In Support of Arbitration

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Pamela Bookman, *The Arbitration-Litigation Paradox*, __ **Vand. L. Rev.** __ (forthcoming), available at SRRN.

Arbitration and litigation are often treated as opposites. Arbitration in its idealized version is sleek, fast, and endlessly adaptable. Litigation is its foil: clunky, inexpert, and sometimes captured. As a consequence, being *pro*-arbitration and *anti*-litigation are assumed to go hand-in-hand.

In *The Arbitration-Litigation Paradox*, Pamela Bookman challenges this account. With a focus on international commercial arbitration, Bookman suggests that hostility to litigation undermines the key role of courts in supporting arbitration. In other words, to be *pro*-arbitration, sometimes courts need to be *pro*-litigation as well.

An interesting aspect of using international commercial arbitration as the core example is that many critiques about party consent and sophistication are simply not present. Arbitration provides a much-needed "neutral and predictable forum for potential disputes" that cross national borders. And "[b]usiness-to-business arbitration generally and international commercial arbitration in particular are the paradigm, original context for the pro-arbitration policy in the first place." (P. 34.)

In the context of sophisticated commercial parties and cross-border transactions, one would expect deference to parties' private contracting. In its arbitration cases, however, the U.S. Supreme Court overrides the choices of the contracting parties. It sacrifices arbitration's "private-law values" of autonomy and adaptability in favor of what Bookman calls "essentialist values" that focus only on arbitration's difference from litigation. (P. 20.) Courts strike down "forbidden characteristics" of arbitration "that make arbitration look more like litigation." (P. 34.)

In Bookman's account, this essentialist approach has no place in a world where distinctions between arbitration and litigation are not always clear. (Note the complaint in the literature that commercial arbitration is being "judicialized.") The term "arbitration" itself is overbroad, obliterating an important distinction between arbitration of consumer claims, where critics point to overexpansion and negative effects, and international commercial arbitration, where courts are "insufficiently supportive." Bookman's proposed replacement for the Court's essentialist views is in part "a clarion call to regulate arbitration in a subject-matter-specific way." (P. 49.)

The article highlights the Court's rhetoric about the virtues of arbitration and the vices of litigation. For any reader who sees this as a rough-fought battle over access to the public court, terms like the "essentialist values" of arbitration may seem a bit bloodless. A more rabblerousing version might tell a story about the Court's lip service to freedom of contract and the talisman of consent, and how these give way to an opposing agenda. (Dismantling aggregate action? Defanging the plaintiffs' bar?)

But these aspects of the fight over arbitration often dominate discussions, obscuring other underlying patterns. Bookman's elegant framework and isolation of the most defensible area of arbitration allow the reader to look past these usual debates. The article challenges the Supreme Court on the extent to which its nominally pro-arbitration decisions actually support this core category of arbitration. And Bookman offers a subtle shift of perception on the major arbitration cases.

The Arbitration-Litigation Paradox is a worthwhile read. It leaves some hanging threads, but this is all the more reason to keep an eye out for Bookman's future work. *The Adjudication Business*, which she previews at the article's end,

promises to pull on one of these threads: the “complex, *competitive* relationship between litigation and arbitration.” (P. 43.)

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