# Is International Commercial Arbitration a Complement or Substitute for Domestic Legal Institutions?*

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**Abstract**

The growth of private, transnational legal institutions has presented states with new and underexamined mechanisms for integrating into the global economy. This paper investigates the interaction between one such institution, international commercial arbitration (ICA), and its domestic alternative, courts. Curiously under-examined in the literature, ICA has become a central pillar of modern global economic governance. I argue that the growth of ICA has eroded the link between domestic rule of law and foreign direct investment by offering an extra-judicial, de-localized system of dispute resolution. Using a dataset tracking implementation of the UN Commission on International Trade Law's 1985 Model Law on International Commercial Arbitration, I find that while direct investors are attracted to states with stronger rule of law institutions, this association is negated by the enactment of arbitration-friendly laws. ICA thus serves as a substitute for local courts. I examine the mechanisms of substitution using dispute data from the International Chamber of Commerce. I find that the mechanism undermining local judicial authority is not the increased attractiveness of a jurisdiction for arbitration, but rather the indirect effect Model Law enactment has on the propensity for local firms to participate in international arbitration. The results lend support to the view that the modern international investment regime is developing into a transnational legal institution increasingly independent of domestic political and legal institutions. These findings contribute to our knowledge of both the political economy of international commercial arbitration as well as the interaction between transnational and domestic legal institutions.

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# 1 Introduction

Foreign direct investment is risky. Not least among these risks are legal risks: what do you do if your local partners (be they private or public actors) do not fulfill their obligations? Local courts can be an unattractive option if they lack independence or if the disputant has greater experience or expertise in local legal practice. As a way out of this bind, global commercial actors developed a private, transnational system of resolving contractual disputes called international commercial arbitration (hereafter, ICA).[1] ICA has enjoyed consistent growth in terms of raw activity, the range of disputes subject to arbitral settlement as well as the authority afforded to arbitrators. Unlike international dispute resolution bodies such as the World Trade Organization's Dispute Settlement Body, ICA is a transnational mechanism of cross-border commercial dispute resolution unmediated by state actors. ICA provides parties the freedom to set arbitral procedures, select what law will govern the dispute and select their own arbitrators. The parties to ICA tend to be private actors, but states are also frequent participants. In recent decades, states have gradually granted greater authority to private arbitrators to interpret and apply public law.[2] In some cases international arbitrators have been found to arrive at alternative interpretations of domestic law or apply transnational legal norms where a domestic court would not.[3] Despite the risk for divergence between arbitral and judicial interpretations of law, the contemporary ICA regime enlists domestic judiciaries in the enforcement of arbitration agreements and awards[4] while at the same time placing strict limits on public and judicial oversight over arbitral practice or the merits of a given award.

The privatization of commercial dispute resolution is more than a pure technical or procedural matter. It carries political risks. High-capacity authoritarian states such as China have included commercial arbitration as part of a broader strategy for attracting foreign investment by providing efficient and neutral commercial dispute resolution services while denying the same quality of justice

1. See Mattli 2001; Hale 2015a; Stone Sweet and Grisel 2017. I use the term ICA, though some instead refer to this system as transnational commercial arbitration.

2. After the landmark *Mitsubishi* case, in which the US Supreme Court ruled that even antitrust claims could be subject to arbitration, one commentator noted,

> With the *Mitsubishi* Court, however, we must recognize that increasing reliance on international commercial arbitration to resolve disputes that might have both a commercial and public-law dimension will mean that *a species of anational tribunal will be playing an increasingly significant role in the development and execution of both municipal and transnational legal norms.* (Donovan 1995, 657)

3. Karton 2013.

4. In arbitration parlance, an "award" refers to the arbitration panel's final decision.

to its citizens.[5] ICA assists weaker states seeking similar ends. Mark Massoud argues that Sudan has embraced ICA because it enables the state to provide high-quality contract enforcement mechanisms to foreign investors without risking the spillover of liberal legal norms outside the domain of foreign commerce or investing in uncertain, long-term judicial reform.[6] Prior research has found that commercial actors seem to be becoming less sensitive to domestic legal institutions which the authors speculate may be due to increased usage of international commercial arbitration.[7]

### 1.1 *Process & Industrial Development Limited v. Nigeria*

As an example of the political and legal complexity of modern, transnational commercial dispute resolution, consider the case of *Process & Industrial Development Limited v. Nigeria*. Nigeria was an early promoter of arbitration as a means of attracting foreign capital and trade. The country even enacted modern arbitration legislation based on a United Nations-approved model law in 1990.[8] In January of 2010, the Nigerian Ministry of Petroleum Resources and a foreign company called Process & Industrial Development Limited (P&ID) made a deal. Nigeria agreed to deliver wet gas to P&ID which would then process the gas and return the processed gas back to Nigeria for free. It seemed like a win-win. Nigeria would the receive processed gas at no cost and P&ID would turn a profit by selling the byproducts of the refinement process. But the deal quickly fell apart. P&ID never built the processing plants and Nigeria failed to deliver the infrastructure required to transport the wet gas to the non-existent plants. Each blamed the other, refusing to uphold their end of the deal until the other had completed theirs. Their contract contained a provision stipulating that any dispute be sent to binding arbitration. While the governing law would be Nigerian, the "venue" of the arbitration would be London. A little over a year later, P&ID invoked this provision and initiated arbitration proceedings against Nigeria to recover the damages it alleges to have incurred as a result of Nigeria's failure to deliver the gas.

The London-based arbitral tribunal ultimately ruled in favor of P&ID. The tribunal awarded the firm $6.6 billion in damages for lost profits plus interest accruing at a rate of 7% per year until

5. Wang 2015.
6. Massoud 2014.
7. Powell and Rickard 2010.
8. This model law, the UNCITRAL Model Law on International Commercial Arbitraiton, is discussed at length below.

it is paid off. At the time of writing, the value of the award has ballooned to about $10 billion, or nearly $\frac{1}{3}$ of Nigeria's 2020 budget ($29 billion).[9] Nigeria meanwhile claims that the contract is fraudulent and has launched a criminal investigation into the circumstances of the deal. Nigeria has fought the award, arguing that the underlying contract is invalid because it was procured through corrupt means. In fact, a Nigerian court has nullified (or "set aside" in the professional parlance of arbitration) the award on these grounds. So how can P&ID collect on the award? What prevents Nigeria from simply ignoring this judgement as it might that of any other foreign or international court? A central feature of the modern international arbitration system allows P&ID to enforce this award nearly anywhere in the world by collecting Nigerian assets held abroad, meaning P&ID can enlist the help of third-party states to seize Nigerian assets that are outside of the direct control of the Nigeria Government. Indeed, English courts have refused to recognize the Nigerian annulment because the arbitration panel found that the proper "seat" (or the legal home governing the proceedings) of the arbitration is not Nigeria, but England. At the present time, Nigeria is seeking to have the English court set aside the award, but the outcome is still uncertain. While details of this care are particularly acrimonious, the legal dynamics illustrated in this example are not unique to this case. In this paper I seek to demonstrate empirically that through the diffusion of domestic laws protecting ICA, global commercial actors have successfully developed a transnational system of dispute resolution to excise commercial disputes from local judicial control.

### 1.2 Overview & Outline

This paper contributes to the extensive literature in international political economy exploring the complex relationship between domestic institutions and global commerce[10] as well as research into the international mechanisms of commitment and commercial dispute resolution.[11] I also build on prior work on the political economy of ICA by examining the interaction between domestic and international institutions, in particular whether access to a system of transnational dispute resolution provides a substitute or complement for domestic legal institutions.[12] This question

9. See https://www.reuters.com/article/nigeria-budget/nigerias-president-submits-revised-2020-budget-to-parliament-idUSL8N2DA6Q9

10. E.g. Li and Resnick 2003; Jensen 2006; Nunn and Trefler 2014; Li, Owen and Mitchell 2018; Beazer and Blake 2018.

11. Elkins, Guzman and Simmons 2006; Neumayer, Nunnenkamp and Roy 2016.

12. See Mattli and Dietz 2014; Hale 2015a, 2015b.

relates to the emerging debate on the relationship between international institutions and domestic political development: do they promote or hinder domestic institutional development? Much of this debate hinges on the nature of the relationship between transnational and domestic institutions. Do transnational institutions complement or substitute for their domestic counterparts? I borrow this language from Ginsburg who in turn borrowed it from economics: a substitute is a good that is generally seen as equivalent to another good; while a complementary good increases demand for its counterpart.[13] If international arbitration is a substitute for local institutions, we may see reduced demand for enhancing the quality of local institutions as well-resourced parties can simply contract into alternative, private institutions that substitute for local ones.[14] Some argue—as I do below—that this "legal outsourcing" is already occurring.[15] One early study found evidence suggesting (ISDS) may indeed exert a harmful influence on the quality of domestic governance.[16] Others argue, however, that arbitration *complements* domestic legal institutions; that it provides external "competition" for local courts which motivates judges and government officials to provide higher quality services.[17] This is the logic underlying the advice of arbitration practitioners who suggest that arbitration is an important element of domestic legal reforms meant to improve the quality and independence of local institutions.[18] In sum, this literature has focused on the effects the development of transnational dispute resolution with scant attention paid to whether international arbitration is indeed operating as a substitute or complement.

In this paper, I provide evidence that ICA is indeed substituting for local legal infrastructure, not complementing it. This finding supports the contention of Ginsburg, Sattorova and others who have argued that arbitration may present obstacles for legal development. I demonstrate this empirically in two ways. First, I show that ICA moderates the well-established finding that investors prefer jurisdiction with high-quality legal systems. That is, countries that have enacted strict ICA provisions enjoy no FDI penalty or benefit based on the quality of their legal institutions, while countries without such provisions do. Second, using data from the International Chamber of

13. Ginsburg 2005. See also Stephan 2014
14. Sonin 2003.
15. Nougayrède 2013; Massoud 2014; Sharafutdinova and Dawisha 2017; Sattorova 2018.
16. Ginsburg 2005; Bodea and Ye 2018.
17. E.g. Franck 2007; Rogers 2015; Rogers and Drahozal, forthcoming.
18. Sattorova (2018) argues that the narrative that arbitration operates as a driver of good governance was developed by development specialists at the World Bank and elsewhere after it became clear BITs may not be as attractive to foreign investors as they were promised to be.

Commerce's (ICC) Court of Arbitration—the world's premier ICA center—I show that enactment of such laws increases the rate of international arbitration by local firms. While I find some evidence that such laws also increase the amount that a jurisdiction is chosen as a seat of arbitration, this result is model-dependent. The political stakes are high because a country can only regulate ICA if arbitrations are seated in its jurisdiction—as the Nigerian court's inability to set aside the P&ID arbitration demonstrates. This finding therefore suggests that ICA may be not only diverting disputes out of local courts, but also shielding them from local oversight.

In what follows, I first discuss why FDI offers a good case study for transnational institutional substitution. In short, foreign investors sit at the intersection of domestic and transnational institutions: investment decisions are highly sensitive to potential host states' political and legal institutions. ICA provides an avenue for circumventing domestic institutions that investors perceive to be risky. Following that, I provide a brief outline of the contemporary ICA regime, highlighting the importance of a UN-approved model law that is the focus of this study: the United Nations Commission on International Trade Law's Model Law on International Arbitration (1985). I then present the empirical analyses. I find evidence consistent with prior work that foreign investors are indeed attracted to states with strong rule-of-law institutions. But I also show that this relationship is moderated by access to strict domestic protections for ICA. I find no relationship between a host state's legal institutions and FDI inflows among states that have implemented the UNCITRAL Model Law. The modern ICA regime serves as a substitute for domestic legal institutions, not a complement. This result is robust to a battery of alternative measures of the rule of law. I then present my analysis of the mechanisms driving this substitution effect. I find that the Model Law has an unambiguously positive effect on the number of local firms engaging in ICA, though the law's effect on attracting ICA to the state's jurisdiction is uncertain. I conclude with a discussion of these trends.

## 2 Foreign Direct Investment and the Rule of Law

Variation in global FDI flows offers a good window into the interaction between international commercial arbitration and local courts because foreign direct investors are both users of ICA and highly sensitive to contractual and institutional risk. With foreign investors at the intersection

of transnational and host state institutions, we can use variation in FDI flows to tease out what impact the growth of ICA might have on the authority of national courts over cross-border commercial contracts. In other words, FDI flows presents us with a well-founded counterfactual because prior theoretical and empirical work has demonstrated that, all else equal, investors tend to prefer countries that have neutral and efficient rule of law institutions. If implementing ICA protections reduces that sensitivity (e.g. if a politically motivated and inefficient legal system becomes less of a deterrent to investment) then we can infer that ICA is substituting for those institutions by providing a functional alternative and exit option. Investigating ICA through FDI flows also enables us to expand the traditional scope of studies on the political economy of FDI which tends to focus on what I call "vertical" risk, or risk stemming from unexpected policy change or international law violations by a host-state. ICA, by contrast, is a system for settling international contract disputes. It is therefore designed to mitigate "horizontal" risk stemming from legal disputes between contractual partners. I use the terms vertical and horizontal because while the nature of the risks distinct, they are in important ways both political as they are both deeply tied to the quality and independence of a country's legal institutions. I discuss each of these issues below.

### 2.1 Vertical Risk

Direct investors are particularly sensitive to a host state's political and legal institutions, even more so than they are to the macroeconomic conditions within the country.[19] Much of the early literature on the institutional determinants of FDI focuses on the threat of vertical risk from unanticipated state action, or the possibility that a host state will expropriate foreign capital or impose policy changes that diminish the economic viability of an investment.[20] Early work in this area found that foreign investors tend to be attracted to democratic institutions.[21] Scholarship has since added nuance to our understanding of the mechanisms driving the link between democracy and FDI.[22] Others have demonstrated that the rule of law, protection of property rights and policy stability caused by a greater number of veto players may be behind the apparent "democratic advantage" in the international competition for foreign capital.[23] This line of research has attenuated the apparent

19. ahlquistEconomicPolicyInstitutions2006
20. Lipson 1985.
21. Jensen 2006; Busse and Hefeker 2007.
22. Pandya 2016, 462-4.
23. Li and Resnick 2003; Choi and Samy 2008; Staats and Biglaiser 2012; Lee, Biglaiser and Staats 2014.

causal link between democracy and FDI because, while these institutional features tend to be found in democratic regimes, they are not exclusive to them. Non-democratic states can attract foreign direct investment to the extent that they possess any of these institutional features.[24] While there are international instruments for protecting foreign investors from expropriation (such as bilateral investment treaties), the literature on their effectiveness is mixed.[25] In the end, direct investors may not care so much about whether a country is democratic, but they are nevertheless highly attuned to the risks posed by countries' domestic political and legal institutions. All else equal, they seek out countries with strong property rights, policy stability and efficient, neutral courts.

## 2.2 Horizontal risk

Outside the risk of unexpected state action, foreign investors are also exposed to significant risks from their relationships with local partners, including both public and private actors. The possibility that a local partner may not uphold their end of a bargain; the uncertainty over what exactly it means to abide by some provision in an agreement; or the inability to resolve these kinds of disputes all limit the incentives for parties to search for and create commercial partnerships. While disputes over such agreements are "private," their resolution is structured by state legal institutions. This is in part why strong rule-of-law institutions with an independent judiciary capable of efficient and neutral contract enforcement have long been associated with improved economic development.[26] But the development literature tends to take a fairly broad view of the rule of law that fails to distinguish between its effects on vertical (as a check on the executive, say) and horizontal sources of risk (through contract enforcement).

Scholarship focused on horizontal risk has found a positive relationship between efficient contract enforcement and investment. The uncertainty caused by an ineffective contracting environment can deter foreign investors from entering into complex investment agreements or developing relation-specific technologies.[27] In the area of trade, research has found that the strength of exporters' legal institutions and access to international arbitration is associated with increased trade in complex

24. Jensen and McGillivray 2005; Wang 2015.
25. Tobin and Rose-Ackerman 2005, 2011; Neumayer and Spess 2005; Kerner 2009.
26. North 1990; Rigobon and Rodrik 2005.
27. Aboal, Noya and Rius 2014.

products.[28] These authors argue this is due to the importance of effective courts for mitigating the relatively high risk of disputes over quality, etc. arising from the production of complex products. Lowering the cost of contract enforcement is particularly important for direct investors because their longer-term contractual relationships with local firms make their stake in the host country less mobile.[29] One survey of law firms reveals that countries with a reputation for higher contract enforcement costs tend to experience lower levels of FDI.[30] Another survey of CEOs of firms investing in Latin America find that two of the top-four most important institutional determinants of FDI (out of a possible 23 survey responses) are that the host state "adhere[s] to the rule of law" and "has a relatively efficient and effective court system."[31] The same study finds a positive association between the quality of rule of law institutions and FDI inflows. The nature of the domestic legal institutions is can influence patterns of FDI flows as well. One study has found that common law countries are more attractive to investors for their efficient contract enforcement and stronger property rights.[32] Others argue that the *relative* level of institutional quality is relevant. One study found that firms from weak rule-of-law countries tend to invest more in host-countries that also have weak legal institutions.[33] This suggest that institutional diversity may be a deterrent to foreign investors.

In sum, this broad literature points towards a strong relationship between the quality of a state's local institutions and investor perceptions of risk. Key to this association is the legal system's role in enforcing contracts with expertise, efficiency and neutrality. Importantly, though, this relationship is attenuated by a lack of experience with a given legal tradition or with institutions of a given level of independence. Below I argue that ICA intervenes on this relationship by granting access to a transnational system of private dispute resolution that resolve both the informational (i.e. experience operating in weak institutional environments), and quality and independence issues investors face when resolving contract disputes with foreign partners. I begin the next section with a brief historical overview of the ICA regime before examining it in the context of institutional substitution.

28. Berkowtiz, Moenius and Pistor 2006; Nunn 2007.
29. Berger 2003; Meyer et al. 2009.
30. Ahlquist and Prakash 2010.
31. Staats and Biglaiser 2012, 199.
32. Lee, Biglaiser and Staats 2014.
33. Beazer and Blake 2018.

## 3 The Rise of International Commercial Arbitration

The early development of ICA was driven by international investors, traders and lawyers seeking to "delocalize" commercial disputes and limit their exposure to foreign legal institutions by shifting disputes out of national courts and into what they perceived to be as more neutral international arbitral tribunals. By offering a transnational forum for commercial dispute resolution, ICA thus allows foreign investors to lessen the uncertainty that comes from investing in states with unfamiliar or weak rule-of-law institutions.[34] This is because, unlike judicial proceedings, arbitration allows the parties to choose their own arbitrators and determine what (potentially distinct) legal rules will govern: the merits of a dispute (i.e. what law will be used to determine the issues at stake); the rules governing the procedure of the arbitration (this is called the "seat" or legal home of the arbitration); as well as in what jurisdiction the award will be enforced. For example, a French firm that wins an award against an American firm in an arbitration that was "seated" in England but applied French law to the merits can take that award to an American court for enforcement (as if it were an American judicial ruling) if the American firm refuses to comply. This, of course, is an idealized example meant to illustrate the flexibility commercial arbitration affords international business. In reality, there are numerous complexities and jurisdictional incongruities that may frustrate this process. Indeed, wide variation in local expertise, enforcement standards, and rules governing ICA limited early growth of the practice. In the 1950s, capital exporting states in concert with transnational arbitral and business organizations leaned on the United Nations to promote a common set of standards and rules for governing ICA.[35] These efforts culminated in a multilateral

34. Early drafts of the Model Law only included objective tests of whether a contract is "international" and therefore subject to the Model Law (e.g. Article 1(3)(a) states that an arbitration is international if the parties' "places of business [are] in different States"). During UNCITRAL's final meeting before recommending the Model Law to the UN General Assembly for a vote, the US and International Bar Association pointed out that the objective framework may cause confusion over whether the activities of foreign direct investors would be considered international or domestic. They gave the example of a contract between the local branch of a foreign company and a domestic party. Would a judge or arbitrator deciding whether to enforce an arbitration clause in such a contract consider it to be international or domestic? It is unclear. In the view of the US and IBA, contracts formed by such an office should be considered international "regardless of whether the office is in the form of a branch or an entity organized under local law." (UN Doc. A/CN.9/263, page 12) They recommended that the draft Model Law be amended to include a provision enabling the parties to agree that their contract related to international commerce. This prevented any uncertainty for foreign investors by precluding a party from later claiming that the business arrangement was not "international." The final version of the Model Law includes Article 1(3)(c) which states that, "An arbitration is international if... the parties expressly agreed that the subject matter of the arbitration relates to more than one country."

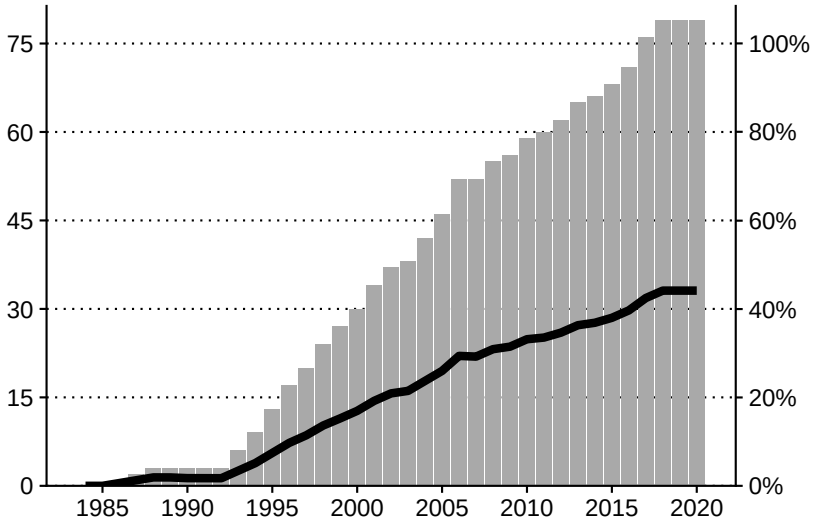
35. Early drafts of what would become the NYC were written by the International Chamber of Commerce. See ICC Publication no 174 1953, which was presented to the United Nation's Economic and Social Council in September 1953.

treaty, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), commonly referred to as the New York Convention (NYC). The NYC combined and expanded two earlier protocols promulgated by the League of Nations in 1923 and 1927 that eased processes for enforcing arbitral agreements and awards through signatories' courts. The NYC thus allows someone to take an arbitral award that was issued in one country to a court in another country for enforcement. The NYC also set strict standards curtailing the ability of courts to set aside (i.e. nullify) arbitral awards. In sum, the NYC helped ensure arbitral agreements and awards were enforceable in more jurisdictions and under more circumstances, but problems within the ICA regime persisted.

A 1979 Report by the UN Secretary General found that while the New York Convention had eased the process of enforcing arbitral awards abroad, there still existed impediments to ICA due to the diversity of local laws governing the practice.[36] The report recommended that UNCITRAL consider efforts to "reduce the disparity [of national arbitration laws] by recommending uniform rules which would take into account the specific features of international arbitration agreements and awards."[37] UNCITRAL set out redress these persistent issues in ICA practice by developing a model law, a legal instrument written such that it could essentially be copied-and-pasted it into a country's law books. This represented a new technique for UNCITRAL which had theretofore promoted the harmonization of domestic commercial laws by creating guidelines or individual model legislative provisions.[38] In 1985, the UN General Assembly endorsed the resulting Model Law noting its contribution "to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising out of commercial relations." Key features of the Model Law include restricting the scope of judicial oversight of arbitration by requiring courts to enforce both arbitration agreements and awards except under a narrow set of conditions; defining arbitration clauses as "separable" from the overarching contract (i.e. an arbitration clause is valid regardless of the validity of the contract of which it is a part); and empowering arbitrators to find their own jurisdiction.

By the end of 2020, over 100 jurisdictions have implemented legislation based on the Model

36. "Study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)." 20 April 1979. UN Doc. A/CN 9/168.
37. Ibid., 108.
38. Block-Lieb and Halliday 2007; Efrat 2016.




**Note:** Grey bars represent the number of countries that have enacted legislation based on the UNCITRAL Model Law; black line plots percentage of all countries that have done so. The population of countries is defined by inclusion in the V-Dem Dataset, Version 10.

Figure 1: Enactment of the UNCITRAL Model Law on International Commercial Arbitration

Law.[39] Figure 1 shows that the rate of enactment has held fairly steady since an inflection point around the early 1990s. UNCITRAL's efforts appear to be paying off. It has made significant progress towards both creating a unified legal framework and "modernizing" national arbitration laws around the globe. A high number and variety of countries have opted to enact reforms of their national arbitration laws based on the Model Law. Before turning to the analysis of the effects of this growing transnational system of dispute resolution, I outline how ICA has come to serve as a substitute for local institutions.

### 3.1 ICA as a Substitute for Domestic Legal Institutions

Given investors' sensitivity to the cost and efficiency of contractual dispute resolution along with the legal and institutional developments described above, it is no surprise that international commercial arbitration has been growing in popularity for decades. It has evolved into a central component of the network of legal institutions governing international trade and investment. ICA has grown in popularity because it provides commercial partners a mechanism for settling disputes in a neutral setting that is both confidential and tailored specifically to the particularities

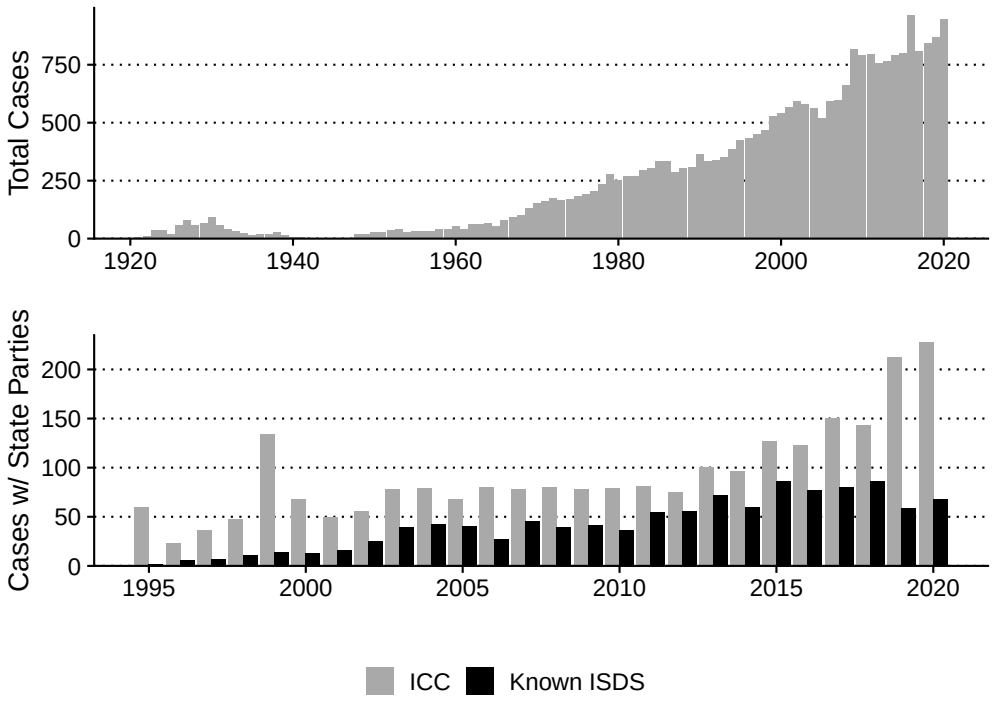
39. See Table A1 for a comprehensive list of the national and subnational jurisdictions that have enacted legislation based on the Model Law to date.

of their relationship. A 2018 survey of legal academics, practitioners and in-house counsel found that 97% of the respondents prefer either arbitration or arbitration together with some other form of alternative dispute resolution to cross-border litigation.[40] The top two reasons for respondents' preference for arbitration reflect the scholarship outlined above. Respondents were most concerned with the enforceability of awards (64% of respondents cited this reason) and "avoiding specific legal systems/national courts" (60%).

The centrality of ICA to modern global economic governance can be seen in the dramatic rise in the number of ICA centers serving a global clientele and their ever-expanding caseloads. While ICA is by its nature secretive, we can gain some insight into ICA's growth by examining statistics provided by the International Chamber of Commerce's (ICC) Court of Arbitration, the preeminent global ICA institution. Over the last decade, it has averaged roughly 800 cases per year. That figure is up from around 600 cases per year the decade prior. The top panel of Figure 2 plots the growth of the ICC's caseload from its inception in the 1920s through 2020. Other major ICA centers have experienced steady increases in their caseloads over time as well.[41] At the end of 2018, the value under dispute at the ICC totaled over $200 billion.[42] As the P&ID case outlined in the Introduction suggests, it is common for states or state-owned entities to appear before ICA panels managed by the ICC and others. In fact, far more commercial disputes involving states are sent to ICA than treaty-based arbitration. To illustrate this I plot the yearly number of cases at the ICC which involved a state or para-statal entity against the number of ISDS cases known to UNCTAD (see lower panel of Figure 2). Contract-based arbitration with state involvement has been increasing as treaty-based arbitration appears to have leveled off and has perhaps begun to even decline.

The stakes involved in contract-based arbitration can be just as high as those in ISDS. Consider the case of Thailand. While Thailand has had an arbitration law on the books since 1987, deficiencies in the law prevented investors from relying heavily on ICA within the country. In 2002, Thailand enacted a new, more arbitration-friendly law based on the UNCITRAL Model Law,

40. White & Case and Queen Mary, University of London 2018 (Accessible at https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf)
41. Stone Sweet and Grisel 2017, 47.
42. ICC 2019, 13.




**Note:** Yearly "Known ISDS" cases obtained from the UNCTAD Investment Dispute Settlement Navigator (https://investmentpolicy.unctad.org/investment-dispute-settlement). ICC case counts are derived from various issues of the *ICC Court of Arbitration Bulletin* from 1992–2021 (on file with the author). State parties includes governments and para-statal entities such as state-owned enterprises.

Figure 2: ICC cases compared to investor state dispute settlement

which is generally seen as the state-of-the-art in ICA legislation.[43] This act was clearly intended to encourage foreign trade and investment. Thailand's Ministry of Judicial Affairs published an official English-language translation of the 2002 Act; in 2001 the government issues regulations required government agencies to comply with adverse awards even if they have not been judicially enforced;[44] the local Thai arbitral center promulgated updated rules and responsibility for it was transferred from the Ministry of Justice to the Office of the Judiciary—a move that was seen to have considerably improved the center's independence.[45] But just two years later, the Thai government issued a decree banning arbitration clauses in concessionary contracts. This came after the Thai Ministry of Transportation lost an arbitration worth over worth $150 million stemming from a dispute with a Thai-German joint venture over the construction of the Bang Na expressway in Bangkok. Later—after another major loss in 2009—the Thai government broadened this ban:

43. I describe this model law in greater detail below.
44. See Nottage and Thanitcul 2016, 17-7.
45. Henderson 2009, 56.

requiring arbitration clauses in *all* public sector contracts be subject to review by the Cabinet on a case-by-case basis.[46] In an effort to attract investors, Thailand has since walked back these restrictions[47] and in 2015 established a new arbitration center focused on resolving cross-border disputes, the Thailand Arbitration Center.

Stone Sweet and Grisel argue that ICA has evolved into what they call an "autonomous legal order" that exists apart from domestic rule of law institutions and courts.[48] The concept of an autonomous legal order is instructive of why investors prefer ICA to cross-border litigation because courts around the world have ceded a great deal of authority to arbitrators to root their awards in their own interpretations of public law.[49] Expansions of arbitral power have enabled the homogenization of both arbitral procedure[50] and substantive legal interpretation.[51] These developments have led to the construction of a cohesive, transnational regime for the enforcement of international contracts through arbitration, combating the diversity of jurisdictions that may deter foreign investors.

Increased homogenization is likely driven in part by the efficiency gains of standardization.[52] Others argue that the culture of the profession has driven the homogenization of ICA practice.[53] For example, social network analyses of appointments at the International Center for Settlement of Investment Disputes (ICSID), a popular arbitral body that hears disputes arising out of host states' international law violations against investors, finds that there is a small core of roughly 50 arbitrators who exert disproportionate influence over the practice.[54] Data on appointment procedures are limited for ICA, but the influence of highly active and prestigious arbitral centers (such as the ICC, London Court of International Arbitration, among others) likely serve a similar role as the individual "power brokers" do in ICSID.[55] In short, despite its flexibility, ICA is a more familiar process in the eyes of foreign investors than whatever national court an investor might encounter

46. See Nottage and Thanitcul 2018. For a good, brief overview of these decrees see https://hsfnotes.com/arbitration/2015/11/25/thai-government-lifts-total-ban-on-arbitration-clauses-in-state-contracts
47. 139.
48. Stone Sweet and Grisel 2017.
49. 171-186.
50. Kaufmann-Kohler 2003.
51. Stone Sweet 2006; Karton 2013.
52. Ginsburg 2003.
53. Dezalay and Garth 1996; Karton 2013; Grisel 2017.
54. Puig 2014; Langford, Behn and Lie 2017.
55. Stone Sweet and Grisel 2017, 55-60.

in litigation. Foreign firms would rather shift contractual disputes into an ICA tribunal that they believe to be a more competent and neutral than local courts. Access to ICA thus helps mitigate the risks posed by both weak rule-of-law and variation in dispute settlement procedures across countries by offering a cohesive, transnational substitute for domestic legal institutions.

Access to this system provides real benefits to weak rule-of-law countries seeking to attract investors wary of the quality and independence of local courts. Sudan serves as an illustrative case of this dynamic. While in the 1990s Sudan invested heavily in developing its local judiciary, the focus of these reforms was on criminal law as a means of exerting social and political control.[56] Despite the increased investment in local courts, the lack of judicial independence and commercial competence made these courts too risky for investors. Sudan was in a bind: the government was in need of foreign assistance to develop its oil fields, but its legal system was deterring prospective investors. The country found a way out by enacting an international arbitration law in 2005 in order to provide a transnational substitute for domestic courts to prospective investors.[57] This helped placate foreign investors wary of dealing with Sudanese courts should a dispute arise. As Massoud writes, "Lawyers in Sudan representing groups involved in the pipeline construction process told me [Massoud] that their clients 'don't know the risks [and] don't know about Sudanese law,' so they feel more comfortable applying international arbitration standards with which they are familiar."[58] Arbitration thus allowed Sudan to provide an independent system of contract enforcement to investors without disrupting the pro-regime bent of the domestic judiciary. This example serves to illustrate how host-state's rule of law institutions begin to matter less to foreign investors when they have easier access to ICA, but this requires buy-in to the practice of arbitration from their local partners. The problem a foreign investor might face then is on the "supply" side of arbitration. Investors may encounter some difficulty persuading local parties to shift possible future disputes out of their own national courts and legal regime into the less familiar international commercial arbitration regime. This is where the Model Law comes in. Below I argue that the process and consequences of enacting reforms based on the Model Law, beyond simply changing the domestic rules, contributes to increasing the local knowledge and legitimacy of commercial arbitration.

56. Massoud 2013, Ch. 4.
57. Massoud 2014, 14.
58. 17.

### 3.2 The Indirect Effects of Enacting the Model Law and the Supply of Arbitration Agreements

In this section I outline three second-order effects of the Model Law that work to increase use of ICA within the enacting country. First, enactment of the Model Law signals to the international business and legal communities that a country takes arbitration seriously. Second, it increases international scrutiny of local arbitral practices which increase the cost of deviation from international arbitral standards. And third, the Model Law increases the legitimacy of arbitration within local legal and business communities. I discuss each of these in turn.

National arbitration reform based on the Model Law signals to both the international community as well as domestic business and legal communities that it seeks to protect and promote arbitration within its borders. In the words the South African Law Reform Commission, an official body charged with investigating reform of the country's national arbitration laws, "The standard by which a country's laws pertaining to international arbitration is measured today is the UNCITRAL Model Law...In Africa itself, South Africa is now seriously behind those jurisdictions like Kenya and Zimbabwe, which have adopted the Model Law."[59] We can see the value of the Model Law as a heuristic in the reports of the US Department of State. Its yearly "Investment Climate Reports" have, for at least the past decade, reported on the status of commercial arbitration within each of the countries included in its reports. Beginning in 2016, the report has included a separate section detailing the legal regime governing ICA in each country, often noting with approval when countries have implemented the Model Law.

Model Law-based reform brings with it increased international scrutiny of a country's domestic ICA regime from a variety of international actors including UNCITRAL, international arbitration institutes and Chambers of Commerce, foreign ministries, practitioners, and academics. UNCITRAL monitors and assists states as they seek to enact and later adhere to the Model Law principles. Personnel from UNCITRAL often provide technical assistance to states' during the reform processes.[60] Post-enactment, UNCITRAL monitors and distributes caselaw pertaining to the Model Law.[61] Because the Model Law serves as a heuristic and benchmark by which out-

59. SALC 1998.
60. 32.
61. States that have enacted any of UNCITRAL's model laws typically appoint a "National Correspondent" who

siders evaluate the arbitral environment of a potential host state, deviations from "modern" ICA principles become more salient.[62] This information then feeds into UNCITRAL's active efforts in identifying areas in need of reform within the ICA regime. This process culminated most recently in an updated Model Law in 2006 and one of UNICTRAL's working groups is currently considering drafting new guidelines governing arbitrator ethics and how to manage concurrent proceedings. In sum, UNCITRAL is actively engaged with the ICA regime. By joining the club of Model Law jurisdictions, a country enjoys both the publicity and technical assistance from UNCITRAL and other arbitration-promoting organizations.

Model Law reforms are also typically joined by increased investment in the domestic arbitral profession and the formation of linkages with transnational networks of arbitral institutions and professionals. For example, the Mauritian national arbitration law creates numerous explicit legal and institutional linkages with the Permanent Court of Arbitration (PCA) in the Hague.[63] The PCA established an office in Mauritius soon after the enactment of the law.[64] The Government of Mauritius also collaborated with the London Court of International Arbitration to create a jointly-run ICA institution.[65] Catherine Rogers, reporting on her own experience assisting the Palestinian Authority (PA) to promote ICA, notes that the PA "work[ed] closely with the International Chamber of Commerce of Palestine and its Arbitration Committee, which in turn works closely with a network of international arbitration organizations and international arbitration experts, including myself."[66]

Egypt presents another good example of what happens in a country after enacting ICA reforms based on the Model Law. Yves Dezalay and Bryant Garth provide a thorough description of the Egyptian arbitral profession in the early-to-mid 1990s, shortly after the country enacted a national arbitration law based on the Model Law.[67] While the authors could find little evidence that

updates the database with cases from their jurisdiction that are relevant to the jurisprudence of a given model law (See http://www.uncitral.org/uncitral/en/case_law/national_correspondents.html).

62. And deviations are rare, see Table 2 below.

63. Here are two examples: the law grants arbitral tribunals jurisdiction to rule on whether an issue is "international" or not. But if a tribunal has not been established, then the question may be referred to the PCA instead of a national court. The law also grants parties the right to ask the PCA to appoint a third (or sole) arbitrator if the party-appointed arbitrators cannot agree.

64. The only other international PCA office is in Singapore, also a Model Law country.

65. i.e. the LCIA-MIAC Arbitration Centre. This was collaboration was discontinued in 2018. The institute is now wholly independent of the LCIA and known as the Mauritius International Arbitration Centre.

66. Rogers 2015, 51.

67. Dezalay and Garth 1996, 219-249.

| | Rule of Law | |
|---|---|---|
| | Low | High |
| Model Law | 342 (89%) | 118 (35%) |
| Non-Model Law | 42 (11%) | 216 (65%) |
| Totals | 384 (100%) | 334 (100%) |

Table 1: CIArb representation by nationality and Model Law status

**Note:** Countries were separated according to their Rule of Law score (V-Dem), for more on this measure see the data section below. A country is coded as "Low" rule of law if the average Rule of Law score over the decade leading up to 2019 was below .8. Membership data scraped from the CIArb official website (https://www.ciarb.org/membership/member-directory/) on 18 March 2019. Data refer only to those who specialize in arbitration.

arbitration within the country was increasing, they witnessed local arbitral centers or institutes such as the Islamic Arbitration Center at the University of El-Azar, host a flurry of professional activities, conferences and workshops meant to promote arbitration within the country.[68] Interestingly, they also noted a shift in the rhetoric of such institutions. They write that the Islamic Arbitration Center was created in part to advocate for an Islamic alternative to international arbitration. This sentiment changed, however, after the Model Law reform as the Egyptian arbitral profession sought to increase its linkages with the Western-dominated international arbitral profession: "...in order to build legitimacy in the international community, the proponents of the new center now emphasize how Islamic law will really lead to no difference in outcomes... There is competition [between arbitration centers], but the 'competitors' cannot get into the field without buying the basic rules developed and maintained in the ICC world."[69]

To examine the Model Law-induced process of integration with the transnational arbitral community cross-nationally, I collected data on the nationality of members to the Chartered Institute of Arbitrators (CIArb). The CIArb is a British professional association that over the last few decades has sought to expand its reach internationally. It has established branches throughout the world that serve to recruit, train and certify members of the arbitration profession. The CIArb is also involved in the promotion of ICA across the globe. While the CIArb is not the only transnational

68. Dezalay and Garth 1996, 244.
69. 243.

professional association related to arbitration, it is a particularly large and well-regarded professional association, so the geographic distribution of its membership ought to give us a snapshot of the overall structure of the profession. Table 1 presents data on the public-facing members of the CIArb. While these data refer to only a small slice of a very large and growing international profession, we can see the pattern that Dezalay and Garth uncovered in Egypt play out cross-nationally today. A very large majority of lawyers represented at the CIAarb from weak rule-of-law countries come from Model Law countries, suggesting that the Model Law encourages local professional investment in arbitration. These are only a handful of examples meant to illustrate a common trend. Countries that enact reforms based on the Model Law tend to simultaneously promote the practice and establish linkages with transnational networks of arbitration centers and professionals that in turn help increase the legitimacy of arbitration and within-in country expertise.

In sum, we can conceptualize the mechanisms by which enacting legislation based on the Model Law will influencing ICA practice in two ways. First, the Model Law is a set of concrete institutional reforms meant to increase protections for international commercial arbitration, i.e. easing the process of global enforcement and curtailing judicial oversight. To that end, the Model Law has defined (and help spread) the framework of what constitutes a "modern" ICA regime. Second, enactment of the Model Law carries with it indirect, social changes that help promote the legitimacy of ICA practice within local business and legal communities. It also fosters the arbitration profession, while also creating incentives the local profession to fashion itself after the ICC's transnational vision of the arbitration profession. Enactment of the Model Law increases the "supply" side of arbitral clauses to better meet investor "demand." By thus easing the process of negotiating arbitration clauses the Model Law contributes to shifting commercial disputes out of public courts and into private arbitration panels thereby eroding the ability of state legal institutions to structure dispute settlement within its own borders. Together, these social and legal changes brought on by enactment of Model Law-based legislation diminish the relevance of the domestic legal regime as they remove the work of dispute resolution out of the domestic legal system. We should see therefore foreign investors becoming less sensitive to the quality of domestic legal institutions where countries have enacted the Model Law. In the following section, I present a quantitative test of this hypothesis.

# 4 Data & Methods

## 4.1 Dependent Variable

In this section I exploit variation in global FDI flows to examine whether the introduction of ICA influences how sensitive foreign investors are to a country's domestic legal infrastructure. The dependent variable for my analysis is therefore the net inflow of FDI to a country per year measured. Data are taken from the World Bank's World Development Indicators. There is some controversy over how to operationalize FDI. Due to wide variation in FDI flows over time and between countries, outliers can be tricky for the study of FDI. Choi recommends using FDI as a percentage of GDP to limit the influence of outliers.[70] Employing this measure presents both theoretical and practical problems for this analysis. Theoretically, FDI/GDP and FDI flows measure different concepts. The former is a measure of the importance of FDI to a country, not the level of FDI itself. I expect high rule of law countries to experience increased FDI, not necessarily an increase in the importance of FDI to the overall economy. On a practical level, FDI/GDP is an unreliable measure of FDI inflows for countries that experience high GDP growth rates. In these cases, the outcome variable will exhibit variation entirely unrelated to the outcome of interest. A recent meta-analysis found that data generating process behind these two concepts are rooted in mechanisms that either were non-overlapping or exhibited inverse effects on each outcome.[71] Therefore, net FDI inflows is a more appropriate measure for this study. Due to the presence of zeros and negative values (where capital outflows are greater than inflows), I transform net FDI inflows using the inverse hyperbolic sine to issues stemming from the skewness of the data.[72]

## 4.2 Explanatory Variables

There are two primary independent variables: enactment of the Model Law and the strength of a country's legal institutions. To measure a high level of protection and support for ICA, I compiled data on the enactment legislation based on the UNCITRAL Model Law. The data were collected from UNCITRAL's annual status reports which I supplemented with information from various

70. See Choi 2009a, 2009b; Li 2009.

71. Li, Owen and Mitchell 2018.

72. On the IHS transformation see Burbidge, Magee and Robb 1988; Busse and Hefeker 2007. This function closely approximates other commonly used functions such as $\log(|FDI| + 1)$ then multiplying by $-1$ if the raw value is negative, e.g. Kerner 2009; Allee and Peinhardt 2011; Tobin and Rose-Ackerman 2011; Moon 2015

| Key Features of the UNCITRAL Model Law | % Adoption |
|---|---|
| *Agreement to Arbitration* | |
| Article 7: Def. of Arbitration Agreement | 100% |
| Article 8: Arb. Agreement and Claim Before Court | |
| 8(1): Court referral of dispute to arbitration | 99% |
| 8(2): Arb. may proceed while Court referral pending | 99% |
| *Choice of Arbitrators* | |
| Article 11: Appointment of Arbitrators | 100% |
| No nationality restriction on arbitrators | 100% |
| *Decisions of the Tribunal* | |
| Article 16: Competence to Rule on Own Jurisdiction | |
| "Kompetenz-Kompetenz" | 100% |
| Separability | 98% |
| Article 17: Interim Measures | 98% |
| *Enforcement of Awards* | |
| Article 34: Restrictions on Challenging an Award | 95% |
| Article 35: Enforcement of International Awards | 91% |
| Article 36: Grounds for Refusing Enforcement | 93% |

**Note:** Data obtained from Binder 2010. Adoption among Model Law countries. Adoption is coded as incorporating the relevant Model Law provision verbatim, with minor revisions, more or less detail or if Binder codes the state as arriving "at a similar result" to the Model Law but with different language. States that create a "different solution" or do not implement the respective Model Law provision are coded as not adopting.

Table 2: Key features of the UNCITRAL Model Law

sources where there were inconsistencies in the reports.[73] A country is coded as 1 on the year in which the Model law reforms came into effect and every year thereafter. All other country-years are coded as 0.

Coding complications arise where a handful of subnational units have implemented Model Law legislation while the national unit has not. Texas and Scotland, for example, have enacted Model Law legislation, but the United States and United Kingdom have not implemented the Model Law at the national level. These countries are coded as 0 in the main analysis. I include results in the robustness checks in which I code these and other countries as 1 starting from the year the first subnational unit enacted Model Law legislation. As seen below, this coding does not materially affect the results.

There is one additional potential problem with relying on enactment of the Model Law as a proxy for a country's national arbitration regime: the Model Law is just a model law. States

73. See Table A1 in the Appendix for a list of Model Law countries and years of initial enactment

have the right to make whatever changes that they see fit. It turns out that few do so. Table 2 presents a list of key features and their adoption rates as coded by Peter Binder.[74] While states do make minor revisions to the Model Law, it appears that most states share UNCITRAL's goal to harmonize national legislation around ICA. Binder's analysis accords with the UNCITRAL's own assessment of the relatively high degrees of uniformity in adoption of the Model Law's core principles. Moreover, the UNCITRAL will not recognize states that deviate too far from the key principals of the Model Law. For example, while many aspects of Romania's 1994 law were inspired by the Model Law, the country lacks official recognition as a Model Law state because of various meaningful discrepancies.[75] One point of divergence is that Romanian awards may be set aside if some legal provision on which the award was based is later deemed unconstitutional.[76] This represents a strict form of judicial supervision over arbitration in Romania that advocates of arbitration tend to oppose.

The second independent variable seeks to measure the strength of each country's domestic legal institutions for each year. I use the Rule of Law Index from the Varieties of Democracy dataset.[77] The index runs from 0 to 1. The index is constructed from a handful of expert-coded rule of law indicators and is heavily influenced by V-Dem's indicators on the judiciary such as compliance with the high court, lower and high court independence, judicial accountability, access to justice, and so on. This measure is ideal as it provides a consistent indicator of the predictability and transparency of a country's legal system as well as the strength of its judicial system over the full span of the time series and for a large cross-section of countries. Other measures of rule of law are used in the robustness checks following the main results.

### 4.2.1 Control Variables

I include two institutional control variables. First, I include a dummy that is coded as 1 if a country has ratified the New York Convention (NYC), which has been found to be positively associated with FDI flows.[78] Second, I include a count of the number of bilateral investment treaties a country

74. Binder 2010.
75. Babiuc and Capatina 1994.
76. See Leaua 2013, 17-8.
77. Coppedge et al. 2020.
78. Berkowtiz, Moenius and Pistor 2006; Myburgh and Paniagua 2016.

has in force in a given year given the relationship between BITs, international arbitration and FDI. These data were obtained from the UNCTAD International Investment Agreements Navigator. Finally, I include a variety of economic variables that have been found to be associated with FDI, all of which were obtained from the World Bank's World Development Indicators: GDP; PER CAPITA GDP; percentage GDP GROWTH; and TRADE OPENNESS defined as the total value of trade (imports + exports) as a percentage of GDP. I include a lagged dependent variable to account for any unobserved heterogeneity potentially biasing the results. I also include country- and year-fixed effects. All explanatory variables are lagged by one year. In all, this results in a panel of 165 countries spanning 35 years from 1985 (the year the Model Law was officially introduced) to 2019 (the most recent year for which FDI data is available). I estimate the following equation using OLS with panel-corrected standard errors to account for heteroskedasticity:

$$FDI_{i,t} = \alpha + \beta_1 FDI_{i,t-1} + \beta_2 RuleofLaw_{i,t-1} + \beta_3 ModelLaw_{i,t-1} + \beta_4 RuleofLaw_{i,t-1} \times ModelLaw_{i,t-1} + \gamma \mathbf{X}_{i,t-1} + \delta_t + \omega_i + \varepsilon_{it}$$

$\mathbf{X}$ is a vector of controls; $\delta_t$ and $\omega_i$ represent country- and year-fixed effects. I then estimate the marginal effects of the *Rule of Law*—conditional on *Model Law*—on FDI flows to assess the following theoretical expectations of the substitution hypothesis:

$$\begin{cases} ModelLaw = 0, & \frac{\partial FDI}{\partial RuleofLaw} > 0 \\ ModelLaw = 1, & \frac{\partial FDI}{\partial RuleofLaw} = 0 \end{cases}$$

I expect the strength of domestic rule of law institutions to be positively correlated with FDI inflows, but conditional on Model Law implementation. If substitution is at work, then a country that has enacted the Model Law should be equally attractive to foreign investors regardless of any changes in the quality of its domestic rule of law institutions. Alternatively, the complementarity hypothesis would expect the Model Law to have a *positive* influence on the marginal effect of Rule of Law on FDI flows.

# 5 Results

The main results are reported in Table 3. The first column reports the results of a non-interactive specification of the independent variable to replicate how the relationship between Rule of Law and FDI has been modelled in prior studies. The positive and significant coefficient on Rule of Law suggests that investors do prefer countries with higher quality rule of law institutions. This is consistent with prior work on host state legal institutions.[79] The next column reports the results from adding Model Law to the model. Interestingly, the effect of the Model Law is estimated to be negative. This flips, however, after interacting Model Law with Rule of Law (Columns 3-5). The estimated coefficients remain largely stable as various sets of control variables are progressively added. Note that the magnitude of the coefficient on Rule of Law increases in this set of models. In line with my theoretical expectations, this estimate suggests that the quality of rule-of-law institutions should exert a greater effect on FDI for countries that have not implemented the Model Law. Moreover, the coefficient on the interaction term largely offsets the effect of the Rule of Law constituent term. To examine this dynamic directly, I plot the conditional marginal effects in Figure 2 with 95% confidence intervals. A Wald test finds these estimates are statistically distinguishable ($p = 0.0001$). In sum, these results support the hypothesis that the effect of Rule of Law is moderated by Model Law. The positive and significant estimate for non-Model Law countries suggests that FDI inflows are directly related to the strength of host state rule of law institutions but only if the country has not implemented the Model Law. Conversely, if a country has enacted the Model Law then the quality of its domestic legal institutions have no discernable influence on FDI inflows.

Given the absence of domestic reforms that accompany ratification of the NYC, I interact NYC with Rule of Law to serve as a placebo test of the mechanisms described above. The results are presented in Column 6. Unlike what we see with the Model Law interaction, the interaction here is highly insignificant and substantively small while the coefficient on Rule of Law largely reverts back to a magnitude similar to that of the non-interacted estimate from Column 2. The coefficient on the interaction term is low and highly insignificant. The conditional marginal effects of Rule of Law conditional on NYC are statistically indistinguishable ($p = 0.895$). This

79. Staats and Biglaiser 2012.

| | (1) | (2) | (3) | (4) | (5) | (6) |
|---|---|---|---|---|---|---|
| Rule of $Law_{t-1}$ | 4.276*** | 4.031*** | 6.309*** | 6.350*** | 5.650*** | 4.175** |
| | (1.226) | (1.230) | (1.293) | (1.289) | (1.338) | (1.727) |
| Model $Law_{t-1}$ | | -1.030** | 2.244*** | 2.049*** | 2.092*** | -1.031** |
| | | (0.466) | (0.782) | (0.770) | (0.793) | (0.466) |
| Model $Law_{t-1}$ × Rule of $Law_{t-1}$ | | | -5.863*** | -5.497*** | -4.992*** | |
| | | | (1.288) | (1.275) | (1.310) | |
| $NYC_{t-1}$ | 1.188** | 1.224** | | 1.366*** | 0.998** | 1.316 |
| | (0.500) | (0.500) | | (0.476) | (0.500) | (0.884) |
| $NYC_{t-1}$ × Rule of $Law_{t-1}$ | | | | | | -0.200 |
| | | | | | | (1.513) |
| $BITs_{t-1}$ | 0.000 | 0.054 | | -0.309 | -0.055 | 0.052 |
| | (0.258) | (0.258) | | (0.223) | (0.254) | (0.258) |
| ln $GDP_{t-1}$ | 3.178** | 2.975** | | | 2.056 | 2.955** |
| | (1.420) | (1.411) | | | (1.407) | (1.429) |
| $Growth_{t-1}$ | 0.075*** | 0.074*** | | | 0.070** | 0.074*** |
| | (0.029) | (0.029) | | | (0.029) | (0.029) |
| ln GDP per $cap._{t-1}$ | -4.491*** | -4.157*** | | | -3.394** | -4.138*** |
| | (1.346) | (1.342) | | | (1.340) | (1.348) |
| ln $Trade\ Openness_{t-1}$ | -0.383 | -0.339 | | | -0.363 | -0.344 |
| | (0.479) | (0.481) | | | (0.481) | (0.485) |
| Lagged DV? | Yes | Yes | Yes | Yes | Yes | Yes |
| Year FE? | Yes | Yes | Yes | Yes | Yes | Yes |
| Country FE? | Yes | Yes | Yes | Yes | Yes | Yes |
| Observations | 4,969 | 4,969 | 5,657 | 5,657 | 4,969 | 4,969 |
| $R^2$ | 0.289 | 0.289 | 0.316 | 0.317 | 0.291 | 0.289 |

**Note:** $^{*}$ $p < .1$, $^{**}$ $p < .05$, $^{***}$ $p < .01$ The table reports the results of OLS regressions with panel-corrected standard errors in parentheses. The results from alternative specifications can be in Appendix C.

Table 3: Model Law and FDI flows

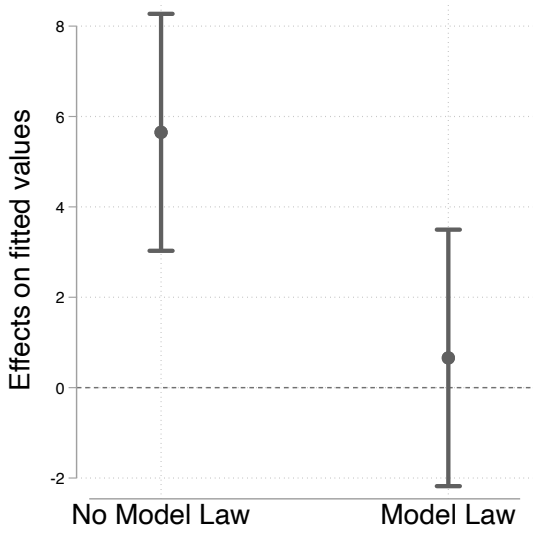



Figure 3: Estimated conditional marginal effect of Rule of Law on FDI flows with 95% confidence intervals

suggests that the Model Law may be exerting a greater influence through its domestic effects, as the primary goal of the NYC is not to reform domestic institutions but integrate the jurisdiction into an international enforcement network—in other words, the largest legal consequences of ratifying the NYC may be felt outside the ratifying jurisdiction. Perhaps the deeper local reforms that the Model Law entails tends to garner heightened attention domestically and therefore may to do more to promote the widespread acceptance of commercial arbitration amongst local business and legal communities. For example, Rogers and Drahozal report that many Georgian judges and legal elites were largely unaware that their country had signed the NYC, while the signing of the country's domestic arbitration law in 2009 (based on the Model Law) set off a process of institutional and professional reform within the local legal and arbitration communities.[80]

### 5.1 Robustness to alternative data

Given the difficulty of measuring a concept like the rule of law, I rerun the full model (Table 3, Model 4) using three alternative measures. First, I rerun the full regression using the Worldwide Governance Indicator's (WGI) Rule of Law Index (Table 4, Column 1). The WGI Rule of Law Index is a composite index that measures popular perceptions of the quality of local courts, police,

80. Rogers and Drahozal, forthcoming.

| | (1) WGI | (2) Doing Business | (3) LJI | (4) Alt. Model Law |
|---|---|---|---|---|
| Model Law = 0 | 3.221*** | 0.1790*** | 5.930*** | 5.461*** |
| | (0.848) | (0.051) | (1.86) | (1.345) |
| Model Law = 1 | 0.964 | 0.104** | -0.424 | 0.274 |
| | (0.967) | (0.050) | (2.260) | (1.452) |
| Wald test p-value | 0.005 | 0.222 | 0.001 | 0.000 |

**Note:** This table presents the estimated marginal effects of *Rule of Law* conditional on *Model Law* as well as test of null hypothesis of their equivalence. In Alt. Model Law recodes the *Model Law* variable to equal 1 for major arbitration states: France, Switzerland, United Kingdom and USA. Full table is presented in Appendix B.

Table 4: Conditional Marginal Effects Using Alternative Measures of Rule of Law and Model Law

contract enforcement, etc. Second, I use the measure of latent judicial independence developed by Drew Linzer and Jeffrey Staton (Column 3).[81] The value of LJI is its narrow focus on judicial independence, which the authors define as autonomy plus the power to make rulings that "greatly constrain the choices of other actors." Independence from political influence and authority are important judicial attributes for foreign investors, but this measure neglects other important factors such as the cost and efficiency of contract enforcement. For my final indicator, the World Bank's Ease of Doing Business Contract Enforcement index, attempts to incorporate important aspects of contract enforcement not captured by LJI (See Table 4, Column 3). This index seeks to measure how costly and time consuming it is to enforce a contract in a given country. On a conceptual level, this measure is ideal for the present study, but two problems limit its utility. First, data are only available beginning in 2005 which cuts the sample size by roughly half. And, second, the indicator's reliability is low because the methodology has changed three times since its inception.[82] As seen in Table 4 (Columns 1-3), despite issues of reliability and data availability, the main results largely hold when using a mix of alternative rule of law indicators. While the Model Law does not negate the marginal effect of the Doing Business index (Column 2), the point estimate on Non-Model Law countries is less than that of Model Law countries' though these differences are not statistically significant.

Next, I attempt to account for potential problems stemming from my use of the Model Law as

81. Linzer and Staton 2015.
82. Which the former head of the World Bank, Paul Romer, attributed to political influence.

a proxy for a country's ICA regime. Model Law implementation is not a perfect measure for how "modern" a country's international commercial arbitration regime is. Some countries offer very similar protections to the Model Law but, because they have not based their domestic legislation on the Model Law, they are coded as non-Model Law countries. Such states include the most prominent arbitral seats such as the United States, United Kingdom, France and Switzerland that also attract large amounts of foreign capital. It is possible that the results are driven by these states' inclusion in the non-Model Law group given their high quality courts, strong protections for ICA and their attractiveness as sites for direct investment. If shifting these countries into the Model Law group dramatically alters the model's estimates, then it might not be the practice of arbitration driving the results but some other unobserved factor of the countries that have enacted the Model Law. Column 4 in Table 4 reports the marginal effects from the full model in which I code the US, UK, France and Switzerland as having enacted the Model Law over the full duration of the analysis. After shifting these countries into the non-Model Law group, we still see a positive and significant relationship between rule of law and inbound FDI for non-Model Law countries that goes away for "Model Law" countries.

## 6 How does the Model Law increase the use of arbitration?

The method of substitution driven by the Model Law carries important political and legal implications because arbitration has no system of appeal.[83] But the lack of appeal should not be confused with the absence of any system of control or supervision. There remain a small set of tools available to local courts for intervening in an arbitration (such as setting aside awards that contravene public policy), so long as the arbitration is seated in that court's jurisdiction. This is because if an award is set aside at the seat of arbitration, foreign courts are generally obligated to refuse to enforce the award. The prospect of annulment due to an award violating public policy or one of the other (albiet, narrow) reasons for which a court may annul an award is what Michael Reisman refers to as arbitration's "system of control."[84] The risk of annulment checks the behavior of arbitrators and encourages them to remain cognizant of the boundaries of their legal and contractual

83. There are only a very strict set of mostly procedural criteria by which a court may annul or "set aside" an award, but not correct the decision for getting some elements of the facts or law wrong. Indeed, getting the law wrong is not sufficient to set aside an award.

84. Reisman 1992.

duties. But because of the transnational nature of ICA, its system of control can be quite weak and depends crucially on national courts exercising this limited supervisory role.[85] Reisman was primarily occupied by a recent (at the time) Belgian law which forbade any kind of review over foreign arbitrations subject to its jurisdiction. ICA writ-large is increasingly at risk of a similar absence of control mechanisms over ICA, particularly given the heavy clustering of seat selections within a few jurisdictions (New York, London, Hong Kong, etc.) and the increasing homogeneity witnessed across the major ICA jurisdictions.[86] The Model Law therefore presents an opportunity for the arbitration community to increase the diversity of jurisdictions with the power to exert some supervisory power over ICA and thereby provide added pressure on courts in the primary states to provide adequate supervision. This, however, requires the Model Law to not only increase arbitration by local firms, but also increase the attractiveness of alternative jurisdictions and therefore the rate by which firms select their local jurisdiction as the seat of arbitration. Alternatively, there is some risk for the Model Law to increase arbitration without granting local courts supervisory jurisdiction. This may exacerbate the problem of control.

In this section I use data on the universe of arbitrations managed by the ICC from 1992 to 2020 to assess these alternatives empirically. Surprisingly, I find only weak evidence that enacting the Model Law helps attract arbitrations to a jurisdiction. Instead, I find evidence that the Model Law shifts the behavior of local firms, increasing the number of disputes brought by (and against) local firms into international arbitration. I will now briefly discuss two alternative mechanisms that may be driving the substitution result above and discuss their observable implications before turning the empirical analysis.

## 6.1 Legal and Professional Mechanisms Driving Changes in Commercial Dispute Resolution Practices

In Section 3, I proposed two mechanisms through which the Model Law can influence arbitral practice and therefore international commercial dispute practices generally: the legal and professional mechanisms of substitution. Each of these mechanisms implies a different set of observable implica-

85. Reisman noted, "In the absence of reciprocal commitments and effective controls, there is no reason why a government will allow its public powers to be used to seize the property of one of its nationals and to send it abroad, merely because a private and thoroughly nonofficial actor called an arbitrator has presumed to order it" (p. 139).

86. Stone Sweet and Grisel 2017.

tions. While these mechanisms are distinct, they are not mutually exclusive. The first mechanism of substitution is through the law itself. That is, the Model Law itself provides an attractive framework for extra-legal commercial dispute resolution. Once this legal framework is available, local actors will to shift their disputes out of public courts into the newly viable arbitration regime. Because the local legal framework is driving the change in this scenario by increasing the attractiveness of the jurisdiction as a seat of arbitration, we should see an increase in the number of arbitration cases that are subject to the local arbitration law. Such a finding would suggest that states are retaining some limited element of control.

The second process—the professional mechanism—concerns the broader changes within the professional communities managing commercial dispute resolution. As described above, enactment of the Model Law is typically accompanied by a variety of institutional linkages and promotional activities such as conferences and training sessions on top of the legislative changes. These activities help spread knowledge and lend legitimacy to arbitration as a viable form of dispute resolution amongst the local business and legal communities, thereby easing the process of negotiating arbitration clauses. Unlike the legal mechanism, the professional mechanism will not necessarily result in increases in local arbitration (because their international partners may insist or convince their local partners to agree to a foreign jurisdiction as the seat of arbitration), but we should see an increase in arbitral practices by nationals from Model Law countries. This would suggest that the Model Law is increasing rate by which firms resort to arbitration, while at the same time further limiting reliance on domestic legal institutions.

### 6.2 Testing the Legal and Professional Mechanisms

To test these mechanisms, I gathered yearly data on both the location of the seat of arbitration as well as the nationality of parties to cases managed by the International Chamber of Commerce (ICC) from 1992 to 2020.[87] The ICC is an especially useful case study here because it is both

87. These data are obtained from the ICC's annual "Statistical Report" contained within the first issue of each yearly volume of the *ICC International Court of Arbitration Bulletin* from 1993-2021. Some of these reports can be found online at https://library.iccwbo.org/dr-statisticalreports.htm, all other reports not publicly available are on file with the author. There are some summation errors in the original data. Beginning in 1994, the ICC reported national-level counts of parties by type (complainant or respondent). When the reported respondents and complainants for a given country differed from the reported total number of parties, I take the sum of the reported respondents and complainants as the total. These errors were quite rare and the difference never exceeded 1. The original data (before my corrections) are available in the replication materials.

highly prestigious and active as well as a distinctly international ICA center.[88] In fact, the range of arbitral seats in the ICC's caseload is uniquely diverse compared to its closest competitors such as the London Court of Arbitration, American Arbitration Association and the China International Economic and Trade Arbitration Commission, which tend to manage cases seated in their home jurisdictions.[89] Given the stature of the ICC within the field of global economic governance, patterns within the ICC are both legally and politically important in their own right. Due to both its prominence as an institution within the field of ICA as well as its unique international character, we can also interpret trends seen within it as broadly representative of shifts in global ICA practice.

I control for a variety of economic and political factors that may increase the probability that commercial disputes arise, including the size of the country's economy, its inbound FDI stock and its openness to trade. I control for the level of development with GDP per capita. And because disputes tend to arise more often during periods of economic downturn, I add a measure for GDP growth.[90] I also control for membership in the New York Convention and the strength of domestic legal institutions using the V-Dem Rule of Law Index. I estimate the following equation using the Poisson pseudo-maximum likelihood estimator:[91]

$$Y_{it} = \exp(\alpha + \beta_1 ModelLaw_{it} + \gamma \mathbf{X}_{it} + \delta_t + \omega_i + \varepsilon_{it})$$

$Y_{it}$ represents the outcome; $\mathbf{X}_{it}$ is a vector of controls; and $\omega_i$ and $\delta_t$ are country- and year-fixed effects. Given the binary treatment with two-way fixed effects in this setup, we can interpret these results within the difference-in-differences framework.[92] To assess the parallel trends assumption, I reran the primary models (i.e. Column 3 in Panels A and B of Table 5) with dummy variables representing each of the three years pre- and post-enactment (plus the year of enactment) of the

88. The 2018 International Arbitration Survey conducted by White & Case and Queen Mary, University of London, asked respondents to list their 4 most preferred international arbitral institutions. The ICC was the most listed institution by a very wide margin: 77% of respondents picked the ICC while the next most-preferred institution was the London Chamber of International Arbitration at 51%.

89. Of the cases managed by the LCIA, for example, 94% were seated within the UK in 2017. It has only gradually fallen since then, reaching 84% in 2020.

90. GDP, GDP per capita, and trade openness data are obtained from the World Bank's World Development Indicators. FDI stock data taken from UNCTAD.

91. For more on PPML see Santos Silva and Tenreyro 2006. Alternative specifications can be found in Appendix D

92. Puhani 2012.

Model Law. Plots of the estimated coefficients on the leading and lagging dummies are presented in Figure 4 below.

The results are presented in Table 5. Panel A presents the results of for the yearly counts of for the number of ICC-managed arbitrations seated in a given country. The Model Law appears to have a positive but inconsistent effect on the number of cases seated. The estimates are model-dependent, however. In the full sample (Columns 1-3), we see that the effect is strong in the bi-variate specification, loses significance after adding economic controls, and becomes significant at the 90% level with the addition of political controls. Columns 4 and 5 subset the outcome based on how the seat was determined. In Column 5, the outcome is the number of cases in which a location of the seat was chosen by the parties themselves, either by contract or mutual consent after the dispute arose. Here again we see a small and weak effect. Column 4 presents results using the count of cases in which the seat was determined not by the parties, but instead by the ICC itself (because the parties either could not agree or for whatever reason choose to have the ICC determine the location of the arbitration). Interestingly, we see a much larger and stronger effect ($p = 0.038$) of Model Law enactment in this set of cases. The model estimates an increase in the number of cases determined by the ICC on the order of roughly 57%. The ICC's willingness to send disputes to Model Law jurisdictions suggests that Model Law enactment does indeed send a strong signal to the broader ICA professional community that the country is fit to host arbitration.

The stated goal of the Model Law is to modernize local arbitration laws. What does it say about the success of the Model Law that updating these laws appears to have a weak effect on arbitration? We should be cautious before drawing any hard conclusions. Choice of seat is highly dependent on expectations of how local judges will interpret their country's arbitration law. While Model Law enactment increases the international harmony of the law "on the books," there nevertheless remains a high degree of uncertainty regarding the practical effect of the Model Law in any given country until a body of national caselaw has been established. Building a clear body of caselaw can take years, so the effect of Model Law enactment on seat selection may operates on a longer timescale than what is captured in this analysis.

We now turn to Panel B of Table 5, in which I shift the outcome from the seat of arbitration to a yearly count of the nationality of parties to arbitration at the ICC. Here we see a much stronger

**Panel A: Seat of ICC arbitration**

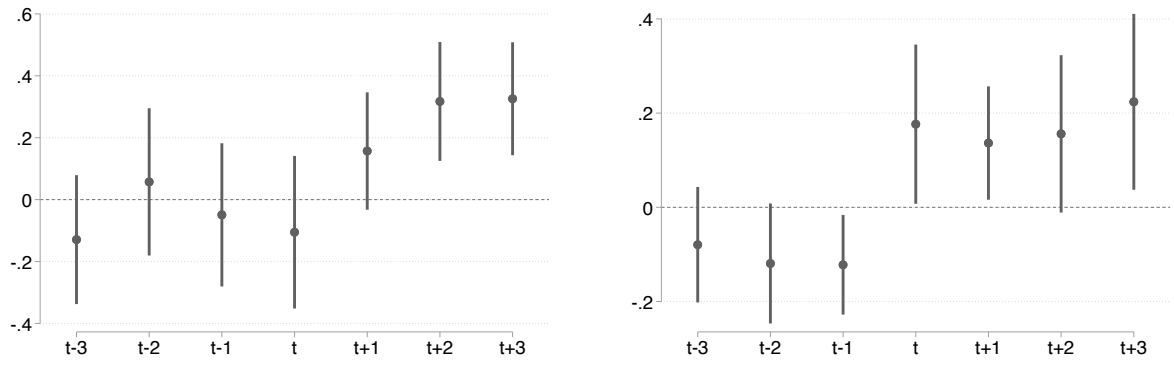
| | Total | | | Court | Parties |
|---|---|---|---|---|---|
| | (1) | (2) | (3) | (4) | (5) |
| Model Law | 0.437** | 0.209 | 0.234* | 0.454** | 0.204* |
| | (0.190) | (0.129) | (0.125) | (0.218) | (0.116) |
| Start Year | 1992 | 1992 | 1992 | 1994 | 1994 |
| Economic Controls? | No | Yes | Yes | Yes | Yes |
| Political Controls? | No | No | Yes | Yes | Yes |
| Year FE? | Yes | Yes | Yes | Yes | Yes |
| Country FE? | Yes | Yes | Yes | Yes | Yes |
| Observations | 3,186 | 2,764 | 2,764 | 1,951 | 2,611 |

**Panel B: Nationality of parties to ICC arbitrations**

| | Total | | | Complain. | Defendant |
|---|---|---|---|---|---|
| | (1) | (2) | (3) | (4) | (5) |
| Model Law | 0.263** | 0.202*** | 0.223*** | 0.295*** | 0.165** |
| | (0.107) | (0.075) | (0.069) | (0.082) | (0.072) |
| Start Year | 1993 | 1993 | 1993 | 1994 | 1994 |
| Economic Controls? | No | Yes | Yes | Yes | Yes |
| Political Controls? | No | No | Yes | Yes | Yes |
| Year FE? | Yes | Yes | Yes | Yes | Yes |
| Country FE? | Yes | Yes | Yes | Yes | Yes |
| Observations | 4,811 | 3,992 | 3,991 | 3,763 | 3,854 |

**Note:** * $p < .1$, ** $p < .05$, *** $p < .01$. Coefficients from Poisson regressions. Standard errors reported in parentheses are clustered by country. The outcome in Panel A is the yearly count of cases seated in a given country, subsetted by the total number of cases as well as the number of seats that were chosen by the parties or the ICC itself. The outcome in Panel B is the yearly count of the parties to ICC arbitrations by nationality. These are subsetted into the total number as well as by the party role: complainant or defendant. Start years vary due to data availability. Full tables can be found in Appendix D. Alternative specifications of Panel B can be found in Appendix E.

Table 5: UNCITRAL Model Law and arbitration at the ICC




(a) Seat of Arbitration

(b) Nationality of Party

**Note:** These figures plot the coefficients and 90% confidence intervals for dummy variables indicating the number of years from enactment of the Model Law. These are based on the models presented in Column 3 of Panels A and B of Table 5

Figure 4: Effect of Model Law on Seat Selection and Nationality of Parties to ICC arbitrations

and stable effect of the Model Law on arbitral behavior. The estimates on the Model Law are highly significant and consistent across all specifications of the pooled sample (Panel B, Columns 1-3). The substantive effect is significant as well. The model with a full set of controls (Column 3) estimates that enactment of the Model Law leads to an increase in a country's nationals represented at ICC proceedings by roughly 25%. As above, I subset this analysis based on the party's role in the arbitration as either the complainant or the defendant. The models estimate a larger effect on the complainant side than the defendant side: a 34% increase in the number of cases with nationals as complainants versus only an 18% increase for defendants. This fits within the professional hypothesis as it suggests that the Model Law is exerting a greater influence on the behavior of local firms that choose to submit disputes to arbitration. The model also estimates a somewhat smaller effect on the number of parties involved in ICC arbitrations as defendants (Column 5), as well.

These quantitative results dovetail with Dezalay and Garth's case study of Egypt in which they found that enactment of the Model Law helped "gain legitimacy *for arbitration* locally and legitimacy *for local leaders* in the centers of arbitration."[93] Indeed, while enactment of the Model Law bolstered the reputation of arbitration within local business communities, Dezalay and Garth found through their interviews that local lawyers and businesspeople alike nevertheless "preferred Paris [i.e. the ICC] to Cairo" (p. 242). In other words, Egyptian business interests were more

93. Dezalay and Garth 1996, 242-5.

willing to arbitrate, but they preferred foreign seats to the Model Law-based system in Egypt. In sum, these results indicate that the Model Law is indeed increasing local usage of international commercial arbitration, though I have found weaker evidence that the Law increases the desirability of jurisdictions as arbitral seats.

### 6.3 Further Work

Further work is needed to measure national commercial arbitration laws systematically across time. While the Model Law is a reliable indicator for ICA-friendly rules, it is a less reliable indicator for that lack of such rules. As noted above, four of the most popular arbitral seats in the world are non-Model Law countries (though subnational units in two of the four countries have implemented the Model Law, such as Texas in the US and Scotland in the UK). Included within ICA-friendly jurisdictions in the non-Model Law group are countries with weak protections for ICA. This measurement error may lead to an underestimate of the Model Law's nullifying effect on rule of law institutions in the eyes of foreign investors. Alternatively, there may be something unique about the harmonization of the Model Law causing the substitution effect that non-Model Law, ICA-friendly countries may not experience.

## 7 Conclusion

It is still true today what Walter Mattli wrote in *International Organization* two decades ago, "The study of private settlement of cross-border trade and investment disputes through international commercial arbitration or other mechanisms has been much neglected by scholars of international political economy and international relations."[94] The study of private authority, transnational legal processes and investor-state arbitration has expanded considerably in the last decade, but ICA—with some exceptions—has been neglected outside a mostly academic-practitioners circles.[95]

Mattli believed this neglect was due to the inability of extant institutional theories in international political economy to account for transnational organizational forms.[96] But recent theoretical work on transnational authority has expanded the discipline's theoretical toolkit and provided a

94. Mattli 2001, 919.
95. These exceptions include Karton 2013; Mattli and Dietz 2014; Hale 2015a, 2015b; Stone Sweet and Grisel 2017.
96. Mattli 2001, 923-925.

common language for better conceptualizing these new and often hard to grasp forms of authority governing the international economy today. The present study shows that ICA can be fruitfully integrated into theoretical work on transnational legal orders.[97] One important difference between a transnational and an international legal authority highlighted by this study is that the former supplants domestic rule of law institutions, while the latter imposes obligations from without. This distinction adds a new dimension to what Nico Krisch dubbed the "decay of consent" in international (or transnational) lawmaking.[98] Countries are signing up for an arbitration regime that has certain known characteristics today, while at the same time limiting their ability to influence the evolution of that regime in the future.

The normative implications of the findings are mixed. The Model Law provides countries with weak rule of law institutions an opportunity to jump start reform in the area of commercial regulation. But due to the secrecy of arbitration, we know little about the broader effects of shifting a substantial case load out of public view. Like ICA, public litigation helps resolve private disputes. Unlike ICA, litigation creates public goods in the form of credible information about the law and facts. Publicity helps build consistent case law which ensures like cases will be treated alike and allows for public debate which in turn leads to the development of interpretive practices more in line with public preferences.[99] Litigation signals possibly malicious behavior of the litigants to potential future counterparties. As it is currently practiced, ICA provides none of these public goods and limits public courts ability to provide them. We therefore know comparatively little about how arbitrators make their decisions. Studies on the related field of ISDS jurisprudence are not encouraging. Gus Van Harten's textual analysis of hundreds of ICSID awards finds that it exhibits a distinct pro-investor bias.[100] Finally, outside of its economic effects, FDI is often touted for the potential spillover of liberal values into illiberal states.[101] Through the introduction of parallel, transnational legal institutions, ICA effectively isolates commercial dispute resolution from the rest of the legal system thereby limiting the means by which rule of law norms could diffuse.

97. See also Stone Sweet and Grisel 2017.
98. Krisch 2014.
99. Resnik 2015.
100. Van Harten 2012.
101. Hewko 2002; Blanton and Blanton 2007; Neumayer and de Soysa 2011.

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# Online Appendix for "Complement or Substitute? International Commercial Arbitration and the Diminishing Authority of Domestic Courts"

# A Model Law Countries

| | | | | | |
|---|---|---|---|---|---|
| Canada | | Kenya | 1995 | Dominican Republic | 2008 |
| *Alberta* | 1986 | Sri Lanka | 1995 | Mauritius | 2008 |
| *British Columbia* | 1986 | India | 1996 | Peru | 2008 |
| *Manitoba* | 1986 | Malta | 1996 | Rwanda | 2008 |
| *New Brunswick* | 1986 | Zimbabwe | 1996 | Slovenia | 2008 |
| *Newfoundland and Labrador* | 1986 | Iran | 1997 | Brunei Darussalam | 2009 |
| | | Oman | 1997 | Georgia | 2009 |
| *Northwest Territories* | 1986 | Macao, China | 1998 | Australia | 1989 |
| | | Germany | 1998 | *New South Wales* | 2010 |
| *Nova Scotia* | 1986 | Madagascar | 1998 | *Northern Territory* | 2011 |
| *Prince Edward Island* | 1986 | Venezuela | 1998 | *South Australia* | 2011 |
| | | Azerbaijan | 1999 | *Tasmania* | 2011 |
| *Quebec* | 1986 | Belarus | 1999 | *Victoria* | 2011 |
| *Yukon* | 1986 | Greece | 1999 | *Western Australia* | 2012 |
| *Ontario* | 1987 | Honduras | 2000 | *Queensland* | 2013 |
| *Saskatchewan* | 1988 | Uganda | 2000 | *Australian Capital Territory* | 2017 |
| *Nunavut* | 1999 | Zambia | 2000 | | |
| Cyprus | 1987 | Bangladesh | 2001 | Hong Kong | 2010 |
| United States | | Croatia | 2001 | Ireland | 2010 |
| *California* | 1988 | Jordan | 2001 | Liechtenstein | 2010 |
| *Connecticut* | 1989 | Turkey | 2001 | Costa Rica | 2011 |
| *Texas* | 1989 | Bulgaria | 2002 | Lithuania | 2012 |
| *Oregon* | 1991 | Paraguay | 2002 | Saudi Arabia | 2012 |
| *Illinois* | 1998 | Thailand | 2002 | Belgium | 2013 |
| *Louisiana* | 2006 | Japan | 2003 | Bhutan | 2013 |
| *Florida* | 2010 | Spain | 2003 | Maldives | 2013 |
| *Georgia* | 2012 | Chile | 2004 | Slovakia | 2014 |
| Nigeria | 1990 | Norway | 2004 | Bahrain | 2015 |
| United Kingdom | | Philippines | 2004 | Montenegro | 2015 |
| *Scotland* | 1990 | Denmark | 2005 | Myanmar | 2016 |
| *Bermuda* | 1993 | Malaysia | 2005 | Republic of Korea | 2016 |
| *British Virgin Isl.* | 2013 | Nicaragua | 2005 | Turkmenistan | 2016 |
| Mexico | 1993 | Poland | 2005 | Fiji | 2017 |
| Russian Federation | 1993 | Armenia | 2006 | Jamaica | 2017 |
| Tunisia | 1993 | Austria | 2006 | Mongolia | 2017 |
| Egypt | 1994 | Cambodia | 2006 | Qatar | 2017 |
| Hungary | 1994 | Estonia | 2006 | South Africa | 2017 |
| Singapore | 1994 | Serbia | 2006 | Argentina | 2018 |
| Ukraine | 1994 | Macedonia | 2006 | United Arab Emirates | 2018 |
| Guatemala | 1995 | New Zealand | 2007 | Uruguay | 2018 |

Table A1: Model Law Countries, 1985–2020

**Note:** Data taken from UNCITRAL yearly status reports along with various others sources. The year given refers to when the law came into effect, not when the underlying legislation was passed. Subnational units are italicized.

# B Full Results for Robustness Checks

| | (1) | (2) | (3) | (4) |
|---|---|---|---|---|
| FDI Flows$_{t-1}$ | 0.173*** | 0.096** | 0.237*** | 0.250*** |
| | (0.033) | (0.042) | (0.022) | (0.021) |
| Rule of Law$_{WGI}$ | 3.221*** | | | |
| | (0.848) | | | |
| Model Law$_{t-1}$ × Rule of Law$_{WGI}$ | -2.256*** | | | |
| | (0.804) | | | |
| Rule of Law$_{Doing\ Business}$ | | 0.179*** | | |
| | | (0.051) | | |
| Model Law$_{t-1}$ × Rule of Law$_{Doing\ Business}$ | | -0.075 | | |
| | | (0.061) | | |
| Rule of Law$_{LJI}$ | | | 5.930*** | |
| | | | (1.861) | |
| Model Law$_{t-1}$ × Rule of Law$_{LJI}$ | | | -6.354*** | |
| | | | (1.887) | |
| Model Law$_{t-1}$ | -0.586 | 2.898 | 2.452** | |
| | (0.565) | (3.470) | (1.021) | |
| Model Law Expanded$_{t-1}$ | | | | 2.274*** |
| | | | | (0.806) |
| Rule of Law$_{V\text{-}Dem}$ | | | | 5.461*** |
| | | | | (1.345) |
| Model Law Exp. $_{t-1}$ × | | | | -5.187*** |
| Rule of Law$_{V\text{-}Dem}$ | | | | (1.322) |
| NYC$_{t-1}$ | 0.812 | -0.064 | 0.673 | 0.829* |
| | (0.829) | (1.231) | (0.512) | (0.496) |
| BITs$_{t-1}$ | -0.089*** | -0.069 | -0.044*** | -0.053*** |
| | (0.034) | (0.052) | (0.016) | (0.016) |
| ln GDP$_{t-1}$ | 0.221 | 1.304 | 0.334 | 0.450 |
| | (2.289) | (3.539) | (1.632) | (1.469) |
| Growth$_{t-1}$ | 0.066 | 0.026 | 0.057* | 0.066** |
| | (0.041) | (0.055) | (0.029) | (0.029) |
| ln GDP per cap.$_{t-1}$ | -1.355 | 1.003 | -2.238 | -1.433 |
| | (2.157) | (3.329) | (1.646) | (1.476) |
| ln Trade Openness$_{t-1}$ | -0.525 | 0.311 | 0.022 | -0.271 |
| | (0.633) | (1.012) | (0.538) | (0.481) |
| Year FE? | Yes | Yes | Yes | Yes |
| Country FE? | Yes | Yes | Yes | Yes |
| Observations | 3,136 | 2,288 | 4,427 | 4,969 |

Standard errors in parentheses

* $p < .1$, ** $p < .05$, *** $p < .01$

Table B1: Full table of results for estimates presented in Table 4 in the main text

# C Main Model alternative specifications

## C.1 Varying Fixed Effects

| | (1) | (2) | (3) |
|---|---|---|---|
| L.FDI Flows$_{t-1}$ | 0.369*** | 0.263*** | 0.357*** |
| | (0.021) | (0.021) | (0.021) |
| L.Rule of Law$_{t-1}$ | 3.094*** | 5.908*** | 3.382*** |
| | (0.655) | (1.344) | (0.642) |
| 1L.Model Law$_{t-1}$ | 2.975*** | 2.136*** | 2.791*** |
| | (0.557) | (0.811) | (0.560) |
| 1L.Model Law$_{t-1}$ × L.Rule of Law$_{t-1}$ | -4.118*** | -4.318*** | -4.378*** |
| | (0.984) | (1.342) | (0.976) |
| 1L.NYC$_{t-1}$ | 1.243*** | 1.583*** | 0.884** |
| | (0.349) | (0.493) | (0.354) |
| L.BITs$_{t-1}$ | 0.016** | 0.002 | 0.002 |
| | (0.008) | (0.013) | (0.009) |
| L.ln GDP$_{t-1}$ | 0.561*** | 5.683*** | 0.657*** |
| | (0.103) | (0.926) | (0.108) |
| L.Growth$_{t-1}$ | 0.083*** | 0.076*** | 0.075*** |
| | (0.028) | (0.028) | (0.029) |
| L.ln GDP per cap.$_{t-1}$ | -0.549*** | -6.004*** | -0.537*** |
| | (0.166) | (1.172) | (0.165) |
| L.ln Trade Openness$_{t-1}$ | 0.510* | 0.003 | 0.389 |
| | (0.261) | (0.488) | (0.257) |
| Lagged DV? | Yes | Yes | Yes |
| Year FE? | No | No | Yes |
| Country FE? | No | Yes | No |
| Observations | 4969.000 | 4969.000 | 4969.000 |

Standard errors in parentheses

* $p < .1$, ** $p < .05$, *** $p < .01$

Table C1: Alternative Fixed Effects

## C.2 AR1 Process

| | (1) |
|---|---|
| L.Rule of $\text{Law}_{\text{V-Dem}}$ | 6.479*** |
| | (1.809) |
| 1L.Model $\text{Law}_{\text{t-1}}$ | 2.685** |
| | (1.109) |
| 1L.Model $\text{Law}_{\text{t-1}}$ × L.Rule of $\text{Law}_{\text{V-Dem}}$ | -6.373*** |
| | (1.850) |
| $\text{1L.NYC}_{\text{t-1}}$ | 0.835 |
| | (0.664) |
| $\text{L.BITs}_{\text{t-1}}$ | -0.069*** |
| | (0.023) |
| L.ln $\text{GDP}_{\text{t-1}}$ | 0.548 |
| | (2.136) |
| $\text{L.Growth}_{\text{t-1}}$ | 0.048* |
| | (0.028) |
| L.ln GDP per $\text{cap.}_{\text{t-1}}$ | -1.638 |
| | (2.161) |
| L.ln $\text{Trade Openness}_{\text{t-1}}$ | 0.153 |
| | (0.610) |
| Year FE? | Yes |
| Country FE? | Yes |
| Observations | 4999.000 |
| r2 | 0.131 |

Standard errors in parentheses

* $p < .1$, ** $p < .05$, *** $p < .01$

Table C2: AR1 process: Prais–Winsten regression with PCSE

### C.3 Clustered SEs

| | (1) |
|---|---|
| L.FDI Flows$_{t-1}$ | 0.250*** |
| | (0.033) |
| L.Rule of Law$_{V\text{-}Dem}$ | 5.459*** |
| | (1.964) |
| 1L.Model Law$_{t-1}$ | 2.271* |
| | (1.310) |
| 1L.Model Law$_{t-1}$ × L.Rule of Law$_{V\text{-}Dem}$ | -5.182*** |
| | (1.987) |
| 1L.NYC$_{t-1}$ | 0.829 |
| | (0.620) |
| L.BITs$_{t-1}$ | -0.053** |
| | (0.021) |
| L.ln GDP$_{t-1}$ | 0.450 |
| | (2.286) |
| L.Growth$_{t-1}$ | 0.066** |
| | (0.030) |
| L.ln GDP per cap.$_{t-1}$ | -1.433 |
| | (2.073) |
| L.ln Trade Openness$_{t-1}$ | -0.271 |
| | (0.466) |
| Year FE? | Yes |
| Country FE? | Yes |
| Observations | 4969.000 |
| r2 | 0.293 |

Standard errors in parentheses

* $p < .1$, ** $p < .05$, *** $p < .01$

Table C3: OLS with standard errors clustered by country

## C.4 Conditional Marginal Effects for Alternative Specifications

| | Table C2 | Table C3 | Table C1 | | |
|---|---|---|---|---|---|
| | (1) AR1 | (2) Clustered SEs | (3) No FE | (4) Unit FE | (5) Year FE |
| Model Law = 0 | 6.478*** | 5.459*** | 3.094*** | 5.908*** | 3.382*** |
| | (1.809) | (1.963) | (0.655) | (1.344) | (0.642) |
| Model Law = 1 | 0.106 | 0.277 | -1.024 | 1.591 | -0.995 |
| | (1.983) | (2.042) | (0.888) | (1.455) | (0.882) |
| Wald test p-value | 0.001 | 0.010 | 0.000 | 0.001 | 0.000 |

Table C4: Conditional Marginal Effects Using Alternative Specifications of Main Model

# D Full Tables for ICC Case Analyses

## D.1 Panel A: Seat of ICC arbitrations

| | (1) | (2) | (3) | (4) | (5) |
|---|---|---|---|---|---|
| Model Law=1 | 0.437** | 0.209 | 0.234* | 0.454** | 0.204* |
| | (0.190) | (0.129) | (0.125) | (0.218) | (0.116) |
| ln Trade Openness | | 0.467 | 0.376 | 0.633 | 0.330 |
| | | (0.382) | (0.335) | (0.549) | (0.320) |
| ln FDI stock | | 0.288*** | 0.272*** | 0.246* | 0.265*** |
| | | (0.081) | (0.079) | (0.139) | (0.081) |
| ln GDP | | 2.020*** | 1.670*** | 1.405 | 1.715*** |
| | | (0.488) | (0.480) | (0.934) | (0.479) |
| ln GDP per cap. | | -1.648*** | -1.297** | -0.708 | -1.379** |
| | | (0.545) | (0.557) | (1.114) | (0.540) |
| Growth | | -0.013 | -0.014 | 0.001 | -0.016* |
| | | (0.009) | (0.009) | (0.017) | (0.009) |
| NYC | | | 1.493** | 0.445 | 1.650*** |
| | | | (0.627) | (0.735) | (0.599) |
| Democracy | | | 0.526 | 3.249 | 0.264 |
| | | | (0.752) | (1.984) | (0.799) |
| Rule of Law | | | -0.292 | -1.787 | -0.136 |
| | | | (0.636) | (1.797) | (0.790) |
| Start Year | 1992 | 1992 | 1992 | 1994 | 1994 |
| Year FE? | Yes | Yes | Yes | Yes | Yes |
| Country FE? | Yes | Yes | Yes | Yes | Yes |
| Observations | 3186.000 | 2764.000 | 2764.000 | 1951.000 | 2611.000 |

Standard errors in parentheses

* $p < .1$, ** $p < .05$, *** $p < .01$

Table D1: ICC Seats

## D.2 Panel B: Nationality of parties to ICC arbitration

| | (1) | (2) | (3) | (4) | (5) |
|---|---|---|---|---|---|
| Model Law=1 | 0.263** | 0.202*** | 0.223*** | 0.295*** | 0.165** |
| | (0.107) | (0.075) | (0.069) | (0.082) | (0.072) |
| ln Trade Openness | | 0.299* | 0.274* | 0.071 | 0.386** |
| | | (0.175) | (0.153) | (0.189) | (0.150) |
| ln FDI stock | | 0.071 | 0.062 | 0.089* | 0.036 |
| | | (0.060) | (0.056) | (0.048) | (0.056) |
| ln GDP | | 1.836*** | 1.597*** | 1.249*** | 1.814*** |
| | | (0.229) | (0.218) | (0.247) | (0.258) |
| ln GDP per cap. | | -1.430*** | -1.194*** | -0.894*** | -1.401*** |
| | | (0.198) | (0.206) | (0.229) | (0.267) |
| Growth | | -0.015*** | -0.016*** | -0.009** | -0.018*** |
| | | (0.004) | (0.004) | (0.004) | (0.006) |
| NYC | | | 0.655** | 0.833** | 0.563** |
| | | | (0.318) | (0.392) | (0.253) |
| Democracy | | | 0.251 | 0.356 | 0.146 |
| | | | (0.385) | (0.601) | (0.351) |
| Rule of Law | | | 0.138 | -0.203 | 0.370 |
| | | | (0.308) | (0.450) | (0.308) |
| Start Year | 1993 | 1993 | 1993 | 1994 | 1994 |
| Year FE? | Yes | Yes | Yes | Yes | Yes |
| Country FE? | Yes | Yes | Yes | Yes | Yes |
| Observations | 4811.000 | 3992.000 | 3991.000 | 3763.000 | 3854.000 |

Standard errors in parentheses

* $p < .1$, ** $p < .05$, *** $p < .01$

Table D2: Full party analysis

# E Analysis of ICC Party Nationality: Alternative Specifications

| | (1) | (2) |
|---|---|---|
| $\text{Total}_{\text{t-1}}$ | | 0.001* |
| | | (0.001) |
| Model $\text{Law}_{\text{t-1}}$ | 0.182*** | 0.177*** |
| | (0.068) | (0.064) |
| ln Trade $\text{Openness}_{\text{t-1}}$ | 0.331** | 0.302* |
| | (0.164) | (0.160) |
| ln FDI $\text{stock}_{\text{t-1}}$ | 0.055 | 0.055 |
| | (0.049) | (0.051) |
| ln $\text{GDP}_{\text{t-1}}$ | 1.590*** | 1.529*** |
| | (0.234) | (0.233) |
| ln GDP per $\text{cap.}_{\text{t-1}}$ | -1.170*** | -1.145*** |
| | (0.227) | (0.222) |
| $\text{Growth}_{\text{t-1}}$ | -0.011** | -0.010** |
| | (0.005) | (0.005) |
| $\text{NYC}_{\text{t-1}}$ | 0.752** | 0.746** |
| | (0.336) | (0.306) |
| Rule of $\text{Law}_{\text{t-1}}$ | 0.358* | 0.362* |
| | (0.210) | (0.208) |
| Start Year | 1993 | 1993 |
| Year FE? | Yes | Yes |
| Country FE? | Yes | Yes |
| Observations | 4129.000 | 4017.000 |

Standard errors in parentheses

* $p < .1$, ** $p < .05$, *** $p < .01$

Table E1: party model with lags and LDV

| | (1) | (2) | (3) |
|---|---|---|---|
| Model Law | 0.154*** | 0.112*** | 0.101*** |
| | (0.045) | (0.040) | (0.039) |
| ln Trade Openness | | 0.303*** | 0.269*** |
| | | (0.062) | (0.062) |
| ln GDP | | 0.385*** | 0.361*** |
| | | (0.041) | (0.038) |
| ln GDP per cap. | | 0.085** | 0.085** |
| | | (0.034) | (0.036) |
| Growth | | -0.017*** | -0.018*** |
| | | (0.003) | (0.003) |
| ln FDI stock | | 0.071** | 0.058** |
| | | (0.029) | (0.025) |
| NYC | | | 0.662*** |
| | | | (0.084) |
| Democracy | | | 0.507*** |
| | | | (0.190) |
| Rule of Law | | | -0.066 |
| | | | (0.185) |
| Year FE? | Yes | Yes | Yes |
| Country FE? | Yes | Yes | Yes |
| Observations | 4811.000 | 3992.000 | 3991.000 |

Standard errors in parentheses

* $p < .1$, ** $p < .05$, *** $p < .01$

Table E2: Negative binomial conditional fixed effects