Chapter II

THE CONSEQUENCES OF THE REPRESENTATIONS OF INTERNATIONAL ARBITRATION

68. For both arbitrators and national courts, espousing one of the three representations that structure the field of international arbitration has major practical consequences. As abstract as they may seem, issues relating to the source of the arbitrators’ power to adjudicate, the relations between national legal orders with respect to arbitration matters, or the existence of an arbitral legal order have a direct impact on the solution to many disputes. These fundamental questions of legal theory indeed have a strong bearing on the entire range of questions likely to arise in international arbitration, be it in relation to the arbitrators’ power to adjudicate, the decisions they render, or the fate of the resulting award. Each of these aspects of the international arbitration regime will be explored in turn.

A. The Consequences of the Representations of International Arbitration on the Arbitrators’ Power to Adjudicate

69. The fierce controversies surrounding the arbitrators’ power to adjudicate are directly dependent on the competing representations of international arbitration, which in turn generate competing methodologies. Such controversies include the determination of the matters that can be resolved by arbitration, the categories of persons authorized to use this private means of dispute resolution, the requirements for consent to arbitration to be valid, the qualities expected of the arbitrators in terms of qualifications, nationality or sometimes even religion, or which institutions can organize arbitral proceedings. All of these matters are crucial for States that accept to relinquish part of their courts’ adjudicatory power to arbitrators. Certain States claim to limit the categories of arbitrable matters or persons authorized to arbitrate, to determine which institutions can organize arbitrations under their auspices, or to impose specific conditions as to the validity of arbitration agreements or the requirements
for serving as an arbitrator; other States deem it preferable to leave it to
the parties, when their consent is established and not vitiated, to organize
the manner in which their dispute will be decided.

Such differing views are to be expected as what is at stake is the
very principle of the parties’ recourse to this private means of dispute
resolution as well as the manner in which the arbitral process is to be
carried out. In addition, the position held by States on these issues
may evolve over time. Mistrust of arbitration, which in the nineteenth
century was essentially regarded as competition to domestic courts,
has today given way to a general acceptance of this means of dispute
resolution. This evolution is not so much due to the need to relieve
domestic courts of an excessive case-load, but rather to the necessity of
opening to the parties the alternative of a dispute resolution mechanism
perceived as neutral as compared to the parties’ national courts, and a
procedure to which the parties are able to contribute in various ways,
notably by appointing the arbitrators and shaping the manner in which
the proceedings will unfold.

70. On each of these issues, the fundamental question, from a meth-
odological viewpoint, is whether to choose between the competing
positions of the parties through a strict choice of law approach or to
apply transnational rules identified through a comparative law analysis.
The answer to this question is directly dependent on the representation
of international arbitration that one will embrace. The conception that
equates arbitrators with the courts of the country of the seat results in
giving effect, without further analysis, to the restrictions to the arbitral
process found in the law of the seat. Restrictions stemming from other
national laws will also be applied if the choice of law rules of the seat
dictate that they should. The Westphalian model instead allows each
State to have its own views prevail, without regard to what other States
will do. A State can, for example, consider that an arbitration agreement
that provides for *ad hoc* arbitration is void, as does Chinese law,184 even

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184 The fact that Chinese law only recognizes institutional arbitration results
from Article 16 of Presidential Decree No. 31 of August 31, 1994 according
to which an arbitration agreement must contain an expression of the parties’
intention to submit the dispute to arbitration, a description of the matters
submitted to arbitration, as well as the designation of the relevant arbitral