**Citation:**

Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 PENN. ST. L. REV. 1031 (2009).

**Other Sources:**

[http://ssrn.com/abstract=1877967](http://ssrn.com/abstract%3D1877967)

**Key words:**

arbitration, contracts, dispute resolution, private ordering

**Abstract:**

With its focus on private legal systems, the private ordering literature sets up a seeming dichotomy between public court adjudication of disputes, applying publicly created laws, and private arbitral adjudication of disputes, applying privately developed rules. Trade association arbitrations fit neatly into the latter category; public courts fit almost as neatly into the former. But while the dichotomy highlights the cases of most interest in the private ordering literature, it is too simple. It gives the appearance of an all-or-nothing choice - all public dispute resolution or all private dispute resolution - when in fact hybrid choices are common.

This article seeks to add to the private ordering literature in two ways. First, it argues that international commercial arbitration, while sometimes cited as an example of private ordering, is in fact - a hybrid case - with important elements of public involvement supplementing the use of a private decision maker. Too often, international arbitration is grouped with trade association arbitration in ways that blur the important distinctions between the two. Not all arbitration is alike, and not all parties that agree to arbitrate opt out of the legal system altogether.

Second, this article examines attributes of international transactions that help explain party choice among these different mechanisms of resolving disputes. It considers four attributes: (1) distance - geographic, as well as cultural and political - between the parties; (2) the complexity of the good or service; (3) the clarity of the applicable national law; and (4) the importance of speedy resolution of disputes. Trade association arbitration is most likely to be used for transactions in simple goods, although less likely in international transactions involving greater distances than domestic transactions. International commercial arbitration is the more likely choice for international transactions, except in cases in which the applicable law is clear or emergency relief is likely to be needed. In such cases, parties are more likely to choose litigation in national courts. The attributes thus prove useful in explaining differences in the choice of enforcement mechanism across various types of international transactions.