PRIVATE JUSTICE AND THE RULE OF LAW

Why Communities Build Their Own Dispute Systems, and When the State Will Enforce Them

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Lawyers usually meet the rule of law in court: notice, an opportunity to be heard, and a neutral decision-maker applying rules known in advance. But courts are only one way a society enforces the rules it has agreed to. Traders, workers, athletes, immigrant communities and religious communities have long built forums of their own, for speed, for expertise, or because the courts were not open to them on fair terms. Through arbitration law, the state lends many of these forums its enforcement power. That raises a rule-of-law question: when should a court stand behind a decision it did not make? This paper's answer is that the conditions must be the same for every community, because the rule of law cannot change depending on who is asking. The encouraging part is how persistently people build peaceful ways to resolve their disputes.

Why Communities Build Their Own Systems

Eric Feldman's study of the Tuna Court at the Tokyo Central Wholesale Market, known as Tsukiji, shows what specialist adjudication looks like in a technical industry.[2] Buyers judge each fish by color, oil content, texture, density and taste, drawing on a lifetime of handling fish.[3] Freshness is crucial to value, and "getting tuna quickly from the auction floor to the table is of the utmost concern."[4] Some defects show only after the sale, when the fish is cut open.[5] When buyers asked for discounts and were refused, some withheld payment. Both sides asked city officials to systematize the handling of these disputes, and in 1972 the Tokyo Metropolitan Government issued an ordinance setting out a dispute-resolution mechanism.[6]

The court sat on "a barren rectangle of outdoor cement adjacent to the tuna auction house." Its five judges were registered tuna auctioneers, none of them lawyers, one from each of the market's auction houses, and a city official supervised every session. They examined the fish and might ask the buyer a question. There was no formal hearing, and buyers did not have to explain their claims. Each judge recorded a percentage reduction in price, and the scores were averaged. Feldman saw judges spend as little as fifteen seconds on a case and never more than two minutes. About 3% of claims were appealed.[7] Feldman's study suggests that "thoughtfully designed and focused courts may outperform the informal norms of close-knit commercial groups."[8] That is the

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[2] Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 Calif. L. Rev. 313, 316 (2006). The market moved from Tsukiji to Toyosu in 2018; the description here is of the court as Feldman studied it.

[3] *Id.* at 325–26.

[4] *Id.* at 362.

[5] *Id.* at 332, 334.

[6] *Id.* at 330–31, 334. Feldman presents this account of the court's origins with some caution. *Id.* at 331 n.55.

[7] *Id.* at 334, 339–40, 343–44.

[8] *Id.* at 320; *see also id.* at 369.

rule of law in a specific and practical sense: a forum the traders asked for and the state created, known rules, and judges with the expertise and speed the dispute demanded.

Sports and labor relations go a step further. The parties write the rules, and the arbitrator applies them. Labor arbitration applies the collective bargaining agreement and what the Supreme Court has called "the industrial common law—the practices of the industry and the shop."[9]

Baseball's salary arbitration, in place since the first hearings in 1974, is a vivid example. Under the collective bargaining agreement between the clubs and the players' union, an eligible player and his club each file a single salary figure, and the arbitrators must award one or the other, with "nothing in between." In the procedure as described in 2006, each side had an hour to present its case and 30 minutes for rebuttal, and the arbitrators decided within 24 hours. Because the arbitrators cannot split the difference, both sides take a substantial risk in going to a hearing, and the format pushes them toward settlement.[10]

The tuna traders and the ballplayers needed what a full trial or a full-scale arbitration, with a year or two of discovery, cannot always give: a decision fast enough to matter, from someone who understands the dispute. What they built were systematic ways to apply reason, logic and law that were (a) significantly less comprehensive than a trial or typical arbitration, but (b) significantly faster and (c) significantly less expensive.

Arbitration's appeal is procedural flexibility, low cost, speed, decision-makers who sometimes have more, and sometimes less, expertise than trial court judges, and enforcement through civil courts. Some arbitration agreements set the arbitrators' qualifications, for example by requiring that they come from a particular organization's panel or a particular profession.[11]

Construction is a familiar example. A large building rests on a chain of contracts, from the owner to the general contractor to the plumbers, electricians and other trades, and the industry's standard forms let the parties choose arbitration.[12] Many construction arbitrators are not lawyers: in 2008, 37% of the American Arbitration Association's construction panel were architects, engineers, contractors, developers and sureties.[13]

Over the past century, arbitration went from unenforceable handshake agreements to contracts routinely backed by the full force of state and federal law. Congress enacted the Federal Arbitration Act in 1925 to end, for matters within federal reach (maritime transactions and contracts involving interstate commerce), the common-law rule that let parties walk away from their agreements to arbitrate.[14]

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[9] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82 (1960); *see* Cameron-Windsor, *supra* note 1, pt. IV.C.

[10] Bill Gilbert, *Salary Arbitration: Burden or Benefit?*, 35 Baseball Rsch. J. (2006), https://sabr.org/journal/article/salary-arbitration-burden-or-benefit/.

[11] 9 U.S.C. § 5 (directing that the agreement's method of naming arbitrators be followed).

[12] AIA Contract Documents, *Litigation or Arbitration? Highlighting Key Differences in Dispute Resolution Methods* (June 17, 2024), https://learn.aiacontracts.com/articles/litigation-or-arbitration-highlighting-key-differences-in-dispute-resolution-methods/ (explaining that the AIA A101-2017 owner-contractor agreement lets the parties choose arbitration, litigation or another binding method).

[13] Michael J. Altschuler, *Arbitrating Before a Non-Attorney Construction Industry Neutral: What Construction Industry Arbitrators Are Thinking About, How They Can Influence the Outcome, and Why and How You Should Connect with Them When Presenting Your Case*, 63 Disp. Resol. J., Nov. 2008–Jan. 2009, at 60, 60.

[14] Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16); Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. Kan. L. Rev. 795, 824 (2012) (discussing the revocability doctrine).

Some immigrant communities, often poorly served by courts that were costly, unfamiliar or hostile, built dispute-resolution forums of their own. For example, in nineteenth-century San Francisco, Chinese district associations, the *huiguan*, arbitrated disputes among their members at a time when the California Supreme Court barred Chinese witnesses from testifying for or against white people in criminal cases.[15] In New York, the Jewish Conciliation Board, founded in 1931 to succeed an earlier Jewish Court of Arbitration, gave immigrants a free alternative to costly litigation, and its decisions were binding under New York's arbitration law.[16]

When Should the State Back a Private Decision?

An arbitration agreement can replace the governing law with (a) another jurisdiction's law; (b) non-state law; or (c) rules the parties write themselves. A court asked to confirm the award asks principally whether the agreement was valid and the process fair.

The Federal Arbitration Act allows a court to vacate an award only on narrow grounds: (a) fraud; (b) corruption; (c) partiality; (d) misconduct; or (e) arbitrators exceeding their powers. In most jurisdictions, an arbitrator's properly rendered award is essentially unreviewable for legal error.[17]

That is the formal legal system putting its power behind an informal one, which makes arbitration a rule-of-law question. The rule of law asks that power be exercised through law: rules known in advance, applied fairly and evenly, and binding on those who agree to apply them. When a court confirms an award, the state stands behind a decision it did not make, in a process in which it did not participate and under rules it may not have written. The question is when it should confirm the award, and the answer cannot depend on who is asking.

Religious Arbitration in Three Traditions

For more than a century, the sunlight of the Federal Arbitration Act has encouraged the growth of religious alternative dispute resolution. Three of the most studied traditions are Christian, Jewish and Muslim.

Each applies its own law. Courts enforce the results under ordinary arbitration law without deciding religious questions.

Christian Conciliation organizations, including Peacemaker Ministries and the Institute for Christian Conciliation, apply biblical principles to disputes between Christians, from real estate and employment to personal injury.[18] As the name suggests, they prioritize conciliation.[19] The goal is to repair the relationship between the parties,[20] and lawsuits between Christians are discouraged

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[15] Charles J. McClain, *Chinese Immigrants in the California Supreme Court: The Earliest Civil Cases*, 19 Cal. Legal Hist. 73, 75, 83 (2024); People v. Hall, 4 Cal. 399 (1854).

[16] Jewish Conciliation Board of America Records, MS-501, American Jewish Archives, https://sites.americanjewisharchives.org/collections/ms0501/ (last visited Oct. 21, 2026).

[17] 9 U.S.C. §§ 2, 10; Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584 (2008).

[18] *See* Broyde & Windsor, *supra* note 1, at 26–27.

[19] Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 Yale L.J. 2994, 2997 (2015).

[20] Judith M. Keegan, *The Peacemakers: Biblical Conflict Resolution and Reconciliation as a Model Alternative to Litigation*, 1987 J. Disp. Resol. 11, 12.

until gospel-based processes have been exhausted.[21] In *Prescott v. Northlake Christian School*, an Institute arbitrator held that biblical passages in a school principal's employment contract were incorporated into its terms, found that the school had failed to resolve its conflict with her in accordance with Matthew 18, and awarded her $157,856.52. The contract gave her no right to employment beyond a one-year term, and the Fifth Circuit observed that the result "appears incompatible with Louisiana law." It sent the case back to decide whether a handwritten clause in the arbitration agreement had expanded judicial review of the award. On remand, the district court found it had not and confirmed the award, and the Fifth Circuit affirmed under the Montana arbitration statute, which the Institute's rules selected: "[a]s a general rule, the fact that the remedy ordered by an arbitrator is inconsistent with state law is not grounds for vacating an award."[22]

The Beth Din of America, the dispute-resolution arm of the Rabbinical Council of America, hears commercial, family and interpersonal disputes between consenting Jewish parties under *halakha*, Jewish law.[23] By default, it decides by *peshara kerova lidin*, a compromise close to the law, rather than by strict law.[24] It is open to secular law as well. By relying on, among other grounds, the principle *dina d'malkhuta dina*, meaning "the law of the land is the law," a panel has held a company bound by the secular doctrine of apparent authority.[25] Courts compel arbitration before rabbinical tribunals, applying neutral principles of law to any religious dimension, and review their awards on the ordinary statutory grounds.[26]

Islamic arbitration tribunals apply *shariah*, the body of Islamic legal norms developed principally in the four major Sunni schools, and draw on the *tahkim* tradition, which gives the arbitrator, the *hakam*, substantial discretion to fashion outcomes that respect the parties' substantive commitments.[27] Few of their awards are published. Julie Macfarlane's interview study of Islamic divorce in North America describes a private-ordering system resolving *mahr*, divorce and family disputes by *shariah* norms adapted to North American conditions.[28] (A *mahr* is the payment a groom promises his bride in an Islamic marriage contract.) A Texas appellate court compelled a divorcing family to arbitrate their divorce, custody and *mahr* disputes before the Texas

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[21] Handbook for Christian Conciliation, Relational Wisdom 360, at 11 (June 2022), https://rw360.org/wp-content/uploads/2019/04/Handbook-for-Christian-Conciliation-v5.3-4-23-19.pdf (citing Matthew 18:15–20; 1 Corinthians 6:1–8).

[22] Prescott v. Northlake Christian Sch., 369 F.3d 491, 493–95 & n.2, 498 (5th Cir. 2004) (vacating and remanding); Prescott v. Northlake Christian Sch., 141 F. App'x 263, 268, 272 (5th Cir. 2005) (per curiam) (affirming confirmation on remand), *cert. denied*, 2005 U.S. LEXIS 9263 (U.S. Dec. 12, 2005).

[23] *See generally* Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 Fordham Urb. L.J. 633 (2004).

[24] Rules and Procedures of the Beth Din of America § 3(a), https://bethdin.org.

[25] United Savings, LLC v. Dunkirk Ctr. for Health, Inc., Beth Din of Am. Reported Decision No. 8 (Feb. 13, 2014), *reprinted in* 2 J. Beth Din Am. 70, 73–75 (2014) (published in anonymized form).

[26] *See* Reiner v. Paneth, No. 24-CV-4914 (RER) (PK), slip op. at 13–15, 22–26 (E.D.N.Y. Sept. 30, 2025) (compelling arbitration before a rabbinical arbitrator and applying neutral principles); Lang v. Levi, 198 Md. App. 154, 16 A.3d 980, 985, 987 (Md. Ct. Spec. App. 2011) (declining to vacate a Beth Din award under the Maryland Uniform Arbitration Act).

[27] *See* Mahdi Zahraa & Nora A. Hak, *Tahkim (Arbitration) in Islamic Law within the Context of Family Disputes*, 20 Arab L.Q. 2, 33–34 (2006).

[28] Julie Macfarlane, *Islamic Divorce in North America: A Shari'a Path in a Secular Society* (2012).

Islamic Court, and a Minnesota court affirmed the confirmation of an Islamic arbitration committee's award under the state's arbitration statute.[29]

Three Conditions for Enforcing Arbitration

Not every private system earns enforcement. Western Sky Financial and its affiliates made consumer loans at annual rates into the hundreds of percent, one at 233.84%, and required arbitration under "the law of the Cheyenne River Sioux Tribe of Indians" while excluding federal and state law. The Fourth Circuit refused to enforce the agreement, holding that it "purports to renounce wholesale the application of any federal law to the plaintiffs' federal claims" and so takes a "plainly forbidden step."[30] The defect was the exclusion of every other law, a one-way ratchet that protected the drafter and left the borrower nothing to invoke. In 2016, in the State's suit under Georgia's Payday Lending Act, the Supreme Court of Georgia rejected the same lender's choice-of-law argument.[31]

The three traditions and Western Sky all used private agreements to choose law other than the state's. Three conditions tell them apart.[32]

First, the parties may not contract out of law altogether. They may choose tribal law, religious law, a trade's customs or rules of their own, so long as the choice leaves the other party the statutes that protect it. Western Sky's did not.

Second, the agreement must survive ordinary contract defenses. Fraud, duress, overreaching and unconscionability apply to religious agreements as they do to any other, and the question is whether this person's consent was meaningful. Courts ask it competently. In a marriage-contract case, an Ohio appellate court affirmed the refusal to enforce a *mahr* agreement presented two hours before the ceremony, after the guests had arrived, to a groom who signed because he was embarrassed and stressed.[33] Courts also hear claims that the process was misused. Where a party alleged that a beth din summons was used to retaliate against her for pursuing her legal claims, a federal court in New York allowed her retaliation claims to proceed.[34]

Third, the award must be confirmable. Where public-policy review survives, a court may refuse to confirm an award that violates a well-defined and dominant public policy.[35] Awards about children face a further check. In Georgia, parents may agree to binding arbitration of custody, and the arbiter's award goes into the final decree unless the judge makes specific written findings that it would not be in the child's best interests.[36]

For Georgia Lawyers

Five points follow for lawyers who draft or challenge these agreements:

1. Choose a body of law, and leave the other party its statutory protections.

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[29] Jabri v. Qaddura, 108 S.W.3d 404 (Tex. App.—Fort Worth 2003, no pet.); Abd Alla v. Mourssi, 680 N.W.2d 569, 573 (Minn. Ct. App. 2004).

[30] Hayes v. Delbert Servs. Corp., 811 F.3d 666, 668–70, 673, 675 (4th Cir. 2016).

[31] Western Sky Fin., LLC v. State, 300 Ga. 340, 347–48, 793 S.E.2d 357, 366 (2016).

[32] For the full argument, see Cameron-Windsor, *supra* note 1, pt. III.

[33] Zawahiri v. Alwattar, No. 07AP-925, 2008-Ohio-3473, ¶¶ 22–23 (Ohio Ct. App. 10th Dist. July 10, 2008).

[34] *See* Rosenbaum v. Bais Yaakov Drav Meir, No. 20-CV-4520 (WFK) (RER) (E.D.N.Y. Mar. 1, 2023) (denying motion to dismiss retaliation claims).

[35] E. Associated Coal Corp. v. UMW, 531 U.S. 57, 62–63 (2000).

[36] O.C.G.A. § 19-9-1.1.

2. Name the procedures the parties are agreeing to, because an agreement that commits them to procedures that do not yet exist invites the argument that they agreed to nothing ascertainable.
3. Limit the clause's scope and duration, because one reaching any dispute, forever, including disputes long after the relationship has ended, is vulnerable for the same reasons an unlimited non-compete would be.
4. Make consent meaningful by giving clear notice of what the agreement requires, time to consider it, access to independent counsel (including secular counsel) and the freedom to forgo the relationship the agreement accompanies.
5. Confirm the award promptly, because a public-policy objection, where available, can be raised only when a court is asked to confirm or vacate the award. Once the award becomes a judgment, full faith and credit attaches, and another forum's public policy no longer bars recognition.

The governing statute matters. Under Georgia's Arbitration Code, manifest disregard of the law is a ground for vacating an award, though only on concrete evidence that the arbitrator knowingly and intentionally ignored the law; under the Federal Arbitration Act, the Eleventh Circuit has held that ground, and public policy, no longer valid.[37] The Code states the same principle: "The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."[38]

Conclusion

Taken together, the three conditions ask whether there is law, whether there was consent, and whether a court can stand behind the result. They apply the same way whatever law the parties chose and whoever they are. The state supplies a framework any community may use and enforces the conditions on which that framework will bear weight. A framework with no conditions attached is deference to whoever drafted the contract. The conditions keep private justice within the rule of law.

[37] O.C.G.A. § 9-9-13(b)(5); Adventure Motorsports Reinsurance, Ltd. v. Interstate Nat'l Dealer Servs., Inc., 313 Ga. 19, 26–27, 867 S.E.2d 115, 121–22 (2021); Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1322, 1324 (11th Cir. 2010).
[38] O.C.G.A. § 9-9-13(d).