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Commercial Arbitration and the Development of Common Law

Noradèle Radjai[*]

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I. 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, fueled 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 lair, 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. Lord Chief Justice THOMAS, "Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration", The BAILII Lecture 2016 (9 March 2016) p. 10. Available at: <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (last accessed 7 June 2018).
2. Myriam GILLES, "The Day Doctrine Died: Private Arbitration and the End Of Law", 2016 U. Ill. L. Rev. (2016) p. 371 at p. 376.
3. Lord Chief Justice THOMAS, "Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration", The BAILII Lecture 2016 (9 March 2016) p. 10. Available at: <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (last accessed 7 June 2018).
4. Harris BOR, "Comments on Lord Chief Justice Thomas' 2016 BAILII Lecture which promotes a greater role for the courts in international arbitration", Kluwer Arbitration Blog, 11 April 2016,

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:

(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.[5] Because arbitration proceedings are often confidential,[6] it is difficult to cite numbers to support these assertions. A renowned German international arbitration scholar, has stated that 90 percent of international economic contracts have an arbitration clause.[7] Even if this may be an exaggeration,[8] data from the major international arbitration institutions show a steady growth in the number of disputes they administer.[9] 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

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available online at <http://arbitrationblog.kluwerarbitration.com/2016/04/11/comments-on-lord-chief-justice-thomas-2016-bailii-lecture-which-promotes-a-greater-role-for-the-courts-in-international-arbitration/> (last accessed 26 March 2019).

5. Ank SANTENS and Romain ZAMOUR, "Dreaded Dearth 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. Alan REDFERN and Martin HUNTER with Nigel BLACKABY and Constantine PARTASIDES, *Redfern and Hunter on International Arbitration*, 5th ed. (Oxford University Press 2009) p. 136 at para. 2.145; Ank SANTENS and Romain ZAMOUR, "Dreaded Dearth 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.
7. Klaus Peter BERGER, *International Economic Arbitration* (Kluwer Law and Taxation Publishers 1993) p. 8 at n. 62 ("About ninety percent of international economic contracts contain an arbitration clause."); Ank SANTENS and Romain ZAMOUR, "Dreaded Dearth 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.
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 much more than 10% of all contracts – contain either forum selection clauses or no dispute resolution provision at all."); Ank SANTENS and Romain ZAMOUR, "Dreaded Dearth 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.
9. Christopher R. DRAHOZAL and Richard W. NAIMARK, eds., *Towards a Science of International Arbitration: Collected Empirical Research*", (Kluwer Law International 2005) p. 1, at p. 341; see also BORN, supra fn. 8, at p. 94.

preferred dispute settlement method for cross-border commercial disputes.[10] Therefore, it cannot be denied that arbitration is the primary means of resolving disputes.[11] It follows that this has led, in turn, to a diversion of commercial disputes away from commercial courts.

This diversion of disputes away from the courts is further compounded by the broadening scope of arbitrability, for instance over consumer and employment disputes.[12]

Many of these disputes that are being channelled away from commercial courts are governed by common law. On the latest available statistics from the International Chamber of Commerce (ICC), it would appear that English law and New York alone are the most frequent choices of law.[13] In 2014 English law as a choice of law was in first place with 14.1 percent, followed by US law.[14] It follows therefore that these cases, were they not being diverted to arbitration, would be heard before the courts of the common law jurisdictions. So, it seems logical to conclude that the increase of arbitrations is removing from the state courts cases that might otherwise contribute to the development of common law.

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...". It also "retards public understanding of the law" and "public debate over its application".[15]

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

10. *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, conducted by Queen Mary University of London and White & Case, p. 2. Available at: <https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations> (last accessed 7 June 2018).
11. Ank SANTENS and Romain ZAMOUR, "Dreaded Dearth 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.
12. Stavros L. BREKOULAKIS, "Chapter 14: Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making" in Tony Cole, ed., *The Roles of Psychology in International Arbitration* (Kluwer Law International 2017) p. 339 at p. 339.
13. 2016 ICC Dispute Resolution Statistics published in ICC Dispute Resolution Bulletin (2017, no. 2). Available at: <http://library.iccwbo.org/content/dr/STATISTICAL_REPORTS/SR_0039.htm?l1=Statistical+Reports&AUTH=9b9ace50-7103-4bf8-9c7f-7c3a255074b4&Timeframe=lFpRLm7D9VnsUTYnT4ea734tgV1WUYujvRvjpq6rJov2b2KavSnQg==> (last accessed 7 June 2018).
14. 2014 ICC Dispute Resolution Statistics published in ICC Dispute Resolution Bulletin (2015, no. 1). Available at: <http://library.iccwbo.org/content/dr/STATISTICAL_REPORTS/SR_0037.htm?l1=Statistical+Reports&AUTH=9b9ace50-7103-4bf8-9c7f-7c3a255074b4&Timeframe=lFpRLm7D9VnsUTYnT4ea734tgV1WUYujvRvjpq6rJov2b2KavSnQg==> (last accessed 7 June 2018).
15. Lord Chief Justice THOMAS, "Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration", The BAILII Lecture 2016 (9 March 2016) p. 4. Available at: <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (last accessed 7 June 2018).

write precedential decisions".[16] 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".[17] The prohibition of class action after the judgments of *AT&T Mobility v. Concepcion*[18] and *American Express Company v. Italian Colors Restaurant,*[19] 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".[20] Even arbitration practitioners refer to the "dearth of precedent".[21]

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.[22]

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.[23] Indeed, 25.7 percent of the cases commenced in 2015 before the Commercial Court were arbitration-related claims.[24] Furthermore, statistics from the Ministry of Justice indicate that over 1,100 cases per year are heard by the commercial

16. Myriam GILLES, "The Day Doctrine Died: Private Arbitration and The End of Law", University of Illinois Review (2016) p. 376.
17. *Id.*
18. *AT&T Mobility v. Concepcion,* 131 S.Ct. 1740 (2011).
19. *American Express Company v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013).
20. Myriam GILLES, "The Day Doctrine Died: Private Arbitration and the End of Law", University of Illinois Review (2016) p. 409.
21. See A. SANTENS & R. ZAMOUR, "Dreaded Dearth of Precedent in the Wake of International Arbitration – Could the Cause Also Bring the Cure?", (2015) 73(7) Yearbook of Arbitration & Mediation.
22. A. STEPHENSON and A. ANDERSSON, "Arbitration: Can It Assist in the Development of the Common Law – An Australian Point of View", 33 International Construction Review (2016, no. 4) p. 413 (Sect. 5).
23. Sir Bernard EDER, "Does Arbitration Stifle Development of the Law? Should s.69 Be Revitalised?", AGM Keynote Address for the Chartered Institute of Arbitrators (28 April 2016) p. 4. Available at <https://www.londonarbitrators.org/sites/londonarbitrators.org/files/CIArb%20_%20EDER%20AGM%20Keynote%20Address%2028%20April%202016%20AMND.pdf> (last accessed 7 June 2018); J. William ROWLEY QC, "Rowley: London Arbitration Under Attack", GAR Arbitration Review (16 May 2016). Available at: <https://globalarbitrationreview.com/article/1036328/rowley-london-arbitration-under-attack> (last accessed 7 June 2018); Justice BLAIR, "Commercial Dispute Resolution – Current Developments in the Commercial Court", 2016 Commercial Litigation and Arbitration Forum (3 November 2016) p. 7.
24. Justice BLAIR, "Commercial Dispute Resolution – Current Developments in the Commercial Court", 2016 Commercial Litigation and Arbitration Forum (3 November 2016) p. 7.

courts.[25] In 2015 the Ministry of Justice indicated that the caseload of the commercial courts was on the rise.[26]

It is not only arbitration practitioners and scholars that have rallied against these criticisms,[27] 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".[28] Lord Woolf has also been reported to say that the courts retain a sufficient workload to develop the common law in commercial matters.[29] 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."[30]

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.[31] Common law relies on precedent developed over generations and prides itself on its ability to adapt its principles to changes in trade, commerce and the markets.[32] As per the analogy drawn by

25. J. William ROWLEY QC, "Rowley: London Arbitration Under Attack", GAR Arbitration Review (16 May 2016). Available at: <https://globalarbitrationreview.com/article/1036328/rowley-london-arbitration-under-attack> (last accessed 7 June 2018).
26. J. William ROWLEY QC, "Rowley: London Arbitration Under Attack", GAR Arbitration Review (16 May 2016). Available at: <https://globalarbitrationreview.com/article/1036328/rowley-london-arbitration-under-attack> (last accessed 7 June 2018).
27. J. William ROWLEY QC, "Rowley: London Arbitration Under Attack", GAR Arbitration Review (16 May 2016). Available at: <https://globalarbitrationreview.com/article/1036328/rowley-london-arbitration-under-attack> (last accessed 7 June 2018); Rachel Tan XI'EN, "Essay on Lord Chief Justice Thomas' 2016 BAILII Lecture", Singapore Academy of Law (2017) (unpublished). Available at: <https://www.sal.org.sg/Portals/0/Documents/Christopher%20Bathurst%20Prize%20submission/Tan%20Xi%E2%80%99en%20Rachel.pdf?ver=2017-09-21-181339-383> (last accessed 7 June 2018).
28. Sir Bernard EDER, "Does Arbitration Stifle Development of the Law? Should s.69 Be Revitalised?", AGM Keynote Address for the Chartered Institute of Arbitrators (28 April 2016) p. 4. Available at <https://www.londonarbitrators.org/sites/londonarbitrators.org/files/CIArb%20_%20EDER%20AGM%20Keynote%20Address%2028%20April%202016%20AMND.pdf> (last accessed 7 June 2018).
29. Robert GRIFFITHS QC, "Litigation v Arbitration", 2016 Speech during the British American Group of Lawyers (BAGOL) Conference (11 May 2016) para. 27.
30. Robert GRIFFITHS QC, "Litigation v Arbitration", 2016 Speech during the British American Group of Lawyers (BAGOL) Conference (11 May 2016) para. 25.
31. A. STEPHENSON and A. ANDERSSON, "Arbitration: Can It Assist in the Development of the Common Law – An Australian Point of View", 33 International Construction Review (2016, no. 4) p. 413 (Sect. 5).
32. Lord Chief Justice Thomas, "Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration", The BAILII Lecture 2016 (9 March 2016) p. 2. Available at: <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-

Justice McLachlin, Chief Justice of Canada, common law is akin to a living tree: "All areas of law ... are living, constantly evolving trees. Some branches sprout and grow; others crack and need trimming. Thus, the law develops and remains responsive to changes in society."[33]

There are numerous examples, across the common law world, of recent cases which have marked important developments of law.[34] The relatively reduced caseload 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 case 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."[35]

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 first 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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lecture-20160309.pdf> (last accessed 7 June 2018); Harris BOR, "Comments on Lord Chief Justice Thomas' 2016 BAILII Lecture which Promotes a Greater Role for the Courts in International Arbitration", Kluwer Arbitration Blog (11 April 2016). Available at: <http://arbitrationblog.kluwerarbitration.com/2016/04/11/comments-on-lord-chief-justice-thomas-2016-bailii-lecture-which-promotes-a-greater-role-for-the-courts-in-international-arbitration/> (last accessed 7 June 2018).

33. The Right Honourable Beverly MCLACHLIN, "Judging the 'Vanishing Trial' in the Construction Industry", 5 Construction Law International (2010, no. 2) p. 9 at p. 10.
34. Andrew STEPHENSON and Astrid ANDERSSON, "Arbitration: Can It Assist in the Development of the Common Law – An Australian Point of View", 33 International Construction Review (2016, no. 4) p. 413; Myriam GILLES, "The Day Doctrine Died: Private Arbitration and the End of Law", U. Ill. L. Rev. (2016) p. 371 at p. 375 et seq.; Lord Chief Justice THOMAS, "Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration", The BAILII Lecture 2016 (9 March 2016) p. 5 et seq. Available at: <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (last accessed 7 June 2018).
35. Justice Beverley MCLACHLIN PC, "Judging the 'Vanishing Trial' in the Construction Industry", 5 Construction Law International (2010, no. 2) p. 10.

ICCA 2014 Congress.[36] This paper will therefore build on the commendable work on this subject that has already been done.

The dominant perception of arbitration is that it constitutes a jurisprudential system that provides the "legal infrastructure" for the settlement of private disputes.[37] This is of course undeniable. What is, however, the nature of this quasi-judicial system? Depending on the answer, the standard of its legitimacy changes.

If, for instance, arbitration is understood as an entirely private normative order, whose existence derives solely from the will of its users,[38] then its legitimacy is also inferred by the party autonomy of the disputing parties only, since their acceptance of the system is what creates it.

However, such a perspective fails to take into consideration "the effects of international arbitration on non-users".[39]

Over recent years, arbitration has undergone a transformation from a purely private mechanism of dispute resolution into an institution of governance, through a multitude of factors. This phenomenon began in the field of investment arbitration but is by no means limited to it.

It is by now indisputable that investment disputes involve issues that pertain to public interests.[40] As explained by Professor Schill, the normative effects of arbitration "go beyond the realm of the disputing parties and have important repercussions on recalibrating social relations, and the rights connected to them, both private and public".[41]

The same can be argued, albeit to a lesser extent, in the context of commercial arbitration where certain developments have contributed to its transformation into an institution of governance. The first factor is the role of a state in its commercial capacity

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36. See, e.g., Stephan W. SCHILL, "Developing a Framework for the Legitimacy of International Arbitration" in *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series no. 18 (Kluwer 2015) (henceforth *ICCA Congress Series no. 18*) p. 789.
37. Stephan W. SCHILL, "Conceptions of Legitimacy of International Arbitration" in David D. CARON, Stephan W. SCHILL, Abby C. SMUTNY and Epaminontas E. TRIANTAFILOU, eds., *Practising Virtue: Inside International Arbitration* (Oxford 2015) p. 106; Amsterdam Law School Research Paper No. 2017-17; Amsterdam Center for International Law No. 2017-14, p. 13. Available at SSRN <https://ssrn.com/abstract=2932147> (last accessed 6 June 2018).
38. See, e.g., Jan PAULSSON, *The Idea of Arbitration* (Oxford University Press 2013); Jan PAULSSON, "Arbitration Unbound: Award Detached from the Law of Its Country of Origin", 30 Int'l & Comp LQ (1981) p. 358; Jan PAULSSON "Delocalisation of International Commercial Arbitration: When and Why It Matters", 32 Int'l & Comp LQ (1983) p. 53.
39. Stephan W. SCHILL, "Conceptions of Legitimacy of International Arbitration" in David D. CARON, Stephan W. SCHILL, Abby C. SMUTNY and Epaminontas E. TRIANTAFILOU, eds., *Practising Virtue: Inside International Arbitration* (Oxford 2015) p. 106; Amsterdam Law School Research Paper No. 2017-17; Amsterdam Center for International Law No. 2017-14, p. 13. Available at SSRN <https://ssrn.com/abstract=2932147> (last accessed 6 June 2018).
40. Michael WAIBEL, Asha KAUSHAL with Kyo-Hwa CHUNG, Claire BALCHIN, eds., *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) p. xxxvii – li, p. xxxvii.
41. Stephan W. SCHILL, "Developing a Framework for the Legitimacy of International Arbitration" in *ICCA Congress Series no. 18*, pp. 794-795.

as *jure gestionis*.[42] When a state participates in a commercial contract, it does so in its private capacity.[43] However, even where the party to the contract is a state-owned entity, it is still plausible that government officials signed the contract.[44] 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.[45] Consequently, the effect of the contract, and disputes resolved under it, will not be confined to the contracting parties.[46]

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.[47] The authority of 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.[48] Most recently, for example, the US Supreme Court decision in *Epic Systems v. Lewis* upheld mandatory individual labor arbitration agreements.[49] 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, inarbitrability) as central as it may be to arbitration theory, has virtually died in real arbitral life".[50]

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42. See, e.g., Veijo HEISKANEN; "State as a Private: The Participation of States in International Commercial Arbitration", 1 TDM (2010) p. 2. Available at <www.transnational-dispute-management.com/article.asp?key=1525> (last accessed 6 June 2018).
43. Veijo HEISKANEN; "State as a Private: The Participation of States in International Commercial Arbitration", 1 TDM (2010) p. 2. Available at: <www.transnational-dispute-management.com/article.asp?key=1525> (last accessed 6 June 2018).
44. Veijo HEISKANEN; "State as a Private: The Participation of States in International Commercial Arbitration", 1 TDM (2010) p. 7. Available at: <www.transnational-dispute-management.com/article.asp?key=1525> (last accessed 6 June 2018).
45. Andrés JANA, "Private and Public Interest in International Commercial Arbitration", this volume, p. 317 at p. 325.
46. Cindy G. BUYS, "The Tensions Between Confidentiality and Transparency in International Arbitration", 14 The American Review of International Arbitration (2003) p. 121 at p. 135.
47. See, e.g., Karim Abou YOUSSEF, "Part I: Fundamental Observations and Applicable Law, Chapter 3 – The Death of Inarbitrability" in Loukas A. MISTELIS and Stavros L. BREKOULAKIS, eds., *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) p. 47.
48. Stavros L. BREKOULAKIS, "Chapter 14: Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making" in Tony Cole, ed., *The Roles of Psychology in International Arbitration* (Kluwer Law International 2017) p. 339 at p. 339.
49. *Epic Systems Corporation v. Jacob Lewis*, 584 U. S. (2018) p. 25.
50. Karim Abou YOUSSEF, "Part I: Fundamental Observations and Applicable Law, Chapter 3 – The Death of Inarbitrability" in Loukas A. MISTELIS and Stavros L. BREKOULAKIS, eds.,

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 margin 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 consolidation of the arbitral procedure, with institutions and associations organizing conferences, trainings and seminars for the promotion of arbitration.[51]

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.[52]

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".[53] 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.[54] Or we can consider legitimacy from the perspective of a broader population – per Professor Schill's categories, this would be national or global legitimacy.[55]

Arbitrability: International and Comparative Perspectives (Kluwer Law International 2009) p. 47 at p. 47.

51. Stephan W. SCHILL, "Developing a Framework for the Legitimacy of International Arbitration" in *ICCA Congress Series no. 18*, p. 796.
52. Stephan W. SCHILL, "Developing a Framework for the Legitimacy of International Arbitration" in *ICCA Congress Series no. 18*, p. 803.
53. Andrés JANA, "Private and Public Interest in International Commercial Arbitration", this volume, at p. 326.
54. Stephan W. SCHILL, "Developing a Framework for the Legitimacy of International Arbitration" in *ICCA Congress Series no. 18*, pp. 812-813.
55. Stephan W. SCHILL, "Developing a Framework for the Legitimacy of International Arbitration" in *ICCA Congress Series no. 18*, pp. 813-817.

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 stifling 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 stifling – 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.[56] As Lord Thomas puts it, this hindrance undermines the very means through which much of the common law's strength was developed.[57]

Even the civil law world is not unaffected by this stifling. 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.[58] 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.[59] 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.[60] If parties choose to resolve their disputes in arbitration rather than before commercial

56. J. William ROWLEY QC, "Rowley: London Arbitration Under Attack", GAR Arbitration Review (16 May 2016). Available at: <https://globalarbitrationreview.com/article/1036328/rowley-london-arbitration-under-attack> (last accessed 7 June 2018).
57. Lord Chief Justice THOMAS, "Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration", The BAILII Lecture 2016 (9 March 2016) p. 4. Available at: <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (last accessed 7 June 2018).
58. Guy I. SEIDMAN, "Comparative Civil Procedure" in Colin B. PICKER and Guy I. SEIDMAN, eds., *The Dynamism of Civil Procedure – Global Trends and Developments* (Springer 2015) p. 15.
59. Derek AUCHIE, "A Response to Judicial Comments on the Arbitration-Litigation Debate", University of Aberdeen BlogSpot (5 May 2016). Available at: <https://www.abdn.ac.uk/law/blog/a-response-to-judicial-comments-on-the-arbitrationlitigation-debate/> (last accessed 7 June 2018).
60. Harris BOR, "Comments on Lord Chief Justice Thomas' 2016 BAILII Lecture which Promotes a Greater Role for the Courts in International Arbitration", Kluwer Arbitration Blog (11 April 2016). Available at: <http://arbitrationblog.kluwerarbitration.com/2016/04/11/comments-on-lord-chief-justice-thomas-2016-bailii-lecture-which-promotes-a-greater-role-for-the-courts-in-international-arbitration/> (last accessed 7 June 2018).

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 those 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?

1. 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.[61] 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 courts to make judgments on points of law that arise during the arbitral proceedings (before the award is rendered).[62] 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.[63] 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

61. Lord Chief Justice THOMAS, "Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration", The BAILII Lecture 2016 (9 March 2016) p. 13. Available at: <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (last accessed 7 June 2018).

62. *Id.*

63. Dorothy MURRAY, "Are Arbitration Clauses Killing Development of Domestic Law?", Commercial Dispute Resolution Blog (28 November 2016). Available at: <https://www.cdr-news.com/categories/arbitration-and-adr/6887-are-arbitration-clauses-killing-development-of-domestic-law> (last accessed 7 June 2018).

(or other national) court would have decided is of no concern to these parties.[64] 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.[65]

The absurdity of the proposed approach is aptly illustrated by the response of Lord Devlin, when confronted with the opposers 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."[66]

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.[67] Indeed, while the critics accuse arbitration of not living up to its billing when it comes to time and costs,[68] a topic covered by the paper of Laura Abrahamson at this ICCA Congress,[69] the proposal to increase the scope of the courts' intervention in arbitration cases would only compound those concerns.[70]

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

64. Mark SAVILLE, "Reforms Will Threaten London's Place as a World Arbitration Centre", The Times (28 April 2016). Available at: <https://www.thetimes.co.uk/article/reforms-will-threaten-londons-place-as-a-world-arbitration-centre-02t50mgrd> (last accessed 7 June 2018).

65. Derek AUCHIE, "A Response to Judicial Comments on the Arbitration-Litigation Debate", University of Aberdeen BlogSpot (5 May 2016). Available at: <https://www.abdn.ac.uk/law/blog/a-response-to-judicial-comments-on-the-arbitrationlitigation-debate/> (last accessed 7 June 2018).

66. Mark SAVILLE, "Reforms Will Threaten London's Place as a World Arbitration Centre", The Times (28 April 2016). Available at: <https://www.thetimes.co.uk/article/reforms-will-threaten-londons-place-as-a-world-arbitration-centre-02t50mgrd> (last accessed 7 June 2018).

67. As Lord Saville, who chaired the committee that formed the Arbitration Act 1996, has argued "[p]eople use arbitration to resolve their disputes, not to add to the body of English commercial law.... Why, in other words, should they be obliged to finance the development of English commercial law?" Mark SAVILLE, "Reforms Will Threaten London's Place as a World Arbitration Centre", The Times (28 April 2016). Available at: <https://www.thetimes.co.uk/article/reforms-will-threaten-londons-place-as-a-world-arbitration-centre-02t50mgrd> (last accessed 7 June 2018); see also Rachel Tan XI'EN, "Essay on Lord Chief Justice Thomas' 2016 BAILII Lecture", Singapore Academy of Law (2017) (unpublished) p. 5. Available at: <https://www.sal.org.sg/Portals/0/Documents/Christopher%20Bathurst%20Prize%20submission/Tan%20Xi%E2%80%99en%20Rachel.pdf?ver=2017-09-21-181339-383> (last accessed 7 June 2018).

68. Lord Chief Justice THOMAS, "Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration", The BAILII Lecture 2016 (9 March 2016), p. 16. Available at: <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (last accessed 7 June 2018).

69. Laura ABRAHAMSON, "Costs, Delay and Transparency – A Comment on Continued Legitimacy Concerns from the User's Perspective" this volume, pp. 354-360.

70. Sir Bernard EDER, "Does Arbitration Stifle Development of the Law? Should s.69 Be Revitalised?", AGM Keynote Address for the Chartered Institute of Arbitrators (28 April 2016) p. 7-8. Available at <https://www.londonarbitrators.org/sites/londonarbitrators.org/files/CIArb%20_%20EDER%20AGM%20Keynote%20Address%2028%20April%202016%20AMND.pdf> (last accessed 7 June 2018).

is, the English Arbitration Act is in the minority in that it upholds the appeals mechanism, a provision that does not exist in most other arbitration jurisdictions. Even common law judges accept that the critics' proposed approach would "[set] the clock back almost 40 years".[71]

The development of the common law before courts cannot depend on, or call for, the regression of arbitration. Instead a solution must be found which recognizes courts and tribunals as "mutually supportive parts of what is a developing system of international commercial dispute resolution",[72] 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.[73]

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 taps into the lawmaking potential of arbitration.

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

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".[74]

Indeed, there was a time when even English judges tried to pretend that they did not make new law – they merely declared it.[75] As Lord Reid put it in 1972, the "fairy tale"

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71. Sir Bernard EDER, "Does Arbitration Stifle Development of the Law? Should s.69 Be Revitalised?", AGM Keynote Address for the Chartered Institute of Arbitrators (28 April 2016) p. 10. Available at <https://www.londonarbitrators.org/sites/londonarbitrators.org/files/CIArb%20_%20EDER%20AGM%20Keynote%20Address%2028%20April%202016%20AMND.pdf> (last accessed 7 June 2018).
72. Justice BLAIR, "Commercial Dispute Resolution – Current Developments in the Commercial Court", 2016 Commercial Litigation and Arbitration Forum (3 November 2016) p. 7.
73. Justice Beverley MCLACHLIN PC, "Judging the 'Vanishing Trial' in the Construction Industry", 5 Construction Law International (2010, no. 2) p. 321; Ank SANTENS and Romain ZAMOUR, "Dreaded Dearth 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. 83.
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 *Romak* tribunal that "the Arbitral Tribunal has not been entrusted, 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," *Romak S.A. v. Republic* of *Uzbekistan* (UNCITRAL, PCA Case No. AA280) Award (26 November 2009) para. 171.
75. Joshua ROZENBERG, "Is English Common Law at Risk of Becoming Out of Date?", BBC News (31 March 2016). Available at: < https://www.bbc.com/news/uk-35883590> (last accessed 7 June 2018).

was that common law was hidden in an Aladdin's cave and judges were given the magic password on appointment.[76]

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".[77]

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"[78] has been somewhat slower by virtue of the limited publication of awards.[79] Nonetheless, arbitrators can and do perform a lawmaking function.[80] 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".[81] The arbitrators develop normative rules that may not be binding but they influence future awards.

In other words, international arbitrators strive, as they must,[82] 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 Sundaresh 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".[83]

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76. Joshua ROZENBERG, "Is English Common Law at Risk of Becoming Out of Date?", BBC News (31 March 2016). Available at: <https://www.bbc.com/news/uk-35883590> (last accessed 7 June 2018).
77. Jan PAULSSON, "International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law" in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series no. 13 (2007) p. 886.
78. Sundaresh MENON, "International Commercial Courts: Towards A Transnational System of Dispute Resolution", Opening Lecture for the DIFC Courts Lecture Series (2015) p. 6. Available at: <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf> (last accessed 7 June 2018).
79. D. Brian KING and Rahim MOLOO, "International Arbitrators as Lawmakers", 46 N.Y.U. Journal International Law & Politics (2014) p. 875 at p. 886, noting that the publication of awards is one of the critical prerequisites to arbitrators as lawmakers.
80. D. Brian KING, and Rahim MOLOO, "International Arbitrators as Lawmakers", 46 N.Y.U. Journal International Law & Politics (2014) p. 875 at p. 882; Alexis MOURRE, "Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards" in Emmanuel GAILLARD and Yas BANIFATEMI, eds., *Precedent in International Arbitration* (Juris 2008) p. 39 at p. 41 et seq.
81. Alexis MOURRE, "Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards" in Emmanuel GAILLARD and Yas BANIFATEMI, eds., *Precedent in International Arbitration* (Juris 2008) p. 39 at p. 43.
82. Gabrielle KAUFMANN-KOHLER, "Arbitral Precedent: Dream, Necessity or Excuse?", The 2006 Freshfields Lecture, 23 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."
83. Chief Justice Sundaresh MENON, "International Commercial Courts: Towards a Transnational System of Dispute Resolution", Opening Lecture for the DIFC Courts Lecture Series (2015) p. 6.

In practice we can see this in the formation of a body of law in certain industries, for instance a so-called lex petrolea 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.[84] It may be true that arbitral decisions only rarely refer back to previous decisions.[85] 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 not[86] – 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 commentator:[87]

> "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",[88] 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

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Available at: <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf> (last accessed 7 June 2018).

84. Ank SANTENS and Romain ZAMOUR, "Dreaded Dearth 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. 90.
85. Gabrielle KAUFMANN-KOHLER, "Arbitral Precedent: Dream, Necessity or Excuse?", The 2006 Freshfields Lecture, 23 Arbitration International (2007, no. 3) p. 357. A 2006 survey of International Chamber of Commerce awards showed that out of the 190 awards reviewed, about 15 percent cited other arbitral decisions in matters of jurisdiction and procedure, the powers of the tribunal to order provisional measures, and in connection with the determination of the law governing the merits.
86. "[M]ost of the time it is difficult to analyse the exact role that reference to the past played in the arbitral tribunal's reasoning." Alexis MOURRE, "Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards" in Emmanuel GAILLARD and Yas BANIFATEMI, eds., *Precedent in International Arbitration* (Juris 2008) p. 39 at p. 44.
87. Ben JURATOWITCH QC, "Departing from Confidentiality in International Dispute Resolution", BIICL Seminar on Difficult Issues in Commercial, Investor-State, and State-State Dispute Resolution: Differences and Commonalities (8 June 2017) p. 9.
88. Alec S. SWEET, Michael Y. CHUNG and Adam SALTZMAN, "Arbitral Lawmaking and State Power: An Empirical Analysis of Investor-State Arbitration", 1 Journal of International Dispute Settlement (2017) pp. 4-5. Available at SSRN: <https://ssrn.com/abstract=2919723> (last accessed 6 June 2018).

access to those decisions could – directly or indirectly depending on the jurisdiction – assist with the development of law. However we label these decisions, whether lawmaking 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.[89]

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.[90] 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."[91]

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 a 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.[92] 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.[93] But arbitrators are rarely presented with contracts that have no governing law and it cannot

89. Stefan PISLEVIK, "*Precedent and Development of Law: Is It Time for Greater Transparency in International Commercial Arbitration?*" (Oxford University Press 2018) p. 10.
90. Alexis MOURRE, "Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards" in Emmanuel GAILLARD and Yas BANIFATEMI, eds., *Precedent in International Arbitration* (Juris 2008) p. 39 at p. 44, referring to the *Dow Chemical* Award (ICC Case No. 4131, *Dow Chemical France v. Isover Saint Gobain*, Interim Award, 23 September 1982), which has been adopted by national courts in relation to the issue of procedural jurisdiction over a group of companies. See also Francois PERRET, "Is There a Need for Consistency in International Commercial Arbitration?" in Emmanuel GAILLARD and Yas BANIFATEMI, eds., *Precedent in International Arbitration* (Juris 2008) p. 37.
91. Alexis MOURRE, "Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards" in Emmanuel GAILLARD and Yas BANIFATEMI, eds., *Precedent in International Arbitration* (Juris 2008) p. 39 at p. 47.
92. Andrew STEPHENSON and Astrid ANDERSSON, "Arbitration: Can It Assist in the Development of the Common Law – An Australian Point of View", 33 International Construction Review (2016, no. 4) p. 413 at Sect. 6.
93. Gabrielle KAUFMANN-KOHLER, "Arbitral Precedent: Dream, Necessity or Excuse?", The 2006 Freshfields Lecture, 23 Arbitration International (2007, no. 3) p. 357 at p. 376.

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,[94] 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".[95] 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.[96] Others propose that publication should be automatic unless the tribunal decides otherwise.[97]

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:[98]

> "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 Seppälä has made in relation to FIDIC – International Federation of Consulting Engineers – contracts. After collecting arbitration awards rendered in arbitration under FIDIC 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

94. Lucy REED, "Lawmaking in International Arbitration: What Legitimacy Challenges Lie Ahead?", this volume, pp. 52-85.
95. Sir 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. 18. Available at: <https://law.smu.edu.sg/sites/default/files/law/CEBCLA/Notes_Confidentiality_in_International_Arbitration.pdf> (last accessed 7 June 2018).
96. Sir 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. 19-20. Available at: <https://law.smu.edu.sg/sites/default/files/law/CEBCLA/Notes_Confidentiality_in_International_Arbitration.pdf> (last accessed 7 June 2018).
97. Ben JURATOWITCH QC, "Departing from Confidentiality in International Dispute Resolution", BIICL Seminar on Difficult Issues in Commercial, Investor-State, and State-State Dispute Resolution: Differences and Commonalities (8 June 2017) p. 8.
98. Sir 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. 18-19. Available at: <https://law.smu.edu.sg/sites/default/files/law/CEBCLA/Notes_Confidentiality_in_International_Arbitration.pdf> (last accessed 7 June 2018).

sample.[99] In the same vein, in relation to oil and gas disputes, it has not been possible for the courts, especially in the United States, to develop any new precedent. The absence of it is so stark that the Second Circuit certified questions of contract interpretation for oil and gas leases to the New York Court of Appeals.[100] Finally, the same can be said for the excess insurance disputes, especially under the "Bermuda Form", which calls for the resolution of disputes by *ad hoc* arbitration in London, such that that there are almost no reported decisions on the issue.[101]

A legitimacy concern therefore arises not only with regard to the arrested 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."[102]

Finally, greater publication of awards is widely expected to enhance not only the development of arbitral case law but also the quality of arbitration,[103] by resulting in "greater certainty".[104] 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.[105] And an eminent law professor and arbitrator has stated that the legitimacy of

99. Christopher SEPPÄLÄ, "The Development of a Case Law in Construction Disputes Relating to FIDIC Contracts" in Emmanuel GAILLARD and Yas BANIFATEMI, eds., *Precedent in International Arbitration* (Juris 2008) p. 67 at p. 69.
100. Ank SANTENS and Romain ZAMOUR, "Dreaded Dearth 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. 81.
101. Ank SANTENS and Romain ZAMOUR, "Dreaded Dearth of Precedent in the Wake of International Arbitration – Could the Cause Also Bring the Cure?", 7 Y.B. Arb. & Mediation (2015) p. 73 at pp. 79-80.
102. Ben JURATOWITCH, "Departing from Confidentiality in International Dispute Resolution", BIICL Seminar on Difficult Issues in Commercial, Investor-State, and State-State Dispute Resolution: Differences and Commonalities (8 June 2017) pp. 8-10.
103. Alexis MOURRE, "Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards" in Emmanuel GAILLARD and Yas BANIFATEMI, eds., *Precedent in International Arbitration* (Juris 2008) p. 39.
104. Jean-Michel JACQUET, "*Avons-nous besoin d'une jurisprudence arbitrale?*", 3 Revue de l'arbitrage (2010) p. 445 at p. 445.
105. Alexis MOURRE, "Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards" in Emmanuel GAILLARD and Yas BANIFATEMI, eds., *Precedent in International Arbitration* (Juris 2008) p. 39 at p. 53; Gabrielle KAUFMANN-KOHLER, "Arbitral Precedent: Dream, Necessity or Excuse?", The 2006 Freshfields Lecture, 23 Arbitration International (2007, no. 3) p. 357 at p. 376; Stefan PISLEVIK, *Precedent and Development of Law: Is It Time for Greater Transparency in International Commercial Arbitration?* (Oxford University Press 2018) p. 8; Catherine A. ROGERS, "Transparency in International Commercial Arbitration", 54 University of Kansas Law Review (2006) p. 1301 at pp. 1319-1320.

commercial arbitration *depends* on the coherence of published decisions.[106] 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.[107] 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.[108] Indeed, there is no unanimity on the issue of confidentiality across different legal systems.[109] 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.[110] 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.

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106. Pierre TERCIER, "*La légitimité de l'arbitrage*", 3 Revue de l'arbitrage (2011) p. 653 at p. 667; Ank SANTENS and Romain ZAMOUR, "Dreaded Dearth 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. 83.
107. See ICC Arbitration Rules, Art. 22(3) (2017); Jason FRY, Simon GREENBERG and Francesca MAZZA, *The Secretariat's Guide to ICC Arbitration* (International Chamber of Commerce 2012) p. 235 at paras. 3-807: "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."
108. See, e.g., *Esso Australia Res. Ltd v. Plowman*, ICCA Yearbook Commercial Arbitration XXI (1996) (henceforth *Yearbook*) pp. 137, 151 (Australian High Ct. 1995); Judgment of 27 October 2000, *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Fin. Inc.*, *Yearbook* XXVI (2001) pp. 291, 298 (Swedish S.Ct.).
109. Sir 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.smu.edu.sg/sites/default/files/law/CEBCLA/Notes_Confidentiality_in_International_Arbitration.pdf> (last accessed 7 June 2018); Samuel MAYANK, "Confidentiality in International Commercial Arbitration", Kluwer Arbitration Blog (2017). Available at: <http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/> (last accessed 7 June 2018).
110. Constantine PARTASIDES, "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.

Second, certain arbitral institutions and associations already publish excerpts of awards in a redacted form, including the ICC Bulletin, the ICCA *Yearbook Commercial Arbitration* and the American Arbitration Association.[111] 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,[112] 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.[113] According to the Rules of the Swiss Chambers' Arbitration Institution (SCAI) an award may be published if no party objects to it.[114] 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.[115] 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.[116]

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;[117] publication limited to only the tribunal's reasoning;[118] and the possibility of tribunals to exclude publication of certain parts of awards upon hearing the parties.[119] 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.[120]

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111. See, e.g., 25 ICC International Court of Arbitration Bulletin (2015, no.2) for ICC Oil and Gas Cases, or 25 ICC International Court of Arbitration Bulleting (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. 41.
114. SCAI Rules of International Arbitration, Art. 44(3).
115. The link to the Subcommittee's page is the following: <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx>.
116. See, e.g., Joshua D. H. KARTON, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press 2013).
117. Sir 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. 21. Available at: <https://law.smu.edu.sg/sites/default/files/law/CEBCLA/Notes_Confidentiality_in_International_Arbitration.pdf> (last accessed 7 June 2018).
118. Mark FELDMAN, "International Arbitration and Transparency", Peking University School of Transnational Law Research Paper No. 16-12 (25 September 2016) p. 21. Available at SSRN: <https://ssrn.com/abstract=2843140 or http://dx.doi.org/10.2139/ssrn.2843140> (last accessed 7 June 2018).
119. Ben JURATOWITCH, "Departing from Confidentiality in International Dispute Resolution", BIICL Seminar on Difficult Issues in Commercial, Investor-State, and State-State Dispute Resolution: Differences and Commonalities (8 June 2017) p. 8.
120. Sir 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. 21. Available at: <https://law.smu.edu.sg/sites/default/files/law/CEBCLA/Notes_Confidentiality_in_International_Arbitration.pdf> (last accessed 7 June 2018);

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.[121]

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.

Constantine PARTASIDES, "What Has Been The 'Spillover' Effect of The Transparency Debate on Commercial Arbitrations?", this volume, pp. 699-710.

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).