

# PRIVATE DISPUTES AND THE PUBLIC GOOD: EXPLAINING ARBITRATION LAW

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At least two intersecting questions lurk in any study of international business arbitration. Each arises from the litigants' desire (at least when the contract was signed) for binding dispute resolution outside the framework of government-administered courts. Each brings analytic challenges that implicate cross-cultural conflicts.

The first question asks how arbitration is actually conducted. What procedures help arbitrators determine facts, ascertain law and interpret contract language? How does an arbitral tribunal strike an optimal balance between efficiency and fairness for admission of evidence, presentation of testimony and allocation of time?

The second line of inquiry explores arbitration's interaction with society at large. When should the enforcement of awards be declined in order to protect public interests? What subjects might be too sensitive to entrust to arbitrators? What ethical standards should govern arbitrators and counsel in cases involving several legal systems?

What might be called the "micro study" of arbitration looks at the first matter: design of tools to further efficient dispute resolution that leaves the parties with a sense of having been treated fairly. Since most institutional rules permit litigants and arbitrators to shape the major contours of their proceedings, much of the arbitral process

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remains constantly in play. The civil procedure of international arbitration is regularly being reinvented by practitioners (suggesting novel ways to try cases), arbitrators (seeking equilibrium in procedural rulings) and scholars (opining on good, bad and ugly ways of doing things).

Arbitration's "macro study," by contrast, implicates the aggregate social consequences of shifting litigation out of the public arena (before national judges) into the private sector (before arbitrators). Reliable enforcement of awards enhances international economic cooperation by bolstering the vindication of contract rights through neutral dispute resolution mechanisms, thus reducing the risks in cross-border transactions.

Promoting efficiency, however, is not the only consideration in arbitration law. Legislators and judges also seek to safeguard vital community interests, such as regulation of markets and environment, as well as the fair administration of justice. The tension between these two concerns (reliable dispute resolution and the safeguard of community interests) lies at the heart of what most arbitration law is all about. These policy rivalries work themselves out in statutes, treaties and judicial decisions.

None of this would matter much if the loser of an arbitration could unilaterally elect to disregard the award. But such is not normally the case. Arbitration proceeds in the shadow of judicial power. When a recalcitrant party tries to renege on the bargained-for obligation to arbitrate, courts are enlisted to seize assets and grant *res judicata* effect to the arbitrator's decision.

The price of judicial support for arbitration includes respect for the evolving outlines of national and international public policy, or *ordre public* to use the Continental terminology. Sometimes these policy concerns relate to whether the arbitral process itself is fair. In other instances, attention might focus on how arbitration intersects with government efforts to protect those members of society whose welfare might be affected by private decision-makers.

The consequences of arbitration are usually more significant in an international setting. If a Boston seller must sue a Georgia buyer in Atlanta, the dispute will take place within a relatively homogeneous linguistic and procedural context. Some variant of English will be used, and the parties will normally be able to have their case heard in

a federal court applying well-known procedural rules. By contrast, if the buyer resides in Milano or Moscow, it might be necessary to engage local counsel to litigate in the language of Dante or Dostoyevsky, pursuant to an unfamiliar code of civil procedure. In some countries, questions might even arise about judicial integrity.

As an alternative to national courts, arbitration permits a more level litigation playing field. Rules of an impartial institution can be applied by a relatively neutral tribunal convened in a mutually accessible country. Proceedings can be held in a common language according to rules that give neither side an undue advantage.

The fine group of articles contained in this symposium give a glimpse into both the “micro” and the “macro” elements of arbitration. The subjects covered include investor protection, money laundering, conflicts of interest and the special problems of maritime arbitration.

Professors Charles Brower and Jack Coe set the tone with a dynamic exchange on investment arbitration, which they see as a way to depoliticize investment disputes by moving them from a “power-based” to a “rules-based” form of adjudication. Taking as his template the well-known *Mitsubishi* case,<sup>1</sup> Brower explores evolving restrictions on investor-state arbitration. He reminds us that courts enforce arbitration agreements and awards on the understanding that arbitrators make “complimentary adjustments” to the way disputes are decided. Mandatory national norms (such as competition law) may displace the legal system stipulated in the parties’ contract. To some extent, arbitrators are expected to behave like judges in their concern for the public interest. Brower elaborates his thesis with parallels to the law of sovereign immunity.

Professor Coe grabs the ball and runs even farther, looking at the balance between public and private interests through the lens of recent changes in free trade agreements. He provides a first-rate analysis of the trend toward greater constraints on how arbitrators hear claims for investor protection. Arbitral tribunals are increasingly hemmed in on several sides: “Notes of Interpretation,” exchanges of

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1. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

diplomatic letters, and treaty appendices. In some instances arbitrators may be subject to second guessing by appellate bodies.

Professor Catherine Rogers reminds us of the critical need for ethical standards to guide those entrusted with resolution of controversies arising from cross-border trade, finance and investment. She addresses an evolving professional culture among international arbitrators, as well as what might be called the “soft law” of professional guidelines,<sup>2</sup> often elaborated by organizations such as the International Bar Association.

Andrew de Lotbinière McDougall, a distinguished Canadian advocate practicing in Paris, introduces readers to the particularly vexing problem of arbitrations intended to disguise the criminal origin of assets. In some instances, bogus disputes among related parties are fabricated to produce an award that will sanitize money obtained through bribery or smuggling. In other cases, arbitrators may become aware of money laundering within the context of a genuinely adversarial proceeding. In clear and comprehensive fashion, Mr. McDougall examines the alternatives open to arbitrators in such cases, including refusal of jurisdiction and invocation of mandatory public norms.

Finally, Professor Fabrizio Marrella, who lectures in Venice and Rome, brings a Continental perspective to maritime arbitration, a richly variegated field that has been too often neglected in colloquia addressing international arbitration. He explores both treaty framework (such as the Montego Bay and Bruxelles conventions) and non-treaty sources of authority in national admiralty laws, *lex mercatoria*, and charter party agreements. Dr. Marrella brings to our attention challenges related to the requirement of a writing and the use of electronic communications.

It is hard to know who deserves the most congratulations for this symposium: the authors who provide these superb scholarly contributions, or the law review editors who cajoled and organized the collection into existence. Either way, it was an enormous pleasure to have had a preview of these stimulating articles.

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2. See William W. Park, *The Soft Law of International Arbitration*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL DISPUTE RESOLUTION (forthcoming 2005).