

# PRIVATE JUSTICE & THE RULE OF LAW

## JUSTICE PRIVÉE ET ÉTAT DE DROIT

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### KEY WORDS

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· Private law · Cyberjustice · Lex  
mercatoria · Procedural law

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### SOME RELATED PROJECTS

Méthodologie d'appréciation des  
risques juridiques des systèmes de  
cyberjustice (CRSH) · Normativités  
informelles et délibérées: l'arbitrage du  
commerce transnational entre droit et  
contrat · Base de données regroupant  
les décisions judiciaires interprétant  
la loi type du CNUDCI sur l'arbitrage  
commercial international (FCI) · The  
Open State (McGill) · Le recours global  
(Fondation Claude Massé)

As a form of private justice supported by the power of the state, arbitration is subject to the control of a court of law. Of its own motion, the court ensures that the matter is arbitrable and that public policy has been respected. At the request of a party, the court is also responsible for ensuring compliance with the agreement between the parties, including issues related to the competence of the arbitrator. Arbitrability, public policy, arbitration agreements and competence lie at the heart of the dynamic between private justice and public justice, as they determine for the latter what remains an area reserved to the state, free from competition. This area has become the focus of attention because of the increasing recognition of the right of the parties to determine their own law, which can entail the application of rules taken outside the parameters set by recognized legal systems. For example, these rules can refer the arbitrator to religious law or to rules of transnational commercial law. A McGill research team is currently asking the hard questions about the relation between private justice and the rule of law.

## RESEARCH QUESTION

The area reserved for state justice is the last bastion of state monopoly on the administration of justice in respect of the determination of cases and controversies, but also in respect of the establishment of substantive law. This area for judicial review of arbitration thus becomes a reflection of the irreducible domain of the state in legally pluralistic societies and the globalized normative universe. The principles and modalities of judicial review of arbitration are being constructed and have yet to be satisfactorily conceptualized, as is also the case with the relationship between non-state law and its recognition by the law and institutions of the state.

A growing number of jurisdictions have adopted an approach to judicial review for public policy that recognizes not only the arbitrator's authority to apply rules pertaining to public policy, but also his 'right to err' in their application, provided that the very recognition or enforcement of such erroneous awards does not threaten public policy. The process of freeing up arbitration is apparent in the constant questioning of the traditional limits that have been set for arbitration and in the ensuing extension of the domain of arbitrability. Expansion of consensual arbitration into areas as varied as bankruptcy, competition law, consumer law, family matters, fraud, labour relations, intellectual property, securities, and taxation has been witnessed. There is a need to consider the appropriateness



of the delineation of matters open to arbitration and the place carved out by the state for judicial monopolies. One requires profound reflection on the nature and validity of the reasons for which certain domains remain reserved for state justice, as well as, on the effectiveness of the conceptual tools associated with judicial review.

## RESEARCH THEMES

### TRANSNATIONAL LAW AND STATE STRUCTURES

This theme considers the question of the sources of transnational law and possible connections between it and the state apparatus. Regarding the question of sources for transnational law, hypotheses tend to be based on contractual explanations or legal ones. Any reconciliation of these explanations would require a fresh look at the relationship between formal law, usage, and contract that would allow sufficient space for the implicit normative context surrounding written provisions. This might ensure a minimum of conceptual coherence in the emerging field of transnational contract law.

### ARBITRABILITY, PUBLIC POLICY AND RULE OF LAW

This considers the question of the relationship between arbitration and judicial control on the basis of public policy and arbitrability, particularly, imperatives of the rule of law, which are derived from principles of liberal and communitarian justice. How is one to reconcile the fundamental principles of the rule of law and judicial review of legality with arbitral liberty, choice of law, and choice of forum? What must one render onto Caesar in a context of a normative plurality that has long been hidden by the Westphalian system and legal positivism? Is *a posteriori* judicial review of arbitral decisions for public policy sufficient to respond to the concerns regarding public policy? What is the common denominator between matters that are considered to be inarbitrable?

### ARBITRAL COMPETENCE BETWEEN CONTRACT AND LAW

The third theme of the research program considers delineating arbitral competence from the perspective of its supervision by courts. It has been generally accepted that this supervision, subject to the principle of *Kompetenz-Kompetenz*, which provides priority in time to arbitrators, extends to the existence as well as to the scope of the arbitration agreement, and to the proper appointment of arbitrators. The limits of jurisdiction, however, remain fluid in reference to the arbitrator and his powers.

### LEGAL RISKS ASSOCIATED WITH ONLINE ARBITRATION

The meeting of arbitration and communication technologies brings the prospect of satisfying a basic and latent demand of the world economy: a rapid and inexpensive means for small and medium enterprises engaged in international commerce to access justice. Online arbitration brings together all of the elements required for this type of justice: freedom of contract, the enforceability of arbitral awards, and advances in communication technologies. However, analysis of legal risk is required, as certain procedural constraints concerning justice may be called into question by these revolutionary technologies.

### ACTIVITIES

Under the aegis of the Institute of Comparative Law (ICL), the team regularly organizes conferences, lectures and workshops and provides unique opportunities for students to encounter the practical aspects of international arbitration.

#### International Arbitration Conferences and Lectures

In 2007-08, the team hosted the Secretary General of the China International Economic Trade and Arbitration Commission (CIETAC) and of the International Court of Arbitration of the International Chamber of Commerce (ICC). It also co-organized seminars on the Dell decision, and on constitutional constraints on arbitration in the United States. Every year, the ICL Dispute Resolution Lecture Series puts students in contact with noted international arbitration practitioners from most continents and many dispute resolution institutions such as the World Bank's ICSID. Every other year, a Brierley Memorial Lecture is delivered by a leading arbitration expert.

#### Summer School in Arbitration

McGill hosts an International Arbitration Summer School open to law students and young lawyers from all jurisdictions.

#### Arbitration Workshops

Team members have been giving workshops for arbitrators and arbitration practitioners. In 2008, McGill is co-host of an ICC arbitration workshop with the ICC Court's office for North America.

#### Internships

Several internship programs are sponsored under this grant in co-operation with leading international organizations such as the Permanent Court of Arbitration at The Hague and the ICC International Court of Arbitration in Paris.