules. In short, I model the choice of applicable law as a tradeoff between the benefits of avoiding costly mandatory rules and the benefits of well-defined (i.e., certain in application) national laws. One qualification is the pre-commitment function that choice-of-law clauses can serve, which provides another possible benefit from choice of a particular national law.⁵¹

C. *Contractual Choice of Law and the New Law Merchant*

The model described above provides a framework for understanding when parties can be expected to choose transnational law rather than national law to govern their contract. All else equal, parties will choose transnational law over national law when the governing rules in the new law merchant are less costly (as between the two parties) than the mandatory rules in available national laws. Both supporters and critics of the new law merchant implicitly assume that this is the case, although they draw differing normative conclusions from their views. Supporters argue that transnational commercial law

50 Geoffrey P. Miller, *Choice of Law as a Precommitment Device*, in FALL AND RISE, *supra* note 5, at 357, 365.

51 As with the choice between arbitration and litigation, if only one party benefits from the national law chosen, that party will have to compensate the other party to induce it to agree to that national law.

is likely to be less costly than national law because it is based on custom and generated by merchants themselves, rather than by rent seeking in the legislative processes of national governments.⁵² Critics argue that the new law merchant would permit parties to contract around national laws that protect third parties from the parties' actions.⁵³ Either way, the expectation is that the deterrence benefits to the parties from transnational commercial law are greater than the deterrence benefits of national laws.⁵⁴

If, however, national law is more certain in application than transnational law, parties to international contracts might nonetheless contract for application of a particular national law instead of transnational law. Uncertainty would both reduce the deterrence benefits of transnational law and increase dispute resolution costs (by increasing the likelihood that litigation will occur). Indeed, a common criticism of the new law merchant is that its application is too uncertain to serve as a substitute for national law. According to F.A. Mann, for example, transnational legal principles "may, on occasions, be useful to fill a gap but in essence they are too elementary, too obvious and even too platitudinous to permit detached evaluation of conflicting interests, the specifically legal appreciation of the implications of a given situation."⁵⁵ John Collier and Vaughan Lowe likewise conclude that any benefits of transnational law come "at the price of certainty. General principles are necessarily vague; they do not provide the kind of detailed code appropriate to complex commercial transactions; and the manner of their application is not always a predictable matter."⁵⁶ On this view, parties deciding whether to provide for transnational law to govern their contract face a tradeoff between the deterrence benefits of avoiding costly national laws and the potential costs due to uncertainty in application of transnational law.

Finally, transnational commercial law might serve as a pre-commitment device in contracts between a private party and a national government (or a party closely tied to a national government). Ole

52 See *supra* text accompanying notes 9–11.

53 See *supra* text accompanying notes 12–14. Critics also argue that the new law merchant would allow parties to contract around those national laws that seek to protect one contracting party from the other. See *infra* note 54.

54 Another possibility is that one party dictates the terms of the arbitration agreement, including the choice-of-law clause, and that only that party benefits from the choice of transnational law. As a positive matter, the analysis is the same except that only the costs and benefits to the party dictating the contract terms are considered.

55 F.A. Mann, *Reflections on a Commercial Law of Nations*, 1957 BRIT. Y.B. INT'L L. 20, 38.

56 JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW* 245 (1999).

Lando explains that clauses providing for application of transnational commercial law

are often inserted in contracts between a government or government enterprise on the one hand and a private enterprise on the other. The government does not wish to submit to the laws of a foreign state. A private party will not wish to have the contract governed by the laws of the foreign government since they may be changed to his disadvantage after the contract is made.⁵⁷

Of course, private parties have means other than choice of law by which to protect themselves from post-contractual opportunism by national governments and may opt for those means instead.⁵⁸

III. AN EMPIRICAL LOOK AT THE NEW LAW MERCHANT

The academic debate over the new law merchant is based on the empirical assumption that parties in fact contract for application of transnational commercial law in lieu of national law. Sometimes this assumption is stated as fact. For example, in a recent Green Paper, the European Commission stated:

It is common practice in international trade for the parties to refer not to the law of one or other state but direct to the rules of an international convention such as the Vienna Convention of 11 April 1980 on contracts for the international sale of goods, to the customs of international trade, to the general principles of law, to the *lex mercatoria* or to recent private codifications such as the UNIDROIT Principles of International Commercial Contracts.⁵⁹

But the Commission provided no support for its empirical assertion that choice of transnational law instead of national law is a "common practice."

This Part examines the empirical evidence on the use of transnational commercial law in international commercial arbitration. Under the model described above, parties will contract for application of transnational law only if the deterrence benefits from contracting

57 Ole Lando, *The Law Applicable to the Merits of the Dispute*, in *ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION* 129, 143-44 (Petar Šarcevic ed., 1989).

58 See, e.g., RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS* § 32.9-11, at 1034-35 (2d ed. 2001) (discussing the use of insurance to protect against the risk of expropriation of investments by foreign governments); Georges R. Delaume, *The Myth of the Lex Mercatoria and State Contracts*, in *LEX MERCATORIA AND ARBITRATION*, *supra* note 6, at 111, 128-30 (describing the use of stabilization clauses and renegotiation provisions).

59 Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernisation, COM(02)654 final § 3.23, at 22.

out of national law exceed the likely costs in the form of uncertainty about the governing legal rule. The available empirical evidence—from arbitration clauses, arbitration awards, and a survey of participants in the international arbitration process—suggests that in most cases the costs of transnational law to parties exceed its benefits; i.e., the use of transnational commercial law in international arbitration is not at all common.⁶⁰

A. Arbitration Clauses

The terms of international arbitration clauses provide an important source of empirical evidence on the use of transnational commercial law. Parties can direct the arbitration tribunal to apply transnational legal principles by so providing in their arbitration clause. The available evidence, from the International Chamber of Commerce (ICC) and a sample of international joint venture contracts, reveals that parties rarely do so.

1. ICC Arbitration Clauses

The International Court of Arbitration of the ICC provides administrative and other services to facilitate arbitrations conducted under rules it promulgates. As seen in Table 1, parties filed 580 arbitration proceedings with the ICC in 2003, up from 337 in 1992.⁶¹ Although arbitration institutions are located in most major trading countries, and some of those institutions have larger caseloads than the ICC,⁶² the ICC remains “the central institution” in international arbitration.⁶³ The ICC also publishes far and away the most data on its arbitration processes.

60 The discussion in this Part is based on TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH (Christopher R. Drahozal & Richard W. Naimark eds., forthcoming 2005) [hereinafter TOWARDS A SCIENCE].

61 2003 *Statistical Report*, ICC INT’L CT. ARB. BULL., Spring 2004, at 7, 7; 1997 *Statistical Report*, ICC INT’L CT. ARB. BULL., May 1998, at 4, 4.

62 See Hong Kong Int’l Arbitration Ctr., *Statistics: International Arbitration Cases Received*, at http://www.hkiac.org/en_statistics.html (last visited Sept. 27, 2004).

63 DEZALAY & GARTH, *supra* note 37, at 45.

| TABLE I. NUMBER OF REQUESTS FOR ARBITRATION FILED WITH THE ICC COURT, 1992-2003 ⁶⁴ | |
|---|-----|
| 1992 | 337 |
| 1993 | 352 |
| 1994 | 384 |
| 1995 | 427 |
| 1996 | 433 |
| 1997 | 452 |
| 1998 | 466 |
| 1999 | 529 |
| 2000 | 541 |
| 2001 | 566 |
| 2002 | 593 |
| 2003 | 580 |

Stephen R. Bond, then Secretary General of the ICC, reported the results of a study of 237 clauses giving rise to ICC arbitrations in 1987 and 215 clauses giving rise to ICC arbitrations in 1989.⁶⁵ According to Bond, only 3% of the 1987 clauses and 4% of the 1989 clauses provided for disputes to be resolved using transnational commercial law (or some other a-national basis for decision).⁶⁶ He concluded that “the statistics just cited support the view that arbitration is generally not sought by the parties because they wish an ‘extra-legal’ resolution to their disputes.”⁶⁷

More recent data from the ICC reveals even less party reliance on transnational law than the Bond study.⁶⁸ The ICC began reporting the sources of law chosen by parties in its *2001 Statistical Report* and has continued to do so in subsequent reports. As Table 2 indicates, only 1% to 2% of clauses giving rise to ICC arbitrations from 2000 to 2003 provided for transnational law (or other rules of decision than national law) to govern the contract. The types of a-national rules specified in the arbitration clauses varied. Out of 541 cases filed in

64 See sources cited *supra* note 61.

65 Bond, *supra* note 39, at 14.

66 Such as amiable composition, equity, or *ex aequo et bono*. *Id.* at 19. Some of the clauses providing for amiable composition (Bond did not specify the number) provided that the arbitrators could apply national law as well. *Id.*

67 *Id.*

68 Without further data, there is no way definitively to identify any trends in the use of arbitration clauses specifying transnational law. See *infra* text accompanying notes 102-04.

2000, seven clauses provided for use of general principles of international trade law, two clauses specified the Convention on Contracts for the International Sale of Goods (CISG), and one clause provided for the arbitrator to act as *amiabile compositeur*.⁶⁹ For 2001, the clauses providing for other rules of decision listed, according to the ICC, “equity, international public law, *amiabile composition* and *ex aequo et bono*,” as well as the CISG (two clauses).⁷⁰ For 2002, equity was the most commonly specified other basis for decision (in 1.6% of all clauses), while one clause directed use of the UNIDROIT Principles of International Commercial Contracts.⁷¹ Most recently, in 2003, the ICC identified “[o]ther rules or principles occasionally chosen” as “EC law (one contract), general principles of equity (two contracts), international law (one contract), international commercial law (one contract) and the United Nations Convention on Contracts for the International Sale of Goods (three contracts).”⁷²

TABLE 2. APPLICABLE LAW IN ICC ARBITRATION CLAUSES⁷³

| | 2000 | 2001 | 2002 | 2003 |
|------------------------------|------|------|-------|-------|
| National Law | 75% | 77% | 79.4% | 80.4% |
| Other Rules | 2% | 1% | 2.3% | 1.2% |
| Applicable Law Not Specified | 23% | 22% | 18.3% | 18.3% |

A significant percentage of clauses giving rise to ICC arbitrations (from 18.3% to 23%) did not specify any applicable law.⁷⁴ Under the ICC Rules, when the parties have not agreed on the applicable law, “the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate,”⁷⁵ which may include transnational law.⁷⁶ But such clauses do not show that parties are contracting to have arbitrators apply transnational law. Moreover, as discussed below, there is little indication that a significant proportion of ICC arbitration awards are based on transnational law.⁷⁷

The ICC is the only arbitration institution that publishes this sort of data. It may be that arbitration clauses choosing institutions other than the ICC rely to a differing degree on transnational law. Or it is

69 2000 Statistical Report, ICC INT’L CT. ARB. BULL., Spring 2001, at 5, 11.

70 2001 Statistical Report, ICC INT’L CT. ARB. BULL., Spring 2002, at 5, 12.

71 2002 Statistical Report, ICC INT’L CT. ARB. BULL., Spring 2003, at 7, 14.

72 2003 Statistical Report, *supra* note 61, at 13.

73 See sources cited *supra* notes 69–72.

74 See *supra* Table 2.

75 RULES OF ARBITRATION art. 17(1) (Int’l Chamber of Commerce 1998).

76 CRAIG ET AL., *supra* note 6, § 17.01(i), at 319–20.

77 See *infra* text accompanying notes 84–87.

possible that agreements giving rise to disputes (which are the only ones included in the data from the ICC) differ systematically from the terms of agreements not giving rise to disputes. As a result, the conclusions here must be qualified accordingly.

2. Arbitration Clauses in International Joint Venture Contracts

In an attempt to address some of the limitations of the ICC data, I examined a small sample of international joint venture contracts from corporate disclosure filings in the United States between 1993 and 1996. The contracts are contained in an online database maintained by the Contracting and Organizations Research Institute (CORI) of the University of Missouri-Columbia.⁷⁸ Because CORI obtained the contracts from the Securities and Exchange Commission's EDGAR database of corporate securities filings, the sample is not representative of all international joint venture agreements. It includes "only contracts involving at least one publicly traded company (or company with publicly traded securities)" in the United States and "only contracts that are deemed material to investors."⁷⁹ As a result, almost all of the contracts in the sample (fourteen of seventeen, or 82.4%) are between an American company and at least one non-American party.

Of the seventeen contracts in the sample, fifteen (or 88.2%) provided for arbitration as the means for resolving disputes. This percentage is consistent with estimates in the literature.⁸⁰ Out of the contracts with arbitration clauses, 26.7% (four of fifteen) referred to either "international legal principles and practices" or "general international commercial practices." The percentage obviously is much higher than among ICC arbitration clauses (although from a much smaller sample), and is worth further examination.

78 See CORI Contracts Library, at <http://cori.missouri.edu> (last visited Oct. 13, 2004). For further details about the sample, as well as other results from the study, see TOWARDS A SCIENCE, *supra* note 60 (manuscript at 59-63).

79 Michael E. Sykuta, Empirical Research on the Economics of Organization and the Role of the Contracting and Organizations Research Institute 8 (Dec. 19, 2001) (unpublished manuscript), at <http://cori.missouri.edu/WPS/Sykuta-CORI.pdf>.

80 See KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 8 & n.62 (1993) ("About ninety percent of international economic contracts contain an arbitration clause.") (citing ALBERT JAN VAN DEN BERG ET AL., ARBITRAGERECHT 134 (1988)); Alessandra Casella, *On Market Integration and the Development of Institutions: The Case of International Commercial Arbitration*, 40 EUR. ECON. REV. 155, 156-57 (1996) ("According to officials of the Netherlands Arbitration Institute, more than 80 percent of private international contracts have clauses providing that disputes will be decided by arbitration.").

All four of the clauses referring to general international legal principles were in joint venture contracts between Chinese parties and American parties. No clauses in contracts between parties of other nationalities contained any reference to transnational commercial law. Three of the clauses provided for general international law principles to apply only when there was no applicable principle in the published provisions of the governing national law (which the parties agreed to be the law of China).⁸¹ For example, one of the clauses provided:

The validity, interpretation and implementation of this Contract will be governed by the law of the People's Republic of China which are [sic] published and publicly available, but if there is no published and publicly available law in China pertaining to any particular matters relating to this Contract, reference shall be made to general international commercial practices.⁸²

In this sort of clause, the parties were not using transnational law to contract out of national law (even assuming that the phrase "general international commercial practices" referred to general legal principles and not simply trade usages). Instead, the purpose here is twofold.⁸³ First, the clause uses transnational law to fill gaps in national law (a gap-filling function). Second, the clause uses transnational law to protect the parties (particularly the American party) from application of unpublished rules of national law (a protective function).

81 See Contract Between Tianjin Economic-Technological Development Business Development Co. and AST Research (Far East) Ltd. art. 26.1 (Reference Number 80950005), at <http://cori.missouri.edu> [hereinafter Tianjin & AST Contract]; Joint Venture Contract Between Tianjin Tanggu Valve Plant & Watts Investment Co. art. 24.01 (June 27, 1994) (Reference Number 80940049), at <http://cori.missouri.edu>; Joint Venture Contract Between Ningbo General Air Conditioner Factory and Fedders Investment Corp. art. 24(1) (July 31, 1995) (Reference Number 80950016), at <http://cori.missouri.edu>. The other clause was ambiguous. The choice-of-law provision specified that Chinese law was to govern, but the arbitration clause directed the arbitral tribunal "to apply the law of the People's Republic of China's [sic] and generally accepted international practices." Joint Venture Agreement Between Diodes Inc. and Mrs. J.H. Xing art. 38, (Mar. 18, 1996) (Reference Number 80960052), at <http://cori.missouri.edu>.

82 Tianjin & AST Contract, *supra* note 81, art. 26.1.

83 See Michael J. Moser, *Foreign Investment in China: The Legal Framework*, in FOREIGN TRADE, INVESTMENT, AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 90, 105 (Michael J. Moser ed., 2d ed. 1987) ("In practice, however, the Chinese authorities have in some instances . . . permitted the inclusion of provisions allowing foreign arbitrators to supplement Chinese law with 'commonly accepted international commercial practices' where no existing Chinese rule addresses a particular issue."). I appreciate helpful discussions with Michael Moser on this point.

These purposes are consistent with the model described above, under which contractual choice of law is based on a trade-off between deterrence benefits gained from contracting out of national law and costs of uncertainty in determining and applying the legal rule. Here, however, national law (at least in some respects) was less certain and less complete than transnational law. The greater certainty of transnational law provided deterrence benefits and saved dispute resolution costs relative to national law.

B. *Arbitration Awards*

Awards issued by international arbitrators provide another source of empirical evidence on the use of transnational commercial law. Because arbitration proceedings are private and most awards are unpublished, only a very limited sample of arbitration awards is available. Again, the leading source of published arbitration awards is the ICC, which has a long-standing practice of publishing selected awards (after redacting information that might identify the parties from the published version of the award).

From 1983 through 2002, a total of 110 English-language ICC awards (including partial, interim, and final awards) were published in the *Yearbook: Commercial Arbitration*.⁸⁴ Of those 110 awards, fifteen (13.6%) were based to some extent (albeit often a small extent) on transnational law or some other a-national basis of decision. The number of awards in the sample is only a small fraction of the total awards issued in ICC arbitrations during that twenty-year period.⁸⁵ Nevertheless, if the sample were a representative sample of all ICC awards, these findings would provide an indication of the degree to which arbitrators rely on transnational law in their awards.

All indications are, however, that the sample of published ICC awards is not a representative sample of all ICC awards—very much the contrary. The Secretary General of the ICC has stated that “[o]nly those awards in which arbitrators have felt least constrained to apply

84 INT’L COUNCIL FOR COMM. ARBITRATION, 8–27 Y.B. COMM. ARB. 1983–2002. My focus only on English-language awards may understate the proportion of ICC awards that rely on transnational law, as French academics have been among the more vocal supporters of the concept. On the other hand, English is the predominant language in which ICC awards are prepared, at least in recent years. See *2002 Statistical Report*, *supra* note 71, at 16 (“72% of the awards rendered in 2002 were in English, 16% in French, 6% in Spanish, 3% in German and the remainder in Italian, Polish, Portuguese and Russian.”).

85 From 1998 through 2002, for example, arbitrators issued 949 final awards and 456 partial awards in ICC arbitrations. *2002 Statistical Report*, *supra* note 71, at 7.

national law have been published.”⁸⁶ As a result, the General Counsel of the ICC has made clear: “[B]y comparison with the number of cases submitted to (ICC) arbitration, *lex mercatoria* appears only rarely . . . [O]ne should not come away with the impression that most ICC arbitrations, or even a large proportion of them, refer to *lex mercatoria*.”⁸⁷

C. CENTRAL Survey

Surveys of participants in international arbitration proceedings also may provide some insights on the use of transnational commercial law (subject, of course, to the usual caveats about survey research). An extensive survey by Klaus Peter Berger and the research team of the Center for Transnational Law (CENTRAL) found a “surprising[ly] . . . high percentage of the addressees [who] indicated their awareness of the use of transnational law in legal practice.”⁸⁸ CENTRAL received 639 “useful” responses (a response rate of 23.4%)⁸⁹ from international arbitrators, in-house counsel, law professors, and practicing attorneys⁹⁰ in fifty-one countries⁹¹ (albeit with a significant concentration of Swiss and German lawyers).⁹² Approximately one-third of the respondents “were aware of the use of transnational commercial law” in their law practices, with the percentage varying from 32% (for contract negotiations and contract drafting)⁹³ to 42% (for international arbitration proceedings).⁹⁴ Around 10% were aware of two to five cases and around 3% were aware of six to ten cases in which transnational commercial law was used.⁹⁵ In addition,

86 CRAIG ET AL., *supra* note 6, at 639 n.39 (quoting Robert Thompson & Yves Derains, *Cour d'Arbitrage de la Chambre de Commerce Internationale*, 101 JOURNAL DU DROIT INTERNATIONAL 876, 878 (1974)).

87 *Id.* at 338 n.62 (quoting Yves Derains & Sigvard Jarvin, *Cour d'Arbitrage de la Chambre de Commerce Internationale*, 113 JOURNAL DU DROIT INTERNATIONAL 1094, 1138 (1986)).

88 Klaus Peter Berger et al., *The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration*, in THE PRACTICE OF TRANSNATIONAL LAW 91, 104 (Klaus Peter Berger ed., 2001).

89 *Id.* at 101.

90 *Id.* at 96.

91 *Id.* at 102.

92 Of the original addressees, 11.67% were lawyers in Germany and 10.9% were lawyers in Switzerland. *Id.* at 102 n.40.

93 *Id.* at 104 n.46.

94 *Id.* at 103–04.

95 The breakdown by categories was as follows: 10.02% were aware of two to five cases in which transnational law was used in contract negotiations, 10.32% in contract drafting, and 11.27% in international arbitration proceedings. *Id.* at 104 n.54. Of the respondents, 3.76% were aware of six to ten cases in which transnational law had been

the survey responses indicated that transnational law more often was used to supplement or interpret national law than to displace it altogether, although not dramatically so.⁹⁶

Luke Nottage has questioned whether the results of the CENTRAL survey overstate the use of transnational law because respondents may have included cases they read about in published reports rather than just cases in which they were involved personally.⁹⁷ Nottage ultimately rejected that possibility, concluding that

at least the wording in the English version of the questionnaire connotes reasonably clearly that respondents are being asked about cases in which they *themselves* have had *direct practical experience* in their work, either for instance through direct involvement or having heard from others about a case in the same law firm or company.⁹⁸

Professor Berger et al. take the same view in a private communication to Nottage.⁹⁹

A more fundamental limitation of the survey, however, at least for present purposes, is that it focuses solely on the *absolute* number of cases in which transnational commercial law was used. While the absolute number of cases certainly is of interest, information on the relative number of cases would provide important context for the results. But the study provides no information on the percentage of cases in which the respondents were aware of the use of transnational law or any basis for calculating the percentage (such as the total number of cases in the respondents' practice). Thus, while the CENTRAL survey provides interesting information, that information is incomplete and does not contradict the data on arbitration clauses.

used in contract negotiations, 2.97% in contract drafting, and 2.97% in international arbitration proceedings. *Id.* at 104–05 & n.55.

96 Of the 206 respondents aware of the use of transnational law in contract negotiations, 105 reported the purpose as replacing national law, 96 as supplementing national law, and 58 as interpreting national law. *Id.* at 160. Of the 266 respondents aware of the use of transnational law in international arbitration, 99 reported the purpose as replacing national law, 145 as supplementing national law, and 90 as interpreting national law. *Id.*

97 Luke Nottage, *Practical and Theoretical Implications of the Lex Mercatoria for Japan: CENTRAL's Empirical Study on the Use of Transnational Law*, 4 VINDOBONA J. 132, 138 n.21 (2000).

98 *Id.*

99 *Id.* (quoting personal communication from CENTRAL to Luke Nottage (Oct. 19, 2000), and stating that "we estimate the number of people who reported cases that did not occur in their own practice to be very low").

D. Future Research

The available empirical evidence reveals very limited reliance on transnational law in international arbitration. However, any conclusions based on this evidence necessarily are tentative. More research is necessary.

Further research usefully could be done on the following questions, among others. First, who are the parties to ICC arbitration clauses that choose transnational law?¹⁰⁰ In particular, it would be useful to know whether clauses choosing transnational law are more common in contracts between a private party and a foreign sovereign than in contracts between private parties. As of now, there is no systematic empirical evidence on the choice of transnational law as a precommitment device in such contracts. Although there is anecdotal evidence that the parties to some state contracts have agreed to the use of transnational law instead of national law, one author concludes that “[i]n the vast majority of state contracts, provisions relating to the applicable law refer to some municipal law as the proper law of the contract.”¹⁰¹ Because of the lack of empirical evidence either way, it would certainly be a topic of interest for future research.

Second, when were the contracts formed that included an ICC arbitration clause choosing transnational law?¹⁰² Such information would be valuable in examining trends in usage of transnational law over time, but is not presently published by the ICC. The difficulty is that the ICC’s annual statistical reports are based on the arbitration cases filed in the year of the report. But those cases arose out of contracts that may have been entered into many years earlier. For ICC arbitrations filed in 2003, for example, the dates of signature of the contracts giving rise to the disputes ranged from 1974 to 2003.¹⁰³ The most common year of contract formation was 2001.¹⁰⁴ Without more information, there is no way to tell whether the contracts choosing transnational law were among the oldest or the most recent, or the extent to which choice of law has changed over time.

Finally, what do data from other institutions and ad hoc arbitrations show? The CORI study hints at the sort of future research that might be done. Studies could examine (1) the provisions of arbitra-

100 This information is available for the CORI sample, as discussed *supra* text accompanying notes 78–83.

101 Delaume, *supra* note 58, at 113.

102 Again, this information is available for the CORI sample. See *supra* text accompanying notes 78–83.

103 2003 Statistical Report, *supra* note 61, at 14.

104 *Id.*

tion clauses from institutions other than the ICC, (2) the provisions of arbitration clauses from ad hoc arbitrations, (3) the provisions of arbitration clauses from more extensive samples of international contracts, and (4) arbitration awards from a broader and more representative sample of cases (from the ICC, from other arbitration institutions, and from ad hoc arbitrations). In addition, surveys focusing on the relative rather than the absolute level of usage of transnational law also would fill important gaps in existing knowledge.

IV. WHY DO PARTIES NOT CONTRACT FOR APPLICATION OF TRANSNATIONAL LAW?

An important follow-up question, given the evidence that parties do not commonly contract for application of transnational commercial law, is why not? This Part provides some tentative comments on several possible explanations. First, it examines the standard critique of transnational law—that its application is too vague and uncertain to serve as a basis for resolving disputes. Second, it considers alternative means of contracting out of national law that are available to the parties.

A. *Vagueness of Transnational Commercial Law*

The standard explanation (and one reflected in the model developed above) is that parties do not contract for application of transnational law because it is too vague and uncertain to serve as a useful substitute for national law.¹⁰⁵ The uncertainty is costly both *ex ante*—because parties do not know the rules governing their conduct—and *ex post*—because it makes litigation more likely. The evidence discussed above appears to be consistent with this explanation—including the use of transnational law in Chinese-American joint venture agreements when the provisions of national law, rather than transnational law, were less certain.

The CENTRAL survey considered that possible explanation along with another one: that parties do not use transnational commercial law because they do not have enough information about it. Berger et al. report that “answers referring to the vagueness and uncertainty of transnational commercial law are by far outweighed by those replies that refer to the lack of practical experience and the fact that no information has been available on the subject of transnational commercial law.”¹⁰⁶ Accordingly, the authors recommend expanding the provi-

105 See *supra* text accompanying notes 55–56.

106 Berger et al., *supra* note 88, at 110.

sion of information on transnational law, what some have called “marketing strategies,” to promote its use.¹⁰⁷

But while “lack of information” and “lack of practical experience” were included in the list of possible responses to the survey, “uncertainty” and “vagueness” were not.¹⁰⁸ Instead, respondents had to come up with those responses themselves, which certainly seems likely to have biased the number of responses downwards. Even so, Nottage explains, the survey found significant concerns about the uncertainty of transnational law:

For instance, these are implied 140 times in relation to why reference was not made to Transnational law in the contract itself, by respondents mentioning “no complete legal system” (10), “vagueness” (48), “certainty, predictability” (58), “enforcement concerns” (8), and “no case law” (16). There were also 110 “other” reasons given (not broken down). This compares with “no experience” being mentioned 169 times; and “no information,” 128 times.¹⁰⁹

Indeed, on average, the respondents ranked the risks of relying on transnational law as exceeding the benefits. The average ranking of the benefits of relying on transnational commercial law (with one being “no benefit” and five being “great benefit”) were 2.39 for contract drafting, 2.55 for contract negotiations, and 2.89 for international arbitration.¹¹⁰ The average ranking of the risks (with one being “no risk” and five being “high risk”) were 3.47 for contract drafting, 3.0 for contract negotiations, and 3.1 for international arbitration.¹¹¹ As a result, while lack of information may contribute to party reluctance to contract for application of the new law merchant, it does not appear to be the only, or perhaps not even the predominant, explanation. Conversely, even with its limitations, the survey found significant concerns about the vagueness and uncertainty of transnational law principles.

107 *Id.* at 113.

108 *Id.* at 110.

When evaluating these data it has to be borne in mind that the questionnaire contained preformulated answers as to the lack of experience and information while arguments relating to the vagueness and uncertainty of the *lex mercatoria* had to be filled in by the addressees under the general heading “suitability” or “other reasons.”

Id.

109 Nottage, *supra* note 97, at 142.

110 *Id.* at 143.

111 *Id.*; see also Berger et al., *supra* note 88, annex I, at 141 (reprinting the text of the questionnaire). U.K. lawyers appear to have been more skeptical of the use of transnational commercial law than other respondents, ranking the benefits lower and the risks greater. See *id.* annex III, at 202–03 charts M/08, M/09.

B. *Other Means of Contracting Out of National Law*

Another possible explanation is that parties can avoid costly national laws by other contractual means with greater benefits or lower costs than transnational law.¹¹² Parties can contract out of national law using explicit contract terms or implicit contract terms.¹¹³ Explicit terms include (1) a pre-dispute waiver of a particular legal rule or rules, (2) choice of a national law other than one that includes an undesirable rule, or (3) choice of transnational law or some other national rules of decision. Implicit terms would include a pre-dispute arbitration clause, if arbitrators are likely to apply national law less strictly than national courts.¹¹⁴ Parties presumably will prefer explicit terms (which will be less costly to enforce), unless arbitrators refuse to enforce them or the greater transparency of such terms results in national courts refusing to enforce the resulting arbitration awards (neither of which appear to be the case in international arbitration).¹¹⁵

Of these alternatives, an explicit term choosing application of a less costly national law is the closest substitute for a clause choosing transnational law. The more choices of national law available to parties, the more likely they can find a national law that they prefer. In-

112 Or perhaps parties simply do not need to contract for the use of transnational law because national laws do not impose significant costs on international commercial transactions (possibly because most legal rules governing such transactions are default rules rather than mandatory rules). If so, the deterrence benefits from contracting out of national law would be small.

113 Another possibility is that parties change their primary conduct so as to avoid the effect of the mandatory rule. As Whincop and Keyes suggest:

First, the parties may re-order their contract to take it out of the reach of the jurisdiction applying the mandatory rule.

... Second, the parties might make credible commitments not to invoke a mandatory rule by agreeing to remove assets from the jurisdiction, so that a judgment based on the mandatory rule would be nugatory. Third, the parties might alter the character of their contract where they have agreed to exclude a mandatory rule.

WHINCOP & KEYES, *supra* note 44, at 54.

114 For other views on arbitration as a means of avoiding mandatory rules (and possible legal responses), see Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1282-83 (2000); Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 VA. J. INT'L L. 647, 651 (1999); see also *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) ("We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.").

115 See *supra* text accompanying notes 7-8.

deed, Ribstein argues that contractual choice of law facilitates interjurisdictional competition, thereby further enhancing the choices available to the parties.¹¹⁶ Consistent with this view, Benson asserts that when the parties “specify the choice of substantive law . . . it is likely that the law chosen will not be from the nation of either of the contracting parties.”¹¹⁷

Certainly the substantial majority of ICC arbitration clauses specify a governing national law,¹¹⁸ suggesting that most parties prefer to have their relationship governed by a particular national law. But the published data does not address whether the law chosen is from the country of either of the parties. The CORI sample of international joint venture contracts,¹¹⁹ although it is small and nonrepresentative, is inconsistent with Benson’s empirical assertion. All of the contracts in the sample (including those without arbitration clauses) provided for a particular national law to govern. In every case (seventeen of seventeen, or 100%), the law chosen was the national law of one of the parties to the contract. None of the clauses specified as governing law the law of a country without a close connection to the contract.

At bottom, the evidence is too preliminary to be conclusive on the contractual alternatives to transnational law. Other explanations for why parties do not contract for the new law merchant no doubt are possible as well. Further empirical research needs to be done to understand better why most parties contract for application of national law rather than transnational law.

V. SIGNALING AND TRANSNATIONAL LAW

The available empirical evidence indicates that parties only rarely contract for application of transnational commercial law. If that is the case, why is so much attention given to transnational law in the international arbitration literature? Numerous books, articles, and websites are devoted to transnational commercial law and the new law merchant.¹²⁰

Yves Dezalay and Bryant G. Garth assert that “[t]he flexibility of the *lex mercatoria* . . . allowed its inventors [i.e., established European arbitrators] to gain time . . . , preserving their position when confronted with the new law firm offensive in this market.”¹²¹ On this

116 Ribstein, *Choosing Law by Contract*, *supra* note 44, at 249–50.

117 Benson, *supra* note 4, at 94.

118 See *supra* text accompanying notes 68–73.

119 See *supra* text accompanying notes 78–83.

120 See *supra* note 6.

121 DEZALAY & GARTH, *supra* note 37, at 89.

view, established international arbitrators sought to use the new law merchant to differentiate themselves from new entrants and give themselves a competitive advantage in the market. Given the limited demand for transnational law among contracting parties, this seems unlikely to have been a very successful strategy. This view also would not explain the continued discussion and analysis of the new law merchant today.¹²²

I agree with Dezalay and Garth that the explanation may be found in the market for international arbitration services, but offer a somewhat different suggestion—that scholarly publications on the new law merchant constitute signaling behavior by prospective international arbitrators. It certainly is plausible that prospective international arbitrators would seek to signal their quality to parties.¹²³ Only limited information is available to a party deciding whom to select as an arbitrator. Arbitration proceedings generally are secret,¹²⁴ and arbitration awards usually are not published.¹²⁵ Ethical rules limit the sorts of inquiries parties can make of prospective arbitrators.¹²⁶ In short, the market for international arbitration services is likely characterized by the sorts of information asymmetries that give rise to signaling behavior.

By publishing books and articles and speaking at conferences on transnational law, prospective arbitrators may be signaling that they have what Stephen R. Bond calls “legal internationalism”: an appreciation of “the various different national legal systems and the reasons for the differing assumptions, presumptions, expectations and demands of the parties.”¹²⁷ According to Redfern and Hunter: “It is be-

122 Dezalay and Garth cite a leading Swiss arbitrator to the effect that “the ‘time of the *lex mercatoria*’ is ending.” *Id.* at 91.

123 See generally A. MICHAEL SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES 5–30 (1974) (discussing job market signaling); Richard E. Kihlstrom & Michael H. Riordan, *Advertising as a Signal*, 92 J. POL. ECON. 427 (1984) (analyzing advertising as signal of product quality); Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355 (1973) (discussing job market signaling).

124 See CRAIG ET AL., *supra* note 6, § 16.06.

125 See Drahozal, *supra* note 5, at 122.

126 Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT’L 395, 423–25 (1998).

127 Stephen R. Bond, *The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 NW. J. INT’L L. & BUS. 1, 10 (1991); see also Christopher R. Drahozal, *Arbitrator Selection and Regulatory Competition in International Arbitration Law*, in TOWARDS A SCIENCE, *supra* note 60 (manuscript at 167, 175–76) (discussing possible signaling by arbitrators).

coming increasingly important for international arbitrators to show their awareness of the world of international trade relations and of the different traditions, aims and expectations of the people of that world."¹²⁸ Even if parties do not want to have their dispute resolved according to principles of transnational law (as the evidence discussed above suggests), they may still prefer an arbitrator with a transnational outlook and expertise as to a number of legal systems.¹²⁹ What is visible thus may be the supply side of the market for arbitration services, rather than any significant demand for transnational commercial law.

CONCLUSION

The available empirical evidence reveals only very limited use of transnational commercial law in international commercial arbitration. Few parties contract out of national law (whether for better or for worse) by agreeing to have their dispute resolved using principles of transnational law. Procedural reasons, rather than substantive reasons, seem to predominate when parties to international contracts choose between arbitration and litigation.

The issue here—whether parties in international arbitration seek to contract out of national law—has an obvious parallel to domestic American arbitration: to what extent do parties use arbitration domestically to avoid application of mandatory rules in state and federal law? The Supreme Court describes arbitration as merely a substitute forum for the resolution of statutory claims, characterizing the arbitration clause as “a specialized kind of forum-selection clause.”¹³⁰ It has repeatedly stated that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”¹³¹ By comparison, Stephen J. Ware asserts “the fact that arbitrators often do not apply the law.”¹³² Indeed, critics of the use of pre-

128 REDFERN & HUNTER, *supra* note 2, ¶ 4-42, at 207.

129 That would seem particularly likely to be the case for sole or presiding arbitrators.

130 Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

131 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)); see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 229 (1987).

132 Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 725 (1999). To his credit, Ware cites to several surveys in which arbitrators indicated that they did not always follow the law in making their awards. *Id.* at 719–20. But like the CENTRAL study described above, see *supra* text accompanying notes 88–99, the surveys cited by Ware give no basis for de-

dispute arbitration clauses in consumer and employment contracts describe arbitration clauses as “a kind of corporate self-deregulation,”¹³³ at least in part because “arbitrators are less likely to enforce [legal] rights” than are judges.¹³⁴ Certainly, examining empirical evidence on the use of transnational law in international arbitration itself sheds no light on practices in domestic consumer and employment arbitration. It does, however, highlight the need for empirical research on arbitration practices (as opposed to simply making assumptions about what those practices are) when evaluating arbitration as an alternative to adjudication in the procedural world of the future.

termining the relative frequency of cases in which arbitrators do not apply the law, rather than the percentage of arbitrators responding to the survey who sometimes do not apply the law. *Id.*

133 David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 38 (1997); see also Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 765 (2002) (noting that “the pressure for mandatory arbitration represents another step, and a giant one, in the privatization of American contract law”); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 695 (1996) (arguing that arbitration “allow[s] parties to write their own laws,” which “compromise[s] society’s role in setting the terms of justice”).

134 Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 346. Carrington and Haagen assert that “[m]any awards resulting from such [American commercial arbitration] proceedings might also be described as Solomonic, halving the objects in dispute.” *Id.* at 345. They cite no empirical evidence to support that assertion, and the evidence that is available (largely although not exclusively from international arbitration) is inconsistent with it. See Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not “Split the Baby”—Empirical Evidence from International Business Arbitrations*, 18 J. INT’L ARB. 573, 574, 578 (2001) (reporting that “the results from this study show emphatically that arbitrators do not engage in the practice of ‘splitting the baby’”).