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Arbitral Decision-Making: Legal Realism and Law & Economics

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ABSTRACT

As the social impact and role of international arbitration receives increasing attention, one central theme in this conundrum gains prominence: how do arbitrators decide cases? What influences arbitral decision-making? With the progressive opening of scholarship in the field to interdisciplinary approaches and studies going beyond doctrinal work, the question often takes the following form: do arbitrators apply the law, or do they make decisions based on something else—personal preferences, political biases, etc? When empirical studies fail to find significant statistical evidence of the role of extra-legal factors in their decision-making, the conclusion is drawn that arbitrators do, indeed, nothing else than apply the law. This article argues that the question so posed is an argumentative fallacy. Using the epistemology of legal realism and a simple methodology of law & economics, this article maintains that arbitrators, like every dispute resolver, are likely to always rely on both legal and extra-legal factors. It focuses on identifying, in the abstract, possible extra-legal factors that may amount to incentives and constraints placed by the current ecosystem of arbitration on arbitral decision-making.

1. INTRODUCTION

Most lawyers, academic or practicing, tend to believe that law is something quite important. And that when one has to apply the law, one has to apply the law, not something else. There is law and then there is the rest. There is infatuation and then there is contempt. Now when this way of thinking comes to bear on our understanding of arbitral decision-making, the following account tends to ensue.

Arbitrators decide cases based on the law. Legal rules and principles direct their decision-making. If that is what they do, they are good, they deserve praise. And the aggregate contents of their decisions, the case law they have produced, and its effects

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on the parties and society, are by no means their making, their fault. It is the law's fault, not theirs. (It is not to their credit either, but when all goes well, there is little need for debate.) No freedom, no responsibility.

Or they are influenced by personal factors. Biases. Personal preferences. Values the law did not state. Policy preferences. Political views. Their decisions are in reality discretionary, possibly whimsical. The law and legal argumentation is just window dressing. Here the arbitrators are bad, deserve criticism. The case law they produce, and its effects on whomever it affects, is their fault (or to their credit). With freedom comes responsibility. If arbitration stands in the spotlight as a social or geopolitical villain, that is the arbitrators' fault. It is because they are biased, or only seek to promote themselves, make decisions that are good for their own business.

The more criticism is voiced against arbitration, the more we see studies, reports and advocacy pitches that set the argumentative stage in the way I just sketched.[1] And then they shoot at the second hypothesis: bias cannot be proven; proficiency in practical legal interpretation is on the whole unproblematic; legal arguments are plentiful in the decisions; infatuation and deference to what is of a legal nature are tangible. The second hypothesis is false; therefore, the first hypothesis is true. Blame the law and the states that make it, not the arbitrators, for they just apply it. A bad fright for the arbitration community, but phew! All is well that ends well. Move along. There is nothing to see here.[2]

And to those who think about arbitration and write on arbitration—the scholars, the commentators, the advocates, the critics, the professors, the students: either you believe in legal realism and consider that the law plays no role for arbitral decision-making, that it is all discretionary, that the arbitrators' breakfast is more important for the decision than the International Bar Association (IBA) Rules on the Taking of Evidence. Then you believe in the second hypothesis above. Or you are a proper lawyer, you revere law and law's actors, you have faith in the intellectual rigor and work ethics of arbitrators, you believe that they only apply the law without any influence

1 See for instance Catherine Rogers, 'The Politics of International Investment Arbitrators (2014) 12 Santa Clara Journal of International Law 223, 226: 'Critics contend that, instead of law and appropriate policy considerations, investment arbitrators' decisions are often the product of extra-legal factors—from their own ideology, to the nature of disputants, to their personal self-interest. For every hypothesis about what extra-legal factors affect investment arbitrators' decisions, there seems to be an equal and opposite hypothesis.' See also Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harvard International Law Journal 435, 435: 'Asserting that arbitration is unfairly tilted toward the developed world, some countries have withdrawn from World Bank dispute resolution bodies or are taking steps to eliminate arbitration. In order to assess whether investment arbitration is the equivalent of tossing a two-headed coin to resolve investment disputes, this Article explores the role of development status in arbitration outcomes . . . The results demonstrate that, at the macro level, development status does not have a statistically significant relationship with outcome. This suggests that the investment treaty arbitration system, as a whole, functions fairly.'

2 See, however, for a notable recent example acknowledging the oversimplifying nature of such arguments, and stressing instead, for instance, the importance of value providers and rituals (instances of extra-legal factors to be sure) in shaping the general arbitral mindset, Emmanuel Gaillard, 'Sociology of International Arbitration' (2015) 31 Arbitration International 1. Gaillard further suggests, in effect, that these sorts of oversimplifying reactions are the equivalent, only from the opposite point of view, of the virulent and extreme attacks exemplified by Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and Transnational Institute 2012): see ibid 14.

of personal preferences or bias. And you believe in the first hypothesis. Good soldier, you are with us and not with them.

This, really, is a schoolbook example of the argumentative fallacy known as a false dilemma: the situation is presented as if there were only two options, and these two options are extreme points on a spectrum of possibilities, which creates the illusion that the two options are mutually exclusive and collectively exhaustive. *Either* arbitrators decide cases based on the law, *or* they throw law to the wind and decide cases based on something else, on external factors. *Either* one is a formalist and believes that law is determinate and that legal decisions are obtained mechanically, *or* one is a legal realist and believes that law is indeterminate and that legal decisions are obtained frivolously. If one of these alternatives can be falsified, shown to be wrong, then the other must be true.

Such a rigorous distinction may seem attractive because, precisely, of its rigorousness. Recall Jacques Derrida: 'unless a distinction can be made rigorous and precise it is not really a distinction'.[3] This distinction may indeed help us think about the role of biases, personal and collective, and the need to protect decision-making mechanisms from unwanted interferences. But, if our purpose is to understand arbitral decision-making, it ultimately obfuscates more than it clarifies. Here John Searle comes to mind: 'it is a condition of the adequacy of a precise theory of an indeterminate phenomenon that it should precisely characterize that phenomenon as indeterminate; and a distinction is not less a distinction for allowing a family of related, marginal, diverging cases'.[4] In other words, it is more helpful to think of the respective roles of legal and non-legal factors in decision-making as an indeterminate phenomenon: extra-legal factors play a greater or lesser role depending on the circumstances, but rarely if ever do they play no role at all or are the only ones to play a role. No modern interpretation theory would deny that interpretation is influenced by the interpreter, and in an actual case—where a number of different rules and principles are applied—the interpreter is rarely if ever completely tied up by the law, just as she is rarely if ever completely free to come to whatever result she fancies.[5]

Setting the stage the way I did above is also a serious misrepresentation of legal realism—a misunderstanding or a straw man set up quite purposefully. The legendary role of a judge's breakfast in his or her decision-making has never been a meme within legal realism.[6] It is only a meme *about* legal realism, thrown around by those who mean to ridicule it.[7] Engaging in legal realism by no means implies maintaining that law plays no role in decision-making, that law is thrown to the wind. Accepting

3 Jacques Derrida, *Limited Inc* (Northwestern University Press 1988) 126: 'I confirm: for me, from the point of view of theory and of the concept, 'unless a distinction can be made rigorous and precise it isn't really a distinction.' Searle is right, for once, in attributing this 'assumption' to me. I feel close to those who share it.'

4 John Searle, 'The Word Turned Upside Down' (1983) 30(16) The New York Review of Books 76.

5 For a recent collection of studies that nicely illustrates this point, see Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015).

6 Brian Leiter, 'American Legal Realism' in W Edmund and M Golding (eds), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell 2002), arguing that no legal realist ever claimed that what the judge had for breakfast determines his decisions.

7 Brian Leiter, *Naturalizing Jurisprudence* (OUP 2007) 62.

that extra-legal factors play an inevitable or nearly inevitable role in arbitral decision-making, a role that obtains by degrees, by no means implies discarding the role of law altogether. Certainly, as Stavros Brekoulakis puts it, many 'studies depart from the behavioural assumption that arbitral decision-making is driven *almost exclusively* by extra-legal factors, mainly policy preferences or financial incentives of arbitrators'.[8] But this clearly need not be: accepting that extra-legal factors play a role in arbitral decision-making does not imply that they play an almost exclusive role, or a predominant role, or a decisive role, or even that they systematically play a role. Similarly, acknowledging the possible role of extra-legal factors in decision-making by no means entails a criticism that arbitration is a biased dispute resolution system. That would be a terribly brutal simplification. Neither is it an accusation against the integrity of arbitration. It simply makes no sense to define integrity as requiring that no extra-legal factor play any role, or else either no decision-making process exhibits integrity or we need to have a long discussion on what distinguishes legal from extra-legal factors.[9]

So this is a simple story: legal and extra-legal factors play a role in arbitral decision-making. The focus of legal research, unsurprisingly, has been on the legal factors (including legal-institutional factors).[10] But what could the extra-legal factors be?[11] This is the task for this article.

To be clear, I am not engaging here in an analytical discussion of the concepts of legal and extra-legal factors in decision-making.[12] Whether the factors I discuss could in fact be considered to be part of the law is not what I want to address here, and it is not relevant to my endeavour. My purpose is to identify possible factors that one would not commonly call legal factors which are likely to influence arbitral adjudication. In identifying these factors, I seek to offer a plausible account of the phenomenon, susceptible of validation by rational assent in the Hartleyan sense.[13] I do not seek to offer evidence obtained through empirical verification. The point is to identify possible incentives, constraints and all manner of other determinants of decision-making, not to measure their effective impact on a particular type of cases and determine whether it is statistically significant or not.

8 Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) 4 Journal of International Dispute Settlement 553, 556.

9 Alan Scott Rau, 'Integrity in Private Judging' (1997) 38 South Texas Law Review 488: 'decisionmakers who have lived in the world at all will invariably come to a case with perspectives and beliefs and preconceptions'.

10 See Brekoulakis (n 8).

11 For a study specifically focusing on cognitive illusions, see Christopher R Drahozal, 'A Behavioral Analysis of Private Judging' (2004) 67 Law & Contemporary Problems 105.

12 For a study distinguishing between law and non-law in the reasoning of arbitral awards, and the evolution over time of the use of reasoning in arbitral awards not based on law, see Florian Grisel, 'Droit et non-droit dans les sentences arbitrales CCI: une perspective historique' (2014) 25(2) ICC International Court of Arbitration Bulletin 13.

13 David Hartley, *Observations on Man: His Frame, His Duty and His Expectations* (Richardson 1749) 324: 'rational assent . . . to any proposition may be defined as readiness to affirm it to be true, proceeding from a close association of the ideas suggested by the proposition, with the idea or internal feeling belonging to the word truth; or of the terms of the proposition with the word truth'. On validation by rational assent of propositions in the science of law as a theoretical corpus, see François Ost, 'Science du droit' in AJ Arnaud (ed), *Dictionnaire encyclopédique de théorie et de sociologie du droit* (LGDJ 1998) 540.

My theoretical starting point for the identification of these extra-legal factors is a combination of legal realism and law & economics. I explain what this means in a first section. Discussions of the relevant extra-legal factors then follow in subsequent sections.

A. Legal Realism and Law & Economics

So my purpose in this article is to identify possible extra-legal factors that are likely to influence arbitral decision-making. This I seek to do without prejudice for the role of law in arbitral decision-making, for there is no relationship of entailment between the identification of such extra-legal factors and any exclusivity of their influence: identifying them does not make them the exclusive grounds of decision-making. It does not eliminate the role of law.

In order to identify these factors, I set out to determine what, in the abstract, is likely to be in the interest of the decision-maker, the arbitrator. To do this, I will borrow the core epistemology of legal realism and some of the methodology of law & economics. It will be a very simple methodology of law & economics, focusing on possible interests in the abstract. If and to what extent such interests do indeed influence the decision-making in a given case, or in a given group or type of cases, is a different question. It clearly is a meaningful question, but it will require distinct studies.

Before we get to legal realism and law & economics, it is probably helpful to enter one more analytical distinction. It is not because an arbitrator takes her own interest into account during the decision-making that the interests of others do not also influence her.[14] To be fair, it would seem very improbable that an arbitrator is not influenced in his decision-making by the interests of others—these would certainly be the interests of the parties, and possibly the interests of a broader social group.[15] In philosophical jargon, this means that moral reasons-for-action most likely apply to arbitral decision-making[16]: moral reasons-for-action are reasons potentially or actually influencing someone's behaviour that 'are focused exclusively or primarily on other people's interests and only derivatively if at all on his own interests (apart from interests, such as a concern for acting in a morally proper fashion, which are themselves defined by reference to the well-being of other people)'.[17]

But of course arbitrators, like everybody else, cannot be assumed to be exclusively altruistic. What lies in their own interests is also susceptible of influencing their decision-making. Again in the jargon I used above, arbitrators now have prudential reasons-for-action: reasons potentially or actually influencing someone's behaviour that 'are focused exclusively or primarily on his own interests and only derivatively if at all on the interests of other people'.[18]

14 See for instance William W Park, 'Arbitration in Autumn' (2011) 2 Journal of International Dispute Settlement 287, 304: 'The general community often has a stake not only in the outcome of arbitration, but also in the way proceedings have been conducted.'

15 For a specific discussion of whose interests, within the universe of the interests of others, arbitrators may take into consideration, see for instance Thomas Schultz, 'The Three Pursuits of Dispute Settlement' (2014) 1 Czech & Central European Yearbook of Arbitration 227.

16 On reasons-for-action in general, see David Sobel and Steven Wall (eds), *Reasons for Action* (CUP 2011).

17 Matthew H Kramer, 'On the Moral Status of the Rule of Law' (2003) 63 Cambridge Law Journal 65, 66.

18 ibid.

So what could such prudential reasons-for-action be in the context of arbitral decision-making? To be sure, it is in the arbitrators' interest to apply the law. Relying on legal factors to come to their decisions, one may safely assume, is in their interest. Yet, this by no means warrants exclusivity: applying the law is not the only thing that is in the interest of an arbitrator.

What else, then, could there be that is in the interest of an arbitrator? Law & economics is precisely one of the approaches to law which was developed to answer that question. To elucidate the relationships between adjudicative decision-making, legal and extra-legal factors, legal realism and law & economics, let us briefly roll back to the beginning and the *raison d'être* of these theories.

How do judges (and arbitrators, and any other adjudicative decision-makers) reach a decision? Legal formalists, also called classical legal theorists,[19] supply the traditional answer: judges apply the law to the facts of the case and, if this is done competently, thus reach the correct answer. According to legal formalism, adjudicative decision-making is a rule-based activity with external factors having no bearing on the outcome of cases.[20]

Indeed, and quite fortunately for the legal formalist, judges need not, and should not, have reference to external factors because the law consists of a complete collection of legal rules contained in defined and accepted legal source material, such as legislation, regulations, established legal doctrines and case law. Because the law is comprehensive in nature, every legal question has a correct answer capable of being mechanically deduced by the properly trained judge by applying the law to the facts of the case,[21] step-by-step as if it were a form of mathematics.[22] The decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion. As Dan Bodansky summarizes it: 'Policy considerations, morality, ideology, the personal sympathies and assumptions of the judge – none of these factors matter in [adjudicative decision-making], since judges do not make the law, they simply find it.'[23] The legalist model comes complete with a set of rules of interpretation so that interpretation too becomes a mechanical rule-bound activity, purging judicial discretion.[24] There is no room in the equation for external factors that fall outside the legal rules.[25] Simple enough.

But no, the legal realists said, this is not what happens in the real world, in the actual practice of decision-making. Legal formalism may easily be authoritative in a world dominated by an episteme of formal logic, rationality, abstraction and

19 William M Wiecek, *The Lost World of Classical Legal Thought* (OUP 2001).

20 Matthew C Stephenson, 'Legal Realism for Economists' (2009) 23 Journal of Economic Perspectives 191, 193.

21 ibid.

22 Richard Posner, 'The Jurisprudence of Skepticism' (1988) 86 Michigan Law Review 827, 865.

23 Daniel Bodansky, 'Legal Realism and Its Discontents' (2015) 28 Leiden Journal of International Law 267, 271.

24 Richard Posner, *How Judges Think* (Harvard University Press 2008) 41.

25 Wiecek (n 19) 7, explaining that, in this view, judges have 'no more discretion to invent a legal rule on instrumentalist grounds or policy preferences than a chemist ha[s] to dictate the outcome of an experiment'.

categorization.[26] I mean here an episteme in the Foucauldian sense of an epoch's underlying, and often unconscious, set of cross-disciplinary assumptions and beliefs determining what is to be characterized as scientific, a 'way of knowing' that distinguishes true, and thus authoritative, knowledge from false knowledge.[27] In other words, legal formalism exhibits the qualities and corresponds to the values one looks for in a positivistic epoch, and thus easily becomes accepted as true in the scientific sense. But, really, as a theory meant to describe a phenomenon, as a descriptive theory of adjudication, it is not great: it scores low on description and prediction, on how much it describes (how many factors of decision-making it takes into account) and how accurately it predicts what will happen (what decision-makers will effectively decide); in Popperian language both its informative content and its predictive power are low, and thus so is its truthlikeness.[28] Legal formalism sees so little of reality because, Jerome Frank says, it is just blind 'legal fundamentalism', blinker-wearing 'rule-fetichism'.[29]

In sum, the explanatory power of legal formalism is limited, limited enough to call for contending theories. Legal formalism really only accounts for the language adjudicative decision-makers speak, not how they actually think and thus decide. Brutally simplified (and linguists forgive me), formalistic, syllogistic legal reasoning is to adjudicative decision-making what language is to the way we think. It influences it; it structures it; it constrains and directs it. But by no means does it account for all of it.

And so as early as the late 1800s, a number of influential judges and academics began to question the prevailing legal formalist view.[30] They argued in essence that the law rarely supplied determinate answers to legal questions and that there was a significant gap between the real reasons for which judges reached their decisions and the legalistic explanation advanced in their judicial opinions.[31] They surmised that adjudicative decision-makers use one form of reasoning to reach their decision (responding to the underlying facts of the case by relying on a combination of legal and extra-legal factors, or 'stimuli' as certain would put it)[32] and another form of reasoning to justify it (relying exclusively or nearly exclusively on legal factors).[33] Put

26 For a discussion of episteme, and epistemic communities, in international law, see Andrea Bianchi, 'Epistemic Communities' in Jean d'Aspremont and Sahib Singh(eds), *Fundamental Concepts for International Law: Constructing Intelligibility in International Legal Studies* (Edward Elgar forthcoming).

27 Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings 1972-1977* (Pantheon Books 1980).

28 Karl R Popper, *Conjectures and Refutations* (Routledge 1963).

29 Jerome Franck, *Law and the Modern Mind* (Transaction Publishers 2009 [originally published 1930]) 53, 165.

30 Posner (n 24) 3.

31 Stephenson (n 20) 197: 'In *The Path of the Law*, Justice Oliver Wendell Holmes emphasized that unconscious factors influenced a judge's decision making process: 'The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment it is true, and yet the very root and nerve of the whole proceeding."

32 Jerome Franck, 'Are Judges Human? Part II' (1931) 80 University of Pennsylvania Law Review 233, 242.

33 Joseph W Singer, 'Legal Realism Now' (1988) 76 California Law Review 465, 472. See also Brian Z Tamanaha, 'Understanding Legal Realism' (2009) 87 Texas Law Review 731, 752; Frederick Schauer, 'Legal Realism Untamed' (2013) 91 Texas Law Review 749, 755–56.

differently, there is a dialectical relation between a tentative conclusion, reached on whatever grounds, and its justification, which takes exclusively a legal form. Each influences, shapes, constrains the other. Or to use my metaphor again, this is the equivalent of putting into words what we really think, struggling to do so and never fully capturing it; what we really think, however, was in the first place shaped, but only in part, by the words we would be able to use.

Clearly then, a legal realism account of adjudication accords decision-makers more discretion *vis-à-vis* legal rules than a legal formalism account does—more discretion *vis-à-vis legal rules*, but not necessarily *vis-à-vis* all determinants of their decision-making.[34] In other words, it is not so that there are necessarily fewer constraints on decision-making in a legal realism account than in a legal formalism account; it is rather so that these constraints are more variegated in nature in the realist account, where they can be legal and non-legal.

Only extreme legal realists, who are the ones used when detractors of legal realism set up straw men, argue that the law is so malleable that plausible legal arguments, derived from accepted legal sources, are almost always available to justify *any* preferred outcome, that the law is so malleable that it does not impose any meaningful constraint on the judicial decision-making process.[35]

But again, for most realists, and certainly those realists I want to follow (let us not forget that the point of this article is to understand arbitral decision-making, not the history of legal realism as a school of thought, and so the relevant theories are those that help us understand decision-making, not legal realism), legal adjudicative decision-making relies on a combination of legal and extra-legal factors. Here is how Michael Reisman and Aaron Schreiber describe it, matter-of-factly, in their jurisprudence textbook: 'It is not enough simply to tell what the formal rules are, for . . . the rules will not actually be applied or applied in a strict fashion in many cases. Even where they are applied, many other factors may enter into how the rules are applied and in the fashioning of . . . decisions.'[36]

Having thus adjusted our epistemology so as to recognize the possible role of extra-legal factors in arbitral decision-making, the key question becomes: what are these extra-legal factors? Let us linger a bit longer with the legal realists.

Different legal realists offer different views on this question: such extra-legal factors could be the psychology of the judge, her personality, the whole range of Freudian beliefs and desires,[37] or more generally subconscious biases,[38] or a variety of social forces recognizable in the patterns into which cases tend to fall.[39] But let

34 Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009) 138.

35 Stephenson (n 20) 195.

36 W Michael Reisman and Aaron M Schreiber, *Jurisprudence: Understanding and Shaping Law* (New Haven Press 1987) 3.

37 This would be the view of Jerome Franck: see Franck (n 29) and Jerome Franck, 'Are Judges Human? Parts I & II' (1931) 80 University of Pennsylvania Law Review 17, 233.

38 Posner (n 24) 3.

39 These would be the views of Herman Oliphant, 'A Return to Stare Decisis' (1928) 14 American Bar Association Journal 71; Underhill Moore and Charles Callahan, 'Law and Learning Theory: A Study in Legal Control' (1943) 53 Yale Law Journal 1; Karl Llewellyn, *The Bramble Bush* (Oceana 1930); Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809.

me respond to the question of the identity of these extra-legal factors not, in a first step, by suggesting possible factors, but by suggesting a methodology to identify them: this is where law & economics comes into the picture.

Law & economics accepts and ultimately builds on the theoretical framework provided by legal realism—it proceeds from the same epistemology.[40] Like legal realism, the central objective of law & economics is to analyse law in practice and how the interaction between law and non-legal factors influences behaviour. In the context of adjudicative decision-making, law & economics, like legal realism, asserts that one must look beyond the legal reasoning in the decision to discover the whole range of reasons for the decision.[41]

In the school of law & economics, adjudicative behaviour is best understood as a function of the variegated incentives and constraints placed on the relevant dispute resolvers. The starting point of the economic analysis is that, like everybody else, judges and arbitrators are maximizers of their own utility. And, just like everybody else, judges and arbitrators will chose means that they expect will promote what they conceive to be in their self-interest—put differently, they will take into account, in their decision-making, the factors that reasonably promote what they conceive to be in their self-interest, regardless whether these factors are of a legal or extra-legal nature.[42] The judge's and arbitrator's utility function is likely to be not that different to the average person in that they are likely to desire similar objectives. Indeed, the central premise of law & economics is that judges, and one may assume arbitrators too, pursue instrumental and consumption goals of the same general kind and in the same general way as everybody else.[43] However, the particular weight afforded to each objective or goal will most likely be different.[44]

40 Certain authors argue that this would only be the case for behavioural law & economics, not for rational choice law & economics, because 'law and economics prescriptions are based on rationalist assumptions that are not called into question through empirical study . . . are contrary to a legal realist approach': Gregory Shaffer 'The New Legal Realist Approach to International Law' (2015) 28 Leiden Journal of International Law 189, 196. Shaffer makes this point because he argues that legal realism entails an empirical approach. In fact, legal realism indeed often does imply an empirical approach, but it does not necessarily imply it. I explain this towards the end of this section. Besides, the early legal realists barely engaged themselves in empirical studies: see for instance Max Lerner (ed), *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* (Transaction Publishers 1989 [first published 1943]) 444: 'I hate facts. I always say the chief end of man is to form general propositions . . . Of course a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance of my duties, but I shrink from the bore.' See also Bodansky (n 23) 277: 'legal realists . . . did little empirical work themselves'.

41 Singer (n 33) 513.

42 John N Drobak and Douglass C North, 'Understanding Judicial Decision-Making: The Importance of Constraints and Non-Rational Deliberations' (2008) 26 Journal of Law and Policy 131; Arthur Allen Leff, 'Economic Analysis of Law: Realism About Nominalism' (1974) 60 Virginia Law Review 451, 456.

43 These would mainly be Richard A Posner, 'The Role of the Judge in the Twenty-First Century' (2006) 86 Boston University Law Review 1049; Richard A Posner, 'Judicial Behavior and Performance: An Economic Approach' (2004-05) 32 Florida State University Law Review 1259; Gordon R Foxall, 'What Judges Maximize: Toward an Economic Psychology of the Judicial Utility Function' (2004) 25 Liverpool Law Review 177; Richard A Posner, *Overcoming Law* (Harvard University Press 1995) 109–44; Richard A Posner, 'What Do Judges and Justices Maximize (The Same Thing Everybody Else Does)' (1993) 3 Supreme Court Economic Review 1; Richard S Higgins and Paul H Rubin, 'Judicial Discretion' (1980) 9 Journal of Legal Studies 129.

44 Posner, 'Judicial Behavior' (n 43) 1260.

The task for this article, then, will be to identify these objectives or goals as they apply to arbitrators, their incentives and constraints, focusing on extra-legal factors, and to determine what is likely to influence their respective weight. The main types of incentives and constraints used in classical law & economics studies on judicial behaviour will be my guide: I will apply them to the specificities of arbitral decision-making. In doing this I will effectively focus on the incentives and constraints that the current ecosystem of arbitration places on arbitrators, instead of focusing on measuring the actual effects of specific extra-legal factors.

Measuring such actual effects would undoubtedly be ideal, but we often lack the empirical data to conduct such empirical investigations. Yet, we should not hold back our understanding of arbitral decision-making while we wait for such data to become available. It clearly is more helpful for the advancement of knowledge to engage in satisficing, rather than pursuing optimality. In this context, this means accepting validation by rational assent (consider something possible, if not plausible, because one may rationally assent to the idea) instead of being content with nothing short of empirical verification. In truth, embracing legal realism does not imply to discard the epistemology of internal doctrinal approaches to inevitably turn to the empiricist methodologies of the social sciences, falling from one into the other as it were.[45] Indeed, legal realism by no means necessarily requires empiricism—that is, an empirical approach, or empirical verification[46]: no relation of necessary entailment obtains between, on the one hand, the idea that legal adjudicative decision-making relies on a combination of legal and extra-legal factors and, on the other, the idea that the actual effects of such extra-legal factors have to be proven by quantitative or qualitative empirical studies. One does not, after all, expect the actual effects of the *legal* factors on decision-making to be empirically proven either.

In any event, we certainly cannot say that something is false because it has not been proven to be true. I already mentioned this above, but no apology is offered for my repetition, since the point is important and indisputable—and misused. No principle like *in dubio pro reo* applies to the determination of the factors of arbitral decision-making.

Seeking rational assent, in the context of the current discussion, means to identify, using basic methods of law & economics, credible extra-legal factors that could influence arbitral decision-making, extra-legal factors that could contribute to leading an arbitrator to decide one way rather than another. Whether that influence is decisive in practice or not is a different question. It depends on the relative weight of all other incentives and constraints, of all other legal and extra-legal factors. And to be sure, this question of the decisive character of the influence is a question which would need to be investigated differently depending on whether we are interested in a single case, or in a class of cases, or in all arbitration cases. But surely in certain cases, some of the extra-legal factors we can thus identify will help us understand what happened or is likely to happen in a given instance of arbitral decision-making, or in a

45 Jakob VH Holtermann and Mikael Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible' (2015) 28 Leiden Journal of International Law 211.

46 Andrew Lang, 'New Legal Realism, Empiricism, and Scientism: The Relative Objectivity of Law and Social Science' (2015) 28 Leiden Journal of International Law 231.

class of such instances—just as identifying the relevant *legal* factors of arbitral decision-making can help us understand what happened or is likely to happen in a given arbitration or class of arbitrations; after all, this is one of the key things we do when we determine, for example, that the IBA Rules on Conflicts of Interest apply in certain situations.

B. An Arbitrator's Financial Interests in Decision-Making

Arbitrators, on many occasions, have a financial interest in their decisions. I do not mean this in the classic conflict of interest sense that the arbitrator has a financial stake in the outcome of the dispute. This may well happen too, but it certainly should not and legal rules meant to capture such situations are plentiful. Rather, I mean it in the sense that arbitrators respond to market pressures, most likely including in their decision-making. That is, legally speaking, entirely in order. Arbitration is strongly regulated by market forces. This is how it is meant to be.

Over 20 years ago, Robert Cooter made the obvious point in an early paper on private judges: arbitrators, he said, are subject to the same 'market pressures as anyone who sells a service'.[47] Arbitrators are private actors who perform their function for private gain.[48] To do that, they must attract business.[49] What arbitrators do influences their market value. Their decision-making has—is meant to have—an effect on their market value and thus their income.

So much is background, and fairly obvious. But now to the real question: what sorts of decisions increase the market value and income of arbitrators?

(i) The market value of decisions on the merits

Surely, decisions that are good on the merits, that are legally accurate, sound and reasonable do increase the market value of the arbitrators who render them. And surely, they do so to a rather significantly extent. Surely then, great lawyers who make great legal decisions, who render great awards on the merits, make for arbitrators who have a high market value, make for successful arbitrators.

Cooter certainly thought so: for an arbitrator to maximize demand for his services, he must—and Cooter thought this was an 'obvious' point on which to build—'acquire a reputation for deciding cases on the merits', and for being particularly good at it.[50] This led Cooter to believe that a good economic strategy for an arbitrator is to 'pick a speciality and acquire skill at interpreting that particular body of law': an arbitrator should focus on making great awards, on the merits, in this particular area of law because she is particularly proficient in this area of the law.[51] Contrariwise, conspicuous failures in delivering good awards on the merits, one would expect, should lead to a fairly quick and strong reaction of the market in moving to other offers, to other arbitrators. After all, in arbitration, there is considerably

47 Robert D Cooter, 'The Objectives of Private and Public Judges' (1983) 41 Public Choice 107, 107.

48 Andrew T Guzman, 'Arbitrator Liability: Reconciling Arbitration and Mandatory Rules' (2000) 49 Duke Law Journal 1279, 1302–03.

49 Christopher R Drahozal, 'Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System' (1999–2000) 9 Kansas Journal of Law and Public Policy 578, 588.

50 Cooter (n 47) 109–10.

51 ibid.

more supply of arbitrator work than demand, which should lead to robust market reactions.

Sensible, is it not?

And yet . . . . And yet there are reasons to doubt that legally proficient arbitral decision-making on the merits greatly contributes to the market value of an arbitrator. In commercial arbitration, the market remains mostly unaware of any unfortunate substantive decision-making. Awards are generally not published and, therefore, rather rarely subject to independent scrutiny. Things are not even so different in investment arbitration, where awards are fairly routinely published and dissected *ad nauseam*.

Consider, for instance, that Federico Ortino, an author by all means considerate, balanced and respected in the field, identified a number of arbitral decisions as 'egregious failures', produced by arbitral legal reasoning that was 'manifestly contradictory, inconsistent or practically non-existent'.[52] And what was the reaction of the market to such naming and shaming?

Nothing conspicuous. The relevant arbitrators seem to have faced no immediate and commensurate decrease in their appointments. And notice: investment arbitration is the luxury class of arbitration, one of its more demanding, high-profile, high-value varieties. There the expected standards of good arbitral decision-making on the merits should be highest.

And consider the number of arbitrators with a purely commercial background sitting as investment arbitrators. Whence the idea that they would be the most likely to exhibit great expertise in applying international law to the merits of the case?

And so it is that it bears asking: is arbitration really all that much about great lawyering on the merits? Should a party want, as an arbitrator, someone who renders awards on the merits exhibiting great lawyerly acumen, or rather someone who is as likely as possible to make that party win the case? Here is what William Park—himself an arbitrator possessing quite extraordinary lawyerly acumen—has to say about it: 'Publicly, lawyers talk about the proverbial good arbitrator who will be honest and intelligent. Yet in evaluating candidates to sit in their own cases, they doubtlessly hope for someone well-disposed to their arguments.'[53] Put bluntly, far more bluntly than what can be attributed to Park, is there really such a thing as an unproficient arbitrator who sees the dispute the way you, the party, see it? What, indeed, is wrong with a foolhardy decision that makes you win the case—so long, of course, as it does not raise grounds for annulment?

And what do studies on the triggers of arbitrator appointments tell us? Let me mention just two such studies, two fairly recent ones.

The first is something I conducted with Robert Kovacs a few years ago on commercial arbitration. The study was slightly complex, but the point was not: neither specialization of an arbitrator in the substantive area of law relevant to the dispute, nor an arbitrator's past decisions are significant factors in the selection of arbitrators.

52 Federico Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 Journal of International Dispute Settlement 31, 31.

53 William W Park, 'A Fair Fight: Professional Guidelines in International Arbitration' (2014) 30 Arbitration International 409, 413.

Participants in commercial arbitration, our findings suggested, seem to be primarily looking for dispute resolution managers: individuals who deliver a nicely handled procedure, with little concern for the expected quality of the substantive outcome.[54]

The second study, by Sergio Puig, dealt with investment arbitration. It came to the conclusion that the primary trigger for appointments in investment arbitration is the arbitrators' social capital (the preferential treatment accorded between members of a group or, brutally put, who they know) combined with market collusion (keeping new entrants at arm's length to reduce competition on the supply side).[55] The trigger is not proficiency in legal interpretation.

In other words, decisions of great lawyerly acumen on the merits do not seem to significantly increase the market value and income of arbitrators. There is not all that much economic incentive for arbitrators to produce good decisions on the merits. It would follow that, from the law & economics perspective adopted in this article, pursuing the objective of rendering legally good, accurate, awards on the merits does not seem to be a particularly important factor of arbitral decision-making.

Yet, this not the whole story of the relation between decisions on the merits and appointments. How such decisions are argued may well play a role for appointments, though not in the way conventional wisdom would make us think.

Given the importance of social capital underscored by Puig, it would seem plausible that following arbitral precedents positively contributes to receiving appointments. The point is simple: who does not like to see one's decisions endorsed by other tribunals? Following precedents, then, would help to build social capital with those arbitrators whose decisions are followed. Referencing precedents would help nurture social relations among arbitrators, just as referencing academic publications helps nurture social relations among academics. Or, seen from the other side, who has not heard an arbitrator complain about the fact that another arbitrator has not followed or, worse, criticized his decisions, and then swear to exact social sanctions against him ('he will never get another referral from me!')?

(ii) The market value of procedural decisions

Decisions on procedural questions would seem to be more likely than decisions on the merits to impact the market value, and thus the income, of arbitrators.

First of all, specialization in the law and practice of arbitration and management abilities seem to be the two most significant factors for the selection of arbitrators.[56] Parties, counsel and arbitrators, when choosing (other) arbitrators, appear to highly value dispute resolution managers who do not mess up the procedure. Individuals who do not allow the arbitration to get derailed. Individuals who make good procedural decisions.

It is also less difficult for the market to gauge the value of arbitrators in regard to their procedural abilities, than in regard to their ability to make decisions on the

54 Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth' (2012) 28 Arbitration International 161.

55 Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law, 387.

56 Schultz and Kovacs (n 54).

merits of a case. Indeed, in general, it is comparatively easier to discriminate between derailed and non-derailed arbitrations, than to discriminate between substantively good and bad arbitration outcomes. This makes it easier to assess the quality of procedural decisions than to assess the quality of substantive decisions. This in turn facilitates the diffusion of information regarding procedural decisions.

So good procedural decisions is what the arbitration market would seem to value and to be reasonably able to obtain information about. Arbitrators could, then, improve their value on the market, improve the attractiveness of their arbitration services, by improving their proficiency in running clean, efficient arbitrations. This would increase the chance of the arbitrator in question to get a slice, or a bigger slice, of the existing pie. It amounts to competitively improving the supply while demand stays constant.

Arbitrators can also increase the demand for arbitration services. They can increase the size of the existing pie. Procedural decisions are one instrument to do this: simply allow new types of cases to go to arbitration by making it easier for these types of disputes, or indeed for all types of disputes, to go to arbitration. How to do this? For instance by lowering jurisdictional or admissibility requirements.

A modicum of knowledge of the recent history of investment arbitration is enough to recollect examples of decisions on jurisdiction that were controversial from a legal perspective (think of small bondholders,[57] or of Most-Favoured-Nation clauses[58]), but uncontroversial from a business perspective—the arbitrators' business perspective (more 'jobs' for arbitrators). From a law & economics perspective, relaxing jurisdictional and admissibility requirements is, in most situations, a very sensible thing to do for arbitrators, at least in the short term. In the long term, this may backfire: consider, for instance, the measurable harm in investment flows caused to states by letting investment arbitrations pass the jurisdictional phase even when they have no case on the merits.[59] More arbitration is not necessarily good for everyone, and it may in particular not necessarily be good for some of those whose consent makes arbitration possible—states. In sum: the idea that 'everyone should have a day in court' may well be a short-term economically sensible extra-legal factor for arbitrators to take into account in their decision-making, but it is not without long-term negative externalities.[60]

(iii) The market value of outlandishly bad decisions

Recall Oscar Wilde: 'The only thing worse than being talked about is not being talked about.' Could this possibly also be true for arbitrators?

Consider this: many decisions, on the merits or procedure, which would be considered incompetent, even appalling, by every objective standard, are in fact good for someone. Derailing an arbitration may actually be what the respondent wants.

57 *Abaclat and others v Argentine Republic*, ICSID Case No ARB/ 07/5.

58 *Impregilo SpA. v Argentine Republic*, ICSID Case No ARB/07/17; *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8; *Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7.

59 Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment' (2011) 65 International Organization 401.

60 Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, and Claire Balchin (eds), *The Backlash Against Investment Arbitration* (Kluwer Law International 2010).

Grossly massaging the law until it relaxes and gives way to a jurisdictional green light may be prized, by the claimant. Even being corruptible must please certain parties.

Contrariwise, what is certain is that someone who is not known at all is very unlikely to be suggested, and thus appointed, as an arbitrator. Is it not so then, that what counts above all is to be on the map? There are economic reasons to prefer being a generally unpalatable somebody than a generally palatable nobody.

(iv) The value of arbitral decisions on markets other than arbitral appointments

I must acknowledge a limitation to what I have done so far. So far, I have focused on the economic incentives implied by arbitrators seeking to be 'picked and picked again', as Christopher Drahosal puts it.[61] But for many arbitrators, being picked is not, economically speaking, the most important incentive.

Most arbitrators have other sources of income, typically legal counsel work, which usually are more lucrative, both in total and for equal time and effort. For such arbitrators, which likely form the great majority of arbitrators, it makes no economic sense to engage in certain behaviour (typically making certain decisions) that increases their chance of being picked but reduces their chance of being used as counsel.

If potential future clients represent a dominant share of an arbitrator's long-term income—an income greater than the income generated by appointments—then it is in most cases economically sensible to privilege these clients' interests over those of the parties to the case. This, however, assumes that these interests are antagonistic, which is not necessarily the case.

The relevant extra-legal factors of decision-making, here, are all those that allow an arbitrator to use the voice, the grandstand that an arbitration gives him to profile himself positively, or refrain from profiling himself negatively, for his other economic activities. Pleasing the sort of clients that law firms typically tend to have would seem to be a typical generator of such extra-legal factors of arbitral decision-making.

C. An Arbitrator's Non-Financial Interests in Decision-Making

My argument so far has focused on financial objectives that arbitrators may pursue through their decision-making. Financial objectives that may influence, as extra-legal factors, their decision-making. Law & economics, and in particular law & economics studies on judicial behaviour, provided the framework that helped us think of what such financial objectives could be.

But of course arbitrators, like everybody else, do not only pursue financial objectives, just as law & economics is not only about financial incentives and constraints. Non-financial objectives are also good candidates for what influences, as extra-legal factors, the decision-making of arbitrators. What, then, could these non-financial interests be that arbitrators pursue, and how do these interests play out in the current ecosystem of arbitration? This will be the task for this section.

I should recall at this juncture a filter I had introduced earlier, be it only because it is not habitual in the law & economics tradition: I focus, in this article, on prudential reasons-for-action, not on moral reasons-for-action. This means that I limit

61 Drahozal (n 49) 588.

myself to factors possibly influencing arbitral decision-making which are not focused exclusively or primarily on other people's interests. This excludes, for instance, the pursuit of justice itself in arbitral decision-making. I obviously do not suggest that pursuing justice cannot or usually does not influence the way arbitrators decide cases. It would seem very rational to assent to the idea that it in fact usually does.[62] But determining what exactly 'doing justice' means for an arbitrator, and how different ideologies of justice shape this understanding, is simply too much for this article.[63] This exclusion also covers desires to change the world for the better and indeed an arbitrator's political vision on society.[64]

In this section, I will focus on just two non-financial interests that may influence an arbitrator in her decision-making: the pursuit or maintenance or a certain reputation, and the avoidance of the reprimand that an annulment or denial of enforcement would cause.

(i) Reputation

For most people, maintaining a good reputation is important. For arbitrators it certainly is important instrumentally, as the previous section suggested: reputation has financial value. It helps to source work, to generate income. But reputation is, for most people, also an objective in itself: few people are entirely insensitive to peer recognition. Reputation has independent value. Judges, for instance, seem to care significantly about all sorts of statistics, even when these statistics have no financial impact, no impact on promotion or their career in general.[65] This can go far: some judges in fact acquire a reputation that amounts to fame. They become stars. Attaining and maintaining that fame, that stardom, it would seem, does influence judicial behaviour, including judicial decision-making.[66]

Now what about arbitrators? Do some of them acquire a level of reputation that amounts to fame, to stardom? The answer depends of course on how high we place the bar on reputation before it becomes fame. And it depends on the community we consider.

The best-known arbitrators are clearly well known to other arbitrators and to people acting as counsel in arbitration. So much would be true in mostly every professional community. But in many cases, their fame extends even beyond these circles, in the first place to people who would like to join these circles: typically practicing lawyers and law students who want to work in the field of arbitration and, therefore, have to acquaint themselves with the social mechanics in that field. In these communities, arbitrators are indeed nothing short of stars.

62 See for instance William W Park, 'Arbitrators and Accuracy' (2010) 1 Journal of International Dispute Settlement 25.

63 For a classic reference on these questions, see Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (2nd edn, CUP 2005).

64 These factors are usually discussed in law & economics studies on judicial behavior: see Foxall (n 43) 181 and Posner (n 43) 1056.

65 Posner (n 43) 1271. Arguably, this behaviour of judges is in fact best explained as an indirect, fairly unconscious way to measure the implicit demand for their services, as Cooter maintains (Cooter (n 47) 107). It would thus be a way to measure their economic value for society. Yet, it is not a direct economic, income-maximizing incentive.

66 Posner (n 43) 1056.

Arbitrators may also be famous in communities that are interested in the effects of their work: international organizations, non-governmental organizations academics beyond the field of law, and even journalists often are interested in the contributions of investment arbitrators to investment law, to general international law, to the economics of foreign investments, to the international political economy of foreign investments and so on.

But what exactly are they famous for? In the main, it would seem to be that they are famous for being arbitrators, that they are famous for having secured a number of arbitrator appointments. Their reputation is that they are successful arbitrators. Their decision-making would be influenced by the objective of being reappointed, in noticeable cases if possible, not for financial reasons, but for the reputation that follows from being appointed.

Now let me make a distinction: are we talking about fame or prestige? I mean them both in the context of reputation. Fame, in the sense I want to use it here, means to be very well known. It is a question of magnitude. It is quantitative. Prestige is different in two respects. First, it attaches to a function: it refers to a form of reputation that follows from one's position, from the function one serves. It refers to the reputation that attaches to an individual because she serves as an arbitrator. It obtains regardless of how that function is actually served by the individual in question. Secondly, prestige is qualitative. It is a positive form of reputation. It entails respect and admiration.

Hence the question: is there prestige in being an arbitrator? What is the reputation that attaches to the function of an arbitrator, and thus to an individual purely by means of being an arbitrator? To what extent do respect and admiration attach to being an arbitrator?

From a 30,000 foot view, there is something inherently prestigious in every dispute resolution function. This is, in fact, often taken as a given in behavioural economic work on the judiciary.[67] Granted, it seems commonsensical that one of the motivating factors for becoming a judge in a state court is the prestige that is associated with the position. Holding a position as a judge does indeed confer a certain level of respect and prestige and social standing in many societies. These are caused by the community's recognition that this individual exhibits the requisite symbolic capital to exert a function that has significant socio-legal consequences for individual parties and, in the aggregate, for the community as a whole. Likewise, there is something inherently respectable in being chosen by members of the international commercial community to decide their disputes.

But let us start the descent from our 30,000 foot view. One proxy to assess the prestige that attaches to the function of an arbitrator may be the evolution of the ideal-types of arbitrators. Recall that the so-called 'first generation' of arbitration, in

67 Linz Audain, 'The Economics of Law-Related Labor V: Judicial Careers, Judicial Selection, and an Agency Cost Model of the Judicial Function' (1992–93) 42 American University Law Review 115, 120–21 ('Because prestige, power and high incomes are commonly available amenities for partners in large law firms and because those partners are willing to take substantial reductions in income to become judges, it follows that the judiciary confers more prestige (and power) on these individuals than is available to them in the law firm context.'); Cooter (n 47) 129 ('In the absence of a compelling alternative, a reasonable hypothesis is that self-interests judges seek prestige.').

the 1970s, were cast by Yves Dezalay and Bryant Garth as 'Grand Old Men'.[68] Such individuals were chosen because of their personal prestige acquired before becoming an arbitrator. They brought that prestige to the collective representation of what it is to be an arbitrator. To put it simply, who would not want to be associated with a group of Grand Old Men (assuming you are a man, that is)? There is—was—prestige in being a Grand Old Man.

The second generation of arbitrators, in the 1990s, were cast as 'Technocrats'. These were acrobats of arbitration law and procedure, highly specialized experts in the technical intricacies of arbitration. Garth and Dezalay considered them, considered this ideal-type to be still 'rather glamorous'.[69]

How about today? If the current generation of arbitrators is indeed best described as 'Dispute Resolution Managers',[70] the question becomes: how much glamour, inherent respect and admiration do managers typically get? Does it differ, to take extremes, from the prestige of being a Grand Old Man (or Woman)? The answer seems sadly obvious.

All of this is very much simplified, of course. The very nature of ideal-types is to be analytical constructs. But the point remains: the prestige, the admiration and respect, aroused by being an arbitrator may well be quite different today than it was 40 years ago.

The point can also be made from another angle: investment arbitration, for all the fame it brought to arbitrators and the arbitral function, may well have hurt the function's prestige.

To be sure, investment arbitration has first altered the relation between arbitrators and fame. Its rise gave arbitrators an extraordinary platform for publicity. Notice how the website of the International Centre for Settlement of Investment Disputes (ICSID), where it lists current and past arbitrations, is used as a Who's Who in arbitration. Today even the layperson can easily find out who arbitrates disputes between household name companies and states. And the stakes! Investment arbitrators decide, mostly in cases in which the arbitrators' identity is public and publicized, matters of unprecedented import (on average): the financial stakes are often high, and so are sometimes the social, environmental and public health stakes.

But this is a double-edged sword. As the world at-large came to realize that certain effects of investment arbitration can be devastating, the notorious backlash against investment arbitration developed and grew.[71] The very word 'backlash' is probably suggestive enough to point out the changing social view of arbitration.

Here we must return to a distinction I sketched above between two different communities, or constituencies, that arbitrators appeal to: on the one hand, arbitration

68 Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (The University of Chicago Press 1996) 21.

69 ibid 8.

70 Schultz and Kovacs (n 54).

71 See for instance Osgoode Public Statement on the International Investment Regime, 31 August 2010, Art. 14: states "should take steps to replace or curtail the use of investment treaty arbitration; and should strengthen their domestic justice system for the benefit of all citizens and communities, including investors." See also Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010).

practitioners and would-be arbitration practitioners; on the other, the public at large that looks at arbitration.

The first constituency, clearly, is narrower than the second. It is composed essentially of lawyers—law practitioners, law students, even academic lawyers. In this group, to put it bluntly, there is no backlash. Backlash stories are simply misunderstandings of arbitration (a textbook case of Bourdieusian symbolic violence if there ever was one). In this group, one may be (or, more precisely, one may carefully build a reputation for being) investor friendly, or well disposed to state public interest, or a neutral player, but one is not against the system itself of arbitration. In this group, the metier of arbitrator is still a high achievement.

But, arguably, the perceived identity of arbitrators is no longer so exclusively shaped by this natural habitat. The perception of outsiders starts to matter: the perception of this second community I flagged, the public at large, which is becoming a constituency. At every conference, on every listserv, on every blog run by arbitration practitioners and would-be arbitration practitioners, forceful reactions abound to reports of campaign groups, empirical studies of political scientists and stories of journalists. These reactions, in many ways, seem unnecessarily forceful. Why worry? Most of the system is not threatened in any way. They rather seem to be reactions to something that went through to the arbitrator's perceived identity. The constituencies of an arbitrator's reputation seem to be expanding.[72]

Let us not kid ourselves: investment arbitration (and arbitration in general is all too easily assimilated to it) is despised in many social circles.[73] There are areas in this world, social and geographic areas, where it is probably advisable not to say that one is an investment arbitrator, and stick to discussing the weather. Just as it did no good to say that one was an investment banker at the height of the economic crisis. Whether this disagreeableness is justified or not is irrelevant.[74] What is relevant is that it exists.

What does this mean? It means that the publicity arbitrators get from practicing their trade grows, but that the social reputation they acquire in doing so, the prestige they derive from it, may be decreasing rather than increasing. It may be becoming less appealing, rather than more. Can it go so far that the reputation individuals acquire from being an arbitrator shifts from being a gain, a utility, to being a cost? Will the decision-making become more cautious? The incentives for it seem to be growing.

(ii) Avoiding reprimand by an annulment or denial of enforcement

For an arbitrator, avoiding annulment or denial of enforcement of an award is likely a fairly strong factor in decision-making. Classic economic theory accents the

72 On the variety of actors shaping the public perception of arbitration, its prestige and its lack of prestige, see Gaillard (n 2) 7–10, and his reference, on page 12, to the 'important function of legitimizing the field vis-à-vis outside players'.

73 Eberhardt and Olivet (n 2).

74 For a study that nibbles at the question, Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 European Journal International Law 1147.

importance for judges not to have their decisions overturned by superior courts.[75] Arbitrators have a similar worry—let us not fret here over the distinction between appeal (of judgments) and annulment (of arbitral awards), for this is a difference that makes no difference for the argument we want to make.

The point really is simple: arbitrators are almost inevitably in effect reprimanded when their awards are annulled, set aside or even, with many qualifications, denied enforcement. In ICSID arbitrations, *ad hoc* annulment committees often make a point of castigating the arbitral tribunal for what the committee sees as a reproachable lack of interpretive proficiency of the applicable legal provisions.

The question of course is not whether the reprimand is justified or not—certain annulments are barely disguised political actions, or deplorable manifestations of judicial incompetence. Essentially, barely anyone likes to see their work, in this case often months if not years of work, thrown to the winds, with accompanying implicit if not express scolding.

The objective of avoiding such reprimand may coincide with legal factors requiring the same decision-making. But it need not. Courts annulling awards or denying enforcement do not necessarily apply the law competently and impartially. Now granted, legal and extra-legal factors would largely be aligned in most situations.

2. CONCLUSION

Yves Dezalay and Bryant Garth, the authors of what may well be the one book that contributed most to our understanding of the workings of the world of arbitration,[76] say this in a forthcoming book chapter on the development of international arbitration as a transnational legal initiative: 'The concepts and categories produced by lawyers and allied professionals to account for and justify legal practices obfuscate rather than clarify origins and evolutions that among other things produce the legitimating categories and concepts.'[77] Ouch. We lawyers, with our traditional concepts and categories, obfuscate our understanding of arbitration more than we clarify it. Perhaps they have a point.

As lawyers, we tend to be content, even proud, to leave the human, non-legal-rational elements of adjudicatory decision-making to the invisible hand. We make the hand invisible by looking the other way. Or we indeed make up a nice story and tell potential clients what we believe they want to hear: if you appoint us as arbitrator, we will apply the law, we will decide based on legal factors. And on nothing else. We do not take anyone's interests into consideration and certainly not our own; when we interpret, we interpret mechanically. In fact, we are not really human beings who respond to incentives, not when we adjudicate cases.

Perhaps this is not a good idea. Not even our students believe this any longer. Perhaps we should be candid, acknowledge what is really likely to influence the

75 See, for example, Andrew J McClurg, 'The Rhetoric of Gun Control' (1992) 42 American University Law Review 53, 62; see also Posner (n 43) 14.

76 Dezalay and Garth (n 68).

77 Yves Dezalay and Bryant G Garth, 'Constructing a Transatlantic Marketplace of Disputes on the Symbolic Foundations of International Justice' in Gregoire Mallard and Jerome Sgard (eds), *Contracting Beyond Boundaries: Private Regulation of International Trade and Finance in the Twentieth Century* (CUP forthcoming) page 1 of manuscript.

decision-making of arbitrators—the historian Lawrence Friedman, who does not beat about the bush quite as much as I do, would call anything else 'antediluvian' research[78]—yet resist a rhetoric of extremes, which uses argumentative fallacies to argue that arbitrators either exclusively apply legal factors in their adjudicative decision-making, or exclusively extra-legal factors.

Undoubtedly there are many more extra-legal factors that influence arbitral decision-making than those discussed in this article. But it was never meant to be more than an article-length laconically selective survey to debunk argumentative fallacies, demonstrate the explanatory power of studies drawing on legal realism generally speaking (and in this case studies drawing more specifically on simple law & economics methods), and mark places where candid work needs to be done. I by no means argue that the plethora of black letter law, doctrinal works on arbitration are not useful. Collectively they are crucial. But they alone will never allow us to fully understand arbitration or how arbitral decision-making works. The same of course holds true for legal realism. As Dan Bodansky puts it, 'legal realism does not answer every question. It offers important insights, but so do its critics. The debate between supporters and opponents of legal realism reminds me a bit of the blind men and the elephant. Each senses an aspect of the truth, but each has only a partial understanding'.[79] Now of course, the celebrity-seeking mechanisms and the attempts to source work in arbitral practice described in this article influence arbitration scholarship probably just as much, if not more, than arbitral decision-making. This likely means that seeking an *understanding* of international arbitration will remain a secondary project for quite a while.[80]

78 Lawrence M Friedman, *American Law in the Twentieth Century* (Yale University Press 2002) 493.

79 Bodansky (n 23) 268.

80 I elaborated on this a bit in my editorial to this issue of the journal: Thomas Schultz, 'The Evolution of International Arbitration as an Academic Field' (2015) 6 Journal of International Dispute Settlement 229. See also, more generally on the objectives actually pursued in legal academia, Pierre Schlag, 'A Comment on Thomas Schultz's Editorial' (2014) 5 Journal of International Dispute Settlement 235.