

# § 12 International Arbitration as a Project of World Order: Reimagining the Legal Foundations of International Arbitration

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...the complex of social processes and organization that are generally referred to as “the law” may be viewed from many different perspectives. People trained and sometimes locked into one perspective can scarcely believe there may be others, even less that they are equally authentic and that, for some or all tasks, they may be even more useful than the one with which they were indoctrinated, and as a result, with which they are comfortable.

Michael Reisman<sup>1</sup>

## I. Introduction

International Arbitration has gained traction not only as a popular mechanism to resolve transnational commercial disputes, but in many cases, as the default mechanism. However, despite its steady incorporation into the realm of dispute resolution and even norm creation, a comprehensive theoretical backbone is lacking. Especially one question is still awaiting a definitive answer: where does the arbitrator’s power come from? Some have even referred to this as the ‘ultimate question’.<sup>2</sup> This question deals with the nature and content of international arbitration, the notion of an arbitral legal order, and the allocation of power between state courts and arbitral tribunals.<sup>3</sup> International arbitral tribunals are private adjudicative actors that decide transnational commercial disputes between private actors or private actors and public entities.

The *ultimate question* does not concern the law applicable within arbitration proceedings, but rather the theoretical premises for the law applicable to arbitration. As Jan Paulsson has stated, ‘the law applicable to arbitration is not the law applicable in arbitration. The latter provides norms to guide arbitrators’ decisions. The former refers to the source of their authority and of the status of their decision: the legal order that governs arbitration.’<sup>4</sup> In the

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1 W Michael Reisman, *The View from the New Haven School of International Law*, Proceedings of the ASIL Annual Meeting, 86, 118-125 (1992).

2 Alan Scott Rau, *The Allocation of Power between Arbitral Tribunals and State Courts* (The Hague Academy of International Law 2018). 15

3 On the potential tension between state courts and arbitral courts see Emilia Onyema, *The Jurisdictional Tensions between Domestic Courts and Arbitral Tribunals*, in Andrea Menaker, (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity* (Alphen aan den Rijn: Kluwer Law International 2017). 481-500. In that context, it has now become common place to define the seats of arbitrations by their proclivity towards arbitration. One can identify ‘arbitration friendly’ or ‘pro arbitration’ seats.

4 Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 29.

terminology of the introductory chapter to this book, one might say that it is a question concerning *productional objectivity*; is the foundation of arbitration left to the discretion of those in power or are there objective principles that underlie the arbitral order and legitimize the arbitral activity?<sup>5</sup>

So far, one might classify the existing theoretical approaches to the *ultimate question* into three camps<sup>6</sup>: (i) The *localist* approach argues that the power of the arbitrators stems from the State of the seat<sup>7</sup> of the arbitration. Insofar that that they are bound by a specific domestic legal system, they are part of that domestic system's dispute resolution apparatus. (ii) The *pluralist* approach is still State-centred. However, it is already the fruit of the 'broad consensus in favour of an increasingly liberal approach towards arbitration'<sup>8</sup>. Indeed, according to this approach, arbitration is not linked only to one state, but to the community of states altogether. (iii) The *autonomous* approach conceives arbitration as a *sui generis* legal order, not anchored in any domestic legal system. At the root of these ideas lies an ideological perspective as to the role arbitration should have, a quest for order, and a desire to delimit the allocation of power between state courts and arbitral tribunals.

I argue that the existing theories do not provide a satisfactory account of the normative purposes of international arbitration. In the terminology of the introductory chapter to this book, one might say that I reject purely voluntaristic or *subjectivist* interpretations of arbitration, which only point to the will of the state (*localists*), the community of states (*pluralists*) or of the parties to the arbitration agreement as part of an order on its own

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5 In detail on this notion see Philip M Bender, 'Ways of Thinking about Objectivity' (§ 1), under II. Whether these principles are also part of the concept of law, is a definitional question, which will not be pursued here. On that, see Bender (n 5) (§ 1), text to n 8–14.

6 Philippe Fouchard, Jean Fran-François Poudret, Sébastien Besson, Frederick Alexander Mann, Emmanuel Gaillard and Jan Paulsson have been some of the ones who have attempted to theories of arbitration. For a comprehensive analysis of the main theories of the arbitral order see, Francisco González de Cossío, *Arbitraje* (Porrúa 2014).

7 The seat of the arbitration is not necessarily a physical but legal concept. The seat determines de legal home for the arbitral proceeding and will determine which courts can intervene in matters of the constitution, provisional measures, jurisdiction and annulment of the final award, among other things. The *lex arbitri* will de that of the seat of the arbitration.

8 Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) 13.

(*autonomists*).<sup>9</sup> Indeed, the idea that arbitration is merely and purely a creature or matter of contract, and all that is set up around or within it is to maintain said consent, is, as Scott Rau once put it, ‘a point so banal, so commonplace, so formulaic, that readers justifiably wince when they see it repeated’<sup>10</sup>. The contractual and territorial approaches to the *ultimate question* lack ‘the ability to resolve by itself the many questions relating to the source of an arbitration agreement’s validity’.<sup>11</sup> Therefore, a purely observational logic (*observational objectivity*)<sup>12</sup>, according to which arbitration norms can be set by merely observing the spontaneous activity of the arbitration community<sup>13</sup>, does not guide us in deciding how we should behave as norm setters. In the end, subjectivist approaches (on the state and contractual level) do little to clarify the normative purpose of international arbitration. Many of the ideas that have surrounded the notion of the arbitral legal order have not only parted from this contractual premise but, in addition, have purported the idea of arbitration only as an *alternate* mechanism to resolve disputes *vis a vis* state courts, rather than a mechanism playing a role within a larger system, and not necessarily as a matter of dispute resolution but as a matter of policy, better yet: international legal policy.

In contrast to the existing arbitral theories, the goal of my approach is to explicitly recognize that international arbitration is not a value-free normative order, but rather the expression of a global normative consensus. I argue that the global community has set certain values to be pursued, specifically in matters of international commerce and development. To turn yet again to the terminology of the introductory chapter, my approach can be described as one which aims at *deontological objectivity*.<sup>14</sup> My approach is deontological in that I find the legitimacy of arbitration in the values of the global community – even though I do not necessarily argue for a natural law concept since I consider these values binding due to a global consensus.<sup>15</sup> These values provide international arbitration with a

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9 Bender (n 5) (§ 1), text to n 4–6 (on subjectivity in general), 120–136, 147–155 (on subjectivity on the production level).

10 Scott Rau (n 2).

11 Gaillard (n 8) 13.

12 For this type of objectivity see Bender (n 5) (§ 1), text to 16–32.

13 For this conceptualization of arbitration see Núñez del Prado, ‘Stateless Justice: The Evolutionary Character of International Arbitration’ (§ 11).

14 On this way of obtaining objectivity see Bender (n 5) (§ 1), text to 33–42.

15 Therefore, one might say that I accept a subjective element at the highest level. See in detail Bender (n 5) (§ 1), text after n 52 (on the possibility of combining

normative purpose, so that arbitration is to be understood as a project that serves these values – the *arbitration project*. The role domestic legal systems are called to play in relation to international arbitration, is not to be the source of its juridicity or the recognition of an autonomous arbitral order, but rather the participation in the iterative process by which the *arbitration project* is executed. Insofar, I rely on the theory of the *transnational legal process* in order to dispel the ideas that hold the relationship between domestic systems and international arbitration as a dichotomy, rather than as one of common players in the execution ‘of the value-based international community’.<sup>16</sup>

In what follows, I will first outline the existing theoretical approaches more in detail (II.), before I present my own value-based approach, which conceives arbitration as the project of a specific world order (III.). Then, I will further conceptualize and concretize this world-order-approach by reference to different theories of (international) law (IV.). Finally, a short section briefly concludes the aforementioned (V.).

## II. Existing Theoretical Approaches to the Arbitral Legal Order

There have been many proponents of several theories. However, the theoretical premises of each can be categorized into three main conceptual building blocks: (i) the *localist* approach – international arbitration as an element or mechanism of a single national legal order; (ii) the *pluralist* approach – international arbitration as an element of a plurality of legal orders and; (iii) the *autonomous* approach – international arbitration as an autonomous legal order.

### 1. The localist approach

The first theory which conceives international arbitration as dependent on a single national order has normally been referred to as a *jurisdictional*<sup>17</sup> theory, which can also be referred to as a *localist* theory. The essence of this

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different modes of thought), text to 120–147 (on permutations of subjectivity and objectivity on different levels).

16 Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014) 46.

17 See González de Cossío (n 6) 132.

theory can be relegated to the attempt of equating the arbitral function to that of a judiciary or judge. The exercise of comparison is concentrated in defining the similitudes and differences between one and the other, ultimately anchoring both to the same legal order but outlining their differences.

This theory has a strong territorial component since international arbitration is seen as an element of the corresponding seat. In the words of one of its most outspoken advocates, Frederick Alexander Mann, 'there is a pronounced similarity between the national judge and the arbitrator in that both of them are subject to the local sovereign (...)'.<sup>18</sup> This notion clearly puts forth a concept of international arbitration in which its *international* component is set aside, and the adjudicatory function is seen as its essence, making it not only similar to the public function of the judiciary but also making it part of the state's legal apparatus. In this first theory, the idea of parties' consent as the root of arbitral power does not even enter into play, since the legal system of the seat is seen as grantor of adjudicative power.<sup>19</sup>

Foucault said that the anxiety of our era had to do fundamentally with a fixation on space.<sup>20</sup> The localist approach represents this fixation because it demonstrates the incapability of abstraction beyond the physical space we come to know and interact with. In so doing, the localists believe that the only plausible source of power for arbitration is that of the *place* in which it is called to adjudicate.

Moreover, this idea has also found footing in more contemporary explanations of the arbitral order. Some proponents of a subjectivist approximation to the *ultimate question* have considered that the parties' choice of seat is not trivial in the sense that their consent to submit the arbitral proceeding to a specific country implies that they are subjecting the arbitration to a specific legal order. In so doing, proponents of this subjectivist approach to the localist theory root the essence of the concept of *lex loci* in the selection of a determined legal order.<sup>21</sup> This approach inevitably presupposes that one can only be subject to one legal order at a time.

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18 Cited in Gaillard (n 8) 16.

19 See Gaillard (n 8) 13.

20 Michel Foucault, 'Of Other Spaces: Utopias and Heterotopias' in Neil Leach (ed), *Rethinking Architecture: A Reader in Cultural Theory* (Routledge 1997 [1984]) 330–336.

21 Roy Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 *Arbitration International*. 19–40.

Furthermore, this idea rests on the premise that each country is its own legal order, functioning in legal vacuums.

As was stated above, the reference to the different theories of the *ultimate question* are of little relevance for a conceptual debate if we are unable to identify the normative premises with which they operate. Regarding the previously mentioned *localist* theory, *state positivism* is the driving force of such conception. Closely following Kelsen's idea of *Grundnorm* and Hart's preposition of primary and secondary norms, localists seem to find the only logical explanation of the source of international arbitration in a state-centred legal outlet which can have both. The localist conception is insolubly connected to a sovereign state's jurisdictional power. I will not contend nor dwell with such theories because they exceed the purpose of this presentation. However, they are very limited analytical tools when analysing transnational legal processes as well as international legal policy.

## 2. The pluralist approach

The *pluralist* (or multiple legal orders) approach considers that the source of power of arbitration comes from states' commitments to recognize the effectiveness of arbitral awards. In line with the object and purpose of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'), proponents of this theory suggest that the law of the seat is one among many legal orders that can recognize the legal effects of an arbitral award and 'the law of the country or the countries where enforcement is sought has indeed as much entitlement in this respect as that of a State in which the arbitration took place'.<sup>22</sup>

This has led to the idea that the internationalization of arbitration has pushed towards its delocalization, thereby implicating that the power or force is not due to the seat of the arbitration.<sup>23</sup> This approach has not found a homogenous judicial understanding around the world. While Courts in the United States have incorporated the idea of *primary* and *secondary* jurisdictions to describe the relation between the seat of the arbitration and that of the place of enforcement<sup>24</sup>, French courts have gone as far as to determine that an award (and therefore, international

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22 Gaillard, (n 8) 25.

23 Jan Paulsson, 'Delocalisation of International Commercial Arbitration' (1983) 32 The International and Comparative Law Quarterly 53; González de Cossío (n 6).

24 *Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2007) United States Court of Appeals, Fifth Circuit, 364 F3d 274, 287; *Termorio SA v*

arbitration as a whole) is not integrated into the legal system of the seat.<sup>25</sup> Despite the latter affirmation having been made to establish that the place where enforcement was sought had as much authority as the seat, it goes to show the intended relevance of multiple jurisdictions and the unanchoring of arbitration from the seat.

It is precisely the unanchoring of awards the primary driving force behind the delocalization theory and the chief aim of a multiple legal order approach. This is so because by multiple orders what is meant is that there is a possibility that the award be recognized and enforced elsewhere, and the potential of enforceability inevitably means that the source of power cannot be localized. Contrary to the localist approach, which almost exclusively concentrates on the legal order that recognizes the possibility of an arbitral agreement (ie the seat), proponents of the multiple legal orders theory shift the relevance to the outcome of an arbitral proceeding (ie the award).<sup>26</sup> Therefore, the possibility of it being enforced in multiple places means that the source of power can be found in multiple legal orders.

However, the pluralist approach is still very much related to the localist theory. Despite the fact that it conceives a more internationalized perspective of arbitration and seeks to give operativity to the New York Convention, its normative premise is still strongly based on state positivism and sovereignty. This is because even though the relevance of the seat is shifted, 'the conception that roots the juridicity of arbitration in a plurality of legal orders does not consider the parties' will to be the sole source of the binding force of the arbitration agreement'<sup>27</sup> but rather the domestic legal systems which are giving effect to the different stages of the arbitral proceeding. Therefore, Gaillard refers to this approach as the 'Westphalian model' because states are the sole source of sovereignty and therefore, the legitimacy of international organizations comes not from a supranational global order but rather from the will of states.<sup>28</sup> In the words of the Court of Appeals for England and Wales:

Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral pro-

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*Electralanta SA ESP* (2007) US Court of Appeals for the District of Columbia Circuit 487, F.3d 928.

25 *Hilmarton Ltd v Omnium de traitement et de valorisation* (1994) Cour de Cassation, Chambre civile 1, 92-15.137.

26 Gaillard (n 8) 25.

27 Gaillard (n 8) 26.

28 Gaillard (n 8) 28–29.



cedures floating in the transnational firmament, unconnected with any municipal system of law.<sup>29</sup>

A partial recognition of the pluralist theory was also upheld in the *Apis AS v Fantazia KeresKedelmi KFT* case in which the English court considered that the fact an award had been set aside in the country of origin did not hinder the possibility to enforce it abroad.<sup>30</sup> However, the juridicity of an award is still thought to derive from the judicial interaction.

The multiple legal orders approach is troublesome both for its practical and theoretical implications. Regarding the former, the reinvigorated judicial perception that each judicial body, whether in the seat or place of enforcement, is endowed with the mission or obligation to grant juridicity to arbitration has had many complex or ‘chaotic’<sup>31</sup> practical consequences, like the enforcement of annulled awards. Regarding the theoretical implications, this approach does not ring true to the values set forth by the New York Convention. Contrary to private international law practice of enforcement and recognition of foreign judicial rulings or judgments in which domestic courts have to internalize and make *theirs* the judgment, in international arbitration the judicial attitude of domestic courts towards foreign awards is not based on a preconceived notion of the juridicity given to that award by the judicial authorities of the seat, but rather it owes its judicial enforcement to a global value set forth in an international convention.

Moreover, the multiple legal orders approach provides more of a descriptive account than a normative premise for arbitral power. This is so because it sets forth the idea that the foundations of arbitral power not only stem from the legal order of the seat, but of any other jurisdiction in which the award is sought to be enforced. However, this theory fails to recognize an overarching normative premise with which this operates. The legal recognition of arbitration by domestic legal systems is a mere description of the implementation effects of the New York Convention, rather than a convincing argument for its transnational use. In the end, the multiple legal orders theory is a partially appropriate account of the

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29 *Bank Mellat v Helliniki Tachniki SA* (1983) England and Wales, Court of Appeal H730.301.

30 AA Otyushieva, AM Ergali and TT Arvind, ‘The Effect Of The Delocalisation Theory In The Context Of Art. V (1) (E) Of The New York Convention – An Investigatin Of Uniformity In Enforcement Of Awards In Various Jurisdictions: Delocalisation In Practice’ (2018) 86 *Journal of Actual Problems of Jurisprudence* 66, 70.

31 Paulsson (n 10) 39.

execution of a much larger systemic enterprise to which I will come back when presenting my own theoretical approach in the upcoming section.

### 3. *The autonomous order approach*

Finally, as a response to the aforementioned approaches or theories, a third explanation came about: the idea of international arbitration as an autonomous legal order. Gaillard, as chief proponent of this theory, suggests that the juridicity and source of arbitration is to be found in a particular transnational legal order that can be labeled as *the arbitral legal order*.<sup>32</sup> At the center of this idea lies the argument that it is not the domestic legal system that determines juridicity but rather the arbitrators 'strong perception' that they do not administer justice under the umbrella of a particular state, but rather as agents of an international community. The center of gravity of this idea are the arbitrators. This can be further seen by the fact that Gaillard conceives arbitrators as the 'organs of a distinct legal order'<sup>33</sup> and that they apply transnational legal rules, which although based on state's legal activity, do not belong exclusively to any state.<sup>34</sup>

In so doing, Gaillard correctly distinguishes between the monopoly of enforcement that state courts have and the source of juridicity of international arbitration, and therefore separates the legal effects of an act from its genesis. The purpose of said distinction lies in his assertion that the monopoly of enforcement by states does not surrender arbitration to all the potential forums where an award might be enforced. Paulsson pushes back on Gaillard's proposition on the basis that it does not adequately represent reality, insofar as arbitrators do not base their jurisdiction on the multiplicity of fora where their awards might be enforced. This has even been categorized as a 'false start'.<sup>35</sup> In so doing, Paulsson rejects all the aforementioned approximations and proposes a 'realistic' account by revising the pluralistic theory. Despite its use as a valid criticism, it still falls short of proposing a sound normative framework to define the normative bases of international arbitration.

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32 Gaillard (n 8) 35.

33 Gaillard (n 8) 59.

34 *ibid.*

35 Paulsson (n 4) 40.

However, my main contention to Gaillard's theory is that, to an extent, it conceives law as shaped by the discretion of those who hold power (in this case, arbitrators). The center of gravity of his theory is the activity and perception of arbitrators, meaning that the mere will of the agents interacting with this legal order, determines its content (*subjectivism*).<sup>36</sup> In this regard, even though Gaillard identifies that arbitrators see their activity (and with it, international arbitration) as part of an arbitral legal order, the source and content of said order lacks a normative framework. Under Gaillard's theory, the recognition of an autonomous order is sufficient to identify not only the source of international arbitration, but its relevance.

It must be said that Gaillard does mention the idea of pre-positive principles and their relation to arbitration. When analysing international arbitration as an autonomous legal order, Gaillard considers that one of the philosophical postulates that could support it is a *jusnaturalist* approach. He specifically mentions that through a *jusnaturalist* outlook the autonomous arbitral order could be justified because it acknowledges higher values that result from 'the nature of things or of society'.<sup>37</sup> However, he does not agree with it. In his rejection, Gaillard – as well as proponents of the *jusnaturalist* trend like René David, Bruno Oppetit and Pierre Mayer – conceive the *jusnaturalist* trend as something that infuses the applicable law in arbitration. They analyse this trend by identifying the influence natural law or principles have over the development of commercial law by arbitral tribunals and even the tension between *lex mercatoria* and applicable law.<sup>38</sup> My proposal, while recognizing or asserting the existence of a value-based system to justify the existence of international arbitration, does not recognize it as the values to be applied within arbitrations, but rather as the normative justifications of its legal essence. As will be presented in the following sections, the assertion that there is a world order which enshrines certain values to be attained through projects, is not the same as recognizing a natural order of things that permeates to the way in which arbitrators resolve disputes.

Despite the aforementioned contentions, Gaillard's proposal does point us into a correct direction in terms of attempting to find the answer to the 'ultimate question' in a transitional order and set aside the anchoring value the *localists* give to domestic legal systems. Nevertheless, his theory

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36 See Bender (n 5) (§ 1), text to 4–6 (on subjectivity in general), text to 53–75 (on subjectivity and lawmaking), text to n 120–136, 147–159 (on different forms of subjectivity in adjudication).

37 Gaillard (n 8) 40.

38 Gaillard (n 8) 40–45.

is strongly based on the self-perception of arbitrators and the role they claim to have. That approximation is not only empirically questionable but theoretically inadequate to explain a transnational legal order. Therefore, in order to redeem what Gaillard correctly identifies as a transnational essence, we must look at the narratives and values that underlie that transnational order, in order to try and identify the possible normative proposals of international arbitration. Moreover, Gaillard claims that international arbitration is an autonomous transnational legal order. However, this autoreferential explanation also falls short of an adequate description of the context and system in which arbitration functions.

When analysing legal phenomena, one can do it in either of two ways: through its concept or its function. While the former tries to capture the defining and evident elements and discuss its conventionally settled meaning, the latter is concentrated in identifying the contributions of the legal phenomenon to a larger whole.<sup>39</sup> Therefore, my chief concern with the existing approximations to a legal theory of international arbitration is that they are all done through its concept, but are inapt to locate international arbitration in a transnational and global context and with it, achieve what Jhering described as 'jurisprudence of interests'<sup>40</sup>. Viewing international arbitration as a single-function enterprise ignores its contribution to a larger whole. It is within a value-based global order where we must look for the meaning of the *ultimate question*.

### III. The World Order Approach

International Arbitration theories have seldom tried to identify the underlying narratives and values that justify adjudicatory power. The debate over *lex mercatoria* that took place in the 80s and 90s<sup>41</sup> or even the suggestion that the New York Convention can serve as a *Grundnorm* in terms of *Kelsenian* theory<sup>42</sup>, do not do so. The former deals with a question of substantive law applicable to a dispute, even though it can be the manifestation of an underlying normative premise, and the latter is the legal

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39 von Bogdandy and Venzke (n 16) 6–7.

40 'Interessenjurisprudenz', see Herbet D Laube, 'Jurisprudence of Interests' (1949) 34 Cornell Law Review 291.

41 See Filip de Ly, *International Business Law and Lex Mercatoria* (TMC Asser Institute 1992).

42 González de Cossío (n 6) 167 (even though the term seems to be used differently from what Kelsen had in mind).

representation of a global value. Therefore, we must look more abstractly as to what lies beneath. I am sure that both *lex mercatoria* and the New York Convention are part of the same *project*. However, they are not its origin.

In the aftermath of World War II the protectionism of the remaining imperial orders and the fascist states ceded to a revitalized globalized and inclusive economic system.<sup>43</sup> This led to the rise of multinational enterprises which became ‘advocates of international order in that they appreciate the utility of maintaining and enhancing a stable transnational economic environment that enables their various enterprises to flourish’.<sup>44</sup>

In this context, in 1974 the UN General Assembly solemnly proclaimed its ‘united determination to work urgently for the establishment of a new international economic order.’<sup>45</sup> This new order set the stage for new world values to shape cooperative action. This can be seen by the fact that in the same year the UN General Assembly adopted the Charter of Economic Rights and Duties of the State, which established that economic relations should be governed by ‘international co-operation for development’<sup>46</sup> and that ‘all states have the duty to contribute to the balanced expansion of the world economy’.<sup>47</sup> Furthermore, in 1986 the UN General Assembly adopted the Declaration on the Right to Development, which further emphasized the reconfiguration of global economic values. It specifically stated that ‘states have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.’<sup>48</sup> These global commitments can be seen as ‘the most explicit normativization of this view of foreign investment’<sup>49</sup> and the values set forth by a new global order.

Moreover, the latter also entailed new collective arrangements and the creation of economic, political, and legal theories that could reinforce

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43 W Michael Reisman, *The Quest for World Order and Human Dignity in the Twenty-first Century: Constitutive Process and Individual Commitment* (The Hague Academy of International Law 2012) 57.

44 *ibid* 60.

45 United Nations General Assembly Resolution 3201 (S-Vi), Declaration on the establishment of a New International Economic Order (1974).

46 Charter of Economic Rights and Duties of the State, ch I (1974).

47 *ibid*, ch IV, art 31.

48 Declaration on the Right to Development Adopted by General Assembly resolution 41/128 of 4 December 1986, art 4.

49 W Michael Reisman, ‘The Empire Strikes Back: The Struggle to Reshape ISDS’ (2017) <<http://dx.doi.org/10.2139/ssrn.2943514>> accessed 2 October, 2020. 6.

these globalized tendencies. This strongly influenced the subject at hand because notions of state power (including judicial power) started to be redefined to accommodate a new world order and the sacrosanctity of domestic jurisdiction began to dilute in the transfers of power to international institutions.<sup>50</sup> New consensus as to the global values to be protected (ie global commerce and investment) also required a transition of adjudicatory power from domestic systems to transnational ones. In the words of Michael Reisman:

The implications for the Westphalian theory are drastic. In the aggregate, all of these entities and all who participate in the global economy constitute a transnational force. (...) a collective decision of the transnational market may view a national statute to deal with a legitimate national concern as less conducive to profitable enterprise than arrangements in other available venues (...).<sup>51</sup>

This new era of a globalized economy also gave way to a 'new generation of international adjudicatory mechanisms'<sup>52</sup> that included arbitration as the default mechanism to solve specific categories of commercial and investment disputes. In so doing, certain types of disputes began a process of adjudicatory displacement, from what was originally a judicial endeavour to a transnational enterprise of conflict resolution and international norm advancement. To some, the migration from exclusive state jurisdiction over certain international commercial disputes to international arbitration responded to a pragmatic need of parties to resolve their disputes in a more cost-efficient, private, predictable, and self-composed manner. While that may be true to some extent, the underlying narrative was one of globalized commercial norms and the objective of facilitating arrangements that pursued values of open economies. Therefore, while the choice to celebrate an arbitration agreement between international companies may be a specific and personal decision of the parties, it is also a collective arrangement to internationalize commercial disputes in an effort to homogenize global commercial values and expectations.<sup>53</sup>

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50 Reisman (n 43) 61.

51 Reisman (n 43) 60.

52 Gary Born, 'A New Generation of International Adjudication' (2012) 61 *Duke Law Journal* 775, 793.

53 The decision to arbitrate is not merely or purely in the hands of potential litigants but also in the hands of state legislatures, international organizations, arbitral institutions and other agents that create *nudges* to arbitrate, and mold institutional designs to facilitate it.

In this vein, if we wish to construct a more complete and substantive narrative for the social, political, and legal relevance of international arbitration, and with it, identify its legal nature, we must do it from a multifunctional perspective. Some theorists like Armin von Bogdandy and Ingo Venzke have contributed to the public theory of international adjudication by proposing a multifunctional approach. This consists of departing from the idea that adjudication serves a single dispute resolution function, and rather stating that they have other functions such as the stabilization of normative expectations, law making, and functioning as ‘organs of the value-based international community’.<sup>54</sup> While von Bogdandy’s and Venke’s theory concentrated on international tribunals, I think their concept can very well be applicable to international commercial arbitration.

Therefore, international arbitration’s adjudicatory power does not stem from pure party or state voluntarism<sup>55</sup> but from a systemic whole that justifies its existence through the values it pursues. It is when we look at international arbitration from a multifunctional approach that we are better placed to try and identify a sound legal theory that explains its legal content and source, because arbitration, as any other activity, has a function in relation to something else.

#### *IV. Further Conceptualization of Arbitration as a Project of the World Order*

The previous section demonstrates that there is an identifiable world order which seeks to promote certain values. A global economic consensus has created new mechanisms by means of which these objectives and values are to be attained. Hence, the need to create agile adjudicative institutions that not only promote investment, commerce, and the rule of law, but enhance normative expectations based on said values. However, how concretely can we think of international arbitration as an activity with the normative purpose or function to achieve those goals and values? In what follows, I will answer this question through the lens of three theoretical concepts.

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54 von Bogdandy and Venzke (n 16) 46.

55 In detail Bender (n 5) (§ 1), text to 4–6 (on subjectivity in general), text to 53–75 (on subjectivity and lawmaking), text to n 120–136, 147–159 (on different forms of subjectivity in adjudication).

1. *Projects and systems (Kahn)*

Paul W. Kahn has provided not only an enriching new account of systems but a very conceptually useful one as well.<sup>56</sup> Kahn identifies that within natural and political orders, two ideas have always loomed into society's organization: *project* and *system*. He suggests that a system has an internal normative structure that is quite distinct from that of a project. While a project strives to achieve an idea that is outside itself, a system maintains an 'immanent principle of order'.<sup>57</sup> Moreover, he states that a system (acting as a whole) operates as a principle of order and the project is the intention to fulfill certain objectives. He specifically states: 'to imagine a system, then, is to imagine order outside of the terms of a project. For this reason, we ask of a system not what its goal is, but what its laws are'.<sup>58</sup> In this vein, laws give specific projects stability and help them attain the objectives that lie outside themselves.<sup>59</sup>

We can say that systems are value-based principles of order, they have an array of projects that set out to attain the systemic whole's end and pursue its values. Therefore, 'the ethos of a system is not to accomplish an end, but to maintain itself'.<sup>60</sup> However, this does not necessarily entail that systems are perpetual and never-changing orders. They can very well be pushed towards change and are not immune to externalities. However, the change must be explained in terms of the objectives of the system (eg growth).<sup>61</sup>

Furthermore, a key distinction of systems is that they have patterns of self-correction, while in projects there is a deliberate act to correct, amend or change. While the former alludes to a more natural arrangement of order, the latter implies a more conscious and deliberate mission to accomplish the objectives of order set out by the systemic whole. This is also relevant when analysing specific changes to the system because a disturbance or change within a project might be an expression of order at the systemic level. Indeed, the laws of the system might conceive a change in the projects as part of the order.<sup>62</sup>

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56 See Paul W Kahn, *Origins of Order. Project and System in the American Legal Imagination* (Yale University Press 2019).

57 *ibid*, 18.

58 *ibid*, 19.

59 *ibid*, 10.

60 *ibid*, 20.

61 *ibid*.

62 *ibid*, 21.



Withing this framework I propose that international arbitration is a *project* of world order (the system). Arbitration cannot be conceived as a system because it lacks an internal normative structure. It is a deliberate plan or mechanism created for a specific function and while projects can have sub-projects, this does not mean that they are systems in themselves. After World War II, and after the Cold War, the natural order of the global community received an exogenous shock that pushed it towards change – a change that conceived global order in new ways, one of which was global commerce. Therefore, the new world order that set new global values, instilled the necessity to craft new projects to attain systemic order. One of these projects was a collective and international arrangement<sup>63</sup> for dispute resolution that would foster global order in the subject of commerce. This exogenous shock can be characterized by the fact that in the *travaux préparatoires* of the New York Convention it was stated that ‘the continuing expansion of world trade and the acceleration of the commercial processes had soon caused the business community to regard the provisions of the Convention as inadequate and, in 1933, the International Chamber of Commerce had prepared a new draft of a “Convention on the Enforcement of International Arbitral Awards”’.<sup>64</sup>

The fact that the outlines of the world order system were redrawn do not diminish its systemic traits. To this end, Kahn makes a poignant example about immigration:

Disruption of a system can be a cross-border phenomenon: the entry of something new. If the system can absorb the new by incorporating it into its internal order, then the boundaries of the system may be effectively redrawn. What had been outside becomes a part of the systemic order of the whole. Think, for example, of immigration. We might imagine immigrants – particularly undocumented – to disturb the internal order of the community. Our response, however, might be to reimagine the borders of the relevant system. We might move from thinking of the territorial state as the boundaries of the system to thinking of regions and their population flows as the system.<sup>65</sup>

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63 One can say that there is no consensus or collective arrangement if we still find countries that are not as open to the idea of international arbitration as others. However, we can say that there is a general consensus on the main objectives of international arbitration. The clearest example would be there are currently 168 parties to the New York Convention.

64 United Nations Economic and Social Council, E/CONF.26/SR.1 12 September 1958.

65 Kahn (n 56) 21.

Therefore, the redrawing of the world order after World War II did not necessarily entail a new system, but rather a reconceptualized notion of order, and the need to envisage new projects to attain that order and the newfound values of the world community. This means that world order (as a system) reconceived its normative structure to include new notions of order, such as the guarantee of international trade, and the legal order of transnational transactions.

International arbitration finds its normative purpose in its mission as a *project* of global order. It is the *system* of global order that grants it not only its course of action, but its legitimacy, content, and purpose. In order to maintain this notion, we also have to recognize that projects can deviate from their indented course and that their function will always be measured with reference to their end.<sup>66</sup> This is particularly relevant when we observe the creation of new arbitration rules by institutions, new soft law measures or even doctrinal reconsiderations as to certain arbitral subjects. They are not examples of a system with internal rule creation, but rather the active and conscious enterprise of amending, reconfiguring, and restructuring a project, in order to best attain its systemic function.

Another example of the recognition of a global project can be seen through the adoption of certain rules regarding international arbitration by the Institute of International Law. In its Article 2 it was emphasized that ‘in no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.’<sup>67</sup>

Finally, the idea that the resolution of international commercial disputes corresponds to international order has been recognized in some cases like *Mitsubishi Motors Corp v Soler Chrysler Plymouth, Inc.*, in which the United States Supreme Court asserted that ‘(...) the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not been tested. If they are to take a central place in the international legal order, national courts will need to “shake off the old judicial hostility to arbitration”.’<sup>68</sup> Therefore, the imagination of

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66 Kahn (n 56) 11 (using the metaphor of a machine, which can only be repaired by agents conscious of its function).

67 Institute of International Law Eighteenth Commission, Rapporteur, ‘Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises’ (1989).

68 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985).

international arbitration as a project of world order or global governance<sup>69</sup> is readily recognizable within the international experience.

After these reflections, we can now further clarify what distinguishes Gaillard's transnational order or autonomous legal order approach and my idea of the *arbitration project* as part of a world order. While Gaillard recognizes that there is a transnational order of arbitration, he emphasizes its existence on the perception arbitrators have as international judges and the creation of transnational rules that apply to international arbitration, which do not belong exclusively to domestic systems. Furthermore, the interaction of international arbitration (as an autonomous order) is seen by Gaillard to interact with domestic orders by means of 'recognition'.<sup>70</sup> However, his transnational theory does not identify the normative purpose of arbitration as a transnational phenomenon and with it, it fails to identify what bounds that transnational order to domestic systems. Additionally, Gaillard's theory seems to relegate domestic systems to a role of recognizing an existing order that lives outside themselves, and with it, ignores the multifunctional roles different actors play in the execution of a common *project*. I contend that it is only through the identification of a value-based system of global order that we can identify the normative purpose of arbitration as a *project* and the deliberate execution of said project by individual states, not as a recognition of an autonomous system but as a deliberate role in the execution of a common project.

## 2. *Dédoublement fonctionnel* (Scelle)

The idea of an arbitral *project* also resonates with much older doctrines of international law. For example, George Scelle, through his theory of *dedoublement fonctionnel* (role splitting) departed from purely positivistic accounts of International Law and did not conceive the international community, as most other international lawyers did, as a collection of states and international organizations governed by a body of rules designed to direct and regulate their behavior. Rather, he proposed four main building blocks for his theory: (i) the idea of a world community integrated by dif-

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69 The state-oriented understanding of international adjudication has been challenged by community-oriented approaches in which international tribunals and courts are seen though their contribution to global governance. See Tomer Bourde, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (Cameron May 2004); von Bogdandy and Venzke (n 16).

70 Gaillard (n 8) 60.

ferent elements, from provincial groupings all the way to a *civitas maxima* or world community. This idea rested on the premise that the ‘international community swarms with myriad legal orders (in today’s parlance we would call them “sub systems”); they do not live by themselves, each in its own area, but intersect and overlap with each other.’<sup>71</sup> (ii) the world community does not result from the coexistence or the juxtaposition of states, but rather consists of the interaction between peoples and individuals through international intercourse and international law. Therefore, for Scelle, the distinction between private and international law is a fiction because both attain to the same objective. (iii) All national legal orders subject to the international legal order. (iv) A legal system needs to have three basic functions: law-making, adjudication, and enforcement.<sup>72</sup>

Furthermore, for Scelle, both members of the executive from a particular country as well as domestic courts, fulfill dual roles when acting within their own national systems and when they act within the international order or system. Specifically in the case of domestic courts, he argues that when dealing with issues of international law or even conflict of laws, judges act as international judicial bodies, thereby fulfilling their ‘dual role’.<sup>73</sup>

Scelle’s theory has great potential to explain the arbitration *project*, and especially its interaction with domestic legal orders. What he understood as ‘sub systems’ can really be conceived as *projects* of the international legal order, and the international legal order can be seen through his idea of a *civitas maxima* of the world community. Moreover, the traditional dichotomy between judicial power and international arbitration power can be put aside by conceiving the international legal order not as a juxtaposition of states, but the interaction between peoples and the legal mechanisms that facilitate said interaction. Both, arbitrators, and state actors (which have a dual role) participate in the same common project. In this regard, international arbitration is a common legal project that facilitates commercial interactions with the objective of creating sustainable normative expectations in the international community. In doing so, it contributes to the maintenance of world order. Specifically, international arbitration can be said to ‘provide a neutral playing field on which transnational economic

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71 Antonio Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting” (dedoublement fonctionnel)’ (1990) 1 *European Journal of International Law in International Law* 210, 211.

72 *ibid.*

73 *ibid.*, 213.

law is enforced<sup>74</sup> and its role as a project can also be seen by the fact that ‘the process of global wealth creation normally is justified by neither speed or cost, but rather because its neutrality forum and delocalized procedure provide a means of avoiding “hometown justice” of the other party’s judicial system’.<sup>75</sup>

### 3. *Transnational legal process (Jessup and Koh)*

I further suggest that the interaction between the arbitration *project* and domestic systems can be understood through the concept of *transnational legal process*.

When trying to grapple with the task of identifying a concept that described the legal phenomena that transcended domestic borders, Philip C. Jessup regarded that the traditional concept of *international law* was inadequate for said purpose. This was so because the term misleads to thinking about exclusive relations between nation states. For this reason, he coined the term *transnational law* to include ‘all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories’.<sup>76</sup>

After the idea of *transnationality* was introduced as a valid concept to describe certain legal phenomena, other theorists began to expand on the concept, and furthered the scope of international legal theory. As one of the main proponents of this concept, Harold Koh purported the idea that transnational legal issues are commonly determined outside the bounds of judicial mechanisms or courts, and that there rather exists a *process* by means of which lawyers and other agents play a more impactful role than traditional judicial commands.<sup>77</sup> Furthermore, he emphasized that the transnational legal process is a trans-substantive process where transnational actors internalize legal norms that are not domestic norms.<sup>78</sup>

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74 W Michael Reisman, W Laurence Craig, William W Park and Jan Paulsson, *International Commercial Arbitration. Cases, Materials, and Notes on the Resolution of International Business Disputes* (Foundation Press 2015) 188.

75 Reisman, Craig, Park and Paulsson (n 74) 188.

76 Philip C Jessup, *Transnational Law* (Yale University Press 1956) 1.

77 Harold Koh, ‘Why Transnational Law Matters’ (2006) 24 Penn State International Law Review 745; Harold Koh, ‘Transnational Legal Process’ (1996) 75 Nebraska Law Review 181.

78 *ibid.*

The interaction that domestic authorities have with international arbitration (ie courts and legislatures) is an example of a transnational legal process. It is not, like some theorists have proposed, the origin of power of international arbitration or the subjugation of a concept, but rather the process by means of which national authorities play a role (*dédoulement fonctionnel*) in the realization of the *arbitration project*. The most obvious and lasting example of this is the ratification of the New York Convention by more than 160 States and the fact that legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been adopted in 83 States and in a total of 116 jurisdictions.<sup>79</sup>

Moreover, the fact that arbitral institutions, professional associations, and individuals in the practice of arbitration have great influence in the design of procedures, rules, objectives, and best practices, is a patent example of Koh's account of a transnational legal process. Perhaps international arbitration is one of the legal realms where private actors have a bigger and more impactful role in its day-to-day execution and development than in other legal realm. This only shows that there is a *transnational legal process* by means of which the *arbitral project* is executed.

Furthermore, for Harold Koh, the transnational legal process in which private and public actors interact, is a dynamic process to 'interpret, enforce, and ultimately, internalize rules of transnational law'.<sup>80</sup> This process 'mutates, and percolates up and down, from public to the private, from the domestic to the international level and back down again'.<sup>81</sup> Therefore, what by some is regarded as the localization of an international concept, the national creation of a concept with transnational repercussions, or even the domestic recognition of a transnational order, is really a transnational legal process in which domestic and international actors interact for the execution of common goals, objectives, values, and the *arbitration project*.

The fact that a court or a legislature adopts, interacts, interprets or mutates international arbitration does not mean that they make it theirs, that they simply recognize it, or that they grant it power. It is only a manifestation of the transnational legal process at work. In this regard, Koh also considers that the transnational legal process is both descriptive and normative because it not only describes a legal phenomenon, but

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79 Figures obtained from <[https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status)> accessed 29 November 2021.

80 Koh (1996) (n 77) 183–184.

81 *ibid*, 184.

it creates rules. These rules can be thought of as part of the *arbitration project*. In this regard, when domestic legal systems interpret arbitration principles, enforce foreign awards, adopt model laws or ratify international conventions, they engage in an interactive process of internalization by which ‘international law acquires its “stickiness” (...) nation-states acquire their identity, and that nations come to “obey” international law out of perceived self-interest’<sup>82</sup> and with the aim of executing a global project.

In other words, we can say that the iterative and interactive process in which states participate in international arbitration represents the role they play in the execution of the *arbitral project*. This is so because as with any project they are not self-executing and regularly require the participation of many actors. The involvement of a plurality of actors in international arbitration is the *transnational legal process* by which the project is executed and can be seen through an array of activities such as the application of soft law by litigants, institutions and parties,<sup>83</sup> the interpretation of substantive rules of international arbitration by arbitrators, the definition of the judicial scope regarding the court’s interaction with arbitration, as well as the use of courts in aid of arbitration, among others. While some might argue that the involvement of many actors renders uniformity a futile task, I would say that uniformity is only a relevant concept if we define a *system* from a positivistic approach. If we come to terms with the realistic notion of a *transnational legal process*, the interaction and activity of a plethora of actors is evidence of the vitality of the global project which requires iterative action for its execution.

By the same token, the ‘double contradictory trend’<sup>84</sup> in international arbitration consisting, on the one hand, in the modernization of local arbitration laws and, on the other, zealous judicial attempts to limit the scope of arbitration, are not proof of an absence of an *arbitration project* but rather of its inherent need to be mended, as all projects need to be, because they are imperfect processes.

In this vein, the interaction domestic systems have with international arbitration must be seen not as a dichotomy between judicial power and arbitral power, or as the domestic recognition of a transnational order, but rather as the execution of a common and transnational *project*. This

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82 Harold Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 Yale Law Journal. 2599, 2655.

83 See William W. Park, *The Procedural Soft Law of International Arbitration*, in Loukas A Mistelis and Julian DM Lew (eds) *Pervasive Problems in International Arbitration* (Kluwer Law International 2006).

84 Gaillard (n 8) 23.

underlying idea has been recognized by theorists such as Jens Damm and Henry Hansmann, when they have asserted that ‘good courts are central to sustained economic development.’<sup>85</sup> While not directly referring to arbitration, they do conceive a globalized commercial litigation practice, which attempts to promote and attain sustained economic development. This is proof that there are transnational objectives and values that are pursued by projects, and the agents in charge of their execution can have multiple roles leading to ‘conversations among courts and domestic and international adjudicators’.<sup>86</sup>

The idea of a universal or transnational public policy (value system) has also been recognized in several judicial decisions. For example, the Swiss Federal Supreme Court determined that the review of awards must be based on ‘transnational or universal public policy’.<sup>87</sup> Moreover, French courts have led the way in expressly recognizing a transnational concept when they have asserted the existence of ‘international public policy’ with regards to arbitration.<sup>88</sup>

Some theorists like Jan Paulsson have stated that ‘the great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself (...). What will the state tolerate? To what will it lend its authority and power?’<sup>89</sup> Paulsson seems to present an apparent dichotomy between arbitral and judicial powers. However, arbitral and judicial powers are two elements of the same *transnational*

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- 85 Jens Damman and Henry Hansmann, ‘Globalizing Commercial Litigation’ (2008) 94 Cornell Law Review 71.
- 86 See André Nollkaemper, *Conversations among Courts: Domestic and International Adjudicators* in Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 523.
- 87 *United Arab Emirates et al v Westland Helicopters Ltd.* Federal Supreme Court (1994) ATF 120 II 155.
- 88 *Société Ganz And Others v Société Nationale Des Chemins De Fer Tunisiens* (1991) Paris Court Of Appeal, 1st Chamber – Section C, 29: ‘(...) hors les cas où la non arbitrabilité relève de la matière – en ce qu’elle intéresse au plus près l’ordre public international et exclut de manière absolue la compétence arbitrale du fait de la nullité de la convention d’arbitrage – l’arbitre international, dont la mission consiste aussi à assurer le respect de l’ordre public international, a le pouvoir de sanctionner les comportements contraires à la bonne foi qui doit présider aux relations entre partenaires du commerce international.’; *Ministère tunisien de l’Equipement v Societe Bec Freres*, (1997) Paris Court of Appeal 92.23638 & 92.23639.
- 89 Jan Paulsson, ‘Arbitration in Three Dimensions’ (2010) LSE Legal Studies Working Paper No. 2/2010 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1536093](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536093)> accessed 29 November 2021.



*legal process* and *project*. This is so because, on the one hand, the idea of international arbitration derives from a global commitment to attain global order. On the other hand, the monopoly of execution of awards that states have is not the source of power of international arbitration or what determines its jurisdiction but rather the role domestic courts are called to execute within the *arbitral project*, through a *transnational legal process*. Paulsson's statement faces arbitration with judicial courts as if they were at odds. I believe that if we imagine international arbitration as a *project* of global governance and its internalization into domestic legal systems as part of a *transnational legal process*, this apparent paradox is rather the organic, evolutive and elastic realization of the *project*.

One subject in which this is of the utmost relevance is the case of subject matter arbitrability and the power of domestic legal systems to determine what subjects may not be arbitrable. To some, this might seem like an argument against my previous assertion. However, I believe it is a pure manifestation of the ways in which norms that lay in the realm of the international percolate to the domestic level and then, the definition of certain parameters is left to state sovereignty. One of the defining characteristics of International Law is that it always implicates the transfer of sovereignty in one way or another, and in turn it also entails the conservation of sovereignty for some matters. This is part of the organic functioning of an international legal order. The case of an *arbitral project* is no different.

The arbitrability of certain subjects can be seen through the enforcement and annulment of arbitral agreements and awards. Both are instances where domestic courts can intervene to determine if the precise subject-matter of the dispute lie outside of what national policy deems permissible. On the one hand, both the New York Convention<sup>90</sup> and the UNCITRAL Model Law<sup>91</sup> give deference to national laws to determine arbitrability. In this regard, many national arbitration statutes provide that an arbitration agreement may be denied enforcement in particular circumstances because the subject-matter is non-arbitrable.

However, the fact that domestic legal systems have a legitimate entitlement to define public policy and determine when their courts must not recognize an act that is contrary to said public policy, is not by its essence contrary to the recognition of an *arbitral project*. On the contrary, it is part

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90 New York Convention, art V (2).

91 UNCITRAL Model Law Article 34 (1) (b) (i): 'The subject matter of the dispute is not capable of settlement by arbitration under the law of this State'.

and parcel of the *transnational legal process* by means of which domestic and transnational orders interact for a common purpose and attainment of global values. This should not be understood to mean that domestic systems must revere unconditionally to the *arbitration project*. It only means that the execution of that global *project* finds some limitations in domestic public policy.

Furthermore, the interaction of national courts with international arbitration can also have the function of *normative development*.<sup>92</sup> This is so because national courts can support the development of international arbitration and help stabilize normative expectations.<sup>93</sup>

Moreover, the interplay between international arbitration and public policy of a state can be seen in the way the United States has dealt with the issue. For example, originally, American case law banned arbitration of competition law matters. Then, judicial concern was not about whether arbitrators should decide competition law claims but rather how arbitration of such claims should unfold procedurally.<sup>94</sup> Additionally, it was precisely through the understanding that in international arbitration, the execution of a global *project* entails a different attitude by domestic judicial actors, that the Supreme Court of the United States allowed a wider scope for subject matter arbitrability in international arbitration, compared to domestic arbitration.<sup>95</sup> In this vein, public policy as a potential hand break to a specific dispute is not a hindrance to the *arbitration project*, but rather the expression of an interactive process to execute the *arbitral project*, as well as its necessary balance against other *projects*.<sup>96</sup> In this same vein, it has been said that the health of the *project* of international arbitration depends not on the permissibility of public policy challenges but rather on the timing of judicial interference.<sup>97</sup>

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92 Nollkaemper (n 86).

93 *ibid*.

94 Reisman, Craig, Park and Paulsson (n 74) 158.

95 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* (n 68).

96 Domestic systems also have projects and these projects also purport certain values and objectives. Therefore, when two or more projects are in tension, a proper balance must be made in order to not diminish the other completely. However, the balancing of projects (as of interests) will always entail tradeoffs.

97 Reisman, Craig, Park and Paulsson (n 74) 189.

## V. Conclusion

When we analyse a legal phenomenon through its function, we can identify many aspects that are seldom recognized through an analysis that fixates only on its concept. Moreover, when we take a purely *observational* approach to analyse a legal phenomenon, it only gets us as far as to identify certain social practices but comes short of identifying the normative purposes of the law.

Through a functional premise of international arbitration, we can assert that the existing legal theories of international arbitration fall short of identifying its underlying values and its normative function. It is through an understanding of international arbitration as a *project* of world order or global governance that we can assert that international arbitration plays a much more meaningful and functional role than a mere mechanism for dispute resolution. This is so because it functions as an adjudicative project to protect, guarantee, and advance global values of international commerce and development. In this vein, looking at international arbitration as a *project* that plays a role in a systemic whole, we can depart from the idea that adjudication serves a single dispute resolution function, and rather assert that it has other functions such as the stabilization of normative expectations, law making, and functioning as a *project* 'of the value-based international community'.<sup>98</sup> Finally, the interaction international arbitration has with domestic legal systems is not a manifestation of its anchoring to a particular legal system, the tug-of-war for adjudicatory power or the mere recognition of an autonomous order, but rather the organic, evolutive and elastic realization of the *arbitration project* through a *transnational legal process*. It is by means of this *transnational legal process* that different domestic, international, public, and private actors interact in an iterative and dynamic process by means of which the *arbitral project* acquires meaning, relevance, and a normative purpose.

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98 von Bogdandy and Venzke (n 16).

