Is an “Arbitral Court” an Oxymoron?

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Pamela K. Bookman, Arbitral Courts, 62 **Va. J. Int’l L.** 161 (2021).

Once upon a time, litigators faced a clear choice among competing dispute resolution procedures. You could litigate. You could arbitrate. Or you could mediate. Early generations of dispute resolution scholars imagined these processes as being wholly distinct. Frank Sander, during the famed 1976 Pound Conference, envisioned a “multi-door courthouse” where disputes could be neatly grouped—with the ease of a Harry Potter-esque sorting hat—into the most appropriate resolution mechanism.

Over the past couple decades, these once-discrete processes have become more muddled. This is particularly true for complex commercial and international disputes. Processes converge and exist parallel to one another across jurisdictions. Parties may litigate the scope of an arbitration clause or the enforceability of an award. They may mediate one branch of a dispute while arbitrating another. They may also mix and match aspects of each procedure with blended processes like “med-arb” or “arb-med.”

Domestic and international court systems have both responded to, and shaped, this complicated reality. Pamela Bookman is among the clearest analysts of these trends in judicial innovation. Her new piece, *Arbitral Courts*, analyzes exactly what its title suggests: public courts that adopt many of the features of private arbitration. Oxymoron? Maybe. New reality? Definitely.

Bookman begins by observing that arbitration is traditionally considered to be a private dispute resolution mechanism meant to *replace* courts for disputing parties. The conventional wisdom has been that “courts and arbitration stay in their lanes.” But that thinking has shifted. Specialized domestic and international courts have begun to adopt qualities of private arbitration, responding to parties’ desire for confidentiality, speed, procedural flexibility, and subject matter expertise. Arbitral courts “shift and blur traditional boundaries between public and private adjudication [and] reveal the power of procedural innovation and forum shopping as forces of institutional change[.]”

Bookman offers numerous examples of these arbitral courts, ranging from Delaware, to Singapore, to Dubai. Consider the Cayman Islands Financial Services Division of the Grand Court (“FSD”), created in 2009, which has jurisdiction for business-related disputes where the amount in controversy exceeds $1.2 million. The FSD’s judges include four full-time judges with some specific background in business law, and three part-time judges, including attorneys for international law firms. Its procedural rules are designed by “an elite group of lawyers” who understand the needs of the transnational companies that choose to incorporate in the Cayman Islands. The FSD also has a fairly liberal policy on sealing its dockets (generally between one-third and half of all cases), meaning that disputes can be largely adjudicated in private.

Or consider the Netherlands Commercial Court, which opened its doors in January 2019. That court hears “trials” in panels of three judges (plus a law clerk) using procedural rules substantially similar to the International Bar Association Rules on the Taking of Evidence in International Arbitration. These Rules permit party-driven customization of evidence and process, as well as confidentiality—features associated with private arbitration rather than public adjudication. Moreover, the Netherlands Commercial Court charges significant fees compared to a normal litigation (€ 15,000), essentially creating a specialized court for clients able to pay top-dollar.

Or finally, consider an attempt at innovation in Delaware. Delaware's Court of Chancery is the most significant court in the United States for corporate disputes. The Court's judges, known as chancellors, are widely considered to be the leading experts in this area of law. In 2009, Delaware's legislature enacted a program whereby parties could pay heightened fees to arbitrate, rather than litigate, their disputes before a chancellor. The proceeding and award would be confidential, even though the arbitrator was a sitting judicial officer. (While it's common for retired judges to serve as arbitrators for-hire, such conduct is typically prohibited of sitting judges under ethics rules). The Delaware scheme was challenged by an open government group, and in 2013, the U.S. Court of Appeals for the Third Circuit held that it violated the right of qualified public access guaranteed by the First Amendment. But nevertheless, the program attracted the attention of court systems designers around the country.

What do these various examples share? A mixing and matching of attributes associated with public litigation and private arbitration. Publicly-funded judicial officers, rendering decisions in confidential proceedings, using rules designed by corporate attorneys, with procedures that can be tailored to individual cases based on the parties' consent.

Bookman goes beyond describing these various courts, offering potential opportunities and areas for concern. One of the article's central observations—and warnings—is the complicated nature of arbitral courts' legitimacy. Normally, courts get their legitimacy from the state, while arbitrators get their legitimacy from the parties' bilateral contract. Arbitral courts are a hybrid; their legitimacy comes from *both* the parties' consent to their jurisdiction, *and* the state's establishment of their structure. Bookman warns that this duality carries an inherent tension. Parties' desire for arbitration-like confidentiality, for example, hampers the ability of these courts to develop public and predictable precedent. Over time, such secrecy could lessen the arbitral courts' legitimacy in the eyes of litigants and taxpayers.

Arbitral Courts fits nicely into a sub-genre of procedure scholarship that examines not just the workings of discrete dispute resolution mechanisms, but their confluence. For example, it pairs nicely with Hiro Aragaki's *The Metaphysics of Arbitration*, Thomas Stipanowich's *Arbitration: The 'New Litigation'*, or Jackie Nolan-Haley's *Mediation: The 'New Arbitration.'* These scholars recognize that ADR procedures are becoming harder to differentiate from "regular" civil procedure, especially for transnational disputes.

"Alternative" dispute resolution is often relegated to the elective corners of law school curricula. But the reality on the ground, from the perspective of international litigators, is that ADR is inextricably interwoven into civil procedure. From the moment a client's dispute arises—or even earlier, when a contract is drafted—lawyers must understand the potential mechanisms for resolution. For several years, Bookman's scholarship has explored how court systems, far from remaining static, have responded to competition from private ADR. In this way, she is an intellectual heir to Frank Sander himself, albeit with a more international flair. Undoubtedly, court systems at home and abroad will continue to mix, match, and muddle dispute resolution processes in the years ahead. This article will provide these innovators with ideas and models—as well as some nagging notes of caution.

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