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International Commercial Courts

Possible Problematic Social Externalities of a Dispute Resolution Product with Good Market Potential

THOMAS SCHULTZ AND CLÉMENT BACHMANN*

2.1 Introduction

International commercial courts are likely to work well as a consent-based international dispute resolution mechanism, as something private autonomy will desire, as something serving law's industry. They come across as easy to like, easy to sell, easy to buy. Think of them as something introduced by Jony Ive – the deep, soothing, British-accented voice in Apple's commercials who makes complex technology understandable, oneiric, something that will finally make your life right. Some adjustments, probably, will be needed here and there for the hybrid courts, but overall, they appear likely to be a fine new product of the arbitration industry at large. Hybrid justice has excellent marketing characteristics, making international commercial courts quite alluring 'litigation destinations', as Pamela Bookman puts it.[1] If there existed something like shares of hybrid international commercial courts in general, they likely would be a rather safe investment. Then again, perhaps the shares should not be held for too long.

In the longer run, the wider social implications of privatized dispute resolution might become disruptive and upset the field. Dispute

* An earlier version of this chapter, making some of the same points, was published as Thomas Schultz and Clément Bachman, 'A Wig for Arbitrators: What Does It Add?', in Rita Trigo Trindade, Rashid Bahar and Giulia Neri-Castracane (eds.), *Vers les sommets du droit, Liber Amicorum pour Henry Peter* (Schulthess 2019) 105. This chapter is a substantial revision of that earlier version.

[1] Pamela Bookman, 'The Adjudication Business' (2020) 45 Yale Journal of International Law. Available at: https://digitalcommons.law.yale.edu/yjil/vol45/iss2/1.

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resolution mechanisms, international commercial courts and arbitration included, are not *just* dispute resolution mechanisms. Now, in strict twentieth-century black letter, neat logic-oriented, systems-directed, category-focused legal thinking, perhaps they were.[2] In that way of thinking, the parties choose to go to arbitration or to hybrid dispute resolution and, if they choose freely, that is that. Like what happens between consenting adults, it is not legitimately anyone else's business. Arbitrators and the semi-private judges of hybrid courts owe it to the parties to respect their consent and if they do not, there are doctrines, rules and the like to annul the decisions and oppose their enforcement. In more contemporary legal thinking, however, things tend to be different (not, of course, that there is only one form of contemporary legal thinking). There we may try to remember that law, lawyers, legal scholars and dispute settlement institutions exist to serve men and women in communal life; not the reverse, where men and women serve law's neatly logical internal perfection and its makeshift legitimation through self-injected constitutionalization, or even serve law's industry. There, dispute resolution institutions are also institutions which sustain or support a certain social order, with its own cultural features, its own values, norms and beliefs, and its own economic arrangements and distribution of wealth. Once we think of dispute resolution institutions that way, it is hard not to consider that individuals and societies tend to become, generally speaking, ever more likely to react to social orders which edge away from their own cultural and economic aspirations. A simple example is the growing backlash against investment arbitration, which may be understood as a mounting reaction to the social order this form of dispute settlement generates – a reaction that has started to spill over into a guarded attitude towards arbitration in general, into the first

[2] This kind of thinking was epitomized by International Court of Justice Judge Gerald Fitzmaurice. 'The real fault of the lawyers', he insisted, 'is that they have not, as lawyers, been single-minded enough, and have not resisted the temptation to stray into other fields', because 'the value of the legal element depends on its being free of other elements or it ceases to be legal'. Gerald Fitzmaurice, 'The United Nations and the Rule of Law' (1953) 38 Transactions of the Grotius Society 135, 140, 142. Pierre Schlag calls this way of thinking the grid aesthetic: 'Law is pictured as a two-dimensional area divided into contiguous, well-bounded legal spaces. These spaces are divided into doctrines, rules, and the like. Those doctrines, rules, and the like are further divided into elements, and so on and so forth. The subjects, doctrines, elements, and the like are cast as "object-forms". . . . The grid aesthetic is the aesthetic of bright-line rules, absolutist approaches, and categorical definitions.' Pierre Schlag, 'The Aesthetics of American Law' (2002) 115 Harvard Law Review 1047, 1051. In sum, think orthodox twentieth-century private international law scholarship.

signs of a disruption of the overall field of arbitration.[3] A similar pushback may well be fuelled by the rise of hybrid commercial justice. Dispute resolution is not simply something which happens between consenting adults in a closed room (or another closed space, for that matter) and which stays there.

In the first section of this chapter, we will review the main features that give hybrid justice its appeal as a product on the dispute resolution market. We will also show, briefly, how the arbitration industry uses these features in business campaigns and academic discourses advertising hybrid international commercial courts. The second section of the chapter then explains why these features are likely to be more oneiric than real and that the reality is likely more complicated and warrants more caution. This will mean that a strong push in favour of hybrid international commercial courts might eventually trigger a commensurate pushback against privatized dispute resolution in general.

Brutally simplified, the overall cautionary story this chapter tells is this. Too much privatization of justice, through both international commercial courts and international arbitration, may well have problematic social externalities: they may well reinforce a specific social order against which people may well revolt. And this backlash might cause more harm to privatized justice than the short-term benefits these developments might bring to its industry. As Sir William Blair put it, in a slightly different context, 'some of the vast amount written on the subject seems more of a sales pitch than an attempt at analysis'.[4] Pretending and wearing masks may be fine, it may even be intrinsic to dispute resolution, necessary for it, but we should be wary not to get caught in our own game, not to believe it ourselves.[5]

2.2 Appealing Features of Hybrid Justice

Two of the key marketing characteristics of international commercial courts, two of the main features that make them so appealing, revolve around the power and the legitimacy of courts, and the fact that they

[3] See, for instance, Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2918) 29 European Journal of International Law 551.

[4] William Blair, 'Contemporary Trends in the Resolution of International Commercial and Financial Disputes', Institute of Commercial and Corporate Law Annual lecture delivered at Durham University, 21 January 2016, 4.

[5] Thomas Schultz and François Ost, 'Shakespearean Legal Thought in International Dispute Settlement' (2018) 9 Journal of International Dispute Settlement 1, 12–18.

participate in what is presented as a race to the top in international dispute resolution.

The point about the power of courts is simple: international commercial courts can circumvent the problems of arbitrability and joinder. For instance, the Singapore International Commercial Court has both the authority to resolve non-arbitrable matters (such as special torts arising from contract, and international intellectual property or trust disputes) and the power to join third parties without their consent.[6] Michael Hwang puts it clearly with regard to the question of arbitrability: 'The target client pool of the SICC will be parties which have disputes (actual or potential) with their counterparties, and who do not immediately think of arbitration as an option. They do not wish to have their cases heard by national courts for various reasons, and yet have reservations about certain features of international arbitration. These reservations would include: . . . the restrictions on the scope of arbitration because of the doctrine of arbitrability.'[7] Dalma Demeter and Kayleigh Smith make essentially the same point, but about joinder. International commercial courts, they argue, are '[t]argeting cases where joinder of third parties is required'.[8] The idea is simple: the intended clients of hybrid justice here are those who do not like courts for some reason, but who do not buy into arbitration either, because of questions of scope.

Calling on the image of Jony Ive again, one might think here of customers who do not like computers for some reason, and yet have reservations about smartphones because their screens are too small for what they want to do with them. Give them a smartphone of sorts with a bigger screen. So we have the iPad, a hybrid computer-smartphone. The logic is simple and effective. Marta Requejo Isidro is straightforward about it: 'International commercial courts are public courts. As such, they are apt to provide an "adjudicative offer" in ways arbitrators are not.'[9] Offers that the competition cannot beat. Psychologically (sales strategies owe much to psychology), one might take this one step further and understand international commercial courts as institutions which are appealing because they are less loose, less floating, than some consider

[6] Justice Quentin Loh, 'The Limits of Arbitration' (2014) 1 McGill J Disp Resol 66, 81.
[7] Michael Hwang, 'Commercial Courts and International Arbitration: Competitors or Partners?' (2015) 31 Arbitration International 193, 196–7.
[8] Dalma R. Demeter and Kayleigh M. Smith, 'The Implications of International Commercial Courts on Arbitration' (2016) 33 Journal of International Arbitration 441, 445.
[9] Marta Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) (2) *MPILux Research Paper Series*, 26.

arbitration to be. All these theories about delocalized arbitration and about arbitration operating within its own transnational legal system are not to everyone's liking; arbitration comes across, to some, as excessively loose. Hybrid justice psychologically brings arbitration back down to earth, to comfortable notions of territoriality, to the fantasies of power and control associated with territory. In this they ride the general societal anti-globalization wave currently in fashion.[10]

Then there is the appeal of the legitimacy of courts. Legitimacy has a number of meanings, so that to situate the argument a first brief discussion of the concept is needed at this juncture, to which we will return. The sort of legitimacy we mean here is one that justifies the creation of new dispute resolution fora, one that justifies the choice of the parties to resort to hybrid justice and the ensuing power of third neutrals over the parties. This sort of justificatory legitimacy relies on standards which resonate with the value orientation of the particular audience to which the thing in question is to be justified. What makes something legitimate, in this particular sense of the concept of legitimacy, is whether this something is attuned to the particular rhetorical sensitivities of the audience for which the something is meant to be legitimate.[11]

Put differently, it is the alignment with trends and the use of signalling buzzwords that marks something as legitimate in that sense. Think of the word 'organic' as a food label. Producing more organic food, allowing supermarkets to use all manner of strategies to sell more of it, is 'legitimate' in that sense, because 'organic' is good and 'chemical' bad, because 'natural' is right and 'manmade' wrong. The ideal product then, from the point of view of the food industry, is one that would barely need to be changed, but could now come with the label 'organic'. Now you pay more for it, because it comes with the label and you feel good about it.

Likewise with hybrid justice – at least to some extent. The signalling buzzword, the elevating label, here, is 'court'. It is a buzzword because it evokes the state, the opposite of privatization. Just as 'manmade', 'technology', 'science' and 'the scientific method' and 'experts' were for a long while markers of civilization and progress, of legitimate developments, and then at

[10] Georgios Dimitropoulos, 'International Commercial Courts in the "Modern Law of Nature": Adjudicatory Unilateralism in Special Economic Zones' (2021) 24 Journal of International Economic Law 361.

[11] For a longer and clearer discussion of these questions, see Thomas Schultz, 'Legitimacy Pragmatism in International Arbitration: A Framework for Analysis', in Jean Kalicki and Mohamed Abdel Raouf (eds.), *Evolution and Adaptation: The Future of International Arbitration*. ICCA Congress Series No. 20 (Kluwer 2020) 25.

some stage shifted to quite the opposite, 'privatization' was for a long while a marker of better, more efficient, more legitimate dispute resolution services, but now seems to be shifting to quite the opposite, rightly or wrongly. Increasing criticism is heaped on arbitration, understood as an epitome of sorts of privatized dispute resolution, as it becomes clear that the ethos of arbitration is very much centred on the arbitration industry itself and mostly pays lip service to external interests and values.[12] In other words, as it becomes clear that arbitration is too 'private', the opposite values become the new standards of legitimacy, and the associated buzzwords become the markers of that legitimacy. 'Court', 'public', 'transparency', 'the state': these are the new trending buzzwords, the new hashtags, the new labels of legitimate dispute resolution services. And, again, the ideal product is one that could be changed just a little but could now come with these new labels. Hybrid justice, in that sense, is a godsend. The arbitration industry's joy is understandable.[13]

So far, then, the simple idea is this: the word 'arbitration' is increasingly a red flag pointing to critical discourses in politics, in the media, in general societal discussions. The corresponding institutional symbolic capital is therefore transferred to its opposite of sorts: courts.

Beyond this simple idea, where one institution's loss in symbolic capital is another's win, insofar as the two institutions are usually presented as opposites, there seem to be at least two reasons why courts, and thus international commercial courts, are credible depositors of the transferred capital, two reasons why they indeed appear more legitimate than arbitration. Both reasons revolve around different forms of public interests – again a symbolical opposite of privatization.

Before we turn to these two reasons why hybrid justice would take more public interests into consideration than arbitration and is thus more legitimate, we should point out that the two reasons seem far more effective in the long run as marketing strategies than the earlier argument that the resolution of private disputes does not, in fact, entail any public interests. The typical argument goes as follows, here in the words of Gary Bell:

> There are instances where arbitral tribunal, in deciding commercial cases must also decide issues of public law and public policy and this may indeed raise issues of legitimacy – why should private individuals

[12] Thomas Schultz, 'The Ethos of Arbitration', in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press 2020) 235.
[13] Schultz and Bachman, 'A Wig for Arbitrators', 105–6.

> appointed by non-state entities decide issues of public law and public policy, one may ask. However, in the vast majority of commercial arbitration cases there are no such public law issues. In any event, the SICC as its very name indicates, is about commercial activities, not investments, and it is very unlikely that an investment dispute in which a sovereign state is involved would come to the SICC. Therefore, the legitimacy of the SICC is to be compared to the legitimacy of commercial arbitration which remains rather high.[14]

The red herring here is remarkable, when public interest becomes 'public law and public policy' and then merely 'public law' (which of course, true to the grid aesthetic, omits unorthodox scholarship on the public implications of, for instance, private contract law, which goes back at least to the 1930s[15]). In any event, it seems far more effective, as we will see, to acknowledge the involvement of public interests and then argue that these public interests are properly taken into account.

The two reasons go as follows. First, states are political entities, in the sense that they are instruments of 'who gets what, when, how', as Harold Lasswell would put it, defining politics.[16] They are a mechanism that transforms interest-based inputs (among other types of input) into an authoritative allocation of values (in the sense of things which have value, not in the axiological sense).[17] In that sense, they are a 'political system', in David Easton's understanding of that concept.[18] In fact, every social institution which turns interest-based inputs into an authoritative allocation of values and thus determines who gets what, when, and how is a political system, including arbitration.[19] But the difference between a state as a political system and arbitration as a political system is that states are expected to be open to a far wider array of inputs, to take into account a far wider array of interests. The whole idea of democratic states is that they aggregate a diversity of interests as great as possible, as representative as possible of all the individuals and communities whose values they allocate. As it becomes ever clearer that even the resolution of disputes which are technically of a private nature effectively has an

[14] Gary Bell, 'The New International Commercial Courts: Competing with Arbitration? The Example of the Singapore International Commercial Court' (2018) 11 Contemp Asia Arb J 193, 212.
[15] Morris Cohen, 'The Basis of Contract' (1933) 46 Harvard Law Review 553, 585–91.
[16] Harold Lasswell, *Politics: Who Gets What, When, How* (P. Smith 1950).
[17] David Easton, *A Framework for Political Analysis* (Prentice Hall 1965), 79–83.
[18] Ibid.
[19] Cédric Dupont and Thomas Schultz, 'Towards a New Heuristic Model: Investment Arbitration As a Political System' (2016) 7 Journal of International Dispute Settlement 3.

impact on the allocation of values far beyond the parties to the dispute, it becomes correspondingly clearer that what is needed to resolve these disputes is a 'political system' (in Easton's sense) which is open to the interest-based inputs of, ideally, all those whose values are allocated.

To put this in a way which is comprehensible from within the orthodox dispute resolution ontology: if arbitration caters essentially to 'the commercial community' but has effects on society at large, then it is a less good fit than a dispute resolution mechanism which is part of the state, which is by this token more likely to cater to wider audiences, at least a priori. To put this even more simply, if a dispute resolution mechanism has effects on society at large, then it should be designed as something that structurally reflects the interests of society at large. Courts, because they are part of the state, are precisely that. Arbitration, because it is a business dispute resolution system for business by business, is precisely not that. Or, to offer one last iteration of the same core idea, it is *the extent to which* a dispute resolution mechanism has effects on society at large (because they all do have *some* effect beyond the nominal parties in front of them) which determines *the extent to which* the mechanism should structurally reflect the interests of society at large. If arbitrations are few and far between, we may not need to worry about this, but the more arbitration expands the greater the concern becomes.[20]

Justice Quentin Loh essentially recognized as much in his promotion of international commercial courts. Instead of denying that public interests are at stake, he argued that international commercial courts, because they are courts and because they are thereby part of the state, can precisely handle these public interests appropriately. Here is how he put it. 'When the issue at stake affects the public interest – a more and more common occurrence linked to the proliferation of public-private contracts entered into by States or their emanations and private partners', then, he argues, dispute resolution fora with the name 'court' are a better fit.[21] 'Court', a dispute resolution mechanism by the public for the public, is the buzzword that invokes the oneiric image of public interest considerations.

The second reason why hybrid justice would take more public interests in consideration than arbitration is less important and probably comes straight from societal experiments with investor-state dispute resolution,

[20] Thomas Schultz and Thomas D. Grant, *Arbitration: A Very Short Introduction* (Oxford University Press 2021), chapter 6.
[21] Quentin Loh cited in Isidro (n. 9).

where many advance the understanding that international investment courts would be preferable to investment arbitration. The idea is simply that the more states are involved, the more *state* interests are taken into consideration. Not public interests, then, in the sense of interests of the broader public, but public interests in the sense of the interests of *states*. And not only the particular interests of the particular state involved, but also common state interests. Interests that states share because they are states.

The great thing, for the arbitration industry, about international commercial courts, about hybrid justice, is that these considerations do not have to translate into capitulation. The arbitration industry does not have to make what would be, in Lucy Reed's terms, 'an abject retreat'.[22] The idea of this 'retreat' is that arbitration, as an industry, may have gone too far, may have expanded too far into areas of significant public interest and sensitivity for which it was not meant, precisely because in terms of dispute resolution design it is suboptimal for the integration of public interests.[23]

To understand the dynamics of the situation, it is important to briefly pause here and notice the words just used, both the adjective and the noun: 'an *abject retreat*'. The admission that litigation is a dispute resolution mechanism that is perhaps better suited than arbitration to deal with certain kinds of disputes is presented as 'an abject retreat.' Such conquest language does not seem appropriate coming from the director of a university centre for international law – a research institute by nature meant to promote something nearing objective knowledge. (Consider the equivalent: a director of a university research laboratory in epidemiology who refers, in a scientific publication, to not using a given drug in the treatment of a given disease as an 'abject retreat' for that drug, while he sells this drug himself, directly, in addition to his employment as laboratory director.) Whether this is an instance of the 'post-shame age' in international law which Fuad Zarbiyev describes,[24] or whether this is an instance of what social psychologists call groupthink[25] (something like

[22] Lucy Reed, 'International Dispute Resolution Courts: Retreat or Advance – The 10th John E. C. Brierley Memorial Lecture' (2018) 4 McGill J. Disp. Resol. 129, 136–7.

[23] See a summary of the discussion in Schultz and Grant, *Arbitration*.

[24] Fuad Zarbiyev, 'International Law in an Age of Post-shame' (2020) 9(3) ESIL Reflections. Available at: https://esil-sedi.eu/wp-content/uploads/2020/07/ESIL-Reflection-Zarbiyev-2.pdf.

[25] Cass Sunstein and Reid Hastie, *Wiser: Getting beyond Groupthink to Make Groups Smarter* (Harvard Business Review Press 2014).

'in my circle, which is highly homogeneous, it is fine to say this and I do not know what other circles would say'),[26] or whether this is something yet different may be worth exploring to understand how the field of private and hybrid dispute resolution forms ideas and opinions. But for the time being, in the context of this chapter, it is sufficient to notice the fact.

It is not so, then, with hybrid justice, that the arbitration industry has to give back to traditional litigation the territory it has taken over the past forty years. Quite the opposite. The arbitration industry can harness the rhetorical power of the word 'court', re-legitimize itself, and continue to expand. Quoting Reed again: it is by 'leaving the Arbitration v Courts . . . debate' that the arbitration industry can achieve 'the best of all possible worlds'.[27] And the operative word to achieve this is, precisely, 'hybridization'. Something new, something better. 'Hybridization' is like 'transnationalization' or 'harmonization' – it expresses a diffuse sense of finding the right balance, getting the best of both worlds, keeping all the good stuff while getting rid of the bad. To be sure, finding the right balance will hardly stir much public outcry as balance is generally considered an unconditional positive. Notice the irony: while courts and arbitration were often competitors, courts, as an idea, as a symbolic institution, as a socially appealing label, are now used to legitimize (hybrid) arbitration.

Then again, the idea is not simply to fuse litigation and arbitration, just like the iPad has never seriously been intended to do away with laptops and iPhones. The idea clearly is to offer an *additional* product on a competitive market. And an additional product on a competitive market is meant to spur competition. And competition, in turn, is meant to make everyone try a little harder, do a little better. So that, at the end of the reasoning, hybrid justice would make everything a little better – arbitration, litigation and of course itself.

International commercial courts are particularly appealing in that sense because they are the latest innovative product of a competition industry. One should want them the way one wants new technology, an 8 K TV set, an Apple Watch, an electric Harley Davidson. When Chief Justice Michael Hwang underscores the need, now, for 'a serious campaign of overseas marketing',[28] when Justice Anselmo Reyes argues that

[26] See an application to arbitration of groupthink in Myriam Gicquello, 'The Reform of Investor-State Dispute Settlement: Bringing the Findings of Social Psychology into the Debate' (2019) 10 Journal of International Dispute Settlement 561.

[27] Reed (n. 22).

[28] Hwang (n. 7), 197.

'[i]n a more competitive marketplace, costs decrease and efficiency increases',[29] they do not mean new consumer goods; they mean international commercial courts. Dispute resolution fora, in the field's discourse, are primarily portrayed as products to be sold like any other product, plain and simple. Bookman puts it eloquently: 'international commercial courts seem to be engaging in "forum selling"'.[30] And Requejo continues: '[e]xpressions such as forum selling or forum shopping epitomize the consequences of the competition between jurisdictions in terms that evoke the selection or the promotion of a consumer product'.[31] The objective is hidden in plain sight. International commercial courts 'will create a platform to catalyse the further growth of the legal services sector and to expand the scope for the internationalisation and export of [a country's] law'.[32] It brings to mind John Maynard Keynes' famous remark, which is more of an aphorism than he probably thought: as the UK representative in UK-US negotiations on what would much later become the GATT and the WTO, he asked, '[i]sn't our scheme intended to get things done, whereas yours [the United States'] will merely provide a living for a large number of lawyers?'[33] Bookman confirms that this is not so special: 'In other contexts, scholars have noted that lawyers have strong incentives to lobby states to supply new legal "products" that will generate revenues for the lawyers.'[34] So yes, more remuneration is to be had for us, the transnational adjudication gang, in our never-ending race to keep up with the Joneses. And Yves Dezalay and Bryant Garth have made clear that this has worked extremely well in the past: the rise of international arbitration throughout the twentieth century was largely the result of the purposeful creation of a market by the lawyers who directly benefit from it.[35] The entrepreneurial success has to be admired: by some accounts, just investment arbitration,

[29] Anselmo Reyes, 'The Business of International Dispute Resolution', (2017) 4 J. Int'l & Comp. L. 69, 80.
[30] Bookman (n. 1).
[31] Isidro (n. 9), 28.
[32] Report of the Singapore International Commercial Court Committee, November 2013, p. 23.
[33] Robert Skidelsky, *John Maynard Keynes: Fighting for Britain, 1937–1946* (Macmillan 2000), 416.
[34] Bookman (n. 1), citing Jonathan R. Macey and Geoffrey P. Miller, 'Origin of the Blue Sky Laws' (1991) 70 Texas Law Review 347.
[35] Yves Dezalay and Bryant Garth, 'International Commercial Arbitration: The Creation of a Legal Market', in Thomas Schultz and Federico Ortino (eds.), *The Oxford Handbook of International Arbitration* (Oxford University Press 2020) 769.

a comparatively marginal practice, has generated more than US$10 billion in fees for the arbitration industry, with an additional three quarters of a billion each year.[36] The old recipe is likely to work, as legal entrepreneurs (i.e., us) create new legal products, convince the world of a need for such products, and then supply these products. Deborah Hensler and Damira Khatam recognize it plainly: arbitration 'not only supports international commerce, it has *become a business* in itself'.[37] In fact it always, probably, has been.

But there is nothing wrong with that. Quite the contrary: the litigation sales competition is presented as a 'race to excellence'.[38] The typical narrative, as Bookman puts it critically, is that of a '"race to the top" for tribunals to develop the best, most efficient procedures to resolve disputes', where 'these jurisdictions are all striving to provide the 'best' possible dispute resolution, resulting in innovation that can promote choice, customization, and efficiencies'.[39]

To be clear, our argument is not that *the actual political driver* for the development of international commercial courts always is an attempt to take litigation market shares away from other countries and cities. Bookman has compellingly shown that the political motive for the creation of some of these courts is the attraction of greater foreign investment (which, as she points out, is not a plan very likely to work,[40] in the same way that offering investment arbitration to attract foreign investment is not a plan very likely to work) or just standard diffusion effects (i.e., political imitation). Our argument is that *the sales strategy* used to promote international commercial courts relies in part on this idea of instrumental competition, where competition is the instrument,

[36] Cédric Dupont, Thomas Schultz and Merih Angin, 'Double Jeopardy? The Use of Investment Arbitration in Times of Crisis', in Daniel Behn, Ole K. Fauchald, and Malcolm Langford (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press 2020) 258.

[37] Deborah R. Hensler and Damira Khatam, 'Reinventing Arbitration: How Expanding the Scope of Arbitration is Re-shaping Its Form and Blurring the Line between Private and Public Adjudication' (2018) 18 Nev LJ, 381, emphasis added.

[38] 'Turning point or brewing storm, a race to excellence has begun'; see Winnie Jo-Me Ma, 2018 Taipei International Conference: Competitive, Collaborative or Cooperative Relations between Litigation, Arbitration and Mediation? Kluwer Arbitration Blog, 23 October 2018, available at http://arbitrationblog.kluwerarbitration.com/2018/10/23/2018-taipei-international-conference-competitive-collaborative-cooperative-relations-litigation-arbitration-mediation accessed 10 June 2020.

[39] Bookman (n. 1).

[40] Ibid., citing John F. Coyle, 'Business Courts and Interstate Competition' (2012) 53 Wm & Mary L Rev 1915.

the invisible hand guaranteeing ever-improving services and the desirability of the market's top product. Political drivers and (subsequent) sales strategies can differ. Bookman again: '[o]nce they are established, they can begin to adopt other kinds of innovation'.[41]

2.3 Likely Less Appealing Realities

So the main features making hybrid justice appealing as a product on the dispute resolution market are that they are technically courts, and thus have the power and legitimacy of courts as state organs, and that they are the latest innovative product in the race to the top in international dispute resolution. While the power of courts as state organs, allowing international commercial courts to be shielded from questions of arbitrability and joinder, seems indeed to be a fair advantage of hybrid justice, the two other features (legitimacy as courts and latest innovative product) appear to be more rhetorical than real. The reality is likely less appealing. *Likely*, because we do not really know. We do not really know because arbitration and commercial dispute resolution scholarship spends its time doing something else, which is often useful, but really not always, at least not for the commercial dispute resolution institutions themselves, in the societal sense (in the societal sense it does not mean the one, for instance, to be found on avenue du President Wilson in Paris).

We will deal with both the argument of the legitimacy of courts as state organs and the argument of the latest innovative product in one discussion, because in our approach they are linked. They are linked because the argument of the latest innovative product essentially means that international commercial courts promise to deliver what they deliver better, faster, more efficiently. And the cause of concern we see is not with the *how* but with the *what*, with *what* international commercial courts deliver, what they produce, what effects they may have.

At this juncture we need to pick up the discussion we started earlier in this chapter about the concept of legitimacy. In that previous part of the discussion we focused on a notion of legitimacy which draws on rhetorical sensitivities, on the 'wow' effect, on the a priori attraction of certain features of dispute resolution design. In the current part of the discussion we switch to a more substantive notion of legitimacy, because this is the notion of legitimacy which could, eventually, lead to the backlash.

[41] Ibid.

The context of these notions of legitimacy is the assessment of institutions, of their existence, their particular shape, their operations. These are notions of legitimacy used to account for people's support and espousal of institutions, and conversely their disapproval and neglect and attack of them. These positions towards institutions are based, at least partly, on people's assessment and perception of them. People's position on the legitimacy of an institution, in the most ordinary sense of the word, is essentially the sum of their different assessments and perceptions expressed in the binary mode of legitimate/illegitimate. 'The legitimacy' of an institution, in that sense, plays a critical role for its evolution over time, possibly for its life and demise. Importantly, such legitimacy notions are non-Kantian, as it were, in the sense of radically *not* categorical imperatives, they are not universal in the sense of valid throughout space and time: they cannot lead to the identification of intrinsic merits of institutions, of qualities of universal value that institutions would have and that could explain, ensure, justify or augur of their success. Legitimate institutions, in that sense, are always only legitimate to given people at a given point in social space and time; they are always only legitimate in the relative perspective of someone, nothing more. Such notions of legitimacy cannot allow us to argue that an institution is legitimate or illegitimate in the abstract, once and for all, with regard to everyone.

The substantive notion of legitimacy we rely on here focuses on this question: who benefits from a given institution, in the rational-choice theory sense of seeing one's actual interests being furthered but also in the behavioural-economics approach of seeing one's emotional and other non-rational preferences being furthered? Does a given institution, as it currently stands or in the way it evolves, benefit a certain group, community, category of people? How do institutional changes impact the interests and values of all affected people? The assumption behind these questions is simple: people are likely to support institutions they perceive to serve their interests and values, and to oppose, or try to change those which do not. In other words, the inquiry posits a correlation between the values and interests a regime serves and the colouration of its supporters' cluster. The more powerful such a cluster is, the more stable the institution would be.[42]

[42] See Cédric Dupont, Thomas Schultz and Jason Yackee, 'Investment Arbitration and Political Systems Theory', in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press 2020) 697.

Let us bring back into the discussion this idea we mentioned in the introduction: arbitration, international commercial courts, and probably all other dispute resolution mechanisms are not only mechanisms which resolve individual disputes. They are also institutions which create or sustain certain social orders. The fact that a number of disputes are resolved through given dispute resolution mechanisms, taken in the aggregate, leads to the enforcement or perpetuation of a certain power structure, certain axiological orientations, certain epistemic choices, the socio-professional positioning of certain actors, a certain type of wealth (re)distribution, certain patterns of relating or behaving. Dispute resolution institutions have social externalities: they increase and decrease certain social inequalities, foster and neglect certain values, spread and shut down certain norms, elevate and sideline certain status groups. And one institution may well create or perpetuate a given social order within the one wider social order, with its specific constellation of groups, values, and authorities, with its own ethos, social layout, and social dynamics.

To be clear, there is nothing theoretically new, or indeed tentative, here: the critical legal studies movement has long shown that law creates a certain social order, and that standard, state-centric and state-produced law tends to maintain the existing nation-based social orders and to reproduce existing power relations.[43]

But, now, how would international commercial courts do this, if they become important enough? What are these power structures, sets of norms and values, understandings of the world that the institution likely promotes? How do the ideological orientations and aesthetic prefigurations of international commercial judges differ from other judges? Do ideologies exist in hybrid justice which are less prevalent or altogether absent in the usual judiciary? Is there a specific arbitration/hybrid justice/private dispute resolution ethos that is not quite as strong at the bar in general? (Answer: attend an arbitration conference; five minutes of observation are enough.) Do the very principles underlying their work differ from those of other judges, or how does the difference impact the resulting social order? In a different context, Joost Pauwelyn conducted a well-known study showing that investment arbitrators are 'from Mars' ('Star Arbitrators', 'high-powered, elite jurists with a much deeper level of expertise and experience as compared to the average WTO panelist', with

[43] See for instance Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 Journal of Legal Education 591.

a self-centred, jostling and excluding personality) while WTO panellists are 'from Venus' ('Faceless Bureaucrats', 'diplomats or ex-diplomats, often without a law degree and mostly with relatively little experience', with a discreet and bureaucratic but inclusive personality), and how radically this changes the rules they make, the values they advance, the interests they promote.[44]

The inquiry could go further, and quite a bit: judges and lawyers in court have, so much should be obvious, certain constraints when they mentally reconstruct the world, when they apprehend reality, when they translate reality into the legal language used in court.[45] (Simply think of the difference between 'truth' and 'judicial truth' to see the point.) And thereby they 'legislate reality', as Pierre Schlag puts it, from a particular perspective.[46] As should also be obvious, legal academics have an altogether different set of constraints, typically vastly looser (though not on every point), when they reconstruct legal realities, when they explain legal phenomena, as they can use a whole array of ideational universes (types of ideas and references, ways of reasoning, objectives to attain, etc.) that judges and lawyers in court are simply not allowed to use in their profession.[47] Put differently, judges and academics have vastly different cosmogonies, different principles that undergird and filter how they reconstruct the world mentally; how they reconstruct it for their tasks; how they reconstruct it for themselves (think of areas of law neatly ordered to calm the judge's, or indeed the researcher's, own anxieties).[48] The question we should then ask here is this: what are those of private dispute resolution practitioners, or judges on international commercial courts? When arbitrators and hybrid justice judges apprehend the world, what are their incentives and constraints? Brutally simplified, do they wear different Wittgenstein-type glasses when they look at the world than

[44] Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109 American Journal of International Law 761, 763, 768, 780, 783 (while informative, the study regrettably perpetuates male/female stereotypes: Mars/Venus are of course mythological symbols of masculinity and femininity; that they are to be associated, respectively, with high-poweredness and facelessness is regrettable, even if, knowing the author, the intention was undoubtedly different).

[45] Ana Luísa Bernardino, 'The Discursive Construction of Facts in International Adjudication' (2020) 11 Journal of International Dispute Settlement 175.

[46] Pierre Schlag, *Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind* (New York University Press 1998) 133.

[47] Pierre Schlag, 'A Comment on Thomas Schultz's Editorial' (2014) 5 Journal of International Dispute Settlement 235.

[48] Thomas Schultz, 'Scholarship as Fun', Harvard Journal on the Legal Left, forthcoming.

judges, or anyone else, do?[49] Or, yet more brutally simplified: do arbitrators and international commercial court judges, and the practitioners before them, understand the world differently than judges do?[50] And how would this affect the social order they collectively create?

The problem with commercial arbitration and hybrid justice is that we have no idea; we do not know the first thing. Mostly, we do not ask. But it matters, in the long run. Not to the phenomenologists (they do not mind), but to dispute resolution practitioners, because it matters to society in the long run.

The question has in fact begun to be entertained with regard to arbitration, starting with the simplest and most tangible points: given that the proportion of male arbitrators, out of all arbitrators, is far greater than the proportion of male judges, out of all judges, does arbitration constitute a parallel patriarchal system of justice?[51] Are typically male values more prevalent (i.e., values typically associated with men), more readily enforced in arbitration than they are in comparable court procedures? Does, then, arbitration favour a more male social order? 'Arbitration: big white male justice': this sounds more like slogan than argument, but scores of students in arbitration programs describe it precisely like this. Students should not be treated as sages before the fact, to be sure, but their ingenuousness, or rather their lack of acculturation, may reveal things which we, precisely because we are too acculturated to dispute resolution, have difficulties noticing – like a fish who has difficulties noticing water, as Andrea Bianchi put it in a different context.[52]

[49] Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell 2001 [1953]), §103: 'It is like a pair of glasses on our nose through which we see whatever we look at. It never occurs to us to take them off.'

[50] We hear the objection: 'This is silly! Why would they?' Answer: because they may have a different set of intellectual instruments, of ideologies in Žižek's sense, of preformed opinions, or pre-understandings in Gadamer's sense, or simply ontologies they need to have or adhere to in order to belong to the relevant community, or to 'fit in' in any other way. To make the point from yet a different angle, think of the recent popular book *Factfulness*, which explained that if you believe the world is getting worse on every front, you will reconstruct the daily reality, through selective attention and belief-informed guesses, in a very different manner than if you believe the world is getting better on very many fronts, and you will therefore end up living in a very different mentally reconstructed reality – see Hans Rosling, *Factfulness: Ten Reasons We're Wrong about the World – And Why Things Are Better Than You Think* (Flatiron 2018).

[51] For instance Schultz, 'Ethos' (n. 12).

[52] Andrea Bianchi, *International Law Theories. An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 1.

But the question of what social order international commercial courts could promote, sustain or create, and who would benefit from it, which group, community and category of people, and how these institutional developments would impact the interests and values of all affected people – these are questions that seem not to be asked, or asked only from a very specific, self-centred perspective. The substantive assessments of international commercial courts have so far essentially been done by us and for us. Our substantive assessment is confined to the interests of our community and of the current users of international commercial dispute settlement, the actors of international trade. The perspective is clear in the existing commentaries: international commercial courts are there to serve the interests of their users, and, as Madame de Pompadour would put it, *après nous le déluge*. The objective is unambiguous: 'Any commercial dispute resolution mechanism is ultimately placed at the service of users,'[53] 'to service the needs of the City of London (financial centre) and the business community'.[54] The nearly exclusive criteria by which these fora are judged are the deserved 'expectations',[55] 'needs'[56] and 'preferences',[57] 'benefits',[58] 'comfort'[59] and 'advantages'[60] of 'international business-to-business actors',[61] and of international 'legal practitioners'.[62] We assess whether these developments benefit our community and where the answer is positive, we work on advertising them, framing these developments in a way that will make them appear attractive to larger audiences. We try to convince others that what is good for us is good for them too. Our language, the words we use, the way we mobilize symbols and use soothing notions such as

[53] Justice Steven Chong, 'The Singapore International Commercial Court: A New Opening in a Forked Path', British Maritime Law Association Lecture, 21 October 2015, 19.
[54] Bell (n. 14), 193, 194.
[55] Reed (n. 22), 132–3, 147.
[56] Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', Opening Lecture for the DIFC Courts Lecture Series 2015, 42–3; Andrew Godwin, Ian Ramsay and Miranda Webster, 'International Commercial Courts: The Singapore Experience' (2017) 18 Melb J Int'l Law 219, 259; Loh (n. 6), 82; Chong (n. 53), 19.
[57] Hwang (n. 7), 200.
[58] Johannes Landbrecht, 'The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?' (2016) 34 ASA Bulletin 112, 112.
[59] Loh (n. 6), 82.
[60] Vivian Ramsey, 'The Challenges to International Arbitration' (2017) 19 Asian Dispute Review 54, 57.
[61] Reed (n. 22), 147.
[62] Landbrecht (n. 58), 122.

'hybridization' – this is rhetoric, advertising. Of course, we tend to talk of universal rights, of the general interest, of universal and formal justice. Of course, we seek the best possible solution for all. But it is hard to deny that our substantive assessment is focused on very specific values and interests. We tend to equal the interests of international trade with the general interest, on the ground that global economic growth can only benefit the whole. Critical thoughts, marked as unhelpful, as too complicated, as too theoretical, as party spoilers, are quickly put away.

But let us not get caught in our own game and believe it ourselves. Heartening rhetoric and clever advertisement will delay serious societal scrutiny, but in the long run substantive assessments of the interests and values of others are probably critical. Importantly, the question may prove crucial even if we only cater for the interests of our community: if what we develop, in this case hybrid dispute resolution mechanisms, is not really good beyond for ourselves and negatively impacts states, common interests, society at large, then we should expect a pushback, a backlash from those people, those forces which do not benefit, and possibly suffer consequences, from what we do.

A few related things, taken from neighbouring fields, we do tend to know, and they may justify that we exercise caution. For instance, we tend to know that economic growth does not benefit everyone, that trickle-down economics is 'zombie economics' – dead theories we should realise are dead even if they are still among us.[63] The economic rise of just some categories of individuals is rather likely to increase resentment, and eventually lead to backlash, because of inequity aversion. As Samuel Scheffler puts it, elegantly summarizing a much more complex argument in a simple *New York Times* article, important inequalities compromise people's relations with one another and distort their understanding of themselves: 'The rich may persuade themselves that they fully deserve their . . . wealth and develop attitudes of entitlement and privilege. Those who have less may develop feelings of inferiority and deference, on the one hand, and hostility and resentment on the other.'[64] This does not augur well for legal institutions which increase inequalities – if of course they do, and this is why we should inquire and be cautious until we have inquired. There may also be a more fundamental societal rift looming in the future here: international commercial courts tend to be developed in

[63] John Quiggin, *Zombie Economics: How Dead Ideas Still Walk among Us* (Princeton University Press 2010).

[64] Samuel Scheffler, 'Is Economic Inequality Really a Problem?', *NY Times*, 1 July 2020.

societies which self-identify as societies of equals, but, as Samuel Scheffler puts it, '[t]here is a limit to the degree of economic inequality that is compatible with the ideal of a society of equals'.[65] To be sure, access to privatized and semi-privatized dispute resolution remains a privilege for the few. Arbitration, for instance, may offer justice, but the overwhelming majority of people and companies will never have access to it. If the right to choose one's judge, autonomy, impartiality and efficiency in dispute settlement are so fundamental, and if inequality in access to them amounts to real, social, economic inequality, then dispute resolution mechanisms should not remain luxury goods. The development of hybrid dispute resolution is unlikely to change anything in this respect. It more likely will merely offer new opportunities for the privileged few.

Beyond that, nothing indicates that hybrid court judges will be more representative than the existing pool of international arbitrators, that they will give greater attention to extra-communal interests and values (i.e., interests and values beyond those of the commercial community): the appointment process will not be much more participative, or democratic; the individuals appointed as international commercial judges will probably resemble today's arbitrators very much.[66] In fact, as this new institution is designed to take market shares from local courts, not arbitral tribunals, it would rather further replace local judges in all their diversity with a much more homogeneous global group of commercially oriented dispute resolution individuals.[67]

International commercial courts also are unlikely to take common state interests into particular account – these interests we described earlier as those that states share because they are states, and which are of a common, public nature. Hybrid mechanisms rather place states in direct competition, thus changing the setting from solidarity of interests to competition of interests. States then have an incentive to advance their particular interests as potential hosts of international dispute settlement

[65] Ibid.

[66] Stephan Wilske, 'International Commercial Courts and Arbitration: Alternatives, Substitutes or Trojan Horse' (2018) 11 *Contemp. Asia Arb. J.* 153, 166: *'[The] judges [are] all male, all rather senior and all with a rather British cultural background. Accordingly, whoever expects diversity to be reflected in the composition of the bench should pursue other options.'* Similarly, Hwang (n. 7) 195: '[i]t is interesting to note that, when the first cohort of overseas judges were appointed to the bench of the DIFC Courts, all of them were practising arbitrators, and hence were familiar with arbitration theory and practice.'

[67] On the homogeneity of the arbitration community, see Schultz, 'Ethos' (n. 12).

bodies,[68] to the possible detriment of interests they share with other states – or as Georgios Dimitropoulos would put it, a reclaiming of *national* sovereignty, one state against the other.[69] And an efficient way for a state to be a good host, a good litigation destination, is to grant wide autonomy to potential users: enabling them to shape the procedure, to determine the substantive rules applicable to the merits, and to apply these rules quite freely. We may thus set off a new race to the bottom, a race which will hardly lead to shift the political orientation of international dispute resolution.

Conclusion

There is a limit to how much money can be made with justice, and there is a limit to how much we can privatize it. Curiously enough, perhaps, at least in view of the staggering outpouring of writings on arbitration and other forms of privatized or semi-privatized justice, we barely know where these limits may lie; in fact we have never really asked ourselves that question, not seriously at least. But it is a question we can investigate. If we mean our field well, we *have to*. Because it certainly seems true that privatization or semi-privatization of dispute resolution is not an unqualified positive.

[68] Wilske (n. 66), 156.

[69] Georgios Dimitropoulos, 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform' (2020) 21 Journal of World Investment and Trade 71.