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The Arbitration Debate: A Tale of Two Contract Cities

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Arbitration is a hotly debated issue. Some scholars, supporting arbitration, point to its advantages and conclude that it offers a speedy, efficient, and cheap dispute resolution forum, preferable to court proceedings. Other scholars, critical of arbitration, point to its disadvantages in employment or consumer context and to the misuse of arbitration by big corporations, and conclude that in such cases employees and consumers are better protected by litigation. Thus, the "arbitration debate" centers on the difference between the two dispute resolution institutions and on the scope of the Federal Arbitration Act (FAA). This "arbitration debate" is present not only in the literature but also in Supreme Court decisions, which are the subject of this Article. This Article suggests that the "arbitration debate" is also a controversy between different visions of contract. Analyzing Supreme Court decisions, it reveals not only different interpretation and application of the FAA but mainly profound different perspectives on contract and contract law. That is, the "arbitration debate" is to a large extent a contract debate.

This Article makes three contributions. First, it adds to the arbitration literature a contract perspective. It shifts the focus of the arbitration literature from the FAA to contract law. It is a reminder that arbitration agreements are first and foremost contracts governed by contract law. Also, since the arbitration debate is rooted in different perspectives on contract law the Supreme Court's unanimous decisions in the past few years do not mean this controversy has ended. Second, it adds to the pluralist theory of contract law a different locus. Thus far the pluralist theory literature has mainly focused on theoretical perspectives and on their application to contract law doctrines. This Article views Supreme Court decisions as an additional site for a pluralist vision of contract law. Third, it adds to the literature on majority and dissenting opinions in Supreme Court cases. It shows that the difference of opinions between the two is profound and rooted in disparate world views of society, human relations, and the market. In other words, the majority and the dissent have different views on what are contracts, what are their functions and what are their limits.

ABOUT THE SPEAKER

Orit Gan is a Senior Lecturer at Sapir College and an adjunct in the Gender Studies Programs at both Ben-Gurion University of the Negev and Bar-Ilan University. Her principal areas of writing and teaching include contract law, contract law theories, and feminist legal theories. She was a Visiting Scholar at Columbia Law School and University of Sydney Law School.

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