

Arbitral Courts

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In recent years, states from Delaware to Dubai have been establishing something in between courts and arbitration, what this Article calls “arbitral courts.” Arbitral courts mimic arbitration’s traditional features. They hire internationally well-regarded judges who may also work as arbitrators. They claim the neutrality, expertise, and sometimes the privacy and confidentiality of international arbitration. Unlike arbitration, however, they bind third parties, develop law, and wield the power of the state.

This Article identifies, theorizes, and explores the significance of these new arbitral courts. Arbitral courts unsettle traditional distinctions between public and private adjudication. Their appearance has significant consequences not only for understanding the state of the evolving international judicial system, of which U.S. courts have historically been an important part, but also for the future of legitimacy and transparency in dispute resolution around the world.

There is much to applaud about the innovation of arbitral courts. But questions remain about whether there is and should be a dividing line between public and private adjudication. This Article uses arbitral courts to investigate that line by distinguishing between courts’ and arbitral tribunals’ claims to legitimacy and their needs for transparency and publicity. It argues that arbitral courts have the potential to develop influential transnational law—if they can maintain the traditional openness of courts despite parties’ preferences for confidentiality. To do so, they should publicly declare their commitment to being a public institution and take other steps to ensure that they maintain transparency over time, even when other forces—like the parties’ preferences—pressure them to become more private.

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“Once upon a time, I . . . dreamt I was a butterfly . . . Soon I awaked, and there I was, veritably myself again. Now I do not know whether I was then a man dreaming I was a butterfly, or whether I am now a butterfly, dreaming I am a man.”

– Zhuangzi (*Chinese philosopher, c. 369 BC – c. 286 BC*)¹

I. INTRODUCTION

In 2009, Delaware enacted a statute allowing Chancery Court judges to act as arbitrators.² For controversies involving at least one Delaware business entity, no consumers, and amounts in dispute over \$1 million, the parties could agree to have a Chancery Court judge arbitrate their dispute. The proceedings would be confidential and held in the Delaware courthouse for a filing fee of \$12,000, plus \$6,000 for each additional hearing day. Regular Chancery Court procedure and evidence rules would apply, but the parties could agree to modify them.³ The judges could grant any remedy they “deem[ed] just and equitable and within the scope of any applicable agreement of the parties.”⁴ The losing party could appeal the “order of the Court of Chancery” to the Delaware Supreme Court, but subject to Federal Arbitration Act standards of review. The arbitration petitions and decisions would be confidential, but once appealed they could become part of the public record.⁵ Delaware designed the statute, Chief Justice Myron Steele explained, “to keep the United States, and in particular, Delaware, competitive in international business dispute resolution.”⁶

In 2013, a Third Circuit panel declared that these “government-sponsored arbitrations” violated the First Amendment’s right of public access to trials because of their confidential nature.⁷ The Third Circuit judges debated whether the Delaware statute created a court that had some arbitration-like features (like confidentiality, optional procedural rules, limited appellate review), which would require public access, or an arbitral tribunal that had some court-like features (Delaware Chancery judges, Delaware courthouse), which would not. In fractured decisions, two of the three judges thought Delaware had unconstitutionally created confidential

1. WILLIAM EDWARD SOOTHILL, *THE THREE RELIGIONS OF CHINA: LECTURES DELIVERED AT OXFORD* 75 (1913) (quoting 1 *THE TEXTS OF TAOISM* 197 (James Legge trans., 1891)).

2. See DEL. CODE ANN. tit. 10, § 349 (2009); Del. Ch. Ct. R. 96-98.

3. *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 513 (3d Cir. 2013).

4. *Id.* at 513.

5. See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1821 (2014).

6. Myron T. Steele et al., *Delaware’s Closed Door Arbitration*, 6 J. BUS. ENTREPRENEURSHIP & L. 375, 380 (2013).

7. *Del. Coal. for Open Gov’t*, 733 F.3d at 512, 521. Judge Roth of Delaware dissented.

courts.⁸ Delaware's courts had to be open to the public.⁹ The Third Circuit thus thwarted Delaware's attempt to create a court-arbitration hybrid—what this Article calls an “arbitral court.”¹⁰

The Third Circuit's decision reflects both conventional civil procedure theory and arbitration theory about the dividing line between courts and arbitration. According to these theories, courts are public, “procedurally rigorous,” and state-sponsored; arbitration is private, “faster and cheaper but with fewer procedural safeguards.”¹¹ Courts' authority derives from the state; their power extends as far as the state's.

Arbitration, by contrast, is understood as both a private dispute resolution mechanism replacing courts and a creature of contract.¹² The parties' agreement both defines and limits arbitral tribunals' authority. While scholars have recognized a convergence of procedures in different fora¹³ and bemoaned both the privatization of court procedure¹⁴ and the judicialization of arbitration,¹⁵ the understanding has been that courts and arbitration stay in their lanes.¹⁶

Over the past fifteen years, however, a new wave of courts has exploded those traditional distinctions. In addition to the Delaware experiment, international commercial courts that borrow traits from arbitration have been established in Dubai (2004), Singapore (2015), the Netherlands

8. *Id.* at 521.

9. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2937 (2015) (discussing the importance of “public faith in the Delaware judicial system”).

10. This term has occasionally been used to describe international arbitration tribunals, like the Permanent Court of Arbitration, see, for example, Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 482 (2003), or private community tribunals, see, for example, Joseph Kary, *Judgments of Peace Montreal's Jewish Arbitration Courts, 1914-1976*, 56 AM. J. LEGAL HIST. 436, 436 (2016). Here, it describes domestic courts that mirror arbitration.

11. Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 2996 (2015).

12. See Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 458-69 (2010).

13. See, e.g., Aaron D. Simowitz, *Convergence and the Circulation of Money Judgments*, 92 S. CAL. L. REV. 1031 (2019); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 442 (2010).

14. See, e.g., Resnik, *Privatization of Process*, *supra* note 5; Hazel Genn, *What Is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397 (2012); Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, in DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS (2020).

15. See, e.g., Rémy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the “Judicialization” of International Arbitration*, 25 AM. REV. INT'L ARB. 223, 227 (2014).

16. See, e.g., Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119 (2019) (detailing the Supreme Court's treatment of litigation and arbitration as opposites); cf. Hiro N. Aragaki, *The Metaphysics of Arbitration*, 18 NEV. L.J. 541 (2018) (debunking conventional wisdom about the sharp divide between courts and arbitration in order to contemplate the existential question of what arbitration is).

(2019).¹⁷ In the same period, tax havens such as Bermuda, the British Virgin Islands, and the Cayman Islands, the place of incorporation for many foreign firms, have established new business courts that “look a lot like commercial arbitration.”¹⁸ This Article considers Delaware’s government-sponsored arbitration experiment, some international commercial courts,¹⁹ and these offshore business courts to be “arbitral courts.”

Arbitral courts are domestic courts. Individual states²⁰ create and fund them (at least as a formal matter; if funded by users’ fees, those are paid to the state and can be redistributed as the state sees fit). Arbitral courts render binding decisions that have the force of legal judgments, enforceable by the power of that creating state. They can issue subpoenas and injunctions. They can join or bind non-consenting third parties. They can develop law; under common law traditions, they can declare law and establish precedent. The subject matter of the disputes, the parties to the disputes, and even the judges may be foreign to the state, but the institution of the arbitral court is domestic to the creating state.

Courts, especially commercial courts, have been trying to respond to parties’ preferences for speed, flexibility, and expertise for decades.²¹ In a number of ways, court procedure has become increasingly privatized—for example, through managerial judging, court-annexed arbitration, and increased party control over procedures.²²

Arbitral courts take these efforts several steps further—blatantly replicating features of international commercial arbitration.²³ They allow

17. Many, but not all, of the courts known as “international commercial courts” would fit this Article’s definition of arbitral courts. See *infra* Part II.

18. Will Moon, *Delaware’s New Competition*, 114 NW. L. REV. 1403, 1441 (2020).

19. There is a small but growing literature on international commercial courts—domestic courts with subject matter limited to international commercial disputes. See, e.g., Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT’L L. 227, 230 n.13 (2020) (collecting sources). Much of this literature acknowledges that these courts have borrowed some features from international commercial arbitration and considers whether they can effectively compete with arbitration to be disputants’ chosen forum. See, e.g., Janet Walker, *Specialized International Courts: Keeping Arbitration on Top of Its Game*, 85 INT’L J. ARB., MEDIATION & DISP. MGMT. 2 (2019); Dalma Demeter & Kayleigh M. Smith, *The Implications of International Commercial Courts on Arbitration*, 33 J. INT’L ARB. 441, 441 (2016); Stephan Wilske, *International Commercial Courts and Arbitration—Alternatives, Substitutes or Trojan Horse?*, 11 CONTEMP. ASIA ARB. J. 153 (2018); Thomas Schultz & Clément Bachmann, *A Wig for Arbitrators: What Does it Add?* (King’s Coll. London L. Sch., Paper No. 2019-33, 2019), <https://tinyurl.com/y3wqxtm>.

20. “State” here refers to a sovereign, whether a U.S. state, foreign country, or foreign locality. See *State*, in BLACK’S LAW DICTIONARY (11th ed. 2019).

21. See, e.g., John Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1921 (2012); The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, Grand Court of the Cayman Islands Guest Lecture: Giving Business What It Wants – A Well Run Court for Commercial and Business Disputes (Mar. 2, 2017), <https://tinyurl.com/y4eqk82q>.

22. See *infra* Part II.B.

23. At its most basic, “[a]rbitration is a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties [in accordance with the parties’ agreement to arbitrate], to render a binding decision resolving [that] dispute in accordance with neutral,

parties to choose which forum hears the dispute (often regardless of the states' connections to it); which procedures guide the dispute; whether the proceedings or the decision will be open to the public or kept confidential; and what law governs the dispute, potentially even if parties select non-state-created law, like general equitable principles, or rules articulated by organizations like the United Nations Commission on International Trade Law (UNCITRAL). Although arbitral courts operate in English—even in non-English-speaking countries—the courts employ foreign judges and allow foreign lawyers to appear before them. They also permit parties to opt out of appeals.

This Article identifies, theorizes, and explores the significance of arbitral courts.²⁴ Descriptively, the Article recognizes arbitral courts as the vanguard of international commercial dispute resolution.²⁵ They are domestic institutions designed to hear cases involving actors or controversies that cross borders.²⁶ As such, they are an important addition

judicial procedures affording the parties an opportunity to be heard.” GARY BORN, *INTERNATIONAL ARBITRATION: CASES AND MATERIALS* 336 (2d ed. 2015); *see also id.* at 131-32 (collecting definitions of arbitration).

24. Scholars have recognized that several international commercial courts appear to be “hybrid” courts. But the literature neither offers a robust description of what that means, nor does it analyze international commercial courts together with other examples of arbitral courts, like the Delaware and Cayman Islands examples. *See, e.g.,* Firew Tiba, *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia*, 14 *LOY. U. CHI. INT’L L. REV.* 31, 32, 47 (2016) (defining the SICC as a hybrid international court because “some of its judges are from overseas jurisdictions”); Yuko Nishitani, *Party Autonomy in Contemporary Private International Law*, 59 *JAPANESE Y.B. INT’L L.* 300, 306 (2016) (“[S]ome jurisdictions have started providing, in international commercial cases, new dispute resolution mechanisms that transcend the conventional threshold between litigation and arbitration.”); Aragaki, *supra* note 16, at 564-65 (asking whether international commercial courts like the one in Singapore is an example of “arbitration” or a “court,” and whether the question matters).

25. This Article focuses on international commercial disputes for several reasons. First, the arbitral courts studied here focus on those disputes. Second, that focus facilitates more coherent discussion about a specific kind of arbitration, avoiding confusion stemming from the multiplicity of different kinds of arbitration. *See, e.g.,* Bookman, *Arbitration-Litigation Paradox*, *supra* note 16, at 1129 (choosing the same focus for similar reasons). Third, international commercial disputes involve high stakes—not just in terms of the dollar amounts in controversy, but in terms of their impact on global governance, as the natural result of an expanding global economy. *See, e.g.,* ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY* (2017). Future research should explore the possibility and implications of arbitral courts in other areas.

26. By contrast, international institutions are created and supported by multiple states. Examples of international courts include the International Court of Justice, the Inter-American Court of Human Rights, and the International Criminal Court. The distinction between courts and arbitration on the international plane—such as the proper classification of the Permanent Court of Arbitration in the Hague—raises different sets of issues beyond the scope of this Article. *See generally* *INTERNATIONAL COURT AUTHORITY* (Karen Alter et al. eds., 2018); *LEGITIMACY AND INTERNATIONAL COURTS* (Nienke Grossman et al. eds., 2014); Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order*, in *CAMBRIDGE COMPANION TO INTERNATIONAL LAW* (J. Crawford & M. Koskeniemi eds., 2011).

to the “international judicial system.”²⁷ Theoretically, the Article situates the emergence of arbitral courts in the context of broader debates over public/private distinctions,²⁸ the judicialization of arbitration, and the privatization of procedure.²⁹

Arbitral courts shift and blur traditional boundaries between public and private adjudication. They reveal the power of procedural innovation and forum shopping as forces of institutional change, which I have explored in previous work.³⁰ But as institutions at the cross-roads of public and private adjudication, arbitral courts reveal not only the possibilities but also the limits of experimentation and party autonomy over procedure, especially if the parties control whether proceedings, opinions, and judgments are kept confidential. To establish and maintain their legitimacy, their future impact and ability to attract cases, and their capacity to develop law, arbitral courts should take steps early on to dedicate themselves to being public institutions. Likely incentive structures may lead arbitral courts to cater to parties’ requests for confidentiality. This Article therefore advocates that arbitral courts should take extra steps to bind themselves now to transparency protocols that would reject or significantly limit grants of such requests.

Part II of this Article describes the traditional divide between courts and arbitral tribunals and then maps trends and debates about the judicialization of arbitration and the privatization of procedure in courts.

Part III defines an arbitral court as a court that puts its publicness in the hands of the parties—offering them options like those available in arbitration, such as confidentiality and optional procedures, but also allowing them access to the full breadth of the court’s state power. This Part identifies common characteristics of arbitral courts and profiles five prototypical examples of arbitral courts, from Delaware, the Netherlands, Singapore, Dubai, and the Cayman Islands. These are not the only examples

27. Martinez, *supra* note 10; *see also, e.g.*, Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 776 (2012); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011).

28. *See generally* ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW* (2009); Morton Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982); *cf.* STONE SWEET & GRISEL, *supra* note 25, at 171 (“[W]e do not make a sharp theoretical distinction between public and private law and process.”).

29. There has been much emphasis on the procedural differences between courts and arbitration, reflecting a concern about “efficiency,” speed and costs, but translating into distinctions about procedural flexibility, class treatment, availability of appellate review, and the like. *See* Bookman, *Arbitration-Litigation Paradox*, *supra* note 16 (describing Supreme Court jurisprudence on the differences between litigation and arbitration). In previous work, I have demonstrated that these are not proper distinguishing factors between public and private adjudication. *Id.* Increasingly, there are courts with arbitration-like features and arbitration with litigation-like features, especially in international commercial disputes. Arbitral courts take this overlap to a new level.

30. *See* Pamela K. Bookman & David Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017); Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2017).

of arbitral courts in the world, but they are the most arbitration-like courts in each region where arbitral courts are appearing.³¹

Part IV, the analytical heart of the paper, evaluates three ways in which arbitral courts test the boundaries between public and private adjudication. It first critiques arbitral courts' manipulation of legitimacy and jurisdiction. Arbitral courts claim legitimacy that derives from the same source as arbitration's legitimacy—the parties' freedom of contract and voluntary submission to the forum. But they also claim jurisdiction and power that derives from the state—asserting traditional court powers over non-consenting parties, over issues that parties did not voluntarily submit to the court's jurisdiction, and over general law development. This attempt at duality may seem at first blush to lay claim to a double layer of legitimacy. This Part argues, however, that it could instead lead to legitimacy and enforcement problems, for example if arbitral courts exert jurisdiction over non-consenting parties over whom they would not otherwise have jurisdiction. Moreover, this Part draws attention to the circularity of arbitral courts both lending legitimacy to a state that international commercial parties might not otherwise fully trust and also borrowing power from the state to bind third parties and make law.

A second boundary test comes from the arbitral court practice of giving parties more control over choosing procedures, including control over whether the proceedings and court decisions will be kept confidential. It seems likely that arbitral courts will generously grant parties' requests for confidentiality, especially over time. Arbitral courts' institutional norms, like those in arbitration, seem focused on catering to parties' interests—parties' requests for efficiency, expertise, and other features they typically find in arbitration. When given the option, parties often prefer confidential proceedings. As is the case in international arbitration, however, allowing the parties to have control over confidentiality determinations can undermine strong and interrelated institutional interests in transparency, legitimacy, and independence.³² Crossing the confidentiality line should be the breaking point of party autonomy over procedure. Arbitral courts should police confidentiality requests vigilantly to ensure their own legal and sociological legitimacy; to justify their public funding, support, and power; and to ensure their ability to perform the functions of courts, including declaring and developing the law for the parties before them and for others.

Third, arbitral court judges also test the limits of public and private adjudication, especially in arbitral courts that hire foreign judges. These decision makers have a hybrid set of incentives, and potentially a hybrid ethos—reflecting their role as decision makers hired by the state to cater to

31. *See infra* Part III.

32. *See infra* Part IV.

private parties' needs and desires. This Part identifies questions for further research about arbitral court judges' attitudes and incentive structures.

Part V evaluates the perils and promise of arbitral courts. It warns of the legitimacy problems that could follow if arbitral courts proceed behind the dark veil of confidentiality. Liberal granting of parties' requests for confidentiality could compromise not only the decisions made in particular cases but also arbitral courts' ability to develop law and shape global governance. This Part identifies arbitral courts' potential for developing transnational commercial law—if they contain the scope of their power within legitimate limits and if they can resist parties' preferences for confidentiality. It therefore offers suggestions for how and why arbitral courts might resist the temptation to keep proceedings private.

Part VI concludes with an agenda of further research questions.

II. THE JUDICIALIZATION OF ARBITRATION AND THE PRIVATIZATION OF PROCEDURE

Courts and arbitration represent the public and private sides of the binding dispute resolution coin. Traditionally, the two sides are thought to offer contrasting options that differ significantly from each other in terms of procedure, subject matter, decisionmakers, cost, speed, and more. A growing theme in contemporary procedural scholarship, however, is convergence.³³ Procedures in arbitration and litigation are converging. Arbitration, especially international commercial arbitration, is judicializing.³⁴ Procedure in courts around the world, meanwhile, is growing privatized, through increased managerial roles of judges, encouraging private settlement;³⁵ incorporation of arbitration and alternative dispute resolution (ADR) as off-ramps to court process;³⁶ and increased acceptance for privately negotiated procedures within courts.³⁷

33. See, e.g., Alyssa King, *Global Civil Procedure*, HARV. J. INT'L L. (forthcoming 2021).

34. See, e.g., STONE SWEET & GRISEL, *supra* note 25, at 84; Bookman, *Arbitration-Litigation Paradox*, *supra* note 16, at 1169; Gerbay, *supra* note 15, at 227.

35. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-77 (1982); Tobias Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1027-28 (2013).

36. Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1652 (2015); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165, 166-67 (2003); Solomon Oliver Jr., *Alternate Dispute Resolution (ADR) and Minorities in the Federal Courts*, 39 CAP. U. L. REV. 805, 806 (2011).

37. See, e.g., Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005); David Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 391-92; Robin Effron, *Ousted*, 98 B.U. L. REV. 127, 128 (2018); Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1331 (2012); Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1494 (2013).

And yet, certain differences should remain. Fundamentally, arbitration is a private institution and courts are public.

This Part sets the stage for understanding the emergence of arbitral courts by differentiating between the perceived distinctions between courts and arbitration (e.g., speed, cost, procedural formality), and the fundamental distinctions: the public and private sources of their authority and legitimacy, and the resulting limitations on the power of courts and arbitral tribunals. This Part then explores the literature on the judicialization of arbitration and the privatization of procedure. Both of these latter trends reflect a convergence of procedures between traditionally public and private binding dispute resolution mechanisms, but with arbitration and courts mostly staying in their own lanes. Judicialized arbitration is still self-evidently arbitration, not a public, domestic judicial system; privatized procedure does not morph courts into arbitral tribunals. Arbitral courts—the subject of the rest of this Article—present an apex of this convergence: domestic courts that seek to mimic arbitration to new extremes, potentially erasing the boundary between arbitration and litigation, and raising existential questions about what courts are.

A. Traditional Distinctions between Courts and Arbitration

Both the Supreme Court and commentators routinely depict litigation and arbitration as starkly contrasting options for binding dispute resolution.³⁸ They tend to focus on certain sets of perceived differences. For example, arbitration is said to be faster, cheaper, more efficient, more expert, and less formal than litigation in court.³⁹ Courts and arbitration are thought to have different procedures⁴⁰ and to adjudicate different kinds of disputes.⁴¹ But these are not, contrary to the Supreme Court's description, inherent differences between the two methods. Arbitration can be slow, expensive, and procedurally complicated. In the United States especially,

38. See, e.g., Helfand, *supra* note 11, at 3023; Bookman, *Arbitration-Litigation Paradox*, *supra* note 16, at 1123; Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (distinguishing between arbitration and the litigation procedures that arbitration “was meant to replace”).

39. See Bookman, *Arbitration-Litigation Paradox*, *supra* note 16, at 1141-42 (discussing Supreme Court cases).

40. See, e.g., Hall St. Assocs., L.L.C. v. Mattel, 552 U.S. 576, 588 (2008) (arbitration's “essential virtue” is resolving disputes without appellate review); Epic, 138 S. Ct. at 1623 (considering individualized proceedings to be fundamental to arbitration); IAN MACNEIL, FEDERAL ARBITRATION LAW § 34.1 (1994) (parties choose arbitration because it lacks discovery).

41. See, e.g., Deborah Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 386 (2018). *But cf.* David L. Noll, *Response: Public Litigation, Private Arbitration?*, 18 NEV. L.J. 477, 479 (2018) (challenging this view).

arbitration can adjudicate almost everything that can be heard in court.⁴² Courts, meanwhile, are working on offering the kind of efficiency and expertise, etc., that are commonly associated with arbitration.

At their core, the difference is that courts are public and arbitration is private. Courts' public nature means that courts should be open to the public—available to all comers to use them, to read their decisions, to observe their proceedings. They employ judges paid by the state whose role is to be public servants—adjudicating not just for the parties but with the public good in mind.⁴³

Both courts and arbitral tribunals are attentive to their own legitimacy. Of course, legitimacy is a complex concept. To function, both courts and arbitral tribunals need the public—and their users—to perceive them as playing an appropriate role in governance and making decisions based on law, not politics or personal preferences.⁴⁴ Put another way, both courts and arbitration need both sociological legitimacy and legal legitimacy. The sociological legitimacy of a court depends on whether the public views the court as worthy of respect and obedience.⁴⁵ Legal legitimacy is established if citizens believe the legal institution has a valid claim to exercise power.⁴⁶

Courts' legitimacy is intertwined with the fact that courts are arms of the state.⁴⁷ They derive their powers from the state's sovereignty, which, in turn, defines the scope of the court's legitimate powers. The state's sovereignty enables courts to render decisions that make law, to issue injunctions, and to assert power over any persons over whom they have personal jurisdiction. But the source of authority also limits courts' powers. Law students may be well familiar with domestic law limits on the powers of federal courts. The Constitution may also impose some limits on state courts, for example, requiring public access.⁴⁸ Sovereignty also limits court

42. See Bookman, *Arbitration-Litigation Paradox*, *supra* note 16, at 1187.

43. This is a description of the idealized role, not necessarily the reality. See, e.g., POUND INST. FOR CIV. JUST., *DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS* (2020), <https://tinyurl.com/y3hnyl4v>; Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law*, A.B.A. (Nov. 18, 2019), <https://tinyurl.com/ybv8jn6u>.

44. See RICHARD H. FALLON JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 23 (2018).

45. *Id.* at 22-23.

46. See, e.g., Jonathan Jackson, *Norms, Normativity, and the Legitimacy of Justice Institutions: International Perspectives*, 14 ANN. REV. L. & SOC. SCI. 145, 149 (2018). There may also be questions of moral legitimacy, which ask whether people ought to respect and try to obey the law “or whether governmental officials are morally justified in coercing compliance.” FALLON, *supra* note 44, at 23.

47. Scholars have long grappled with the intricacies of the concept of legitimacy and this Article does not try to engage in those debates so much as to try to apply the basic ideas of legitimacy to arbitral courts.

48. See *infra* notes 145-158 and accompanying text (discussing whether the Constitution requires open access in civil cases). As another example, on October 5, 2020, the Supreme Court heard a case asking whether the Constitution allows state court judges to be appointed or dismissed due to political party affiliation. *Carney v. Adams*, 592 U.S. __ (2020). For the lower court's discussion of the issue, see

powers on the international plane.⁴⁹ For example, for a foreign court to recognize and enforce another court's judgment, the rendering court must have had jurisdiction over the case.

In recognition of the awesome state power that courts wield, states require courts to maintain standards of fairness and due process by requiring certain kinds of procedures and a certain amount of open access for the public to keep tabs on what courts are doing (among other reasons).

Arbitration, by contrast, is private. It is held in private spaces. It excludes strangers from proceedings. Parties can (but do not have to) agree not to disclose their relationship or the arbitration's outcome to third parties.⁵⁰ Arbitral awards are made by private decision-makers who are paid by the parties, follow procedures chosen by the parties, and bind only the parties to the dispute. Excepting specialized regimes where parties are required by law to arbitrate, arbitrators' authority over a particular dispute derives principally from—and is limited by—those parties' private choices. Arbitrators therefore also may have a different attitude toward decision-making. Their task is to resolve the dispute before them. Accordingly, some suggest arbitrators may be less interested in “making law”; as providers of a business service, they may be guided by commercial reasonableness as much as, if not more than, the governing law.⁵¹

Arbitration's legitimacy derives from at least three sources: the arbitration agreement (the parties' consent), an international infrastructure undergirded by state support,⁵² and the virtues and reputations of the arbitrators themselves.⁵³ First, the private source of arbitration's legitimacy is from the parties' agreement to resolve disputes arising out of their contract in arbitration. But freedom of contract alone does not legitimize

Adams v. Governor of Del., 914 F.3d 827, 829 (3d Cir. 2019).

49. According to the Restatement (Fourth) of the Foreign Relations Law of the United States, customary international law does not confine courts' judicial jurisdiction. This is a change from the Third Restatement. See Pamela K. Bookman, *Towards the Fifth Restatement of U.S. Foreign Relations Law: The Future of Adjudicative Jurisdiction Under Public International Law*, in THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (2020). But it is uncontroversial that customary international law constrains courts' enforcement jurisdiction. See, e.g., Hannah Buxbaum & Ralf Michaels, *Reasonableness as a Limitation on the Extraterritorial Application of U.S. Law: From 403 to 405*, in THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (2020).

50. See, e.g., Gu Weixia, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?*, 15 AM. REV. INT'L ARB. 607, 609 (2004).

51. See JOSHUA KARTON, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* 40-78, 99-114 (2013).

52. *Id.* at 70.

53. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 45 (1996); Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth*, 28 ARB. INT'L 161, 166 (2012).

international commercial arbitration. An international treaty, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, established a legal infrastructure for courts to enforce arbitration agreements, recognize and enforce arbitration awards, and aid arbitration when a proceeding requires interim measures or injunctive relief that arbitral tribunals lack the power to authorize.⁵⁴ Over 150 countries have signed this treaty, and it is largely an international law success story.⁵⁵ Thus, arbitration's power derives not only from contract but also from the active consent and support of many states—both the seat of the arbitration and the states where enforcement is sought.⁵⁶ That infrastructure reinforces the point: a key distinction between courts and arbitration is the source of their power.

Finally, arbitrators also lend considerable legitimacy to arbitration. Arbitrators appear more neutral because they are not state actors and possibly do not share a nationality with one of the parties, in contrast to judges on traditional courts. Many arbitrators are well regarded experts in their fields. Moreover, they are chosen by the parties, and therefore even the losing party has helped constitute the tribunal and may feel like it had an advocate during the decision-making process. The chair of an arbitration panel—the third arbitrator chosen by the parties' chosen co-arbitrators⁵⁷—also has legitimacy based on the fact that they represent a choice acceptable to arbitrators presumed to act in the interest of the parties who selected them.

The sources of arbitration's legitimacy both define and limit the scope of its jurisdiction and authority. Because arbitration is “a creature of contract,”⁵⁸ parties have the freedom to control which procedures apply, which state's law (if any) the arbitrators should use to resolve the dispute, and whether their process or the arbitrator's conclusions should be kept confidential. Similarly, because arbitration is *only* a creature of contract, arbitrators are limited to resolving the dispute before them as defined by the contract; their authority extends only to those parties that have consented to arbitration; and they cannot enforce their own awards or exercise the injunctive powers of the state without a court's assistance.

54. See Bookman, *Arbitration-Litigation Paradox*, *supra* note 16, at 1137.

55. See Martinez, *supra* note 10, at 441 (calling the New York Convention “one of the great successes of international law”).

56. See, e.g., JAN PAULSSON, *THE IDEA OF ARBITRATION* (2013) (theorizing arbitration's authority as based on multiple sources, including parties' freedom of contract and state power); see also EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2010) (theorizing arbitration as an autonomous legal order).

57. In most high stakes arbitral disputes, “each party names a ‘co-arbitrator,’ who then jointly select[] a ‘presiding arbitrator.’” STONE SWEET & GRISEL, *supra* note 25, at 224.

58. See Alan Scott Rau, *Hall Street Associates v. Mattel, Inc.: Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 472 (2006).

Daniel Markovits has argued that it is important to recognize that arbitration is not one thing but two—a private replacement for judging and a form of contract gap-filling. He criticizes “arbitration’s most enthusiastic defenders, including the Supreme Court,” for justifying the expansion of arbitration’s scope (for example enforcing arbitration clauses in consumer or employment contracts) on the rationale that arbitration is merely a replacement for judging, but then conceiving of arbitration as merely an extension of the parties’ contract, completely manipulable by private parties, when arbitration defenders try to “relax the law’s scrutiny of the actual arbitral process.”⁵⁹ In other countries that are more attentive to these dual roles, one finds more external limits on arbitration’s scope. For example, in the EU, arbitration clauses in consumer or employment contracts are not enforceable, and in Switzerland, courts can decline to enforce arbitral awards if the arbitral proceeding violated standards of due process, including letting both sides be heard.⁶⁰

As these examples show, arbitration, like other kinds of private ordering, is to varying extents regulated by the state; even under the New York Convention there are grounds for not enforcing arbitral awards, for example if they are a result of fraud or if they exceeded the authority granted by the parties. But such interventions, especially in international commercial arbitration, are the exception rather than the rule. Some theorists even conceive of international arbitration as an independent “transnational legal order,”⁶¹ seemingly denying the possibility of state regulation external to the private arbitration process. But regardless of arbitration’s autonomous status, any given dispute’s parameters are still defined by the scope of the private arbitration agreement.

B. *Judicializing Arbitration*

With respect to many of the so-called differences between them, courts and arbitral tribunals adjudicating international commercial disputes have been converging over the past few decades. In that time, international arbitration has exploded in terms of the number of cases, amounts in controversy, and reported popularity.⁶² As arbitration centers like the

59. Markovits, *supra* note 12, at 434.

60. *Violation of Due Process*, SWISS INT’L ARB. DECISIONS, <https://tinyurl.com/y59dd2ec> (last visited Jan. 25, 2021); Tribunal fédérale [TF] [Federal Supreme Court] Dec. 10, 2007, 26 ASA BULL. 322 (Switz.); Remy Gerbay, *Due Process Paranoia*, KLUWER ARB. BLOG (June 6, 2016), <https://tinyurl.com/y2s6dogb>.

61. GAILLARD, *supra* note 56, at 35.

62. STONE SWEET & GRISEL, *supra* note 25, at 2-3 (collecting statistics); Horst Eidenmuller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 IND. J. GLOBAL LEGAL STUD. 707, 722-23 (2011). Some empirical studies of contracts cast doubt on proclamations of

International Chamber of Commerce (ICC) have gained prominence, they have also become sites of increasingly contentious, high stakes, and complicated disputes. And they have been populated by lawyers trained in American litigation tactics.

Scholars have cited all of these trends in explaining why and how international arbitration has become increasingly “judicialized.”⁶³ In the early twentieth century, proponents of arbitration “touted [it] as a more efficient, less costly, and more final method for resolving disputes,” with “little or no discovery, motion practice, judicial review, or other trappings of litigation.”⁶⁴ But by the start of this century, international arbitration had become increasingly similar to civil litigation—more “formal, costly, time-consuming, and subject to hardball advocacy.”⁶⁵ Arbitration centers now have lengthy and sophisticated codes of procedure,⁶⁶ including options for discovery,⁶⁷ class proceedings⁶⁸ and internal appellate review.⁶⁹ A new generation of arbitrator also increasingly sees their role as similar to that of a managerial judge.⁷⁰

Some kinds of arbitration have also become more transparent. In certain areas, for example, particularly investor-state arbitration, tribunals now publish most awards.⁷¹ As a result, these arbitral awards have

arbitration’s total market dominance. *See, e.g.*, Julian Nyarko, *We’ll See You in . . . Court! The Lack of Arbitration Clauses In International Commercial Contracts*, 58 INT’L REV. L. & ECON. 6 (2019); Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMPAR. & INT’L L. 449, 475 (2009); Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 876 (2008); Christopher Drahozal & Stephen Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses*, 25 OHIO ST. J. ON DISP. RESOL. 433, 434 (2010).

63. *See* STONE SWEET & GRISEL, *supra* note 25 (developing a theoretical framework to explain judicialization in terms of supporting arbitration’s legitimacy and other functional factors); Aragaki, *supra* note 16, at 552 (explaining judicialization as a response to legitimacy concerns); Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 9 (quoting lawyers blaming litigators for arbitration’s judicialization); *id.* at 11 (faulting the increasing complexity of arbitration disputes).

64. Stipanowich, *New Litigation*, *supra* note 63, at 8.

65. *Id.* As I have explored elsewhere, the Supreme Court’s characterizations of arbitration even today hew closer to the early twentieth century caricature. *See* Bookman, *Arbitration-Litigation Paradox*, *supra* note 16, at 1150-63 (describing the Court’s “essentialist view” of arbitration).

66. STONE SWEET & GRISEL, *supra* note 25, at 84.

67. *See, e.g.*, Giacomo Elgueta, *Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics*, 16 HARV. NEGOT. L. REV. 165 (2011).

68. *See* Alyssa King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031 (2017).

69. *See, e.g.*, AM. ARB. ASS’N, OPTIONAL APPELLATE ARBITRATION RULES 3 (2013), <https://tinyurl.com/y6nah3x9>.

70. Schultz & Kovacs, *supra* note 53, at 162.

71. *See, e.g.*, Hensler & Khatam, *supra* note 41, at 412 (describing ICSID’s efforts to expand transparency).

contributed to developing the substantive law in this area, and arbitral awards are often cited in a quasi-precedential fashion.⁷²

In international commercial arbitration, however, there is resistance to this last step of judicialization. Confidentiality continues to reign supreme, especially in terms of publication of awards.⁷³ The arbitration institutions seem to acknowledge a need to provide transparency into their procedures and reasoning, but parties often choose arbitration specifically to keep their business disputes—and other information about their businesses—confidential. There have been several efforts to address the “confidentiality-transparency problem” without sacrificing that allegiance to confidentiality.⁷⁴ The ICC has been issuing redacted awards since the 1930s; some other arbitration houses have begun doing so;⁷⁵ some say they would publish upon the parties’ request, but have never published any awards.⁷⁶ It is not surprising that if publication decisions are left entirely to the parties, however, few or no awards will be published.⁷⁷ Practical considerations also impede robust publication—who covers the cost of publishing the awards and of redacting them to preserve the parties’ autonomy?

Within the world of multinational businesses, law firms, lawyers, and arbitrators who use or operate it, international commercial arbitration nevertheless enjoys a high level of perceived legitimacy.⁷⁸ Some scholars have criticized adherence to confidentiality as undermining the legitimacy of international commercial arbitration, “the arbitral order’s own claims to operate in the public interest,”⁷⁹ and arbitration’s ability to contribute to the development of substantive law. They argue that as a private, largely self-regulating instrument of global governance, international commercial

72. See, e.g., Mark Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010) (noting that this trend is prevalent in investor-state arbitration, but much less so in international commercial arbitration).

73. STONE SWEET & GRISEL, *supra* note 25, at 228.

74. See, e.g., Mary Zhao, *Transparency in International Commercial Arbitration: Adopting a Balanced Approach*, 59 VA. J. INT’L L. 175 (2019) (arguing for more transparency in international commercial arbitration); Joshua Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, 28 ARB. INT’L 447 (2012) (exploring the conflict between party and systemic interests in transparency); Catherine Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301 (2006) (arguing for nationally imposed disclosure obligations in international commercial arbitration).

75. For example, the AAA-ICDR and the SIAC began publishing redacted awards in 2012. See STONE SWEET & GRISEL, *supra* note 25, at 229.

76. STONE SWEET & GRISEL, *supra* note 25, at 229 (describing the LCIA and the HKIAC).

77. See Karton, *A Conflict of Interests*, *supra* note 74 (exploring parties’ interests in confidentiality of arbitration).

78. See, e.g., STONE SWEET & GRISEL, *supra* note 25, at 219.

79. STONE SWEET & GRISEL, *supra* note 25, at 229.

arbitration must defend its legitimacy against detractors.⁸⁰ It can be difficult to do so if the proceedings and results are all cloaked in secrecy.

Arbitration is often praised for its flexibility and adaptability.⁸¹ Judicialization can be understood as showcasing, rather than undermining these attributes.⁸² As a private legal ordering, arbitration is responsive to users' needs and desires. These forces have likely driven judicialization to some extent, but they have stopped short at eliminating confidentiality in international commercial arbitration. Confidentiality is not an inherent trait of international commercial arbitration, but confidentiality is likely to endure because of parties' needs and desires,⁸³ despite whatever institutional costs in terms of legitimacy and efforts for international commercial arbitration to shape and develop substantive law.

C. Privatizing Procedure

At the same time that arbitration has been judicializing, courts—especially in the common law world—have been privatizing. This trend has occurred along several vectors, including managerial judges, court-annexed arbitration, and party-driven procedures.⁸⁴ Overall, public adjudication in courts has become more private and more privatized: the workings of courts are more hidden from public view and more controlled by party preferences.

First, the judge's role in the United States and elsewhere⁸⁵ has transformed from one running public trials to one managing cases and

80. See, e.g., S.I. Strong, *Legitimacy and International Arbitration: An Alternate View*, KLUWER ARB. BLOG (Oct. 4, 2017), <https://tinyurl.com/y6xyk9xx>; S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias, and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 U. ILL. L. REV. 533. For scholarship engaging in the legitimacy “debate,” see, for example, GUILHERME RIZZO AMARAL, JUDICIAL PRECEDENT AND ARBITRATION – ARE ARBITRATORS BOUND BY JUDICIAL PRECEDENT? 79 (2d ed. 2018); Stephan Schill, *Conceptions of Legitimacy of International Arbitration*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION (David D. Caron et al. eds., 2015); David D. Caron et al., *An Introduction*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 2 (David D. Caron et al. eds., 2015) (noting that as “[i]nternational arbitration has become an institution that contributes to the shaping of law,” and international arbitrators “contribute to the progressive development of transnational law,” concerns about arbitration’s legitimacy have risen).

81. See, e.g., Stipanowich, *New Litigation*, *supra* note 63, at 51 (calling flexibility arbitration’s key feature).

82. STONE SWEET & GRISEL, *supra* note 25, at 169; cf. Bookman, *Arbitration-Litigation Paradox*, *supra* note 16, at 1124 (criticizing view of arbitration as having certain “essential” procedural features).

83. See STONE SWEET & GRISEL, *supra* note 25, at 229 (predicting that arbitration houses are unlikely to make awards public in light of party preferences).

84. See, e.g., Resnik, *Procedure as Contract*, *supra* note 37; see also, e.g., Hoffman, *Whither Bespoke Procedure*, *supra* note 37; Effron, *supra* note 37; Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1 (2014); Bone, *supra* note 37; Kapeliuk & Klement, *supra* note 37.

85. THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin & Archie Zariski eds., 2013); SARAH MURRAY, THE REMAKING OF THE COURTS: LESS-ADVERSARIAL PRACTICE AND THE CONSTITUTIONAL ROLE OF THE JUDICIARY IN AUSTRALIA

promoting private settlement.⁸⁶ The traditional trial held in open court has all but disappeared,⁸⁷ replaced by in camera conferences that are harder, or impossible, for third parties to observe or learn about.⁸⁸ The reduction in the prevalence of trials corresponds to a reduction in the prevalence of traditional forms of open court proceedings and precedent because disputes are instead increasingly resolved through settlement, negotiation, and other procedures that take place away from public view.

Second, arbitration and ADR have in some places replaced court procedure. The U.S. Supreme Court's liberal approach towards arbitration clauses in consumer and employment contracts pushes large quantities of disputes either towards arbitration or away from dispute resolution altogether.⁸⁹ In addition, experiments beginning in the 1970s allowed or required courts to push parties into non-binding arbitration.⁹⁰ These state court experiments varied in their particulars, but the basic idea was that courts either encouraged or forced parties to arbitrate their disputes in order to clear court dockets and ideally to foster faster and cheaper claim settlement.⁹¹ Court-annexed arbitration was private and confidential on the reasoning that secrecy facilitates negotiation and settlement.⁹² These processes are, importantly, not the same as arbitral courts—the arbitration proceedings were an off-ramp, rather than conducted by the judge herself, and results were not binding.⁹³ If parties were unsatisfied with the court-annexed arbitration, they still had recourse to the court and its regular (if slow) public procedures.⁹⁴

(2014).

86. Resnik, *Privatization of Process*, *supra* note 5, at 1806.

87. Thomas Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution*, 1 J. EMPIRICAL LEGAL STUD. 843 (2004); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

88. *See* Resnik, *Privatization of Process*, *supra* note 5; *cf.* Moon, *supra* note 18, at 1440 n.175 (noting that lawyers gain useful knowledge of Delaware courts' inner workings from experience in camera and purchased transcripts of court statements made during bench trials or motion practice).

89. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U. CHI. L. REV. 623 (2012).

90. *See, e.g.*, Hensler, *supra* note 36, at 178; *see also* *ADR Overview*, NYCOURTS.GOV, http://ww2.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml (last visited Feb. 13, 2021).

91. *See, e.g.*, Resnik, *Contingency of Openness*, *supra* note 36, at 1655 (describing these processes).

92. *See id.*

93. In this respect they seem similar to the current structure of the Chinese International Commercial Courts, although the ADR off-ramps in that setting may be binding. *See* Wei Cai & Andrew Godwin, *Challenges and Opportunities for the China International Commercial Court*, 68 INT'L & COMPAR. L.Q. 869 (2019).

94. In some states, there was a sanction if the result in court turned out to be less favorable than what the party had attained in the court-annexed procedure. Resnick, *Contingency of Openness*, *supra* note 36, at 1655.

Third, many scholars have charted the rise of party control over court procedures, sometimes known as “private procedural ordering.”⁹⁵ In the early twentieth century, courts would often not allow party control even in the form of forum-selection clauses and choice-of-law clauses, which were seen as illegitimate attempts to “oust” courts of jurisdiction.⁹⁶ By the middle of the last century, most courts had ousted ouster.⁹⁷ Parties had increasing control over their choice of forum, choice of substantive law governing their contractual relationships, and ultimately, choice of procedures.⁹⁸

III. ARBITRAL COURTS

The judicialization of arbitration and the privatization of procedure reveal that public and private adjudication in courts and arbitration have been converging over time. But courts and arbitral tribunals are not the same. Courts are part of the state. They are public institutions. They remain primarily open to the public, with a public source of authority and funding and the powers of injunctive relief and compulsory jurisdiction, as well as the ability to make and develop law. Arbitration is a private institution, primarily controlled by the parties. Arbitral tribunals lack many of the powers of public courts. But arbitration offers parties extensive possibilities for personalizing their preferred dispute resolution mechanism, including by keeping it secret.

Arbitral courts test these public/private boundaries. To show how, this Part offers a definition of an arbitral court, outlines its common features, and examines five representative examples of arbitral courts around the world.

A. Defining Arbitral Courts

Arbitral courts are domestic courts that challenge the fundamental public/private divide that separates arbitration and courts as sites of binding adjudication. Thus, arbitral courts are courts that put their public-ness in the hands of the parties—e.g., by allowing them to opt into confidentiality, to choose which procedural or substantive rules to follow or to avoid, and to harness the power of the state to extend beyond the limits of their

95. See, e.g., Effron, *supra* note 37, at 129 n.1 (collecting scholarship).

96. *Id.* at 128; John Coyle, *A Short History of the Choice-of-Law Clause*, 91 COLO. L. REV. 1147 (2020) (noting early limits on parties’ ability to choose the law governing their contracts).

97. Effron, *supra* note 37, at 128.

98. See, e.g., Bone, *supra* note 37, at 1330; Bookman & Noll, *supra* note 30, at 777-96 (describing parties’ roles in developing procedures to address unexpected situations in litigation); cf. Hoffman, *Bespoke Procedure*, *supra* note 37, at 389 (documenting the limited circumstances under which parties actually contract for special procedures).

contractual agreements. They are designed to offer some combination of the traits of arbitration and courts that are perceived as most attractive.

This Section identifies the characteristic features of arbitral courts, some of which are common to all of the case studies that follow, and some of which are typical but not necessarily found in each example of an arbitral court. Regardless of the precise collection of arbitration-like characteristics, arbitral courts reveal a trend that extends even beyond recognized ways in which courts, even commercial courts, have been catering to private parties and their disputes, mimicking arbitration, and, as we shall see, potentially neglecting their roles as public institutions.

Arbitral courts are (1) domestic courts that have the following arbitration-like characteristics: they (2) allow party autonomy over procedures, (3) permit parties to opt into confidentiality, (4) exercise jurisdiction based on consent, often without further connections to the locality, and (5) proceed in English. They often (6) employ well paid foreign judges who may moonlight as arbitrators, (7) use three-judge panels, (8) offer opportunities for foreign lawyers to appear without local counsel, (9) allow parties to opt out of the right to appeal, and (10) are willing to enforce parties' selection of non-state law to govern their dispute.

First, arbitral courts are domestic courts.⁹⁹ They often handle cross-border disputes and have high amount in controversy requirements. They are specialized, affording the expertise that arbitration offers.¹⁰⁰ This subject-matter specialization tends to mean that, like international commercial arbitration, arbitral courts adjudicate “private” rather than “public” disputes. But these limits are not entirely clear, and nor is the line between public and private disputes. The Singapore and Dutch examples allow referral jurisdiction by local courts of more general jurisdiction—that is, the ordinary courts may refer a case to the specialized arbitral court that focuses on international commercial disputes. The Cayman Islands court allows more public minded proceedings, such as insolvency. Many disputes in international commercial arbitration include states and state-related entities;¹⁰¹ arbitral courts may see their fair share of such disputes in the future. Moreover, even entirely “private” suits, when adjudicated in courts, take on a public dimension, for the court is exercising the power of the state and making binding law.

Second, arbitral courts allow considerable party control over procedures. Some argue that arbitration's hallmark is its procedural

99. As noted in the Introduction, arbitral courts are not international institutions; they do not hear disputes between states; they do not implicate the same theoretical questions that international “courts of arbitration” tend to raise. *See supra* notes 19-26 and accompanying text.

100. *See, e.g.*, Dubai Law No. 12 of 2004, art. 5; SICCPROCEDURALGUIDE at 4.

101. *See Born, New Generation, supra* note 27, at 827.

flexibility.¹⁰² In arbitral courts, parties can opt out of default procedural and evidentiary rules, sometimes including the opportunity to appeal. In common law courts, it is not uncommon for parties to contract over procedures or agree to procedural deviations in certain contexts.¹⁰³ But the exceptional party autonomy in arbitral courts goes a step beyond these trends in an attempt to offer arbitration's characteristic flexibility. Traditionally, parties cannot opt out of procedure or evidence rules whole hog, nor can they opt into confidential proceedings, or out of appellate review. Arbitral courts allow such choices. Several arbitral courts' default procedural rules are often borrowed directly from model arbitration rules, which offer defaults but also allow for considerable party choice.¹⁰⁴

Third, arbitral courts allow parties to opt into confidentiality. All of these courts are relatively new, and for some, the standards for granting confidentiality requests are still uncertain. In Delaware, the offer of confidentiality was virtually absolute. More commonly, arbitral courts offer confidentiality based on varying standards that often seem not difficult to meet if both parties join the request, and potentially even without such agreement.¹⁰⁵

Fourth, arbitral courts' jurisdiction is principally based on consent—whether in a contract's forum-selection clause or by incorporating in an offshore territory—with no or minimal additional connection to the forum. The Delaware arbitral court required at least one party to be a Delaware entity and the Cayman Islands functionally has a similar requirement. In both of those places, foreigners can easily incorporate and register entities and thereby bring transnational disputes to the local courts. The other examples, mirroring arbitration, do not require a local connection. But, unlike arbitration, an arbitral court's jurisdiction and powers are not limited by the parties' consent—that is, even under consent-based jurisdiction, arbitral courts still can do what arbitration cannot, including join third parties, consolidate claims, and issue injunctive relief.¹⁰⁶ After all, a major

102. Stipanowich, *New Litigation*, *supra* note 62, at 1-2 (“The most important difference between arbitration and litigation—and the fundamental value of arbitration—is the ability of users to tailor processes to serve particular needs.”); *Jivraj v. Hashwani* [2011] UKSC 40, [61] (appeal taken from EWCA Civ.) (“One of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute.”).

103. *See* Resnik, *Procedure as Contract*, *supra* note 37, at 653; Effron, *supra* note 37, at 149-50. *But cf.* Dodson, *supra* note 84, at 2-4.

104. *See, e.g.*, Matthew S. Eric, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 225, 248 (2020).

105. *See* Zhengxin Huo & Man Yip, *Comparing the International Commercial Courts of China with the Singapore International Commercial Court*, 68 INT'L & COMPAR. L.Q. 903, 938 (2019) (discussing confidentiality in SICC).

106. *See* Drossos Stamboulakis & Blake Crook, *Joinder of Non-Consenting Parties: The Singapore*

advantage that courts have over arbitration is the ability to exercise the power of the state.

Fifth, arbitral courts, like arbitration, proceed in English, which is remarkable in places where that is not the national language, such as the Netherlands and Dubai.¹⁰⁷ The adoption of the English language disrupts common assumptions about the importance of local culture in procedure,¹⁰⁸ and allowing English-language proceedings sometimes has required legislative or even constitutional amendments to existing judicial structures.¹⁰⁹ But it also reflects apparent assumptions that parties choose arbitration because of the availability of proceeding in English. Survey responders rarely cite English language availability as a main attraction of arbitration,¹¹⁰ but in contexts where English is the common language between two non-English speaking parties, the possibility of proceeding in English may be a significant draw.¹¹¹

Sixth, the judges on arbitral courts are often foreign citizens or former foreign judges who are well paid and sometimes also serve as arbitrators.¹¹² Many arbitral courts include judges who are not nationals of the forum state. A major draw of arbitration is not just the expertise of the decision-makers but their apparent neutrality. This feature is particularly important in transnational disputes, where the parties may be from different countries and different legal traditions. Such parties often choose arbitrators who are not co-nationals of either party; they may be wary of national courts and in particular judges who might be biased in favor of local parties.

International Commercial Court Approach Meets Transnational Recognition and Enforcement, 1 ERASMUS L. REV. 98 (2019); Sir Rupert Jackson, Arbitrator, Lecture for the Qatar Conference: A Comparative Perspective to Hybrid Dispute Resolution Fora 5 (Nov. 18, 2018), <https://tinyurl.com/y5mjlnhp> (noting most international commercial courts allow joinder, and the AIFC court allows joinder “if it is desirable”). Joinder is not readily available in arbitration. See S.I. Strong, *Third Party Intervention and Joinder as of Right in International Arbitration*, 31 VAND. J. TRANSNAT’L L. 915, 918 (1998).

107. Other arbitral courts that operate in English in non-English-speaking countries include the Astana International Financial Centre Court, the Qatar International Court, and the Abu Dhabi Global Markets Court.

108. See OSCAR CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 2 (2005).

109. See, for example, the Dubai International Financial Center (DIFC) and the Netherlands Commercial Court (NCC) discussed *infra* Part III.B. Belgium’s attempted arbitral court required considerable legislative gymnastics to circumvent traditional language requirements. Erik Peetermans & Phillippe Lambrecht, *The Brussels International Business Court*, 1 ERASMUS L. REV. 42 (2015).

110. See *2018 International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARY UNIV. OF LONDON SCH. OF INT’L ARB. 2 (2018), <https://tinyurl.com/yxdzrjnx> (listing enforceability, avoiding specific legal systems, flexibility, and ability to select arbitrators as the main attractions of arbitration (not English language opportunities)).

111. Thanks to Josh Karton for raising this point.

112. For example, Beverly McLachlin, the former Chief Justice of the Canadian Supreme Court, sits on the Singapore International Commercial Court as well as the Hong Kong Court of Final Appeal; she is also an arbitrator and mediator at Arbitration Place in Toronto. Julius Melnitzer, *Former High Court Chief Justice Beverley McLachlin to Join Arbitration Firm*, NAT’L POST, July 25, 2018, at FP1.

In addition to neutrality, arbitral court judges also offer subject-matter expertise and bring their personal integrity to the process, like arbitrators. In Delaware and the Netherlands, the availability of local judges is thought to be a selling point; Delaware and Dutch judges have a reputation for expertise and fairness. They may be attractive as neutral fora, therefore, to non-U.S. or Dutch entities, although they may not be the first choice in a dispute involving citizens of those countries. In Dubai, Singapore, and the Cayman Islands, the courts have hired foreign jurists in addition to local members of the bench.¹¹³ These judges' expertise, neutrality, and integrity add to the perceived legitimacy of the new courts, much as arbitrators' "virtue" supports the legitimacy of the arbitration system.¹¹⁴

Also like arbitrators, arbitral court judges are likely handsomely paid, although, like arbitrators (and unlike judges), in general, their salaries may not be publicly available.¹¹⁵ The Dutch courts endeavor to be "self-funding," i.e., funded entirely by parties' fees.¹¹⁶ The Delaware experiment also contemplated large fees compared to ordinary litigation.¹¹⁷ It does not appear that those fees would have directly supplemented judges' salaries.¹¹⁸

Seventh, the structure of judging may also mirror arbitration. Many arbitral courts assign three-judge panels to adjudicate disputes, similar to arbitration (and to certain kinds of U.S. litigation).¹¹⁹ To date, no arbitral courts allow parties to choose the particular judges who will sit on their panels.¹²⁰ Instead, they compile a roster of first-rate judges, many of whom also serve as arbitrators, and assign those judges to cases. These assignments are not necessarily random; in the Singapore International Commercial Court (SICC), for example, a judge may be assigned to a case because of her nationality (for expertise in the parties' chosen substantive law).¹²¹ This

113. Arbitral courts in Astana, Abu Dhabi, and Qatar have followed this trend. *See, e.g.,* Tiba, *supra* note 24 (discussing the Qatar International Court and Dispute Resolution Centre and the Abu Dhabi Global Market Courts); Nicolás Zambrana-Tévar, *The Court of the Astana International Financial Center in the Wake of Its Persian Gulf Predecessors*, 12 ERASMUS L. REV. 122 (2019).

114. *See infra* Part IV.A.

115. It appears that SICC judges, like other Singapore trial-level judges, earn S\$234,600 a year (approximately US\$173,000), a number that seems generous, but also has not changed since 1994. *See* Judges' Remuneration Act ch. 147, § 2(1) (1994) (Sing.) (statute listing judges' salaries, available at <https://sso.agc.gov.sg/SL/147-OR1>); Sucheta Dasgupta, *Salary Hike for Judges: Money Matters*, INDIA LEGAL (Dec. 9, 2017, 6:57 PM), <https://tinyurl.com/y65bzdfx>.

116. The Brussels International Business Court (BIBC) also aspired to be self-funding. *See* Peetermans & Lambrecht, *supra* note 109, at 54.

117. Chancery Court judges in Delaware make over \$184,000 a year. S.B. 235, 149th Gen. Assemb. (Del. 2018).

118. Del. Coal. for Open Gov't, Inc. v. Strine, 894 F. Supp. 2d 493, 503 (D. Del. 2012) ("[T]he Chancery Court judge and staff are paid their usual salaries for arbitration work.").

119. *See, e.g.,* Bookman, *Adjudication Business*, *supra* note 19, at 252.

120. In most high stakes arbitral disputes, "each party names a 'co-arbitrator' who then jointly selects a 'presiding arbitrator.'" STONE SWEET & GRISEL, *supra* note 25, at 224.

121. *Cf.* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the*

system allows arbitral courts to compete with arbitration on speed; one complaint about high-profile international commercial arbitration is the delay involved with waiting for the availability of arbitrators who are in particularly high demand. In theory, arbitral courts could allow parties to participate in the selection of the judges on their cases—but no current arbitral court has such a practice.

Eighth, many arbitral courts allow foreign lawyers to appear before them, as would be allowed in arbitration but usually not in domestic courts.¹²² The availability of these opportunities may reveal whether the arbitral court wants to attract foreigners and foreign lawyers, or whether the focus is more on generating work for the local bar.¹²³

Ninth, another classic difference between arbitration and litigation is the availability of appellate review on the merits.¹²⁴ Some arbitral courts offer substantive appellate review to a specialized appellate body,¹²⁵ some do not allow appellate review,¹²⁶ and some allow the parties to choose in advance whether they want appellate review.¹²⁷

Finally, arbitral courts all enforce valid choice-of-law clauses, and some, like arbitration, enforce parties' selection of non-state law. That is, parties can choose to have their disputes governed by state law, like New York or German law, or they could choose a legal system that does not come from a state, for example, rules adopted by international bodies such as the United Nations Commission on International Trade Law (UNCITRAL). The Delaware statute specifically empowered the Delaware judges to grant any remedy that was in accordance with "general principles of law and equity"

Federal Courts of Appeals, 101 CORNELL L. REV. 1 (2015) (noting that judges are not selected based on the case, but challenging the assumption that judges are randomly assigned in the statistical sense).

122. In the United States, foreign lawyers usually cannot appear in court if they are not admitted to the local bar or the bar in another U.S. state. *See, e.g.*, David Spector & Jessica Romero, *Arbitration and The Unauthorized Practice of Law*, 13 ARIAS Q. U.S. 16, 16-19 (2006), <https://tinyurl.com/yxly8sqg>.

123. For example, SICC and DIFC allow foreign lawyers to practice before them, but the NCC, Delaware, and Cayman Islands do not. For SICC, see Supreme Court of Judicature Act of 1969, rev. ed. 2007, ch. 322 § 18M (Sing.), <https://sso.agc.gov.sg/ACT/SCJA1969>. For DIFC, see Jayanth K. Krishnan & Priya Purohit, *A Common-Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution*, 25 AM. REV. INT'L ARB. 497, 529-30 (2014), and compare R. PROC. FOR NCC DIST. CT. & NCC CT. OF APPEAL art. 3.1.1, <https://tinyurl.com/y4d8pnn5> (with exceptions, parties must be represented by members of the Dutch bar). For Delaware, see Del. Super. Ct. R. Civ. P. 90.1 (providing rules for admission pro hac vice for attorneys not members of the Delaware bar), and *infra* note 232 and accompanying text (noting local bar requirements for attorneys to appear before the Cayman Islands FSD).

124. *See* Hall St. Assoc., LLC v. Mattel, 552 U.S. 576, 583 (2008); *cf.* STONE SWEET & GRISEL, *supra* note 25, at 229-30 (noting an increasing demand for appellate mechanisms within arbitration, and arbitration houses' efforts to afford opportunities for appellate processes).

125. *See*, for example, discussion of the NCC at *infra* Part III.B.

126. *See*, for example, discussion of the BIBC, Delaware at *infra* Part III.B.

127. *See* discussion of the NCC at *infra* Part III.B.

that would be within the scope of the parties' agreement.¹²⁸ Courts, by contrast, traditionally do not enforce choice-of-law clauses selecting non-state law.¹²⁹

B. Case Studies

This Section profiles prototypical arbitral courts from each of the regions where states are experimenting with arbitral courts: the United States,¹³⁰ Europe,¹³¹ Asia,¹³² the Middle East,¹³³ and the Caribbean.¹³⁴ The examples—from Delaware, the Netherlands, Singapore, Dubai, and the Cayman Islands—are some of the most arbitration-like of the commercial courts that have emerged in their respective regions. Delaware's arbitral court was held unconstitutional, but the Dutch, Singaporean, Dubai, and Cayman courts are all in operation. These courts are all common-law courts except the Dutch example. Dubai, as part of the United Arab Emirates,

128. DEL. CODE ANN. tit. 10, § 349 (West 2020).

129. See Geneviève Saumier, *The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract*, 40 BROOK. J. INT'L L. 1, 3 (2014) (noting that courts' choice-of-law rules typically "allow only the designation of State law").

130. Many U.S. states have opened business courts in recent decades, hoping to attract businesses to their states and to their courts, with limited success. See, e.g., Coyle, *supra* note 21. In theory, a state situated outside the Third Circuit might try to establish a Delaware-inspired arbitral court and seek a different constitutional evaluation.

131. International commercial courts have been proliferating in Europe, especially in the wake of the Brexit vote. Many of these courts, like the Chamber for International Commercial Disputes at the District Court Frankfurt/Main, are specialized chambers of existing courts that allow proceedings in English, but continue to use national judges and mostly national procedures. See also Eva Lein, *International Commercial Courts in Switzerland*, in INTERNATIONAL BUSINESS COURTS 115 (Xandra Kramer & John Sorabji eds., 2019). See generally Bookman, *Adjudication Business*, *supra* note 19 (describing these courts). The attempted Brussels International Business Court greatly resembled arbitration, but the legislation that would have created it never passed Parliament. Geert van Calster, *The Brussels International Business Court*, in INTERNATIONAL BUSINESS COURTS 107 (Xandra Kramer & John Sorabji eds., 2019). It was blocked by political opposition criticizing the proposed tribunal for being a "caviar court" catering to elites and neglecting the rest of the population. Matthias Verbergt, *Controversiële 'kaviaarrechtbank' van Geens wordt begraven*, DE STANDAARD (Mar. 21, 2019), <https://tinyurl.com/y4len9n6>.

132. Legal hubs in Asia are expanding, offering litigation, arbitration, and mediation options and hybrids in single locations. See Erie, *supra* note 104. Other examples of arbitral courts in the greater Asian region include Kazakhstan's Astana International Financial Center court. See Nicolás Zambrana-Tévar, *The Court of the Astana International Financial Center in the Wake of Its Predecessors*, 12 ERASMUS L. REV. 122 (2019). The Chinese International Commercial Courts do not qualify as arbitral courts because they hybridize arbitration with litigation *not* by incorporating arbitration-like traits into court procedures, but rather by creating a tribunal that can urge parties toward alternative mediation or arbitration tracks before, or instead of, proceeding to litigation, similar to court-annexed arbitration experiments in the United States. See Cai & Godwin, *supra* note 93, at 895.

133. Other examples of arbitral courts in the Middle East include the Qatar International Court and the Abu Dhabi Global Markets Court. See, e.g., Tiba, *supra* note 24, at 32.

134. Other examples of arbitral courts in the Caribbean include the business courts in the Cayman Islands, Bermuda, and British Virgin Islands. See Moon, *supra* note 18, at 1438.

could be roughly categorized as a civil law jurisdiction, but the Dubai International Financial Centre (DIFC) is a separate common-law jurisdiction, and Dubai's arbitral court is in fact the DIFC court.

The focus here is on how each of these courts has navigated the public/private divide between arbitration and litigation by carefully choosing procedural traits commonly associated with one or the other. They represent different variations on courts trying to have their cake and eat it too—to resemble both a court and an arbitral tribunal at the same time. Arbitral courts unsettle traditional understandings of that public/private divide more than trends of judicialization or privatization. They represent privatization gone so far as to possibly eclipse the public/private distinction altogether by handing the reins over to parties to define the courts' procedures, scope of authority, and very public nature. Perhaps ironically, the case studies below are informed by publicly available sources and therefore cannot reveal the extent of proceedings in which these courts have granted parties' requests for confidentiality.

1. *Delaware*

Delaware has long been an exporter of corporate law. Its state judiciary's expertise has helped propel Delaware's dominance in corporate law. But arbitration offers meaningful competition to Delaware courts, particularly insofar as it offers valuable confidentiality of disputes.¹³⁵ The law was enacted “to enhance the Delaware courts' prestige and extend its ability to adjudicate the nation's most complex business disputes.”¹³⁶ It was an “attempt . . . to marry one of America's premier business courts to the fundamentally more private consensual adjudicative alternative, binding arbitration.”¹³⁷

135. “Cloaking proceedings in privacy may also be a way of keeping the lid on other facts that might prove embarrassing—or worse.” Thomas J. Stipanowich, *In Quest of the Arbitration Trijuncta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 353 (2013); see also Lynn M. LoPucki, *Delaware's Fall: The Arbitration Bylaws Scenario*, in CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 35 (Stephen M. Bainbridge et al. eds., 2017) (arguing that arbitration bylaws pose a threat to Delaware's dominance in the corporate charter competition).

136. Steven Davidoff Solomon, *The Life and Death of Delaware's Arbitration Experiment*, N.Y. TIMES: DEALB%K (Aug. 31, 2012, 11:58 AM), <https://tinyurl.com/y2wbxba2>. The legislative history states that the statute was “intended to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters,” which included bringing Delaware procedures into line with standard arbitration procedures, such as confidential adjudication “in a more streamlined fashion,” and relying on parties' consent for jurisdiction. H.B. 49, 145th Gen. Assemb., 1st Reg. Sess. (Del. 2009), <https://legis.delaware.gov/BillDetail/19375>.

137. Stipanowich, *Arbitration Trijuncta*, *supra* note 135, at 349-50. The possibility of arbitration bylaws is also threatening Delaware's judicial dominance. See LoPucki, *supra* note 135, at 35.

The Delaware House and Senate both approved the bill unanimously.¹³⁸ It appears to have faced no opposition in the legislature.¹³⁹ Parties and potential parties to disputes before the Delaware arbitral court, presumably, agreed to use the procedure and were interested in the forum at least in part because it offered confidentiality. Indeed, one may wonder who would object to two private sophisticated parties choosing a particular method of resolving their disputes.

Nevertheless, observers raised several objections relating to the interests of persons not represented by the parties. Observers “complained that the confidential nature of the process harms investors (by reducing the information available about the dispute), other businesses (by reducing the amount of precedent on Delaware corporate law), and the public as a whole (by reducing the public accountability of the court system).”¹⁴⁰ As one commenter explained, “much of Delaware’s value derives from the positive externalities that come from its corporate law jurisprudence,” but confidential disputes in the Delaware courts “might have the effect of degrading the continued development of the Delaware common law.”¹⁴¹

The Delaware Coalition for Open Government opposed the law for reducing access to government and public accountability of the courts.¹⁴² This group sued in the District of Delaware, arguing that the Delaware statute permitted court proceedings “behind closed doors,” denying them and the general public their First Amendment right of access to judicial proceedings and records.¹⁴³

138. Roll Calls, H.B. 49, 145th Gen. Assemb., 1st Reg. Sess. (Del. 2009), <https://tinyurl.com/yxnxfv9m>.

139. This result fits with the “interest-group” theory of Delaware corporate law, which posits that the Delaware legislature serves the “(1) the ‘consumers’ of Delaware corporate law (principally out-of-state shareholders and managers); and (2) the interests within the state that stand to benefit in various ways from the state’s chartering system.” Geoffrey Miller & Jonathan R. Macey, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 470-71 (1987).

140. Christopher Drahozal, *Judge-Arbitrators in Delaware*, KLUWER ARB. BLOG (Dec. 20, 2011), <https://tinyurl.com/y6gspqjc> (citing Steven Davidoff Solomon, *A Troubled Deal and the Law of Unintended Consequences*, N.Y. TIMES: DEALB%K (Nov. 7, 2011, 4:12 PM), <https://tinyurl.com/yyjkhzbe>); Brian Quinn, *Delaware’s New Arbitration Rules*, M&A LAW PROF BLOG (Jan. 27, 2010), <https://tinyurl.com/yxmbrqnn>; Brian Quinn, *Skyworks Fireworks*, M&A LAW PROF BLOG (Nov. 4, 2011), <https://tinyurl.com/yxhnswhf>.

141. Quinn, *Delaware’s New Arbitration Rules*, *supra* note 140; see also Paul Kirgis, *In Court, But Out of Sight: Chancery Court Arbitration*, INDISPUTABLY (Dec. 15, 2011), <https://tinyurl.com/y3ory8en> (citing Quinn and raising other problems with the Delaware experiment, including the question of how Delaware judges will prioritize their time and efforts).

142. The Coalition is a state affiliate of the National Freedom of Information Coalition (NFOIC), headquartered at the University of Missouri. The NFOIC describes itself as “a coalition of journalists, lawyers, elected officials, news organizations, business owners, government employees, civic associations and private citizens who believe that government of the people, by the people and for the people, should be open TO the people.” *About*, DEL. COAL. FOR OPEN GOV’T, <http://delcog.org/about/> (last visited Feb. 13, 2021).

143. Complaint at 4, *Del. Coal. for Open Gov’t, Inc. v. Strine*, 894 F. Supp. 2d 493 (D. Del. 2011).

The First Amendment prohibits governments from “abridging the freedom of speech, or of the press.”¹⁴⁴ In *Richmond Newspapers*, the Supreme Court held that “this protection of speech includes a right of public access to trials.”¹⁴⁵ But that case was about a criminal trial. The Supreme Court has never addressed how the case applies to civil proceedings.¹⁴⁶

The Delaware case exemplifies this lack of clarity. The district court held that the Delaware statute’s provision for confidential proceedings by Delaware judges in the Delaware courthouse was unconstitutional because the proceedings were analogous to civil trials, which, under Third Circuit precedent, require a public right of access.¹⁴⁷ On appeal, the Third Circuit judges considered that approach too simplistic. The judges instead followed the “experience and logic test,” which asks whether “‘there has been a tradition of accessibility’ to that kind of proceeding, and [whether] ‘access plays a significant positive role in the functioning of the particular process in question.’”¹⁴⁸ If both experience and logic favor requiring public access to the proceeding, that establishes a presumption of public access that only a compelling government interest can rebut.¹⁴⁹

The judges disagreed on how to apply that test here. As for experience, two judges held that civil trials had a history of openness, while arbitration “reveal[ed] a mixed record of openness.”¹⁵⁰ For the logic test, the court identified many positive effects of access and few benefits of confidentiality for these kinds of proceedings.¹⁵¹ For example, public access promotes informed discussion of government proceedings, the perception of fairness, a venue for airing community concerns, and a check on corruption and fraud.¹⁵² Confidentiality, by contrast, was not so valuable, especially

(No. 1:11–1015) (“Although the statute and rules call the procedure “arbitration,” it is really litigation under another name. Although procedure may vary slightly, the parties still examine witnesses before and present evidence to the Arbitrator (a sitting judge), who makes findings of fact, interprets the applicable law and applies the law to the facts, and then awards relief which may be enforced as any other court judgment. The only difference is that now these procedures and rulings occur behind closed doors instead of in open court.”).

144. U.S. CONST. amend. I.

145. *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 513 (3d Cir. 2013) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980)).

146. See David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835 (2017). Most lower federal courts recognize a right to public access to civil proceedings. *Id.* at 858 n.142.

147. The district court “concluded that because Delaware’s government-sponsored arbitration was ‘sufficiently like a trial,’ and because a right of public access applies to civil trials, a right of public access must also apply to Delaware arbitrations.” *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 514–15 (3d Cir. 2013) (citations omitted).

148. *Id.* at 514 (citing *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10 (1986)).

149. *Id.* at 514.

150. *Id.* at 518, 521.

151. *Id.* at 518–19.

152. *Id.*

when parties already had access to secrecy for trade secrets and other sensitive proprietary information. Judge Fuentes wrote separately to emphasize that the only constitutional problem with the statute was the lack of public access to the proceedings.¹⁵³

Judge Roth's dissent suggests that it is not entirely clear, as a matter of constitutional doctrine, what the law is and whether the Delaware court-arbitration experiment is unconstitutional.¹⁵⁴ Focusing on the history of arbitration, Judge Roth concluded that arbitration's history is largely confidential. As a matter of both history and logic, she reasoned, it makes sense for arbitration to be confidential—and therefore, arbitration, even if run by the state, is not subject to the First Amendment's public access requirement.¹⁵⁵ Regardless of whether the majority or the dissent is right as a constitutional matter,¹⁵⁶ the constitutional analysis demonstrates how arbitral courts challenge traditional public/private distinctions.

The Third Circuit's reasoning suggests that the boundary between public and private adjudication is defined by confidentiality. Delaware could have continued the process—with high fees, flexible procedures chosen by the parties, appellate review under Federal Arbitration Act (FAA) standards, etc.—if only the proceedings were made public. Delaware may have been able to go farther than that, even under the Third Circuit's reasoning. It likely could have revised the statute so that the default rules for the arbitral court made the proceedings public, but parties could opt into confidentiality with the court's permission. That might have created an exception that breaks the rule, but it would have put pressure on the scope of a court's authority to allow confidentiality in a particular case rather than as a question of institutional design, which might have escaped constitutional scrutiny.¹⁵⁷

After the Third Circuit decision, however, Delaware chose not to reenact the statute with everything except the confidentiality provision, and also did not attempt any clever work-arounds. Instead, it enacted the Delaware Rapid Arbitration Act (DRAA), which makes Delaware law more arbitration friendly, for example, with provisions that prevent Delaware courts from issuing anti-arbitration injunctions. This statute seems to have had limited success in terms of the number of contracts that designate arbitration under the DRAA.¹⁵⁸

153. *Id.* at 521 (Fuentes, J., concurring).

154. *Id.* at 525 (Roth, J., dissenting).

155. *Id.* at 526.

156. The Supreme Court denied certiorari. *Strine v. Del. Coal. for Open Gov't, Inc.*, 572 U.S. 1029 (2014).

157. See Bookman & Noll, *supra* note 30 (discussing expansive scope of judges' equitable authority to dictate procedures in particular cases); cf. Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 823 (2018).

158. Christopher Drahozal, *Innovation in Arbitration Law*, THE CLS BLUE SKY BLOG (Mar. 1,

2. *The Netherlands*

Of the European international commercial courts that have been established in the last few years, the Netherlands Commercial Court (NCC), which opened in January 2019, represents the greatest challenges to the public/private divide.

The Netherlands Commercial Court has many court-like features. It has both a trial and appellate level. The judges are members of the Dutch judiciary. Only Dutch lawyers, or European lawyers working with a Dutch lawyer, can represent clients there.¹⁵⁹

The NCC also adopts many traits of arbitration. At the trial court level, a panel of three judges and one law clerk hears disputes.¹⁶⁰ Like arbitration, the NCC Rules allow considerable party autonomy over procedures.¹⁶¹ The Rules align with the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration,¹⁶² with some exceptions, and the parties may agree to depart from the standard rules of evidence.¹⁶³ Confidentiality orders are permitted “for compelling reasons.”¹⁶⁴ The NCC also charges higher fees than typical Dutch courts: € 15,000 to submit an international dispute to the NCC, and € 20,000 for an appeal, in contrast to € 4,000 at the trial level and € 5,000 for an ordinary appeal.¹⁶⁵ Proceedings and judgments are in English.¹⁶⁶

At the December 2018 legislative hearings to approve the bill that would establish the NCC, several members of parliament expressed concerns about creating the chamber. Some argued that the NCC would create a two-tiered judiciary—one for rich corporations, and one for the rest of the country. They wanted assurances that “the capacity and costs of [the NCC]

2016), <https://tinyurl.com/y5czfuc8>; Christopher Drahozal, *Innovation in Arbitration Law: The Case of Delaware*, 43 PEPP. L. REV. 493, 499 (2016). A contract must be quite explicit in choosing to operate under state arbitration law rather than the FAA. See, e.g., *Writing Arbitration Clauses to Get the Arbitration You Want*, LAW360 (Aug. 9, 2016, 5:25 PM), <https://tinyurl.com/yx8fjp8p>.

159. *Key Aspects*, STIBBE, <https://tinyurl.com/yxs4scuu> (last visited Feb. 13, 2021).

160. NCC RULES art. 3.5.2.

161. “[T]he procedural rules of the Netherlands Commercial Court provide flexibility, allowing proceedings to be conducted either in the civil law tradition, or in a manner more similar to proceedings in common law jurisdictions or international arbitration. This flexibility aims to make proceedings more recognisable for international parties.” *Handbook on the Netherlands Commercial Court Published*, STIBBE (Mar. 8, 2019), <https://tinyurl.com/yxgceapn>; see also NCC RULES art. 3.4.1.

162. *Key Aspects*, *supra* note 159.

163. NCC RULES art. 8.3.

164. *Id.* art. 8.4.2.

165. *Behandeling Engelstalige rechtspraak bij internationale handelskamers*, EERSTE KAMER DER STATEN-GENERAAL (Dec. 4, 2018), <https://tinyurl.com/y2z9dddx> (statement of Mrs. Duthler (VVD)).

166. Bookman, *Adjudication Business*, *supra* note 19, at 250-51. If a case were to proceed to the Dutch Supreme Court, however, proceedings there would be in Dutch. Annette Scholten, *An International Netherlands Commercial Court?*, TRANSNAT'L NOTES (Feb. 28, 2017), <https://tinyurl.com/y4p6k553>.

will not be at the expense of the capacity and resources for the other cases of the judiciary.”¹⁶⁷ Another Member of Parliament (MP) worried that the NCC’s high fees would interfere with the right, guaranteed by Article 6 of the European Convention on Human Rights, that “entitles everyone to a fair and public hearing of their case within a reasonable period of time before an independent and impartial tribunal established by law.”¹⁶⁸ Yet another MP expressed concerns about how the NCC’s innovations would be distributed throughout the rest of the judiciary. Noting that judges are overworked and the judicial system is underfunded, the MP described the NCC as “a gold [band-aid], while for other wounds [band-aids] are not even available”¹⁶⁹ To address this concern, the MP asked the Ministry to promise that excess fees from the NCC would “go back to the general resources of the Council for the Judiciary, in order to cover the deficits there. Let the strongest shoulders carry the heaviest loads.”¹⁷⁰

The Minister of Justice’s responses to these public-minded concerns shifted the focus to differences between courts and arbitration. He argued that while the NCC is more expensive than other Dutch courts, the real comparator should be arbitration—and the NCC is less expensive than arbitration.¹⁷¹

Despite the MPs’ concerns, the legislation passed in December 2018.¹⁷² On January 1, 2019, the Dutch launched the Netherlands Commercial Court.¹⁷³ Some commenters seem confident that if the court is deemed a success, that “will lead to a call to implement these adjustments in other cases as well.”¹⁷⁴ Thus far, the NCC has rendered eight judgments in seven cases and has no pending hearings, according to the court website.¹⁷⁵

167. *Behandeling Engelstalige rechtspraak bij internationale handelskamers*, *supra* note 165 (statement of Mrs. Wezel (SP), on behalf of the political groups of the SP, GroenLinks (the Green Party), 50PLUS and the Party for the Animals); *see also id.* (statement of Mrs. Bikker (Christian Union)) (expressing concerns about “the financing of this court, the court fees and the position of small and medium-sized businesses, in particular the smaller entrepreneur, who is being [left] behind.”).

168. *Id.* (statement of Mrs. Duthler (VVD)).

169. *Behandeling Engelstalige rechtspraak bij internationale handelskamers*, *supra* note 165 (statement of Mrs. Andriessen (D66)).

170. *Id.*

171. *Verslag van de plenaire vergadering van dinsdag 4 december 2018*, EERSTE KAMER DER STATEN-GENERAAL (Dec. 4, 2018), <https://tinyurl.com/y6gp25fv> (statement of Minister Dekker) (“The NCC is indeed more expensive than normal proceedings before the Dutch government, but usually cheaper than arbitration or proceedings before a foreign government, due to all kinds of additional costs of translation and travel and accommodation costs abroad.”).

172. *Netherlands Commercial Court (NCC) Legislation Approved by Senate*, DE RECHTSPRAAK (Dec. 11, 2018), <https://tinyurl.com/y2vq7jd2>.

173. *Netherlands Commercial Court (NCC): Who We Are*, DE RECHTSPRAAK, <https://tinyurl.com/y52pfgen> (last visited Feb. 13, 2021).

174. Eddy Bauw, *Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court*, 1 ERASMUS L. REV. 15, 23 (2019).

175. *Netherlands Commercial Court, Judgments*, DE RECHTSPRAAK, <https://tinyurl.com/y2vdjkb4>

3. *Singapore*

Singapore, a small island country with limited natural resources, has built an “outward-looking economy” that seeks to import globalized business.¹⁷⁶ From the 1960s to the 1990s, it became “a leading manufacturing, transportation, shipping and financial services center in the global economy of the early twenty-first century.”¹⁷⁷ Since then, Singapore has continued those efforts and extended them into the realm of international commercial dispute resolution, opening the Singapore International Arbitration Center in 1991, an international mediation center in 2014, and the SICC in 2015.¹⁷⁸

The establishment of the SICC was remarkably quick and devoid of controversy. The Chief Justice of Singapore first suggested the idea in 2013.¹⁷⁹ A committee of judges and “eminent international and local lawyers and legal experts” was then convened to study the idea, yielding a report¹⁸⁰ in November 2013 that was subject to a “public consultation” in December 2013 and January 2014. The court’s framework was finalized by the end of 2014, allowing the court to open on January 5, 2015.¹⁸¹

The SICC’s stated purpose is “to enhance [Singapore’s] status as a leading forum for legal services and commercial dispute resolution” and to become “an Asian dispute resolution hub catering to international disputes with an Asian connection.”¹⁸²

The SICC identifies itself as a court. Its website suggests that parties might prefer it to arbitration to avoid five potential problems:

(last visited Feb. 13, 2021).

176. Gordon Silverstein, *Singapore: The Exception That Proves Rules Matter*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 73, 77 (Tom Ginsburg & Tamir Moustafa eds., 2008).

177. *Id.*

178. See Bookman, *Adjudication Business*, *supra* note 19, at 247; Erie, *supra* note 104, at 263.

179. *Establishment of the SICC*, SING. INT’L COM. CT., <https://tinyurl.com/y5g6uhl5> (last visited Feb. 13, 2021).

180. ANG CHENG HOCK ET AL., SING. INT’L COM. CT. COMM., REPORT OF THE SINGAPORE INTERNATIONAL COMMERCIAL COURT COMMITTEE (2013), <https://tinyurl.com/y44bfauq> [hereinafter SICC Committee Report].

181. *Establishment of the SICC*, *supra* note 179.

182. SICC Committee Report, *supra* note 180, at 5; Michael Hwang, *Commercial Courts and International Arbitration – Competitors or Partners?*, 31 *ARB. INT’L* 193, 196 (2015).

1. over-formalization of, delay in, and rising costs of arbitration;
2. concerns about the legitimacy of and ethical issues in arbitration;
3. the lack of consistency of decisions and absence of developed jurisprudence;
4. the absence of appeals; and
5. the inability to join third parties to the arbitration.¹⁸³

Accordingly, the SICC touts itself as providing speedy, relatively informal, low cost dispute resolution. Its judges follow an ethics code. The SICC follows the common law tradition and it aspires to develop transnational commercial law.¹⁸⁴ The court also has broad power to join third parties and subpoena witnesses.¹⁸⁵

In its institutional design, however, the SICC borrows extensively from arbitration.¹⁸⁶ Proceedings are in English (one of Singapore's official languages). The court has jurisdiction over international commercial disputes if the parties consent to jurisdiction or if the case is referred by Singapore courts; no connection to Singapore is required.¹⁸⁷ The court offers flexible procedures and allows the parties to opt out of default procedural rules. Parties need not seek court leave to serve parties extraterritorially if the defendant is located abroad.¹⁸⁸ Parties can waive the right to appeal. Subject to court approval, they can agree to keep the case confidential.¹⁸⁹ Whether parties may designate non-state law to govern their

183. *Establishment of the SICC*, *supra* note 179.

184. Sundaresh Menon, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions*, 108 AM. SOC'Y INT'L L. PROC. 219, 234 (2014).

185. "[T]he SICC has a broad and discretionary mandate to join non-consenting parties to its proceedings." Stamboulakis & Crook, *supra* note 106, at 98.

186. The court is explicit in its intention to bring together court and arbitration features. *See, e.g.*, Sundaresh Menon, Chief Just. of the Sup. Ct. of Sing., Singapore International Chamber of Commerce Distinguished Speaker Series: The Rule of Law and the SICC (Jan. 10, 2018), <https://tinyurl.com/yx8h5j7c>.

187. Man Yip, *The Singapore International Commercial Court: The Future of Litigation?*, 12 ERASMUS L. REV. 82, 86 (2015) ("[T]he SICC framework implicitly recognises that the exercise of extraterritorial jurisdiction is not as 'exorbitant' as traditionally perceived to be and that parties' choice alone is a sufficient basis to establish existence of jurisdiction . . .").

188. *Id.* at 86-87.

189. Norton Rose Fulbright, *The Singapore International Commercial Court: A Challenge to Arbitration?*, 7 BANKING & FIN. DISP. REV. 7 (2015), <https://tinyurl.com/y3bgyj6c>. Beginning in early opinions, the SICC urged careful balancing of "both the public interest of open justice and the countervailing private interest of safeguarding confidential information" in order to "mak[e] the SICC a pragmatic, flexible and attractive forum for dispute resolution." Hwee Hwee Teh & Justin Yeo, *Commentary: The Singapore International Commercial Court in Action: Illustrations from the First Case*, SING. INT'L COM. CT. ¶ 47 (July 21, 2016), <https://tinyurl.com/yy9lxn2s> (discussing BCBC Sing. Pte Ltd. v. PT Bayan Resources, [2016] SGHC(I) (Sing.), <https://tinyurl.com/y3r7pdst>).

contracts is still untested,¹⁹⁰ but the SICC Rules provide that foreign law may be proved as a fact.¹⁹¹

Nearly half the court's judges are "international" judges, highly respected arbitrators or former judges from other countries including the United States, the United Kingdom, Canada, Australia, and Japan.¹⁹² As in arbitration, parties may choose between filing an action before a single judge or a panel of three judges.¹⁹³ And whereas many courts require lawyers to be admitted to the local bar, the SICC welcomes foreign lawyers and has developed an ethics code for them.¹⁹⁴

The SICC is one of the more successful arbitral courts thus far, in that it has cases and is beginning to develop case law. Since the SICC was created in 2015, it has rendered more than 70 judgments.¹⁹⁵ Some have involved high stakes; the first decision resolved a S\$1.1 billion dispute (about US \$800 million).¹⁹⁶ The court has decided cases quickly, often within three months of the hearing, and sometimes within 30 days.¹⁹⁷

In 2018, the SICC celebrated the first case submitted as a result of a forum-selection clause. (Other cases to date had been referred to the SICC from the ordinary Singapore courts.) The court declared the case to be "a landmark achievement" and "a strong testament to the trust and confidence the wider legal community has in the Singapore judiciary."¹⁹⁸

190. See Yeo Tiong Min, Yong Pung How Chair Professor of Law, Sing. Mgmt. Univ., Choice of Law for Contracts: The Hague Principles from a Singaporean and Asian Perspective ¶¶ 35-39 (May 18, 2017), <https://cebcla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Paper2017.pdf> (suggesting that the SICC might recognize parties' choice of non-state law, but that issue is unlikely to come up in practice).

191. *Frequently Asked Questions, No. 19*, SING. INT'L COM. CT., <https://www.sicc.gov.sg/faqs> (last visited Feb. 13, 2021).

192. See *Judges*, SING. INT'L COM. CT., <https://www.sicc.gov.sg/about-the-sicc/judges> (last visited Feb. 13, 2021).

193. Filing before a single judge costs S\$3,300; before a three-judge panel, the price rises to S\$4,950. There are additional fees of similar amounts, payable by each party, for hearings, certification of the exchange of evidence affidavits, trial, and interlocutory applications. SICC RULES, order 110, r. 47(2) (fees ranging from S\$1,100 to S\$3,500 for single judge actions and from S\$2,750 to S\$10,500 for three-judge panels). The SICC follows the English rule on costs. "The unsuccessful party . . . must pay the reasonable costs of the application or proceedings to the successful party, unless the Court orders otherwise." SICC RULES, order 110, r. 46, <https://tinyurl.com/y2mfbvzy>.

194. SICC CODE OF ETHICS, <https://tinyurl.com/yyf8hf66> (applicable to "every registered foreign lawyer" before the SICC or the Court of Appeal, "when constituted to hear any relevant appeal").

195. See *Judgments*, SING. INT'L COM. CT., <https://www.sicc.gov.sg/hearings-judgments/judgments> (last visited Feb. 11, 2021).

196. BCBC Sing. Pte Ltd. v. PT Bayan Resources, [2016] SGHC(I) 01 (Sing.), <https://tinyurl.com/y3r7pdst>; K.C. Vijayan, *\$1.1b Dispute is First Case Heard*, STRAITS TIMES (Nov. 21, 2015), <https://tinyurl.com/y2pdc7oh>.

197. See *Judgments*, SICC, *supra* note 195; Rebecca LeBherz & Zoe Walker, *The Singapore International Court – Two Years On*, KING & WOOD MALLESONS (May 29, 2017), <https://tinyurl.com/y58eg26h>.

198. *A Landmark First Case Filed in the Singapore International Commercial Court*, SICC NEWS (Sing. Int'l Com. Ct., Singapore), Apr. 2018, at 1, <https://tinyurl.com/y2ukdjnp>; Huo & Yip, *supra* note 105, at 938.

The SICC has also announced at least one influential opinion, *B2C2 Ltd. v. Quoine*, a decision in a cryptocurrency dispute, written by Judge Simon Thorley.¹⁹⁹ In an opinion by Chief Judge Sundaresh Menon, the Singapore Court of Appeal affirmed in part and reversed in part in 2020.²⁰⁰ The SICC and Court of Appeal opinions have been widely cited, including by lawyers in the United Kingdom advocating that UK courts should adopt their reasoning.²⁰¹ U.S. scholars have also commended the decision, although with the caveat that it might not confront all the complexities of “smart contracts” or transactional scripts.²⁰²

The Singapore court’s blurring of public and private adjudication does not seem to have been put to the ultimate test, however. Thus far, the SICC does not seem to have considered any cases in which the government or government-affiliated entities have been a party. Such a case would test the limits of the SICC’s neutrality. Singapore courts have been known to favor the government in other contexts.²⁰³ If the SICC takes a more independent stance in a government-related dispute, that will be the case it should celebrate.

4. *Dubai*

The Dubai International Financial Center (DIFC) establishes a business-friendly legal jurisdiction that insulates foreign companies from local regulations influenced by Islamic law that might otherwise govern Dubai commerce. The UK lawyers who designed the DIFC court modeled it on a combination of the London Commercial Court and international arbitration.²⁰⁴

199. *B2C2 Ltd v. Quoine Pte Ltd*, [2019] SGHC(I) 03 (Sing.); *Simon Thorley QC*, BRICK COURT CHAMBERS, <https://www.brickcourt.co.uk/our-people/profile/simon-thorley-qc> (last visited Feb. 13, 2021) (Simon Thorley arbitrator bio); *Judges, SICC*, *supra* note 192 (SICC bio).

200. *Quoine Pte Ltd v. B2C2 Ltd*, [2020] SGCA(I) 02 (Sing.).

201. UK JURISDICTION TASKFORCE, LEGAL STATEMENT ON CRYPTOASSETS AND SMART CONTRACTS (2019) (“As far as we are aware, the proprietary status of cryptoassets specifically has not yet been the subject of any authoritative decision in any common law jurisdiction. We find some support, however, for our conclusion in a recent case in Singapore, *B2C2 v Quoine*. The judge accepted (there being no argument to the contrary) that bitcoins could be the subject of a trust, and hence were property. He observed that ‘cryptocurrencies have the fundamental characteristic of intangible property as being an identifiable thing of value’ and that they met all of the requirements in *National Provincial Bank*.”) (citing *Quoine Pte Ltd v. B2C2 Ltd*, [2020] SGCA(I) 02 (Sing.)).

202. *See, e.g.*, Shaanan Cohny & David A. Hoffman, *Transactional Scripts in Contract Stacks*, 105 MINN. L. REV. 319, 360 (2020) (concluding that the opinion “got it mostly right in context, but that its reasons won’t scale” to broader questions raised by transactional scripts, commonly known as “smart contracts”).

203. *See* Silverstein, *supra* note 176, at 80; JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* 85-86 (2012).

204. *See* Bookman, *Adjudication Business*, *supra* note 19, at 243.

The court has jurisdiction over international commercial disputes if the parties consent to jurisdiction; in 2011, the DIFC removed any requirement that the case have a physical connection to the DIFC.²⁰⁵ But the court also has jurisdiction over other DIFC-related disputes. The DIFC honors parties' choice of law selections, including, possibly, if they select non-state law.²⁰⁶ Where parties have not designated the governing law, the background law is local "DIFC law," "the result of legislation and common law decisions."²⁰⁷

The court offers one set of procedural rules modeled on the London Commercial Court's and a second set of alternative procedures modeled on common arbitration rules for increased flexibility. Like the Dutch arbitral court, the DIFC mimics the International Bar Association rules of evidence for arbitration.²⁰⁸ Subject to court approval, parties can agree to keep the case confidential.²⁰⁹ Like the Singapore arbitral court, the DIFC court employs foreign judges, in this case some from the UAE but also from England and Wales, Scotland, Australia, and Malaysia.²¹⁰ On February 8, 2021, the Ruler of Dubai appointed two new British judges to the Court of Appeal and the first female Emirati common law judge to the DIFC Court of First Instance.²¹¹ This staffing represents a departure from ordinary Dubai courts. In another departure that mimics arbitration, foreign practitioners may practice in the DIFC courts if they are in good standing in another jurisdiction.²¹² The DIFC courts have also developed their own professional conduct code for all lawyers authorized to appear before them.²¹³

In a unique attempt to combine court and arbitration features, the DIFC has an innovative approach to enforcement. It has recognized and enforced English judgments as though they were UAE judgments, and entered into

205. Zain Al Abdin Sharar & Mohammed Al Khulaifi, *The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis*, 46 H.K. L.J. 529, 545 (2016).

206. DIFC Law No. 3 of 2004, art. 8, § 2(c), <https://tinyurl.com/yys524k8>.

207. *Court Rules*, DIFC CTS., <https://www.difccourts.ae/difc-courts/rules> (last visited Feb. 13, 2021) ("The DIFC Courts will apply the DIFC's laws and regulations, all of which are listed under Laws and Regulations, unless the parties explicitly agree that another law governs their dispute.").

208. Erie, *supra* note 104, at 269.

209. Norton Rose Fulbright, *supra* note 189, at 7.

210. *Judges*, DIFC CTS., <https://www.difccourts.ae/about/court-structure/judges> (last visited Feb. 13, 2021). Michael Hwang, the former Chief Justice of the DIFC court, is from Singapore.

211. *Ruler of Dubai Appoints New Judges to the DIFC Courts*, DIFC CTS. (Feb. 8, 2021), <https://tinyurl.com/y3oer3tg>. The Chief Justice of the DIFC Courts explained that "[t]he DIFC Courts serve the international business community by maintaining a world-class bench," and expressed pride in being "the first court in the world to appoint a female Emirate judge to a common law court." *Id.*

212. *New Dispute Resolution Options in the DIFC Courts*, CLIENT ALERT (Latham & Watkins LLP), Oct. 21, 2012, at 1, <https://www.lw.com/thoughtLeadership/dispute-resolution-options-difc-courts>.

213. *The Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts*, DIFC CTS. (Sept. 3, 2014), <https://www.difccourts.ae/code-of-conduct/>.

various agreements with other international commercial courts to encourage reciprocal recognitions and enforcement.²¹⁴

Even more interestingly, the DIFC Courts also allow parties to convert a DIFC court money judgment into an arbitral award at the DIFC-LCIA Arbitration Centre (or any other arbitration center).²¹⁵ This unusual process would allow the winning party in a DIFC court proceeding to enforce the resulting money judgment as an arbitral award, which is easier to enforce internationally under the New York Convention.²¹⁶

The DIFC courts also allow joinder or consolidation of “connected contracts,” parties, and proceedings.²¹⁷ These rules articulate a loose standard for bringing in third parties who may be relevant to the case but not parties to the contract that formed the basis for the dispute, and for consolidating claims that might not arise out of that contract. For the court to join a third party, it need not have independent territorial (or other) jurisdiction over that third party.²¹⁸ Parties before the DIFC courts cannot, however, waive the right to appeal, and unusually, a non-party affected by the court’s judgment may also exercise the right to appeal.²¹⁹

Like the Singapore arbitral court, the DIFC court has developed a relatively robust docket. The court has heard disputes based on a DIFC forum selection clause.²²⁰ In 2016, the DIFC court decided 217 disputes involving, in the aggregate, more than \$500 million.²²¹ That same year, 42% of contracts drafted in English in the Middle East and North Africa chose the DIFC as the seat for disputes.²²² In 2019, DIFC Courts heard 952 cases involving, in the aggregate, over \$840 million.²²³ Over 70% of claims in the

214. See Erie, *supra* note 104, at 40.

215. Wilske, *supra* note 19, at 162-63; Marta Requejo Isidro, *International Commercial Courts in the Litigation Market* (Max Planck Inst. Lux. for Procedural L. Rsch. Paper Series, Paper No. 2019 (2), 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327166.

216. See *supra* notes 54-55 and accompanying text.

217. Walker, *supra* note 19, at 11; DIFC COURT RULES pt. 20.7, <https://www.difccourts.ae/difc-courts/rules/part-20> (“The Court may order a person to be added as a new party if: (1) it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings; or (2) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the Court can resolve that issue.”).

218. Peter Wood, *The DIFC Court of Appeal Confirms the DIFC Courts’ ‘Necessary or Proper Party’ Jurisdiction*, LEXOLOGY (May 6, 2019), <https://tinyurl.com/y5h2fzbxw>; Nest Inv. Holding Leb. S.A.L. v. Deloitte & Touche (M.E.), [2018] DIFC CA 011.

219. Walker, *supra* note 19, at 15.

220. See, e.g., Susie Abdel-Nabi & Nicholas Braganza, *United Arab Emirates: Positive Clarification on The Jurisdiction of the DIFC Courts*, MONDAQ (Aug. 22, 2017), <https://tinyurl.com/y25cm7jy>.

221. Emmanuel Gaillard, Yas Banifatemi & Chloe Vialard, *The International Chambers of the Paris Courts and Their Innovative Rules of Procedure*, SHEARMAN & STERLING (Apr. 23, 2018), <https://tinyurl.com/yybal92e> (discussing global trends).

222. Requejo, *supra* note 215, at 7.

223. *DIFC Courts Cements Status as Jurisdiction of Choice for Regional Dispute Resolution*, DUBAI INT’L

Court of First Instance arose from parties' selection of the DIFC Courts as their chosen forum.²²⁴

The DIFC court has a high settlement rate, which some see as a sign that “the court is doing its job” and creating “certainty and trust.”²²⁵ In suits involving the government, however, the DIFC courts' record is mixed. They have ruled against quasi-government corporations, but they have favored the government in all cases involving the DIFC Authority.²²⁶

5. *Cayman Islands*

In his study of offshore tax havens, Will Moon has described the offshore business courts established in the past decade in Bermuda, the British Virgin Islands, and the Cayman Islands as resembling arbitration.²²⁷ The Cayman Islands Financial Services Division (FSD) court is representative, and an important example because of historic controversies over the secrecy of its dockets.

The FSD is one of the Cayman Islands' four specialty courts. Its subject matter jurisdiction covers proceedings relating to mutual funds, contracts, Cayman Islands Companies Law, bankruptcy, and enforcement of foreign judgments and arbitration awards, among other topics.²²⁸ For some of these categories, the amount in controversy must exceed CI\$1 million (approximately US\$1.2 million in February 2021). While this subject-matter requirement seems to restrict cases to those involving Cayman Islands registered companies, it should be remembered that the Cayman Islands is a magnet incorporation jurisdiction for companies whose principals, employees, and places of business are located elsewhere.²²⁹ As a result, FSD disputes—whether they involve contracts, bankruptcy, or other issues—are often transnational.²³⁰

FIN. CTR. (Feb. 26, 2020), <https://tinyurl.com/yy7wubt6>.

224. *Id.*

225. JAYANTH A. KRISHNAN, THE STORY OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS: A RETROSPECTIVE 26, 68 (2018). According to a local practitioner interviewed in 2017, “[o]pportunities for investment and growth here [in the litigation business in Dubai] are greater now than ever, particularly in IP and litigation.” Alex Taylor, *Dubai: The Gateway to the Middle East for International Firms*, THE LAW. (Oct. 13, 2017), <https://tinyurl.com/y4ex4eze>.

226. Erie, *supra* note 104, at 275.

227. Moon, *supra* note 18, at 1406-08, 1440-41.

228. FINANCIAL SERVICES DIVISION GUIDE GRAND COURT CAYMAN ISLANDS SECOND EDITION 12 (2015), <https://tinyurl.com/y2y8vcht> [hereinafter FINANCIAL SERVICES GUIDE].

229. See William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 8-9 (2019) (“[A] very high percentage of corporate entities registered in offshore financial havens are ‘exempted’ or ‘excepted’ entities under the laws of those jurisdictions, formed for the express purpose of doing business *outside* of those jurisdictions.”).

230. “The procedures of the FSD have been developed to meet the needs of large scale and complex litigation which require courts to respond to the need for urgent applications often with an international dimension.” *Cayman Islands*, STANDING INT’L F. OF COM. CTS.,

The FSD is a domestic court that was designed to closely resemble the London Commercial Court. The Cayman Islands is a common law jurisdiction; the Privy Council in London is its highest court of appeal.²³¹ Proceedings are in English. Foreign lawyers are not allowed to practice before the courts, except if accompanied by a local lawyer.²³² The Cayman Islands Code of Conduct governs lawyers appearing before the court.²³³

The court's judges are business law experts, but not necessarily Cayman nationals.²³⁴ The former Chief Justice of Bermuda is an FSD judge,²³⁵ as is a Malaysian-born British national and a Turks and Caicos Belonger who was previously a judge in that country.²³⁶

The FSD's procedures are modeled after the London Commercial Court's, and are responsive to users' needs in the aggregate, even if not more than usual in a particular court proceeding. Like many arbitral courts, an elite group of lawyers designed the procedures.²³⁷ A User's Committee continues to meet regularly to review "developments and the operation of the FSD."²³⁸ As a result, the procedures tend to mimic English common law and also reflect the interest of the firms' corporate clients. For possible disputes where such clients might be on both sides of the "v," this system may yield fair and efficient proceedings. But in other contexts, the results may be more slanted.²³⁹

<https://tinyurl.com/y2stokq3> (last visited Feb. 13, 2021); see also Ian Huskisson et al., *Litigation & Dispute Resolution 2019: Cayman Islands*, GLOBAL LEGAL INSIGHTS, <https://tinyurl.com/y2p3kuua> (last visited Feb. 13, 2021) ("A very large part of the business of the Cayman Islands courts is cross-border in nature.").

231. Its laws and procedures are available only with paid registration, but the FSD publishes a Users' Guide modeled on the London Commercial Court Guide. FINANCIAL SERVICES GUIDE, *supra* note 228.

232. Hector Robinson & Peter Hayden, *Litigation and Enforcement in the Cayman Islands: Overview*, THOMSON REUTERS PRACTICAL L. (Aug. 1, 2014).

233. CODE OF CONDUCT FOR CAYMAN ISLANDS ATTORNEYS-AT-LAW, <https://tinyurl.com/yxjl5qys>.

234. The current FSD judges are not Cayman Islands natives or citizens. The designation of "foreignness" is complicated, however, because the Cayman Islands (like Bermuda and the BVI) is a British Overseas Territory, and the small size of the population may make it necessary to look broadly for judges. Cf. Rosalind Dixon & Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 57 COLUM. J. TRANSNAT'L L. 283, 327 (2019).

235. *Judges: Hon. Ian Kawaley*, CAYMAN IS. JUD. ADMIN., <https://tinyurl.com/y3y7ukzl> (last visited Feb. 13, 2021).

236. *Judges: Hon. Richard N. Williams*, CAYMAN IS. JUD. ADMIN., <https://tinyurl.com/y3y7ukzl> (last visited Feb. 13, 2021).

237. Moon, *supra* note 18, at 1407.

238. *Cayman Islands*, *supra* note 230.

239. For example, a Cayman Islands procedural rule requires a shareholder to seek leave from the court before filing a derivative action. This rule severely limits potential shareholder derivative litigation that would otherwise be available in jurisdictions like Delaware—a rule that arguably favors corporate interests over shareholders'. See Mathias M. Siems, *Private Enforcement of Directors' Duties: Derivative Actions as a Global Phenomenon*, in COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS? (Stefan Wrška et al. eds., 2012).

The FSD may be attractive to some litigants because of the perceived potential for sealing cases. Confidential or proprietary information filed with offshore courts such as the FSD can be quite valuable, and therefore the content of the FSD's court files is often "the subject both of pre-emptive applications for sealing and subsequent applications ... for general access."²⁴⁰

To determine whether to seal records in such circumstances, the FSD adheres to open justice as "a fundamental principle of the common law."²⁴¹ The Cayman Islands Constitution requires that "[a]ll proceedings instituted in any court for the determination of the existence of extent of any civil right or obligation, including announcements of the decision of the court, shall be public."²⁴² This requirement does not directly apply to certain ex parte matters, such as applications to authorize a settlement,²⁴³ but even in such proceedings, the common law principle—tempered with limitations based on "the interests of justice"—remains.²⁴⁴ In cases where records or proceedings are sealed, the FSD has published opinions detailing the privacy and publicity interests it has weighed in deciding to seal the records.²⁴⁵

There has been some controversy over allegedly excessive use of sealing orders. According to a 2018 report by journalist David Marchant, after a history of sealing fewer than 10% of cases in the first seven years of its existence, the rate of sealing cases went from 15% in 2017 to 33% in the first half of 2018, with 55% sealed in the 68 days between May 17 and July 23, 2018.²⁴⁶ The spike seems to have followed a new Practice Direction that allowed sealing winding-up petitions, "a legal notice issued by a creditor like [a government tax authority] with the intention of forcing a company into [fore]closure."²⁴⁷ According to Marchant's most recent analysis of available

240. Bernadette Carey, *Open Book or Locked Vault? Access to Court Documents in the Cayman Islands*, CONYERS, DILL & PEARMAN (Feb. 17, 2017), <https://tinyurl.com/y6ezjgbw>.

241. *In the Matter of the Companies Law (2013 Revision) and in the Matter of the SPhinX Group of Companies (in Official Liquidation) as Consolidated by Order of the Grand Court dated 6 June 2007*, Cause No. FSD: 16 of 2009 (ASJ) ¶ 7 (Jan. 30, 2017) (Cayman Is.) [hereinafter *SPhinX*].

242. Cayman Islands Constitution Order 2009 sched. 2, § 7, <https://tinyurl.com/ycaj5sax>.

243. *SPhinX*, *supra* note 241, ¶ 8 ("[S]anction applications do not engage section 7 of the Constitution because they do not require the Court to determine rights and obligations of the parties in adversarial legal proceedings.")

244. *SPhinX*, *supra* note 241, ¶ 12.

245. *See, e.g., id.*; *In the Matter of an Application for Leave to Seek Judicial Review and in the Matter of an Application for a Confidentiality Order*, Cause No. 30 of 2019 (May 29, 2019) (Cayman Is.); *see also* Jason Wood et al., *Confidentiality in Issuing Cayman Islands Proceedings*, OFFSHORE LITIG. BLOG (June 5, 2019), <https://tinyurl.com/ybzfyxsb>.

246. Moon, *supra* note 18, at 40 (citing David Marchant, *Cayman Court Secrecy on the Rise: 55% of Recent Financial Cases are Sealed*, OFFSHORE ALERT (Aug. 6, 2018), <https://tinyurl.com/y5xurxgm>).

247. Simon Renshaw, *What is a Winding Up Petition or Order from Creditors like HMRC?, COMPANYDEBT*, <https://www.companydebt.com/winding-up-petitions/> (last updated Dec. 27, 2020).

statistics, in the first seven months of 2019, one third of cases were sealed.²⁴⁸

The Grand Court of the Cayman Islands, however, disputed the 2018 report. The Chief Justice explained that the sealed orders generally were temporary and “made only for good reason.”²⁴⁹ Specifically, he argued that “most of the cases not currently public are winding-up petitions, which are subject to a ‘special procedure’ that delays their publication,” usually for 72 hours, “so a judge can assess the petition’s merit.”²⁵⁰ The court also defended the practice of sealing winding-up petitions because publicizing such decisions, even if they are dismissed as non-meritorious, can “cause irreparable harm” to a company’s reputation.²⁵¹ Law firms also favored sealing winding-up petitions.²⁵²

As for judicial opinions and decisions not under seal, the FSD appears to have made improvements to the accessibility of opinions even since the time that the research for this Article began. For “full and unlimited access” to the Cayman Islands Law Reports, registered users must pay an annual fee of CI\$350/US\$420.²⁵³ But visual access to reported and unreported opinions—including those cited in this Article—are now available by clicking through the Judgments portion of the website, to Unreported Judgments, then Access Public Registers.²⁵⁴

IV. TESTING THE BOUNDARIES

Arbitral courts are the vanguard of international commercial dispute resolution institutional design. By borrowing from “the best” of both litigation and arbitration, Hiro Aragaki has explained, courts like the arbitral court in Singapore reject “an either/or choice between public and private adjudication; instead, they think of dispute resolution holistically, all the

248. David Marchant, *Cayman Secrecy: 1/3 of Business Court Cases in 2019 Sealed from Public View*, OFFSHORE ALERT (Aug. 11, 2019), <https://tinyurl.com/y42vmjh5>.

249. Ken Silva, *More Court Records Being Kept Secret*, CAYMAN COMPASS (Aug. 8, 2018), <https://www.caymancompass.com/2018/08/08/report-more-court-records-being-kept-secret/>.

250. *Id.* A winding up petition “is a legal notice issued by a creditor like [a government tax authority] with the intention of forcing a company into [fore]closure.” Renshaw, *supra* note 247. Because it can result in freezing all of a company’s assets, such petitions are “amongst the most serious pieces of legal action any limited company can face.” *Id.*

251. Silva, *supra* note 249.

252. Jessica Williams & William Peake, *New Cayman Islands Grand Court Practice Direction Aims to Prevent Premature Publication of Winding Up Petitions*, HARNEYS: OFFSHORE LITIG. BLOG (Aug. 17, 2017), <https://tinyurl.com/y4bcspz2>.

253. *Judgments*, CAYMAN IS. JUD. ADMIN., <https://www.judicial.ky/judgments> (last visited Feb. 13, 2021); *Financial Services Division*, CAYMAN IS. JUD. ADMIN., <https://www.judicial.ky/courts/grand-court/financial-services-division> (last visited Feb. 13, 2021).

254. *Judgments*, CAYMAN IS. JUD. ADMIN., <https://www.judicial.ky/judgments> (last visited Feb. 13, 2021).

while borrowing one device from one process and glomming it on to another without so much as an afterthought.”²⁵⁵

This Part provides the afterthought, and an accompanying critique. Arbitral courts and their designers may be throwing traditional distinctions to the wind. But can arbitral courts coherently reject the public/private distinctions in all senses? While there is a flexibility in the distinction between public and private adjudication in many respects,²⁵⁶ this Part contends that there are and should be limits because arbitral courts wield the power of the state and relatedly because they have the potential to declare and develop law.

This Part identifies three ways in which arbitral courts blur the public/private distinction, tracking the core fundamentals of courts discussed in Part II: the hybrid sources of arbitral courts’ authority and legitimacy, public access vs. confidentiality, and the role of decisionmakers. It argues for maintaining some boundaries by keeping arbitral courts’ authority consistent with its basis for legitimacy, and by keeping arbitral courts transparent and open. Arbitral court judges will be key to any efforts to do this.

First, there should be consistency between a court’s claim to legitimacy and its jurisdictional reach. If a court claims legitimacy based on the consent of the parties before it, then in theory its jurisdiction should be so limited, just as an arbitral tribunal’s jurisdiction would be. That consent should not justify the court reaching beyond what would otherwise be the limits of its jurisdiction as it applies to parties and disputes beyond what the consenting parties’ agreement. *Second*, courts are public institutions—arms of the state. When courts become confidential or entrust the parties with questions of confidentiality, they cross a line that is difficult to justify and will compromise courts’ ability to be effective in dispute resolution over the long term and in law making.²⁵⁷ *Third*, arbitral courts’ hybrid nature is also apparent in arbitral court judges, who may have experience as both judges and arbitrators and whose incentive structures combine aspects of both arbitrators’ and judges’. If arbitral courts are to make and develop law—one unique function that courts can offer²⁵⁸—then the judicial ethos should take

255. Aragaki, *supra* note 16, at 564-65.

256. *See supra* Part II.

257. *See, e.g.*, Lahav, *supra* note 157 (discussing functions of courts in democracies beyond dispute resolution and law making); Tom Ginsburg & Tamir Moustafa, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 4 (2008) (discussing courts’ additional functions in authoritarian states).

258. Most arbitral courts are common law courts that make common law (even those, like the DIFC court, that are not located in common law countries or within a common law tradition). Courts in civil law countries, like the arbitral court in the Netherlands, also develop law, but in a different way. *See* Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 *AM. J. COMPAR. L.*

precedence over any countervailing arbitrator ethos, to the extent that those conflict.

A. Legitimacy, Jurisdiction, and Enforceability

As discussed in Part II, a central distinction between courts and arbitral tribunals is the source of their authority and legitimacy.²⁵⁹ For any given case, an *arbitral tribunal's* authority comes from—and is limited by—the parties' consent to jurisdiction through their arbitration clause. The arbitral tribunal's decision is ultimately enforced by the state according to the scope of this agreement. This limited authority supports arbitration's legitimacy, which is buttressed by an international structure of support built by international treaties, national courts, and private interests. Well respected decision-makers (arbitrators) also lend sociological legitimacy because of who they are, how they are chosen, and how they decide.

Courts generally have different sources of authority and sociological legitimacy—principally from the state. In democracies, courts may have democratic legitimacy and legal legitimacy.²⁶⁰ Their decisions can build internal legitimacy by being well reasoned and following existing law.²⁶¹ In non-democratic states, courts may be able to build some of this internal legitimacy but the state and its courts require a source of legitimacy to take the place of democratic legitimacy. One source of any state's legitimacy can be its courts—and indeed, arbitral courts, themselves—if they conduct themselves in a way that appears legally sound, fair, and independent.

That is, the legitimacy of courts and their host states are bound up with each other. Courts, especially in non-democratic states, can lend legitimacy to the state as opposed to the other way around. Political scientists have documented that authoritarian regimes “need to portray themselves as respectful of the rule of law to prolong their grip on power” domestically to make up for their otherwise “questionable legitimacy.”²⁶² From an international perspective, an independent judiciary is thought to project an image of a reliable economic climate and foster investment and trade.²⁶³

149 (2013).

259. *See supra* notes 44-59 and accompanying text.

260. This statement vastly oversimplifies. *See* FALLON, *supra* note 44, at 156, 160.

261. *See, e.g.*, Richard Fallon, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001).

262. Ratna Rueban Balasubramaniam, *Judicial Politics in Authoritarian Regimes*, 59 U. TORONTO L.J. 405 (2009).

263. Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCIENCE 281, 286 (2014). Some studies suggest that international arbitration also lends legitimacy to authoritarian regimes. *See* Mark Massoud, *International Arbitration and Judicial Politics in Authoritarian States*, 39 LAW & SOC. INQUIRY 1 (2014).

Authoritarian governments seeking to cultivate independent judiciaries, however, can find themselves in a circular bind. The courts may potentially seek to limit the regime's power; if they do, then "[the] authoritarian regime must find ways to limit judicial power."²⁶⁴ But the regime needs to limit judicial power "without formally eviscerating judicial autonomy, since such formal evisceration compromises the regime's desire to project . . . legal legitimacy for its actions."²⁶⁵ Sometimes that cycle leads to more rule of law reforms, as authoritarian regimes seek to reestablish legal legitimacy in the face of having compromised judicial power, in order "to restore investor confidence in the government's commitment to the rule of law."²⁶⁶ But other studies suggest that "many regimes have figured out how to use law as an instrument of social control over political critics without appearing to compromise formal judicial independence."²⁶⁷

Moreover, although courts may be in a position to limit a regime's power, "the potential of courts to live to fight another day as protectors of the rule of law (perhaps when conditions grow less authoritarian) may ultimately depend upon their ability to refrain from challenging the regime, especially when the latter's core interests are at stake."²⁶⁸ In other words, courts and judges may pick their battles with the regime—and not check the regime's power at every turn—because "going too far may ultimately result" in the regime restricting the judiciary's power or "in a loss of legitimacy for the judiciary, as judicial independence may come under direct fire that will produce a loss of public confidence in the courts."²⁶⁹ Thus "[e]ven rule-of-law-minded judges must be wary of this problem and may have to try to advance the rule of law in a face-saving way, sending a message to the regime that its actions are unacceptable without seeming to threaten its core interests directly."²⁷⁰ Doing so may require adept needle threading.

Arbitral courts in non-democratic states seem poised to take on this paradoxical role. These jurisdictions are trying to encourage trust and investment by establishing reliable courts—but if the courts challenge the state's power, that might result in the state rejecting the courts' power. Arbitral courts may face incentives to "pick their battles" to avoid "excessive" confrontations with the state.

Arbitral courts present an unusual confluence of these reinforcing power sources because they can claim legitimacy not just as arms of the

264. Balasubramaniam, *supra* note 262, at 405.

265. *Id.* at 406.

266. *Id.* at 409.

267. *Id.* at 410.

268. *Id.* at 411 (describing Martin Shapiro's view).

269. *Id.*

270. *Id.*

state but also based on parallels to arbitration. That is, they have a two potential sets of sources of legitimacy and power: courts' bases, including the state's sovereign authority, and arbitration's bases (the parties' consent, the support of an international network of states, and the virtues of the arbitrators). Like arbitration, arbitral courts seem legitimate because parties have chosen to have their disputes adjudicated there and because of the status and reputation of the decision-makers.²⁷¹ For decades now, it has become commonplace that courts can adjudicate disputes based on forum selection clauses even if the parties and the dispute have no ties to the forum.²⁷² Parties can consent to jurisdiction in courts just like they can in arbitration, thereby giving the court or arbitral tribunal jurisdiction over a set of parties and a set of disputes that they would not otherwise have. The well-respected judges add an additional layer of legitimacy.

When parties consent to jurisdiction, it might seem logical that arbitral courts, like arbitration, would limit their jurisdiction to whatever the parties chose to submit to them. But this is not usually the assumption because arbitral courts *also* have the authority of the state. Once parties have consented to a court's jurisdiction, the court typically exercises the full force of its powers—including the power to issue subpoenas and injunctive relief, to consolidate cases not subject to the parties' forum agreement, to join non-consenting third parties,²⁷³ and to establish law that will be binding on future parties. Unlike what typically happens in arbitration, the parties' consent does not limit the court's jurisdiction to the parties who have consented. That is, consent-based court jurisdiction results in cases where courts can issue subpoenas to third parties, join third parties, and otherwise consolidate cases—even when there is no other territorial basis, beyond the presence of the consenting parties, for the court's jurisdiction. Indeed, part

271. STONE SWEET & GRISEL, *supra* note 25, at 221 (“The arbitral order benefits from, and actively harnesses, the functional logic of delegation-as-authorization. In the commercial law of the most important legal systems in the world, the contracts—a placeholder for the sanctity of party autonomy—is a privileged source of legitimization of the judge.”).

272. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2015); John Coyle & Katherine Richardson, *Enforcing Outbound Forum Selection Clauses*, 96 IND. L.J. (forthcoming 2021) (noting this general rule and exceptions).

273. The SICC's joinder rules are particularly expansive. Once the SICC has jurisdiction over a case because two contracting parties consented to have the SICC hear their contractual disputes, the court has the full power of the state to include in the proceedings additional parties who may not have consented. Stamboulakis & Crook, *supra* note 106. Indeed, the SICC rules grant the court authority to join non-consenting parties, including naming them as additional plaintiffs or defendants, even if, apart from this joinder, they have no other connection to Singapore and Singapore would otherwise lack judicial jurisdiction over them. *Id.* “[T]he only limitation to joinder of third parties in the SICC is a non-mandatory consideration [in O 110, r. 9(3)] of whether there is an ‘international and commercial character’ to the claims against the third party or the third party’s relationship with the original parties.” *Id.* at 100. Such joinder is not typically available in arbitration; the arbitral tribunal’s jurisdiction is set—and limited—by the scope of the parties’ agreement.

of the courts' attractiveness as a forum is that they can bind third parties, adjudicate some kinds of cases (like business torts) that might not be able to be subject to arbitration,²⁷⁴ and develop generally applicable law.²⁷⁵

This result is at best awkward, and at worst illegitimate, especially in cases where the arbitral court joins a third party over whom it has no other basis for exercising jurisdiction. It is unclear how often this extension of jurisdiction would happen²⁷⁶ or whether it would be made public if it did occur.

The point, however, is that the questions of jurisdiction over third parties test the boundary between the powers and legitimacy of the court acting as a public or private dispute resolution forum. Arbitral courts suggest that the public/private boundary may be shifting in international commercial disputes (in courts or arbitration), to one defined by the line between authority based on parties' consent and authority based on state sovereignty in courts with compulsory jurisdiction. Arbitral courts are trying both to straddle that line and to circumvent it.

State sovereignty alone, however, does not establish judicial jurisdiction over everyone everywhere. Nor does it establish judicial *legitimacy*, especially when states seek to draw legitimacy *from* the strength of their judicial institutions.²⁷⁷ This criticism applies to the arbitral court in Delaware, for example, which sought to base its legitimacy on the strength of the Delaware judiciary, and relied on that basis as sufficient even if the public nature of the court—and the accompanying public access and oversight and other democratic safeguards—were removed. In non-democratic states, the risks seem more severe. There, the pedigree of the arbitral court judges and the arbitration-like (and common law) features of the arbitral courts are intended to lend legitimacy and credibility to the state as well as the courts. But it is circular to have courts' consent-based legitimacy support the state's sovereign legitimacy, while also allowing the state's power to extend the court's power beyond its original source: the parties' consent.

Arbitral courts thus might do the converse of what Daniel Markovits criticizes the U.S. Supreme Court and similar arbitration enthusiasts of doing: trying to have it “both ways.”²⁷⁸ Arbitral courts seek to be like arbitration and act as a contractual gap-filler when it comes to resting their authority on the parties' consent (even without other sovereign or territorial

274. See Yip, *supra* note 187, at 83.

275. Joshua Karton, *Sectoral Fragmentation in Transnational Contract Law*, 21 U. PA. J. BUS. L. 142, 175 (2019); Lord Cwmgiedd, *supra* note 21.

276. Stamboulakis & Crook, *supra* note 106, at 101 (predicting the SICC will be “exceedingly cautious” in exercising this jurisdiction).

277. See Moustafa, *supra* note 263, at 287.

278. See Markovits, *supra* note 12, at 434.

claims to jurisdiction), but to be like a court—with the full sovereign power of the state—once some basis for jurisdiction has been established.

Arbitral courts' power, especially in common law jurisdictions, is not limited by considerations of whether the court's jurisdiction was granted solely by the parties' consent (e.g., in a case with no other ties to the forum). This breadth of jurisdiction is not shocking. Courts in New York and London have been exerting such power for decades. But the internal inconsistency should be flagged. Sociologically it may be harder to establish and maintain the legitimacy of this practice in smaller, newer, and less liberal and democratic jurisdictions. This is not to say that the state's power, e.g., to make law through common law courts, is inherently illegitimate if the source of the court's jurisdiction over a particular case derives exclusively from the parties' consent. Rather, there is a tension that has heretofore gone unnoticed and that may be strained if the state is relying on the court to lend it legitimacy instead of the other way around.

The same limits echo in the area of enforcement. One of the most often cited reasons for choosing arbitration over litigation is the easy enforceability of arbitral awards around the world. But this distinction could erode over time. Based on a trio of treaties, the difference between easy enforceability (traditionally associated with arbitral awards) and stricter scrutiny (traditionally associated with enforcing court judgments) may ultimately depend on whether the parties have consented to the forum's jurisdiction—not whether that forum was an arbitral tribunal or a court.²⁷⁹ Under this framework, it could be consent, or its absence, that one day distinguishes between ready international legitimacy and suspicion—not the difference between an arbitral tribunal and a court. If that becomes the norm over time, that may further weaken distinctions between arbitration and litigation in transnational disputes more generally. But as is the case with jurisdiction, if enforceability is made easier because parties consented to the

279. Three factors contribute to this shift. *First*, as of 2019, there are now international treaties governing both the enforcement of arbitral awards and court judgments. The treaties allow easy enforcement and minimal judicial review for awards and judgments based on tribunals that the parties consented to—arbitral awards and judgments arising from disputes with exclusive forum selection clauses. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294. The treaty that governs international enforcement of other kinds of foreign court judgments allows more scrutiny, making enforcement more difficult. *See* Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>. *Second*, in addition to this international treaty regime, many states, including arbitral courts' host states, are entering bilateral agreements among themselves to promote ease of enforcement of court judgments. *See, e.g.,* Erie, *supra* note 104, at 243. *Third*, the arbitral courts themselves are experimenting with innovative approaches to enforcement, as the DIFC court exemplifies. *See supra* notes 215-216 and accompanying text (discussing DIFC court's procedure allowing parties to convert DIFC court judgments into arbitral awards). These are all relatively recent developments and their ultimate influence is yet to be tested.

tribunal's jurisdiction, then the scope of that consent should limit the scope of that enforceability. That is, if the SICC, for example, were to use its authority to join non-consenting third parties, over whom the court otherwise would not have jurisdiction, then foreign courts should be reticent to enforce that judgment against the third party.²⁸⁰

Arbitral courts rely not only on consent as an arbitration-borrowed basis for legitimacy, but also on the personal legitimacy of the decision-makers that signal the courts' independence. Singapore, Dubai, and the Caymans thus have hired judges from the United Kingdom and elsewhere to bring with them the credentials, trustworthiness, and legitimacy that Delaware sought to sell with its judges.²⁸¹ As non-nationals, these foreign decision-makers may quell potential concerns that these courts will exhibit bias in favor of local parties or the local government. One purpose of hiring these judges is to fill in legitimacy gaps created by the fact that the court's authority ultimately derives from the state in places where the state might otherwise face a legitimacy deficit.²⁸² This personnel-driven legitimacy once again mirrors arbitration.

Arbitral courts also try to fend off some challenges to arbitration's legitimacy in other ways. For example, arbitral courts adopt their own ethical rules, perhaps responding in part to perceived criticism that arbitration lacks an applicable ethics code.²⁸³ Likewise, some observers *question* the legitimacy of arbitration's practice of letting parties choose arbitrators²⁸⁴ (although others suggest that this practice increases the likelihood the losing party will abide by the award²⁸⁵). Arbitral courts do not allow such a practice (although in theory they could).

Whether this legitimacy, loaned by the chosen judges, will ultimately be credible will depend on how cases play out in these courts. Our ability to know how those cases play out will depend on arbitral courts' commitment to openness. If government or government-connected parties come before arbitral courts, will the courts maintain their neutrality? Put simply, will arbitral court judges be independent?

280. See Stamboulakis & Crook, *supra* note 106, at 98.

281. In Singapore, there was a preexisting trusted legal system in place before the founding of the SICC. See Yip, *supra* note 187, at 82.

282. See, e.g., Mark Townsend, *Head of Press Regulator Advised Kazakh Regime That Suppresses Free Speech*, GUARDIAN (Jan. 25, 2020), <https://tinyurl.com/rj7zak9>.

283. See *Code of Ethics*, SICC, *supra* note 194; *The Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts*, *supra* note 213; Michelle Grando, *Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop*, KLUWER ARB. BLOG (Sept. 19, 2017), <https://tinyurl.com/y68d3nye> (discussing the need for ethical codes).

284. See, e.g., STONE SWEET & GRISEL, *supra* note 25, at 226.

285. *Id.* at 224.

The proof will be in the pudding. The ultimate test of the substantive legitimacy may be in the outcomes of cases.²⁸⁶ These courts are still new and must be watched for evidence. The DIFC courts, the oldest of the examples, have had mixed results. As Matthew Erie has documented, DIFC Courts have ruled in favor of the government bodies that have appeared before them, but they have also ruled against quasi-government corporations.²⁸⁷ This example yields both hope and skepticism—and a need for transparency to be able to monitor arbitral court independence.

B. Publicity, Confidentiality, and Party Autonomy

The previous section addressed challenges to arbitral courts' hybrid approach to jurisdiction and legitimacy, and cautioned that the public's ability to evaluate that legitimacy will depend on how much of the arbitral courts' operations the public can see. If the working of arbitral courts is kept completely confidential, that would of course undermine the institutions' legitimacy in its own right, as the Delaware experiment revealed.

Most arbitral courts, however, purport to be public institutions. Perhaps unsurprisingly, however, arbitral courts give parties considerable choice and control over procedural and evidentiary rules, with seemingly little court oversight to ensure, for example, the fairness of the procedures. For many such rules, one may not worry about this lack of oversight, assuming that the parties' need to agree will offer self-regulation. That is, the parties' interests will be antagonistic towards each other and will balance each other as they negotiate for procedures, obviating the need for judges to supervise for fairness. For example, the plaintiff might want extensive discovery, the defendant might want minimal discovery, and in contracting for procedure, they might reach a compromise solution.

On confidentiality decisions, however, experience teaches that the parties' interests will likely be aligned in favor of confidentiality even though public access—to courts' proceedings, records, and decisions—would be in the long-term institutional interest of the forum and of the law. Permitting party control over decisions about confidentiality, therefore, may cross the public/private divide.

In arbitration, parties are free to agree to keep their disputes—including the proceedings and resulting decisions—confidential and private. Confidentiality is not an inherent attribute of international commercial arbitration, but it is an available option, and appropriately so.²⁸⁸ Moreover,

286. See Bookman & Noll, *supra* note 30, at 824.

287. Erie, *supra* note 104, at 275.

288. See, e.g., Marlon Meza-Salas, *Confidentiality in International Commercial Arbitration: Truth or Fiction?*, KLUWER ARB. BLOG (Sept. 23, 2018), <https://tinyurl.com/y7wfm9nf>; KARTON, *supra* note 51, at 99.

when confidentiality is on offer, parties often choose to keep their disputes secret. Parties' control over confidentiality is not particularly worrisome insofar as the effect of the arbitration remains private and binding only on the consenting parties, without legal impact for others. Indeed, the call for more transparency in international commercial arbitration comes with its increasingly influential role in global governance. Without that impact beyond the parties, confidentiality between truly consenting parties may not be concerning.

Courts, however, ordinarily limit opportunities for confidentiality of regular proceedings and of judicial decisions, and courts and scholars alike urge the importance of "open justice."²⁸⁹ Even when the disputes involve private parties arguing over private law issues, courts working "out of sight" (like confidential arbitration) compromise both their legitimacy and their ability to develop law in the public interest.²⁹⁰ Courts' openness "sustains judicial independence, legitimates public investments in the judiciary, and offers routes to oversight when courts fail to live up to obligations to treat disputants fairly."²⁹¹ Privatizing disputes risks "erod[ing] public confidence" in courts; prevents "checks against both unfairness to some litigants . . . behind closed doors and potentially corrupt practices by attorneys, judicial officers, and litigants"; and "threatens to impede public awareness of the substantive law."²⁹² The purpose of open justice, the UK Supreme Court recently stated, "is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice system of which the courts are the administrators."²⁹³ Open justice is necessary "to enable the public to understand how the justice system works and why decisions are taken."²⁹⁴

The pitfalls of trusting the openness of arbitral courts to the parties have been demonstrated in the court context, for example, in the history of the opioid litigation,²⁹⁵ as well as in international commercial arbitration, where calls for more institutional transparency have run up against party

289. See *supra* notes 17, 43 and accompanying text.

290. Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 803 (2008).

291. Resnik, *Contingency of Openness*, *supra* note 36, at 1631-32.

292. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3055-56 (2015).

293. *Cape Intermediate Holdings Ltd. v. Dring* [2019] UKSC 38, [37] (appeal taken from EWCA Civ.) (allowing a non-party access to discovery produced in an asbestos litigation that settled).

294. *Id.* [42]-[43].

295. Benjamin Lesser et al., *How Judges Added to the Grim Toll of Opioids*, REUTERS (June 25, 2019), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/> (reporting on the secrecy of early iterations of the opioid litigation when the parties agreed to keep the litigation confidential); *id.* (quoting the judge as explaining, "This case was sealed because both sides agreed and asked me to seal it").

preferences.²⁹⁶ Party control over confidentiality choices is a little like defendant control over forum choices—the allocation of decision making authority typically decides the outcome.²⁹⁷

The traditional distinction is that in arbitration, parties have considerable control over procedures including questions of confidentiality, whereas in courts, especially common law courts, the public has access to the proceedings and decisions of the courts. This public/private division has been eroding for some time, as detailed in Part II. Even before arbitral courts, increased party autonomy over procedures had governed choice of forum, choice of law, and procedural decisions over issues such as discovery. But parties had not been given control over the public nature of court proceedings should they occur.

Arbitral courts potentially upend that distinction. They are poised to cross the line from judge control over confidentiality, with at least strong presumptions against it, to party control over confidentiality decisions and minimal judicial supervision, with presumptions favoring the parties' preferences. Judges may still be the ultimate decision-makers, but they have strong incentives to favor pleasing the parties. And party preferences are likely to favor confidentiality.

Arbitral courts have put themselves in this position to cater to their customers—i.e., potential parties to international disputes. Offering confidentiality is a form of “forum selling,”²⁹⁸ a way to compete with arbitration to attract parties to select the arbitral court in their forum selection clause or otherwise choose the arbitral court for disputes.

The originators of the term “forum selling” suggested that the practice was problematic when courts were selling themselves to plaintiffs with unilateral control over forum choices, but not if parties were agreeing on a forum in a forum selection clause.²⁹⁹ In that latter situation, the authors assumed parties would choose the best courts for both parties (perhaps each party's second choice), and courts would be driven to provide quality proceedings that would satisfy both sides.

But there are times when the parties' interests conflict with those of the court and the public. Josh Karton has demonstrated that transparency

296. *See, e.g.*, KARTON, *supra* note 51 (collecting scholarship advocating increased transparency and explaining the conflicts with party preferences); *cf.* Rogers, *supra* note 74, at 1303 (considering different institutional interests in more transparency).

297. *See* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1093-94 (2015); Bookman, *Unsung Virtues of Global Forum Shopping*, *supra* note 30, at 614.

298. Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016).

299. *Id.* at 243 (“When sophisticated parties use forum-selection clauses to choose the forum in their contracts, they have an incentive to choose a forum that provides unbiased, efficient adjudication because doing so maximizes the value of their transaction.”).

presents such a conflict in international commercial arbitration.³⁰⁰ The institution needs transparency to sustain sociological and legal legitimacy. In arbitral courts, these needs exist to an arguably even greater extent. Arbitral courts are new, and therefore need to publicize what they are doing to establish these different kinds of legitimacy. In democracies, open justice is necessary to bolster judicial independence, legitimacy, and to allow for public oversight with respect to cases and lawmaking more generally.³⁰¹ Arbitral courts in non-democratic states have an even higher burden to demonstrate to the public—and the world of commercial parties who might choose to litigate their disputes there—that they are independent and follow the law.³⁰²

C. *The Decision Makers*

A third dividing line between arbitration and litigation in courts is the decision maker.

Studies of international commercial arbitrators³⁰³ depict them as private citizens with a business service ethos; in deciding cases, they often focus on commercial reasonableness, and are typically less concerned with creating a legal rule that will have staying power for the next case than they are with resolving the case for the parties who have hired them.³⁰⁴

Judges, like arbitrators, come in many stripes and their approaches to decision making are far from monolithic.³⁰⁵ But again, generally, national

300. KARTON, *supra* note 51, at 98.

301. *See supra* notes 293-294 and accompanying text.

302. One might wonder whether arbitral courts' rules about confidentiality are constrained by some higher order law. While the UK Supreme Court has recently reaffirmed the principle of "open justice," it is not clear whether and how this rule will bind or persuade arbitral courts, even those in the common law tradition. In the United States, the Third Circuit held that the Constitution enshrines a similar principle, thwarting Delaware's attempt to create a confidential arbitral court. But it probably would have been possible for Delaware (or another interested state) to circumvent such a ruling, as noted earlier. *See supra* note 124 and accompanying text. A revised statute could make confidentiality available at the judge's discretion, and then set (or allow judges to set) a low threshold for granting confidentiality requests (perhaps even not requiring the request to be bilateral). Such an arrangement might have satisfied the Third Circuit. It is also possible that another set of federal judges, especially those appointed more recently, might agree with the dissent rather than the majority in *Delaware Coalition*.

303. Not all arbitrators are created equal. *See, e.g.*, Joost Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761 (2015) (distinguishing between investor-state arbitrators and WTO trade adjudicators in terms of nationality, professional background, legal expertise, diversity, status, and ideology); James Crawford, *The Ideal Arbitrator: Does One Size Fit All?*, 32 AM. U. INT'L L. REV. 1003 (2018). This Article focuses on descriptions of international commercial arbitrators.

304. KARTON, *supra* note 51, at 90-91.

305. *See, e.g.*, Matthew C. Stephenson, *Legal Realism for Economists*, 23 J. ECON. PERSPS. 191, 194-95 (2009); Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission*, 7 J.L. ECON. & ORG. 183, 186 (1991).

commercial court judges tend to be public servants rather than private citizens, and conceive of themselves as such. Common law judges traditionally aim to resolve cases with an eye towards creating a rule that will be applicable and manageable in future cases rather than exclusively yielding a result that satisfies the parties. Some judges have been accused of “forum selling,” particularly in situations when plaintiffs have “a wide choice of forum,” which creates incentives for the judges “to make the law more pro-plaintiff because plaintiffs choose the court with the most pro-plaintiff law and procedures.”³⁰⁶

Like arbitral courts themselves, arbitral court judges can be something of a hybrid between arbitrators and national court judges. Some arbitral court judges are or were judges in other existing courts in the domestic system; indeed, the Delaware arbitral court judges were simply Chancery Court judges given additional responsibilities. The “international” judges at the Singapore, Dubai, and Cayman Islands arbitral courts are well respected former judges from the United Kingdom and other jurisdictions, although some come from private practice or have experience as an international arbitrator. At the Singapore and Dubai courts, there are a few civil law judges in addition to a roster of well-regarded common-law judges. Many of these international judges also sometimes serve as arbitrators.³⁰⁷

Like international commercial arbitrators, these judges are desirable decision makers because they have expertise in relevant law, in decision-making, and in international commercial disputes.³⁰⁸ They are well respected not just for their expertise but for their ethics and virtue.³⁰⁹ Because they are not locals, they may offer more neutrality than typical judges, who might be thought to be biased in favor of local parties.³¹⁰ These individuals may indeed be the key to arbitral courts’ success—and to their legitimacy.

But regardless of their nationality, like ordinary court judges, arbitral court judges are structurally positioned within the architecture of the state. They are paid by the state. They have been recruited by the state to jumpstart these new institutions and may feel (virtuously) invested in the institutions’ success.

As a result, arbitral court judges have hybrid incentive structures that are difficult to parse. Whereas judges, whether on domestic or international courts, are often said to have a “systemic perspective” when adjudicating cases, that perspective is often said to have “less importance in international

306. Klerman & Reilly, *supra* note 298, at 242.

307. Former Chief Justice Beverly McLachlin is a good example.

308. *See* Crawford, *supra* note 303, at 1006.

309. *See* Dezalay & Garth, *supra* note 53.

310. *See, e.g.,* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in American Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 442 (2007).

arbitration, which, [for the arbitrator], is essentially a service to the parties.”³¹¹

How will this hybrid posture affect arbitral court judges’ behavior and affect the relationship between the state and the arbitral court? How will arbitral court judges perceive their role and the role of their new institution? How will they perceive their loyalties—to the development of their home law (e.g., English law) or forum law (e.g., Singapore law), to the resolution of particular disputes, or to the furtherance of their institutions? And will states that otherwise lack separation of powers and full judicial independence construct and respect those ideals with respect to arbitral courts?

Because neither arbitrators nor judges are monolithic groups, further research interviewing these judges and investigating the answers to these questions is important. For now, this Article’s modest task is to raise these questions. The hybrid nature of the institution of the arbitral court makes it unclear whether arbitral court judges will conceive of themselves more as judges or arbitrators. Their attitudes will affect how they interpret law, resolve cases, and decide procedural questions like whether to grant the parties’ request for confidentiality. For arbitral courts in jurisdictions with uncertain histories of judicial independence, it remains to be seen how the state will interact with the judges and vice versa.

Finally, arbitral courts to date, unlike arbitration, do not allow parties to choose their decision makers. Some may think this limit removes the attraction of arbitration, as well as a key to its legitimacy—parties may be more likely to accept a decision if they have a say in choosing who decides. But others who question the legitimacy of a decision made by an adjudicator chosen by the parties may argue that this omission makes arbitral courts all the more authoritative.

In short, the hybridity of arbitral courts is epitomized in the hybridity of arbitral court judges. It is still unclear what this unusual combination of ingredients will yield. The future of arbitral courts, discussed in the next Part, may rest largely on the shoulders of arbitral court judges and how they choose to respond to—and resist—the institutional incentives handed to them.

V. THE FUTURE OF ARBITRAL COURTS

Thus far, this Article has documented the emergence of arbitral courts around the world as a culmination of long trends in the convergence of public and private adjudication. The previous Part argued that arbitral

311. Giorgio Sacerdoti, *From Law Professor to International Adjudicator*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 204 (David D. Caron et al. eds., 2015).

courts' efforts to blur the boundaries between these two types of adjudication should reveal the limits of convergence. Courts, as public institutions, should have consistent articulations of legitimacy and jurisdiction and should provide transparency and public access. If arbitral courts establish and maintain legitimacy and transparency, they have significant potential for international influence—not just in resolving individual disputes, but in global governance and in their capacity to declare and develop transnational law.

This Article yields, in some sense, a simple answer to the question of what arbitral courts should do: They should take seriously their public role as courts. They should embrace, promote, and protect judicial independence and accountability, which includes and indeed depends upon transparency. And in cases where they derive their legitimacy and jurisdiction from foreign parties' consent, they should limit the exercise of their power to the scope of the parties' contract. If they exercise power beyond that scope, it should at least be confined by other limits on judicial jurisdiction. Arbitral court judges are the key players who are poised to decide whether arbitral courts will do this.

These judges seem to have strong incentives to provide parties—including potentially the state—with requested confidentiality. States create arbitral courts to cater to the needs of certain kinds of parties; they design them to be a more attractive forum than arbitration. To have cases, and simply to exist, arbitral courts need parties to want to resolve their disputes with them. Granting confidentiality requests—allowed by the courts' rules—may seem like a minor accommodation that serves all these purposes. Likewise, arbitral courts, as new institutions, may be positioned to try to establish and build their own power, and asserting jurisdiction over non-parties, or issuing broad injunctions, may seem like a natural way to assert judicial authority.

Currently, there are three sets of internally inconsistent incentive structures that might make arbitral courts police confidentiality requests and jurisdictional expansion more strictly. The first is the “market.” Making the court attractive to potential parties may include offering confidentiality. But it also requires the court to be transparent enough to advertise what it is doing and to showcase its restraint, quality, and independence. Second, the judges themselves may bring with them both a liberal and restrictive judicial ethos. Third, the state may want arbitral courts to be at least somewhat transparent and restrained to build the state's and the courts' legal legitimacy. Each of these potential restraints is a two-sided coin with incentives that lean both towards and away from transparency and restraint.

First, the so-called market. Arbitral courts are still quite new. In the beginning, the need to establish a reputation to support the court's legal and sociological legitimacy may make arbitral court judges more reluctant to

push the boundaries of their power and to grant parties' confidentiality requests. The standard explanation of arbitral courts and commercial courts more generally is that they—like arbitration—are driven by parties' (the market's) needs and desires. The pressure to cater to the potential customer—the potential parties to transnational disputes—is real, both to accumulate cases and to justify the court's continued existence. Over time, as the court establishes its reputation, it will gain more freedom to accommodate parties' demands for confidentiality and expansive use of jurisdiction. Within certain bounds, the arbitral court may be able to rest on its reputation, especially if it is exercising its power in secret.

Second, the arbitral court judges, especially the international judges, may bring with them a restrictive judicial ethos. Hiring respected judges has signaled and provided arbitral courts' expertise in both commercial law and managing cases as well as a liberal sense of judicial independence. It remains to be seen whether arbitral court judges will also or alternatively be driven by an arbitrator ethos that focuses on the parties' dispute and commercial reasonableness over common law development or the interests of third parties. A judicial ethos might restrict judges' grant of parties' request for confidentiality and include a sense of judicial restraint, prioritizing instead the institutional and public law interests of the court, whereas an arbitrator ethos might view confidentiality as an uncontroversial choice that is up to the parties. As noted in Part II, even in traditional courts, judges have increasingly recognized their role as more managerial and oriented towards serving private parties' dispute resolution needs. Arbitral courts could provide a forum in which this kind of privatization is prized and cultivated.

Third, the state's influence may reinforce parties' preferences for confidentiality—since the state is also trying to accommodate parties' preferences to encourage parties to invest and to adjudicate disputes in the state. Delaware provides the best example of a state trying to cater to the market's desire for confidential state-subsidized decision-making.³¹² Likewise, if the state appears as a party—or is otherwise involved in or connected to a case—then it could use its influence to affect the proceedings or the outcome of the case, or to keep the proceedings confidential. But as discussed in Part IV, the state is also interested in the institutional integrity and legitimacy of arbitral courts and as such it may promote arbitral courts' jurisdictional restraint and preservation of transparency.

Existing structural incentives, therefore, may be strong at times for arbitral courts to grant confidentiality requests and exercise broad jurisdiction; at other times or in other situations, however, arbitral courts' incentives may push in the opposite direction. Arbitral courts should resist the urge to cater to the market in particular cases in favor of their longer-

312. *See supra* notes 2-6 and accompanying text.

term interest in showing themselves to be independent, sophisticated, and legitimate courts.

The problem is that, from the institutional self-interest perspective, arbitral courts need only *enough* transparency to establish and maintain legitimacy and, possibly, to declare and develop substantive law. Complete transparency may not be necessary to satisfy the “market,” and indeed, many potential parties (and, at times, the state) may desire confidentiality. Over time, as the institutions gain legitimacy and positive reputations for independence, those reputations will give them cover for allowing more confidentiality upon request, to the detriment of broader and longer-term institutional interests. Neither the market nor the state necessarily promotes their best interests by advocating more transparency—like arbitral tribunals, they have interests in providing as much confidentiality as users desire. Arbitral court judges will ultimately be deciding what constitutes enough transparency for judicial independence and institution building, but they may also have incentives to satisfy the parties and the state sufficiently to ensure the continued existence of the arbitral court as an institution.

Arbitral courts should therefore tie themselves to the mast of publicity today so that they do not fall to the temptations of confidentiality requests tomorrow.³¹³ Today, while they may still recognize the supremacy of their institutional interests in transparency over the parties’ interests in confidentiality, arbitral courts and their host states should bind themselves to a commitment to publicity. Opinions discussing the importance of the open justice principle, like those from the Caymans court, could be examples of such commitments.³¹⁴

Another way to do this might be to specify in bilateral or multilateral recognition and enforcement agreements with other countries that court decisions would be enforceable, or more easily enforceable, if those decisions are routinely made public. Currently, the most common requirements found in these agreements are that the court originally issuing the judgment have jurisdiction over the dispute and the parties and that the judgment not violate the sovereignty and public policy interests of the jurisdiction where enforcement is sought.³¹⁵ In other words, the

313. Tying oneself to the mast refers to Ulysses asking his men to tie him to the mast of his ship so that he could hear the Sirens’ song even though the song would otherwise make him jump into the sea. See Edward Rubin, *Hyperdepoliticization*, 47 WAKE FOREST L. REV. 631, 646 (2012).

314. See *supra* notes 241-245 and accompanying text; see also *supra* note 189 (describing SICC opinions about open justice principles).

315. See, e.g., Riyadh Arab Agreement for Judicial Cooperation art. 32, Apr. 6, 1983, <https://www.refworld.org/docid/3ae6b38d8.html>; The GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications, 1996, <http://www.diac.ae/idiias/rules/GCC/>; Agreement Between the People’s Republic of China and the United Arab Emirates on Judicial Assistance in Civil and Commercial Matters art. 22, China-U.A.E., Apr. 21, 2004,

international regime over recognition and enforcement of judgments and awards could favor enforcement of public awards from consistently public courts and disfavor enforcement of confidential awards and/or awards from insufficiently public courts, at least outside of arbitration.³¹⁶ Another option might be simply to publicly declare a commitment to openness for the sake of independence and legitimacy. One problem, however, is that it could be difficult to police this commitment if the parties involved and the court are all in favor of confidentiality. How would one know that the arbitral court was operating confidentially? The decision lies mainly in the hands of arbitral court judges deciding individual confidentiality motions.

If they commit to openness, arbitral courts may ultimately be well positioned to develop transnational law and have significant influence, especially in areas of the law that are new or dominated by arbitration and therefore lacking in many published precedents. The SICC's decision in *Quoine* is a prime example of this potential. It is consistent with the SICC's commitment to developing transnational commercial law, filling holes in the common law often attributed to the proliferation of arbitration in certain areas of contract law.³¹⁷ As the Chief Justice of Singapore has said, "if major and complex commercial cases are heard by arbitral tribunals rather than courts, judicial precedents might become outdated, and this might be an impediment to the development of a *lex mercatoria*."³¹⁸ In this atmosphere, arbitral courts should be "well placed to develop jurisprudence."³¹⁹

This potential, however, requires arbitral courts to have both the legitimacy and transparency of *public* adjudication. Doing so is not without costs. Where parties prefer confidentiality, they may opt for arbitration over arbitral courts if confidentiality is available in one but not the other. But not all disputes require confidentiality.³²⁰ Dubai and Singapore, for example, are establishing not just litigation destinations in the form of arbitral courts³²¹ but multi-door legal hubs that cater to litigation, arbitration, and other kinds of ADR simultaneously and in the same location. They therefore may be

<https://tinyurl.com/y6xe5xte>; Memorandum of Guidance as to Enforcement Between the Supreme Court of Singapore and the Dubai International Financial Centre Courts ¶¶ 1-2, Jan. 19, 2015, <https://tinyurl.com/yyzbupfx>; Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases arts. 1-2, China-Sing., Aug. 31, 2018, <https://tinyurl.com/yyd3ksy2>.

316. Thanks to John Coyle for this recommendation.

317. See Bookman, *Adjudication Business*, *supra* note 19, at 278; Menon, *supra* note 184, at 234; Lord Cwmgiedd, *supra* note 21.

318. Sundaresh Menon, Chief Just. of the Sup. Ct. of Sing., International Commercial Courts: Towards a Transnational System of Dispute Resolution ¶ 54 (2015), <https://tinyurl.com/y5zsw476>.

319. *Id.* ¶ 55.

320. See, e.g., Nyarko, *supra* note 62, at 15 (disproving conventional wisdom that all international commercial contracts contain arbitration clauses).

321. See Bookman, *Adjudication Business*, *supra* note 19, at 231.

better able to attract more disputes overall—and exert more influence—by establishing arbitral courts with stronger claims to legitimacy and independence, as demonstrated by and through the courts’ openness and legitimate exercises of more limited jurisdiction. The law that the arbitral courts develop may then apply in these other more private fora (like arbitration or mediation)—but its impact will be harder to observe.

VI. CONCLUSION

This Article has identified the emerging phenomenon of arbitral courts and placed it in the context of trends of the judicialization of international commercial arbitration and the privatization of court procedure. It has argued that arbitral courts are testing the traditional boundaries between public and private adjudication in ways that potentially put more pressure on questions of consent-based jurisdiction than on public/private distinctions. It has also highlighted the importance of legitimacy and transparency for the full functioning of courts. It has warned of the dangers of leaving confidentiality decisions up to parties who would likely favor confidentiality even at the expense of institutional interests in open justice. In the end, it argues that if arbitral courts can commit to legitimacy and transparency, they may be able to have real global influence, including in shaping substantive law.

Arbitral courts raise a host of additional questions that are ripe for further scholarly inquiry. For example, arbitral courts create several conflicts of law puzzles. How should other courts treat forum-selection clauses choosing arbitral courts as the parties’ chosen forum—like an arbitration clause or like a forum-selection clause? If arbitral courts enforce parties’ choice-of-law clauses designating non-state law, will that lead other courts to do so? Will other courts enforce arbitral court decisions—and on what basis? What *res judicata* effect will arbitral court judgments have internationally? What preclusive effect does a confidential arbitral court decision have?

Arbitral courts also raise broader questions about judicial reform and access to justice. Will the creation of these courts produce positive effects for the rest of the judiciary in the host states³²² or simply focus resources on “one percent procedure”?³²³ In Dubai, for example, will the creation of a common law jurisdiction with common law courts including foreign judges influence the rest of the local judiciary and result in liberalizing the

322. See, e.g., Alexandre Biard, *International Commercial Courts in France: Innovation without Revolution?*, 1 ERASMUS L. REV. 24 (2019).

323. See Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016).

rest of the state and increasing the rule of law? The foreign judges at the Astana International Financial Centre court do not have many cases yet but have been tasked with touring the nation and educating Kazakh judges about the common law.³²⁴ What will be the effect of these education tours? Can the identity of the judges or other arbitration-like features change the very nature of a state's court system? Will the SICC exhibit more judicial independence than other branches of the judiciary? Matthew Erie has begun to investigate these questions;³²⁵ future work should continue these efforts.

One possibility is that arbitral courts might herald the advance of increased rule of law in illiberal host states, but not necessarily have any liberalizing effect, for example, spreading democratic governance.³²⁶ Arbitral courts have the potential to be strong legal institutions that uphold the predictability of the law and promote economic stability and growth. Especially in non-democratic or not completely democratic states, arbitral courts' outward facing motives seem to be to inspire investor confidence or attract international commercial disputes, but may not have broader effects of transforming the judiciary or the state.³²⁷ It is unclear how well those financial motives will discipline the state or the courts. Arbitral courts may be well-suited, indeed, to play the role of courts in authoritarian states—lending legitimacy to the regime, enforcing state power, and encouraging investment.³²⁸ Particularly if they eschew transparency, they may serve these roles without yielding other trickle-down liberalizing effects.

324. In promotional materials, the AIFC court touted its intention “[t]o collaborate with and establish working relationships with other courts in Kazakhstan, . . . [and] [t]o support the delivery of high-quality legal education and training to meet the needs of lawyers and judges in Kazakhstan and the Eurasia region.” Gabe Kirchheimer, *Kazakhstan Adopts English Law to Inspire Investor Confidence*, BLOOMBERG (Oct. 22, 2018), <https://tinyurl.com/y5mj5656>.

325. Erie, *supra* note 132.

326. *Cf.* Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SING. J. LEGAL STUD. 232, 233 (2012) (defining rule of law to not include democracy and human rights).

327. *See* Bookman, *Adjudication Business*, *supra* note 19, at 240.

328. Peter H. Solomon, Jr., *Judicial Power in Authoritarian States: The Russian Experience*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 261, 281-82 (Tom Ginsburg & Tamir Moustaafa eds., 2008).