

BOOK REVIEW

DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER

By Yves Dezalay and Bryant G. Garth
Chicago; University of Chicago Press, 1996, 353 pp.

*Reviewed by Karen S. Walch**

Yves Dezalay and Bryant G. Garth accomplish a significant tour de force with their publication *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. The authors assert that the global market of transnational business dispute resolution has undergone significant changes in the post World War II era. They judiciously contend that the internationalization of law, in general, and the use of transnational business dispute arbitration, in particular, are the result of a unique dynamic in the relationship between and among national and international business, states and firms, and the law and individual "virtuous" lawyers. The authors' success is a result of their ability to vary the levels of analysis with an interdisciplinary assessment of this dynamic which ultimately provides a thesis that can be appreciated by lawyers, legal academics and an array of social scientists and historians interested in business, market and state relations.

The authors thank Pierre Bourdieu for providing a structural framework within which they explain a social construction toward the present acceptance of international commercial arbitration. Over the past twenty-five to thirty years, the authors conclude that arbitration has become big legal business and an accepted method for resolving international business disputes, and that the International Chamber of Commerce (ICC) has become "the institution of choice." In short, the acceptance of and increased need for transnational business arbitration has become an important and tremendously practical issue in the contemporary global economy. The authors point out that one of the most significant characteristics of the post World War II market growth in international business arbitration is that it has been largely detached from scrutiny and regulation of any national court system. This, however, is in contrast to predictions they make which

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suggest that states will become more dominant in transnational business dispute resolution in the future.

Dealing in Virtue is organized into three major sections with the first part exploring the virtues of arbitration and individual arbitrators. Part two describes and explains the construction of the current transnational private justice system and how international business conflict management has become dominated by the legal community. Part three discusses some of the global and systemic transformations in the economic marketplace which has and will continue to require effective professional management of transnational business conflicts. Dezalay and Garth organize and utilize these sections to expound on two major conclusive research discoveries: the practice of international business arbitration is limited to a few institutions, and a relatively few select arbitrators are used on both sides of the Atlantic. How is it, they ask, that such an "inner circle" has dominated in transnational arbitration, and how is that likely to change with increasing competition in the international dispute resolution field?

The level of analysis first addressed in Section One of *Dealing in Virtue* highlights the arbitrators themselves. Dezalay and Garth spend a considerable amount of time at the outset describing this select and small elite group of arbitrators who are chosen for their virtue—judgment, neutrality and expertise. This symbolic capital is built on their public service or scholarship which provides the significant and substantial cash value necessary for international arbitration. This symbolic capital is the "recognized power" critical for the construction of order and legitimacy in the field of transnational arbitration. The authors profile some members of this select group in a vivid way and, with some nostalgia, illustrate the way the practice used to be. Dezalay and Garth describe some of the current conflicts between these "grand old men" and the new "technocrats" who may threaten the "age of innocence" of international commercial arbitration. These impeccable, outstanding professional arbitrators now face competition from large law firms which has led to what some describe as the "banalization" and rationalization of arbitration.

The authors use Section Two to describe some of the forces which have created opportunities for the "grand notable" arbitrators and their legal colleagues of the future. In Section Two, the real history of the flourishing field of international commercial arbitration is explained by tracing the successful transformation of the International Chamber of Commerce. With historical and sociological insight, the authors recognize the construction of the post World War II arbitration method is the result of the "merchants' of law" search for international justice in the face of rising transnational business disputes. The authors effectively use the North-South context to describe the collective construction and a universal acceptance of law as a means to resolve business disputes. Despite the fact that North-South

conflicts are largely the result of political events, the authors point out that business disputes were routinely settled in private with little to no involvement of state or political actors.

The spread of American legal style practice has ultimately emerged, the authors assert, as the lingua franca of international commerce. The business litigiousness and the rise in transnational business disputes, especially in the 1970s and 1980s, has created a new and more competitive market in legal services. In the conclusion of Section Two, the authors illustrate the rise of business litigation and arbitration with a case analysis of a large Algerian construction project financed by petrodollars. This case illustrates the forces which fuel the explosion of corporate litigation and how clients new to this "warfare" quickly learned the benefits gained in terms of time and potential settlement value, but gave lawyers "virtual carte blanche." Thus, they say, the "armies of litigators naturally grew."

Section Three of *Dealing in Virtue* focuses primarily on the current transformations in the field of international arbitration and business disputing. The authors point out that international commercial arbitration has to be assessed in relation to the changing position of law and lawyers in the context of economic and state power. Arbitration in Hong Kong, for example, is inextricably connected to the politics of Hong Kong and even in China. The authors primarily address the changes in England, the United States, Sweden, Egypt and Hong Kong, but they note that large law firms from the United States, London and elsewhere, are now found worldwide in attempt to handle transnational commercial disputes. In addition, graduate study in U.S. law schools is now one of the necessary requirements for building a valuable resume of non-U.S. practitioners in international commercial disputes. The authors conclude that the internationalization of law is driven by American legal concepts and practices which have been disseminated via USAID and other U.S. funded international organizational policies and practices.

Dezalay and Garth end their book with some theoretical considerations about the changing relationships between business, law and state judicial systems. Despite all the potential changes, the authors suggest that Paris offers the certainty, legitimacy and an enduring center for international commercial arbitration. Paris possesses an appropriate mix of Continental academics, large multinational law firms and a fragmented and compartmentalized legal landscape necessary for business disputing. The authors highlight Paris as the force which has facilitated the successful export of international commercial arbitration and they maintain that it will remain the heart of international commercial arbitration.

One element inadequately explored by the authors in the concluding section is the issue of alternative dispute resolution's (ADR) method of mediation. Dezalay and Garth claim that it is difficult to imagine mediation

gaining prominence in international commercial dispute settlement. They do, however, assess the rise of new dispute resolution providers and the hostility building in the field toward the dominance by judges and attorneys in business dispute settlement. They cite examples of U.S. providers of ADR who seek to go global with international joint ventures, such as JAMS with World Jurists Association and the Center for Public Resources entry into Europe. The authors see the growing number of litigation lawyers turning to ADR as an opportunity to create and market "yet another profitable expertise."

The authors believe that the increasing belief in the political and economic model of Western liberal democracies and the internationalization of law now make it possible to build global legal regulatory structures. The argument generally asserts that if supranational institutions are to be legitimate and effective in forming large regional markets or assist the private sector access to the global market, the political and legal superstructures are necessary for enforcement. These authors aptly point out that the political and economic stakes associated with international and regional trade and security agreements are extremely high and private disputes may ultimately lose some of their importance and become mere bargaining chips in a political context. Therefore, one might ask, whether the apolitical nature of transnational commercial dispute settlement will continue to be in demand in the future?

If it is true as these authors predict, that modern trade battles and the field of transnational business justice will be more closely connected to states and the creation of new models and institutions rather than a simple modification of the existing institutions. The future of emerging dispute resolution mechanisms within supranational organizations, such as the World Trade Organization under GATT, the European Court of Justice and NAFTA, will depend on the political struggles concerning international legal, financial and business sectors. The authors suggest that study and examination critical networks, alliances and institutions which are active in the new modifications are the best way to determine what is likely to emerge in the future. It is quite certain, however, that arbitration will become more political and costly while commercial enterprises will be searching for more efficient and effective means for dispute resolution. It may be here where mediation gains ground and reshapes the field of business disputing. The central elements of mediation which involve consensus, power of shared decision making, negotiation on the interests, solutions for the future, facilitated by a neutral and competent mediator in a nonadversarial manner can represent the best of dealing in virtue.