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Introduction to Symposium: Achieving Justice in Arbitration

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INTRODUCTION

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This symposium attests to the depth of scholarship that now surrounds the law of arbitration and to arbitration's widening adjudicatory mission in matters international and domestic. Authored by senior and emerging scholars who share a commitment to professional excellence, the various contributions not only assure continuity in arbitral scholarship, but also underscore the growing sophistication of arbitral practice and illustrate the complexity of the relationship between arbitration and the legal process. This symposium represents an inquiry into the convergence and divergence of legal and arbitral adjudicatory values and what impact these similarities and differences might have upon the functioning and continued legitimacy of the arbitral process.

The emergence of arbitration in domestic law from the confines of specialty areas has occurred with surprising alacrity, especially in the United States with the recent decisional law of

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the United States Supreme Court. In the transnational sphere, the internationalization of commerce and the willingness of states to privatize trade policy and other political disputes have contributed to the magnified stature of arbitration. The heightened popularity of arbitration in increasingly variegated dispute areas has created concerns relating to what form of justice is available and achievable in arbitration and, relatedly, whether the traditional concept of justice has been redefined by the reference to arbitration.

In particular, do legal norms (as to matters of both procedure and substance) survive in whole or in part once they are integrated into the process of arbitral adjudication? Moreover, is their survival or status in arbitration at all relevant in evaluating the operation of the arbitral process? Arbitration, after all, is a substitute for judicial adjudication; party recourse to arbitration is a bargain for another mode of dispute resolution, devoid simultaneously of the values and the problems that characterize the legal process of adjudication. Legality, nonetheless, remains important to the arbitral process. Basic lawfulness is instrumental to its continued viability. At times, arbitral agreements and awards must be enforced coercively through court proceedings. The arbitral process, therefore, must comply with minimal legal standards in order to remain functional in the critical circumstance of party noncompliance.

As a number of contributors make apparent, most national statutes on arbitration unhesitatingly attribute systemic autonomy to the arbitral process and require further that municipal courts cooperate with, assist, and support arbitration. In effect, under contemporary law, the requirements of legality are not much of a restraint upon the exercise of arbitral authority or jurisdiction; they demand, in a general way, a basic regard for procedural fairness and some protection for the fundamental public policy concerns of the implicated jurisdiction. The reluctance of states to interfere with arbitral agreements and determinations, although it promotes the autonomy of the arbitral process, has engendered an unfortunate and dangerous situation of nearly complete license. In particular, the statutory deregulation of arbitration poses the danger that an unbridled arbitral process, employed in a wider variety of domestic and international dispute contexts, could eventually undermine its own legitimacy. Deregulation initially insulates arbitration from intrusion by contradistinctive legal values, but some of those val-

ues are instrumental to the integrity of any adjudicatory process. Their absence leads to a lack of both procedural limitations and jurisdictional definition. An unfettered adjudicatory process can result in abuses that significantly compromise basic rights and provide inadequate or untoward remedial relief. Clear boundaries are necessary between the arbitral and legal processes for the benefit of arbitration so that it can preserve the legitimacy that proceeds from meaningful legal constraints.

The problems generated by statutory deregulation and the rise of absolute arbitral autonomy have been especially pronounced in United States arbitration law. In recent pronouncements, the United States Supreme Court has nearly eviscerated the inarbitrability defense to arbitration and, as a consequence, lessened significantly the role of public policy and judicial authority in arbitration law. Is arbitration intended or able to provide adjudicatory relief for both regulatory and contractual disputes? Can a judicial policy proclaiming the arbitrability of statutory rights be applied indiscriminately in both domestic and international cases? While international arbitrators may be uniquely positioned to elaborate an international law merchant, should national statutory law nevertheless maintain some form of application in international cases through municipal judicial interpretation in matters vital to national interests?

The phenomenon of arbitral autonomy also has had an impact upon the exercise of arbitral jurisdictional authority in both domestic and international proceedings. Should arbitrators be allowed to award punitive damages or other forms of extraordinary relief as part of their ordinary powers to adjudicate disputes? Such authority appears to supercede party prerogatives in contract. The enforcement of arbitration agreements of questionable validity in the setting of consumer claims reflects another excess of would-be arbitral autonomy. It manifestly violates the consensual character of the recourse to arbitration. Because it is a form of purely private justice, arbitration cannot act as a mechanism for expressing or (much less) protecting the public interest. The redefinition of arbitration's stature under the auspices of the deregulatory movement has resulted in an ambitious and ill-conceived recasting of the institution of arbitral adjudication—without proper regard for the values at stake on either side of the adjudicatory equation.

The use of arbitration in state and federal statutes implementing alternative dispute resolution frameworks also has com-

plicated and confused the law of arbitration. Court-annexed arbitration, like the use of arbitration to resolve securities disputes, is not an ordinary application of the arbitral mechanism. To some extent, it is a sui generis and novel use of the existing framework; court-annexed arbitration represents a different form of arbitration that provides for yet another avenue of arbitral justice. Moreover, in this regard, it should be noted that commercial, maritime, and labor arbitrations, despite their similarities, are likewise separable forms of arbitration that service different adjudicatory needs and communities. The justice achieved in each of them may vary and the role of legality in relation to each of them may differ as well. The various branches of arbitral activity must be joined and their distinctive character retained in order to produce comprehensive and meaningful arbitration law. By their diversity, the contributions in this symposium begin that difficult and complex task.

There are other issues that attend the development of arbitration law and its evolving relationship with the legal process. For example, what role should lawyers and the traditional concept of litigation play in arbitral proceedings? Should there be broad and liberal discovery as a matter of right in arbitral proceedings or should the question be resolved on an ad hoc basis by arbitrators in individual cases? American lawyerly values do appear to be the antithesis of arbitral procedural flexibility. In this regard, can the ethic of arbitral flexibility remain workable in light of more sophisticated legal representation? Is justice by so-called approximation and through arbitrator discretion acceptable to the legal community? Might such a process not only encroach unduly upon basic legal norms, but also substantially disappoint party expectations? Do regulatory claims demand a level of formalism that is inapposite to the ethic of arbitration? Can arbitration remain functional outside the consensus of specialized communities? The trust that has been and must necessarily be placed in the arbitrators may have to be supplemented with some type of public exposure and scrutiny of proceedings and awards in order to maintain the legitimacy of an expanded arbitral process. Again, the contributions break ground by bringing these difficult issues of redefinition, adaptation, and adjustment to the fore. As a whole, they emphasize that arbitration law has reached a critical juncture in its evolution where the very role and function of arbitration (for the sake

of the institution itself and the adjudicatory values it represents) warrant a thorough reexamination.

The success of arbitration in matters of international trade and commerce has been immense, but the continued operation of the arbitral process in that area also raises a host of potential problems. Arbitration is being employed experimentally as a mechanism by which to resolve sovereign conflicts. The question becomes how far the delegation of sovereign authority to arbitration can extend. How much privatization is possible? How autonomous can arbitration remain in this context? Is the reference to arbitration likely to result in fair and binding determinations? The recourse to arbitration in this setting also may require a substantial restructuring of existing arbitral procedures and a possible reconsideration of the adjudicatory gravamen of the process. Relatedly, arbitration may prove to be a useful mechanism by which to resolve the problems associated with the international debt crisis. Here, too, the established framework may need to be customized to the particular character of the situation, resulting in yet another sui generis form of international arbitration. Moreover, the continued use of arbitration in international commerce raises questions pertaining to whether the acceptance of arbitration by developing countries is a necessary first step to participation in international trade; whether the procedure of arbitration should be accompanied by the application of a law that equalizes the disparities in national economic development; whether arbitral procedures should be modeled upon civil-law or common-law notions of procedural regularity; and whether some form of stare decisis and decisional content should accompany arbitral awards.

The articles that follow confront many of the vital issues of international and domestic arbitration law. They contain sophisticated, thorough, and well-documented discussions of these questions. The teaching of this symposium does much to advance the content of arbitration law and the understanding that is necessary to adapt the institution of arbitral adjudication to its new but precarious vocation in domestic and international dispute resolution.