Evolution and Adaptation: The Future of International Arbitration

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GENERAL EDITORS
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Preface

ICCA Congress Series no. 20 comprises the proceedings of the XXIV ICCA Congress, held in Sydney, Australia, on 15-18 April 2018. We thank the ICCA Sydney Host Committee for their hard work and gracious hospitality, which created such a well-organized and welcoming setting for the substantive work of the Congress participants.

The theme of the Congress, "Evolution and Adaptation: The Future of International Arbitration", was chosen with great care. We wished to highlight arbitration as a "living organism" which has adapted in the past to various substantive and practical challenges, and that today – under attack from various quarters – might need to demonstrate its adaptability again. Under this theme, the Programme Committee developed a range of plenary and parallel sessions to address the evolving needs of users, the impact of the rapidly changing face of technology, the expectations of the public, and the convergence and divergence of different aspects of legal traditions and cultures.

As Jean Kalicki explained in her opening remarks on the first day of the Congress, a 1996 book entitled Dealing in Vines: International Commercial Arbitration and the Construction of a Transnational Legal Order had described a great transition in the field of arbitration. The authors' thesis was that what had begun as an informal, settlement-oriented system, once dominated by European academics who they called the "grand old men", had shifted to a more formalized and litigious practice, dominated by US or multinational law firms and what the authors called the "arbitration technocrats". The authors wondered about the future, particularly whether it might see the growth of regional arbitration centers. But there were other changes on the horizon that the authors did not foresee in 1996. The index to the book contained only a single reference to bilateral investment treaties – and also only a single reference to the topic of women in arbitration. Each of those solitary listings led to a single footnote reference, not even a discussion in the body of the book itself.

Yet if someone today were to write a new book about the few decades of arbitration since Dealing in Vines was published, it would tell a very different story – including about change in the subject matter of disputes and diversity in the composition of counsel teams and arbitrators. One need only look at today's headlines, not only in the specialized arbitration press but also in the mainstream media, to see how investor-State dispute settlement has come to dominate a good portion of the public debate about arbitration. And one need only look at the delegates to the XXIV ICCA Congress, who hailed from some sixty-two different countries, to understand the globalization of arbitration practice. Thanks both to generational change, and to the concerted efforts of arbitral institutions and community leaders, the field also has made major strides in gender diversification.

But the story of evolution will not end today either, because arbitration is an adaptive and not a static mechanism. If another book on our community is published a few decades from now, the tale it will tell will be different again from whatever story we might tell today. What that future story will look like will depend in large part on how

International commercial arbitration is now facing new challenges. Some of them are coming from external sources such as the legitimacy allegations against investment arbitration, and others are, in a certain manner, a consequence of the incredible success of international commercial arbitration and its expansion to new areas that demand actors to take into consideration public interest, in both, a strict sense – when state entities are directly involved – but also in a broad one – when the dispute between private parties may have impact on others.

Considering its extraordinary expansion, international arbitration needs to address possible concerns that the increased presence of public interests raised, both in specific cases but also in its function as a worldwide system of dispute resolution.

It was suggested at the ICCA 2014 Congress in Miami that the more universal arbitration becomes the more customized it will be for responding to the concerns of specific users. This makes sense: arbitration should not function as a Procrustean bed. As has been mentioned, the ICC’s concern for developing special rules for arbitration involving States or state entities is also reflected in arbitration legislation of countries such as Brazil or Peru.

The new developments in international arbitration demand finding a balance between the respect of what is considered to be fundamental and constitutive of arbitration, and the acceptance of the changes that are required to consider the presence of public interests in the dispute.

The debate about the need for increased transparency in commercial arbitration is a good example of the new forms of tensions that commercial arbitration is facing and the need to address them.

As was said, commercial arbitration, as a system of adjudication of disputes requires an ongoing assessment of any possible legitimacy concerns from its users and more broadly from those who have control over the normative structure that permits its functioning.

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**Commercial Arbitration and the Development of Common Law**

Nenad Radja

**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>I. Overview</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>II. Does Commercial Arbitration Hinder the Development of Common Law?</td>
<td>333</td>
</tr>
<tr>
<td>III. Does the Hindrance of Common Law Development Make Commercial Arbitration Any Less Legitimate?</td>
<td>338</td>
</tr>
<tr>
<td>IV. How Could or Should Commercial Arbitration Adapt to These Concerns?</td>
<td>343</td>
</tr>
<tr>
<td>V. Conclusion</td>
<td>353</td>
</tr>
</tbody>
</table>

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**E. OVERVIEW**

Recent years have seen concerns raised about the increasing use of arbitration and its potential hindrance on the development of common law. The criticism across the common law world is essentially that the growth of arbitration and the subsequent ebbing of court decisions are freezing doctrinal development.1

Some critics have gone so far as declaring arbitration responsible for “the end of law”.2 Most recently, the Lord Chief Justice of England and Wales, Lord Thomas, fuelled the debate with a controversial speech which called for an urgent rebalancing of the relationship between courts and arbitration, accusing arbitration of turning the common law into “an ossuary”.3 Another critic has lamented that: “Arbitration is retreating into its shell, dragging with it into the darkness the very cases that should be used to develop the common law as it applies to modern commerce”.4

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1. Partner in the international arbitration team at LALVE, specialising in commercial and investment arbitration in the energy, telecommunications and construction sectors; member of the Steering Committee of the International Bar Association Arbitration 40 Subcommittee (IBA Adv 40) as well as a member of several other professional associations, namely the London Court of International Arbitration (LCIA), the Chartered Institute of Arbitrators (CIArb), the British Institute of International and Comparative Law (BIICL), the American Bar Association and Arbitral Women. The author would like to thank Nicole Chaillopoulos for her assistance with this paper.


This paper will explore three criticisms of the legitimacy or reach of commercial arbitration and assess how commercial arbitration should adapt in light of these legitimacy concerns, by exploring the following questions:

1. Does commercial arbitration hinder the development of common law?
2. If so, does this hindrance render commercial arbitration any less legitimate?
3. If so, how should commercial arbitration adapt?

II. DOES COMMERCIAL ARBITRATION HINDER THE DEVELOPMENT OF COMMON LAW?

It is broadly accepted that arbitration is today the most common means of resolving international commercial disputes. In particular, international arbitration has become the method of choice for dispute resolution in certain industries when operating in a cross-border context, such as major construction projects, insurance and reinsurance, and the oil and gas industry. Because arbitration proceedings are often confidential, it is difficult to cite numbers to support these assertions. A renowned German international arbitration scholar, has stated that 60% of international economic contracts have an arbitration clause. Even if this may be an exaggeration, data from the major international arbitration institutions show a steady growth in the number of disputes they administer. In the survey conducted by the Queen Mary University of London and White & Case in 2015, 90 percent of the respondents stated arbitration to be the preferred dispute settlement method for cross-border commercial disputes.


8. See, e.g., Gary Born, International Commercial Arbitration, 2nd ed. (Kluwer Law International 2014) p. 97 (“This figure lacks empirical support and is almost certainly inflated: in reality, significant numbers of international commercial transactions – certainly more than 10% of all contracts – contain either forum selection clauses or no dispute resolution provision at all.”); Arkt Santens and Romani Zamour, “Dreaded Death of Precedent in the Wake of International Arbitration – Could the Cause Also Bring the Cure?”, Y & B. Arb. & Mediation (2015) p. 73 at p. 75.

REFORMING COMMERCIAL ARBITRATION IN RESPONSE TO LEGITIMACY CONCERNS

This paper will explore these criticisms of the legitimacy or reach of commercial arbitration and assess how commercial arbitration should adapt in light of these legitimacy concerns, by exploring the following questions:

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In England, the most recent and vocal proponent of this criticism, Lord Chief Justice Thomas, argues that by taking place behind closed doors, arbitration undermines the "means through which much of the common law's strength — its 'excellence' was developed."9 It also "retards public understanding of the law" and "public debate over its application."10

In the United States, arbitration, mainly domestic, has been under attack for being "confidential affairs shielded from public view and decided by arbitrators who do not

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2. 11. Ark SANTENS and Roman ZAMOUB, "Dreaded Death of Precedent in the Wake of International Arbitration — Could the Cause Also Bring the Cure?," 7 Y.B. Arb. & Mediation (2015) p. 73 at p. 75.
3. 12. SANTENS and ZAMOUB, "Dreaded Death of Precedent in the Wake of International Arbitration — Could the Cause Also Bring the Cure?," 7 Y.B. Arb. & Mediation (2015) p. 73 at p. 76.
4. 13. SANTENS and ZAMOUB, "Dreaded Death of Precedent in the Wake of International Arbitration — Could the Cause Also Bring the Cure?," 7 Y.B. Arb. & Mediation (2015) p. 73 at p. 75.
6. 15. SANTENS and ZAMOUB, "Dreaded Death of Precedent in the Wake of International Arbitration — Could the Cause Also Bring the Cure?," 7 Y.B. Arb. & Mediation (2015) p. 73 at p. 75.
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8. 17. SANTENS and ZAMOUB, "Dreaded Death of Precedent in the Wake of International Arbitration — Could the Cause Also Bring the Cure?," 7 Y.B. Arb. & Mediation (2015) p. 73 at p. 75.
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write precedential decisions. The lack of stare decisis in arbitration has been the reason to suggest that arbitration does not generate law, and by stripping the courts from the caseload consequently leads to the “end of law.” The prohibition of class action after the judgments of AT & T Mobility v. Concepcion and American Express Company v. Italian Colors Restaurant, has resulted in assertions that “entire classes of claims” are evicted from the public justice system, and that “arbitration ... fundamentally precludes the common law development.” Even arbitration practitioners refer to the “death of precedent.”

In Australia, similar problems have been reported about fewer cases reaching the courts, which “has the effect of stunting the development of the common law” in certain legal fields, such as construction, where arbitration is preferred. Thus, the criticism that arbitration is stunting the development of common law is, to varying degrees, shared across the common law world.

Many have protested against the criticism at this juncture, by referring to the fact that there are still many cases before the courts that contribute to the development of common law. Indeed, 25.7 percent of the cases commenced in 2015 before the Commercial Court were arbitration-related claims. Furthermore, statistics from the Ministry of Justice indicate that over 1,000 cases per year are heard by the commercial courts. In 2015 the Ministry of Justice indicated that the caseload of the commercial courts was on the rise. It is not only arbitration practitioners and scholars that have rallied against these criticisms, but also other judges. Sir Bernard Eder states that “the common law continues to develop at a pace with a constant stream – indeed flood – of cases over a wide area of jurisprudence.” Lord Woolf has also been reported to say that the courts retain sufficient workload to develop the common law in commercial matters. As noted by Griffiths QC, “The Courts have had enough time to develop the common law and still do so with plenty of opportunity to further refine the principles of common law which have been there for centuries.

One could also argue that the rise of popularity of arbitration in England, Singapore, Australia, etc. brings with it a tide of popularity for these jurisdictions including for their state courts – the notion that increased competition brings with it increased business. Ultimately, however, the weight of these arguments will always be questionable, against the undeniable fact of the diminishing caseload of commercial courts relative to arbitrations. Also undeniable is that new case law is required for common law to be able to adapt to and respond to developments in markets, trade and commerce, including those associated with globalization and new technologies. Common law relies on precedent developed over generations and prides itself on its ability to adapt to principles to changes in trade, commerce and the markets.

17. Id.
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17. Id.


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There are numerous examples, across the common law world, of recent cases which have marked important developments of law. The relatively reduced case-load of commercial courts must necessarily limit these developments. As put by the Right Honourable Beverley McLachlin, Chief Justice of Canada in the context of construction law: "the tree looks different than it used to. It may not be dead, but new branches are not appearing as often as they once did. And old branches that need pruning are often neglected."

It seems safer to conclude, therefore, that commercial arbitration probably does hinder the development of common law and that the debate cannot end at this fray question.

More importantly, to curtail the debate at this juncture would be a missed opportunity – a missed opportunity for a candid dialogue with the critics and a missed opportunity at a potential solution. So rather than deny that arbitration is taking away cases from the courts and therefore from the development of common law as we know it, it is preferable to tackle the issue at the more crucial juncture: what does this hindrance of the common law mean for the legitimacy of commercial arbitration and should we do anything about it?

III. DOES THE HINDRANCE OF COMMON LAW DEVELOPMENT MAKE COMMERCIAL ARBITRATION ANY LESS LEGITIMATE?

The outcome of any debate about legitimacy will be influenced by how broadly or narrowly the concept is defined. An analysis of the concept of legitimacy falls outside the scope of this paper and has already been explored by many before me, including at the


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as pure gold! When a state participates in a commercial contract, it does so in its private capacity. However, even where the party to the contract is a state-owned entity, it is still plausible that government officials signed the contract. Moreover, a state-owned entity is possibly exercising governmental authority, such that it deals with matters closely linked to the public interests, especially in the fields of energy, construction or telecommunications; an arbitral tribunal, in turn, will potentially have to deal with matters arising out of the state's exercise of regulatory powers.

Consequently, the effect of the contract, and disputes resolved under it, will not be confined to the contracting parties. For instance, if a state-owned company that is in charge of energy-related policies in the country enters into a contract with a foreign company for the installation of photovoltaic panels, the two companies will not be the only affected parties. The population of the state will also be affected, because they will have access to new sources of renewable power; but also this project may be funded through their taxes, and if the project fails they will also have to bear the consequences indirectly. Through this simple example, we see that even with commercial arbitration, the pool of persons affected can be wider than just the users or stakeholders.

The ever-increasing scope of arbitrability, noted above, also broadens the group of people directly or indirectly affected by arbitral decisions. The authority of the arbitral tribunals has expanded greatly, resulting in a wide range of cases being adjudicated by them, cases which in the past belonged in the realm of public law and courts. More recently, for example, the US Supreme Court decision in Epic Systems v. Lewis upheld mandatory individual labor arbitration agreements. A commentator observes that "the scope of rights amenable to arbitration has grown to such an extent that, the concept of arbitrability (or its mirror image, infeasibility) at central as it may be to arbitration theory, has virtually died in real life arbitration." 42


Such a development, it goes without saying, has had crucial implications for other actors, outside the margins of commercial arbitration. Commercial tribunals, through dealing with such issues, have an impact on other parties, unrelated to the specific dispute. Therefore, it becomes apparent that international commercial arbitration is no longer confined within the margins of the parties' autonomy, but has an increased social impact transcending the disputing parties.

Furthermore, the increase of institutional arbitrations has led to a standardization and codification of the arbitral procedure, with institutions and associations organizing conferences, trainings and seminars for the promotion of arbitration. This function of arbitration, of developing rules and an arbitration culture, reflects the transformation of arbitration from a dyadic mechanism of dispute settlement to a system of global governance.

As such, arbitration is no longer a plain mechanism of private dispute settlement, where party autonomy remains the single concern, but arbitration has grown to become a means of decision-making, a system that provides transnational norms that affect many more than just the disputing parties.

Such a concept of arbitration, though, leads to the conclusion that the parties to the disputes are not the only actors in arbitration, and their perspective is not the only one to consider. The interests involved in the disputes go beyond the individual interest of the parties, to "an interest that concerns the arbitration system as a whole." 51 The standard of legitimacy for arbitration must therefore evolve, also in the commercial realm, for the simple reason that arbitration has evolved into a system of governance impacting on social spheres beyond the disputing parties, and for this reason its legitimacy cannot derive solely from the consent of the latter.

That assessment may not be shared by all, however, and for the purpose of this discussion, the answer to the question before us – namely whether the hindrance of common law gives rise to a legitimacy concern for commercial arbitration – may be the same regardless of the standard of legitimacy adopted.

Generally speaking, we can consider a focused notion of legitimacy, looking at the interests of the stakeholders, usually the parties themselves, or what Professor Schill referred to in his seminal paper, as party or community legitimacy. Or we can consider legitimacy from the perspective of a broader population – per Professor Schill’s categories, this would be national or global legitimacy. 52
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50. Karim Abou YOUSSEF, "Part I: Fundamental Observations and Applicable Law, Chapter 3 - The Death of Inarbitrability" in Lozouk A. MISTELUS and Stavros I. BIREKGLARIS, eds.,

COMMERCIAL ARBITRATION AND THE DEVELOPMENT OF COMMON LAW: N. BADJAI

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Taking first the broader notions of legitimacy from a national interest perspective, the hindrance of the development of common law in any particular jurisdiction must be viewed as contrary to those interests. This is true whether we view the issue from the perspective of state courts whose mandate is to develop the law, from the perspective of parties to commercial court cases who will have expectations of how common law develops, or from the perspective of the public at large whose interest is to be governed by a law that evolves and adapts in line with its programmed path.

From a global perspective, we could argue that the stalling of the evolution of common law is not inconsistent with the interests of the population at large, since they may refer to other legal systems to govern their relationships. However, few people would disagree that the stalling— or death; taken to its extreme— of an entire system of law, is not a desirable outcome, not least a system which forms the basis of almost one-third of the world’s 320 legal jurisdictions. As Lord Thomas puts it, this hindrance undermines the very means through which much of the common law’s strength was developed.

Even the civil law world is not unaffected by this stalling. While more poignant in common law systems which base their development on binding precedent, civil law systems also develop by reference to cases, even if these are not binding precedent. Even the reliance by civil law courts on doctrine and scholarly articles is necessarily curtailed by the limited access to cases also for the purpose of commentary. Seen from this light, there can be little doubt that legitimacy issues arise from the global and national perspectives.

Taking a more focused notion of legitimacy, which examines the issue from the perspective of the parties or the arbitration community, one could argue that the courts and law are there to serve the public, not the other way around. Stakeholders of commercial arbitration, the parties, care about one thing: their own commercial advantage. Few commercial parties will be interested in acting altruistically in the interest of the wider industry or the development of the common law as a whole. If parties choose to resolve their disputes in arbitration rather than before commercial courts, and as a result the law is less developed, that is the parties’ choice. In terms of legitimacy, one could argue that there is thus no incoherence between the parties’ choices and the outcome. However, this is perhaps overly simplistic: when parties choose English or another system of common law to govern their contracts, they do so with certain notions of what that system of law represents. At the very least these notions must include an assumption that the parties are referring to a system of law which evolves and adapts with jurisprudence over time. If this aspect of common law is being limited by commercial arbitration, then the legitimacy question must at least arise, even when seen from the perspective of users, the principal stakeholders.

So, whichever concept of legitimacy is adopted, there is a more or less strong argument to be made against commercial arbitration’s legitimacy by virtue of its impact on the development of law.

Moreover, whether we put on them the label of legitimacy or not, these concerns are certainly enough to require us to consider the third and final question – how should commercial arbitration adapt to these concerns?

IV. HOW COULD OR SHOULD COMMERCIAL ARBITRATION ADAPT TO THESE CONCERNS?

A. The Proposal to Limit the Scope of Arbitration

Let us first examine the solution presented by the critics: their proposed solution is to revise arbitration legislation to restrict the scope of arbitration and increase the scope of court’s jurisdiction over commercial disputes. 56 Lord Chief Justice Thomas contemplates a revision of the English Arbitration Act 1996 to allow for more appeals from arbitration to the courts, or to encourage a greater use of Sect. 45 of the Arbitration Act to enable the court to make judgments on points of law that arise during the arbitral proceedings (before the award is rendered). 57 Essentially, the proposed solution is to force parties to return to litigation to ensure the continued development of law.

But a solution that seeks to override party autonomy strikes at the heart of legitimacy. Parties surely do not opt for arbitration, only to be returned to the state courts. The development of the law is not of primary concern to parties; if it were, they could elect to go to the courts directly. On the contrary, the limitation of the referral to courts from arbitration cases has evidently increased the number of cases going to arbitration. By electing arbitration as their method of dispute resolution, the parties have agreed to accept the decision of their chosen tribunal instead of that of the court. What an English

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would disagree that the stifling—or death, taken to its extreme—as an entire system of
law, is not a desirable outcome, not least a system which forms the basis of almost one
third of the world’s 320 legal jurisdictions.66 As Lord Thomas puts it, this hindrance
undermines the very means through which much of the common law’s strength was
developed.67

Even the civil law world is not unaffected by this stifling. While more poignantly in
civil law systems which base their development on binding precedent, civil law
systems also develop by reference to cases, even if these are not binding precedent.68
Even the reliance by civil law courts on doctrine and scholarly articles is necessarily
curtailed by the limited access to cases also for the purpose of commentary. Seen from
this light, there can be little doubt that legitimacy issues arise from the global and
national perspectives.

Taking a more focused notion of legitimacy, which examines the issue from the
perspective of the parties or the arbitration community, one could argue that the courts
and law are there to serve the public, not the other way around.69 Stakeholders of
commercial arbitration, the parties, care about one thing: their own commercial
advantage. Few commercial parties will be interested in acting altruistically in the
interest of the wider industry or the development of the common law as a whole.70 If
parties choose to resolve their disputes in arbitration rather than before commercial

Review (16 May 2016). Available at: <https://globalarbitrationreview.com/article/1036328/
rowley-london-arbitration-under-attack/> (last accessed 7 June 2018).
67. Lord Chief Justice THOMAS, "Developing Commercial Law Through the Courts: Rebalancing
the Relationship Between the Courts and Arbitration," The BAILL Lecture 2016 (9 March 2016)p 4.
Available at: <https://www.judiciary.uk/wp-content/uploads/2016/03/kj-speech-baili
lecture-20160309.pdf> (last accessed 7 June 2018).
68. Gay L. SEIDMAN, "Comparative Civil Procedure" in Colin B. PICKER and Gay L. SEIDMAN, eds.,
University of Aberdeen Blogspot (5 May 2016). Available at: <https://www.abdn.ac.uk/law/
blog/a-response-to-judicial-comments-on-the-arbitration-litigation-debate/> (last accessed 7 June
2014).
70. Harris BOR, "Comments on Lord Chief Justice Thomas’ 2016 BAILL Lecture which Promotes a
Greater Role for the Courts in International Arbitration," Kluwer Arbitration Blog (11 April
-on-lord-chief-justice-thomas-2016-baili-lecture-which-promotes-a-greater-role-for-the-courts-in
-international-arbitration/> (last accessed 7 June 2018).
REFORMING COMMERCIAL ARBITRATION IN RESPONSE TO LEGITIMATE CONCERNS

(or other national) court would have decided is of no concern to these parties. Parties use arbitration to resolve their disputes, not to add to the body of common law. And it is undeniable that the courts should serve the public, not the other way around.\(^{64}\)

The absurdity of the proposed approach is aptly illustrated by the response of Lord Devlin, when confronted with the opponents of the initial curtailing of the right of appeal under the 1979 English Arbitration Act: "The next step would, I suppose, be a prohibition placed on the settlement of cases concerning interesting points of law.\(^{65}\)

There is no legitimate reason why international (or English) parties should be put to the expense and delay occasioned by appeals to the courts in the name of the development of common law.\(^{66}\) Indeed, while the critics accuse arbitration of not living up to its billing when it comes to time and costs,\(^{67}\) a topic covered by the paper of Laura Abrahamson at this ICCA Congress,\(^{68}\) the proposal to increase the scope of the court’s intervention in arbitration cases would only compound those concerns.\(^{69}\)

The proposed solution would moreover not serve its purpose: if parties are actively choosing arbitration over courts, then a system that sends them back to the common law courts will only likely alienate them also from arbitration in common law jurisdictions, further compounding the problem of the dearth of precedent in the common law. As it


69. Laura ABRAHAMSON, "Costs, Delay and Transparency — A Comment on Continued Legitimate Concerns from the User’s Perspective" this volume, pp. 314-360.


COMMERCIAL ARBITRATION AND THE DEVELOPMENT OF COMMON LAW: N. KADJA

is, the English Arbitration Act is in the minority in that it upholds the appeals mechanism, a provision that does not exist in more other arbitration jurisdictions. Even common law judges accept that the critics’ proposed approach would “set the clock back almost 40 years”.\(^{61}\)

The development of the common law before courts cannot depend on, or call for, the regrowth of arbitration. Instead a solution must be found which recognises courts and tribunals as "mutually supportive parts of what is a developing system of international commercial dispute resolution"\(^{70}\) and which builds upon the place that arbitration holds today — while enabling the courts to perform a mandate which in a strict sense can be performed by them and them only.\(^{71}\)

2. A Solution Based on Greater Interaction Between Courts and Tribunals

It is a fact that many parties today refer their large international disputes to arbitration. If arbitration is hindering the development of common law, or even national law generally, to the detriment of its legitimacy, then we must develop a solution which ties into the lawmakers’ potential of arbitration.

a. Body of decisions produced by arbitral tribunals (or "lawmaking") for the hold

It cannot credibly be denied that a body of law is developing through arbitral awards, even if there may continue to be — in the words of Lucy Reed — "persistent objectors".\(^{72}\) Indeed, there was a time when even English judges tried to pretend that they didn’t make new law — they merely declared it.\(^{73}\) As Lord Reid put it in 1972, the "fairest tale"


74. Lucy REED, "Lawmaking in International Arbitration: What Legitimacy Challenges Lie Ahead?", this volume, p. 52 at p. 59. The "persistent objectors" still insist that their role as arbitrators is to decide the dispute alone without any regard to future interpretation of similar treaty provisions. An illustrative example is the finding of the Rusal tribunal that the "Arbitral Tribunal has not been re-visited, by the Parties or otherwise, with a mission to ensure the coherence or development of `arbitral jurisprudence’. The Arbitral Tribunal’s mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal’s analysis might have on future disputes in general,” Kanud S. et al. of Sabkhatan (UNCHR, PCA Case No. 124972) Award (26 November 2009) para. 171.

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68. Laura ABRAHAMSON, "Costs, Delay and Transparency — A Comment on Continued Legitimacy Concerns from the User’s Perspective" this volume, pp. 314-360.

69. Sir Bernard EDER, "Does Arbitration Still Develop the Law? Should s.69 Be Reintroduced?", AGM Keynote Address for the Chartered Institute of Arbitrators (28 April 2016) p. 10. Available at: <https://www.londonarbitrators.org/sites/londonarbitrators.org/files/CIM%20-%20DEDER%20-%20Keynote%20Address%202016%20s69%20042616%20AMND.pdf> (last accessed 7 June 2016).
was that common law was hidden in an Aladdin's cave and judges were given the magic password on appointment.85
In the investment arbitration world, a "de facto doctrine of precedent" is by now a given, which, as Professor Paulsson puts it, "can only be denied by those determined to close their eyes."86
In the realm of commercial arbitration, the expected development of "a formation of a free-standing body of law responsive to the needs of international commerce"87 has been somewhat slower by virtue of the limited publication of awards.88 Nonetheless, arbitrators can and do perform a lawmaking function.89 It is accepted that between tribunals, awards, while not being binding precedent, may constitute persuasive precedent. "Past solutions have some impact on the thinking of arbitrators having to resolve future cases."90 The arbitrators develop normative rules that may not be binding but they influence future awards. In other words, international arbitrators strive, as they must,91 to be consistent with past decisions of other tribunals so as to meet commercial parties' legitimate expectations for their disputes to be resolved in a consistent fashion. These propositions are echoed by the Chief Justice of Singapore, Sundararaj Menon, who recognized that the international commercial arbitration framework has begun a process leading towards a formation of a "free-standing body of law responsive to the needs of international commerce."92

79. D. Brian KING and Rahim MOLOG, "International Arbitrators as Lawmakers", 46 N.Y.U Journal International Law & Politics (2014) p. 875 at 886, noting that the publication of awards is one of the critical prerequisites to arbitrators as lawmakers.
82. Gabrielle KAUFMANN-KOHLER, "Arbitral Precedent: Dreams, Necessity or Excess?", The 2006 Fredrichs Lecture, 25 Arbitration International (2007), no. 3), p. 357 at p. 374, noting that "when making law, decision makers have a moral obligation to strive for consistency and predictability, and thus to follow precedents. It may be debatable whether arbitrators have a legal obligation to follow precedents - probably not - but it seems well settled that they have a moral obligation to follow precedents so as to foster a normative environment that is predictable."

COMMERCIAL ARBITRATION AND THE DEVELOPMENT OF COMMON LAW: N. RADJAI

In practice we can see this in the formation of a body of law in certain industries, for instance a so-called lex petrolia in oil and gas industry and lex sportiva in sports. These laws have been developed though the development of a group of principles that are considered standard practices in the respective industries, and hence widely accepted by them.93 It may be true that arbitral decisions only rarely refer back to previous decisions.94 But in a context where a limited pool of players are involved, whether as counsel or arbitrator, it is inevitable that prior decisions influence subsequent ones, whether they are expressly referred to or not95 - thus leading to an emergence of a certain approach to certain issues. Indeed, when a party appoints any given arbitrator on the basis of her prior expertise, that party accepts and even expects that the arbitrator will take into account that prior experience and expertise in rendering her decision. As summarized by one English law commentator96:

"For better or worse, international commercial arbitration is now a major forum for the resolution of disputes that impact on those other than the parties to them. It is a forum in which claims of corruption of public officials and of breaches of competition law are made and decided, in which States and State-owned entities are routinely parties, and in which large swathes of commercial law, including standard form commercial contracts, are applied and developed."

Thus, if we define lawmaking as being when an award "supplements the corpus of normative materials that counsel and tribunals will take into account in future proceedings,"97 certain commercial arbitration decisions are already making law today. Moreover, regardless of whether commercial arbitration decisions could be said to create a body of law, these decisions are being rendered, in the hundreds, each year and
was that common law was hidden in an Aladdin’s cave and judges were given the magic password on appointment. 8

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access to those decisions could – directly or indirectly depending on the jurisdiction – assist with the development of law. However, we label these decisions, whether lawmakers or not, they constitute an important source for state courts that could then in turn develop the law in the strict sense. The debate on lawmaking by tribunals has largely focused on lawmaking for the reference of parties and tribunals in future arbitrations. There is no reason why tribunals cannot contribute to lawmaking in a broader sense of the word for national systems of law as well.19

There is even precedent for this development, at least as far as issues of procedure are concerned, where solutions adopted in past arbitration awards have not only been considered as precedent by arbitrators but also by national courts.20 There is no reason why awards cannot form persuasive precedent also on matters of national law, as explained by Alexis Mourre: "The assumption that reference to arbitral precedents would not be conceivable with respect to substantive issues in presence of choice of law clause is therefore incorrect."21

b. More systematic publication of arbitral decisions

The only way to enable this valuable interaction between arbitral tribunals and the courts, for the furtherance of the law, is to engage in a more systematic publication of commercial arbitral awards. Publication would enable parties to refer to such decisions in support of their arguments before courts, which would then be free to allocate the appropriate weight to such decisions. The awards would not have precedential value in strict sense but can be just as persuasive as other non-precedential material that is used by common law courts – such as academic articles and court decisions from other jurisdictions.22 Even for the civil law realm, greater transparency of arbitral awards would also enable scholars and practitioners to debate certain issues, which could indirectly also influence the development of law by national courts.

It may be true that arbitral awards rarely offer insight into legal analysis useful beyond the case at hand because the analysis is transaction-focused and fact-specific.23 But arbitrators are rarely presented with contracts that have no governing law and it cannot

be excluded that some make decisions which are founded on their application of that law. Moreover, and this is hinted at by Lucy Reed in her paper for this Congress,24 if there were more systematic publication, the way awards are written and motivated may adapt in order to provide the allegedly missing analysis.

Most importantly, the law would no longer be "underground."25 To the extent companies are increasingly choosing arbitration over courts, and arbitrators are writing awards on recurring commercial legal issues, the secrecy of those awards is a loss overall. It is this consideration that has led to a broader call for publication of commercial arbitral awards, with some suggesting that the publication of anonymized awards should be the norm.26 Others propose that publication should be automatic unless the tribunal decides otherwise.27

In view of the lawmaking potential of commercial arbitration, a more systematic publication of arbitral awards is also imperative from a legitimacy perspective. As highlighted by one commentator:28

"As more and more international commercial cases go to arbitration rather than the courts, we are more and more losing sight of the basic feedstock of our commercial law. In such circumstances, it is in my opinion inevitable that the public interest is being and will increasingly be damaged as more and more decisions on areas of commercial law become inaccessible to the public arena."

Indeed, this problem has been identified also by reference to the visibility of law from within the arbitration community. In the field of construction, an illustrative example is the observations Christopher Sempill has made in relation to HĐC – International Federation of Consulting Engineers – contracts. After collecting arbitration awards rendered in arbitration under HĐC contracts he found only forty awards. Considering that this type of contract has been in use for over fifty years, forty awards is only a small

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COMMERCIAL ARBITRATION AND THE DEVELOPMENT OF COMMON LAW: N. RAJAR

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90. Alexis Mourre, "Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards" in Emmanuel Galliard and Yas Banifatemi, eds., Precedent in International Arbitration (June 2008) p. 4, referring to the Dow Chemical Award (ICC Case No. 4131, Dow Chemical France v. Horse Saut Guyot, Internail Award, 21 September 1982), which has been adopted by national courts in relation to the issue of procedural jurisdiction over a group of companies. See also Francisco Peretti, "Is There a Need for Consistency in International Commercial Arbitration?" in Emmanuel Galliard and Yas Banifatemi, eds., Precedent in International Arbitration (June 2008) p. 17.
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A legitimacy concern therefore arises not only with regard to the ar rested development of national laws but also with regard to the exclusion of the public at large from the development of law that is undoubtedly taking place before tribunals. In certain fields, such as construction and energy, it is already the case that a practice is developing as to the way certain matters are being argued before tribunals, which only a small group of practitioners are privy to. As summarized by Ben Juratowitch QC: "there are a number of high quality arbitral awards dealing with matters of general interest that very few people have the benefit of reading", and that "there are therefore compelling reasons for people to be increasingly concerned about the fact that it is to a substantial degree happening in secret."

Finally, greater publication of awards is widely expected to enhance not only the development of arbitral case law but also the quality of arbitration, by resulting in "greater certainty". It is broadly accepted by all practitioners and scholars that have treated this topic, that increased publication will lead to awards being referred to more often. And an eminent law professor and arbitrator has stated that the legitimacy of commercial arbitration depends on the coherence of published decisions. More widespread publication of awards would allow broader access to this body of decisions, thus enhancing commercial arbitration's legitimacy.

c. On issues of confidentiality

Of course, the manner and system we adopt for this broader publication of awards would have to be carefully assessed, also in view of confidentiality concerns. But these are not insurmountable.

First, there has already begun a shift away from confidentiality in arbitration in recent years, and not only in the investment realm. The new edition of the ICC Rules, for example, does not have a default provision on confidentiality. In addition, in recent years, several national courts have made findings that the country's arbitration law does not include an express or implied duty of confidentiality. Indeed, there is no unassailability on the issue of confidentiality across different legal systems. Even in systems which do integrate notions of confidentiality, parties who arbitrate necessarily accept that the details of an award may become public due to challenges to courts or through its enforcement. One notes also that in the investment realm, the increased transparency has not by and large posed a hindrance to parties. On the contrary, awareness of public scrutiny may have a positive effect on how the proceedings are conducted and awards drafted.


107. See ICC Arbitration Rules, Art. 27(b) (2017); Jason FRY, Simon GREENBERG and Frances MASZGA, The Secretedness to ICC Arbitration (International Chamber of Commerce 2012) p. 335 at paras. 1-807. The Rules do not provide that the arbitration proceedings are confidential. Rather than creating a general rule requiring the proceedings to be kept confidential and then attempting to define the exceptions that will inevitably arise, the Rules take a more flexible and tailor-made approach, leaving the matter for the parties or the arbitral tribunal to address in light of the specific circumstances of the case.


110. Constantin Partasidis, "What Has Been The "Spillover" Effect Of The Transparency Debate on Commercial Arbitrations", this volume, p. 699 at p. 706, referring also to the fact that the obligation of confidentiality is not implied by the agreement of the parties, but is a matter of law, meaning that it can change.
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109. See Bernard RIX, "Confidentiality in International Arbitration: Virtue or Vice", Jones Day Professorship in Commercial Law Lecture, Singapore Management University in Singapore (12 March 2015) p. 6. Available at: https://law.mmu.edu.my/sites/default/files/law/CERCLA/Notes_Confidentiality_in_International_Arbitration.pdf (last accessed 7 June 2018);


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Second, certain arbitral institutions and associations already publish excerpts of awards in a redacted form, including the ICC, the ICCA Yearbook Commercial Arbitration and the American Arbitration Association. Indeed, arbitration rules of several institutions expressly allow the publication of awards under certain conditions. For instance, the Rules of the American Arbitration Association International Centre for Dispute Resolution (AAA-ICDR) allow for the publication of selected awards that became public in the course of enforcement, while the Rules of the Vienna International Arbitral Centre (VIAC), which have been revised in 2018, provide for the publication of anonymized summaries or extracts of awards. According to the Rules of the Swiss Chambers’ Arbitration Institution (SCAI) an award may be published if no party objects to it. The International Bar Association (IBA) Arbitration Committee has also formed a subcommittee led by Professor Pierre Mayer with the aim of compiling and analyzing international commercial arbitration decisions dealing with matters of contract interpretation. In the field of academia, scholars are also compiling arbitral awards for the purpose of identifying an evolution in contract law as applied by tribunals.

The publication of awards can also be done in a manner that preserves the confidentiality of the parties and their business secrets, through a variety of means. Commentators have suggested, for example, publication of the award only after a certain period has elapsed; publication limited to only the tribunal’s reasoning; and the possibility of tribunals to exclude publication of certain parts of awards upon hearing the parties. For instance, the default rule of the applicable arbitration rules could be the publication of awards in an anonymized version, from which the parties could opt out.

111. See, e.g., 23 ICC International Court of Arbitration Bulletin (2015, no.2) for ICC Oil and Gas Cases, or 25 ICC International Court of Arbitration Bulletin (2015, no.1) for the first ICC cases dealing with Emergency Arbitrator procedures.

112. AAA-ICDR Arbitration Rules, Art. 30(3).

113. VIAC Rules of Arbitration, Art. 4.1.

114. SCAI Rules of International Arbitration, Art. 44(3).

115. The link to the Subcommittee’s page is the following: <https://www.ikbnet.org/LP0/Dispute_Resolution_Section/Arbitration/Default.aspx>.


121. When asked about what institutions could do to improve international arbitration, 64 percent of the respondents to the Queen Mary University of London survey mentioned the publication of awards in a redacted form and/or summaries. 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, conducted by the Queen Mary University of London and White & Case, p. 23. Available at: <https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations> (last accessed 7 June 2018).
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There are therefore possible solutions for the publication of arbitral awards which can be applied in a manner that respects the confidentiality expectations and interests of arbitrations users. And while confidentiality remains an important element, even users have expressed a growing appetite for the publication of awards.

V. CONCLUSION

The legitimacy of commercial arbitration is undoubtedly under fire for a variety of reasons. As to the criticism regarding the development of common law, commercial arbitration probably does have an impact and it is only with the more systematic publication of awards that we can effectively respond. These latest calls for publication from the common law world may thus be the cue to finally take this long-heralded next step in the journey of commercial arbitration – a step which may also address some of the broader legitimacy challenges being faced by arbitration today.