Arbitration and the Constitution

BY PETER B. “BO” RUTLEDGE, PROFESSOR OF LAW

Editor’s Note: During the 2010-11 academic year, Professor Bo Rutledge served as a Visiting Fulbright Professor at the Institut für Zivilverfahrensrecht at the University of Vienna School of Law in Austria. Rutledge is also the author of the forthcoming book Arbitration and the Constitution under contract with Cambridge University Press.

 Arbitration and the Constitution? At first glance, these two topics would appear to be strange bedfellows.

The Constitution largely concerns the distribution of power among branches of the federal government, the relationship between federal and state governments, and the government’s relationship with the individual. With little exception, it does not address purely private conduct.

Arbitration, by comparison, is traditionally understood to be a largely private undertaking. In a run-of-the-mine case, parties include arbitration clauses in their contracts and thereby express a contractual preference to resolve their disputes out of court. Instead of a judge or jury, a private citizen (or panel of them), often chosen by the parties, resolves that dispute.

Unlike judges, arbitrators are not bound to apply a particular set of procedural rules (unless the parties so request) and consequently enjoy a comparatively greater degree of procedural flexibility in how they resolve a dispute. The arbitrator’s decision then is final and binding on the parties.

So what do these two systems – one largely concerned with state relations and one largely removed from state activity – have to do with each other?

For a long time, the answer was “not much.” A firm wall separated constitutional law from arbitration law.

During the late 1920s, cracks in the wall separating arbitration and the Constitution began to appear.

Of central importance was the doctrine of jurisdictional ouster. Under this doctrine, predispute arbitration agreements were not enforceable because they attempted to “oust” courts of jurisdiction (similar doctrines operated to invalidate choice-of-forum and choice-of-law clauses during this period). As a matter of contract law, such agreements were void as contrary to public policy.

Things changed during the 1920s when Congress enacted the Federal Arbitration Act (FAA). Modeled on New York’s arbitration law, the FAA made two critical changes in federal law.

First, it overcame the century-old judicial hostility to arbitration agreements. Instead, such agreements were now enforceable “save upon such grounds as existed at law or in equity for the revocation of any contract.”

Second, the FAA required courts to confirm arbitral awards (that is, convert them to judgments) subject to a limited number of defenses. Those defenses were largely limited to procedural defects (like biased arbitrators) and did not concern legal errors in the award (as might be the basis for an appellate court’s reversal of a district court’s decision).

While the FAA expanded the opportunities for arbitration, particularly in the commercial setting, significant constraints remained in the decades following its passage.

Among them was the non-arbitrability doctrine. Under this doctrine, courts would not enforce arbitration agreements to the extent the underlying dispute involved a federal statutory claim (such as under the securities laws or the antitrust laws).

The theory here was one of statutory interpretation — it would be inconsistent with the congressional grant of jurisdiction and would create a cause of action under these statutes to allow parties to sweep them out of court and into a private tribunal.

While the decisions were not couched in explicitly constitutional terms, they reflected a set of constitutionally based concerns about the importance of federal courts and the process by which “public” disputes would be resolved.

Beginning in the 1970s, three key changes significantly enhanced pressures on the wall separating arbitration and the Constitution.

First, the United States ratified the New York Convention. Signing of the Constitution by Howard Chandler Christy, courtesy of the Architect of the Capitol.

During the late 1920s, cracks in the wall separating arbitration and the Constitution began to appear.
Third, the U.S. Supreme Court systematically dismantled the non-arbitrability doctrine. By the early 1990s, most disputes, including those arising under federal laws like the antitrust and securities laws, were now arbitrable, whether they arose in the international or purely domestic context. Consequently, today, a variety of disputes – ranging from garden-variety disputes between credit card holders and their banks to disputes between Canadian softwood lumber producers and the U.S. Government – are subject to the same basic form of resolution: private arbitration, outside the courts under a procedurally flexible regime where the result is binding on the parties.

This brings us back to the relationship between arbitration and the Constitution. As arbitration has become a preferred form for the resolution of disputes, large and small, fissures have emerged in that wall separating these two fields. In a forthcoming book, I analyze those fissures systematically, but here let me identify four:

**Separation of Powers** Recall that one feature of arbitration is that the result is binding on the parties and that, as a consequence of the FAA, courts are largely obligated to confirm arbitral awards, thereby giving them the effect of a court-rendered judgment.

In international trade and investment treaties, the opportunities for judicial review are even more limited. How are such schemes consistent with Article III of the U.S. Constitution, which vests judicial power in the U.S. Supreme Court and lower federal courts?
When the Supreme Court invalidated provisions of the Bankruptcy Act in Northern Pipeline Co. v. Marathon Pipeline Co., it articulated a firm stance that Congress could not simply reallocate power to resolve private rights from the Article III courts to other entities that did not have the life tenure and independence associated with federal judges.

Doesn’t arbitration do precisely that?

**Due Process**

Recall that another hallmark of arbitration is the procedural flexibility afforded to the arbitrator.

How is this scheme consistent with the Due Process Clause?

In a variety of cases, the Supreme Court has made clear that non-Article III entities cannot deprive individuals of constitutionally protected interests (like property) without procedural due process.

But if arbitrators are not bound to follow any particular set of procedures, what guarantees does a party (particularly an individual litigant) have that her claim will be accorded due process?

Is it sufficient to say that arbitration simply does not constitute state action and, thus, does not implicate the Constitution? If that is the case, then, does judicial confirmation of the award supply the state action?

**The Jury Right**

Remember that arbitration typically occurs in front of a panel of one or more privately appointed arbitrators.

How is this scheme consistent with the Seventh Amendment’s entitlement of a civil jury in most civil cases?

The typical explanation is that individuals by opting into arbitration have waived their right to a jury.

But is this necessarily so? Why should the jury right be alienable at all? And even if it should be, why should an arbitration clause (particularly if it makes no mention of a jury waiver) suffice to waive an important constitutional right?

**Federalism**

As noted earlier, the FAA required courts to enforce arbitration agreements subject only to generally applicable contract defenses.

Does federal or state law supply the relevant contract doctrine? If federal law does so, how is this consistent with *Erie v. Tompkins*, which declared an end to “general” federal common law?

If state law applies, does that not allow state governments to thwart Congress’ scheme by developing anti-arbitration doctrines?

Thus, arbitration raises a host of interesting constitutional questions, many of which are at the forefront of ongoing debates in the courts and in Congress.

While the questions are interesting in their own right, even more interesting is how they have been addressed.

Largely, the courts have resisted efforts to develop a formal “constitutional law of arbitration.”

Instead, constitutional principles have seeped into the arbitral jurisprudence in more subtle ways. For example, courts have interpreted provisions of the previously referenced New York Convention to incorporate standards of procedural due process.

Similarly, faced with an assault on arbitration following the demise of the non-arbitrability doctrine, arbitral institutions like the American Arbitration Association have committed themselves to administering some arbitrations according to “due process” protocols that employ constitutional-like concepts but do not expressly commit them to all of the accoutrements of procedural due process doctrine.

Furthermore, drafters of international trade and investment treaties have designed implementing legislation in order to preserve safety valves for judicial review of certain questions in order to steer clear of any Article III controversies.

In conclusion, the story of arbitration and the Constitution is more than simply a story of how a once-disfavored form of dispute resolution has crept slowly into our legal lives.

Instead, the history and developments teach us something deeper about how areas of the law influence each other, not simply on the basis of express doctrinal incorporation or development but rather through more subtle influences that filter into our legal dialogue through cracks in a wall that once separated the two fields.