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International Arbitration Scholarship and the Concept of Arbitration Law

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INTERNATIONAL ARBITRATION SCHOLARSHIP AND THE CONCEPT OF ARBITRATION LAW

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INTRODUCTION

This article is about the concept of arbitration law and its relationship with international arbitration scholarship. Despite the meteoric rise of the field of international arbitration in the last forty years, this topic has attracted no attention from international arbitration scholars.

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This is perhaps unsurprising. Developing a concept of arbitration law requires research that transcends arbitration and non-arbitration fields, mainly in the fields of legal theory and socio-legal jurisprudence. Equally, it requires an interdisciplinary framework of analysis. However, as this article argues, the field of international arbitration scholarship has been developing in isolation from crucial theoretical developments in other legal and non-legal disciplines. Partly because of its close relevance to legal practice, arbitration was not originally considered a subject of academic importance. Accordingly, arbitration scholarship was driven primarily by lawyers practicing in the area of arbitration, rather than academics. Practicing arbitration lawyers were not concerned with the concept or legal theory of arbitration or how socio-legal jurisprudence may relate to the subject of arbitration. Their focus was on scholarship that would directly respond to the problems they were facing in arbitration practice. Equally their methods of inquiry were not empirical, scientific, contextual or interdisciplinary; their primary method of analysis was the traditional approach taken for legal research, namely doctrinal analysis that focuses exclusively on legal statutes and case law.

As a result, arbitration scholarship never fully engaged with the crucial movements and theories of international legal scholarship that advanced a more progressive and humanitarian concept of international law. With rare exceptions, interdisciplinary research did not appear in arbitration scholarship, and arbitration law was not critically examined through the prism of political theory, international affairs or economics. The dearth of interdisciplinary scholarship has had two undesirable implications for the field of arbitration.

First, it has had a negative impact on how non-arbitration scholars and the public perceive arbitration. By failing to develop a large-scale perspective and to engage with a wider group of lawyers and non-lawyers, arbitration lawyers have obscured the relevance, role and contribution of arbitration theory and practice to other areas of law and to society. The discipline of arbitration often seems to be under the self-reassuring delusion that its contribution to the public is somehow axiomatic: arbitration serves the business community, and therefore it serves the interests of the public too. However,

the prevailing perception of arbitration by non-arbitration scholars and by a critical mass of the public is often quite different. Arbitration is increasingly viewed as an opaque system that unduly interferes with the state's ability to protect the values, traditions and interests of the public.¹ Although it is critical for the future of arbitration, this type of unfavorable implications is not the focus of this work.

Secondly, and more importantly for the purposes of this article, the failure of arbitration to engage with the developments in international legal scholarship has crucially impaired the concept and autonomy of arbitration law. As the paper explains, arbitration scholarship has failed to connect with modernist scholarship on anti-formalism and legal pluralism that have advanced a more inclusive concept of international law. Such a progressive concept of law focuses on content rather than pedigree and recognises the important role of legal principles and other standards such as policies and practices. However, arbitration scholarship has largely remained adherent to an old-fashioned version of positivism that accepts state legal rules only. Thus, arbitration scholarship has failed to develop an account of international arbitration as a non-state community that has the capacity to produce legal rules. Eventually, it has failed to advance persuasive claims of normativity and autonomy of international arbitration.

The main purpose of this work is to connect arbitration scholarship with the theoretical developments in international law, and crucially to develop an account of normativity for

1. For investment arbitration see generally GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007); Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION* 433, 434–36 (Michael Waibel et al., eds., 2010) (arguing that the arbitration paradigm is not appropriate for investment treaty disputes, because the latter concerns the “exercise of general regulatory powers that are typically subject to judicial review under constitutional or administrative law”); David Kennedy, *Law and the Political Economy of the World*, 26 *LEIDEN J. INT’L L.* 7, 43 (2013) [hereinafter Kennedy, *Political Economy*] (“Arbitration has metastasized to become an adjudicator of last resort for reviewing the legislative, administrative and even judicial decisions of the developing world.”); see also Linda Silberman, *International Arbitration: Comments from a Critic*, 13 *AM. REV. INT’L ARB.* 9, 17 (2002) (“My quarrel with these various dispute resolution mechanisms has more to do with the basic underlying decision to entrust matters of great public significance to decision-making by supranational institutions than it does with arbitration per se. But the process of arbitration exacerbates the concern.”).

arbitration law. The central argument of this work is that international arbitration is a community that has the capacity to engender non-state rules which the members of this community accept as normative. As this article shows, clear norms regulating the conduct of arbitration have emerged from practices consistently applied in arbitration, which the members of the arbitration community have tended to follow and to accept as guiding principles. There are aspects of arbitration practice that are so well-established among arbitration lawyers that they breed expectations of compliance, or *normative expectations*. What is equally crucial is that arbitration practices and expectations of compliance derive from a *legal principle*, namely the legal principle of fair process. As is explained, the existence of legal principles is a distinctive feature of a system or a normative community, as such principles set out the general values, goals and needs of that community, which guide the behaviour of the members of that community. This article does not purport to argue that arbitration rules are homogenous, fully determinate, or self-executing. These attributes exist only in state law. However, after the progressive legal scholarship of the last century we now know that different concepts of law exist. We have also started to realize that normativity occurs in both state and non-state communities, and in different *forms* and *degrees*. As has been observed, normativity and regulation “form a continuum [whose] legal character . . . is often a matter of degree and (not necessarily a resolvable) debate.”² It is within this concept of relative normativity that international arbitration can forcefully claim its normative potency.

This article is divided in four parts. Part I gives an overview of the developments in international legal scholarship in the last fifty years. It examines how policy-oriented legal scholarship and interdisciplinary research have crucially affected the concept of international law. Here an overview of scholarship relating to anti-formalism and legal pluralism is offered to illustrate the thesis that the concept of international law has shifted from a concept dominated by pedigree and sovereignty to a more inclusive one that encompasses informal legal norms and non-

2. See Roger Cotterrell, *Spectres of Transnationalism: Changing Terrains of Sociology of Law*, 36 *J.L. & SOC'Y* 481, 485 (2009) [hereinafter Cotterrell, *Spectres*].

state actors. Such a concept of law pays attention to content and recognises the important role of legal principles and other standards such as policies and practices. The discussion of this progressive concept of law is necessary, as it provides the basis of the main analysis of this work on arbitration's normative potency in the final part of the article. Part II explains how arbitration scholarship has failed to connect with the developments in international legal scholarship and international law. This part examines the development of arbitration scholarship through doctrinal work produced by lawyers who were mainly practising in the field of arbitration. It further examines the main themes of arbitration scholarship and discusses the theory of delocalization, which was one of the few progressive movements in arbitration scholarship that appeared to have implications on legal theory. As this article shows, with the exception of a small number of French theorists, arbitration theory has failed to critically engage with non-arbitration and non-legal scholarship, focusing exclusively on doctrinal analysis. As a result, arbitration theory was largely developed under the "delusion of self-sufficiency as a science of law".³ Part III discusses the reasons why it matters that arbitration theory has failed to engage with crucial movements and theories of international legal scholarship. As is explained, such a failure has crucially impaired the concept of arbitration law and has curtailed the efforts of arbitration scholarship to advance persuasive claims of autonomy and normativity. As a result, *international* arbitration remains firmly subject to *national* laws and *state* public policy, while international tribunals are considered to be subservient to national courts as opposed to being an *alternative* to them. Finally, Part IV examines the normative potency of arbitration law. The analysis here draws on scholarship relating to anti-formalism and legal pluralism to advance the thesis that a common ground of settled assumptions on arbitration conduct has emerged, which guide arbitration practice and breed expectations of compliance, or normative expectations. A number of examples of arbitration practices are discussed here to illustrate the point of normative expectations.

3. Roger Cotterrell, *Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies*, in LIVING LAW: RECONSIDERING EUGEN EHRLICH 75 (Marc Hertogh ed., 2009) [hereinafter Cotterrell, *Edge of Empire*].

Before we turn to the main analysis, it is necessary to discuss a methodological point. A combination of approaches has been taken for the purposes of this work.⁴ For the most part, the analysis draws on legal theory and socio-legal literature. This is of course necessary as the main thrust of the argument of this work is that arbitration scholarship has never critically engaged with non-arbitration discourse and methodology. Some parts of the article however also engage in doctrinal analysis and review case law and legal texts. This type of analysis is necessary to discuss how arbitration law is currently treated by national judiciaries and legislatures, and to support the observation that international arbitration remains firmly subject to national laws and state public policy. The use of a combination of methods further underlines the main premise of this article, namely that arbitration scholarship needs to engage in both doctrinal and non-doctrinal analysis. This approach can assist arbitration theorists to produce a broader narrative of arbitration law and practice, which will be more appealing and accessible to non-arbitration scholars and to the public. More crucially they will assist them to construct a general theory of arbitration law that is both normative and conceptual and able to demonstrate arbitration's normative potency.

I. PROGRESSIVE DEVELOPMENTS IN INTERNATIONAL LEGAL SCHOLARSHIP AND THE CONCEPT OF INTERNATIONAL LAW

The last fifty years has been an exciting time for international law.⁵ Successive waves of progressive legal

4. I use the terms "approach" and "methodology" interchangeably for the purposes of this work. For the similarities and differences in meaning of the terms "methodology," "approach," and "method," see ROBERT CRYER ET AL., *RESEARCH METHODOLOGIES IN EU AND INTERNATIONAL LAW* 5 (2011).

5. The term "international law" is used here in its widest sense and interchangeably with the term "transnational law." It primarily refers to the classic definition as proffered by Philip Jessup—"Transnational law then includes both civil and criminal aspects, it includes what we know as public and private international law, and it includes national law, both public and private. There is no inherent reason why a judicial tribunal, whether national or international, should not be authorised to choose from all of these bodies of law the rule considered to be most in conformity with reason and justice for the solution of any particular controversy. The choice need not be determined by territoriality, personality, nationality, domicile, jurisdiction, sovereignty . . ." PHILIP JESSUP, *TRANSNATIONAL LAW* 106 (1956). Both terms, "international" and "transnational law," are used widely in legal scholarship, with some

scholarship have introduced a series of new ideas, new institutions and new methods of inquiry to break away from the doctrinal constraints of formalism. As a result, a new concept of international law has emerged, which encompasses not only state legal rules, but also legal principles, policies and norms.⁶

The progressive shift to a more pragmatic and functional international law started to gather pace after the end of World War II. International legal scholarship responded to the pervasive legal and political uncertainty of the post-war era in two ways. First, a group of international lawyers engaged in a huge enterprise of codification, of multilateral law and institution building with a view to developing an international administrative law.⁷ The lofty aim of these lawyers was to build a global institutional regime of “procedural regularity and normative proliferation in which most actors abide by most norms most of the time.”⁸

Secondly, another group of modernist international lawyers, somehow counter-intuitively, rejected codification and pushed the legal discourse more forcefully toward policy and functionalism.⁹ Modernist international lawyers of this era may

scholars preferring the former (Koskenniemi, Berman, Franck, Posner) and others preferring the latter (Cotterrell, Carbonneau, Wai, Whytock, Callics and Zumbansen). Other commentators consider the term “international law” wrong and favor the term “global law” (Teubner). In any case, all these terms (“international”, “transnational,” and “global law”) have a wide meaning and therefore—for the purposes of this study—are preferable to the term *lex mercatoria* (used for example by Cutler), which focuses exclusively on private law and the law merchant.

6. See David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 101 (1997) [hereinafter Kennedy, *International Law*]; see also Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT’L. L.J. 81 (1991).

7. Joseph Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZAÖRV 547, 549 (2004) (“In mid-century one discovers a huge enterprise of actual and in-the-making multilateral law making treaties ranging from the Law of the Sea to Human Rights and even what may be called “constitutional treaties.”; cf. David Kennedy, *International Legal Education*, 26 HARV. INT’L. L.J. 361, 363 (1985) (observing that international lawyers and scholars after the Second World War “consummated the nineteenth century struggle between naturalism and positivism in an uneasy positivist truce and fueled the two great waves of international institution building in this century”).

8. Kennedy, *International Law*, *supra* note 6, at 101.

9. Notable scholars who have produced modernist policy-oriented work include Myres McDougal and Harold Lasswell. For an example, see generally Myres McDougal, *INTERNATIONAL LAW, POWER AND POLICY: A CONTEMPORARY CONCEPTION* (1954). The work of McDougal and Lasswell picks up on the socio-legal work that Roscoe Pound

have enthusiastically embarked on policy-oriented work out of frustration with the doctrinal purity of the legal scholarship of the first part of the twentieth century, which had failed to prevent two world wars. Alternatively, they may have felt that positivism—which we must remember was the *progressive* movement in the 19th century—had exhausted its *raison d'être* by safely separating law from religion and morality.¹⁰

Either way, policy-oriented international legal scholarship paved the way for the post-modernist movement of interdisciplinary work which dominated the legal discourse in the 80's and 90's.¹¹ The fervor over interdisciplinary research opened new horizons for the discipline of international law in two different directions.¹²

First, it transcended boundaries *between* legal and non-legal disciplines. Here, international legal scholars ventured to examine law from a number of different and indeed divergent perspectives. Some relied heavily on science and drew mainly on economics and political theory to found new disciplines, such as law and economics and international relations.¹³ Others, not

and legal realists had started in the pre-war era. See Harold Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 189 (1996).

10. See Kennedy, *International Law*, *supra* note 6, at 113–14 (arguing that, in a paradoxical way, positivism's triumph in the late nineteenth century “puts international law on the road to pragmatism” and paved the way to realism, socio-legal jurisprudence and international relations theory).

11. See Koh, *supra* note 9, at 188; David Kennedy, *A Rotation in Contemporary Legal Scholarship*, 12 *GERMAN L.J.* 338, 356–61 (2011).

12. See Purvis, *supra* note 6, at 81 (“For some thirty-five years international law had been isolated from the rest of intellectual life by the necessities and distractions of two world wars. By mid-century the insights of modernist thinking were only just beginning to influence the discipline of international law. A new breed of modern scholars of international law thought they were about to transform their discipline, removing international law thought they were about to transform their discipline, removing international law thought they were about to transform their discipline, removing much of its history.”); cf. David Kennedy, *A New Stream of International Law Scholarship*, 7 *WIS. INT'L L.J.* 1 at 3–4 (1988) (“The post-World War II generation was different Although these men were enthusiasts about international law and institutions, they slowly abandoned the doctrinal purity and insitutional isolation characteristic of the pre-war generation. Self-described pragmatists and functionalists, sneaking up on sovereignty in numerous ingenious ways, they self-consciously blurred the boundaries between national and international, public and private law. They imported into public international law precisely the realist attack on doctrinal formalism which the pre-war generation has resisted.”).

13. Scholarship in law and economics was particularly strong in that period, witnessing the emergence of a number of influential theories and frameworks of analysis such as the rational choice theory and the organizational theory. Koh calls this

least the Critical Legal Studies scholars,¹⁴ examined law through the prism of disciplines that were less likely companions for international law, such as psychology,¹⁵ literature,¹⁶ feminism,¹⁷ gay discourse,¹⁸ and race studies.¹⁹

This type of interdisciplinary work was not concerned with doctrinal debates about international law. Employing scientific, often empirical, methods of inquiry,²⁰ this group of scholars was interested in how international law may affect the real actors; how international law pertains to society, politics, economics, and international affairs.²¹

scholarship “high-tech economics in international trade law.” See Koh, *supra* note 9, at 190. For scholarship on international relations scholarship see Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 205 (1993); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367 (1998).

14. See Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES 11 (1987) (“CLS might well seem to be the latest revival of an anti-Formalist, Legal Realist movement at law schools” who were pursuing a critical approach toward the study of law in society). As the organizers of the inaugural annual 1977 conference on Critical Legal Studies were noting, “law is an instrument of social, economic and political domination both in the sense of furthering the concrete interests of the dominators and in that of legitimating the existing order: this approach emphasises the ideological character of legal doctrine and is therefore more concerned with its internal structure than the approach that focuses on latent social functions.” *Id.*; cf. Duncan Kennedy & Karl Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L. J. 461 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

15. See Antony Carty, *Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt*, 16 CARDOZO L. REV. 1235 (1995) (examining how Kelsen’s and Schmitt’s legal work and theory was influenced by Sigmund Freud’s psychoanalytical work).

16. See Jane Baron & Julia Epstein, *Language and the Law: Literature, Narrative and Legal Theory*, in THE POLITICS OF LAW, 662 (David Kairys ed., 3d ed. 1998); James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 HARV. INT’L L. J. 327 (1985).

17. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L. LAW 613 (1991); see also Nadine Taub & Elizabeth M. Schneider, *Women’s Subordination and the Role of Law*, in THE POLITICS OF LAW 328 (David Kairys ed., 3d ed. 1998).

18. See generally Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in THE POLITICS OF LAW 115–47 (David Kairys ed., 3d ed. 1998).

19. See Charles R. Lawrence III, *Race and Affirmative Action: A Critical Race Perspective*, in THE POLITICS OF LAW 312–28 (David Kairys ed., 3d ed. 1998).

20. See Tom Ginsburg & Gregory Shaffer, *How Does International Law Work?: What Empirical Research Shows*, in OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES 753, 754 (Peter Cane & Herbert Kritzer eds., 2010).

21. There have been remarkable studies of this kind which one can indicatively only refer to. For socio-legal analysis see NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM

The second strand of interdisciplinary work transcended boundaries *within* law, most notably breaking down the traditional dichotomy of private and public international law. The project of bridging the gap between private and international law was prompted by the realization that these two disciplines of law were increasingly facing the same problems.²² The aim of this project was to develop a more coherent and eventually fairer version of international law,²³ bringing individuals and corporations into the foreground of international law. This liberal²⁴ vision of a global law has led to the attribution of rights to individuals as against states on an international level.²⁵ Examples of international private rights can now be found in a number of areas of law, including environmental law, tort, proprietary rights, and maritime law. Most notably, international private rights can be found in the area of human rights (including civil, political, economic and social rights), the violation of which allows individuals to bring a

(2009). For a critical examination of international law and politics, see MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW* (2011). For an economics and law analysis see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (8th ed. 2010). For an examination of international law through the lenses of political science and rational choice theory see JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); see also Anne-Marie Slaughter, in a series of works, *supra* note 13. Cf. KENNEDY, *supra* note 1, at 7 (“The visible interpenetration of global political and economic life has changed the context for international scholarly inquiry. The central questions today are not political questions—if by that we mean questions to be addressed by governments as acting alone or negotiated through conventional diplomatic circuits. They are not economic questions—if by that we mean questions to be answered by the operations of markets, guided by the hand of robust competition in the shadow of regulation.”). Kennedy then proceeds arguing that the main questions today are questions of political economy. *See id.*

22. See Koh, *supra* note 9, at 184–85; ALEX MILLS, *CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LIFE 3* (2009).

23. Ralf Michaels, *Public and Private Law in the Global Adjudication System: Three Questions*, 18 *DUKE J. COMP. & INT’L L.* 253 (2008); MILLS, *supra* note 22, at 3; Koh, *supra* note 9, at 184.

24. The liberal character of this project has prompted fierce contestation from left scholars; see, for example, CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 183* (2003) (observing that transnational merchant law is “deeply implicated in the ordering of state—society relations because [it] operate[s] to recast ‘public’ concerns as ‘private’ and thus [is] not subject to democratic methods of scrutiny and review”).

25. See *Occidental Exploration & Prod. Co. v. Ecuador*, [2005] E.W.C.A. (Civ) 1116, ¶ 16 (appeal taken from Queen’s Bench Division) (holding that BITs provide direct standing to individuals and investors); see also MILLS, *supra* note 22, at 264.

direct claim before the European Court of Human Rights.²⁶ Equally, investment treaty agreements accord individuals the right to bring direct actions against states.²⁷

All these modern and post-modern movements of international legal scholarship have affected international law in two crucial ways. First, they have affected the nature of and inquiries about international law. International law has become more progressive and humanitarian in nature, extending its scope over civil and human rights, health care and the environment.²⁸ As the scope of international law widens,

26. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, Sept. 3, 1953, 213 U.N.T.S. 221 (“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”).

27. Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, in HUMAN RIGHTS IN INTERNATIONAL LAW AND ARBITRATION 65 (Pierre-Marie Dupuy et al. eds., 2009) (“Following the phenomenal development in the past [twenty-five] years of bilateral investment treaties, regional trade agreements, such as NAFTA, and more importantly of investment arbitration, the right of access to justice for the investor has shifted from inter-state claims to the private-to-state arbitration where private actors have direct access to international remedial process without the traditional need for the interposition of the national state in diplomatic protection.”); see also Tillmann Rudolf Braun, *Globalization: The Driving Force in International Investment Law*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 491 (Michael Waibel, Asha Kaushal, et al. eds., 2010) (“[I]nsofar as modern bilateral investment treaties assure investors material rights along with associated formal enforcement procedures, they contribute to a fundamental change in international law—the individual or legal person in private law is assigned *individual rights* through a treaty in international law and thus is upgraded to the status of a *partial subject* of international law.”). Further, the so-called “umbrella clauses,” found in at least fifty percent of investment treaty agreements, even allow investors to bring investment treaty claims against states for contractual breaches. See Stephan W. Schill, *The Robert E. Hudec Article on Global Trade: Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT’L L. 1, 47–48 (2009). Of course, contestations still persist on a number of areas concerning international private rights; it is contested for example whether these rights are rights attributable directly to individuals by international law or whether they are merely rights of states in relation to their nationals.

28. Cf. Kennedy, *International Law*, *supra* note 6, at 102 (“The great innovations of twentieth century international law—a theoretical and doctrinal pragmatism, the dramatic expansion of international institutions and non-state actors, the doctrinal disestablishment of sovereignty and blurring of the boundaries between public and private or international and municipal law, decolonization and the engagement with politics, economics and sociology, not to mention the great normative projects of state responsibility, human rights, and so on—have begun largely as the projects of disciplinary progressives. At least within the intellectual establishments of the West and

questions about international law change and new challenges emerge. International legal scholars are currently concerned not so much with whether international law exists; they are mainly concerned with whether international law is fair and inclusive.²⁹ This type of inquiry is closely related to *legitimacy*, and although it implicates international arbitration too, it goes beyond the scope of this article and it is not examined here.

Secondly, the developments in the international legal scholarship have affected the *concept* of international law, which has shifted from a concept dominated by pedigree and sovereignty to a more inclusive one that encompasses informal legal norms and non-state actors. It is this aspect of international law's progress that is most relevant for the purposes of this article. Thus, it is useful to provide an overview of scholarship relating to anti-formalism and legal pluralism before turning to the concept of arbitration law.

In the heyday of positivism, international law was exclusively structured around the idea of nation-state, which was seen as the indispensable framework of legal order. On-state actors, either individuals or corporations, were not recognized as subjects of international law and were denied standing to initiate proceedings in international courts and tribunals.³⁰ Only rules that derived from a formal source—typically sovereignty—and

North, public international law in the twentieth century has largely been a progressive and humanist discipline, marked by its hostility to what is remembered as the classical system. This more pragmatic approach may well provide the lawyer a broader tool kit of solutions to transboundary problems, from AIDS to the environment.”).

29. THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 6 (1998) (“The question to which international lawyer must now be prepared to respond [is] . . . whether . . . international law [is] fair?”); KOSKENNIEMI, *supra* note 21, at 334 (“The new developments in the law did not point to unity. The more powerfully they dealt with international problems—problems of economics, development, human rights, environment, criminality security—the more they began to challenge old principles and institutions”); Kennedy, *Political Economy*, *supra* note 1, at 12 (suggesting that international law should now focus its attention “on crucial questions of global political economy: the dynamics of inequality, the distributions of growth, the reproduction of hierarchies within and between leading and lagging sectors, regions, nations and cultures.”).

30. See *Mavrommatis Palestine Concessions* (Greece v. Britain), Judgment, 1924 P.C.I.J. (ser. B) No. 3, at 12 (Aug. 30) (“By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.”).

developed through formal processes were accepted as law.³¹ Developing, adjudicating, or enforcing norms beyond and outside the hierarchy of the state was seriously questioned;³² in fact, for some scholars, any non-state rule was considered as non-law,³³ as it lacked the ability to sanction non-performance.³⁴

However, technology after the Second World War dramatically enhanced the prospect of communication and synergies, and facilitated the development of commercial and non-commercial communities, which transcend state territorial boundaries.³⁵ Contemporary societies see fewer reasons to organise in vertical state-hierarchies. Instead human and business activity is now organized in horizontal, transnational and specialized non-state communities, which are strongly connected and affiliated on the basis of common activities and interests.³⁶ These communities, which operate within or outside

31. See Francis Mann, *The UNCITRAL Model Law—Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157 (Pieter Sanders ed. 1967), reprinted in 2 ARB. INT'L 241, 241–42 (1986) (noting that only recently has arbitration been released from the strictures of formal law).

32. See *id.*

33. See Paul Lagarde, *Approach Critique de la Lex Mercatoria*, in LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES, ÉTUDES OFFERTES À BERTHOLD GOLDMAN [CRITICAL APPROACH TO THE LEX MERCATORIA, in LAW OF INTERNATIONAL ECONOMIC RELATIONS—A STUDY OFFERED TO BERTHOLD GOLDMAN] 125 (Philippe Fouchard et al. eds., 1982).

34. See Alexander Court de Fontmichel, L'ARBITRE, LE JUGE ET LES PRATIQUES ILLICITES DU COMMERCE INTERNATIONAL [THE ARBITRATOR, THE JUDGE, AND ILLICIT PRACTICES IN INTERNATIONAL TRADE] 102 (2002).

35. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1161–62 (2007) (“Given increased migration and global communication, it is not surprising that people feel ties to, and act based on affiliations with, multiple communities in addition to their territorial ones. Such communities may be ethnic, religious, or epistemic, transnational, subnational, or international, and the norms asserted by such communities frequently challenge territorially-based authority. . . . Finally, we see communities of transnational bankers developing their own law governing trade finance and the use of modern forms of *lex mercatoria* to govern business relations. Such non-state legal systems often influence (or are incorporated into) state or international regimes.”).

36. See Roger Cotterrell, *Transnational Communities and the Concept of Law*, 21 RATIO JURIS 1, 5–6 (2008) [hereinafter Cotterrell, *Transnational Communities*] (“The many different kinds of transnational regulation which now exist, or are developing, relate to the interests, experiences, allegiances and values associated with transnational networks of community: for example, transnational business and financial networks; networks established and sustained by NGOs and social movements in environmental and human rights fields; networks of production and distribution in particular transnational industries (like that described in Snyder’s toy industry study); networks

the state hierarchy, exhibit manifestations of normativity in their structure, operation and organisation. As a result, the orthodox juristic proposition that law can only derive from a single legal and political system, namely the state, became increasingly difficult to reconcile with the reality of global interdependence.³⁷ The development of transnational specialized communities, making a shift from a monist to a pluralistic world, has critically changed our perception of international law.³⁸ As David Kennedy puts it, “the idea that there is national law and international law, public law and private law, and that the legal order is a tidy sum of the four, is no longer plausible. It doesn’t add up. We need a better map.”³⁹

Indeed, the normative potency of non-state actors and the articulation of informal legal norms have been increasingly recognized by a number of international law scholars.⁴⁰ This recognition grows out of scholarship that employs a range of differing types of methodologies, frameworks of analysis and lines of inquires. Some scholars, for example, have engaged with legal theory to develop an analytical conceptual framework for a

facilitated by co-operation between states such as the EU, NAFTA, MERCOSUR; and professional networks such as those involved in international commercial arbitration or transnational legal practice.”). Cf. GRAEF-PETER CALLIÈSS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE, A THEORY OF TRANSNATIONAL PRIVATE LAW* 56 (2010) (referring to “interest-driven” specialized groups which are functioning legal systems).

37. FRANCK, *supra* note 29, at 4; MILLS, *supra* note 22, at 74; Cotterrell, *Transnational Communities*, *supra* note 36, at 6.

38. Cf. David Kennedy, *Turning a Market Democracy: A Tale of Two Architectures*, 32 HARV. INT’L. L.J. 373, 375–76 (1991) (“[T]he old international law was hopelessly compromised by ideological strife and an overemphasis on state sovereignty and conflict. The new international law will begin where these leave off. Theoretically, that means an end to the preoccupation with naturalism and positivism and a move to a more practical and pragmatic international law that can respond to the new problems requiring international cooperation—the environment, health care, and so forth. Doctrinally, this means a move away from sovereignty and doctrines of procedure to a renewal of substantive codification and a revitalization of international institutions.”).

39. David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641, 643 (2006) [hereinafter Kennedy, *Legal Pluralism*].

40. Cf. Braun, *supra* note 27, at 491–92 (“in international investment law, globalization has caused the states to transform their role as the guarantors of legal certainty: states no longer establish law and order on their own but rather *provide for* and *guarantee* the establishment of law and order through the provision of investor-state dispute settlement procedures. The rule-making process in international investment law can—fourthly—be compared to a *marketplace* and described in terms of *variety, choice, and competition*.”).

better understanding of the normative function of non-state actors and transnational rules.⁴¹

Other scholars have employed socio-legal analysis to identify non-state norms.⁴² The most prominent school of thought in this line of inquiry is that of legal pluralism, which studies the normative potency of non-state transnational communities.⁴³ Legal pluralists focus on communities⁴⁴ that tend to be highly technical and specialized and take the form of networks,⁴⁵ or systems,⁴⁶ or diverse global societies.⁴⁷ These

41. Compare John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN. ST. L. REV. 119, 193 (2009) (employing analytical methods to develop a framework for international law), with CALLIESS & ZUMBANSEN, *supra* note 36, at 56 (relying on the method of “rough consensus and running code” to develop an analytical framework of transnational law); see Ross Cranston, *Theorizing Transnational Commercial Law*, 42 TEX. INT’L L.J. 597, 602 (2007).

42. See EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* lix (Roscoe Pound & Klaus Ziegert trans., 2002) (“At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science [Jurisprudenz], nor in judicial decision [Rechtsprechung], but in society itself. This sentence, perhaps, contains the substance of every attempt to state the fundamental principles of the sociology of law.”). For Ehrlich, one of the pioneers of empirical sociolegal analysis, law encompassed both state rules, found in statutes and judicial decisions, and non-state norms. Of course, the focus of Ehrlich’s inquiry and his living law theory was on local communities, whereas the subject of contemporary pluralism is global diverse communities and global law, but the principle of non-state living law applies to a great extent even today. For further information on this topic, see Gunther Teubner, *“Global Bukowina”: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE*, 3 (Guntner Teubner ed., 1997).

43. Berman, *supra* note 35, at 1157–59.

44. See *id.* at 1157–58; see also Cotterrell, *Transnational Communities*, *supra* note 36, at 5–6 (referring to transnational communities).

45. FRANCOIS OST & MICHEL VAN DE KERCHOVE, *DE LA PYRAMID AU RÉSEAU? POUR UNE THÉORIE DIALECTIQUE DU DROIT [FROM THE PYRAMID TO THE NETWORK? FOR A DIALECTICAL THEORY OF THE LAW]* 14 (2002) (speaking about networks).

46. See Robert Wai, *The Interlegality of Transnational Private Law*, 71 L. & CONTEMP. PROBS. 107, 110 (2008). Wai also argues that the normative framework for contemporary business transactions includes a variety of norms, coming from state and non-state actors: “private law provides a useful corrective to a tendency in doctrinal-law scholarship to focus on state norms, and the tendency in leading works of global legal pluralism to emphasize nonstate normative orders.” *Id.* at 109. What is particularly interesting in his analysis is that he introduces a new theoretical framework for understanding the normative functions of transnational private law and transnational rules: this is the Systems theory, which is premised on the observation that “social practices, rather than an abstract or ideal theory of law, determine the boundaries of normative systems.” *Id.* at 112–13.

47. Teubner, *supra* note 42, at 3 (“[S]ocial subsystems have already begun to form an authentic global society or, better, a fragmented multitude of diverse global societies.”).

communities acquire normative powers and legal validation through constant self-referencing processes and practices,⁴⁸ which the members of the community accept as binding (a method often called autopoiesis).⁴⁹ As Teubner points out, “the new living law of the world is nourished not from stores of tradition but from the ongoing self-reproduction of highly technical, highly specialized, often formally organized and rather narrowly defined, global networks of an economic, cultural, academic or technological nature.”⁵⁰

Although views favoring formalism and the exclusivity of state law still persist in international legal scholarship, the movement of legal pluralism and anti-formalism have crucially

48. BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* 437 (2d ed. 2002) (speaking about “normative interlegality”). “These groups tend to self-regulate crucial aspects of their business and non-business activities through recommendations, best practices, guidelines, codes of conduct, and self-regulation. See CALLIESS & ZUMBANSEN, *supra* note 36, at 2; cf. Jan Dalhuisen, *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and its Lex Mercatoria*, 24 *BERKELEY J. INT’L L.* 129, 147 (2006) (noting that laws must have a “self-propelling force to maintain itself”); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 *ANNALS AM. ACAD. POL. & SOC. SCI.* 12, 27 (2005) (“The new order of regulatory capitalism . . . is characterized by . . . formalization of inter-institutional and intra-institutional relations and the proliferation of mechanisms of self-regulation in the shadow of the state . . .”).

49. The term “autopoiesis” was originally introduced by Humberto Maturana. Humberto Maturana, *Autopoiesis*, in *AUTOPOIESIS: THEORY OF THE LIVING ORGANISATION* (Milan Zeleny ed., 1981). The concept of the autopoietic law has since been revisited and partially transformed by a number of scholars, most notably, Niklas Luhmann. LUHMANN, *supra* note 21. For a good overview and discussion of autopoietic law, see the collection of articles in GUNTHER TEUBNER, *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* (1987), and in particular, see Teubner, *supra* note 42, at 1. In his work *GLOBAL BUKOVINA*, Teubner refers to the “closed circuit arbitration” which is “a self-regulatory contract which goes far beyond one particular commercial transaction and establishes a whole private legal order with a claim to global validity. Apart from substantive rules it contains clauses that refer conflicts to an arbitration ‘court’ which is identical with the private institution that was responsible for ‘legislating’ the model contract.” TEUBNER, *supra* note 42, at 15.”

50. TEUBNER, *supra* note 42, at 5. See KOSKENNIEMI, *supra* note 21, at 354 (noting that it leads to a situation where law and regulation are indistinguishable and therefore it leaves us “unable to distinguish between the gunman and the policeman, the regime corruption from the regime of contract”, and also as a “generalising doctrine with an ambivalent political significance.” A similar approach is taken by Horatia Muir-Watt, who argues that legal pluralism is inadequate to address the legitimacy problem raised by transnational expressions of non-state authority. Horatia Muir-Watt, *Private International Law: Beyond the Schism, from Closet to Planet* (launching paper of the research project Private International Law as Global Governance), available at <http://blogs.sciences-po.fr/pilagg/files/2012/03/HMW-PILAGG-Paper-FINAL.pdf>).

affected the concept of contemporary international law.⁵¹ In a pluralistic world, there is no single fundamental test for legal norms, and there are different systems, both state and non-state ones that engage in the development of a variety of legal norms. Such a concept of law pays particular attention to content rather than pedigree and recognizes the important role of legal principles and other standards such as policies and practices.⁵²

Legal norms developed informally are more suitable to explain how social and business activities are organized and regulated in our multi-layered contemporary world.⁵³ We now realize for example that “ISO 14000 environmental standards are forced through the supply chain by private ordering, whether or not they correspond to national regulations.”⁵⁴ Our understanding of normativity gradually extends beyond the picture of law as a system that comprises only of rules, which as Dworkin observes has for long “exercised a tenacious hold on our imagination, perhaps through its very simplicity. If we shake ourselves loose from this model of rules, we may be able to build a model truer to the complexity and sophistication of our own practices.”⁵⁵

51. See, e.g., KOSKENNIEMI, *supra* note 21, at 214 (arguing in favor of formalism in international law); JEAN D’ASPROMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW – A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* (2011) (arguing that a formal theory of sources remains instrumental in ascertaining rules of international law); Thomas Schultz, *Some Critical Comments on the Juridicity of Lex Mercatoria*, 10 Y.B. OF PRIV. INT’L L. 667 (2008) (arguing that *lex mercatoria* lacks the formal requirements which are essential features of a legal system).

52. The binding force of legal principles and policies was demonstrated by Ronald Dworkin, another contemporary scholar who convincingly attacked positivism as a legal theory that accepts only state rules as law. In *TAKING RIGHTS SERIOUSLY*, Dworkin shows that legal rules enacted by states are not the only possible legal rules; legal principles and policies have normative force as well. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

53. Cotterrell, *Transnational Communities*, *supra* note 36, at 4–5 (“The task is rather to rethink legal theory in a situation in which it is slowly losing its basic modern reference points, the firmly defined jurisdiction of the nation state and the politically organized national society as the terrain from which all legal phenomena can be observed and evaluated. Perhaps, indeed, there can no longer be a single legal reference point to provide the basis for juristic thought.”).

54. Kennedy, *Legal Pluralism*, *supra* note 39, at 642.

55. DWORKIN, *supra* note 52, at 45. See Cotterrell, *Transnational Communities*, *supra* note 36, at 10 (“[J]uristic legal theory needs to knock away the support on which it has been leaning since the rise of modern legal positivism . . . [which assumes] that all law is created by the state or derives authority and validity from its recognition by agencies of the state, and that its guarantee is its enforceability by the state.”).

It is important to note that the realization of the role and significance of non-state legal norms does not suggest the eradication of state. The majority of scholars unequivocally accept the importance of state law and state order.⁵⁶ The above observations simply highlight that contemporary societies are highly diverse, and multidimensional, and recognize the authority of both state and non-state actors. Equally important, the above observations suggest that our understanding of law has irrevocably advanced from the Austinian thesis that law can only be rules backed by threats⁵⁷ to a more inclusive and pluralistic concept of international law that accepts both regal rules produced formally by states, and legal standards developed in non-state communities, in the form of principles, policies and norms.⁵⁸ Of course, much of this discussion is not new. Theories on the evolution of norms outside and beyond the formal sources and processes of states have received more attention since the Second World War and they are currently enjoying almost mainstream recognition.⁵⁹ What is new, however, is whether the developments in international legal scholarship and

56. CALLIESS & ZUMBANSEN, *supra* note 36, at 19 (“[T]he many examples of a ‘global law without a state’ [does] not in fact contain a flat-out rejection of state-based, official law. Rather, examples such as corporate codes of conduct or privately enacted rules in transnational commercial arbitration can be seen as underscoring the increasing complexity of a legal order the building blocks of which originate in regulatory processes that are no longer confined to government actors nor to nation-state alone.”). See Cotterrell, *Transnational Communities*, *supra* note 36, at 10 (“A useful pluralist concept of law would be one that can recognize the current (and probably enduring) prominence of state law but not assume that all law must conform to or be measured against the state law model, or exist in inevitable subordination to or dependence on the law of the state.”).

57. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, 13–16 (1954).

58. Even Hart was open to the idea of international law. See H.L.A. HART, *THE CONCEPT OF LAW* 235 (2d ed. 1994) (observing that there is no need to search for a basic law (a Grundnorm) in international law, and while we can resign to the idea that international law may not be a system of legal rules, it can well qualify as set of legal rules.) There is no need to look for analogies between international law and municipal law in terms of form (because the analogies are too thin), but he accepts that there are important analogies in terms of function and content: “the analogies of content consist in the range of principles, concepts, and methods which are common to both municipal and international law, and make the lawyers’ technique freely transferable from the one to the other.” *Id.*

59. See Simon Roberts, *After Government? On Representing Law Without the State*, 68 *MOD. L. REV.* 1 at 5–11 (2005) (identifying the different attempts to represent law without state).

international law affected international arbitration. The following parts discuss this matter in detail. Part II explains how arbitration scholarship failed to connect with crucial theoretical developments in international legal scholarship and international law. Part III identifies the consequences of failing to connect with developments in international legal scholarship and international law. Lastly, Part IV discusses how the developments in international legal scholarship can be used to advance an autonomous concept of international arbitration law.

II. HOW ARBITRATION SCHOLARSHIP FAILED TO CONNECT WITH THE DEVELOPMENTS IN INTERNATIONAL LEGAL SCHOLARSHIP AND INTERNATIONAL LAW

While the scope of international legal scholarship has been expanding and the concept of international law has been progressing, the field of international arbitration has largely developed in isolation.

Due to its close relevance to legal practice, arbitration was not originally considered a subject of academic importance. Arbitration courses, therefore, were not included in generalist law degrees (like J.D. or LL.B. programs) or in LL.M. curricula.⁶⁰ At best, arbitration was considered a subordinate legal subject. For example, in Germany and in a number of other German influenced jurisdictions, such as Austria, the Netherlands, Greece, and Italy, arbitration has mainly been treated as procedural law; this explains why arbitration laws are

60. It was only in the mid 1980's that arbitration was first taught as a post-graduate course. In 1985, Queen Mary University of London ("QMUL") introduced the course of International and Comparative Commercial Arbitration in its LL.M. curriculum, mainly thanks to the vision and efforts of two very influential commercial lawyers, Professor Julian Lew, who first developed and taught the course at QMUL, and Professor Roy Goode, who was the Director of the Centre for Commercial Law Studies at QMUL at the time. It took another fifteen years until arbitration courses were introduced in the LL.M. curricula of other academic institutions in the UK (e.g., King's College London, University College London, London School of Economics), in Switzerland (e.g., University of Geneva), in Sweden [there is no example here- maybe this should be deleted], and the United States (e.g., Columbia University, New York University, University of Texas at Austin, Penn State University, University of Miami, Pepperdine University, Hamline University). Arbitration is still not included in most LL.B. or J.D. programmes.

still included in their national codes of civil procedure.⁶¹ Moreover, in France and Switzerland, arbitration has been viewed as private international law or conflicts of laws subject,⁶² and in the common law world, arbitration has traditionally been treated as a version of ordinary contract law.⁶³ This explains why scholarly work in arbitration largely drew on theories, concepts, and doctrines of private international law, civil procedure, and contract law.⁶⁴

Since arbitration was not taught in law schools and scholarly work treated arbitration as a subordinate subject, international arbitration never organically developed as an autonomous legal discipline. In fact, arbitration scholarship grew not in law schools or the academic world.⁶⁵ The most

61. See *ZIVILPROZESSORDNUNG* [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, *BUNDESGESETZBLATT* [BGBl.] 3202, § 1025-66 (Ger.); *ZIVILPROZESSORDNUNG* [ZPO] [CIVIL PROCEDURE STATUTE] § 577-618 (Austria); *Wetboek van Burgerlijke Rechtsvordering* [Rv] [Code of Civil Procedure] § 1020-76 (Neth.); *Codice di procedura civile* [C.p.p.] [Code of Civil Procedure] § 806-40 (It.); *KODIKAS POLITIKES DIKONOMIAS* [KPOL.D.] [Code of Civil Procedure] 1:806-903 (Greece). In Greece, Law 2735/1999 governs arbitration procedures, with the arbitration provisions of the Greek Code of Civil Procedure applying on an ancillary basis. See *Nomos* (2735/1999) *Diethnis Emporiki Diatisia* [International Commercial Arbitration] *EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS* [E.K.E.D.] 1999, A:167 (Greece).

62. See *Bundesgesetz über das Internationale Privatrecht* [CPIL] [Code on Private International Law], Dec. 18, 1987, at 176-94 (Switz.) (codifying German international arbitration law within the Code on Private International Law). While French arbitration law is included in the French Code of Civil Procedure, international arbitration law is part of the country's private international law. See *CODE DE PROCÉDURE CIVILE* [C.P.C.] art. 1442-1507 (Fr.) (codifying French arbitration laws in the Code of Civil Procedure); see generally *FOUCHARD GAILLARD GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION* (Emmanuel Gaillard & John Savage eds., 1999) (providing a conflict of laws analysis of arbitration).

63. See *DAVID ST. JOHN SUTTON, JUDITH GILL & MATTHEW GEARING, RUSSELL ON ARBITRATION* 3:2 (23d ed. 2008) (discussing arbitration provisions in English contract law); *Thomas-CSF v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (stating that "[a]rbitration is contractual by nature" in the United States); *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980) (holding that a "party may be bound to an arbitration agreement in the United States if so dictated by the "ordinary principles of contract and agency").

64. See generally *FOUCHARD ET AL.*, *supra* note 62; *BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* (2005).

65. With the exception of very few older pioneer scholars of international law, such as Andreas Lowenfeld, Hans Smit, and Philippe Fouchard, who wrote extensively on arbitration, full-time academics who focus extensively on arbitration law is a relevantly recent phenomenon. For example, look to the works of US Professors George Berman at Columbia University, Thomas Carbonneau and Catherine Rogers at

influential works in arbitration law were produced by lawyers who were mainly *practicing* in the field of arbitration, as counsel or arbitrators, often as both.⁶⁶ However, practicing arbitration lawyers were not concerned with the concept or legal theory of arbitration or how socio-legal jurisprudence may relate to the subject of arbitration. Their focus was on scholarship that would directly respond to the problems they were facing in arbitration practice. Their methods of inquiry were not empirical, scientific, contextual or interdisciplinary; their primary method of analysis was the traditional approach taken for legal research, namely doctrinal analysis that focuses exclusively on legal statutes and case law.

This is not to argue that the field of arbitration remained undeveloped. On the contrary, a wealth of doctrinal work and a series of pro-arbitration decisions of national courts at the highest level greatly expanded the scope of arbitration's authority.⁶⁷ International tribunals are now considered capable of trying a wide range of disputes, even disputes implicating national public policy that previously fell within the exclusive domain of state courts.

Penn State University, William Park at Boston University, Alan Scott Rau at University of Texas, Linda Silberman and Franco Ferrari at New York University, Christopher Drazohal at the University of Kansas, Jack Coe and Thomas Stipanowich at Pepperdine University, and Susan Franck at Washington & Lee University. In Europe, look at the works of Professors Klaus Peter Berger at the University of Cologne, Loukas Mistelis at Queen Mary University of London, Patricia Shaughnessy at Stockholm University, Charles Jarrosson and Catherine Kessedjian at Panthéon-Assas, and Thomas Clay at the University of Versailles.

66. See JULIAN D.M. LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS* (Kenneth R. Simmonds ed., Oceana Publications, Inc. 1978). Julian Lew was for most of his career working as a practicing arbitration lawyer in English law firms and was a visiting Professor in Queen Mary University of London. Similarly, all major arbitration works have been produced by arbitration lawyers who mainly practice arbitration. See generally ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958, TOWARDS A UNIFORM JUDICIAL INTERPRETATION* (1981); W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* (3d ed., 2000); JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* (2003); HANOTIAU, *supra* note 64; GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* (2d ed., 2001); REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (5th ed., 2009).

67. See, e.g., *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, 473 U.S. 614 S. Ct. 3346 (1985).

In the area of commercial arbitration, for example, it is now accepted that tribunals have authority to determine not only commercial claims pertaining to the formation, interpretation, and performance of a commercial contract, but also statutory claims that may have crucial social implications or involve public policy.⁶⁸ Although in most domestic legal systems a number of areas, such as disputes that have criminal implications, or disputes concerning legal matters of personal status, remain non-arbitrable, the authority of commercial tribunals now extends over disputes relating to intellectual property, antitrust claims, or tax claims.⁶⁹

Meanwhile, in the area of investment treaty arbitration, a significant number of international investment treaties have adopted arbitration as the preferred model for the resolution of public international law disputes. These disputes would normally fall within the regulatory sovereignty of the host nation,⁷⁰ even disputes on sovereign debt bonds.⁷¹

68. See Thomas E. Carbonneau & François Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 TUL. J. INT'L & COMP. L. 193, 196 (1994) (discussing the types of issues arbitration tribunals decide).

69. See generally ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009). These developments in arbitration doctrine and practice have encouraged some arbitration scholars to declare the death of non-arbitrability doctrine, arguing that now any type of public policy dispute may be submitted to arbitration. See, e.g., Karim Youssef, *The Death of Inarbitrability*, in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, 47, 47 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009) ("In recent years, the scope of rights amenable to arbitration has grown to such an extent that, the concept of arbitrability (or its mirror image, inarbitrability) as central as it may be to arbitration theory, has virtually died in real arbitral life.").

70. See generally CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, *INVESTMENT TREATY ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007); VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* *supra* note 1; RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008); STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009); ANDREW NEWCOMBE & LUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (2009); *cf.* also Campbell McLachlan, *Investment Treaty Arbitration: The Legal Framework*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE (ICCA Congress series no. 14) 95 (Albert Jan van den Berg ed., Kluwer 2009) for a good overview of role and function of investment treaty arbitration.

71. See *Abaclat v. Argentina*, ICSID Case No. ARB/07/5 (using arbitration to settle a dispute over a sovereign debt bond unrelated to a specific project in the host state—in this case borrowing).

However, and notwithstanding the fact that the scope of authority of international tribunals was expanding in practice, the main focus of arbitration scholarship remained narrow. The agenda of arbitration scholarship and conferences in the last forty years has been dominated by practically oriented topics, such as the validity of arbitration agreements, the power of tribunals to provide interim relief, the role of non-signatories in arbitration, and procedural matters including the taking of evidence, enforcement of arbitral awards, and cost-control and effective case management of arbitration proceedings.⁷² Similarly, the current arbitration zeitgeist is the use of third-party funding in international arbitration, the appropriate standards of impartiality of tribunals, and the conduct of counsel before tribunals.

The only progressive movement in arbitration scholarship that appeared to have implications on legal theory was the theory of delocalization that emerged in the 1980's from the seminal papers of William Park and Jan Paulsson. Transnational arbitration, it was argued, is a delocalized legal system that is not subject to the national law (procedural or substantive) or the national courts of the seat of the arbitration (often referred to as *lex loci arbitri*).⁷³

This was an interesting proposition that injected a breath of progressive air in arbitration scholarship, which however proved ephemeral. Instead of engaging with legal theory, the discourse on delocalisation descended to a trite debate on why the parties to an arbitration choose the arbitration seat. Opponents of the theory of delocalization argued that the parties to an arbitration effectively submit to the national legal system of the seat by choosing to arbitrate in a certain state; therefore, arbitration can

72. By way of illustration only, one can look into the agenda and proceedings of the most influential arbitration conference, organized by the International Committee of Commercial Arbitration and held biannually.

73. See generally William Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983); William Park & Jan Paulsson, *The Binding Force of International Arbitral Awards*, 23 VA. J. INT'L L. 253 (1983); Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981); Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L. & COMP. L.Q. 53 (1983).

never be truly autonomous.⁷⁴ Proponents of the delocalization theory argued that the parties choose a seat mainly for practical reasons, such as whether a seat is close to the evidence of the case or to the headquarters of the parties.⁷⁵ Therefore, the parties never submit to the laws of the state where they arbitrate; rather, arbitration is only nominally linked with the national legal system of the seat, and in essence remains delocalized and autonomous.

That being the essence of the debate, it is no wonder that the theory of 'delocalization' has effectively made no meaningful progress in the last twenty years. The conflict-of-laws argument of 'reformist' arbitration lawyers that as opposed to national courts, international tribunals have no forum and therefore they owe no allegiance to the laws of the seat always sounded more axiomatic and descriptive than cogent, and in any event it never really advanced the argument in favor of an autonomous arbitration system. Indeed, developing a proposition that arbitration is delocalized and autonomous of any national legal system would require the construction of a general theory of arbitration law that is both normative and conceptual and purports to demonstrate arbitration's normative potency.

However, arbitration scholarship never seized on such a challenge. Apart from the recent interest in investment treaty arbitration, which has prompted some arbitration scholars to look into issues beyond arbitration doctrine,⁷⁶ arbitration scholarship never fully engaged with the crucial movements and theories of international legal scholarship that advanced the concept of international law. Interdisciplinary research on the

74. See Noah Rubins, *The Arbitral Seat is No Fiction: A Brief Reply to Tatsuya Nakamura's Commentary, 'The Place of Arbitration in International Arbitration' Its Fictitious Nature and Lex Arbitri*, 16 MEALEY'S INT'L ARB. REP. 12 (2001).

75. Tetsuya Nakamura, *The Place of Arbitration in International Arbitration- Its Fictitious Nature and Lex Arbitri*, 15 MEALEY'S INT. ARB. REP. 11 (Oct. 2000); Philippe Pinsolle, *Parties to an International Arbitration With the Seat in France are at Full Liberty to Organise the Procedure as They See Fit*, 16 MEALEY'S INT. ARB. REP. 30 (2001).

76. Some scholars for example have been looking into the impact of human rights on arbitration. See HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 65 (Pierre-Marie Dupuy, Ernest-Ulrich Petersmann, & Francesco Francioni eds., Oxford University Press 2009); see also James Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77 (2007).

Law and Arbitration movement did not appear in arbitration scholarship, and arbitration law was never critically examined through the prism of political theory, international affairs or economics.

More crucially, arbitration scholarship failed to critically engage with legal theory and socio-legal jurisprudence. With the exception of a small number of French theorists, the majority of arbitration scholars⁷⁷ paid little to no attention to such subjects. Legal theory for example was often regarded as an academic “tempest in a teapot”⁷⁸ or a discussion with “few practical ramifications” that “ignores or at least do not fully accord with what happens in the real world of international commercial arbitration.”⁷⁹

By failing to engage with non-arbitration and non-legal scholarship and by focusing exclusively on doctrinal analysis, arbitration theory was largely developed under “delusions of self-sufficiency as a science of law”.⁸⁰ This does not suggest that doctrinal analysis is unimportant. On the contrary, examining the internal structure of legal arguments and propositions is crucial to the coherence of arbitration theory. However, arbitration discourse should not be interested only in legal propositions that have the status of formal law; it should also be interested in informal arbitration norms and practices. It should

77. See generally DANIEL COHEN, *ARBITRAGE ET SOCIÉTÉ* [ARBITRATION AND SOCIETY] (1993); BRUNO OPPETT, *THÉORIE DE L'ARBITRAGE* [ARBITRATION THEORY] (1998); É. LOQUIN, *L'APPLICATION DES RÈGLES NATIONALES DANS L'ARBITRAGE COMMERCIAL INTERNATIONAL, IN L'APPORT DE LA JURISPRUDENCE ARBITRALE*, [APPLYING A-NATIONAL RULES IN INTERNATIONAL COMMERCIAL TRADE ARBITRATION, in *THE CONTRIBUTION OF ARBITRATION CASES*] 87 (1986). More recently, for influential work, see EMMANUEL GAILLARD, *ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL* [PHILOSOPHICAL ASPECTS OF THE LAW OF INTERNATIONAL ARBITRATION] (2008), translated in *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 59 (2010). For a sociological analysis in English, see YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* (1996) (undertaking empirical research on international arbitration), see Schultz, *supra* note 51, at 694–95; see also Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and its Consequences*, 2(1) *J. INT. DISP. SETTLEMENT* 59 (2011); cf. Paolo Esposito & Jacopo Martire, *Arbitrating in a World of Communicative Reason*, 28 *ARB. INT'L* 325, 328 (2012) (relying on the work of Habermas' theories to examine the concept of international arbitration).

78. THOMAS CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 624 (6th ed. 2012); See LEW, MISTELIS & KRÖLL, *supra* note 66, at para. 5-5

79. See LEW ET AL., *supra* note 66, at paras. 5-5, 5-7.

80. See Cotterrell, *Edge of Empire*, *supra* note 3.

equally be interested in what arbitration law means to the actual actors. As the following two sections argue, the experiences, expectations and consciousness of arbitration lawyers are crucially relevant to the development of a concept of autonomous arbitration law.⁸¹

III. *THE ADVERSE EFFECTS OF ARBITRATION'S FAILURE TO ENGAGE WITH CRUCIAL DEVELOPMENTS IN INTERNATIONAL LEGAL SCHOLARSHIP*

The failure of arbitration scholarship to engage with crucial movements and theories of international legal scholarship has had undesirable implications for the field of arbitration in two ways.

First, it has engendered an unfavorable perception of international arbitration by non-arbitration lawyers and by the public. By failing to engage with interdisciplinary research and the concerns of non-arbitration and non-legal scholarship, arbitration lawyers have failed to develop a broader and more accessible account of international arbitration. Naturally, arbitration has lately been the subject of harsh critique by non-arbitration scholars who fear, not always justifiably, that international tribunals unduly interfere with the state's ability to protect the values, traditions and interests of the public.⁸² Although it is critical for the future of arbitration, this type of

81. Cf. Cotterrell, *Edge of Empire*, *supra* note 3, at 77. As Ehrlich has famously noted in the *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW*, "[t]he center of gravity of legal development therefore from time immemorial has not lain in the activity of the state but in society itself, and must be sought there at the present time." EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 390 (Walter L. Moll trans., Harvard Univ. Press 1962) (1932).

82. See CUTLER, *supra* note 24, at 183 ("The devolution of authority to resolve disputes and to enforce agreements to the private sphere through the increasing legitimacy of private arbitration, and the reassertion of merchant autonomy as the substantive norm are perfecting this reconfiguration of political authority. This is reordering state-society relations both locally and globally"). Cutler also notes that arbitration and *lex mercatoria* should be tackled on the field of representation and legitimacy to avoid "a 'hegemonic in the Gramscian sense' influence" of the "mercatoracy." *Id.*; Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 *VAND. J. TRANSNAT'L L.* 775 (2008).

unfavourable implications is not the focus of this work, and it is examined elsewhere.⁸³

Secondly, and more importantly for the purposes of this article, the failure of arbitration to engage with the developments in international legal scholarship has crucially impaired the concept and autonomy of arbitration law. By remaining adherent to an old-fashioned version of positivism that accepts state legal rules only, arbitration scholarship has failed to advance an account of arbitration as a non-state community that has the capacity to produce non-state legal rules. Eventually, it has failed to advance persuasive claims of normativity and autonomy of international arbitration.⁸⁴

Naturally thus arbitration and arbitration law is largely treated as subservient to national courts and to the national laws of the seat. Indeed, with few only exceptions,⁸⁵ mainstream

83. See Stavros Brekoulakis, *Collective Biases and International Tribunals I* (Queen Mary Univ. of London, Sch. of Law Legal Studies Research Paper No. 131, 2013).

84. There are notable exceptions here; see, for example, Julian D. M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 *ARB. INT'L* 179, 186 (2006), (putting forward an appealing vision of an autonomous arbitration system, based however exclusively on doctrinal method of analysis). Gary Born has also advanced a comprehensive account of international arbitration as a global system designed around the 1958 New York Convention in his treatise of two volumes and 3,398 pages. GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (2009); see in particular Chapter 1, where he lays down the foundations of the system and Chapter 26 where he explores issues of preclusion, *lis pendens* and *stare decisis* in international arbitration.

85. French (and French influenced) scholars were the first to introduce the notion of arbitration as an autonomous system. See Charalambos Fragistas, *Arbitrage Etranger et Arbitrage International en Droit Privé* [Foreign Arbitration and International Arbitration in Private Law], 49 *REV. CRIT. DIP I* (1960); Berthold Goldman, *Les Conflits de Lois dans l'Arbitrage International de Droit Privé* [Conflicts of Law in International Arbitration of Private Law], 109 *COLLECTED COURSES* 347 (1963); Philippe Fouchard, *L'ARBITRAGE COMMERCIAL INTERNATIONAL* [INTERNATIONAL COMMERCIAL ARBITRATION] (1965). From Anglo-Saxon scholars, Julian Lew was one of the first to theorize on the autonomous nature of arbitration. JULIAN LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* (1978). Julian Lew has also reiterated his original thesis of autonomous nature of arbitration. Lew, *supra* note 84. Gaillard has more recently engaged in the study of theory of transnational arbitration, which, according to him, constitutes an autonomous legal order which although eventually derives its legal order from the will of the States, it is still an autonomous system that is shaped by the "convergence of national legal orders that, through their widespread acceptance of arbitration, legitimizes its existence." Gaillard, *supra* note 77, at 59. See EMMANUEL GAILLARD, *THE USE OF COMPARATIVE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION*, 4 *ICCA Congress Series* 283 (1989); see also Emmanuel Gaillard, *General Principles of Law—More predictable after all?*, 55 *N.Y.L.J.* 3 (2001). What is probably missing from Gaillard's otherwise erudite studies on the theory of arbitration is

arbitration theory and practice rests upon two main theses: first, arbitration is derivative of national laws, and secondly, state public policy defines the material scope of arbitration.⁸⁶ Even the term and concept of international arbitration is considered a “misnomer,” which does not exist in the legal sense, “as “every arbitration is a national arbitration, that is to say, subject to a specific system of national law.”⁸⁷ Tribunals are therefore subject to the national laws and national courts of the arbitration seat.⁸⁸

This approach is echoed in the current legal framework of arbitration, which is controlled by state laws and state public policy. For a start, the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, the greatest pillar of the arbitration edifice and the main force behind the meteoric rise of arbitration in the last fifty years, refers to *foreign* rather than *international* awards. More importantly, it expressly provides in Article V(2)(a) that recognition and enforcement of an arbitral award may be refused if “the subject matter of the difference is not capable of settlement by arbitration under the law of [the enforcing] country.”⁸⁹ In similar fashion, paragraph (b) of the same

information from socio-legal analysis, which is necessary when we try to ascertain normativity of any social or business community.

86. See, e.g., JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 83 (2d ed., 2007) (noting that “[t]he *lex arbitri* builds the foundation (Grundnorm) for the effectiveness of the arbitration agreement.”); Stavros Brekoulakis, *Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori*, in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 101 (Loukas Mistelis & Stavros Brekoulakis eds., 2009) (discussing in detail and from a doctrinal perspective, applicable laws issues in arbitration, and argues against the relevance of the *lex fori* and state public policy when arbitrators as well as national courts deciding the issue of material scope of a private tribunal.); see generally Stavros Brekoulakis, *Arbitrability and Conflict of Jurisdictions: The (diminishing) Relevance of lex fori and lex loci arbitri*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (Franco Ferrari & Stefan Kroell eds., 2011).

87. Mann, *supra* note 31, at 245; Schultz, *supra* note 51 (criticizing *lex mercatoria* as lacking a clear conceptual framework).

88. Mann, *supra* note 31, at 245 (pointing out that any source and power of arbitration comes exclusively from national state and municipal law: “[e]very right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called the *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri* or, in French, *la loi de l’arbitrage*.”).

89. United Nations Convention on the Recognition and Enforcement of Arbitral Awards, art. 5(2)(a), July 6, 1958, 330 U.N.T.S. 3.

provision states that enforcement of an arbitral award will also be refused if the “recognition of enforcement of the award would be contrary to the public policy of [the enforcing] country.”⁹⁰ The same approach is taken by the European Convention on International Commercial arbitration⁹¹ and by the vast majority of national arbitration laws.

Almost every international and national legislation on arbitration is underpinned by the idea that an arbitration must be anchored in a state, and that a national law must govern all aspects of the arbitration process.⁹²

As an English court observed:

Indeed, English law at least has turned its face against the notion that it is possible to have arbitral procedures that are wholly unconnected with any national system of law at all...[B]y choosing the legal place of the arbitration proceedings the parties *ipso facto* choose the laws of that place to govern their arbitration proceedings⁹³

90. *Id.* at art. 5(2)(b).

91. See European Convention on International Commercial Arbitration of 1961, art. 6, para. 2, Apr. 21, 1961, 484 U.N.T.S. 364, (stating that “[t]he courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration.”).

92. More crucially, national laws (invariably the law of the seat) determine the scope of authority of international tribunals and whether a dispute can be submitted to arbitration or not. *E.g.*, UNCITRAL Model Law on International Commercial Arbitration, Art. 34(2)(b)(i) (stating that “the subject matter of the dispute is not capable of settlement by arbitration under the law of this State,” i.e. the *lex fori*). National courts have been consistently applying the *lex fori* and the public policy of the forum when looking into the issue of arbitrability. See, *e.g.*, *Fincantieri-Cantieri Navali Italiani SpA v. Ministry of Defence, Armament and Supply Directorate of Iraq*, App. 1994, XXI Y.B. Comm. Arb. 594 (1996), where Italian courts applied Italian law to determine whether a dispute concerning rights affected by United Nations and European embargo legislation could be submitted to arbitration, as the parties had originally agreed. For further analysis and references on this point, see GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 521 (2009) for a comprehensive overview of decisions from various national courts, including Belgian, Dutch, French, Italian, Swiss, and US decisions, which all hold that the issue of material scope of an arbitration will be determined by national laws by reference to the law of seat. There are only a few exceptions to that approach. See *e.g.*, *Meadows Indemnity v. Baccala & Shoop Ins. Servs.*, 760 F. Supp. 1036, 1046 (E.D.N.Y. 1991) (holding that the question of whether a claim about fraud, implicating public policy issues, can be the subject matter of arbitration is not to be determined by a national law; rather it must be made “on an international scale, with reference to the laws of the countries party to the Convention.”).

93. *Union of India v. McDonnell Douglas* [1993] 2 LLOYD’S REP. 48.

Any legislative or judiciary attempt in the past to challenge the reign of national laws over arbitration spectacularly failed. For example, in 1985 Belgium enacted a law providing that national courts will have no jurisdiction to review an arbitral award issued by a tribunal sitting in Belgium, when the dispute was between two non-Belgian parties.⁹⁴ This was a progressive arbitration law allowing tribunals not to take into account Belgian law or its state public policy when deciding a dispute with international elements. Unfortunately, it was a short-lived arbitration law. Not long after its enactment, it became the subject matter of considerable criticism⁹⁵ and it has now been amended by law reinstating the default right of Belgian national courts to review all awards where the seat of arbitration is in Belgium.⁹⁶

Another example is the 1980 decision of the Paris Court of Appeal in *General National Maritime Transport Co. v. Société Götaverken Arendal*.⁹⁷ Here, arbitration took place in Paris under the rules of the International Chamber of Commerce, between a Libyan and a Swedish party concerning a dispute arising out of a

94. The expectation here was that Belgium would become an attractive (a-national) place to arbitrate. See Alain Vandereist, *Increasing the Appeal of Belgium as An International Arbitration Forum? The Belgian Law of March 27, 1985 Concerning the Annulment of Arbitral Awards*, 3 J. INT'L ARB. 77 (1986).

95. William Laurence Craig, *Uses and Abuses of Appeal From Awards*, 4 ARB. INT'L 201 (1988) (recognizing that court review of arbitral awards should be limited, while opposing the idea of national awards, noting that “[t]he existence of such a possibility, however, means that the road to non-appealable arbitral awards may not be paved with gold. Indeed, among some commentators, the concept of a non-reviewable award attracts the kind of contempt that was felt some years ago for divorces from Las Vegas or Chihuahua”).

96. This would apply except if the parties have expressly agreed to waive this right. The legislation was amended in 1999 and then recently in 2013 with the current Belgian Judicial Code providing that “[t]he parties may, through an express declaration in the arbitration agreement or through a later agreement, exclude any action for the annulment of an arbitrator’s award when neither of them is either a natural person with a Belgian citizenship or a residence in Belgium, or a legal person having its main establishment or having a branch there.” Belgian Code Judiciaire [C. Jud.] art. 1718. Similar provisions can be found in Swiss Private International Law Act, art. 192, and the new French Law, art. 1522, which provides that “[b]y way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside.” Décret 2011-48 du 13 janvier 2011 portant réforme de l’arbitrage [Decree 2011-48 of 13 January 2011 on the reform of arbitration], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [L.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 14, 2011.

97. *General National Maritime Transport Co. v. Société Götaverken Arendal*, Cour d’appel [CA][regional court of appeal] Paris, Feb. 21, 1980, Rev. Arb. 524.

contract that was signed and performed outside France. Although the seat of the arbitration was in Paris, the French court held that it had no authority to review and set aside the ensuing award. The Paris Court of Appeal reasoned that an award that has otherwise no links with France is not necessarily subject to the authority of the French legal system and French courts merely because the seat of the arbitration was in France.

Soon after *Götaverken*, the Paris Court of Appeal held in *AKSA v. Norsolor* and in similar factual circumstances that French courts have no authority to review an award rendered in France, even when one of the parties to the arbitration was French.⁹⁸ These were, again, progressive but short-lived decisions; the French legislature was quick to enact an International Arbitration Decree in May 1981 that expressly allowed judicial scrutiny by French courts of arbitral awards rendered in France, irrespective of whether they are otherwise connected to France or not.

Against this context, international tribunals have naturally felt bound to follow a national law when determining the arbitration process and when deciding whether the subject matter of a dispute is capable of settlement by arbitration.⁹⁹ Only

98. See *AKSA v. Norsolor*, Cour d'appel [CA][regional court of appeal] Paris, Dec. 9, 1980, Rev. Arb. 306.

99. See, e.g., Homayoon Arfazadch, *Arbitrability under the New York Convention: The Lex Fori Revisited*, 17 *ARB. INT'L* 76 (2001); Homayoon Arfazadch, *ORDRE PUBLIC ET ARBITRAGE INTERNATIONAL À L'ÉPREUVE DE LA MONDIALISATION [PUBLIC ORDER AND INTERNATIONAL ARBITRATION PUT TO THE TEST OF GLOBALIZATION]* 95 (2006); Piero Bernardini, *The Problem of Arbitrability in General*, in *ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW CONVENTION IN PRACTICE*, 503 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008; LEW, MISTELIS & KRÖLL, *supra* note 66, paras. 9–13 (stating that “in the majority of cases courts have determined the question of arbitrability at the pre-award stage according to their own national law”); see also European Convention art. VI(2) (stating that “[t]he courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration”); Bernard Hanotiau, *What Law Governs the Issue of Arbitrability?*, 12 *ARB. INT'L* 391 (1996); VAN DEN BERG, *supra* note 66, at 153 (stating that “all courts [have] decided the question of arbitrability exclusively under their own law and [have] not take[n] account of the law of the country where the arbitration was to take place or was taking place”). Indeed, tribunals have been applying national law to determine arbitrability. See, e.g., SCC Arbitration O53/2005, Final Award (2006), in 1 *STOCKHOLM INT'L ARB. REV.* 211 (2007) (referring to Art. V2(II) of the New York Convention and applying the law of the place of arbitration—Finnish law on that occasion—in order to decide whether a dispute involving an insolvent party can be the subject matter of arbitration and noting that “in arbitrations

a few tribunals have applied transnational or a-national rules to determine, for example, the existence or validity of an arbitration clause.¹⁰⁰ Even fewer have applied transnational or a-national rules to determine whether a dispute can be submitted to arbitration.¹⁰¹ Some tribunals have even come to regret the decision to rely on transnational or a-national rules, and have seen their awards being annulled¹⁰² or refused enforcement.¹⁰³

For example, the arbitral tribunal in *Peterson Farms, Inc. v. C & M Farming, Ltd.* refused to apply the national law of the underlying contract to determine the validity of the arbitration agreement. Instead the tribunal determined the question of validity in accordance with the common intention of the parties, reasoning that “the autonomy of arbitration agreements has become a universal principle in the realm of international commercial arbitration.”¹⁰⁴ English courts set the award partially aside noting that “‘the autonomy’ of the arbitration agreement

conducted in Finland the arbitrators should be guided by Finnish law when determining whether or not the dispute is arbitrable”). The same approach was taken by a tribunal sitting in London, which applied English and European law to determine whether a dispute involving an insolvent party can be subject to arbitration. The decision of the tribunal was upheld by English courts. *Syska & Elektrim SA v. Vivendi & Others* [2008] EWHC 2155 (Comm); *Syska & Elektrim SA v. Vivendi & Others* [2009] EWCA (Civ) 677.

100. See, e.g., *Dow Chemical v. Isover-Saint-Gobain*, Case No. 4131 of 1982, 9 Y.B. Com. Arb. 131 (ICC Int’l Ct. Arb.) (taking into account the usages conforming to the needs of international commerce) (“Et en tenant également compte . . . des usages conformes aux besoins du commerce international.”); see also Case No. 6000 of 1988 (1991), 2(2) ICC Int’l Ct. Arb. Bull. (1991), 34 (noting “the usages of the international trade . . . would justify and require the extension to this company, party to a group of companies, of the arbitration clauses included in the contracts executed” by the other companies of the group); see also Case No. 5894 of 1989, 2(2) ICC Int’l Ct. Arb. Bull. (1991), 25; cited in Case No. 5721 of 1990, 117 JDI (Clunet) 1019; *C&M Farming Ltd v. Peterson Farms, Inc.*, ICC Award (Mar. 10, 2003) (unpublished).

101. See, e.g., Case No. 6719 of 1991, in *COLLECTION OF ICC AWARDS 1991–1995*, at 567; Case No. 6149 of 1990, in *COLLECTION OF ICC AWARDS 1991–1995*, at 315; see also BORN, *supra* note 92, at 523–24 (taking the view that issues of material scope of tribunals should be determined by substantive transnational rules, as choice of law analyses is not capable of producing coherent or satisfactory results, which frustrate the parties’ objectives, although he also accepts at the end that this matter should be subject to state public policy).

102. *Peterson Farms, Inc. v. C & M Farming Ltd.* [2004] 1 LLOYD’S REP. 603.

103. *Dallah v. Pakistan*, [2009] EWCA (Civ) 755 (Eng.) (refusing to enforce an award that had applied a-national substantive rules to determine the validity and scope of an arbitration clause).

104. *Peterson Farms, Inc. v. C & M Farming, Ltd.* [2003] EWHC 2298 (Comm) at 44–45.

is not in point. The question is whether [an arbitration agreement] is governed by [a national law]. In my judgment it plainly is." There was, therefore, "no basis for the tribunal to apply any other [rules] whether supposedly derived from 'the common intent of the parties' or not."¹⁰⁵

Overall, *international* arbitration remains firmly subject to *national* laws and *state* public policy, while international tribunals are considered to be subservient to national courts as opposed to being an *alternative* to them.

IV. CONNECTING ARBITRATION WITH LEGAL INTERNATIONAL SCHOLARSHIP: DEVELOPING A CONCEPT OF ARBITRATION LAW

It was the failure of arbitration scholarship to engage with two crucial developments in international legal scholarship that mostly impaired the development of a concept of arbitration law and the claim for normative potency: first, the collapse of formalism and the move from legal rules to legal norms and principles; second, the move from a state-centred to a pluralistic world.

As was discussed above, in today's highly diverse and multidimensional world of multiple normative communities, there is neither a single fundamental test for law nor a single fundamental source of law. Both state and non-state actors have the capacity to develop and promulgate norms that regulate crucial aspects of business transactions and non-business activities. While a large proportion of legal rules are still enacted by states, an increasing number of legal norms neither derive authority or validity from a state institution nor require enforceability by a state agency.

Freed from the rule of a single source of law and pedigree, international arbitration qualifies as a community with the capacity to engender non-state rules which the members of this community accept as normative. Before we further discuss this thesis, two clarifications are required: first, the discussion on arbitration's normativity here goes beyond the authority of an arbitral tribunal to determine a dispute. This type of

105. *Id.*

normativity, which can be referred to as *inter partes* normativity, derives from arbitration agreements and is mainly a matter of contract law. This work examines the broader aspect of arbitration's normativity, namely the normative potency of arbitration law and arbitration community. Second, the focus of the examination here is on procedural rules and norms rather than on substantive ones. Since international arbitration is a legal system of procedure, any rule developed within this system mainly pertains to the conduct of arbitration.

From this procedural standpoint, clear norms regulating the conduct of arbitration have emerged through constant arbitration practices, and with the simultaneous contribution of a variety of national and transnational sources. These sources include arbitration institutions,¹⁰⁶ associations and councils,¹⁰⁷ arbitration specialized departments of law firms,¹⁰⁸ commercial organizations and chambers.¹⁰⁹ More arbitration cases, both investment and commercial, are now in the public domain,¹¹⁰

106. Such institutions may have international scope, for example, the International Court of Arbitration of the International Chambers of Commerce ("ICC") and the London Court of International Arbitration ("LCIA"), or regional scope like the Cairo Regional Centre for International Commercial Arbitration and the Singapore International Arbitration Centre.

107. See for example, the American Arbitration Association, the International Bar Association (Arbitration Subcommittee), and the International Council for Commercial Arbitration.

108. Cf. Teubner, *supra* note 42, at 4 ("Perhaps the most interesting and dynamic phenomenon within law's empire itself is the development of private worldwide law offices, multinational law firms, which tend to take a global perspective of conflict regulation.").

109. The International Chambers of Commerce has had an instrumental role in the development on international arbitration. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 27–28 (2000) (listing the ICC as one of the most important actors in the globalization of regulation "because, in addition to having an interest-group strategy for shaping regulation, for seventy years it has had a private ordering strategy based on recording its members' customary practices and releasing them in the form of model rules and agreements"). Further, the Swiss Chambers of Commerce and the Stockholm Chambers of Commerce has had a very important contribution to arbitration.

110. See INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID"), <http://icsid.worldbank.org/ICSID/Index.jsp> (listing all investment arbitration treaty awards under the International Centre for Settlement of Investment Disputes ("ICSID")); KLUWER ARBITRATION DATABASE, <http://www.kluwerarbitration.com> (listing a large number of commercial arbitration awards). A number of ICC Awards are published in the ICC Bulletins and in edited volumes of COLLECTION OF AWARDS.

while the number of weekly arbitration conferences, seminars, events, and roundtable discussions have arguably reached a point of excess. This very dynamic process of accumulation of information, amplified by the use of new-age technology such listservs¹¹¹ and blogs,¹¹² rapidly produces¹¹³ a burgeoning volume of highly technical knowledge which continuously informs the members of the arbitration community.

As a result, arbitration lawyers tend to speak the same ‘language’ in the context of arbitration proceedings. This procedural Esperanto¹¹⁴ comprises of a-national rules and practices, which exhibit considerable convergence on many aspects of the arbitration process,¹¹⁵ such as the commencement of arbitration,¹¹⁶ the constitution of an arbitral tribunal,¹¹⁷ the method which tribunals follow to determine the applicable substantive law,¹¹⁸ and the requirements for a valid award.¹¹⁹

111. See for the example the listserv for OIL, GAS, ENERGY, MINING, INFRASTRUCTURE, AND INVESTMENT DISPUTES (“OGEMID”), <http://www.transnational-dispute-management.com/ogemid> (last visited May 17, 2013), which is a hub of daily communication and discussion among thousands of arbitration practitioners and scholars.

112. For example, see the KLUWER ARBITRATION BLOG <http://kluwerarbitrationblog.com> (last visited May 17, 2013).

113. Cf. Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitutions of Autonomous Sectors in World Society?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 71, (Karl Heinz Ladeur ed., 2004) (referring to “neo-spontaneous law”).

114. See Werner Melis, *Presentation of Documentary Evidence and Witnesses*, in PREVENTING DELAY AND DISRUPTION OF ARBITRATION, ICCA Congress Series, v. 5, 511–15 (Albert Jan Van den Berg ed., 1991) (mentioning the term in relation to procedure).

115. Catherine Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT’L L. REV. 957, 999–1000 (2005) (referring to this as “procedural rule-making process” whereby “arbitration proceedings generate procedural rules and practices, . . . that serve as precedent for future arbitrations and beyond.”).

116. For example, see ICC Rules Art. 4, LCIA Art.1, Swiss Rules of International Arbitration Art. 2, and UNCITRAL Arbitration Rules Art.2, which all have very similar content.

117. For example, see ICC Rules Arts.11–15, LCIA Arts.5–8, Swiss Rules of International Arbitration Arts. 5–8, and UNCITRAL Arbitration Rules Arts. 8–10, which all have very similar content.

118. For example, see ICC Rules Art. 21, LCIA Art. 22.3, Swiss Rules of International Arbitration Art. 35, and UNCITRAL Arbitration Rules Art. 35, which they all have very similar content.

119. For example, see ICC Rules Arts. 30–35, LCIA Art. 26, Swiss Rules of International Arbitration Arts. 31–32, and UNCITRAL Arbitration Rules Art. 34, which they all have very similar content.

Even extremely technical and culturally dependent matters such as the taking of evidence have gone through a process of considerable assimilation. A typical example here is the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration, which reflect and codify best practices on a number of evidentiary matters such as the presentation of documents, witnesses of fact and expert witnesses, inspections as well as the conduct of evidentiary hearings.¹²⁰

While the IBA Rules have been promulgated as non-binding rules,¹²¹ they currently enjoy wide acceptance within the international arbitration community.¹²²

Standard practices and norms gradually emerge not only with regard to the conduct of the arbitration proceedings. They also emerge with regard to advocacy and ethical conduct before international tribunals.¹²³ International arbitration lawyers feel now more than ever before part of a transnational group of counsel, which transcends national bar associations. Arbitration counsel tend to observe legal ethics as well as advocacy practices which as Laurence Shore notes are “outside their customary intellectual abodes” and which “give them the opportunity to exercise objective detachment, become intellectually honest counsel” and “discard, or at least modify, nationally driven interpretations” when appearing before international tribunals.¹²⁴

120. See *2010 IBA Rules on the Taking of Evidence in International Arbitration*, INT’L. BAR ASS’N, http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/IBA_Rules_Evidence/Overview.aspx (replacing the 1999 IBA, which themselves replaced the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, issued in 1983).

121. See Georg von Segesser, *The IBA Rules on the Taking of Evidence in International Arbitration: Revised Version, adopted by the International Bar Association on 29 May 2010*, 28 ASA BULLETIN 735 (2010).

122. See *2012 Empirical Survey Current and Preferred Practices in the Arbitral Process*, SCH. OF INT’L. ARB., QUEEN MARY UNIVERSITY OF LONDON (2012), <http://www.arbitrationonline.org/survey> [hereinafter 2012 QMUL Empirical Survey] (finding that the IBA rules are adopted in sixty percent of arbitrations).

123. See *About*, FOUND. FOR INT’L ARB. ADV., <http://www.fiaa.com> (noting the organization is dedicated to providing advocacy training specifically designed for international arbitration) (last visited May 17, 2013).

124. Laurence Shore, *Arbitration, Rhetoric, Proof: The Unity of International Arbitration Across Cultures*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 293 (2009).

The emergence of a-national implicit and explicit rules on the conduct of arbitration is itself crucial. What is more important is the fact that the members of arbitration community tend to follow these rules and accept them to guide their conduct. This type of acceptance is crucial to identify normativity. As Dworkin observes, the difference between a statement of a normative rule and a statement of a non-normative (social) rule is the *attitude* that the members of a community display towards the rule. The attitude of the members of a community towards a normative rule is that of *acceptance* of the rule as a standard for guiding their own conduct and for evaluating the conduct of the other members of the community.¹²⁵ Thus, through the increasing number of harmonized arbitration practices and standards, a *common ground of settled assumptions in relation to the conduct of arbitration* has emerged.¹²⁶ Certain aspects of arbitration practice are so well-established among arbitration lawyers that breed *expectations of compliance*, or “normative expectations.”¹²⁷

To give an example, in a commercial dispute of significant value, it is generally expected that substantive submissions will be offered in writing form, and that they will be exchanged sequentially, most likely in two rounds comprising of a statement of claim and statement of defense, reply and most likely a rejoinder.¹²⁸ Further, fact witness evidence is generally expected

125. DWORKIN, *supra* note 52, at 51.

126. Alan Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449–50 (2004–05) (“we are increasingly seeing in the actual governance of international arbitrations a pattern of ‘convergence’; there has developed a set of common assumptions as to how an arbitration will be conducted, drawing from and harmonizing the assumptions of divergent legal cultures.”); cf. Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1323 (2003) (noting that party autonomy “has allowed arbitration practice to develop a set of rules which progressively rise to the level of a standard arbitration procedure” and which has “the invaluable merit of merging different procedural cultures”); see also Catherine Rogers, *International Arbitration's Public Realm*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 293 (2010) (pointing out that “the evolution of these now well-settled procedural norms occurred less through formal exchange of published opinions than through the cross-pollenization that comes with the overlapping experiences of those in the international arbitration community”).

127. See Teubner, *supra* note 42, at 10 (referring also to “normative expectations”); Cotterrell, *Transnational Communities*, *supra* note 36, at 5–6, 10.

128. Cf. 2012 QMUL Empirical Survey, *supra* note 122 (finding that eighty-two percent of the respondents said that substantive written submissions are most

to be offered by exchange of written statements,¹²⁹ together with cross-examination.¹³⁰ Finally, an oral hearing on the merits is largely expected.¹³¹

Of course, and depending on the circumstances of the case, a tribunal may agree with the parties to vary this basic procedural model, and make arrangements for expert witnesses, production of documents, additional pre-hearing and post-hearing submissions. However, none of these additional options constitute aberrations. Rather they constitute well-known variations of a typical arbitration process, which are also well anticipated by arbitration practitioners.

Equally importantly, the above norms in arbitration practice have not developed accidentally. They have developed by reference to the fundamental *legal principle* of fair process. The principle of fair process requires that each arbitration party must be treated equally and must be given the opportunity to present each case, as well as that the arbitration will be conducted in a manner that avoids unnecessary delays. The principle of fair process and the ensuing sub-principles apply in arbitration not because they are stipulated in all arbitration laws and arbitration rules.¹³² Rather, the fact that these principles universally feature in arbitration laws and rules is evidence of their wide institutional support.¹³³ The existence of legal

commonly exchanged sequentially, and seventy-nine percent prefer it sequentially; sixty-three percent of the respondents said that the most common number of substantive written submissions that are exchanged between the parties is four (i.e. two full rounds): a Statement of Case, Statement of Defence, Reply and Rejoinder (or similar designations).

129. *Id.* (finding that in eighty-seven percent of arbitrations fact witness evidence is offered by exchange of written witness statements).

130. *Id.* (noting that the vast majority of respondents said that cross-examination was either always or usually an effective form of testing the evidence of fact witnesses (ninety percent) and expert witnesses (eighty-six percent)).

131. *Id.* (finding that in ninety-six percent of arbitrations oral hearings are conducted, and eighty-five percent are held at the legal seat).

132. See English Arbitration Act s.33 (1996) (Eng.) (providing that “the tribunal shall (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case avoiding unnecessary delays of expense, so as to provide a fair means for the resolution of the matters falling to be determined”); see also Model Law Art. 18 (“[T]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”).

133. DWORKIN, *supra* note 52, at 40, (observing that we need to be able to find some kind of institutional support for the claim that a legal principle exists “and the

principles is a distinctive feature of a system or a normative community, as they set out the general values, goals and needs of that community, which guide the behaviour of the members of that community.¹³⁴ The legal principle of fair process “brings about mutual orientations”¹³⁵ among arbitration lawyers as regards the conduct of arbitration proceedings and further enhances the normative potency of the arbitration community.¹³⁶

Some scholars have contested arbitration’s normativity on the basis that it lacks coercive power to enforce and execute the decisions of international tribunals, including procedural orders and awards.¹³⁷ It is questionable whether such critical emphasis can be placed on arbitration’s lack of coercive powers. It is now commonplace to observe that in arbitration the vast majority of procedural orders and arbitral awards are voluntarily complied with by the parties.¹³⁸ This is not just suggested by anecdotal experience; it has been demonstrated by empirical surveys.¹³⁹

more [institutional] support we found, the more weight we could claim for the principle.”). Although he accepts that “we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle”, he observes that if this principle is exemplified in a statute, or is discussed and cited in a decision, this would bring strong support for the principle. *Id.*

134. The normative potency of legal principles is well known from the work of Dworkin who has showed that legal obligations may derive from fundamental legal principles and that law includes both legal principles and rules; see Dworkin, *supra* note 52, at 28. For the meaning and importance of legal principles in business regulation, see also BRAITHWAITE & DRAHOS, *supra* note 109, at 18 (noting that principles have less specificity but they constitute an agreed standard of conduct and propel action in a certain direction).

135. BRAITHWAITE & DRAHOS, *supra* note 109, at 19.

136. See *supra* note 127.

137. See, e.g., Schultz, *supra* note 51, at 694 (“Enforcement power is, precisely, the form of jurisdictional power that the *lex mercatoria* most certainly lacks. A commercial arbitral award, in order to gain access to coercive might, must meet the requirements set by the public legal system. The *lex mercatoria* lacks an important element of autonomy, as it still needs to rely on national courts for enforcement.”).

138. See BORN, *supra* note 92, at 2710.

139. See 2008 *Empirical Survey*, SCH. OF INT’L. ARB., QUEEN MARY UNIVERSITY OF LONDON, in Loukas Mistelis & Crina Baltag, *Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration*, 19 AM. REV. INT’L. ARB. 343 (2010) [hereinafter 2008 QMUL Empirical Survey]. Cf. Richard Naimark & Stephanie Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People: a Forced-Rank Analysis*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION, 43 (Christopher Drahozal and Richard Naimark eds., 2005) (finding a high rate of voluntary compliance with awards, but in most cases courts also play a role in compliance).

More interestingly, empirical data suggests that the majority of the parties voluntarily comply with arbitral awards to avoid tarnishing their business reputation as recalcitrant parties.¹⁴⁰

Thus, international arbitration is perceived by international corporations as the natural forum for the resolution of disputes between international merchants; similarly, arbitral awards are perceived as the authoritative pronouncement of such a forum. They are perceived as norms that can informally, i.e. without the intervention of state courts, regulate international trade groups.¹⁴¹ As Posner observes “when members of a solitary group transact, norms and non-legal sanctions generally resolve disputes [. . .] Norms also prohibit bad faith and opportunism. The importance of maintaining a good reputation and of avoiding ostracism deters improper behavior. Accordingly, insiders can dispense with expensive formalities-lawyers, bonds, even writings-and with the unreliable courts.”¹⁴² From this standpoint, the focus shifts from ‘enforceability’ to ‘compliance’, and from ‘coercion’ to ‘normative persuasion.’¹⁴³

140. 2008 QMUL empirical survey, *supra* note 139.

141. See generally CHRIS REED, MAKING LAWS FOR CYBERSPACE (2012) (making the same point in relation to the enforcement of norms and rules in cyberspace communities). He notes that enforcement of cyberspace norms rules is not usually achieved through the use of state’s coercive power; rather the authority of a cyberspace norm will be accepted if the cyberspace actor has become a virtual member of the community which that lawmaker regulates. *Id.*

142. See Stavros Brekoulakis, *Enforcement of Foreign Arbitral Awards: Observations on the Efficiency of the Current System and the Gradual Development of Alternative Means of Enforcement*, 19 AM. REV. INT’L ARB. 428 (2010); Eric Posner, *The Regulation of Groups: the Influence of Legal and Non Legal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 155, 156, 165 (1996), has also argued on the basis of a law and economics analysis that within members of a coherent (“solidary”) group, non-legal sanctions (i.e. the group’s enforcement mechanism) will likely be superior to that of the courts. “When members of a solitary group transact, norms and non-legal sanctions generally resolve disputes. When contingencies arise, norms allocate risks and specify means of resolution. Norms also prohibit bad faith and opportunism. The importance of maintaining a good reputation and of avoiding ostracism deters improper behavior. Accordingly, insiders can dispense with expensive formalities-lawyers, bonds, even writings-and with the unreliable courts.”*Id.*

143. This is of course not an observation concerning arbitration only. It is a suggestion empirically tested in many other fields of the globalization of business regulation. See, e.g., BRAITHWAITE & DRAHOS, *supra* note 109, at 10 (noting through case studies that a wide range of globalized business regulation and have found that “globalized rules and principles can be of consequence even if utterly detached from enforcement mechanisms Modelling of self-regulatory principles and the rules of

An arbitral award that is perceived by the parties as accurately reflecting the prevailing and evolving standards and practices of that community is more likely to enjoy acquiescence and deference by the business community.¹⁴⁴

This is not to argue that arbitral awards are somehow self-executing, if a recalcitrant party refuses to voluntarily comply with the decision of an international tribunal. Parties still resort to states to have an award enforced against a recalcitrant party. However, this does not constitute evidence that arbitration lacks normative autonomy. In today's pluralistic world, state and non-state communities coexist, while often their jurisdiction overlaps.¹⁴⁵ Thus, arbitration's claim of autonomy entails *co-existence* and *cooperation* with national states rather than *isolation* and *antagonism*. What is crucial is that the majority of the arbitral awards are complied with voluntarily in the first place. The small number of recalcitrant party that refuse to comply with an arbitral award will either face the informal sanction of undermining their business reputation or face the coercive power of state enforcement.

CONCLUSION

Progressive legal scholarship in the last fifty years has advanced a broader and more progressive concept of international law, which includes not only state rules, but also norms, policies, principles and standards. Of course, the concept of international law that has emerged after the collapse of legal formalism remains not without challenges. As rules blend with norms and policies, international lawyers will now have to examine how international law can maintain its normative potency and its distinctiveness from politics. Although this type of challenge may well prove pervasive, it is a price worth paying for the fact that contemporary international law has become more progressive and humanitarian, encompassing

the private justice systems of corporations are crucial to understanding how the globalization of regulation happens").

144. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 440 (2002), (observing correctly that the power and relevance of decisions within the members of a community depends on whether they "accurately reflect evolving norms of the communities that they must choose to obey them").

145. *Id.*; see also Cotterrell, *Spectres*, *supra* note 2.

matters relating to health care, environment, human rights, and redistribution of wealth.

Meanwhile, international arbitration scholarship has failed to engage with this type of discourse and has largely grown under the delusion that it is a self-sufficient field. As the article explained, arbitration scholarship was mainly produced by practicing lawyers, whose main concern was to develop arbitration doctrine and respond to problems arising in arbitration practice. Exclusive focus on doctrinal jurisprudence may have helped international tribunals to expand the scope of their authority over disputes that previously fell within the exclusive domain of state courts, but it has eventually impaired the concept of arbitration law. By failing to engage with sociolegal jurisprudence on pluralism and legal theories on anti-formalism, arbitration scholarship failed to advance persuasive claims of autonomy and normativity of arbitration law. As a result, *international* arbitration remains firmly subject to *national* laws and *state* public policy, while international tribunals are considered to be subservient to national courts as opposed to being an *alternative* to them.

One of the main goals of the article was to look into scholarship on legal pluralism and connect it with arbitration law. Freed from the rule of a single source of law and pedigree, international arbitration qualifies as a community with the capacity to engender non-state rules which the members of this community accept as normative. As the article showed, clear norms regulating the conduct of arbitration have emerged through constant arbitration practices, which members of the arbitration community tend to follow and accept them to guide their conduct and behavior. Equally importantly, normative expectations concerning the conduct of arbitration have developed by reference to the fundamental arbitration *legal principle* of fair process. As has been argued, the existence of legal principles is a distinctive feature of a system or a normative community, as they set out the general values, goals and needs of that community, and they guide the behavior of the members of that community. For arbitration, the existence of the legal principle of fair process guides the practice of arbitration lawyers as regards the conduct of arbitration proceedings and breeds *expectations of compliance*, or “normative expectations.”

The above does not purport to suggest that international arbitration is a homogeneous and hierarchically structured system; it is not. Nor does it suggest that evolving arbitration norms are free from indeterminacy or indeed ambiguities; they are not. Nor is it suggested that arbitral tribunals can always function without interacting with state courts and state laws; they cannot. However, homogeneous and fully determinate rules exist in state law only. After 50 years of progressive legal scholarship we now know that state law is not the only kind of law existing in our contemporary world. Normativity occurs in both state and non-state communities, and in different forms and degrees.¹⁴⁶ As Cotterrell observes, from a genuinely legal pluralistic perspective, “one does not expect to see legal regimes all of the same kind (they could be very diverse), and some regimes will be *more legal than others*.”¹⁴⁷ Similarly, Dworkin notes that the normative potency of a legal principle will depend on the degree of institutional support we can find for that principle.¹⁴⁸ It is within this concept of relative normativity that international arbitration can more forcefully claim its normative potency, in the form of procedural practices and standards that derive from legal principles, guide the conduct of arbitration and breed expectations of compliance.

146. See Cotterrell, *Spectres*, *supra* note 2, at 485 (“Legal pluralist . . . should be seen . . . as supporting the radical claims that, as regards their practical authority, forms of social regulation form a continuum; that lines between the ‘legal’ and ‘non-legal’ depend on perspective; and that the legal character (however assessed) of regulation is often a matter of degree and (not necessarily resolvable) debate. Some sources of regulation may seem more ‘official’ than others, but what counts as official becomes a matter of controversy and varies with viewpoint, as sources of regulatory authority compete.”). At the end, legal pluralism as many of its proponents argue is not about truly autonomous transnational systems, but about systems with overlapping jurisdictions and some national territorial links too. See Berman, *supra* note 144, at 501.

147. Roger Cotterrell, *Transnational Networks and International Economic Law*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 125/2012, available at <http://ssrn.com/abstract=2154392> (last visited May 17, 2013).

148. See DWORKIN, *supra* note 52; see also *supra* note 133 and accompanying text.