Prologue

I have been reflecting on the idea of default arbitration for more than a decade. When I started working on my first article on the topic,[[1]](#footnote-1) I thought that the idea was so revolutionary that I should clearly aim at publishing in a U.S. law review. It seemed to me that only the U.S. academy could be open-minded enough to allow the publication of a piece developing ideas which were so far from the mainstream doctrines in the field. I had not expected that anybody would endorse the idea, although I certainly hoped to have an opportunity to debate it with other scholars.

I was therefore delighted when I heard about the project of Fabio Núñez del Prado to write the present book. We first met in The Hague in August 2018. Fabio attended the private international law session of the Hague Academy of International Law where I was giving a special course on the law of foreign judgments. He came to see me at the end of one of my lectures and informed me about his interest in another topic, namely default arbitration. He proposed that we further discuss the topic over lunch in a Peruvian restaurant, which we did a couple of days later. Not only was the food delicious, but I also realized that Fabio had very clear ideas on default arbitration, and that his book was going to be a great contribution on the topic.

A few years after writing my article on the topic, I decided to develop my ideas in a book which was published in 2017.[[2]](#footnote-2) While working on the book, I thought that I should include a chapter offering an economic analysis of default arbitration. But I was unable to develop anything satisfactory, and thus abandoned the idea. Fabio has done the job, and he has done it marvelously well. As he had immediately told me during our lunch in the Hague, there is a lot of scholarship on economic analysis of arbitration, and it was therefore clear that the idea of default arbitration should be analyzed from an economic perspective. Fabio Núñez del Prado introduces the essential idea that adjudication should be subjected to a regime of private property to avoid externalities, free-riding and overexploitation. The goal would be to create the incentives for a fair use of adjudication by internalizing the costs through a price system. In the common law literature, the idea has typically been rejected on the related, but distinct, ground that courts create law, and that this law-making function is a public good. It is useful that civil law scholars like Fabio Núñez del Prado participate in this conversation and underline that there are other legal traditions where the law-making function of courts is much more limited. Furthermore, experience has demonstrated that arbitrators are able and willing to develop the law, certainly in the context of investment arbitration, but also in international commercial arbitration. Again, the work of Fabio Núñez del Prado offers the different perspective of a tradition where judges are not considered as super-heroes with unique abilities.

Another important contribution of this book is that it articulates a rationale for making arbitration a default not only for international disputes, but also for domestic disputes. This is a new proposition in the literature on default arbitration. My own proposal was essentially concerned with international disputes. The argument was that arbitration uniquely offers neutrality of adjudication for international disputes, as parties do not want to litigate in their opponent’s courts, and that it should therefore be made the default rule for resolving international disputes. The proposal of Gary Born is also to create a system of default arbitration in disputes arising between parties domiciled in different states.[[3]](#footnote-3) Fabio Núñez del Prado does not limit the scope of his proposal to international disputes. His work is informed by the Peruvian experience, where certain disputes with the state are to be resolved by way of arbitration, and by the ideas of other Peruvian scholars, including Alfredo Bullard.

Finally, I would like to conclude this prologue by saying a few words on Yale. When I met with Fabio in the Hague, he was on his way to the U.S. to attend the master’s programme at Yale Law School. As I also did attend the programme in 2005, we had a discussion on what he should expect from this great institution and how he should make the best use of his time there. I advised that he work with Michael Reisman, a leading U.S. international law scholar and arbitrator, which he did. But Fabio also worked there with one of the leading U.S. law and economics scholars, Ian Ayres. Both of them supervised his work on default arbitration during his time at Yale and enjoyed the idea. I remember that I told Fabio that the best use one could make from Yale law School was to learn about pluri-disciplinary research rather than the doctrinal details of American law. With Reisman and Ayres, he got both.

There was a time when Yale was famous for its hostility to alternative dispute resolution in general[[4]](#footnote-4) and arbitration in particular.[[5]](#footnote-5) Ironically, it has now produced two scholars who want to promote default arbitration.

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1. Beyond Contract – The Case for Default Arbitration in International Commercial Disputes, 32 Fordham International Law Journal 2009, p. 417. [↑](#footnote-ref-1)
2. Rethinking International Commercial Arbitration – Towards Default Arbitration, Edward Elgar, 2017. [↑](#footnote-ref-2)
3. Gary Born, BITS, BATS and Buts: Reflections on International Dispute Resolution 13 YAR 2014, p. 3. [↑](#footnote-ref-3)
4. See the famous article by Owen Fiss, Against Settlement, Yale Law Journal 1984, p. 1073. [↑](#footnote-ref-4)
5. J. Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale Law Journal 2015, p. 2804. [↑](#footnote-ref-5)