



British Institute of  
International and  
Comparative Law

# Private and Public Adjudication: Institutional Design and Legitimacy



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# Public and private divide

- Public and private substantive law
- Private and public adjudication
- States cannot be subject to the same legal procedures and moral approaches as private individuals?
- Trade-offs involved in private and public adjudication, implications for the choice of methods of dispute resolution, the rule of law and institutional legitimacy

# Brief history of adjudication

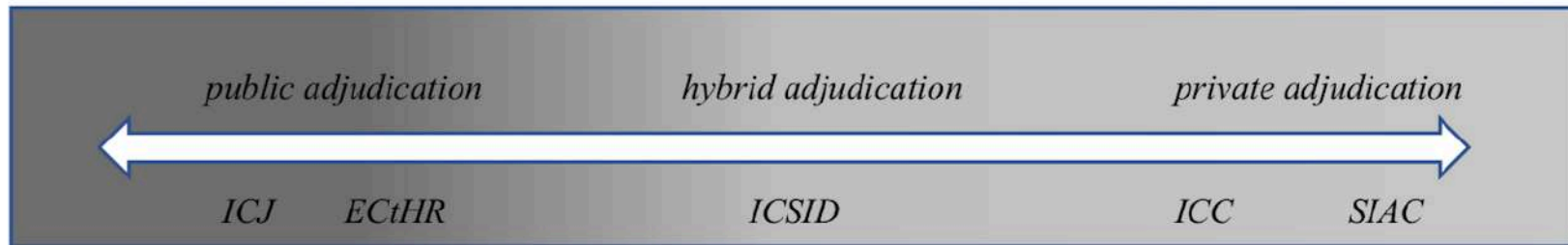
- Private adjudication existed long before the emergence of states (still exists in tribal societies)
- *Lex mercatoria* (the law of merchants) in the Middle Ages
- Public courts looked like private institutions (self-funded, competing for business)
- Second half of the 20th century - private actors grow in importance
- Wanted to avoid domestic courts, created private institutional methods of dispute resolution
- The debate about legitimacy and the rule of law

# Institutions

- Protection of property - competing jurisdictions along the public-private spectrum:
  - International Court of Justice
  - European Court of Human Rights
  - International Centre for Settlement of Investment Disputes
  - International Chamber of Commerce
  - Singapore International Arbitration Centre

# Public-private spectrum

*Table 1. Public and private adjudication institutions continuum*



# Public and private adjudication: key differences

- Adjudicators: appointment methods and criteria, tenure and background
- Transparency and confidentiality
- Applicable substantive law: principles and rules
- The length of proceedings
- Costs of adjudication
- Review of decisions: internal and external

# Key differences

*Applicable law*

*Disputes are resolved primarily on the basis of public law with open-ended principles playing the most important role*

*Disputes are resolved on the basis of public and private national and international law with open-ended principles playing the most important role*

*Disputes are resolved primarily on the basis of private national law rules playing the most important role*

*Setting precedents*

*Decisions in earlier cases often serve as guidance for future cases*

*Decisions in earlier cases often serve as guidance for future cases*

*Decisions in earlier cases do not serve as guidance for future cases*

*Review mechanisms*

*An internal review mechanism of rendered decisions in limited circumstances*

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*No internal review mechanism of rendered decisions*

*Review by courts*

*Decisions cannot be challenged or set aside by domestic courts*

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# Key differences

## *Funding*

*Institutions are established by and funded by states with no or nominal fees for the disputing parties*

*Institution funded primarily by parties but subsidized by an intergovernmental organization with some fees for the parties*

*Institutions are established by and funded by private actors with significant fees for the parties*

## *Appointment and tenure of adjudicators*

*Adjudicators appointed by states, mostly for fixed terms*

*Adjudicators appointed by parties or the institution for each case*

*Adjudicators appointed by parties or the institution for each case*

## *Diversity of adjudicators*

*Rigid requirements on diversity of adjudicators on geographic and development level of the country of origin*

*No requirements on diversity of adjudicators on geographic and development level of the country of origin*

*No requirements on diversity of adjudicators on geographic and development level of the country of origin*

## *Adjudicators' background*

*Adjudicators primarily have public law and public service background*

*Adjudicators have private law and/or private practice background*

*Adjudicators primarily have private law and private practice background*

## *Transparency*

*Decisions and other procedural documents are published*

*Decisions and other procedural documents are published in most cases*

*Decisions and other procedural documents are confidential by default*



# Advantages of private adjudication

- Why parties prefer to resort to private adjudication?
  - to resolve disputes quicker and confidentially
  - to select their own adjudicators
  - cheaper for the taxpayers (parties cover the costs of proceedings)

# Transactional nature of private adjudication

- private adjudication does not aim at setting or clarifying the rules of conduct for future disputes
- does not allow third parties to know the rules of conduct in advance to prevent undesirable activities.

# Promoting legal certainty

- Important rule of law requirement: resolution of disputes by application of the law, rather than the exercise of discretion
- Open-ended principles giving adjudicators a significant discretion to interpret such laws and practices and imposing their vision
- Weak or non-existent correction or appeal mechanisms
- Secrecy of adjudication
- Facilitation of private ordering, securing a consistent body of case law, promoting public policy goals

# Adjudication and reforms

- Public adjudication better serves as vehicle for reform, increasing legal certainty and achieving socially desirable outcomes
- Private adjudication is not particularly good because of
  - the transactional nature of private adjudication institutions
  - the lack of publicity
  - much weaker law-making function

# Legitimacy: not absolute but relative

- Acceptance of an institution as designed and operated in accordance with generally recognized principles of due process
- depends on who has established an institution – public or private actors.
- Legitimacy plays more important role for int'l courts and tribunals than legitimacy of domestic courts
- int'l courts and tribunals have no enforcement or sanctioning power for non-compliance and their authority
- their credibility relies on being legitimate in the eyes of domestic courts and governments.

# Representative adjudication?

- In public adjudication process, such as ICJ and ECtHR, states appoint judges who represent different developmental and geographic constituencies
- In private and hybrid dispute settlement adjudicators are typically appointed regardless of whether they reflect the communities they serve.
- One of the core elements of the rule of law is resolution of dispute by those who reflect the makeup of the communities they serve.
- The mismatch between those who act as adjudicators and respondents undermines the legitimacy of the system.

# Challenges for hybrid institutions

- Hybrid institutions such as ICSID established by states but serving private parties
- Legitimacy in the eyes of private parties
- Forum shopping (other dispute resolution institutions or rely on private contracts with states)
- Legitimacy in the eyes of states (confidentiality, appointment of adjudicators, applicable law and review mechanisms)



# Public and private adjudication learning from each other

- Improving consistency and predictability (by introducing selective review of the most important decisions, transparency)
- Adjudicators better represent the disputing "constituencies" and qualified in domestic and international law, public law and private law
- Access to legal aid (as ECtHR and the ICJ)

# Questions?

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