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ARTICLES

DISPUTING BOILERPLATE

W. Mark C. Weidemaier[*]

Sovereign bond contracts are thought to consist primarily of boilerplate. That is, except for a handful of custom terms, the contracts are assumed to adopt highly standardized provisions that are functionally identical to those used in other bond contracts. Because standardized terms may be "sticky," this description invokes significant theoretical baggage. It implies that market participants may select widely used terms over terms that match their unique preferences.

This Article explores the phenomenon of standardization in the context of a particular contracting choice: whether to include an arbitration clause in a sovereign bond contract. These contracts are widely believed to adopt boilerplate dispute resolution provisions calling for litigation in foreign courts, typically in New York or England, even though some parties (by hypothesis) would prefer arbitration. The usual explanation for this discrepancy invokes the inherent "stickiness" of standard terms. This Article contests this explanation, demonstrating that contracts are more varied than is often assumed and arguing that a general preference for litigation, rather than default rule stickiness, may best explain the relatively infrequent use of arbitration. In the process, the Article provides a systematic empirical look at the manner in which these bond contracts

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structure the process of enforcing sovereign debt obligations and raises broader implications for the study of contract innovation and change.

INTRODUCTION

Sovereign bond contracts are thought to consist mostly of boilerplate. That is, except for a handful of custom terms, the contracts are assumed to adopt highly standardized provisions that are functionally identical to those used in other bond contracts.[1] The assumption of standardization extends to enforcement-related terms, including terms in which the issuer consents to be sued in the event of a default. Thus, the "standard" choice of forum term is presumed to call for litigation in foreign courts, typically in New York (for New York-law bonds) or England (for English-law bonds).[2]

To describe sovereign bond contracts as "standardized," or "boilerplate," is to invoke significant theoretical baggage. For a variety of reasons, standardized terms may be "sticky."[3] Parties who adopt a standard term may obtain benefits, while those who depart from the standard may incur costs, and these benefits and costs may induce even sophisticated parties to select a standard term over a custom term that matches their unique preferences. Thus, the presumed choice of forum standard may not evidence a preference for litigation over arbitration among participants in the sovereign debt markets. This is because the litigation term is thought to be a sticky default.[4]

The assumptions underlying this "stickiness" explanation, however, are largely untested. Do sovereign bonds really contain standardized dispute resolution terms, and do these terms indeed eschew arbitration for litigation? If so, why attribute these contracting practices to the stickiness of forum selection terms rather than, say, a widely held preference for litigation? This Article explores these questions. In the process, it provides the first systematic empirical look at the manner in which sovereign bond contracts structure the process of enforcing sovereign debt obligations. This analysis reveals a richer and more nuanced picture of how some of the world's most sophisticated contracting parties structure the dispute resolution process, and of the likely impact of standardization on their choices.

Part I begins with an introduction to this unique contracting context, one in which the threat of legal enforcement plays a relatively minor role. Part I also introduces the presumptive standard set of choice of forum and other enforcement-related terms. That standard eschews arbitration in favor of litigation before creditor-friendly courts in New York or England. Part I closes

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1. See *infra* note 18 and accompanying text for prior research characterizing sovereign bonds as boilerplate.

2. Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335, 338 (2006); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 732 n.131 (2007).

3. Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 653 (2006).

4. Cross, *supra* note 2, at 337; Waibel, *supra* note 2, at 732 n.131.

by exploring a common explanation for the widespread use of this presumed standard. This explanation posits that bond contracts choose litigation not because market participants prefer it to arbitration, but because forum selection clauses are sticky.

The foregoing discussion suggests the ambiguity inherent in highly standardized contracts. Do parties simply prefer the standard, or does standardization deter contract innovation and change? Answering these questions requires some prior belief as to the parties' likely preferences, as well as an analysis of the contracts themselves. Part II engages these questions, beginning with an assessment of the merits of arbitration as a means of resolving sovereign debt disputes. I do not purport to offer a definitive resolution. I suggest, however, that few participants in the sovereign debt markets presently have *strong* reasons to prefer arbitration. That conclusion implies that arbitration clauses may appear infrequently in sovereign bond contracts for reasons having little or nothing to do with contract stickiness.

Part II next reports findings from an analysis of sovereign bond contracts, including at least one issuance from virtually every major (and most minor) issuers of New York- or English-law bonds over the last twenty years. As it turns out, enforcement-related terms vary to a surprising degree across the different issuers in my sample. With respect to choice of forum terms, more than twenty percent of the issuers depart in some way from the presumptive standard, including nearly ten percent whose bonds include arbitration clauses. Different issuers also vary in the degree to which they waive sovereign immunity from suit, from execution, or both. This variance *across* issuers, however, coexists with *intra*-issuer contracting stasis. The issuers in my sample may choose nonstandard enforcement terms, but they rarely change their own established contracting practices.

Part III explores the implications of these findings. Contrary to the stickiness explanation, actual contracting practices suggest that market participants generally prefer litigation to arbitration in this context. Most issuers provide for litigation but include broad sovereign immunity waivers in their bond contracts. This practice captures some of the advantages claimed for arbitration, without incurring the potential costs and uncertainty associated with a relatively untested, and unsubsidized, disputing forum. Moreover, when there are unique reasons to prefer arbitration—as when the issuer's courts are unlikely to enforce foreign court judgments—many (though not all) issuers provide for it. And although issuers rarely change their existing dispute resolution terms, they presently have little reason to do so.

Part III closes by briefly situating these findings within the broader body of research into sovereign debt and, more generally, contract innovation and change. At a basic level, the findings serve as a reminder that actual contracting practices are often more diverse than expected. This is especially true across the different issuers in the sample, suggesting that robust models of sovereign debt contracting practices must take into account a more heterogeneous set of terms than has previously been thought to exist. The findings also implicate a larger debate over when and where contract change is likely to occur. Much contracts

scholarship focuses on innovation by larger and "high-status" players—those whose economic strength and reputational capital make them ideal "first movers." But the variance in enforcement-related terms tells a different story. In particular, the use of arbitration by relatively minor players in the sovereign debt world calls for greater attention to the forces that drive innovation among less-established and lower-status players.

I. INTRODUCING THE STANDARD

A. Sovereign Debt and the Role of Legal Enforcement

In many ways, sovereign bonds are typical debt instruments: tradable bonds by which governments raise funds from investors, often residents of foreign countries.[5] In loans to private borrowers, the threat of legal enforcement is a significant inducement for the borrower to repay (and thus, for the lender to make the loan in the first place). Defaulting borrowers face the prospect of having their property seized and sold in satisfaction of the debt. For sovereign borrowers, however, the reality is different. After a default, the sovereign's own courts may be unable or unwilling to enforce the debt, and for a number of reasons courts in other countries may not offer reliable means of legal enforcement.

One reason for this is the doctrine of sovereign immunity, which until the latter half of the twentieth century conferred on foreign states absolute immunity from suit in many jurisdictions, including the United States.[6] The doctrine has been weakened in many jurisdictions, including the United States and United Kingdom,[7] so that sovereigns generally now retain their immunity from suit for public or governmental, but not for private or commercial, acts.[8] Nevertheless, even if a foreign state is subject to suit and a creditor can obtain a judgment for the defaulted debt, sovereign issuers remain relatively insulated from the threat

5. Waibel, *supra* note 2, at 719. Historically, emerging market governments "borrowed from foreign residents in foreign currency under foreign law," although this is increasingly no longer the case. Anna Gelpern & Mitu Gulati, *Public Symbol in Private Contract: A Case Study*, 84 WASH U. L. REV. 1627, 1632–33 (2006). *See generally* Anna Gelpern, *Domestic Bonds, Credit Derivatives, and the Next Transformation of Sovereign Debt*, 83 CHI.-KENT L. REV. 147 (2008) (discussing growth in domestic debt in emerging markets).

6. *See* Turkmani v. Rep. of Bol., 193 F. Supp. 2d 165, 170–71 (D.D.C. 2002) (explaining that U.S. government recognized absolute theory of foreign sovereign immunity until 1952).

7. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611 (2006); State Immunity Act, 1978, c. 33, § 2-11 (U.K.), *reprinted in* 17 I.L.M. 1123.

8. HAZEL FOX, THE LAW OF STATE IMMUNITY 124–216, 272–74 (2002) (describing varying approaches to sovereign immunity throughout world, as well as restrictive theory of sovereign immunity); Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043, 1075–76 (2004) (describing enactment in U.S. of Foreign Sovereign Immunities Act of 1976).

of legal enforcement.[9] The issuer's assets may be located primarily within its own borders, where a creditor's prospects of seizing them are rather dim.[10] And even if the issuer keeps assets in foreign jurisdictions, those assets may be immune from execution.[11] For example, under the Foreign Sovereign Immunities Act ("FSIA") a foreign state's property located within the United States will likely be immune from execution unless the property is used for a commercial activity and either the state has waived its immunity from execution or the property "is or was used for the commercial activity upon which the [creditor's] claim is based."[12] Thus, the coercive mechanisms available to secure payment when private borrowers fail to pay are of limited use in the sovereign debt context.

The lack of reliable means to enforce sovereign debt obligations has led to a debate over what role, if any, the threat of legal enforcement plays in enabling sovereign borrowing.[13] Under most accounts, reputational constraints—primarily the threat of exclusion from future borrowing—serve as the primary inducement to debt repayment.[14] The threat of legal enforcement, however, likely plays at least some role. At a minimum, the threat of enforcement may impose indirect costs—for example, by restricting the sovereign's ability to conduct foreign trade or preventing it from holding assets in countries where they might be attached.[15]

9. *See* Andrei Shleifer, *Will the Sovereign Debt Market Survive?*, 93 AM. ECON. REV. 85, 87 (2003) ("Because borrowers in sovereign debt markets are, well, sovereign, creditors have virtually no rights.").

10. *Id.* ("Creditors cannot grab assets in the country. The most they can do is to seize a few airplanes or barges of oil, which does not get them far except as a strategy of harassment."); *see also* William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 11 (2004) ("[D]efaulting sovereigns try their best not to leave valuables lying around.").

11. *See* William W. Park, *When the Borrower and the Banker Are at Odds: The Interaction of Judge and Arbitrator in Trans-Border Finance*, 65 TUL. L. REV. 1323, 1342–43 (1991) (discussing immunity from execution under U.S. law).

12. 28 U.S.C. § 1610(a)(1), (2).

13. *Compare* Jeremy Bulow & Kenneth Rogoff, *Sovereign Debt: Is to Forgive to Forget?*, 79 AM. ECON. REV. 43, 43–44 (1989) (modeling conditions under which legal or political sanctions are necessary to support sovereign borrowing), *with* Harold L. Cole et al., *Default, Settlement, and Signalling: Lending Resumption in a Reputational Model of Sovereign Debt*, 36 INT'L ECON. REV. 365, 365, 369–71 (1995) (modeling process in which defaulting countries settle defaulted debt to signal their intent to repay future loans), *and* William B. English, *Understanding the Costs of Sovereign Default: American State Debts in the 1840's*, 86 AM. ECON. REV. 259, 259, 267–72 (1996) (arguing that defaulted U.S. states repaid debt in order to maintain access to capital markets, rather than to avoid legal, military, or trade sanctions).

14. *See* Bratton & Gulati, *supra* note 10, at 14 (describing reputation theory as "the dominant view"); Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 588–89 ("What most powerfully explains the willingness of lenders to treat these promises as credible is a conviction that governments will seek private financing of public debt into the indefinite future.").

15. Jeremy Bulow & Kenneth Rogoff, *A Constant Recontracting Model of Sovereign Debt*, 97 J. POL. ECON. 155, 158–59 (1989); *see also* Bratton & Gulati, *supra* note 10, at 15–16 (describing enforcement theory of sovereign debt).

Moreover, while admittedly rare, individual creditors have had some notable successes in obtaining and executing judgments against defaulted sovereigns.[16]

Because enforcement matters (at least to a degree), and because sovereign borrowers default with some frequency,[17] it is hardly surprising that sovereign bond contracts contain detailed terms pertaining to legal enforcement. Most observers take it as a given that these terms, and indeed most terms in sovereign bond contracts, are functionally identical—that is, boilerplate.[18] Thus, bond contracts are presumed to contain a "standard" set of terms governing how and where disputes related to the bonds will be resolved.

B. *The Presumed Dispute Resolution "Standard"*

As an example of the dispute resolution standard, consider the "Governing Law and Jurisdiction" clause in a recent bond offering by the Lebanese Republic, as described in the prospectus excerpt reprinted as Appendix A. The clause conforms to one of two perceived standards, reflecting an initial choice between the law and courts of New York and the law and courts of England.[19] Thus, the "standard" begins by selecting between relatively stable and predictable bodies of law applied by the courts of major (and competing) financial centers, where cultural and economic factors may exert pressure to enforce loan agreements.[20] The dispute resolution provisions in the Lebanese bonds choose New York law and provide that the issuer will submit to the *nonexclusive* jurisdiction of state or federal courts in Manhattan.[21]

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16. *See* Fisch & Gentile, *supra* note 8, at 1084–87 (describing litigation by the vulture fund Elliott Associates and similar attempts to enforce sovereign debt obligations).

17. Carmen M. Reinhart & Kenneth S. Rogoff, *Serial Default and the "Paradox" of Rich-to-Poor Capital Flows*, 94 AM. ECON. REV. 53, 53 (2004) ("Throughout history, governments have demonstrated that 'serial default' is the rule, not the exception."); Shleifer, *supra* note 9, at 87 ("[O]verborrowing, default, and limited repayment are completely normal and expected by both borrowers and lenders.").

18. Robert B. Ahdieh, *Between Mandate and Market: Contract Transition in the Shadow of the International Order*, 53 EMORY L.J. 691, 713–21 (2004); Cross, *supra* note 2, at 337; Gelpern & Gulati, *supra* note 5, at 1628–29; Waibel, *supra* note 2, at 732 n.131; *see also* Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 932 n.7 (2004) (discussing assumption of standardization in sovereign bond contracts).

19. *See* Cross, *supra* note 2, at 338 (describing New York and London as "creditor friendly" jurisdictions).

20. *E.g.*, LEE C. BUCHHEIT, HOW TO NEGOTIATE EUROCURRENCY LOAN AGREEMENTS 134 (2d ed. 2006) (noting that, from lenders' perspective, choice of law reflects desire for enforcement litigation to occur in jurisdictions whose law "strongly favours the enforcement of financial contracts according to their terms"); Fisch & Gentile, *supra* note 8, at 1079–81 (describing negative reaction of New York financial community to Second Circuit ruling invoking act of state doctrine to bar creditor litigation, and successful efforts to reverse decision).

21. "The Fiscal Agency Agreement and the Notes shall be construed and interpreted in accordance with the law of the State of New York . . . without reference to conflicts of laws principles. The Republic irrevocably agrees . . . that the courts of the State of New York and of the United States sitting in The City of New York, Borough of Manhattan, shall have non-exclusive jurisdiction to settle any disputes . . . . " THE LEBANESE REP., BASE PROSPECTUS 99 (Apr. 4, 2007) (detailing U.S. $22,000,000,000 Global Medium-Term Note Program). As for why the clause specifies courts in

The clause next contains a package of terms addressing other enforcement-related matters. These terms include:

- An expansive waiver of sovereign immunity from both jurisdiction and execution for lawsuits related to the bonds.[22] Even without such a waiver, the issuer would likely be susceptible to suit in the United States.[23] The broad contractual waiver, however, permits bondholders to avoid litigating whether the particular transaction falls within the "commercial activity" exception to sovereign immunity from jurisdiction.[24] Moreover, because foreign states also enjoy broad immunity from attachment and execution against their property,[25] the contractual waiver may expand the scope of property available to satisfy bondholder claims.[26]
- Provisions carefully limiting the Republic's waiver of jurisdictional immunity to actions related to the bonds, and exempting property used for official purposes from its waiver of immunity from execution.[27]
- A term designating an official to accept service of process in actions relating to the bonds,[28] thereby easing a significant practical difficulty associated with suing a foreign state.[29]

Manhattan, see BUCHHEIT, *supra* note 20, at 137. "Have you ever been to the South Bronx? Have you ever spent two consecutive weeks in Troy, New York?" *Id.*

22. THE LEBANESE REP., *supra* note 21, at 99–100 ("To the extent that the Republic may in any jurisdiction claim or acquire for itself or its assets immunity (sovereign or otherwise) from suit, execution, attachment (whether in aid of execution, before judgment or otherwise) or other legal process (whether through service or notice or otherwise), the Republic irrevocably agrees for the benefit of the Holders of Notes not to claim, and irrevocably waives, such immunity, to the fullest extent permitted by the laws of such jurisdiction.").

23. *See* Rep. of Arg. v. Weltover, Inc., 504 U.S. 607, 614–17 (1992) (holding that issuance of bonds is "commercial activity" for which foreign state is not entitled to immunity under Foreign Sovereign Immunities Act). *See generally* 28 U.S.C. § 1605 (2006) (creating subject matter jurisdiction for foreign sovereigns in United States courts under certain enumerated exceptions, including commercial activities with connection to United States).

24. *See* 28 U.S.C. § 1605(a)(1) (allowing United States courts jurisdiction over foreign sovereigns when the sovereign has waived its immunity explicitly or by implication).

25. *Id.* § 1609.

26. *Compare id.* § 1610(a)(1) (property used for commercial activity in United States is not immune if foreign state has waived immunity), *with id.* § 1610(a)(2) (property used for commercial activity in United States is not immune if "*the property is or was used for the commercial activity upon which the claim is based*" (emphasis added)).

27. THE LEBANESE REP., *supra* note 21, at 100 ("The waiver of immunity in this paragraph shall have the fullest scope permitted under the Foreign Sovereign Immunities Act of 1976 of the United States and is intended to be irrevocable for purposes of such Act but shall otherwise constitute a limited and specific waiver for the purpose of the Fiscal Agency Agreement and the Notes and under no circumstances shall it be interpreted as a general waiver by the Republic or a waiver of immunity in respect of property that is used solely or principally for official purposes . . .").

28. *Id.* ("The Republic irrevocably appoints the person who from time to time is the Consul of the Republic in The City of New York as it [sic] agent in the United States to receive service of process in any Related Proceedings in The City of New York based on or in connection with the Fiscal Agency Agreement or any of the Notes.").

29. BUCHHEIT, *supra* note 20, at 137–38.

Thus, the "standard" dispute resolution clause begins with a choice between the law and courts of New York and the law and courts of England. In either case, the clause also contains a package of terms that waive the sovereign's immunity from suit and (in this case) execution and that address practical litigation-related concerns such as service of process. At the same time, the standard clause takes care to ensure that the issuer retains its more expansive sovereign immunity from suit in other contexts and does not face seizure of important public or governmental property.[30]

C. Sovereign Bonds and Theories of Default Rule "Stickiness"

To describe sovereign bond contracts as "standardized" or "boilerplate" is to invoke significant theoretical baggage. Suppose, for example, that participants in sovereign debt markets had reason to favor arbitration over litigation in the event of a default. Shouldn't sovereign bond contracts quickly incorporate such a value-maximizing term? The answer, many would assert, is "No."[31] This answer implicates a body of contract theory exploring the ways in which standardization can deter contract innovation.[32] A number of theoretical approaches predict that parties will be reluctant to depart from default terms.[33] Of these, network theory is the most prominent in the sovereign debt context.[34]

1. Network and Learning Effects and Switching Costs

Why would sophisticated contracting parties agree to a set of standardized terms when they would prefer different ones? One answer is that standardized terms confer value because many have used them in the past ("learning effects"), because many use them now or are likely to do so in the future ("network effects"), and because there are costs associated with producing new terms ("switching costs").[35]

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30. These latter exemptions serve an obvious function: "If a foreign bank were to attempt to levy against the Presidential Palace or the state orphanage, for example, this would almost certainly prompt a phone call to the unfortunate lawyer who negotiated the loan agreement on behalf of the sovereign borrower." *Id.* at 143.

31. *E.g.*, Cross, *supra* note 2, at 374–77 (extending network theory to choice of forum terms in sovereign bonds); Waibel, *supra* note 2, at 732 n.131 (disputing value of arbitration under International Centre for Settlement of Investment Disputes but noting that sovereign bonds "display tremendous inertia against change (for example, to include arbitration clauses)").

32. *See* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 289–305 (1985) (exploring how state provision of default rules may combine with other barriers to impede contract innovation).

33. Ben-Shahar & Pottow, *supra* note 3, at 655–60.

34. *See, e.g.*, Ahdieh, *supra* note 18, at 710–28 (using network theory to explain patterns of stasis and change in sovereign bond contracts); Choi & Gulati, *supra* note 18, at 932 & n.7 (focusing on inclusion of collective action clauses in sovereign bonds governed by New York law, and presenting evidence consistent with network theory); Gelpern & Gulati, *supra* note 5, at 1629 (explaining application of network theory to complex financial contracts, including sovereign bonds).

35. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 719–29 (1997).

For example, by choosing a term that has been widely used in the past, contracting parties may benefit from prior users' experience with the term. Early users of contract terms thus generate positive externalities from which later users benefit.[36] These learning effects may include certainty as to the term's meaning and validity resulting from an established body of precedent.[37] Prior users may have eliminated errors in the term's formulation over multiple drafting iterations.[38] Common terms also may be familiar to important third parties, such as lawyers and investment bankers, who have developed expertise associated with the term.[39] Importantly, where contracts are actively traded, the use of a standard term also may reduce the cost to investors and analysts of pricing the contract.[40]

Similar benefits—termed "network effects"—may accrue to parties who select terms that are commonly used *now*, or that will be commonly used in the future.[41] Thus, as use of a term becomes widespread, judicial interpretation may clarify its meaning, and third parties, including investors, may develop expertise in evaluating the term's significance and pricing implications.[42] These network effects also constitute positive, inter-firm externalities.[43] But unlike learning effects, which flow only from early to later users of a contract term, "[n]etwork externalities run in two directions in the sense that all users benefit from one another's contemporaneous use of the product, regardless of when they started using it."[44]

Finally, an analogous set of *intra*-firm benefits may accrue from the repeated use of a contract term within a single firm.[45] When present, these benefits may result in switching costs that deter the firm from adopting a new term.[46] Parties who adopt nonstandard terms, or who depart from their past practices, may incur error costs. Judges may interpret the new term in unanticipated ways,[47] or the term may fail to address an unforeseen contingency.[48] For actively traded contracts, moreover, investors may have difficulty pricing the nonstandard term or may discount the term to reflect the

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36. *Id.* at 724.

37. *Id.* at 722.

38. *Id.* at 721. *But see* Claire A. Hill, *Why Contracts Are Written in "Legalese,"* 77 CHI.-KENT L. REV. 59, 60, 80–81 (2001) (noting that multiple iterations may fail to correct, or may even worsen, contract defects).

39. Kahan & Klausner, *supra* note 35, at 723.

40. *Id.* at 723–24; *see also* Broad v. Rockwell Int'l Corp., 642 F.2d 929, 943 (5th Cir. 1981) (noting that uniformity of contract terms makes it easier for investors and advisors to compare issues).

41. Kahan & Klausner, *supra* note 35, at 725.

42. *Id.* at 726.

43. *Id.* at 727.

44. *Id.*

45. *Id.* at 727–29.

46. Kahan & Klausner, *supra* note 35, at 727.

47. *See* Goetz & Scott, *supra* note 32, at 283–84 (discussing risk of interpretation error).

48. Kahan & Klausner, *supra* note 35, at 720.

cost of assessing its value.[49] Beyond this, use of a nonstandard term may signal negative information to the market, perhaps an increased likelihood of default in a lending transaction.[50] Thus,

> [s]witching may be costly for a single firm because it takes time and effort to produce a new term that works . . . [and t]here is no guarantee that investors, analysts, and judges will interpret a new term in a way that is favorable to its original proponent or . . . that others will adopt the term in the foreseeable future.[51]

These benefits and costs have implications for the degree of standardization we should expect in contracts. As applied to contracting behavior, network theory posits that learning and network benefits may lead contracts to be more standardized than would otherwise be the case.[52] Parties may forego a value-maximizing term in favor of a "standardized term subject to network externalities."[53] Likewise, switching costs may deter parties from revising existing contracts, either to take advantage of a market "standard" or to choose a nonstandard term that is nevertheless superior to a term in the firm's existing contracts.[54] Put differently: network theory posits that standardization can serve as a barrier to contract innovation and change.[55]

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49. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 785 (1995); *see also* FRANKLIN ALLEN & DOUGLAS GALE, FINANCIAL INNOVATION AND RISK SHARING 122 (1994) ("If a novel security must earn an uncertainty premium, there is an incentive to issue standard securities which do not bear this premium. The private returns from standardization may lead to coordination failure, that is, the market may fail to innovate, or it may coordinate on the 'wrong' security.").

50. Ahdieh, *supra* note 18, at 716–16; Klausner, *supra* note 49, at 785. For a related point, see Ben-Shahar & Pottow, *supra* note 3, at 652.

> [I]n the presence of a familiar and commonly utilized background provision . . . a transactor might fear that proposing an opt-out from the default will dissuade his potential counterparty from entering into the agreement. The fear is that the counterparty will suspect that the proposer's decision to deviate from the norm and use an unfamiliar provision hides some unknown problem.

Id.

51. Gelpern & Gulati, *supra* note 5, at 1629.

52. Kahan & Klausner, *supra* note 35, at 729. Conversely, in some cases contracting parties may have insufficient incentives to adopt terms that will confer network externalities on future users. *Id.* at 730. *But see* Choi & Gulati, *supra* note 18, at 931 n.2 (noting that, to extent sovereign bond contracts are already heavily standardized, this concern is less likely).

53. Choi & Gulati, *supra* note 18, at 930–31.

54. Kahan & Klausner, *supra* note 35, at 727–29.

55. The impact of learning and network effects on contracting behavior has been questioned on theoretical and empirical grounds. *See, e.g.*, Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 569–76, 587 (1998) (expressing skepticism that contract terms generate significant interpretive network effects); Larry E. Ribstein & Bruce H. Kobayashi, *Choice of Form and Network Externalities*, 43 WM. & MARY L. REV. 79, 82, 128 (2001) (concluding, from study of closely held firms' choice between limited liability company and limited liability partnership forms, that characteristics of relevant business form were more significant factors in choice of organizational form than were network externalities). Nevertheless, it is widely assumed that sovereign bond contracts are highly standardized and network theory is commonly invoked in analyses of sovereign bond contracts. *See generally* Choi & Gulati, *supra* note 18 (arguing sovereign

2. Network Theory as Applied to Enforcement-Related Terms

Recently, there has been increased interest in arbitration's potential as a forum for resolving sovereign debt disputes. Some scholars and advocates have argued that issuers, investors, or both would be better off arbitrating sovereign debt disputes, especially before the International Centre for Settlement of Investment Disputes ("ICSID"), than litigating those disputes before New York or English courts.[56] The case for arbitration principally rests on two asserted benefits: neutrality and enforceability.[57] The first benefit rests on the claim that arbitrators—because selected and paid by the disputants—are less susceptible to political and other pressures than are locally elected or politically appointed judges.[58] For this reason, issuers might prefer arbitration to litigation before foreign courts.[59] The second benefit rests on the claim that, in some cases, arbitration awards may be easier to enforce than court judgments.[60] Under the FSIA, for example, a successful arbitration claimant may be able to attach and execute upon a broader range of property within the United States than a successful litigant in court.[61] And even within the sovereign's own borders, a number of multilateral treaties may facilitate the enforcement of arbitration awards.[62]

The belief that arbitration offers these advantages,[63] paired with the assumption that New York- and English-law bonds adopt boilerplate terms

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bond contracts remain standardized due to factors other than preference); Gelpern & Gulati, *supra* note 5 (stating that prevalent explanation for boilerplate is network effects).

56. *See, e.g.*, Cross, *supra* note 2, at 354–65 (arguing that arbitration offers benefits to issuers and creditors); Memorandum from Owen C. Pell to the Global Committee of Argentina Bondholders (Feb. 15, 2005), *available at* http://www.prnewswire.co.uk/cgi/news/release?id=140069 (suggesting that Argentina would voluntarily comply with ICSID awards).

57. See generally Cross, *supra* note 2, for a forceful articulation of arbitration's potential advantages.

58. Cross, *supra* note 2, at 355.

59. *Id.* For a related point about likely state preferences for dependent adjudicators such as arbitrators, see Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 32 (2005).

60. Cross, *supra* note 2, at 356–65; Waibel, *supra* note 2, at 758; Memorandum from Owen C. Pell to the Global Committee of Argentina Bondholders, *supra* note 56.

61. Cross, *supra* note 2, at 358–59; Memorandum from Owen C. Pell to the Global Committee of Argentina Bondholders, *supra* note 56.

62. *See* Cross, *supra* note 2, at 361–62 (noting that one advantage of ICSID arbitration is that ICSID awards are directly enforceable in member states' courts); Waibel, *supra* note 2, at 758 (stating that use of ICSID changes sovereign debt adjudication "from a private, into an international, dispute between states" and that "noncompliance with an ICSID award amounts to an international—and very public—breach"); Memorandum from Owen C. Pell to the Global Committee of Argentina Bondholders, *supra* note 56 (explaining that, while enforcement of U.S. judgments is uncertain in other countries, ICSID judgments are treated as judgments rendered by courts of the enforcing jurisdiction).

63. Not all agree that arbitration of sovereign debt disputes would be a beneficial development. *See* Waibel, *supra* note 2, at 715, 757–58 (objecting that ICSID arbitration could "blow a hole" in sovereign's ability to restructure sovereign debt instruments).

calling for litigation in New York or England,[64] gives rise to a puzzle: Why don't bonds provide for arbitration? Network theory seems to offer a ready answer.[65] Bond contracts governed by New York or English law seek to tap into relatively robust bodies of law regarding the enforceability of sovereign debt obligations and the application of sovereign immunity and other defenses.[66] Widespread use of choice of forum terms calling for litigation in New York or England may have contributed to the development of this law. Likewise, widespread use of New York and English courts may have developed expertise among members of the relevant legal and judicial communities.[67] By adopting the standard choice of forum term, new bonds might access (and continue to generate) these benefits. Similar benefits could be hypothesized for other enforcement-related terms, such as sovereign immunity waivers. For example, bonds that adopt boilerplate language might tap into existing precedent interpreting the waiver, access professional expertise as to the term's meaning and validity, and reduce the cost to market participants of pricing the immunity term.[68]

Parties who select nonstandard dispute resolution terms may forego these benefits and incur a related set of costs. In theory, of course, contracting parties may obtain the benefit of their chosen law in any forum. Arbitrators, for example, will likely honor contract terms instructing them to apply New York law. But judicial review of arbitral awards is generally limited,[69] and arbitrators have a reputation—perhaps undeserved—of basing their decisions on equitable principles.[70] Arbitration may also raise procedural uncertainties, such as whether

64. *See* Cross, *supra* note 2, at 338–41, 340 & n.22 (identifying Brazil and Ukraine—and possibly other non-EU member issuers located in former Eastern bloc—as only nations to include arbitration clauses in sovereign debt contracts); Waibel, *supra* note 2, at 732 n.131 ("[S]overeign bonds are 'conservative' financial instruments whose contractual terms display tremendous inertia against change (for example, to include arbitration clauses)").

65. Cross, *supra* note 2, at 374; Waibel, *supra* note 2, at 732 n.131.

66. *See, e.g.*, BUCHHEIT, *supra* note 20, at 130 (stating New York and London have well-developed law, which results in predictable interpretation of contract terms); Fisch & Gentile, *supra* note 8, at 1075–88, 1097 (discussing developments in sovereign debt litigation and legal doctrine).

67. On the development of law related to sovereign debt obligations, primarily but not exclusively by courts located in New York, see Fisch & Gentile, *supra* note 8, at 1075–88.

68. For example, U.S. law requires separate waivers of the sovereign's immunity from suit and immunity from execution. 28 U.S.C. § 1610(a)(1) (2006); FOX, *supra* note 8, at 146. Selecting New York courts as the situs for litigation would help ensure that an immunity waiver referencing the sovereign "or its assets" would be interpreted to waive immunity from execution. *See, e.g.*, Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 82–83 (2d Cir. 2002) (finding sovereign immunity waived because contract included such language). In truth, however, judicial opinions interpreting contractual waivers of immunity are rare, so it is questionable whether these contract terms generate significant interpretive network effects. Perhaps a better explanation is that the widespread selection of courts in New York and England develops constituencies—such as lawyers and investment bankers—with the power to influence court practices. See *supra* note 20 and accompanying text for a discussion of how cultural and economic factors may influence choice of law provisions.

69. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, *done* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (stating that recognition and enforcement of arbitration award may be refused only under certain enumerated conditions).

70. *E.g.*, Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74

creditors will have recourse to summary enforcement procedures and preliminary measures of relief often available in court.[71] Such uncertainty might impact borrowing costs. Sovereign bonds are actively traded on secondary markets, and investors may demand a premium if they are to hold an unfamiliar security.[72] Moreover, the choice of a nonstandard term may signal adverse information about the issuer's likelihood of default.[73] After all, why tinker with perfectly good enforcement boilerplate unless the issuer or its underwriters are already thinking about default?[74]

Nevertheless, while the foregoing story is plausible, it is no more than that. It is not self-evident that arbitration offers benefits in this context, that sovereign bonds indeed adopt boilerplate enforcement terms, or that any uniformity in contracting practices should be attributed to contract stickiness rather than preference.[75] In any event, the assumptions underlying the network story remain largely untested.[76] Do participants in the sovereign debt markets really have reason to prefer arbitration? If they do, does standardization pose a meaningful barrier to contract change for such a sophisticated set of parties?[77] These questions are complicated by the ambiguity inherent in any given set of contracting practices. A high degree of standardization across sovereign bonds need not imply suboptimal contracting; market participants may simply prefer the standard term.[78] Likewise, variance across bond terms might or might not evidence optimal contracting practices by parties with diverse preferences.[79] To

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TUL. L. REV. 39, 42–46 (1999) (stating that arbitration has traditionally been perceived as "speedy, cheap, and equitable").

71. *See* Cross, *supra* note 2, at 371–74 (discussing uncertainty associated with whether summary procedures and interim relief, both available under New York law, are available in arbitration).

72. Ahdieh, *supra* note 18, at 714; Douglas Gale, *Standard Securities*, *in* FINANCIAL INNOVATION AND RISK SHARING, *supra* note 49, at 309, 309.

73. Klausner, *supra* note 49, at 785.

74. Waibel, *supra* note 2, at 732 n.131 ("[S]overeign bonds with arbitration clauses . . . could implicitly recognize the possibility of eventual default and thereby negatively affect their marketability; the inclusion of arbitration clauses is therefore generally avoided, leaving domestic courts the forum of choice.").

75. *See* Ben-Shahar & Pottow, *supra* note 3, at 655–60 (discussing varied analytical approaches to understanding stickiness of default terms).

76. In Westlaw and LexisNexis searches of the disclosure documents that some sovereign issuers file with the Securities and Exchange Commission, Professor Karen Halverson Cross found that only one of sixteen issuers—Brazil—used arbitration, and also noted the possibility that former Eastern-bloc issuers who are not European Union members (such as Ukraine) might use arbitration. *See* Cross, *supra* note 2, at 339–41 & n.22 (also citing prior study of thirteen issuers that found only Brazil using arbitration).

77. *See, e.g.*, Choi & Gulati, *supra* note 18, at 930 ("The parties involved are among the most sophisticated in the world financial markets.").

78. *Cf.* Ribstein & Kobayashi, *supra* note 55, at 119 (noting, in connection with choice of corporate form, that continued incorporation may evidence that some firms prefer that form).

79. Standardization might "reflect maximization of positive interpretive network effects or . . . suboptimal tipping." Lemley & McGowan, *supra* note 55, at 498. Likewise, variance might "reflect the optimal convergence of heterogeneous firms with heterogeneous governance provisions or . . . opportunity costs of not using a standard term." *Id.*

make sense of the pattern, we need to assess both market participants' likely preferences and whether their contracts appear to conflict with these preferences. Part II of this Article engages these questions, beginning with an assessment of the merits of arbitration as a means of resolving sovereign debt disputes.

II. SOVEREIGN DEBT ARBITRATION: THEORY AND FACT

A. *Arbitration's Uncertain Benefits*

For now, let us assume that the dispute resolution terms in sovereign bond contracts are indeed boilerplate—functionally identical—and that they eschew arbitration for litigation before courts in England or New York. There is nothing intrinsically puzzling about this state of affairs. The parties simply may prefer to resolve their disputes in court, or they may be sufficiently uncertain about the benefits of arbitration that they do not wish to experiment. Indeed, although arbitration clauses may be relatively common in some cross-border transactions,[80] they appear infrequently in commercial lending contracts.[81] The usual explanation for this is that commercial lending contracts involve relatively settled law that is predictably applied by creditor-friendly courts, often through summary procedures (unavailable in arbitration) that reduce enforcement costs.[82] Add to this the fact that sovereign debt litigation involves vast sums of money, and it is perhaps to be expected that market participants will opt for the full procedural rights and appellate review available in court.[83]

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80. Stephen R. Bond, *Commentary*, *in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 57, 59 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (reporting that fifteen of seventeen (roughly eighty-eight percent) of international joint venture agreements studied included an arbitration clause).

81. *See, e.g.*, Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 350, 351 tbl.2 (2007) (finding low incidence of arbitration clauses in variety of commercial contracts filed with Securities and Exchange Commission, including lending contracts); William W. Park, *Arbitration in Banking and Finance*, 17 ANN. REV. BANKING L. 213, 215–16 (1998) (discussing low incidence of arbitration in lending contracts and citing, as one reason, that "default usually results from simple inability or unwillingness to pay, rather than any honest divergence in the interpretation of complex or ambiguous contract terms"). Arbitration clauses may be more common in consumer financial transactions. *See* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62, 63 tbl.2 (2004) (finding arbitration clauses in eighteen of twenty-six (roughly sixty-nine percent) consumer financial contracts). Unlike most commercial lending arrangements, these are contracts in which the lender expects to engage in a high volume of routine collections activity and also incurs the risk of becoming a class action defendant.

82. *See, e.g.*, Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 231 (2000) (noting that courts have experience with (typically unambiguous) loan contracts and that arbitration may lessen deterrence benefits of litigation); Park, *supra* note 81, at 215–16 (stating financial institutions may find going to court easier than arbitration, particularly given "benefit of summary procedures for the enforcement of promissory notes and other commercial paper obligations").

83. In similar fashion, parties are thought to avoid arbitration in "bet the company" cases, "in

As noted previously, however, some have argued that issuers and bondholders should prefer arbitration to litigation in New York or England. For issuers, the advantage is the perceived neutrality of arbitration relative to the judges in these jurisdictions.[84] For bondholders, the perceived advantage stems from the fact that arbitration awards may in some circumstances be easier to enforce than court judgments.[85] Either of these benefits might induce parties to include arbitration clauses in sovereign bond contracts.[86] For example, if arbitration awards were easier to enforce, even issuers that would prefer to litigate might accept arbitration if doing so reduced borrowing costs. This scenario would be most likely if bondholders believed that arbitration facilitated the orderly collection of defaulted debt and thus increased the cost of default to the issuer. Alternatively, even if bondholders believed arbitration to be an inferior enforcement forum—say because arbitrators are more likely to accept the sovereign's arguments in default-related disputes—they might accept arbitration in exchange for higher returns. This latter scenario seems unlikely, as I presume that most issuers prefer to minimize borrowing costs.[87] Nevertheless, the following discussion evaluates both the "neutrality" and "ease of enforcement" benefits claimed for arbitration.

I do not argue that arbitration is an inappropriate forum for resolving sovereign debt disputes or deny that some market participants might have reason to prefer it to litigation in New York or England.[88] But I do claim that its benefits are quite speculative and likely to be modest if they do exist. Thus, few participants in the sovereign debt markets are likely to prefer arbitration, and

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which an erroneous outcome could jeopardize the continued existence of the company." Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 79 (2008); *see also* ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 603 (4th ed. 2006) ("[A] party for whom the stakes and risk of loss are high may for that reason become less interested in 'informality' – and more reluctant to chance a decision without having taken every possible advantage of the full panoply of legal procedures" available in court.).

84. Both scholars and advocates have made this case. Professor Karen Halverson Cross has made the most thorough and forceful articulation of arbitration's potential benefits. Cross, *supra* note 2, at 354–65. For an argument that holders of defaulted Argentine bonds should invoke ICSID arbitration pursuant to arbitration provisions in bilateral investment treaties between Argentina and other countries, see Memorandum from Owen C. Pell to the Global Committee of Argentina Bondholders, *supra* note 56.

85. Cross, *supra* note 2, at 356–65; Memorandum from Owen C. Pell to the Global Committee of Argentina Bondholders, *supra* note 56; *see also* Park, *supra* note 11, at 217–20 (discussing potential enforcement advantages of arbitration).

86. For a model of the choice between arbitration and litigation, see Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 531–32 (2005). Drahozal explains that parties will choose arbitration if the marginal benefit of arbitration exceeds its marginal cost and, in cases where arbitration benefits only one party, that party makes a transfer payment to induce the other party's assent. *Id.*

87. The widespread use of choice of forum terms calling for litigation in New York or England is consistent with this assumption. Issuers could, of course, attempt to negotiate more favorable choice of forum terms, and at least some do. See *infra* notes 148–49 and accompanying text for examples of issuers who have adopted more favorable choice of forum terms than what is standard.

88. *See generally* Park, *supra* note 11 (providing additional analysis of arbitration's role in cross-border lending transactions).

fewer still are likely to prefer it strongly enough to expend negotiating capital in pursuit of an arbitration clause.[89]

1. The Questionable Case for Neutrality

Consider first the notion that arbitrators are "neutral"—free of political and other bias[90]—and therefore should be more agreeable to sovereign borrowers. This notion runs counter to a great deal of historical skepticism about arbitration among developing nations in particular.[91] The "neutrality" argument, however, suggests that this skepticism may be misplaced. Yet the term "neutrality" is worth unpacking, because it is potentially misleading in the context of arbitration.

Begin by distinguishing two separate concepts related to "neutrality": the concept of *competitive constraint* and the concept of *bias*. Arbitrators are *competitively constrained* because they must be selected by both parties, typically after a dispute arises, from a pool of competing arbitrators. This means that if sovereign borrowers and their creditors have sufficient access to information about arbitrators' prior awards—a debatable assumption in many contexts, but not unreasonable here—each will prefer to avoid arbitrators whose awards are unfavorable relative to those of others in the pool.[92] In such a case, we might characterize the awards of successful arbitrators as statistically exchangeable: "[T]he strategy of a successful (i.e., enduring) arbitrator is to provide decisions that are forecasts of the decisions *other* arbitrators will make in similar situations."[93] The point is straightforward: arbitrators will not get much business if their rulings predictably depart from what their competitors would do in

89. *See* Lemley & McGowan, *supra* note 55, at 588 (making a similar point with regard to financial contracts generally).

90. Cross, *supra* note 2, at 355.

91. See *infra* notes 100, 104–05 and accompanying text for a discussion of skepticism regarding neutrality of arbitrators.

92. At present, because of the relatively small number of investment treaty arbitrations, especially in the context of sovereign debt instruments, there will be relatively few prior awards to consider. This may increase the uncertainty inherent in the process of arbitrator selection. Over time this would change, but in the short term parties (perhaps especially creditors) may prefer a forum they perceive to offer more certainty.

93. Orley Ashenfelter, *Arbitration and the Negotiation Process*, 77 AM. ECON. REV. 342, 343 (1987).

similar cases.[94] This notion of competitive constraint is a component of arbitrator "neutrality."[95]

Importantly, the fact that arbitrators are subject to competitive constraint does not mean that they are *unbiased*. Nothing prevents the parties from agreeing to arbitrate before a pool of arbitrators whose awards tend towards bias in one party's favor. To see the point, consider the familiar example of a contract between a business and a consumer—say, a ticket for a cruise in the Pacific—which includes a choice of forum clause selecting Florida state courts.[96] Assume that Florida state judges are generally sympathetic to the cruise industry. In a sense, the forum is "biased" against consumers; certainly it is less favorable than alternatives.[97] The bias would not disappear if Florida procedural rules allowed litigants to strike unfavorable judges. No doubt the parties would steer clear of the most (and least) biased judges, but that would not ensure "neutrality."

The process of arbitrator selection involves a similar dynamic, most obviously when the parties choose the arbitrator or arbitrators from a list provided by an administering institution, such as the American Arbitration Association, designated in the contract. In this "list" process, the parties strike unfavorable arbitrators from the list, rank the rest according to preference, and the administering institution appoints the most highly ranked arbitrator or arbitrators acceptable to both parties.[98] This process allows each party to eliminate unfavorable arbitrators but not to ensure the appointment of any one in particular. And, of course, their choices are constrained by the arbitrators on the roster maintained by the administering institution. In international disputes featuring three-arbitrator panels, it is more common for each party to appoint an arbitrator and for the two party-appointed arbitrators, or some neutral appointing authority, to appoint the third.[99] Nevertheless, the choice of

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94. This is not to say that such distributional concerns are the only considerations that shape arbitrator selection decisions. For example, considerations often grouped loosely under the heading of procedural justice—perceptions that the process is fair and that participants are treated with respect, and other process and interactional concerns—may also shape the parties' choices. *See generally* Richard A. Posthuma et al., *Arbitrator Acceptability: Does Justice Matter?*, 39 INDUS. REL. 313 (2000); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution*, 10 PSYCHOL. PUB. POL'Y & L. 211 (2004).

95. Cross, *supra* note 2, at 370 (stating that arbitrators have incentives to render decisions that are "responsive to the interests of the parties" because their "reputation and prospects for future work hinge on their satisfaction").

96. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 587–88 (1991).

97. Consumers might have to pay a higher price for these alternatives. This point emphasizes that dispute resolution terms impact the overall allocation of risks and rewards in the transaction. Choice of a borrower-friendly forum may prompt the lender to demand concessions elsewhere in the agreement. In the sovereign debt context, if arbitrators are less "biased"—i.e., more likely to accept the sovereign issuer's arguments in default-related litigation—bondholders might demand higher returns if they perceive this to increase the risk of default.

98. *See, e.g.*, United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, G.A. Res. 31/98, art. 6 (Apr. 28, 1976) (establishing default appointment process for single-arbitrator cases); COMMERCIAL ARBITRATION RULES R-11 (Am. Arbitration Ass'n 2009) (establishing process for selection of arbitrators after parties have conferred).

99. *E.g.*, UNCITRAL Arbitration Rules, *supra* note 98, art. 7. This is the default method for

arbitrator, and especially the choice of the third, "presiding" arbitrator, remains effectively constrained by the pool of arbitrators deemed suitable for international arbitration, and this is an elite group hailing primarily, though not exclusively, from Western countries.[100]

What does this mean for sovereign debt arbitration? Arbitrators may be "neutral" in the sense of being *competitively constrained*. Thus, in addition to appointing one of the three arbitrators, each party can be reasonably assured that the third, presiding arbitrator will not fall too far outside the mainstream.[101] Sovereign issuers, therefore, may well prefer this aspect of arbitration to the "standard" dispute resolution provision calling for litigation in New York or England; at least in arbitration they can participate in selecting the decision maker.[102] But this does not necessarily mean that the overall pool of arbitrators will be unbiased, or that arbitrators will produce substantially "better" results, from the perspective of sovereign borrowers, than the judges who preside over these national courts.

I do not assert that arbitration—before ICSID panels or otherwise—is in fact biased in favor of foreign investors.[103] But it is clear that many governments

appointing arbitrators under ICSID. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 37(2)(b), *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 160; ICSID, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Rule 3 (Apr. 10, 2006), *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (follow "English PDF" hyperlink).

100. *See, e.g.*, YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 93–97 (1996) (discussing development and limits of market in "third-world legal expertise" and noting that arbitrators from third-world countries are rarely appointed president of arbitral tribunal); John Beechey, *International Commercial Arbitration: A Process Under Review and Change*, DISP. RESOL. J., Aug.–Oct. 2000, at 32, 33 (finding many arbitrator appointments continue to come from small group of English-speaking lawyers from Western countries with known track record); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 78–79 (2007) (reporting that seventy-five percent of arbitrators in her sample came from Organisation for Economic Co-Operation and Development countries); Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 965–70 (2005) (discussing developments in market for international arbitrator services, including likelihood that arbitrators will favor appointment of other "members" of the "club").

101. As noted in the text, it is common in international arbitrations for each party to appoint an arbitrator of its choosing, and neither can block the other's appointment except in unusual cases. Nevertheless, the parties do have some control over the selection of the presiding arbitrator. If the presiding arbitrator is to be selected by agreement, each party may control the selection directly by rejecting arbitrators it deems unacceptable. If the presiding arbitrator is to be selected by the party-appointed arbitrators or by some neutral appointing authority, the parties influence the selection less directly. Yet few party-appointed arbitrators or appointing institutions will knowingly appoint as president an arbitrator whose past decisions can be viewed as aberrant.

102. In this sense, the likely issuer preference for arbitration invokes the distinction between independent and dependent international tribunals, with the former characterized by greater institutional separation from the state parties involved. *See* Posner & Yoo, *supra* note 59, at 7–8 (noting that conventional wisdom favors independence for international tribunals). There is some theoretical and empirical support for the view that dependent tribunals, over which state parties have greater control, are more successful. *Id.*

103. One study reveals no obvious pro-investor bias at ICSID, although the study does not

and advocacy groups *claim* that it is biased.[104] To an extent, these claims may simply be an effort to exert leverage and to shape arbitrators' behavior, but they also reflect skepticism about investment arbitration among developing countries in particular.[105] And, as the foregoing discussion suggests, this skepticism is not inconsistent with the fact that arbitrators operate in a competitive marketplace, nor with the fact that arbitrators are less susceptible to political pressures than judges. Indeed, the fact that competitive constraint does not ensure lack of bias can be demonstrated empirically, even in arbitration systems created by parties with relatively equal negotiating leverage and information. For example, there is some evidence of pro-team bias in Major League Baseball arbitration, a system populated by sophisticated and well-informed repeat players.[106] Thus, it is at least open to question whether sovereign borrowers, especially emerging market countries, should strongly prefer existing arbitration systems even to courts in New York and London.[107]

Another facet of arbitration bears mention: It is financed by the parties themselves. National courts are heavily subsidized by taxpayers, but arbitration tribunals must be paid by the parties, and these costs may be shifted to the losing party. There is no reliable evidence of the costs of ICSID arbitration, but the costs may be substantial. One study found that tribunal costs alone (primarily

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permit any assessment of the merits of the claims adjudicated or any comparison to the results that might be expected in litigation. Franck, *supra* note 100, at 83–85.

104. *E.g.*, Beechey, *supra* note 100, at 32, 33 (noting skepticism among developing nations about international arbitration); Letter from Food & Water Watch, USA et al., to Ana Palacio, Sec'y Gen. of ICSID (June 21, 2007), *available at* http://www.foodandwaterwatch.org/water/world-water/right/icsid-letter (stating, in letter sent on behalf of 134 organizations supporting Bolivia's decision to withdraw from ICSID, "ICSID represents the inequities of an international system biased against the developing countries"); Emad Mekay, *Bias Seen in Int'l Dispute Arbiters*, INTER PRESS SERV., June 19, 2004, http://www.ipsnews.net/news.asp?idnews=38229 (noting that while most ICSID cases are against developing nations, most arbitrators "hail from industrialized countries").

105. For an overview of historic (but diminished) skepticism about arbitration, see generally Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000). *See also* Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 356–60 (2007) (exploring reasons for state resistance to international investment arbitration).

106. *See generally* John D. Burger & Stephen J.K. Walters, *Arbitrator Bias and Self-Interest: Lessons from the Baseball Labor Market*, 26 J. LAB. RES. 267 (2005).

107. It bears repeating that if arbitrators are more likely to produce "issuer-friendly" decisions, bondholders might demand a premium for holding bonds that introduced such uncertainty into enforcement proceedings. See *supra* notes 84–87 and accompanying text for a discussion of related costs and benefits. None of the arguments for the use of sovereign debt arbitration, however, suggest that issuers would be willing to make such a transfer payment. Thus, another component of the arbitrator "neutrality" argument suggests that issuers might find it "less of an intrusion on [their] sovereignty" to submit a dispute to an independent arbitrator than to submit to the jurisdiction of courts in New York or England. Cross, *supra* note 2, at 355. Some issuers indeed may perceive arbitration to offer this benefit. *Cf.* Harvey D. Shapiro, *The Sovereign Borrowing Battle: Who Has Jurisdiction if a Government Is Sued?*, INSTITUTIONAL INVESTOR, Apr. 1977, at 56 (discussing borrowers' resistance to foreign court jurisdiction). But it is hardly clear that this will be a common perception. Nor is it clear that issuers would value this benefit so highly that they would accept higher disputing costs or higher borrowing costs to obtain it.

arbitrator fees) averaged almost $600,000 per ICSID case and that governments paid slightly over half that amount.[108] These figures do not include legal fees and other litigation costs, which may dwarf costs associated with the tribunal itself.[109] To be sure, these costs may be modest compared to the aggregate claims asserted against defaulting issuers. But they are not trivial.[110] Indeed, it is entirely possible that aggregate disputing costs would be substantially greater in arbitration. If that is so, we should not be surprised if sovereign borrowers and their creditors prefer to have taxpayers subsidize their disputes.

2. Are Arbitration Awards Easier to Enforce?

Despite these concerns, issuers might consent to arbitration if doing so reduced borrowing costs. If arbitration facilitated the collection of defaulted debt, bondholders might prefer it to litigation and accept lower returns from bonds that included arbitration clauses.[111] Indeed, an issuer might agree to arbitration to signal its low likelihood of default. But there are reasons to doubt arbitration's enforcement benefits. One such reason is the possibility that arbitrators will less rigorously enforce loan obligations, thus reducing the deterrent effect of enforcement proceedings.[112] This possibility is often invoked to explain why commercial loan agreements rarely include arbitration clauses.[113] This section offers two additional reasons for doubting arbitration's enforcement benefits in the sovereign debt context. First, it is unlikely that the incremental international pressure associated with unpaid arbitration awards would prompt voluntary payment. Second, bond contracts that provide for litigation may obtain some of the enforcement benefits claimed for arbitration by including broad waivers of sovereign immunity. Such a practice would capture some of arbitration's potential benefits without incurring any of the associated costs and uncertainty.

Begin with the prospect of voluntary payment. Creditors historically have had little ability to enforce sovereign debt obligations in the issuer's courts, and sovereign borrowers may not keep substantial assets in jurisdictions with relaxed approaches to sovereign immunity.[114] Thus, the coercive mechanisms available to secure payment when corporate borrowers fail to pay are of limited use in the sovereign debt context. But perhaps arbitration awards are more likely than

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108. *See* Franck, *supra* note 100, at 68–69 (reporting results from only seventeen cases).

109. In addition to the parties' own litigation costs, the tribunal may require the losing party to pay some or all of the other party's litigation costs. *See id.* at 69–70 (reporting results from small subsample of ICSID awards and noting that, in five cost-shifting cases in which award contained relevant information, sovereign contributed average of $927,635 to investor's legal costs).

110. The costs cited above are *per-dispute* costs, not an estimate of the total cost of resolving all claims arising out of a default.

111. If arbitration is *inferior* from an enforcement perspective, bondholders would presumably view arbitration clauses negatively and perhaps demand higher returns for holding such securities.

112. Hylton, *supra* note 82, at 231.

113. See *supra* notes 81–82 and accompanying text for a discussion of the infrequency with which commercial lending contracts include arbitration clauses.

114. Bratton & Gulati, *supra* note 10, at 11–13.

court judgments to induce voluntary payment. Unlike failure to pay a court judgment, failure to pay an award issued by an ICSID tribunal violates an international treaty.[115] Moreover, the World Bank, with which ICSID is closely associated, would prefer not to see ICSID awards routinely go unpaid and might pressure sovereigns to pay awards, perhaps threatening to deny future lending.[116] These additional pressures might lead to voluntary payment.[117]

While not completely implausible, this suggestion is hardly self-evident.[118] It seems equally if not more likely that any additional pressure associated with an ICSID award would be of modest significance. "Unlike corporate borrowers, sovereigns do not necessarily default because they cannot pay."[119] Default may already impose significant costs on the issuer, generating international pressure and limiting its future access to credit markets.[120] Nevertheless, the issuer may default if these costs are outweighed by the political and economic costs of servicing its existing (largely foreign-owned) debt.[121] Whatever the reason, default is typically followed by efforts to restructure the outstanding debt, efforts whose success depends at least in part on obtaining bondholders' consent to the restructuring.[122] Thus, the issuer will presumably be disinclined to pay awards voluntarily, lest it encourage creditors to hold out and potentially disrupt its restructuring efforts. In this context, it seems unlikely that any *incremental* cost of international pressure due to unpaid arbitration awards (over and above the cost to the issuer of ignoring court judgments) will induce payment. Such cases might exist, but it is hard to believe they will be common.

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115. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 99, art. 53; CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1088–90 (2001).

116. Cross, *supra* note 2, at 363.

117. *Id.* at 362–63; *see also* Memorandum from Owen C. Pell to the Global Committee of Argentina Bondholders, *supra* note 56 (stating experience shows that nations pay ICSID awards). There is some, albeit mixed, empirical evidence suggesting higher rates of state compliance with the judgments of "dependent" tribunals like arbitration. *See* Posner & Yoo, *supra* note 59, at 38, 48 (finding increased compliance in cases where jurisdiction of International Court of Justice is more closely tied to party consent; also finding roughly equivalent compliance with GATT and WTO adjudication mechanisms). For a discussion of problems in measuring compliance rates, see *id.* at 28.

118. Although there is a high reported rate of compliance with ICSID awards, Peter Griffin & Ania Farren, *How ICSID Can Protect Sovereign Bondholders*, INT'L FIN. L. REV., Sept. 2005, at 21, 24, the awards issued to date tend to involve amounts that may pale in comparison to the stakes of sovereign debt litigation, Franck, *supra* note 100, at 55–64.

119. Bratton & Gulati, *supra* note 10, at 12.

120. Jonathan Eaton & Raquel Fernandez, *Sovereign Debt* 8–16 (Nat'l Bureau of Econ. Research, Working Paper No. 5131, May 1995).

121. Bratton & Gulati, *supra* note 10, at 12; *see also* Gelpern & Gulati, *supra* note 5, at 1632–38 (discussing growth of domestic debt in emerging markets). Not all defaults are strategic in this sense. Default may be essentially involuntary in cases of significant economic distress or illiquidity. Yet for these involuntary defaults, it seems doubtful that increased international pressure will lead to substantial rates of voluntary payment. Presumably, the debtor is willing to pay, but financial exigency limits its ability to do so.

122. *See* Bratton & Gulati, *supra* note 10, at 18–23 (discussing sovereign debt restructuring and need for creditor consent).

Nor is it obvious that arbitration awards, even those issued by ICSID panels, facilitate coercive debt collection. To be sure, under U.S. law foreign states enjoy a more limited immunity from attachment and execution for judgments based on arbitral awards.[123] This is because the FSIA permits successful arbitration claimants to execute upon property of a foreign state "used for a commercial activity in the United States."[124] Successful court litigants, by contrast, may execute upon such property only if the property *also* "is or was used for the commercial activity upon which the claim is based."[125] But this benefit is largely illusory, for U.S. law also permits contractual waivers of sovereign immunity.[126] Thus, the issuer can confer this enforcement benefit simply by agreeing to waive its immunity from execution. As it turns out, the substantial majority of bond contracts in my sample contain such a waiver.[127]

The foregoing discussion has not exhausted arbitration's potential enforcement advantages. International treaties, including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, require contracting states to enforce arbitral awards with limited or no review of the merits of the arbitration panel's decision.[128] Few such treaties require recognition and enforcement of foreign court judgments.[129] So it is conceivable that arbitration awards might be easier to enforce than court judgments in the issuer's own courts.[130] Yet in the context of default on hundreds of millions or billions of dollars of national debt, it is unclear why these treaties would make much difference. Perhaps the most fundamental problem is that the issuer's courts will lack the willingness or political capital necessary to induce the unwilling sovereign to pay. Court judgments are not self-executing, so these courts can not compel payment even if they wished to do so. And while issuers may incur reputational costs by ignoring judgments rendered by their own courts, these

123. *Compare* Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1610(a)(2) (2006) (no sovereign immunity from execution for property of foreign state used for commercial activity in United States "*if . . . the property is or was used [in connection with] . . . the commercial activity upon which the claim is based*" (emphasis added)), *with id.* § 1610(a)(6) (no sovereign immunity from execution for property of foreign state used for commercial activity in United States if judgment "is based on an order confirming an arbitral award").

124. 28 U.S.C. § 1610(a)(6).

125. *Id.* § 1610(a)(2).

126. *Id.* § 1610(a)(1).

127. See *infra* notes 190–202 and accompanying text for a discussion of bond contracts containing a waiver of immunity.

128. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 69, art. IV. For discussion of this treaty, which is often referred to as the New York Convention, and other relevant treaties, see Park, *supra* note 81, at 219.

129. *See* Park, *supra* note 81, at 218 (noting some countries may enforce foreign judgments out of desire for "comity," but "not all legal systems will be so generous" (citations omitted)).

130. Because most of the issuer's assets will be located within its jurisdiction, bondholders may need to seek enforcement through these courts. *See* Bratton & Gulati, *supra* note 10, at 11 (stating "sovereign obligations cannot be directly enforced in the sovereign obligator's own courts" and that defaulting sovereigns rarely leave assets in countries with lowered sovereign immunity barriers).

costs may not be very high.[131] This fundamental dynamic persists even when the issuer's courts have the authority or duty to enforce an arbitration award.[132] And even if other jurisdictions exist in which foreign arbitration awards are enforceable, but foreign court judgments are not, these jurisdictions do not matter unless the issuer keeps substantial assets in them and the assets are subject to execution under the enforcing jurisdiction's law.[133]

None of this is to say that arbitration, before ICSID or any other international arbitration tribunal, is inherently inferior for resolving sovereign debt disputes. But its advantages are unclear, to say the least. Perhaps the most we can say is that there is no justifiable consensus as to the best forum for resolving sovereign debt disputes.[134] Indeed, it may be that market actors have given little thought to the question. Some evidence of this comes from the behavior of public sector officials, who have devoted substantial attention to identifying optimal contract terms for sovereign borrowing but have largely ignored questions about the proper disputing forum.[135] The important point, however, is that arbitration's benefits are not so apparent that many participants in the sovereign debt markets are likely to favor it. And given the rather speculative benefits arbitration offers, certainly they are not likely to have strong preferences.

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131. *See* Eric A. Posner, Book Review, 101 AM. J. INT'L L. 509, 511 (2007) (reviewing ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006)) (noting potentially limited reputational costs of ignoring national court judgments).

132. *Cf.* Cross, *supra* note 2, at 361 (acknowledging that this enforcement benefit may be only "theoretical").

133. There are currently 143 ICSID Contracting States, each of which is obliged to "recognize an award . . . as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 99, art. 54(1). But ICSID does not displace background law conferring immunity from execution on the sovereign's assets. *See id.* art. 55 (specifying that "Article 54 shall not be construed as derogating from the law in force . . . relating to immunity"). Thus, even "a final judgment of a court" in a jurisdiction in which the issuer keeps substantial assets may be effectively unenforceable. Broad immunity waivers do not necessarily solve this problem (even in jurisdictions that recognize them), because many sovereign assets will be exempt from execution notwithstanding the waiver. See *infra* notes 196–99 and accompanying text for a discussion of the effects of immunity waivers.

134. So much is clear from extant debates over the merits of U.S. class action practice. *Compare* Whitney Debevoise & David Orta, *The Class Action Threat to Sovereign Workouts*, INT'L FIN. L. REV., July 2003, at 41, 44 (rejecting efficacy of class actions as response to sovereign debt in favor of negotiated restructuring), *with* David Skeel, *Why the Class Action Strategy Is Worth a Second Look*, INT'L FIN. L. REV., Sept. 2003, at 23, 24 (arguing that, under current conditions, "there may be a role for the class action mechanism to play").

135. *E.g.*, GROUP OF TEN, REPORT OF THE G-10 WORKING GROUP ON CONTRACTUAL CLAUSES 2–5 (2002), *available at* http://www.bis.org/publ/gten08.pdf (proposing model contract terms for appointment of trustee or bondholder representative, majority action clauses, majority enforcement and acceleration clauses, etc., without addressing disputing forum); *see also* Ahdieh, *supra* note 18, at 736–40 (discussing role of regulatory cues provided by public actors in spurring innovation).

B. Evaluating Enforcement-Related Contracting Practices

The discussion thus far has taken for granted that sovereign bonds indeed adopt boilerplate terms calling for litigation in New York or London, arguing that there is no need to invoke network theory, or any other theory of contract "stickiness," to explain such a pattern. To the contrary, there is no reason to presume that issuers or bondholders would be significantly better off choosing arbitration. This section turns to the contracts themselves, asking whether the assumption of standardization matches the empirical reality.

1. Description of the Contracts

There is little empirical evidence on the use of arbitration in sovereign debt contracts, and even less that would help explain why parties choose particular enforcement-related terms. In a search of disclosure documents filed with the Securities and Exchange Commission ("SEC"), Professor Karen Halverson Cross found that only Brazilian bonds provided for arbitration.[136] SEC filings, however, cover only a portion of the sovereign debt market. In an effort to develop a more robust picture of actual contracting practices, I randomly selected and coded disclosure documents—offering circulars in the private offering context, and prospectuses and prospectus supplements in the registered offering context—gathered both from SEC filings and from the Thomson Financial database.[137] These disclosure documents contain detailed descriptions of the terms of the underlying bond contracts.[138]

The dataset includes a total of 111 bond issuances between 1991 and 2008. Most (96 out of 111) were issued between 1999 and 2007. New York or English law governs 105 of the issuances. Because these two "standards" are of primary interest, I have excluded the remaining six from the tables and figures reported below.[139] As Table 1 indicates, the resulting dataset includes 46 English-law bonds, all of which are private issuances, and 59 New York-law bonds, of which 31 (52.5%) are private issuances and 28 (47.5%) are registered offerings.

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136. Cross, *supra* note 2, at 340. Professor Cross also noted that some issuers located in the former Eastern bloc were reputed to offer arbitration as an alternative to litigation. *Id.* at 340 & n.22 (citing Ukraine as example).

137. I thank Mitu Gulati for providing me with access to many of these disclosure documents.

138. Sovereign bond documentation includes a contract between the issuer and its investment bankers, a disclosure statement, and contracts, "including the debt instrument itself, that govern the relationship between the sovereign debtor and its bondholders." Gelpern & Gulati, *supra* note 5, at 1636. The issuer, its investment bankers, and their respective lawyers negotiate the "key contracts." *Id.* at 1637. Investors generally review only the disclosure statement, which describes key bond terms in detail. *See id.* at 1637 n.43 (stating that, of the investors they interviewed, none reported reading contract). For a general discussion of U.S. disclosure rules in the sovereign borrowing context, see generally Lee C. Buchheit, *The Schedule B Alternative*, INT'L FIN. L. REV., July 1992, at 6, 6; Stephen J. Choi & G. Mitu Gulati, *An Empirical Study of Securities Disclosure Practices*, 80 TUL. L. REV. 1023, 1034–43 (2005–2006).

139. These include two Canadian-law issuances by the Province of Manitoba, issuances governed by French law by Morocco and Portugal, and German-law issuances by Argentina and Venezuela.

Table 1. New York- and English-law bonds, by manner of issuance

		Registered/Private		
		Private	**Registered**	**Total**
Governing Law	**English**	46	0	46
	New York	31	28	59
	Total	77	28	105

I coded each issuance for a variety of enforcement-related terms, including approaches to sovereign immunity, choice of forum, use of arbitration, and governing law. The resulting dataset offers the most comprehensive empirical picture currently available of enforcement-related contracting practices in sovereign debt transactions. SEC disclosures, for example, cover only bonds publicly issued in U.S. markets, while this dataset allows an evaluation of contracting practices in both public and private markets and with respect to bonds governed by both New York and English law. Furthermore, the sample includes at least one issuance from virtually every major issuer of New York or English law bonds over a period of nearly twenty years.

As I have mentioned, actual contracting practices are difficult to interpret.[140] Assume, for example, that sovereign bonds uniformly eschew arbitration for litigation. It may be impossible to identify the precise extent to which such uniformity reflects the stickiness of the litigation default term, as opposed to a widespread preference for litigation or some other cause.[141] In evaluating the data, however, I was particularly interested in contracting practices that seemed inconsistent with any strong version of the stickiness story. For example, variance in how different issuers structure the dispute resolution process suggests that it may be easy to overstate the benefits that accrue from widespread use of a particular dispute resolution term. In addition, a particular kind of *uniformity*—widespread use of contract terms waiving the issuer's immunity from execution—would suggest an alternative explanation: Bonds that include such clauses provide one of the primary enforcement benefits claimed for arbitration[142] without incurring any of the associated risks.[143]

I report several principal findings:

- First, across different issuers, bond contracts are not as standardized

140. See *supra* notes 75–79 and accompanying text for a discussion of the difficulty in interpreting actual contracting practices.

141. *Cf.* Ribstein & Kobayashi, *supra* note 55, at 119 ("If the corporate form is advantageous for some firms, the fact that firms are continuing to incorporate fails to indicate the presence of network externalities.").

142. See *supra* notes 123–27 and accompanying text for a discussion of the enforcement benefits of arbitration in light of bonds waiving the issuer's immunity. *See* Cross, *supra* note 2, at 359 (noting that immunity waivers may convey similar enforcement benefits but that not all sovereigns might agree to such waiver).

143. See *supra* notes 80–135 and accompanying text for a discussion of the absence of associated risks for bonds with immunity waivers.

as is often supposed. With respect to choice of forum terms, this variance includes, but is not limited to, a small minority of issuers whose bonds permit investors to arbitrate.

- Second, issuers that agree to arbitration appear to have varied reasons for doing so. Some are barred by domestic law from submitting to the jurisdiction of foreign courts. Others include arbitration in a menu of disputing forums available at the investor's election. In most cases, however, the use of arbitration arguably is driven by doubt as to the availability or efficacy of litigation in foreign courts.
- Third, similarly situated issuers sometimes make different contracting choices. For example, arbitration clauses are common but not standard in bonds issued by former Soviet republics that are relatively new entrants to the sovereign debt markets.
- Fourth, there is additional variance in sovereign immunity terms. But a sizeable majority of the issuers (around eighty-five percent) broadly waive their sovereign immunity from execution. The widespread use of such immunity terms weakens the case for arbitration's superior enforceability.
- Finally, issuers with established dispute resolution terms rarely change their contracting practices. Thus, despite the variance *across* issuers, there is limited *within-issuer* variance.

The following sections discuss these findings. Part III discusses their implications for sovereign debt arbitration and for research into contract innovation and change.

2. Variance Across Issuers: Choice of Forum and Arbitration

Unless otherwise noted, I report enforcement-related contracting practices by issuer, reporting separate results for bonds issued under New York and English law. That is, the figures reported below do not include multiple, same-law bond issuances by the same issuer.[144] However, in the few cases where I have both New York- and English-law bonds by a particular issuer, I report separate results for both sets of bonds.[145] Beginning with choice of forum terms, the disclosure documents reveal a perhaps surprising diversity of approaches. As Table 2 indicates, most issuers submit to the jurisdiction of a single external forum—courts in England (for English-law bonds) or New York (for New York-law bonds)—and thus conform to one of the two perceived choice of forum

144. As I discuss below, see *infra* notes 204–06 and accompanying text, it appears that issuers rarely change established contracting practices. Thus, excluding multiple issuances by the same issuer avoids some double-counting without reducing the apparent diversity of contracting practices.

145. Only Poland, Kazakhstan, and the Philippines fall into this category. I report separate results for the New York- and English-law bonds of these issuers because bonds are generally considered to be standardized within (but not necessarily across) these two markets. *See* Ahdieh, *supra* note 18, at 726 (noting New York and English debt markets are internally standardized but distinct from each other).

standards.[146] But even a cursory glance at Table 2 reveals that the choice of forum "standard" is not so standard after all. Indeed, over 20% of the issuers depart in some way from the standard.[147]

Table 2. Summary of choice of forum terms

Choice of forum		Issuers		
		N	% of Total	Cumulative %
No external forum	**No submission to jurisdiction**	1	1.4%	1.4%
	Domestic courts only	2	2.8%	4.2%
External forum	**Arbitration only**	2	2.8%	6.9%
	Arbitration + foreign courts	5	6.9%	13.9%
	Multiple foreign courts	5	6.9%	20.8%
	One foreign court	57	79.2%	100.0%
		72		

One issuer (Russia) does not submit to any jurisdiction, even that of its own courts.[148] Two others (Australia and the Province of Nova Scotia) do not submit to the jurisdiction of any foreign court or tribunal but do agree that bondholders may sue in the borrower's domestic courts.[149] The remaining issuers submit to the jurisdiction of some external forum, but often in ways that depart from the choice of forum standard. Five issuers (6.9%) submit to the jurisdiction of both New York and English courts.[150] And, of course, some issuers add arbitration to this mix.

146. Again, this does not mean that bondholders may only sue in these courts. In many cases, the issuer also consents to be sued in its own courts. Moreover, the issuer may be amenable to suit in foreign courts even if it has not agreed to be sued there, but if the issuer has not waived its immunity from suit the bondholder would have to invoke exceptions to sovereign immunity under the law of those jurisdictions. See *supra* notes 24–26 and accompanying text for a discussion of exceptions to sovereign immunity.

147. The first five rows in Table 2 represent some departure from the choice of forum "standards."

148. THE RUSSIAN FEDERATION, OFFERING CIRCULAR 90 (June 10, 1998) (offering 11.75% Bonds due in 2003 and specifying that "Issuer has not submitted to the jurisdiction of any court, agreed that disputes may be resolved in any forum or appointed any agent for service of process") [hereinafter THE RUSSIAN FEDERATION, 1998 OFFERING CIRCULAR]; THE RUSSIAN FEDERATION, OFFERING CIRCULAR 85–86 (June 26, 1997) (offering 10% Bonds due in 2007) [hereinafter THE RUSSIAN FEDERATION, 1997 OFFERING CIRCULAR].

149. COMMONWEALTH OF AUSTL., AMENDMENT NO. 1 TO REGISTRATION STATEMENT UNDER SCHEDULE B OF THE SECURITIES ACT OF 1933, at 9–10 (June 5, 1995); PROVINCE OF NOVA SCOTIA (CAN.), PROSPECTUS SUPPLEMENT (TO PROSPECTUS DATED JUNE 6, 2002) 5 (Jan. 18, 2007).

150. Two of these are New York-law bonds (Venezuela, Trinidad and Tobago) and three are English-law bonds (Oman, Moldova, Barbados).

As it turns out, the prevailing view that sovereign bond contracts eschew the use of arbitration is correct, but only to a point.[151] Bonds issued by seven of the seventy-two issuers (9.7%) expressly permit bondholders to bring claims in arbitration: Brazil, El Salvador, Estonia, Georgia, Poland, the Slovak Republic, and Ukraine.[152] As Table 3 indicates, five of these are English-law bonds (all private issuances) and two are New York-law bonds (one a private issuance and one registered).[153]

Table 3. Arbitration use by governing law and manner of issuance

Registered/Private			**Governing Law**		
			English	**New York**	**Total**
Private	**Arbitration**	**No**	26	21	47
		Yes	5	1	6
Registered	**Arbitration**	**No**	0	18	18
		Yes	0	1	1
		Total	31	41	72

Although only a minority of issuers use arbitration, Table 4 below reveals some interesting differences in *how and why* they use it. National law in both Brazil and El Salvador forbids each country to submit to the jurisdiction of foreign courts.[154] The New York-law bonds issued by these countries contemplate only arbitration in New York or litigation in the borrower's domestic courts. Each, therefore, represents a significant departure from the

151. *See* Cross, *supra* note 2, at 377 (referring to "persistent absence" of arbitration from sovereign bond contracts); Waibel, *supra* note 2, at 732 (discussing lack of arbitration clauses in sovereign bonds).

152. I say "expressly permit," because including an arbitration clause in the bond contract is not the only way sovereign issuers may consent to arbitration. Many bilateral investment treaties ("BITs") contain provisions allowing foreign investors to submit investment-related disputes to arbitration, often before ICSID. *See, e.g.*, Memorandum from Owen C. Pell to the Global Committee of Argentina Bondholders, *supra* note 56 (stating one benefit of ICSID is that while U.S. judgments are not automatically respected outside the U.S., Argentina is obligated to honor ICSID awards). For example, relying on a provision in the Italy-Argentina BIT, Italian bondholders have instituted ICSID arbitration proceedings against Argentina. *See* Alemanni v. Argentine Rep., ICSID Case No. ARB/07/8 (registered Mar. 27, 2007); Beccara v. Argentine Rep., ICSID Case No. ARB/07/5 (registered Feb. 7, 2007).

153. In one case (Poland), five of the seven English-law bonds in the sample include an arbitration clause, and two do not. In all other cases where I have multiple issuances of same-law bonds (Brazil (2); El Salvador (8); Slovakia (2); Ukraine (4)), all bonds in the sample contain an arbitration clause.

154. *See, e.g.*, FEDERATIVE REP. OF BRAZ., FINAL PROSPECTUS SUPPLEMENT (TO PROSPECTUS DATED MAY 8, 2007) 13 (Jan. 6, 2009) ("Brazil is prohibited from submitting to the jurisdiction of a foreign court for the purposes of adjudication on the merits."); THE REP. OF EL SAL., OFFERING CIRCULAR v (Oct. 17, 2002) (offering 7.75% Notes due in 2023 and stating that "[u]nder its Constitution, the Republic is not permitted to consent to jurisdiction of the courts of any foreign jurisdiction").

standard. The arbitration clause effectively substitutes for foreign court litigation, perhaps as a concession to investors reluctant to submit to the jurisdiction of the issuer's domestic courts. And in each case, domestic law prevents the issuer from agreeing to the "standard" term.

By contrast, bonds issued by Georgia, Estonia, Poland, the Slovak Republic, and Ukraine (all governed by English law) supplement the standard dispute resolution term with an additional forum choice, arbitration, to be invoked at the bondholder's discretion. Consider a sample clause as described in the offering circular to a 2002 issuance by the Republic of Estonia:

> (2) Jurisdiction of English Courts
>
> The Issuer irrevocably agrees . . . that the courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with the Notes or the Coupons . . . . Nothing in this Condition shall limit any right to take Proceedings against the Issuer in any other court of competent jurisdiction . . . .
>
> (3) Arbitration
>
> The Issuer also agrees that any disputes . . . may, at the option of the relevant holder, be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration . . . . The place of any such arbitration shall be London and the language English.[155]

In this clause, arbitration does not substitute for the issuer's consent to be sued in foreign courts. Rather, arbitration adds to a menu of disputing options, effectively permitting investors to select the forum that will maximize the likelihood of enforcement.

Table 4. Arbitration users; submission to other external forums

Issuer	Governing Law	Other External
Brazil	New York	None
El Salvador	New York	None
Estonia	English	Courts of England
Georgia	English	Courts of England
Poland	English	Courts of England
Slovak Republic	English	Courts of England
Ukraine	English	Courts of England

Despite these apparent differences, there may be a common theme linking many of these issuers: in each case, there may be greater-than-usual uncertainty as to whether the issuer's courts will enforce foreign court judgments. In such cases, investors may assign greater value to arbitration's ordinarily rather speculative enforcement advantages. For Brazil and El Salvador, the refusal to

155. REP. OF EST., OFFERING CIRCULAR 9 (June 25, 2002) (offering 5% Notes due in 2007).

submit to foreign jurisdiction, or to waive immunity from suit or execution, limits the value of litigation in foreign courts.[156] Georgia, Estonia, Ukraine, and the Slovak Republic are relatively new issuers of sovereign debt, each having gained its independence in the early 1990s.[157] Each of these issuers of English-law bonds, moreover, gained its independence from a country whose law of sovereign immunity may have offered absolute immunity from suit and execution.[158] And although each agrees to a broad immunity waiver, their domestic law may deny enforcement to foreign court judgments.[159] For example, although members of the European Union recognize judgments rendered by the courts of other EU member states,[160] Georgia and Ukraine are not EU

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156. Bondholders might successfully invoke the jurisdiction of foreign courts even without the issuer's consent. Under U.S. law, for example, foreign states are not immune from suit (as opposed to execution) in actions based upon a commercial activity carried on in the United States by the foreign state. 28 U.S.C. § 1605(a)(2) (2006). See *supra* notes 23–24 and accompanying text for a discussion of the commercial activities exception to sovereign immunity. U.S. law, however, requires a separate waiver of immunity from execution, which neither country provides. *See* 28 U.S.C. § 1610(a)(1) (stating foreign property in United States is not immune from attachment following adverse judgment if "the foreign state has waived its immunity from attachment . . . either explicitly or by implication"). And judgments obtained in foreign courts without the issuer's consent to jurisdiction may not be enforceable in the issuer's own courts. *See, e.g.*, FEDERATIVE REP. OF BRAZ., *supra* note 154, at 13 ("Any judgment rendered against Brazil by a court outside Brazil in an action in which Brazil has not submitted to the jurisdiction of such court or otherwise expressly waived its defense of sovereign immunity would not be enforceable against Brazil under its laws.").

157. *See* U.S. Dep't of State, Background Note: Estonia, http://www.state.gov/r/pa/ei/bgn/5377.htm (last visited Dec. 2, 2009) (stating independence established from U.S.S.R. in 1991); U.S. Dep't of State, Background Note: Georgia, http://www.state.gov/r/pa/ei/bgn/5253.htm (last visited Dec. 2, 2009) (stating independence obtained in 1991); U.S. Dep't of State, Background Note: Slovakia, http://www.state.gov/r/pa/ei/bgn/3430.htm (last visited Dec. 2, 2009) (noting independence gained in 1993); U.S. Dep't of State, Background Note: Ukraine, http://www.state.gov/r/pa/ei/bgn/3211.htm (last visited Dec. 2, 2009) (stating independence gained in 1991).

158. *See* FOX, *supra* note 8, at 230–31 (describing sovereign immunity law in former Czechoslovakia and Soviet Union, and in Russian Federation). Moreover, the former Soviet Union, from which Georgia, Estonia, and Ukraine gained independence, apparently had no domestic law permitting officials to waive the state's sovereign immunity. *See, e.g.*, Mark A. Stoleson, Note, *Investment at an Impasse: Russia's Production-Sharing Agreement Law and the Continuing Barriers to Petroleum Investment in Russia*, 7 DUKE J. COMP. & INT'L L. 671, 686 (1997) (discussing how proposal for new law would allow Russia to waive sovereign immunity in contracts with foreign investors). The Georgian, Estonian, and Ukrainian bonds, however, all contain broad immunity waivers.

159. *See* UKR., OFFERING CIRCULAR 12 (Jan. 29, 2007) (offering 3.5% Notes due in 2018 and specifying that "[c]ourts in Ukraine will not enforce a judgment obtained in a court established in a country other than Ukraine unless such enforcement is envisaged by an international treaty . . . or an *ad hoc* arrangement between such country and Ukraine providing for reciprocal enforcement of judgments . . . [T]here is no such treaty or arrangement in effect between Ukraine and Ireland, Switzerland or the United Kingdom. An arbitration award would, however, generally be enforceable in Ukraine . . . ."); REP. OF EST., *supra* note 155, at 42 (similar provision); GEOR., PRELIMINARY PROSPECTUS 4 (Mar. 28, 2008) (similar provision); THE SLOVAK REP., OFFERING CIRCULAR 60 (June 21, 1999) (offering 7.5% Notes due in 2004 and containing similar provision). To the extent these issuers keep assets in other countries, however, the immunity waiver may increase bondholders' odds of successful execution.

160. Joseph J. Simeone, *The Recognition and Enforceability of Foreign Country Judgments*, 37 ST. LOUIS U. L.J. 341, 362 (1993).

members, nor were Estonia or the Slovak Republic at the time each issued the bonds in my sample.[161]

Initially, then, it appears that issuers include arbitration clauses in their bonds primarily when there are particular reasons to doubt the enforceability of foreign court judgments. But this explanation may fail to account for the full variance in the use of arbitration clauses. Poland, for example, acceded to the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters in 1999, thus obliging itself to enforce judgments issued by EU member states.[162] Yet English-law bonds issued in 2002 permit bondholders to choose between arbitration and litigation in English courts.[163] Moreover, arbitration clauses are sometimes absent even when there may be increased doubt about the enforceability of foreign court judgments. For example, English-law bonds issued by Kazakhstan, Latvia, and Lithuania (which are former Soviet republics like Georgia, Estonia, and Ukraine) confer nonexclusive jurisdiction on English courts but do not consent to arbitration.[164] English-law bonds issued by Moldova, another former Soviet republic, submit to the jurisdiction of courts in England *and* New York but do not agree to arbitration in either.[165] Yet at least some of these issuers appear to pose enforcement problems similar to those posed by the arbitration users.[166]

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161. Professor Cross notes: "The reason for allowing the lenders the option of arbitration is that Ukraine, similar to other sovereign issuers located in the former Eastern bloc, is not an EU member and therefore is not obligated to recognize court judgments rendered in EU member states." Cross, *supra* note 2, at 340 n.22 (citing Andrew Yianni, partner, Clifford Chance, e-mail correspondence to author dated Nov. 26, 2007, 8:34 am CST (on file with author)). Estonia and Slovakia joined the EU in 2004, while the latest bonds in my sample were issued in 2002 (Estonia) and 2003 (Slovakia). Europa, The 2004 Enlargement: The Challenge of a 25-Member EU, http://europa.eu/legislation_summaries/enlargement/2004_and_2007_enlargement/e50017_en.htm (last visited Nov. 20, 2009).

162. Pawel Pietkiewicz & Łukasz Hejmej, *The Polish Judicial System and Legal Procedure*, *in* POLISH BUSINESS LAW, 43, 59 & n.134 (Zdzislaw Brodecki ed., 2003).

163. *See, e.g.*, THE REP. OF POL., OFFERING CIRCULAR 11–12 (Mar. 8, 2002) (offering 5.5% Notes due in 2012 and providing terms for arbitration and court jurisdiction).

164. *See* REP. OF KAZ., OFFERING CIRCULAR 14 (May 10, 2000) (offering 11.125% Notes due in 2007 and detailing terms under which jurisdiction is applicable); REP. OF LAT., OFFERING CIRCULAR 10–11 (Apr. 1, 2004) (offering 4.25% Notes due in 2014 and setting forth governing law and jurisdiction for notes and coupons); THE REP. OF LITH., OFFERING CIRCULAR 9 (May 8, 2002) (offering 5.875% Notes due in 2012 and stating governing law regarding notes and coupons).

165. *See* THE REP. OF MOLD., INFORMATION MEMORANDUM 17 (Dec. 5, 2002) (offering 39,865,000 U.S. Dollar Denominated Notes due in 2009 and detailing governing law and jurisdiction). Of these four countries (Kazakhstan, Latvia, Lithuania, and Moldova), only Latvia and Lithuania are EU members. Europa, *supra* note 161. All four are parties to the New York Arbitration Convention. *See* U.N. TREATY COLLECTION, STATUS TABLE FOR CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 1–2, http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf.

166. For example, disclosure documents indicate that courts in Kazakhstan will not enforce foreign judgments unless a treaty between Kazakhstan and the country in which the judgment was rendered provides for reciprocal enforcement, but "[t]here is no such treaty in effect between Kazakhstan and the United Kingdom or between Kazakhstan and the United States." REP. OF KAZ., *supra* note 164, at 6. Disclosure documents for Moldovan bonds contain a similar caution. *See* THE

Thus, while it is tempting to attribute arbitration usage to unique concerns over the enforceability of foreign court judgments, questions remain. What is clear is that a number of issuers have issued bonds that include arbitration clauses, and that these are only some of the departures from the choice of forum standard.[167] Moreover, there is additional variance across issuers in sovereign immunity provisions. The next section discusses these sovereign immunity findings.

3. Variance Across Issuers: Sovereign Immunity Terms

Previously, I noted that the standard set of enforcement terms also contains a waiver of the sovereign's immunity from suit and perhaps execution.[168] But it may be misleading to refer to a "standard" set of terms. The immunity waivers negotiated by different issuers vary to a surprising degree.[169] The bond contracts approach immunity in one of three ways: some refuse to waive immunity altogether; some waive immunity from suit but not immunity from attachment and execution; and some waive both forms of immunity, though typically with exceptions for property used for public or governmental purposes. Most issuers, however, fall into the third category, waiving immunity both from suit and from execution. These issuers use sovereign immunity terms to confer on bondholders one of the key enforcement advantages claimed for arbitration.

a. No Waiver of Immunity (at Least in Foreign Courts)

Five issuers of New York- or English-law bonds do not waive sovereign immunity from either jurisdiction or execution, at least in foreign courts.[170] For example, offering circulars describing Russian bonds caution:

> The Issuer has not waived any rights to sovereign immunity it may have in any jurisdiction. Accordingly, the Issuer may be entitled to immunity from suit in any action or proceeding arising out of the Bonds and the Issuer and its assets, properties and revenues may be entitled to immunity in any enforcement action. In addition, the Issuer has not submitted to the jurisdiction of any court, agreed that disputes may be resolved in any forum or appointed any agent for service of

REP. OF MOLD., *supra* note 165, at 4 (citing lack of international treaty between Moldova and United States and Moldova and United Kingdom regarding enforcement of civil case judgments).

167. See *supra* notes 146–50 and Table 2 for a discussion of choice of forum.

168. See *supra* notes 22–26 and accompanying text for a discussion of sovereign immunity waivers. *See* BUCHHEIT, *supra* note 20, at 142 (noting that conventional waiver of immunity covers both sovereign's immunity from suit and immunity of its property from attachment or execution).

169. This variance may be driven in part by differences in issuers' domestic laws pertaining to sovereign immunity. *See* BUCHHEIT, *supra* note 20, at 143 (discussing variance in domestic laws and potential impact on sovereign immunity).

170. These are Australia (New York-law bonds issued in 1995), Brazil (New York-law bonds issued in 1999 and 2007), El Salvador (New York-law bonds issued in 1999, 2000, 2001, 2002, 2005, and 2006), Nova Scotia (New York-law bonds issued in 2007), and Russia (English-law bonds issued in 1997 and 1998). Two additional issuances—Canadian-law bonds issued by the Province of Manitoba in 2003 and 2007—also fall into this category.

> process. . . . Accordingly, Bondholders may have difficulty obtaining effective redress in connection with the Issuer's obligations under the Bonds.[171]

In the case of the Russian Federation, domestic law may not authorize officials to waive sovereign immunity.[172] However, issuers with significant negotiating leverage, obvious reputation for repayment, robust and effective legal systems, or some combination of these factors also may decline to waive sovereign immunity or agree only to litigation in their domestic courts. For example, disclosures for New York-law bonds issued by the Province of Nova Scotia indicate that the Province has not waived its immunity from jurisdiction but "does not have immunity in the courts of Nova Scotia from lawsuits based on the securities."[173] A bondholder who obtains a judgment from a court in Nova Scotia may be unable to enforce it by execution, but "must be paid by the Minister of Finance out of the Consolidated Fund of the Province."[174] The Province thus seeks to channel litigation into domestic courts and contemplates voluntary payment of any resulting judgment, rather than enforcement through execution.[175]

In similar fashion, Brazil discloses in a 2007 prospectus that it has made only a limited waiver of its jurisdictional immunity, consenting to jurisdiction in the Southern District of New York solely for the purpose of converting an arbitration award into a judgment.[176] Brazil does not waive its immunity from suit in foreign courts for any other purpose, nor does it waive its immunity from execution with respect to property located outside Brazil.[177] Successful

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171. THE RUSSIAN FEDERATION, 1998 OFFERING CIRCULAR, *supra* note 148, at 89–90; THE RUSSIAN FEDERATION, 1997 OFFERING CIRCULAR, *supra* note 148, at 85–86.

172. At least until recently, domestic law in the Russian Federation did not permit officials to waive sovereign immunity. Stoleson, *supra* note 158, at 686. As of November 2001, the Federation had yet to pass legislation weakening the former rule providing for absolute sovereign immunity. FOX, *supra* note 8, at 126.

173. PROVINCE OF NOVA SCOTIA (CAN.), *supra* note 149, at 5. Canadian-law bonds issued by the Province of Manitoba contain similar provisions. *See* PROVINCE OF MANITOBA (CAN.), PROSPECTUS SUPPLEMENT (TO PROSPECTUS DATED NOV. 4, 2003) 7 (Apr. 5, 2005) (offering 4.45% Debentures due in 2010 and noting province "does not have immunity in the courts of Manitoba from lawsuits based on the Securities").

174. PROVINCE OF NOVA SCOTIA (CAN.), *supra* note 149, at 5.

175. The lack of a contract term submitting to the jurisdiction of foreign courts does not necessarily prevent the issuer from being sued there. It does, however, make it more difficult for bondholders to obtain and enforce a foreign judgment. See *infra* notes 180–83 and accompanying text for a discussion of the difficulty in enforcing a foreign judgment in the absence of certain contract terms.

176. FEDERATIVE REP. OF BRAZ., *supra* note 154, at 13.

177. *Id.* Brazil consents to jurisdiction in New York "for the limited purpose of converting into a judgment an arbitral award rendered against Brazil in New York." *Id.*; *see also* Cross, *supra* note 2, app. I, at 378–79 (setting out terms of Fiscal Agency Agreement, in which Brazil agrees not to raise any immunity defenses "in any arbitration proceedings or judicial proceedings *for the conversion of any award rendered in arbitration . . . into a judgment*" (emphasis added)). Note that proceedings to convert an arbitration award into a judgment are not the same as proceedings to enforce the judgment itself—for example, by seizing and selling sovereign assets. A separate waiver of immunity of execution would be required for such proceedings, and Brazil appears not to provide such a waiver.

arbitration claimants must obtain a Brazilian court order recognizing the arbitration award, after which Brazilian law, at the time of the issuance, required that the award be included for payment in a subsequent budget.[178] For actions brought in Brazilian courts, however, the bonds waive immunity from jurisdiction and execution in Brazil (except for execution on public property).[179]

The fact that an issuer refuses to waive immunity from suit or execution does not mean that bondholders cannot sue in foreign courts. Under the FSIA, for example, foreign states do not enjoy immunity from suit in actions based on "commercial activity" that takes place within, or that has a sufficient connection to, the United States.[180] The issuance of sovereign bonds constitutes commercial activity under the FSIA.[181] A contractual waiver of immunity, however, can eliminate any threshold jurisdictional issues[182] and make a broader range of property subject to execution.[183] But as the examples in this section illustrate, although investors presumably value such waivers, not all sovereign issuers provide them.

b. *Waiver of Jurisdictional Immunity Only*

Bonds by another four issuers appear to waive immunity from suit in foreign courts, but not immunity from execution against state property.[184] South African bonds issued in 2006 are one example:

> The South African government will irrevocably submit to the jurisdiction of the Federal and State courts in The City of New York, and will irrevocably waive any immunity from the jurisdiction (including sovereign immunity but not any immunity from execution or attachment or process in the nature thereof) of such courts and any objection to venue, in connection with any action arising out of or based upon the Notes brought by any holder of Notes.[185]

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178. FEDERATIVE REP. OF BRAZ., *supra* note 154, at 13–14.

179. *Id.* at 14.

180. *See* 28 U.S.C. § 1605(a)(2) (2006) (stating that foreign state has no immunity from suit in actions based upon "a commercial activity carried on in the United States," or "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or "an act outside the territory of the United States in connection with a commercial activity . . . and that act causes a direct effect in the United States").

181. Rep. of Arg. v. Weltover, 504 U.S. 607, 614–15 (1992).

182. *See* BUCHHEIT, *supra* note 20, at 141 (noting this benefit of contractual immunity waivers).

183. *See* 28 U.S.C. § 1605(a)(1) (stating that foreign state is not immune from suit when it has waived immunity); *id.* § 1610(a)(1) (providing that property in United States used for commercial activity is subject to execution if foreign state has waived immunity from execution, even if property is not or was not used for commercial activity upon which claim was based, as 28 U.S.C. § 1610(a)(2) would otherwise require).

184. The four issuers are China (New York-law bonds issued in 2003), Finland (New York-law bonds issued in 1996), Italy (New York-law bonds issued in 2004), and South Africa (New York-law bonds issued in 2006).

185. REP. OF S. AFR., PROSPECTUS SUPPLEMENT (TO PROSPECTUS DATED AUG. 20, 2003) S-2 to S-3 (Apr. 18, 2006) (offering 4.5% Notes due in 2016). As with many other issuers, South Africa reserves the right to plead sovereign immunity with respect to claims under U.S. federal or state

In jurisdictions that recognize the so-called restrictive theory of sovereign immunity, like the United States and United Kingdom, such contract terms defeat threshold jurisdictional objections.[186] But without a separate waiver of immunity from execution, creditors may have greater difficulty seizing property located in these jurisdictions.[187] For example, it is likely that holders of these South African bonds could execute against property used for a commercial activity within the United States only if the property "is or was used for the commercial activity upon which the [bondholders'] claim is based."[188] As an alternative, bondholders may file suit in South African courts, and they may also seek to enforce foreign judgments in South Africa. In either case, however, South African law may not permit execution against state property. Rather, the State Liability Act currently requires any judgments to be paid out of the National Revenue Fund.[189]

c. Waiver of Immunity from Jurisdiction and Execution

The most common category of sovereign immunity waiver extends to both jurisdiction and execution.[190] Sixty-three of the seventy-two issuers (87.5%) in the sample agreed to such a waiver. Note that these clauses effectively provide one of the primary enforcement benefits claimed for arbitration.[191] That is, they permit bondholders who obtain court judgments to execute upon property of a foreign state "used for a commercial activity in the United States" without demonstrating any nexus to the "commercial activity upon which the claim is based."[192] They may also facilitate enforcement in other jurisdictions where such waivers are recognized.

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securities laws. *Id.* at S-3; *see also* Choi & Gulati, *supra* note 138, at 1035–36 n.44 (discussing import of issuer's refusal to waive immunity with respect to securities law claims).

186. *See* 28 U.S.C. § 1605(a)(1) (stating immunity can be waived implicitly or explicitly); FOX, *supra* note 8, at 146 (noting that State Immunity Act of 1978 allows prior written agreements which bind state in advance to court jurisdiction).

187. *See* 28 U.S.C. § 1610(a)(2) (providing commercial activity exception to immunity from execution); FOX, *supra* note 8, at 146 (providing that, under State Immunity Act of 1978, general immunity waiver does not imply immunity waiver for execution of judgment).

188. 28 U.S.C. § 1610(a)(2). The requirement that there be a nexus between the commercial property located in the United States and the "commercial activity upon which the claim is based" is absent where the sovereign has waived immunity from execution. 28 U.S.C. § 1610(a)(1).

189. REP. OF S. AFR., *supra* note 184, at S-32. For a discussion of current developments regarding the State Liability Act, including whether creditors may in fact be able to execute upon or attach state assets, see generally SHAMEELA SEEDAT, INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA, NON-COMPLIANCE BY GOVERNMENT DEPARTMENTS WITH COURT ORDERS: WILL SECTION 3 OF THE STATE LIABILITY ACT BE STRUCK DOWN BY THE CONSTITUTIONAL COURT? (2007), *available at* http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1981.

190. In some cases, the issuer's domestic law may bar execution on sovereign property located within its own jurisdiction, but the issuer still waives its immunity from execution for assets located elsewhere. I include these bonds in this category.

191. See *supra* notes 123–24 and accompanying text for a discussion of foreign states' more limited immunity from attachment and execution under U.S. law.

192. *Compare* 28 U.S.C. § 1610(a)(2) (declaring property not immune from execution if it "is or was used for commercial activity upon which the claim is based"), *with id.* § 1610(a)(6) (declaring

Consider a fairly typical clause from the Republic of Hungary:

> To the extent that the Republic may in any jurisdiction claim for itself or its assets or its revenues immunity from suit, execution, attachment . . . the Republic agrees not to claim and irrevocably waives such immunity to the fullest extent permitted by the laws of such jurisdiction, provided that the Republic does not waive any immunity with respect to: (i) present or future "premises of the mission" as defined in the Vienna Convention on Diplomatic Relations signed in 1961, (ii) "consular premises" as defined in the Vienna Convention on Consular Relations signed in 1963, (iii) any other property or assets used solely for official state purposes in the Republic of Hungary or elsewhere, or (iv) military property or assets of the Republic of Hungary related thereto.[193]

This clause exempts from execution property used for diplomatic or military, or for "public" or "governmental," as opposed to commercial, purposes. These exemptions serve an obvious function: "If a foreign bank were to attempt to levy against the Presidential Palace or the state orphanage, for example, this would almost certainly prompt a phone call to the unfortunate lawyer who negotiated the loan agreement on behalf of the sovereign borrower."[194]

Even the issuers who waive immunity from suit and execution, however, vary in the extent to which they expressly exempt property from execution. For example, some do not exempt noncommercial property from execution. Contrast the preceding clause with the following extraordinarily broad waiver of sovereign immunity described in a 2002 offering circular from Estonia:

> The Issuer hereby irrevocably and unconditionally waives and agrees not to raise . . . any right to claim sovereign, diplomatic or other immunity from jurisdiction or execution and any similar defence, and irrevocably and unconditionally consents to the giving of any relief or the issue of any process, *including, without limitation, the making, enforcement or execution against any property whatsoever (irrespective of its use or intended use)* . . . .[195]

What are the implications of this extraordinarily broad language? For example, has Estonia waived immunity from execution for its embassies in London and Washington, D.C.?

In all likelihood, the answer is that this broad language is functionally similar, if not identical, to the much more cautiously worded waiver provision in the Hungarian bonds. Diplomatic property is immune from execution under the Vienna Convention on Diplomatic Relations, notwithstanding the sovereign's

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property not immune from execution if judgment is "based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement"). See *supra* notes 123–26 and accompanying text for a discussion of differences between arbitration and litigation in the scope of a foreign state's immunity from attachment and execution.

193. REP. OF HUNG., OFFERING CIRCULAR 11 (Feb. 5, 2003) (offering 4.5% Notes due in 2013).

194. BUCHHEIT, *supra* note 20, at 143.

195. REP. OF EST., *supra* note 155, at 9 (emphasis added).

advance waiver of immunity.[196] Under U.S. law, moreover, the FSIA recognizes such waivers only with respect to property "used for a commercial activity in the United States."[197] Property used or intended to be used in connection with a military activity is likewise exempt from execution whether or not the sovereign has waived immunity in advance.[198] These and other limitations highlight the general difficulty bondholders have enforcing judgments against defaulting issuers—a difficulty that remains whether the issuer agrees to arbitration, waives its sovereign immunity, or both.[199]

Despite these reasons for doubting the practical significance of Estonia's broad waiver, other issuers with similarly broad waivers of immunity do carve out specific exemptions for diplomatic, consular, and military property. Thus, English-law bonds issued by Latvia in 2004 expressly exempt diplomatic, consular, and military property from execution.[200] Even these bonds, however, omit the express exemption, found in the Hungarian bonds, for "official" or "public" property located in the sovereign's own territory or elsewhere.[201]

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196. Vienna Convention on Diplomatic Relations art. 22, *done* Apr. 18, 1961, 23 U.S.T 3227, 500 U.N.T.S. 95; EILEEN DENZA, DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 129 (1998); *see also* 28 U.S.C. § 1610(a)(4)(B) (stating that exception to immunity from execution for judgments establishing rights in property does not apply to property "used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission"); S&S Mach. Co. v. Masinexportimport, 802 F. Supp. 1109, 1110 (S.D.N.Y. 1992) (denying judgment creditor's request for attachment of Romanian consulate building notwithstanding Romanian government's waiver, by treaty, of immunity).

197. *See* 28 U.S.C. § 1610(a) (listing limited exceptions under which commercial property of foreign states located within the United States can be attached); Liberian E. Timber Corp. v. Rep. of Liber., 659 F. Supp. 606, 609 (D.D.C. 1987) (noting two-step analysis under 28 U.S.C. § 1610(a)(1) that requires foreign states to waive immunity and use attached property for commercial activity). An arbitration award confers no advantage here; holders of such awards may only execute on property "used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(6).

198. *See* 28 U.S.C. § 1611(b)(2) (stating that, regardless of whether there has been waiver of immunity sufficient under § 1610, property is immune from execution if it is, or "is intended to be, used in connection with a military activity and is . . . [either] of a military character, or . . . is under the control of a military authority or defense agency").

199. Conceivably, the broad waiver might have greater force in other jurisdictions in which Estonia keeps significant assets, including within Estonia itself, but that prospect seems speculative at best. The Vienna Convention on Consular Relations, *done* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, for example, does not expressly extend to consular premises the same immunity from execution extended to diplomatic premises by the Vienna Convention on Diplomatic Relations. *See S&S Mach. Co.*, 802 F. Supp. at 1111 n.5. Perhaps Estonia's failure to exempt consular property from its waiver of immunity from execution would strengthen a creditor's hand in seeking to execute on such property. But the prospect of successful enforcement proceedings still seems remote. *See id.* (denying attachment of consular property). *See generally* August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 EUR. J. INT'L LAW 803 (2006) (describing approaches to enforcement immunity in number of European countries, including general recognition of immunity for property serving sovereign or governmental purposes).

200. REP. OF LAT., *supra* note 164, at 11. For a similar waiver provision, see THE REP. OF LITH., *supra* note 163, at 9.

201. See *supra* note 193 and accompanying text for a Hungarian offering circular that exempts property "used solely for official state purposes" from immunity. *See* KINGDOM OF MOROCCO, OFFERING CIRCULAR 7 (July 7, 2003) (offering 5% Notes due in 2008 and exempting "property

Thus, there remain differences in the immunity provisions even among issuers who generally waive immunity from both suit and execution. These differences may be of modest practical significance and in some cases may reflect variance among issuers' domestic laws related to sovereign immunity.[202] Nevertheless, it is curious that the disclosure documents would contain such variation. Some issuers, moreover, quite clearly negotiate substantively meaningful changes to the standard broad waiver of sovereign immunity. Russia's refusal to waive sovereign immunity from suit or jurisdiction is an example.[203] Across issuers, then, it is perhaps misleading to describe the dispute resolution provisions in sovereign bonds as "boilerplate."

4. Limited Variance *Within* Issuers

Nevertheless, if enforcement-related terms vary across issuers, individual issuers do not often change the terms they have adopted. I have multiple sets of disclosure documents for only sixteen issuers, averaging 3.2 disclosure documents for each of these sixteen. Thus, despite the breadth of the dataset, it is not especially "deep," and the conclusions in this section are somewhat tentative.

With that caveat, however, the issuers in the current sample rarely introduce significant changes to their established enforcement-related contracting practices. With the exception of Poland, the issuers in my sample do not vary the choice of forum or sovereign immunity terms across different same-law issuances.[204] Focusing on a subset of issuers, Table 5 represents the relative

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located in Morocco dedicated to a public or governmental use (as opposed to a commercial use) by the Kingdom").

202. For example, sovereign borrowers whose domestic law does not forbid execution on property used for public or governmental purposes may include express exemptions for such property. BUCHHEIT, *supra* note 20, at 143.

203. See *supra* notes 171–72 and accompanying text for further discussion of Russian bonds.

204. This is true for same-law issuances. For example, if its New York-law bonds provide for litigation in New York, and the issuer subsequently issues English-law bonds providing for litigation in England, I do not consider this a change in bond terms. It is, rather, the issuance of bonds that conform to the alternate standard. *Compare* REP. OF THE PHIL., OFFERING CIRCULAR 16 (Sept. 5, 2002) (offering 7.5% Bonds due in 2007 and providing for litigation in English courts), *with* REP. OF THE PHIL., PROSPECTUS SUPPLEMENT FOR 6.375% GLOBAL BONDS DUE 2032 (Jan. 9, 2007) (registered New York-law bonds; litigation in New York courts).

In addition to the exception referenced in the text, there is one other possible exception: South Africa. The prospectus supplement for a 2006 registered offering of New York-law bonds makes clear that South Africa has not waived its immunity from execution. REP. OF S. AFR., *supra* note 185, at S-3. No such limitation appears in the prospectus supplement for a similar 2007 issuance, which states only that South Africa has not waived its immunity for claims based on U.S. securities laws. REP. OF S. AFR., PROSPECTUS SUPPLEMENT (TO PROSPECTUS, DATED AUG. 20, 2003) S-11 (May 16, 2007) (offering 5.875% Notes due in 2022). And the underlying prospectus states that South Africa "will irrevocably waive any immunity to which it might otherwise be entitled" and thus implies a broader waiver of sovereign immunity. REP. OF S. AFR., PROSPECTUS 8–9 (Aug. 20, 2003) (offering debt securities and warrants to purchase debt securities). Both the 2006 and 2007 bonds, however, were issued pursuant to an Amended and Restated Fiscal Agency Agreement between South Africa and Deutsche Bank, to which the form of the bond is attached. And the bond itself states that South Africa

continuity of enforcement-related bond terms over time (with changes marked by the symbol "•"). Note that bond terms may remain unchanged despite changes in the law firms representing the issuer or underwriters.[205] Note, too, that different issuers may adopt different enforcement-related terms even though the same law firms are involved.[206]

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does not waive its "immunity from execution or attachment or process in the nature thereof." Form of Registered Security, Attached as Exhibit A to Amended and Restated Fiscal Agency Agreement, dated as of May 15, 2003 between Rep. of South Africa and Deutsche Bank Trust Co. Americas. Thus, it appears that in each case the issuer waives only its immunity from jurisdiction.

205. For example, Table 5 shows that El Salvador's enforcement-related terms remain unchanged despite the switch from Brown & Wood to Arnold & Porter as counsel to the issuer, and the switch from Rogers & Wells to Cleary Gottlieb as counsel to the underwriter. Likewise, Ukraine's enforcement terms remain unchanged despite transitions from White & Case to Linklaters as issuer's counsel and from Allen & Overy to Clifford Chance as underwriters' counsel.

206. White & Case, for example, represented both Costa Rica (2003) and Ukraine (2000, 2002).

Table 5. Within-issuer standardization

Issuer	Year	Issuer Counsel	Underwriter Counsel	Choice of Law	Choice of Forum	Immunity Provision
Argentina	1994	Cleary Gottlieb	Davis Polk	NY	NY courts	Jurisdiction and execution
	1998					
	2000					
	2001		Sullivan & Cromwell			
Costa Rica	2001	Greenberg Traurig	Cleary Gottlieb	NY	NY courts	Jurisdiction and execution
	2003	White & Case				
El Salvador	1999	Brown & Wood	Rogers & Wells	NY	Arbitration or domestic courts	Jurisdiction and execution in domestic courts only
	2000					
	2001	Arnold & Porter	Cleary Gottlieb			
	2002					
	2002					
	2002					
	2005					
	2006					
Lithuania	2000	Gov't lawyer	Linklaters	English	Courts of England	Jurisdiction and execution
	2002					
	2006					
Ukraine	2000	White & Case	Allen & Overy	English	Arbitration or courts of England	Jurisdiction and execution
	2002					
	2005	Linklaters	Clifford Chance			
	2007					
Poland	1995	White & Case	Linklaters	English	Courts of England	Jurisdiction and execution
	2000	Allen & Overy	Clifford Chance		• Arbitration or courts of England	
	2002					
	2002					
	2003					
	2004					
	2008				• Courts of England	

As Table 5 shows for that subset of issuers, enforcement-related bond terms do not often change. The exception is Poland, which apparently issued English-law bonds in 1995 that provided for litigation in English courts, added an arbitration clause to bonds issued between 2000 and 2004, and removed the

arbitration clause from bonds issued in 2008. A second exception (not noted in Table 5) involves a minor change, but one that usefully highlights the role law firms may play in designing and disseminating new contract terms. Although all of the El Salvadoran bonds in my sample provide for arbitration in New York under rules developed by the United Nations Commission on International Trade Law, the arbitration provision changed between 2000 and 2001.[207] The 2001 bonds specify the number of arbitrators (three) and the method of their selection, contain provisions addressing the nationality of the third arbitrator, and explicitly state that claims under U.S. securities laws are not subject to arbitration.[208] The arbitration clause in the 2000 bonds does not address these issues.[209]

Apparently, the law firm representing the issuer is responsible for this change to the El Salvadoran bonds. Prior to 2001, El Salvador was represented by Brown & Wood on the issuances in my sample, but it was represented by Arnold & Porter in 2001 and thereafter. Arnold & Porter also represented Brazil, and the language added in 2001 to the El Salvadoran bonds is identical to significant portions of the Brazilian arbitration clause.[210] Although the change in El Salvadoran bond terms is modest, it is consistent with the view that law firms and other repeat-player intermediaries can drive the adoption and dissemination of new contract terms.[211] I return to this topic below.[212]

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207. Typically, the disclosure documents describe the terms of the underlying bonds in detail, but occasionally the disclosures quote bond terms in full, as with the offering circulars for El Salvadoran bonds described in the text. *See* THE REP. OF EL SAL., OFFERING CIRCULAR 3 (Jan. 24, 2000) (offering 10% fixed rate Notes due in 2007 and providing arbitration terms).

208. *See* THE REP. OF EL SAL., OFFERING CIRCULAR v (July 18, 2001) (offering 8.5% Notes due in 2011). Issuers typically refuse to waive sovereign immunity for claims under U.S. securities laws. For an explanation of the import of that refusal, see Choi & Gulati, *supra* note 138, at 1035–36 n.44.

209. THE REP. OF EL SAL., *supra* note 207, at 3.

210. In my sample, Arnold & Porter represented El Salvador on private issuances governed by New York law in 2001, 2002, 2005, and 2006, and it represented Brazil on registered offerings in 1999 and 2007. Each issuer's arbitration clause provides that:

- The arbitration is to be conducted under UNCITRAL rules "(excluding Article 26 thereof)," which authorizes the arbitrators to issue interim measures of protection upon request;
- "The number of arbitrators shall be three, to be appointed in accordance with Section II of the UNCITRAL Arbitration Rules";
- "The appointing authority shall be the Chairman of the International Court of Arbitration of the International Chamber of Commerce"; and
- "The third arbitrator may be (but need not be) of the same nationality as any of the parties to the arbitration."

THE REP. OF EL SAL., *supra* note 154, at v; Cross, *supra* note 2, at app. 1 (quoting Fiscal Agency Agreement, Braz.-Bank of N.Y. (successor-in-interest to JPMorgan Chase Bank, N.A.), Nov. 1, 1996). I cannot rule out the possibility that the underwriters or their lawyers were responsible for this change to the El Salvadoran bonds. However, these firms do not overlap on the bonds in my sample.

211. *E.g.*, Choi & Gulati, *supra* note 18, at 935–37; Kahan & Klausner, *supra* note 35, at 736–40.

212. See *infra* notes 266–91 and accompanying text for a discussion of contract innovation, including the role played by intermediaries.

III. IMPLICATIONS

As it turns out, there is relatively substantial variance in the enforcement-related contracting practices of different sovereign issuers. This variance includes departures from the choice of forum "standard" by over twenty percent of the issuers in the sample,[213] including 9.7% who have issued bonds containing arbitration clauses.[214] Similarly situated issuers, moreover, sometimes make different choices with respect to arbitration, although their reasons for doing so are unclear.[215] And there is additional variance in sovereign immunity terms, although a sizeable majority of issuers waive immunity from both jurisdiction and execution.[216] At the same time, individual issuers rarely change their own contracting practices.

This Part explores the potential implications of these findings. It begins, however, with a cautionary note. As noted previously, it is difficult to discern the forces that shape contracting practices.[217] One reason for this is the obvious fact that parties may have diverse preferences. Although it is tempting to assign universal values to contract terms—to assume, say, that arbitration would benefit or disadvantage all sovereign issuers in the same way—the reality is likely different. Moreover, issuers may provoke different market reactions despite using the same contract term. For example, collective action clauses ("CACs") allow a supermajority of bondholders (typically around seventy-five percent) to modify key financial terms in sovereign bonds.[218] There is some evidence that issuers deemed to pose a low risk of default obtain pricing benefits by including CACs in their bonds, while high-risk borrowers pay a premium.[219] This pattern suggests that market participants might interpret particular contract terms to signal elevated risk, but only when adopted by certain classes of issuers.[220] In similar fashion, perhaps higher-risk issuers would pay a premium for departures from the "standard" dispute resolution term. Such changes, after all, might signal

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213. See *supra* notes 146–50 and Table 2 for further discussion of choice of forum.

214. See *supra* note 152 and accompanying text and Table 2 for those countries that expressly permit arbitration. See *supra* note 152 for a discussion of how bondholders may sometimes invoke arbitration provisions in bilateral investment treaties.

215. See *supra* notes 163–66 and accompanying text for a discussion of these issuers.

216. See *supra* Part III.B.3 for a discussion of approaches to sovereign immunity from execution.

217. See *supra* notes 78–79 and accompanying text for a discussion of the difficulty in drawing conclusions from any given degree of standardization.

218. Until the inclusion of CACs became widespread, sovereign bonds governed by New York law typically required unanimous bondholder consent. Gelpern & Gulati, *supra* note 5, at 1628–29.

219. Barry Eichengreen & Ashoka Mody, *Would Collective Action Clauses Raise Borrowing Costs? An Update and Additional Results* 8 (World Bank Policy Research, Working Paper No. 2363, 2000), *available at* http://elsa.berkeley.edu/users/eichengr/research/governinglawnew.pdf. For such issuers, the desire to preserve future access to credit markets may adequately deter default and, "in the exceptional circumstance that they have difficulties in servicing their debts, the fact that they can resort to provisions facilitating the orderly restructuring of their obligations is viewed positively by the markets." *Id.* For high-risk borrowers, however, "the presence of collective-action clauses significantly aggravates moral hazard and increases borrowing costs." *Id.*

220. *Id.*

that the parties are already thinking about the consequences of default.[221] These possibilities complicate any attempt to interpret actual contracting practices. And the effort is complicated further by the vagaries of the contract drafting process itself.[222]

Despite these qualifications, some conclusions begin to emerge from an analysis of these sovereign bond contracts. First, there is little reason to presume a strong and widely held preference for arbitration. Thus, the answer to the "puzzle" of why more sovereign bond contracts do not choose arbitration may be that few parties care to choose it, rather than anything having to do with contract stickiness. Second, the sovereign debt literature's emphasis on learning and network effects, though perhaps legitimate, may have led observers to assume greater uniformity across issuers than is in fact the case. The pattern observed here suggests that contracting practices may be more diverse than is often assumed. Finally, there are potential implications for the study of contract innovation and change. In particular, the use of arbitration by relatively minor players in the sovereign debt world calls for greater attention to the forces that drive innovation among less-established and lower-status players.

A. The Diminished Functional Case for Sovereign Debt Arbitration

To begin with the question of sovereign debt arbitration: Is there reason to believe that market participants should strongly prefer arbitration to litigation? There is cause for doubt. Recall the two primary advantages claimed for arbitration over litigation: neutrality and ease of enforcement.[223] Previously, I expressed skepticism that many sovereign issuers view arbitration as significantly more neutral than litigation, even when compared to New York or English courts.[224] Of course, it is an empirical question whether and under what conditions issuers prefer arbitration to litigation, and my findings do not address that question directly. They do, however, undercut an important component of the claim that arbitration offers substantial enforcement advantages over litigation.

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221. Conversely, perhaps changes to these contract terms would be interpreted more negatively for lower-risk issuers, who (by hypothesis) should give little if any thought to the consequences of default.

222. For example, some have suggested that the early inclusion of collective action clauses in New York-law bonds was due, at least in part, to the inadvertence of the drafting attorneys. *See, e.g.*, Mark Gugiatti & Anthony Richards, *The Use of Collective Action Clauses in New York Law Bonds of Sovereign Borrowers*, 35 GEO. J. INT'L L. 815, 825–28 (2004) (attributing early inclusion of CACs in some New York law bonds, at least in part, to inadvertence; in each case, underwriters were represented by New York law firm's London office, whose lawyers presumably began with standard terms and conditions taken from English-law bonds, where CACs were standard). *But see* Anna Gelpern & Mitu Gulati, *Innovation After the Revolution: Foreign Sovereign Bond Contracts Since 2003*, 4 CAP. MARKETS L.J. 85, 90 (2009) (suggesting that early adoption of CACs may have been "a distinct mode of contractual innovation").

223. See *supra* notes 57–62 and accompanying text for a further discussion of arbitration's claimed benefits over litigation.

224. See *supra* Part II.A.1 for a critical assessment of arbitration's supposed neutrality benefit.

A central argument for the superior enforceability of arbitration awards is that, when seeking to execute on sovereign assets located in the United States, the holder of a judgment based on an arbitration award need not show that the property to be seized bears a nexus to the "commercial activity upon which the claim is based."[225] Yet contract terms waiving sovereign immunity from execution also confer this benefit, and over eighty-five percent of the issuers in my sample include broad immunity waivers in their bonds.[226] This practice significantly weakens even the theoretical advantages arbitration might offer as an enforcement tool.[227]

Of course, arbitration offers other potential benefits, such as limited judicial review in countries where bondholders might seek to enforce an arbitration award.[228] But for reasons I have already discussed, these benefits are quite speculative.[229] Indeed, actual contracting practices suggest that market participants generally share this skepticism. The most commonly used term, which pairs a broad immunity waiver with a forum selection clause calling for litigation, is consistent with commercial lending practices generally[230] and minimizes whatever potential enforcement benefits arbitration might offer. Any residual enforcement benefits would have to be weighed against the potential costs associated with the selection of a relatively untested—and unsubsidized—forum. It may be that this calculus usually favors litigation. This conclusion draws support from the fact that arbitration clauses appear with some frequency when arbitration's enforcement benefits are greatest. Thus, arbitration clauses often appear when there is particular reason to doubt that the issuer's courts will enforce judgments rendered by foreign courts.[231] The relatively frequent use of arbitration in this context, and its infrequent use otherwise, suggests that market participants generally do not perceive arbitration to offer significant enforcement advantages.

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225. *Compare* 28 U.S.C. § 1610(a)(1), (a)(6) (2006) (permitting execution on property used for commercial activity in United States if foreign state has waived immunity or if judgment is based on order confirming arbitral award), *with id.* § 1610(a)(2) (permitting execution on property used for commercial activity in United States only if property also "is or was used for the commercial activity upon which the claim is based").

226. See *supra* notes 190–94 and accompanying text for a discussion of this broad waiver of immunity.

227. If an issuer will not agree to waive its immunity from execution, it is unclear why it would agree to confer a similar benefit by agreeing to arbitration.

228. See *supra* notes 128–33 and accompanying text for a discussion of the minimal value of limited judicial review in enforcing sovereign debt arbitration awards.

229. See *supra* notes 115–21 and accompanying text for a discussion questioning the likelihood of voluntary payments. See *supra* notes 128–33 and accompanying text for a discussion of the limitations of judicial enforcement of arbitration awards.

230. See *supra* notes 80–82 and accompanying text for a discussion of why arbitration clauses appear infrequently in commercial lending contracts.

231. See *supra* notes 156–66 and accompanying text for a discussion of this explanation and its limits.

B. The Network Explanation Revisited

If the foregoing discussion is correct, there is no need to invoke network theory, or any other theory of default rule stickiness, to explain the relatively infrequent use of arbitration in sovereign bonds. Of course, this does not mean that standardization poses no barrier to innovation—that it is literally irrelevant to contracting practices. Widespread use of a term may deter innovation without preventing it entirely.[232] In fact, there is arguably some evidence consistent with the presence of learning and network effects in the sample here. In particular, a few countries, such as Kazakhstan and Moldova, have issued bonds that do not include arbitration clauses even when arbitration might add some enforcement value.[233] There may be particular reasons why these former Soviet republics do not use arbitration, but one might also characterize these failures to use arbitration as evidence of network benefits associated with the choice of forum standard. That is, these issuers adhere to the standard even when arbitration might plausibly offer some enforcement advantages.

Nevertheless, several patterns apparent in sovereign debt contracting practices suggest that the power of the dispute resolution "standard" may be rather modest. First, it is not uncommon for issuers to depart from the choice of forum standard or to include restrictive immunity waivers that may reduce the effectiveness of enforcement proceedings. Thus, Russian bonds do not consent to the jurisdiction of any court, in any jurisdiction.[234] Likewise, bonds issued by Australia and by Nova Scotia do not submit to the jurisdiction of any external forum, although these issuers do consent to be sued in their own courts.[235] Several other issuers, including China, Finland, Italy, and South Africa, have issued bonds that submit to the jurisdiction of foreign courts but that do not waive the issuer's sovereign immunity from execution.[236] A second pattern involves the adoption of arbitration clauses by relatively new entrants to the sovereign debt markets, including Estonia, Georgia, Ukraine, and the Slovak Republic.[237] A third, and related, pattern is that when arbitration's benefits are most plausible—because the issuer's courts may not enforce foreign court judgments—arbitration clauses appear with some frequency.[238] As noted previously,[239] a few issuers that apparently fall into this category do not use arbitration, but these appear to be a minority.

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232. *See* Kahan & Klausner, *supra* note 35, at 729 (noting that, when present, "learning and network benefits . . . increase the degree of contract standardization").

233. See *supra* notes 164–66 and accompanying text for further discussion of these bonds.

234. Indeed, the offering documents caution that even Russian courts may "decline jurisdiction" over suits brought to enforce defaulted debt obligations. THE RUSSIAN FEDERATION, 1998 OFFERING CIRCULAR, *supra* note 148, at 90; THE RUSSIAN FEDERATION, 1997 OFFERING CIRCULAR, *supra* note 148, at 86.

235. See *supra* note 149 for more information on these bonds.

236. See *supra* note 184 and accompanying text for more information on these bonds.

237. See *supra* note 153 for more information on these bonds.

238. See *supra* notes 156–61 and accompanying text for a discussion of this use of arbitration.

239. See *supra* notes 164–67 and accompanying text for a discussion of bonds issued by Kazakhstan, Latvia, Lithuania, and Moldova.

These patterns do not disprove the existence of learning and network effects, but they are difficult to square with the claim that widespread use of the default litigation term seriously deters issuers who wish to depart from the standard. In each pattern, issuers forego the widely used dispute resolution term in favor of a custom term. These departures from the standard add up. With respect to choice of forum clauses alone, over twenty percent of the issuers depart from the choice of forum standard, whether by providing for no enforcement forum whatsoever, by submitting only to the jurisdiction of the borrower's own courts, or by submitting to arbitration either alone or in conjunction with the jurisdiction of one or more foreign courts.[240] There is additional variance across issuers in sovereign immunity provisions. Because contract terms are likely to be at their stickiest when market participants rarely negotiate custom terms,[241] the relatively frequent use of nonstandard terms suggests that the stickiness of enforcement-related terms may be overstated.

The more intriguing pattern may be the general consistency *within* the bonds issued by each issuer.[242] If there is little evidence of potent learning and network benefits accruing from widespread use of dispute resolution terms, the evidence is consistent with the belief that established contracting practices are difficult to change.[243] There are exceptions. Poland and El Salvador, for example, have issued bonds with varied dispute resolution terms.[244] In general, however, the issuers in this sample rarely changed their existing terms. Perhaps this consistency evidences the presence of switching costs, or some other mechanism that might deter changes to established dispute resolution terms. For example, any change to enforcement-related terms might be interpreted to signal an increased likelihood of default.[245] In addition, because a default will likely implicate multiple bond issuances, it may complicate matters for outstanding bonds to be governed by different dispute resolution terms. Issuers could address this problem by amending existing bonds, but it is potentially expensive to do so.[246] Finally, analysts and investors may have trouble assessing the pricing implications of altered bond terms, and this may lead issuers to resist changing established practices.

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240. See *supra* notes 146–50 and Table 2 for a discussion of choice of forum.

241. Ben-Shahar & Pottow, *supra* note 3, at 653.

242. See *supra* notes 204–10 and accompanying text for a discussion of within-issuer consistency in bond terms.

243. As noted previously, because the sample is not especially deep, these conclusions about within-issuer consistency remain tentative.

244. See *supra* Part II.B.4 for a discussion of Poland and El Salvador's issuance of bonds with varied dispute resolution terms.

245. *Cf.* Waibel, *supra* note 2, at 732 n.131 ("[S]overeign bonds with arbitration clauses . . . could implicitly recognize the possibility of eventual default and thereby negatively affect their marketability; the inclusion of arbitration clauses is therefore generally avoided, leaving domestic courts the forum of choice.").

246. Once bonds have been issued, changes may require bondholder consent, and obtaining consent is expensive. Kahan & Klausner, *supra* note 35, at 728 n.40. For a related discussion of difficulties issuing new bonds with CACs, see Steven L. Schwarcz, *"Idiot's Guide" to Sovereign Debt Restructuring*, 53 EMORY L.J. 1189, 1203 (2004).

On further scrutiny, however, at least the first two of these arguments are unconvincing. To begin with, they implicitly view arbitration as a litigation *substitute*, and it may indeed serve that function in some cases. But existing contracting practices also suggest that arbitration might be offered to creditors as an additional disputing option. Thus, Estonia, Georgia, Poland, Ukraine, and the Slovak Republic have all issued bonds permitting creditors to initiate arbitration proceedings, litigation in English courts, or litigation before "any other court of competent jurisdiction."[247] Even Brazil and El Salvador offer arbitration as an alternative to litigation in the issuer's own courts.[248] Historically, of course, litigation in the borrower's courts has not been an appealing option to creditors, although it is not unprecedented for lenders to confer exclusive jurisdiction on those courts.[249] Sovereign debt, however, is increasingly held by the issuer's own citizens.[250] To the extent it becomes difficult to discriminate between foreign and domestic bondholders, litigation in domestic courts may become a more palatable option.[251]

If we conceptualize arbitration as an *additional* disputing forum available at the option of creditors, it becomes harder to sustain the argument that issuers would incur substantial costs adding an arbitration clause to existing bond terms. The dispute resolution "standard" already contemplates litigation in multiple forums, because issuers generally submit to the *nonexclusive* jurisdiction of New York or English courts.[252] Adding arbitration as a disputing option, while leaving existing options intact, would simply expand the range of options already available in the event of a default. Perhaps few issuers would agree to confer such a benefit on holders of existing bonds. But given the range of forums already available to bondholders,[253] adding an arbitration clause to new bonds would only modestly expand the number of forums in which issuers might have to defend against bondholder claims.[254] And finally, amending existing contracts

247. GEOR., *supra* note 159, at 81–82; REP. OF EST., *supra* note 155, at 9; THE REP. OF POL., *supra* note 163, at 11; THE SLOVAK REP., *supra* note 159, at 16; UKR., OFFERING MEMORANDUM 49–50 (Feb. 9, 2000). The litigation option may be valuable to bondholders even if the issuer's courts will not recognize foreign court judgments, particularly with respect to assets located in other jurisdictions.

248. FEDERATIVE REP. OF BRAZ., PROSPECTUS SUPPLEMENT 11 (Oct. 18, 1999) (supplement to offering of 14.5% Bonds due in 2009); THE REP. OF EL SAL., OFFERING CIRCULAR iv (July 13, 2006) (offering for 7.65% Notes due in 2035).

249. *See, e.g.*, Shapiro, *supra* note 107, at 58 (recounting agreement by commercial banks to submit to exclusive jurisdiction of sovereign courts after failing in their efforts to obtain arbitration clause).

250. Gelpern, *supra* note 5, at 154.

251. It may also generate demand for other, standardized means of dispute resolution, such as arbitration. *Id.* at 157–58.

252. See *supra* notes 19–21 and accompanying text for a discussion of the choice of forum standard.

253. In many cases, arbitration may already be an option for a subset of bondholders under bilateral investment treaties between the issuer and their home countries. See *supra* note 152 for a discussion of BITs.

254. Moreover, issuers who wished to harmonize the choice of forum terms in their outstanding bonds could in many cases do so without substantial cost. Changes that do not adversely affect bondholder interests may not require bondholder consent. *See, e.g.*, REP. OF COSTA RICA, OFFERING

to offer creditors *additional* disputing options hardly seems to signal increased likelihood of default. If anything, such a change would signal the issuer's confidence in its ability to repay.

Nevertheless, it remains possible that pricing difficulties would deter issuers from modifying established contracting practices.[255] If issuers suspect that arbitration will confer benefits on bondholders but do not see their borrowing costs reduced accordingly, they may be reluctant to agree to such terms. Even this possibility, however, remains speculative. As I have already discussed, the evidence suggests that market participants do not view arbitration as a preferred forum. Of course, preferences may change over time. Although there is a substantial history of investor-state arbitration, there is little experience arbitrating claims arising from defaulted sovereign bonds.[256] ICSID tribunals, however, are now presiding over arbitrations arising out of Argentina's 2001 default.[257] If experience with these proceedings gives creditors or issuers reasons to prefer arbitration, we might expect contracts to adjust accordingly. The lack of such an adjustment would provide some support for the stickiness explanation. At present, however, there is little reason to suspect that existing choice of forum provisions do not reflect contracting preferences. Understanding whether bond terms are resistant to change will have to await some *reason* for change.

C. Broader Implications: Contract Diversity and Innovation

Even if standardization poses little barrier to the adoption of preferred enforcement-related terms, that does not mean it is irrelevant to sovereign debt contracting practices. Some contract terms may be stickier than others.[258] But the findings reported here have some general implications for the study of

CIRCULAR 16 (Feb. 22, 2001) (offering 9% Notes due in 2011 and permitting Republic and Fiscal Agent to modify Fiscal Agency Agreement or Notes without bondholder consent or vote "for the purpose of . . . surrendering any rights or power conferred upon the Republic . . . or . . . in any manner which shall not adversely affect the interest of any holder of Notes in any material respect").

255. One explanation for the pattern suggested by my sample—that new issuers sometimes adopt nonstandard terms but established terms rarely change—is that it may be easier for analysts and investors to price entirely new bonds than it is to determine the pricing implications of slight modifications to existing bond terms. As the text indicates, issuers might resist including arbitration clauses if they suspect such clauses will confer benefits on bondholders but will not result in lower borrowing costs.

256. For the most extensive empirical analysis of investor-state arbitration, see generally Franck, *supra* note 100. One of the rare international arbitrations involving sovereign loans is the ICSID case *Fedax N.V. v. Rep. of Venezuela*, involving a claim by an assignee of Venezuelan promissory notes. ICSID Case No. ARB/96/3 (1998), *reprinted in* 37 I.L.M. 1391.

257. *See* Alemanni v. Argentine Rep., ICSID Case No. ARB/07/8 (registered Mar. 27, 2007). These claims are subject to ICSID arbitration because bilateral investment treaties between Argentina and the countries in which the bondholders are citizens provide for arbitration, not because Argentine bonds permit arbitration. See *supra* note 152 and accompanying text for a further discussion of bilateral investment treaty arbitration and its applicability to sovereign bonds.

258. For example, Professors Stephen Choi and Mitu Gulati report evidence consistent with the view that standardization, rather than preference, explains the widespread use of unanimous action clauses in New York-law bonds before 2000. Choi & Gulati, *supra* note 18, at 963–66.

sovereign debt and for research into contract innovation and change. This final section briefly explores these implications.

Researchers who study contract change often focus (as I have done) on the terms that pique their interest. Empirical analyses of sovereign debt, for example, generally focus on particular contract terms, such as CACs,[259] without explicitly contemplating variance in terms other than the ones under study.[260] This is consistent with the general understanding that sovereign debt instruments are, for the most part, boilerplate. It is also consistent with network theory's emphasis on the benefits accruing from widespread use of contract terms. But the sovereign debt literature's emphasis on network theory, while legitimate, may have led researchers to assume greater uniformity than in fact exists. The diversity across issuers in largely overlooked, enforcement-related bond terms undercuts this understanding and cautions that bond contracts may be less standardized than is often thought.[261] Indeed, recent research supports the claim that sovereign debt markets may be characterized by "quiet experimentation."[262] If that is true, more robust models of sovereign debt contracting practices may need to account for a messier reality, one in which contracts differ in multiple ways.[263]

Indeed, there seems little reason to limit this conclusion to sovereign bond contracts. In a variety of contexts, the term "boilerplate" may obscure a more diverse set of contracting practices. Even boilerplate contracts, after all, can be expected to contain some mix of standard and custom terms.[264] The important question raised by network theory—whether contracts reflect an optimal balance between standardization and customization—cannot be answered without a clear sense of how the parties have drawn that balance. Thus, enforcement-related terms serve as another reminder that actual contracting practices can be surprisingly diverse.[265]

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259. See *supra* notes 218–20 and accompanying text for a discussion of CACs.

260. Choi & Gulati, *supra* note 18, at 993 (noting that prior studies comparing English- to New York-law bonds assumed that bonds were identical except with respect to use of CACs); *see also* Torbjörn Becker, Anthony Richards & Yunyong Thaicharoen, *Bond Restructuring and Moral Hazard: Are Collective Action Clauses Costly?*, 61 J. INT'L ECON. 127, 128 (2003) (studying effect on price of bonds of including CACs); Eichengreen & Mody, *supra* note 219, at 1–16 (same).

261. Given the difficulty of enforcing sovereign debt obligations, see *supra* text accompanying notes 6–17, and the limited attention they have received, see *supra* text accompanying note 135, one might argue that enforcement-related terms are relatively minor components of sovereign bond contracts. But this overlooks the central role choice of forum and other enforcement-related terms may play in determining the significance of the major recent innovations in sovereign debt contracting practices: for example, the widespread inclusion of CACs in New York-law bonds, or the creative use of *pari passu* clauses to impede restructuring efforts. Litigation may play a significant role in shaping the ultimate meaning and validity of these innovations.

262. Gelpern & Gulati, *supra* note 222, at 18.

263. *See, e.g.*, Choi & Gulati, *supra* note 18, at 993 ("Our examination of sovereign bond contracts suggests that it is problematic to lump all the New York contracts together as being identically situated in terms of the ease of restructuring them.").

264. *See* Goetz & Scott, *supra* note 32, at 266 (explaining contracts as combinations of default and custom terms).

265. Another example of significant variance in supposedly boilerplate contracts involves

These results also implicate a larger body of scholarship examining the conditions under which innovation is likely to occur. This literature yields a number of hypotheses. Some theories link innovation to structural characteristics such as firm size and market power. For example, one prediction is that large firms, and those with greater market power, are most likely to innovate.[266] These firms have the size and scope to justify the investments, and capture the gains, associated with innovation.[267] A competing hypothesis predicts innovation by firms with little market power and greater exposure to competitive pressure.[268]

A related sociological literature links innovation to party status and suggests that innovation may occur among high-status *and* low-status firms.[269] The theoretical basis for this prediction is that both high- and low-status firms are securely established as players (or nonplayers) in the relevant category and therefore have little to gain by conforming to audience expectations concerning "proper" behavior by category members.[270] Thus, high-status players are secure in their group membership and may innovate to differentiate themselves from competing firms or brand themselves as market leaders.[271] Low-status firms are not likely to be perceived as "players" no matter what they do.[272] They may innovate to establish a niche in a competitive marketplace populated by more established firms.[273] There is empirical support for the view that innovation may occur among both high- and low-status players.[274]

Despite these theoretical and empirical grounds for expecting innovation by less-established and low-status players, the sovereign debt and boilerplate literatures have focused primarily on players with high status and significant

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manufacturing contracts in the automotive industry. *See* Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953, 957–58 (2006) (studying form contracts drafted by Original Equipment Manufacturers).

266. W. Scott Frame & Lawrence J. White, *Empirical Studies of Financial Innovation: Lots of Talk, Little Action?*, 42 J. ECON. LITERATURE 116, 119 (2004).

267. *Id.*

268. *Id.* at 120; *see also* Choi & Gulati, *supra* note 18, at 935–36 (describing these theories as applied to contract innovation).

269. Damon J. Phillips & Ezra W. Zuckerman, *Middle-Status Conformity: Theoretical Restatement and Empirical Demonstration in Two Markets*, 107 AM. J. SOC. 379, 383–90 (2001).

270. *Id.* at 384–85.

271. *Id.* at 385.

272. *Id.*

273. *E.g.*, Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423, 451 (1993).

274. *See* Scott Baker & Kimberly D. Krawiec, *The Economics of Limited Liability: An Empirical Study of New York Law Firms*, 2005 U. ILL. L. REV. 107, 155 (focusing on New York law firms' adoption of LLP form and concluding "elite firms adopted the new LLP form far more slowly than did their less elite New York counterparts"); Phillips & Zuckerman, *supra* note 269, at 411–15 (studying law firms in Silicon Valley and finding that low- and high-status firms were most likely to adopt family law practices, traditionally viewed as a low-status practice area); Powell, *supra* note 273, at 451 (focusing on development of poison pill antitakeover device and concluding: "Lacking the stable client base of older established firms, newcomers may have to adopt a specialist strategy in order to attract clients and find their niche. The development of new legal devices and strategies heightens their visibility and marketability to potential clients.").

market power. With respect to sovereign issuers, for example, most observers trace the move from unanimous action clauses to CACs in New York-law bonds to Mexico's decision to include a CAC in a 2003 bond issuance.[275] This view dovetails neatly with the prediction that high-status players are likely to drive innovation.[276] Indeed, one impetus behind the decision may have been Mexico's desire to distinguish itself as a leader among sovereign issuers.[277] The sovereign debt and boilerplate literatures also highlight the role of large, repeat-player intermediaries, especially lawyers and underwriters.[278] For example, Professors Stephen Choi and Mitu Gulati attribute the diffusion of CACs throughout New York-law bonds to high volume issuer's counsel such as Cleary Gottlieb.[279] By contrast, looking at corporate bonds, Professors Marcel Kahan and Michael Klausner find that high volume underwriters play a role in coordinating issuers' contract choices but no evidence that law firms play a similar role.[280]

My findings tell a similar story, but with a caveat discussed below. I did not set out to explore the role of law firms and underwriters in producing contract change, but my findings generally support the notion that high-volume intermediaries play an important role in designing and disseminating contract terms. Because I do not always have the first bond in which an issuer included an arbitration clause, I cannot be certain which law firms and underwriters were involved at that time. As a rough proxy, however, I can look to the firms involved in the earliest issuance in the sample. The resulting picture is consistent with the view that high-volume intermediaries can drive contract change. For example, for each issuer of English law bonds that permit arbitration, Allen & Overy or Linklaters acted as underwriter's counsel on the earliest issuance in the sample.[281] These firms are major players; one or the other represented either the issuer or the underwriter on most of the English-law issuances in my sample.[282]

275. *E.g.*, Choi & Gulati, *supra* note 18, at 960; Gelpern & Gulati, *supra* note 5, at 1698. *But see* Gelpern & Gulati, *supra* note 222, at 6 (noting that "active experimentation" with CAC terms continues among relatively small issuers in London market for New York- and English-law bonds).

276. Gelpern & Gulati, *supra* note 5, at 1698 ("Mexico's sound economy and sterling reputation made it the perfect first mover."). *But see id.* at 1628 (noting that Kazakhstan had previously included CAC in bond issuance but that "no one seemed to notice").

277. *See id.* at 1696 (exploring Mexico's initial adoption of CACs and concluding that "[t]o the extent Mexico wanted to use the CAC incident to create a perception of autonomy and leadership, it was wildly successful").

278. Large law firms, for example, may devise new terms to solve frequently encountered problems "with the incentive to diffuse their invention[s] in the market." *Id.* at 1680–81.

279. Choi & Gulati, *supra* note 18, at 971–76.

280. Kahan & Klausner, *supra* note 35, at 753–60. Departing from the Choi-Gulati and Kahan-Klausner focus on high-volume intermediaries, Professors Anna Gelpern and Mitu Gulati tell a somewhat different story with respect to Mexico's initial decision to include CACs in its 2003 bonds. Gelpern & Gulati, *supra* note 5, at 1680–82. The market participants they interviewed attributed the decision to officials at the Mexican Finance Ministry without significant pressure from lawyers or underwriters. *Id.*

281. Allen & Overy acted as underwriter's counsel in issuances by Estonia (2002) and Ukraine (2000), and Linklaters acted as underwriter's counsel in issuances by Georgia (2008) and the Slovak Republic (1999).

282. Overall, Allen & Overy acted as underwriter's counsel in eight of the forty-six issuances

By focusing on underwriter's counsel, and not issuer's counsel or the underwriters themselves, I do not mean to weigh in on extant debates over which set of intermediaries is more likely to produce and disseminate contract terms.[283] Indeed, I have already described at least one occasion on which a change in the issuer's arbitration clause appears traceable to the law firm representing the issuer.[284] Rather, I emphasize only that my findings suggest that researchers are right to focus on major intermediaries as agents of contract change.

The caveat is that much of the arbitration usage is by less-established and lower-status issuers, such as Estonia, Georgia, Ukraine, and the Slovak Republic. This pattern is consistent with predictions of innovation among smaller and low-status players, as well as with recent research finding some smaller issuers engaged in "active experimentation" with CAC terms.[285] But the *theory* underlying these predictions may not be a good fit for the pattern I observe. That theory emphasizes that lower-status players may feel less pressure to conform to audience norms concerning "proper" behavior.[286] As a result, even modest potential benefits may be sufficient to induce departures from the norm.[287] Extending this theory to the sovereign debt context, we might explain the use of arbitration by relatively low-status issuers as attempts to distinguish their bonds from those of competing issuers by adding arbitration to a menu of traditional disputing options.[288] Yet this seems an awkward explanation for the pattern of arbitration use. If it is indeed the case that issuers primarily use arbitration when there is doubt as to the enforceability of foreign court judgments,[289] then arbitration effectively substitutes for the standard in cases where, for one reason or another, the standard cannot be used. Put differently, innovation occurs because the standard is unavailable or unsatisfactory, not because lower-status issuers feel less pressure to conform to the standard or because they need to distinguish their bonds in a crowded marketplace.

(17.4%) and as issuer's counsel in another thirteen (18.3%). Linklaters acted as underwriter's counsel in sixteen issuances (34.8%) and as issuer's counsel in another three (6.5%). Both firms were involved in two of the issuances. Thus, one firm or the other represented either the issuer or the underwriters in thirty-eight of the forty-six English-law issuances (82.6%).

283. *Compare* Choi & Gulati, *supra* note 18, at 975–76 (finding evidence that high-volume issuer's counsel, but not high-volume underwriter's counsel or underwriters, were associated with switch to CACs), *with* Kahan & Klausner, *supra* note 35, at 753–60 (finding evidence that underwriters, but not law firms, play a role in coordinating issuers' selection of bond terms and in promoting diffusion of learning benefits).

284. Recall that, in 2001, El Salvador changed its arbitration clause to incorporate nearly verbatim provisions that had long been included in Brazilian bonds, and that the agent responsible for this change appears to have been Arnold & Porter, the law firm representing both issuers. See *supra* text accompanying notes 207–11 for a discussion of this change.

285. Gelpern & Gulati, *supra* note 222, at 6.

286. See *supra* notes 269, 272 and accompanying text for a discussion of the theory behind low-status players' pressure to conform.

287. *E.g.*, Phillips & Zuckerman, *supra* note 269, at 385.

288. This explanation would best apply to the former Soviet republics. See *supra* notes 154–55 and accompanying text for a discussion of traditional disputing options in various jurisdictions.

289. See *supra* notes 156–61 and accompanying text for examples of this use of arbitration.

It is unclear which of these views best describes the adoption of arbitration clauses in sovereign bonds. The latter seems more consistent with the generally overlooked status of choice of forum terms,[290] and also with the fact that issuers who use arbitration disclose, but hardly advertise, that fact.[291] But no definitive answer is available at this point. At a minimum, however, these findings provide further evidence that innovation can occur among lower-status players. And they suggest that the usual theoretical explanations may not account for the full range of such innovation.

CONCLUSION

Is the relative absence of arbitration clauses from sovereign bond contracts a puzzle to be solved? As it turns out, perhaps not. The theoretical case for arbitration is uncertain. There is no reason to dismiss it out of hand as a potential forum for resolving sovereign debt disputes, but there is certainly no reason to presume that issuers or bondholders should strongly prefer it. The empirical reality is consistent with this skeptical view of sovereign debt arbitration. Most issuers use sovereign immunity terms to confer enforcement benefits similar to those claimed for arbitration. This practice reduces arbitration's potential advantages, while avoiding its potential uncertainty and cost. And where arbitration's enforcement benefits are most plausible, it is used with some frequency. At a minimum, these patterns suggest that theories of contract stickiness are not necessary to explain the choice of dispute resolution term. When combined with the surprising diversity of practices across issuers, these patterns also suggest that the benefits of widespread use may be overstated in this context.

More broadly, the diversity of contracting practices suggests that sovereign bond contracts may be less uniform than is often assumed and that smaller, lower-status issuers may be sources of experimentation and innovation. Major intermediaries like law firms and underwriters may play a role in designing and disseminating contract terms, but bit players, too, may be worthy of attention. And perhaps most of all, these findings serve as a reminder that we should not simply presume that standardization seriously impacts contract choice. Default rules and terms may indeed be sticky. But just *how* sticky is the question, and it may demand a diversity of answers to reflect the vast diversity of contracting contexts.

290. For example, public officials have devoted little attention to these terms. See *supra* note 135 and accompanying text for a discussion of public officials' efforts to identify optimal bond terms.

291. Typically, the disclosure documents prominently disclose the risk that bondholders will not be able to enforce judgments against defaulted issuers, and the arbitration provision is often discussed in this section as well. *E.g.*, THE REP. OF EL SAL., *supra* note 248, at iv.

Appendix

Governing Law and Submission to Jurisdiction[292]

The Fiscal Agency Agreement and the Notes shall be construed and interpreted in accordance with the law of the State of New York, which shall govern them and any controversy or claim arising out of or relating to any of them, without reference to conflicts of laws principles. The Republic irrevocably agrees for the benefit of each Holder of Notes that the courts of the State of New York and of the United States sitting in The City of New York, Borough of Manhattan, shall have non-exclusive jurisdiction to settle any disputes which may arise out of or in connection with the Fiscal Agency Agreement or the Notes and that, accordingly, any suit, action or proceedings arising out of or in connection therewith (together referred to as "*Related Proceedings*") may be brought in any such courts. Related Proceedings may also be brought in the courts of the Republic. The Republic irrevocably submits to the jurisdiction of the courts referred to in this Condition for purposes of any Related Proceedings.

To the extent that the Republic may in any jurisdiction claim or acquire for itself or its assets immunity (sovereign or otherwise) from suit, execution, attachment (whether in aid of execution, before judgment or otherwise) or other legal process (whether through service or notice or otherwise), the Republic irrevocably agrees for the benefit of the Holders of Notes not to claim, and irrevocably waives, such immunity, to the fullest extent permitted by the laws of such jurisdiction. The waiver of immunity in this paragraph shall have the fullest scope permitted under the Foreign Sovereign Immunities Act of 1976 of the United States and is intended to be irrevocable for purposes of such Act but shall otherwise constitute a limited and specific waiver for the purpose of the Fiscal Agency Agreement and the Notes and under no circumstances shall it be interpreted as a general waiver by the Republic or a waiver of immunity in respect of property that is used solely or principally for official purposes (such as ambassadorial and consular real property and buildings and the contents thereof, or any bank accounts of embassies or consulates to the extent of monies maintained therein for ambassadorial, consular or other official purposes, but not commercial purposes, in each case necessary for the proper official, ambassadorial or consular functioning of the Republic).

The Republic irrevocably appoints the person who from time to time is the Consul of the Republic in The City of New York as it [sic] agent in the United States to receive service of process in any Related Proceedings in The City of New York based on or in connection with the Fiscal Agency Agreement or any of the Notes.

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292. THE LEBANESE REP., *supra* note 21, at 99–100.