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## International Arbitration & Global Governance: Contending Theories and Evidence

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INTERNATIONAL ARBITRATION & GLOBAL GOVERNANCE: CONTENDING THEORIES AND  
EVIDENCE

By  
Ryan Thomas\*

I. INTRODUCTION

*International Arbitration & Global Governance: Contending Theories and Evidence* (“Arbitration and Governance”) is edited by Walter Mattli and Thomas Dietz.<sup>1</sup> The authors wrote this book in order to present contending theories of arbitration in a way that they believed would be more accessible to a wider academic audience, as opposed to most of the literature concerning arbitration, which the authors view as overly practice-orientated and technical.<sup>2</sup> The authors’ goal in assembling this work was to expand the realm of arbitration literature beyond volumes written almost exclusively by arbitrators, for arbitrators and other insiders.<sup>3</sup> The authors perceive that this narrow analysis of arbitration has failed to adequately examine the arbitral process conceptually or even critically.<sup>4</sup> To remedy this, the authors have assembled a collection of scholarly articles that aim to take a broader look at the social and geopolitical consequences of international arbitration.<sup>5</sup>

The book is a useful tool for any law student looking to expand their understanding of international arbitration and the effect that the continued expansion of this field has had, and will continue to have, on global governance and the roles of state actors. The authors have made the material accessible, even to those outside the field of law, by utilizing an essay format approach that is light on arbitral verbiage. At 239 pages, the book is a relatively quick read and at under \$40 it is an inexpensive addition to any class on arbitration.

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<sup>1</sup> WALTER MATTLI & THOMAS DIETZ, *INTERNATIONAL ARBITRATION & GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE* (2014). (This work consists of a collection of scholarly articles that, while not all written by the same authors, examines the ways in which international arbitration serves as a type of trans-national governance).

<sup>2</sup> Walter Mattli is a Professor of International Political Economy and Fellow of St. John’s College at the University of Oxford. He is nationally recognized for his work in financial policy and economics. Thomas Dietz is an Associate Professor in Politics and Law at the University of Muenster, and a Research Fellow as well as a member of the Law Faculty at Wolfson College at Oxford. He is a noted scholar of International Politics, International Law and Global Governance.

<sup>3</sup> MATTLI & DIETZ, *supra* note 1, at v.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

## II. OVERVIEW

*Arbitration and Governance* is comprised of nine chapters.<sup>6</sup> Each chapter is relatively autonomous from the next with very little referencing between the chapters. All of the chapters attempt to address new and expanding roles of international arbitration as a form of global governance and an alternative to the relief that has traditionally been provided by national courts. Based on the organizational structure the editors chose, selecting scholarly articles with a small number of overarching topics, the reader gets the impression that the authors have opted for an approach that attacks the topic from all sides with minor coordination, instead of a more orderly and focused approach to the topic. However, this may be precisely the approach the authors intended because, as the authors have made abundantly clear, this book is not supposed to read like every other volume on arbitration. Rather, the editors intended to present the material in a new and novel way that traditional students of arbitration are not accustomed to seeing.

In chapter 1, Mattli and Dietz discuss what they see as the four main models of arbitration governance and the societal and governmental impacts of each model.<sup>7</sup> In chapter 2, Alec Stone Sweet and Florian Grisel argue that arbitration has reached a critical point, caught between being an agent of the two parties and the wider transnational business and investment community.<sup>8</sup> In chapter 3, Ralf Michaels examines the different roles that arbitrators are assigned by the parties to play in the arbitral process as well as the roles that arbitrators assume for themselves.<sup>9</sup> In chapter 4, Joshua Karton examines the legal culture surrounding arbitration that he argues is essential to the development of arbitration as a form of governance.<sup>10</sup> In chapter 5, Moritz Renner discusses the problems with opting out of state law in favor of a private legal system and the public policy issues that this process creates.<sup>11</sup> In chapter 6, Claire Cutler argues that the development of international arbitration is a part of a concerted effort by the ruling capitalist powers to exempt themselves from State laws in favor of their own private laws that they can create and apply.<sup>12</sup> In chapter 7, Thomas Dietz compares universal arbitration with specialized arbitration, finding the specialized

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<sup>6</sup> MATTLI & DIETZ, *supra* note 1, at 1-239.

<sup>7</sup> *Id.* at 1-21.

<sup>8</sup> *Id.* at 22-46.

<sup>9</sup> *Id.* at 47-73.

<sup>10</sup> *Id.* at 74-116.

<sup>11</sup> MATTLI & DIETZ, *supra* note 1, at 117-39.

<sup>12</sup> *Id.* at 140-67.

form of arbitration to be superior.<sup>13</sup> In chapter 8, Thomas Hale analyzes the effect that the ratification of the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards has on a countries' foreign trade, finding that ratification does in fact increase trade.<sup>14</sup> Lastly, in chapter 9, Horatia Muir Watt explores ways in which host states can introduce social and economic rights within the investment arbitration forum, a forum that she argues has until now excluded those rights.<sup>15</sup>

Each chapter is relatively self-contained. However, the editors seem to have selected authors and articles strategically. By doing so, they build toward the general principle that as international arbitration continues to grow in popularity and becomes increasingly unbound from State actors, the arbitration field will have to develop a culture and policies to govern itself. These policies must balance the economic and judicial independence that has made arbitration so appealing with wider social policy concerns.

### III. MAPPING AND ASSESSING THE RISE OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE GLOBALIZATION ERA: AN INTRODUCTION

Chapter one begins with an analysis of the rising popularity of arbitration over the last decade.<sup>16</sup> Unsatisfied with the vague, overarching term of "arbitration," the authors proceed to break arbitration down into three main types of arbitration that take place on a wide scale. The first type is universal arbitration.<sup>17</sup> This type of arbitration is primarily handled by the five major arbitration houses which accept cases from a broad range of companies in many different industries.<sup>18</sup> The second type of arbitration is specialized arbitration.<sup>19</sup>

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<sup>13</sup> MATTLI & DIETZ, *supra* note 1, at 168-95.

<sup>14</sup> *Id.* at 196-13.

<sup>15</sup> *Id.* at 214-239.

<sup>16</sup> MATTLI & DIETZ, *supra* note 1 at 2-3 (you can make this an id cite initially)(the authors use data from the Hong Kong International Arbitration Centre to show that the number of cases submitted to the five major arbitration houses, which they identify as the International Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce, the Singapore International Arbitration Center, and the International Center for Dispute Resolution of the American Arbitration Association, have grown steadily and should continue to trend upwards. In 1992, 606 cases were submitted to the five major arbitration houses. By 2011, the five major arbitration houses were handling 2368 cases. Over that same time, the International Center for Dispute Resolution of the American Arbitration Association has seen the largest growth.)

<sup>17</sup> *Id.* at 2.

<sup>18</sup> MATTLI & DIETZ, *supra* note 1, at 2 (These five arbitration houses, which are organizations that employ arbitrators, offer general arbitration and handle a large portion of all arbitration cases).

<sup>19</sup> *Id.*

This type of arbitration is industry specific and open to only those that are members of the industry, such as the Society of Maritime Arbitration.<sup>20</sup> The third type of arbitration that the authors identify is investor-state arbitration (ISA).<sup>21</sup> ISA primarily concerns the ever expanding realm of bilateral investment treaties (BITs), a type of treaty in which one of the parties to the dispute is the host state.<sup>22</sup> The authors argue that the rise in ISA constitutes a form of global governance that presents the parties with a type of transnational private authority by which the parties may resolve their disputes.<sup>23</sup> The authors argue and present four main models by which field of arbitration is governed.

The first of these models is the Economic-Rationalist Model.<sup>24</sup> This model posits that as transactions become more economically complex, equally complex systems emerge to govern them to make them more efficient.<sup>25</sup> Therefore, as international commercial transactions have grown in complexity, international commercial arbitration has emerged as a governance structure that possess the requisite flexibility, technical expertise, privacy, confidentiality, and speed to allow these transactions to operate efficiently.<sup>26</sup> The International Court of Arbitration of the International Chamber of Commerce is a prime example of the Economic-Rationalist model.<sup>27</sup> By employing a highly professional team of arbitrators that can be replaced for poor performance and whom yield tremendous power in an arbitral dispute, the ICC has created a highly effective system in which only approximately 5% of it's awards are challenged.<sup>28</sup> So few awards are challenged, in part, due to the reputational integrity of the ICC, as well as the risk

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<sup>20</sup> MATTLI & DIETZ, *supra* note 1, at 2 (unlike universal arbitration, specialized arbitration is only open to the members of the field in question. This forces members to be accountable to one another and ensures that disputes will be resolved by arbitrators with the requisite knowledge of the field).

<sup>21</sup> *Id.* (Investor-state arbitration removes the dispute from the real of a national court, which an investor may rightfully fear would favor the state).

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 7; *see also* Oliver E. Williamson, *Markets and Hierarchies* (New York: Free Press, 1975). (discussing how organization structures built into the contractual process are used as a form of governance).

<sup>25</sup> MATTLI & DIETZ, *supra* note 1, at 7.

<sup>26</sup> *Id.*

<sup>27</sup> *See* Walter Mattli, "Private Justice in a Global Economy: From Litigation to Arbitration," *International Organization* 55, no. 4 (Autumn 2001): pp. 919-47 [I don't really know what this source is look at Rule 16 in the bluebook – I think this might be the rule you need]; *see also* Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773.

<sup>28</sup> MATTLI & DIETZ, *supra* note 1, at 8.

that a party will ruin its own reputation in international circles if it fails to comply with an ICC verdict.<sup>29</sup> While certainly beneficial to international corporate parties, the Economic-Rationalist model also benefits society at large by creating positive externalities, namely, by enabling the efficient operation of global markets, which in turn allocate global resources most efficiently.<sup>30</sup>

The second model of arbitration governance that is presented is the Cultural-Sociological model. While similar in many ways to the Economic-Rationalist model, the Cultural-Sociological model argues that the former is incomplete and overly simplistic.<sup>31</sup> The Cultural-Sociological model argues that a strong legal culture common to the arbitration community is necessary to explain the emergence of ICA (International Commercial Arbitration).<sup>32</sup> First, all members of the community are dedicated to internationalism, in that they prefer a global system of governance over local laws.<sup>33</sup> Second, they believe in the superiority of private adjudication over national courts.<sup>34</sup> Lastly, members of the community generally favor the business community.<sup>35</sup> These traits lead to a culture in which ICA is seen as a “positive-sum” arrangement that benefits not only the parties involved in the dispute, but the global society at large.<sup>36</sup>

The third model of arbitration governance that is discussed is the Power-Based Model. This model argues that modern ICA is a result of powerful companies and organization utilizing their superior bargaining power in the contractual process to create a system in which the powerful party is always favored.<sup>37</sup> This model takes a grim view of arbitration, seeing it as a way for the powerful to take advantage of the weak.<sup>38</sup>

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<sup>29</sup> MATTLI & DIETZ, *supra* note 1, at 8; *see also* Gerald Aksen, *Ad Hoc Versus Institutional Arbitration*, 1 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 2, p. 22 (1991)

<sup>30</sup> *Id.* at 9.

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.*; *see also* Joshua Karton, *International Arbitration Culture and Global Governance*, WALTER MATTLI & THOMAS DIETZ, INTERNATIONAL ARBITRATION & GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE (2014) p. 74-116.

<sup>33</sup> *Id.*

<sup>34</sup> MATTLI & DIETZ, *supra* note 1, at 10.

<sup>35</sup> *Id.*

<sup>36</sup> *See* MATTLI & DIETZ, Figure 1.6 p. 9.

<sup>37</sup> *See* Thomas Dietz, *Does International Commercial Arbitration Provide Efficient Contract Enforcement Institutions for International Trade?*, INTERNATIONAL ARBITRATION & GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE p. 168-195.

<sup>38</sup> MATTLI & DIETZ, *supra* note 1, at 14

The last model that is discussed is the Constitutionalization model. This model is characterized by a system of both domestic and international norms that guide the decision making process of arbitrators, as well as a combining of law and politics.<sup>39</sup> This model largely seems to presume that arbitrators bring with them an eye towards wider social policy objectives that influence their decision making.

The chapter ends with a brief summary of the proceeding chapters as well as some suggestions for further research.<sup>40</sup> The key questions raised for further research include: a concern that arbitration is creating a private legal authority, an analysis of the respective winners and losers in the arbitration process, and an examination of the conditions that contribute to the constitutionalization of global governance.<sup>41</sup>

The chapter serves as an effective roadmap of the chapters to follow. Additionally, it does an excellent job of giving a very brief overview of the general principles of the arbitration field, as well as some of the leading models of the field. The authors make effective use of charts to explain their observations. Lastly, the chapter seems indicative of their overall goal: to present arbitration in a way that is widely accessible to a large number of readers. This chapter is far less academic and much easier to read than a typical law review article.

#### IV. THE EVOLUTION OF INTERNATIONAL ARBITRATION: DELEGATION, JUDICIALIZATION, GOVERNANCE

Written by Alec Stone Sweet and Florian Gisel, this chapter discusses the pressure that the continued expansion of transnational commerce has placed on ICA to develop more defined governing structures, especially in regards to disclosing arbitral awards.<sup>42</sup> The authors' approach combines two main theories: judicialization and principal-agent theory.<sup>43</sup> Judicialization refers to a process by which governance structures emerge and adapt to meet the needs of those that utilize the system<sup>44</sup>. The principal-agent theory posits that as ICA continues to grow, the principal-agent relationship between the parties and the arbitrator will expand to include the international business community at large. Proceeding from a combination of the judicialization and the principal-agent theories, the authors

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<sup>39</sup> MATTI & DIETZ, *supra* note 1, at 14-15.

<sup>40</sup> *Id.* at 16-21.

<sup>41</sup> *Id.* at 21.

<sup>42</sup> *Id.* at 23.

<sup>43</sup> *Id.* at 24.

<sup>44</sup> MATTI & DIETZ, *supra* note 1, at 24.

develop three distinct models of arbitral governance that define modern arbitration.<sup>45</sup>

The first model is the Contractual model. Parties to arbitration will be held to the terms that they contractually agreed upon.<sup>46</sup> Therefore, once the arbitration proceeding begins, the arbitrator's decision is bound by what the parties have agreed to, giving the parties very little control over the arbitrator.<sup>47</sup> However as a neutral third party, the arbitrator does have a set of obligations towards the parties that he must fulfill. First, the arbitrator must render an accurate award that is in line with what the parties agreed to contractually.<sup>48</sup> Second, due process must be ensured so as to strengthen the perception that the arbitrator is truly impartial in the matter.<sup>49</sup> Third, the arbitrator must render a decision efficiently, that is without unnecessary costs or delays.<sup>50</sup> Lastly, the arbitrator must render an award that is enforceable, in that it would survive scrutiny by a national judge should one of the parties challenge the award.<sup>51</sup> International Arbitration survives and continues to grow because good arbitrators hold not only the parties, but also themselves, to the contractual terms.<sup>52</sup>

The second model is the Judicial Model. This model diverges from the contractual model in that it assumes that arbitrators have a duty to resolve disputes in ways that take into account broader social interests of society.<sup>53</sup> While arbitrators have broad authority to resolve disputes between parties, they must also be mindful of their relationship with national courts which can vacate their

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<sup>45</sup> MATTLI & DIETZ, *supra* note 1, at 23 (stating that although the authors have chosen to analyze the problem in this way, they acknowledge that this analysis is certainly not the only way, or even the best way to analyze the issue and that the authors intend not to take a stand on the normative issues raised in the analysis).

<sup>46</sup> *Id.* at 29.

<sup>47</sup> *Id.* at 30 (explaining that courts have given a great deal of deference to arbitrators and will allow the arbitrator the ability to determine much of his own jurisdiction). *See also* Attorneys as Arbitrators, 39 J. Legal Stud. 109.

<sup>48</sup> MATTLI & DIETZ, *supra* note 1, at 30.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 31.

<sup>53</sup> MATTLI & DIETZ, *supra* note 1, at 31.

awards but can also expand their role.<sup>54</sup> In order to maintain as much autonomy as possible from the national courts, the authors argue that arbitrators will perform their duties with not only the contractual parties in mind, but also with an eye towards the larger social community.<sup>55</sup> This view of the arbitrator as less of a contractual referee and as more of a global judge substantially differs from the traditional understanding of the role of the arbitrator.

The last model is the Constitutional model. This model asserts that the arbitrator is not merely an independent actor, but a part of a wider international legal order.<sup>56</sup> Two core claims form the basis of the model. The first is that broad ranging international treaties have created a complex relationship between arbitrators, national law, and international law.<sup>57</sup> In particular, the authors point to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as demonstrating that private arbitrators are, in fact, agents of a broader legal community.<sup>58</sup> The second claim is that the framework of ICA is a part of an emerging international economic constitution that all international commercial actors are subject to.<sup>59</sup> As this constitution continues to expand and develop, the authors argue that it will have to be able to take into account basic human rights, such as property rights and due process, that will affect the way future arbitration panels make decisions. In sum, the model argues that as arbitration becomes more constitutional, it will have to take into account broader national, transnational, and international norms and needs.<sup>60</sup>

The chapter ends with a brief discussion on the extent to which ICA is becoming an autonomous legal system, concluding that although the system thrives on independence, it still requires state power to ultimately enforce its decisions.<sup>61</sup> Consequently, to keep itself within the good graces of the national courts needed to ultimately back its decisions, the arbitral process will be forced to develop and include certain societal norms of the global community.<sup>62</sup>

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<sup>54</sup> MATTLI & DIETZ, *supra* note 1, at 32; *See also Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc.*, 473 US 614 (1985) (in which the United States Supreme Court allowed an arbitration panel in Japan to apply United States anti-trust law, while still retaining the ability of the Court to review future applications of United States law by foreign arbitrators).

<sup>55</sup> MATTLI & DIETZ, *supra* note 1, at 33,

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 34

<sup>59</sup> *Id.*

<sup>60</sup> MATTLI & DIETZ, *supra* note 1, at 36

<sup>61</sup> *Id.* at 43.

<sup>62</sup> *Id.* at 45.

This chapter is extremely well written and it is very easy to follow the argument that is laid out. The models presented are well supported and not only help to explain the rise of international arbitration, but also provide a framework for where the field is likely to go in the future.

## V. ROLES AND ROLE PERCEPTIONS OF INTERNATIONAL ARBITRATORS

In the third chapter of this book, Ralf Michaels examines not only the roles that contracting parties assign to the arbitrator, but also the roles that arbitrators take upon themselves.<sup>63</sup> In particular, Michaels focuses on how these roles adapt and evolve to changes within the arbitral system over time.<sup>64</sup> Michaels structures his analysis by focusing on the role of the arbitrator as both a national and global citizen, as both a scholar and a practitioner, and as both a public and private agent.<sup>65</sup>

As the expansion of ICA continues, arbitrators are frequently caught between their roles as a national and a global actor.<sup>66</sup> This contrast manifests itself in surprisingly basic ways.<sup>67</sup> For example, while choice of law was traditionally left to the parties to freely contract, newer approaches to the ICA have allowed a greater deference to arbitrators to choose the appropriate rule of law.<sup>68</sup> Because the arbitrator does not have a strong enforcement option, he is somewhat necessarily tied to the international legal system.<sup>69</sup> Past attempts to sever this connection between the arbitrator and the traditional legal system have not been successful.<sup>70</sup> Therefore, the arbitrator is forced by necessity to take on a transnational role.<sup>71</sup> Michaels continues his analysis of the arbitrator as a global actor through a sociological lens. Michaels argues that as a remarkably small community made up of mostly repeat actors, the international arbitration community is one built upon shared values that influence decision making.<sup>72</sup>

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<sup>63</sup> MATTLI & DIETZ, *supra* note 1, at 47

<sup>64</sup> *Id.* at 48.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 49.

<sup>67</sup> *Id.* at 50.

<sup>68</sup> MATTLI & DIETZ, *supra* note 1, at 50.

<sup>69</sup> *Id.* at 51.

<sup>70</sup> *Id.* at 51.

<sup>71</sup> *Id.* at 52.

<sup>72</sup> *Id.*

Michaels claims that, much like a cartel, the international arbitration community works together to provide a consistent process that is difficult for outsiders to enter into.<sup>73</sup> By working together, the community ensures that international arbitration remains legitimate and indispensable.<sup>74</sup> Michaels concludes this analysis of arbitrators as global actors by emphasizing that domestic courts, and in particular the United States Supreme Court, have largely left transnational adjudication to the realm of arbitration.<sup>75</sup>

Michaels next analyzes the role of the arbitrator as both a practitioner and a scholar. Leading arbitrators in the past gained prestige from their venerated status as a definitive authority.<sup>76</sup> In the modern era of arbitration with increasing competition from other arbitration houses and from national courts, arbitrators have continued to rely on this perceived expertise to attract clients, selling themselves as better, more competent versions of existing state courts.<sup>77</sup> Going back to his analogy of ICA as a cartel, Michaels posits that the arbitration community uses this reputational advantage and perception of professionalism to keep newcomers out of the field.<sup>78</sup> The arbitration community also discourages newcomers from entering the field by keeping the level of complexity exceedingly high.<sup>79</sup> Few individuals may enter the field because of the highly specialized scholarship that is required.<sup>80</sup>

Michaels concludes his analysis by examining the contrast between the arbitrator as both a private and public actor. The arbitrator must balance his role as a service provider to the parties with his role as a quasi-judge, though this status does not necessarily connect him with a particular state.<sup>81</sup> A problem emerges as the arbitrator must provide the service that the parties have contracted for, while being mindful of his judicial role in a wider system of global governance.<sup>82</sup> This balance is especially difficult to maintain because it is the

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<sup>73</sup> MATTLI & DIETZ, *supra* note 1, at 54.

<sup>74</sup> *Id.* at 56.

<sup>75</sup> *Id.* at 57.

<sup>76</sup> *Id.* at 59.

<sup>77</sup> MATTLI & DIETZ *supra* note 1, at 60.

<sup>78</sup> *Id.* at 62.

<sup>79</sup> *Id.* at 65.

<sup>80</sup> *Id.* at 68.

<sup>81</sup> *Id.* at 69.

<sup>82</sup> MATTLI & DIETZ, *supra* note 1, at 71.

independence from the state and the public interest that partly makes arbitration so attractive.<sup>83</sup>

Michaels concludes by summarizing the various pressures that international arbitration faces from both state courts as well as private mediation.<sup>84</sup>

The main argument of this chapter seems to be that in order to maintain the advantage that arbitration currently enjoys over these other processes, the role of the arbitrator will have to continue to develop and define itself. This development must take place in such a way that the traditional appeal of arbitration as an independent process is preserved, while the emerging role of a quasi-judge is respected. This chapter effectively outlines and supports that argument.

## VI. INTERNATIONAL ARBITRATION CULTURE AND GLOBAL GOVERNANCE

Written by Joshua Karton, chapter four examines the effect that culture has on the emergence of ICA as a form of global governance and in shaping the form that the system of government ultimately takes.<sup>85</sup> The majority of Karton's observations comes from a series of interviews that he conducted in 2012 with twenty international commercial arbitrators.<sup>86</sup> While the interviews were conducted anonymously, Karton assures the reader that the interviewees are leading experts in their field based on lists from Chambers and Partners, as well as Who's Who Legal.<sup>87</sup>

Karton begins his analysis by arguing that it is a common shared culture that forms the basis for international arbitration as a form of governance.<sup>88</sup> Karton defines culture as a shared set of practices, interests, values, goals and attitudes that a group shares.<sup>89</sup> Importantly, Karton argues that these key aspects of a culture are expressed reflexively, that is to say that judges may be expressing them almost automatically without being fully conscious of what they are doing.<sup>90</sup>

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<sup>83</sup> MATTLI & DIETZ, *supra* note 1, at 71.

<sup>84</sup> *Id.* at 73. (State courts as well as mediation continue to compete with arbitration for cases, especially cases with broad social and economic implications).

<sup>85</sup> *Id.* at 79.

<sup>86</sup> *Id.* at 80.

<sup>87</sup> *Id.* (Both of these sources are respected publications in the field of international law and arbitration).

<sup>88</sup> MATTLI & DIETZ, *supra* note 1, at 83.

<sup>89</sup> *Id.* at 84.

<sup>90</sup> *Id.*

Karton moves on to identify some of the basic aspects of culture that all arbitrators share.<sup>91</sup> They tend to have elite educations, they usually develop their careers in large corporate firms that are typically Anglo-American, and they frequently travel in both academic and business circles.<sup>92</sup> This shared experience attracts like-minded individuals that share the same background and ways of thinking.<sup>93</sup> While this is persuasive, Karton identifies that his own analysis may have a major flaw: ICA has only existed in its modern form for roughly three generations.<sup>94</sup> This short amount of time may not be sufficient for the organization to fully develop a culture.<sup>95</sup> However, with arbitration's position in the world economy firmly solidified for the foreseeable future, it is highly plausible that such a culture will fully develop and will likely be based on the shared values and norms of those presently in the field.

After establishing that arbitrators share certain cultural norms, or at the very least that such norms are being developed and implemented, Karton addresses the ways in which that shared culture affect arbitral decisions. The primary effect that culture seems to have is that it encourages internationalism, a form of governance that promotes uniform international rules and practices.<sup>96</sup> Though 97.7% of arbitration contracts contain a choice of law provision,<sup>97</sup> arbitrators tend to favor international rules over national ones regardless of the contractual parties wishes.<sup>98</sup> Karton points to the UNCITRAL Model Law as an example of a worldwide consensus on several fundamental aspects of the arbitration practice that have grown out of this desire for internationalism.<sup>99</sup> As the field of arbitration continues to attract young cosmopolitan lawyers that share many of these same transnational beliefs and ideas, the effects of these cultural norms will only continue to grow stronger.<sup>100</sup> Based on his interviews, Karton

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<sup>91</sup> MATTLI & DIETZ, *supra* note 1, at 87.

<sup>92</sup> *Id.* at 93.

<sup>93</sup> This seems to harken back to Michaels idea of arbitration as an industry that uses its shared values to limit the number of outsiders that can enter, or at least exerts pressure on new members to conform to the existing value hierarchy.

<sup>94</sup> *Id.* at 95.

<sup>95</sup> *Id.* at 95.

<sup>96</sup> MATTLI & DIETZ, *supra* note 1, at 96.

<sup>97</sup> *Id.* at 100.

<sup>98</sup> *Id.* at 100.

<sup>99</sup> *Id.* at 103.

<sup>100</sup> *Id.* at 105.

asserts that there is a growing understanding within the arbitral community that tribunals assume that as long as parties agree to be bound by this form of dispute resolution, the parties are also agreeing to be bound by the applicable trade usages and norms that are developed within the field.<sup>101</sup>

Karton concludes his analysis by reflecting on the impact that the continued growth of a defined arbitration culture will have on the emergence of a system of global governance.<sup>102</sup> A common legal culture that is shared and accepted by the majority of the practitioners in the field lends a measure of consistency and predictability to the field, a necessary step in the continued development of arbitration as a system of global governance.<sup>103</sup>

Karton succeeds in introducing the idea that the culture of arbitration can and will be a part of any form of governance that the field develops. Arbitrators, like any other group, will eventually have to develop a system of norms by which to operate. Identifying those norms and shaping them will be an important part of the continued growth of international arbitration.

## VII. PRIVATE JUSTICE, PUBLIC POLICY: THE CONSTITUTIONALIZATION OF INTERNATIONAL COMMERCIAL ARBITRATION

Chapter five is written by Moritz Renner and concerns the potential problems from a public policy perspective of allowing international commercial actors to opt out of domestic legal systems through private agreements. Arbitration remains preferable to domestic legal systems because it allows for a higher degree of confidentiality, efficiency, flexibility, neutrality, and can be much more cost effective.<sup>104</sup> However, one of the primary ways that this flexibility and independence is achieved is by separating the arbitral process from domestic conflict-of-law rules.<sup>105</sup> These factors combine to create a system in which the international arbitrator, through the contracting process, is bound by the will of the parties at hand and is not a guardian of any singular state's public policy in the way that judges of national courts are.<sup>106</sup>

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<sup>101</sup> MATTLI & DIETZ, *supra* note 1, at 113.

<sup>102</sup> *Id.* at 116.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 117.

<sup>105</sup> *Id.* at 120.

<sup>106</sup> MATTLI & DIETZ, *supra* note 1, at 123; *See also* Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in *Comparative Arbitration Practice and Public Policy in Arbitration*, edited by Pieter Sanders, pp. 227-256, 240-241 (1987) (explaining that the arbitrator is an agent of the parties, not of any broader state policy).

One of the main differences that sets international arbitration apart from domestic law is that in domestic law, case-law and precedent provide a degree of guidance to judges deciding similar cases in the future.<sup>107</sup> The confidentiality and flexibility that makes arbitration such an attractive form of dispute resolution also make it very difficult to achieve the same kind of guiding principles.

To rectify this issue, Renner proposes two solutions. Either arbitrators could refrain entirely from applying mandatory norms, in which case arbitrators would have the freedom to apply rules as they see fit, or the arbitration community could develop its own strategies for applying a set of mandatory norms.<sup>108</sup> Faced with this decision, the arbitration community has chosen to move towards instituting its own mandatory norms.<sup>109</sup>

The key difficulty in developing these norms is maintaining the delicate balance between state and private interests.<sup>110</sup> Some tribunals have routinely held that the contractual choice of law provision trumps all other provisions.<sup>111</sup> This need to balance public and private interests creates a system in which even norms that are considered “mandatory” or part of a wider “public policy” can be contracted around by a party wishing to abridge these norms.<sup>112</sup>

One of the ways to get around this is to support the continued constitutionalization of the arbitration process.<sup>113</sup> To achieve this support, it is necessary to construct a hierarchy of norms that brings together both law and politics.<sup>114</sup> This system is built around transnational public policy that moves the arbitration process away from the traditional autonomy that arbitration has enjoyed, and towards a more globally regulated system.<sup>115</sup> The hope is that this system will better address the emerging public policy concerns that have made the critics of arbitration skeptical of its ability to create positive externalities for the global community.

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<sup>107</sup> MATTLI & DIETZ *supra* at 125.

<sup>108</sup> *Id.* at 125.

<sup>109</sup> See Moritz Renner, “*Towards a Hierarchy of Norms in Transnational Law?*” pp. 539-543 (2009) (explaining that the arbitral community has begun to develop its own strategies for applying norms that it creates).

<sup>110</sup> MATTLI & DIETZ *supra* note 1 at 126.

<sup>111</sup> *Id.* at 127.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 133.

<sup>114</sup> *Id.*

<sup>115</sup> MATTLI & DIETZ *supra* note 1 at 134.

The author concludes this chapter by acknowledging that there is a risk that as arbitral tribunals start to act more like domestic court systems, the arbitration process will lose its appeal as a truly “alternative” form of dispute resolution.<sup>116</sup> To be successful, arbitration must adapt norms in such a way that the underlying appeal of arbitration is maintained while continuing to adapt to and respect emerging state related interests.<sup>117</sup>

This chapter does a fine job of explaining the delicate balance that arbitration must maintain between public and private interests. The author warns that if arbitration does not maintain its autonomy, it may ultimately lose its appeal as a form of dispute resolution. Hopefully, the field heeds this warning and takes steps to preserve its place within our legal system.

#### VIII. INTERNATIONAL COMMERCIAL ARBITRATION, TRANSNATIONAL GOVERNANCE, AND THE NEW CONSTITUTIONALISM

Written by Claire Cutler, chapter six discusses the constitutionalization of the arbitral process. The author begins the chapter by arguing that international commercial arbitration is a key element to new constitutionalism and that it is in place to defend the continued expansion of capitalism and legitimize the private resolution of commercial disputes.<sup>118</sup> The author sees the arbitrator as a part of a mercatocracy, a system of transnational merchants governing themselves, that forms the merchant class that created arbitration as a system of governance for itself.<sup>119</sup>

The author then further expands on her analysis of international arbitration as a system aimed at the continued expansion of capitalism.<sup>120</sup> Due to the expansion of international arbitration and the organization of bilateral investment treaties (BITs), foreign investors now have more options than ever before when dealing with host nations.<sup>121</sup> By drawing dispute resolution out of the realm of national courts and into an international forum, foreign investors get a greater degree of certainty that they will be treated fairly and equitably, as opposed to having to litigate the matters in the national courts of the host state.<sup>122</sup> Some commentators argue that this move to delocalize and

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<sup>116</sup> MATTLI & DIETZ *supra* note 1, at 139.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 142.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> MATTLI & DIETZ *supra* note 1, at 145.

<sup>122</sup> *Id.* at 146.

privatize these forms of dispute resolution leads to a “democratic deficit.”<sup>123</sup> With the dispute out of the domestic courts, the host state is unable to create legislation at will that would affect these relationships, leading to a substantial loss of state sovereignty.<sup>124</sup> Additionally, this system gives the appearance of privileging international commerce over local commerce, as economic actors will prefer to settle disputes in arbitration, rather than risk having to litigate in state courts.<sup>125</sup> The author goes on to call the belief that depoliticization is necessary to settle international trade and investment disputes is a myth put forward by the international arbitration regime.<sup>126</sup> The author ends her analysis by noting that several countries, including Bolivia, Ecuador, and Venezuela have withdrawn from investor-state arbitration over public policy concerns.<sup>127</sup>

The author’s main issue with international commercial arbitration seems to be that by transferring investor-state relations to impartial third parties, states will lose out to powerful investors that will construct the system to their favor.<sup>128</sup>

While the author does make a fair point about states losing some autonomy in the arbitration process, it seems simple enough to remedy. During the bargaining process, countries could include a choice of law provision in the contract that selects their own system of laws. This party focused solution seems much simpler and honors the intent of the contracting parties much better than a new system of constitutionalism that would require wide reaching regulations that would seem to rob international arbitration of the flexibility and autonomy that has made it a successful, desirable alternative to state courts.

#### IX. DOES INTERNATIONAL COMMERCIAL ARBITRATION PROVIDE EFFICIENT CONTRACT ENFORCEMENT INSTITUTIONS FOR INTERNATIONAL TRADE?

Written by Thomas Dietz, this chapter challenges the prevailing view of an upsurge in the number of cases that are taken to arbitration.<sup>129</sup> Dietz breaks the chapter into three fundamental parts. The first part is descriptive and argues that the overall caseload of the major arbitration houses is still too small to constitute a type of governance. Part two attempts to explain these findings further. Lastly, part three further illustrates these arguments and further subdivides them by contrasting universal arbitration with what Dietz refers to as specialized arbitration.

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<sup>123</sup> MATTLI & DIETZ *supra* note 1, at 148.

<sup>124</sup> *Id.* at 149.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 154.

<sup>127</sup> *Id.* at 166.

<sup>128</sup> MATTLI & DIETZ *supra* note 1, at 166.

<sup>129</sup> *Id.* at 169.

Part one begins by assessing the caseloads of the major arbitration houses. During the period of 1970-1990, the caseload doubled.<sup>130</sup> The numbers show that while approximately 3,000 disputes were sent to arbitration between 1920-1980, 3,500 disputes were sent to arbitration in the 1990s.<sup>131</sup> The last statistic that Dietz presents on the number of cases sent to arbitration is that between the years of 1996 and 2005, 5,250 cases were sent to the ICC.<sup>132</sup>

Dietz then examines the number of disputes submitted to the ICC from four countries: Germany, India, Bulgaria, and Romania.<sup>133</sup> When compared to the total number of companies operating from these regions, Dietz finds that the number of companies that actually engage in cross-border arbitration is actually quite marginal.<sup>134</sup> Looking beyond this small sample of countries, Dietz next turns to the United States. Dietz finds that a mere 0.2 percent of all exporting companies from the United States are involved in international commercial arbitration.<sup>135</sup>

Dietz concludes his argument by assessing the financial impact of commercial arbitration on the economy of Germany. He first takes the German GDP (\$3.3 trillion) and divides that by the number of domestic commercial cases (50,000) to conclude that one commercial case corresponds to a German economic value creation of \$66 million.<sup>136</sup> Next, he divides the volume of world exports for 2010 (\$15.2 trillion) by the number of international commercial cases filed in 2010 at seven of the major courts (3,039) to get a figure of 5 billion. The author believes that one case of international arbitration corresponds to an international economic value creation of \$5 billion. Referring back to the German calculation, he then divides the \$5 billion dollar figure by the \$66 million figure to get a result of 76. He concludes that for the impact on the global economy to be

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<sup>130</sup> See Walter Mattli, "Private Justice in a Global Economy: From Litigation to Arbitration," *International Organization* 55, no.4 (Autumn 2001): p.920.

<sup>131</sup> MATTLI & DIETZ *supra* note 1, at 171.

<sup>132</sup> See Alec Stone Sweet, "The New Lex Mercatoria and Transnational governance," *Journal of European Public Policy* 13, no.5 (2006): p. 636.

<sup>133</sup> MATTLI & DIETZ *supra* note 1, at 172.

<sup>134</sup> *Id.* at 173.

<sup>135</sup> See "A profile of U.S. Importing and Exporting Companies, 2008-2009," U.S. Census Bureau, Department of Commerce, April 12, 2011, available at <<http://www.census.gov/foreign-trade/Press-Release/edb/2009/edbrel.pdf>>.

<sup>136</sup> MATTLI & DIETZ *supra* at 175.

equal to the impact on the German economy, the German caseload would have to be 76 times higher.<sup>137</sup>

Part two of the chapter tries to explain these findings. Dietz identified two major reasons that companies may be less willing to submit a dispute to arbitration and may instead prefer national courts. The first is that national laws offer more predictability and legal certainty.<sup>138</sup> In addition to providing the certainty and stability that business craves, this also turns national law into a commodity that businesses can shop around for, deciding on one that is favorable to them and unfamiliar to their competitors.<sup>139</sup>

The second major reason that companies may be reluctant to utilize international arbitration has to do with concerns surrounding the enforcement of awards in the absence of strong international treaties that mandate enforcement.<sup>140</sup> Despite their flaws, national courts do provide a strong enforcement procedure that the arbitration process currently does not. Dietz offers Indonesia as a prime example of this problem. Despite Indonesia becoming a party to the New York Convention in 1981, it has been nearly impossible to enforce a foreign arbitral award in Indonesia.<sup>141</sup>

The third section of the chapter compares universal arbitration with specialized arbitration. Specialized arbitration is unique in two primary ways.<sup>142</sup> The first is that the contracting parties cannot choose the applicable law.<sup>143</sup> Once parties have chosen to arbitrate under the rules of a particular business association, such as a maritime law association, they are bound by the rules of that association.<sup>144</sup> Second, specialized arbitration not only provides the expertise needed to resolve disputes in highly specialized and complicated fields, but it also provides the enforcement that is needed in international arbitration. For example, the diamond industry posts pictures of non-complying parties in very public areas of its exchanges.<sup>145</sup> This is not only embarrassing to the non-complying party, but

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<sup>137</sup> *Id.* (I'm not wholly convinced that this one to one comparison of GDP and the number of arbitration cases is proper. To say that arbitration cases alone lead to economic value creation seems to ignore a wide number of variables that are also at play such as government regulation, inflation, consumer demand, and general economic growth.)

<sup>138</sup> MATTLI & DIETZ *supra* note 1, at 181.

<sup>139</sup> *Id.* at 181.

<sup>140</sup> *Id.* at 184.

<sup>141</sup> See Robert N. Hornick, *Indonesia Arbitration in Theory and Practice*, 3, THE AMERICAN JOURNAL OF COMPARATIVE LAW 39, pp. 559-597 (1991).

<sup>142</sup> *Id.* at 188.

<sup>143</sup> *Id.* at 188.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 189.

it also serves as a warning to others in the industry that it would be unwise to do business with this individual, as the risk that they will not comply with an arbitral award is exceedingly high.<sup>146</sup>

The chapter concludes with a brief summary of the authors argument as well as a short discussion of maritime arbitration. The author's main point in including maritime arbitration is to reinforce how important it is for any arbitration tribunal to have a strong enforcement mechanism for its awards. In the case of maritime arbitration, this is accomplished through ship arrest.<sup>147</sup> When a non-complying parties' ship inevitably comes into port, a strong system of national laws allows the ship to be seized.<sup>148</sup> This system of ship arrest creates a highly effective system in which non-compliance with the orders of these specialized arbitration tribunals can be extremely costly to actors in this global market. Such effective enforcement is necessary for arbitration to be viewed as a reliable alternative to national courts.<sup>149</sup>

The strength of this chapter is its commentary on the enforcement of arbitration awards. Without the backing of a national court, arbitrators have had to find creative ways to enforce their awards. While the general reputational hit that a non-complying party suffers has some effect, something like ship seizure would add the extra muscle that arbitration will need going forward.

## X. WHAT IS THE EFFECT OF COMMERCIAL ARBITRATION ON TRADE?

Written by Thomas Hale, this chapter primarily concerns the effect that the ratification of the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards has on a country's foreign trade. Hale begins by reiterating a common theme throughout this text, that effective international trade requires credible enforcement.<sup>150</sup> One of the ways that countries have achieved this credible enforcement is the enactment of the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards.<sup>151</sup> Hale finds that, in total, when two member nations of the New York Convention agree to private arbitration, trade between those countries increases by 30% if one country is a member, and by a staggering 63% if both countries are members.<sup>152</sup> Hale goes on to posit that membership in the New York Convention, as well as membership in the World

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<sup>146</sup> MATTLI & DIETZ *supra* note 1, at 189.

<sup>147</sup> *Id.* at 190.

<sup>148</sup> *Id.* at 191.

<sup>149</sup> *Id.* at 194.

<sup>150</sup> *Id.* at 196.

<sup>151</sup> MATTLI & DIETZ *supra* note 1, at 197.

<sup>152</sup> *Id.* at 198.

Trade Organization, are forms of global governance that allow for the effective enforcement that the arbitration field may be missing.<sup>153</sup>

Hale next lays out the data that his study relies on, as well as his method of analysis. The trade data is pulled from the IMF's *Direction of Trade Statistics*<sup>154</sup> while the GDP data is taken from a number of sources.<sup>155</sup> Hale's model seems a bit overly statistical for a book that is intended to reach a broad audience within the legal field, most of whom likely do not possess the mathematical expertise to fully appreciate and/or critique the model. The model utilizes a wide range of variables to ultimately assess the impact of membership in the New York Convention and the World Trade Organization on a country's bilateral trade.<sup>156</sup> Hale ultimately concludes that when one country is a member of the New York Convention, the trade between the countries increases by 8%, whereas when both nations are members, their trade increases by 35%.<sup>157</sup> The increase in trade was even more striking when countries were members of the World Trade Organization.<sup>158</sup> When one country is a member of the WTO, trade increases 58%, whereas when both countries are members, trade increases by an astounding 306%.<sup>159</sup>

This chapter was one of the shortest in the book and by far the most technical. However, the ultimate conclusion that there is credible data to show that transnational agreements that support the enforcement of arbitral awards is exciting. This data lends credibility to the overarching theme of the book of arbitration as a true type of global governance.

## XI. THE CONTESTED LEGITIMACY OF INVESTMENT ARBITRATION AND THE HUMAN RIGHTS ORDEAL: THE MISSING LINK

The last chapter is written by Horatia Muir Watt and concerns ways in which social and economic rights can be introduced into the field of investment arbitration. Watt takes issue with investors that use the contractual process to exculpate themselves from the regulations of the home state.<sup>160</sup> Watt argues that

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<sup>153</sup> MATTLI & DIETZ *supra* note 1, at 201.

<sup>154</sup> *Id.* at 205.

<sup>155</sup> See PWT6.1, PWT5.6, WDI2003, *Historical Statistics, International Financial Statistics and United Nations Statistical Yearbook*; see also Liu (2009, p. 436) for further details regarding the mis-measurement of GDP in previous studies.

<sup>156</sup> MATTLI & DIETZ *supra* note 1, at 207

<sup>157</sup> *Id.* at 210.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 212.

<sup>160</sup> *Id.* at 215.

existing investment arbitration tribunals could be used to hold corporate actors that are the beneficiaries of bilateral investment treaties accountable for human rights violations.<sup>161</sup>

Watt identifies the primary issue with holding corporate actors responsible for alleged human rights violations is finding a proper forum for these cases to be heard, with the home State's domestic courts being the most logical place.<sup>162</sup> However, because of the strength of the arbitral agreements, it can be quite difficult to get these claims around the arbitral process and into the jurisdiction of the national courts.<sup>163</sup>

To resolve this, Watt believes that the existing international investment regime is sufficiently able to bridge this gap.<sup>164</sup> Watt conceives of a system in which host states allow the arbitrator to extend their jurisdiction in a proceeding and take human rights violations suffered by the population of the home State not a party to the arbitration into account.<sup>165</sup> This would seem to place a great deal of hope in the idea that arbitrators would be a willing actor in this extension of his rights.

While Watt identifies a real problem in arbitration, namely holding economic actors responsible for human rights violations, the solution proposed seems insufficient. Watt's fix relies heavily on arbitrators to greatly expand their jurisdiction, something that they may be very reluctant to do. An arbitrator runs the risk of losing business if he continually goes far beyond what the parties contracted about. A better solution might be to address any potential violations of this nature in the contract itself.

## XII. CONCLUSION

International Arbitration & Global Governance serves as an effective introduction to the field of international commercial arbitration. While it does end up reading as more of a collection of essays than a coherent book with a singular theme, by utilizing multiple authors, the editors have given the readers a number of different perspectives on the topic. In an academic setting, the book would best be utilized by assigning several individual chapters instead of the entire book. As international arbitration continues to develop, books like this that suggest ways in which the system can be governed and made more efficient will continue to be extremely valuable to the field as a whole.

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<sup>161</sup> MATTLI & DIETZ *supra* note 1, at 216.

<sup>162</sup> *Id.* at 231.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 237.

<sup>165</sup> *Id.* at 239.