
THOMAS SCHULTZ* AND CLÉMENT BACHMANN**

A Wig for Arbitrators: What Does It Add?

Table of contents	Page
I. Of Joy, Reason, and Self-Delusion	1
II. Causes of Joy: Legitimation, Marketization, Relief	3
III. Causes of Doubts: 'Their' Legitimacy	7
IV. Conclusion: Vulnerability and Beyond	13
Bibliography	15

* Professor of International Arbitration, University of Geneva; Professor of Law, King's College London.

** Research assistant and PhD candidate, University of Geneva.

I. Of Joy, Reason, and Self-Delusion

‘A wig for arbitrators’? Well no, this isn’t an essay expressing the existential angst caused by the receding hairline of one of the authors.

It rather is an essay about joy. In a sense. Not the man-of-the-world, good-humoured sort that the dedicatee of this essay often tosses at his colleagues and students, co-author of the essay included. A different sort of joy, a warier kind. One triggered by the rise of hybrid international commercial courts. (Also called ‘hybrid dispute resolution fora’, these are ‘domestic international’ courts; domestic in the sense that they are part of a country’s judiciary; international in the sense that English is their default language, their bench is usually compounded from different countries, and the law they apply is typically foreign, often a variant of Anglo-American law.¹)

But for the time being, let us simply rejoice.

Yes, you read that right. This supposedly serious article begins with this curious call. Now, lest the angst from above creep out of this text and hop over to the unexpecting reader, we must do some explaining. First of all, yes, we really are referring to this quite unreliable and somewhat dangerous feeling – the thing they call ‘joy’. Of course, in principle, and thank god, it tends to remain at a safe distance from our reasonable, stern field. But still you may have heard of it, or even experienced it now and then in your spare time. So yes, that thing. ‘Joy’.

But the question returns: are we quite insane? Perhaps. And why not? Are we not just human after all? Why would lawyers not deserve a little honest thrill from time to time? Why does this sound shocking?

Well, here’s why: our mission is nothing to joke about. While some are asked (and sometimes paid) to make people laugh, to excite and stimulate enthusiasm, to spread joy, we lawyers are asked (and often paid) to not laugh, to curb the

¹ The first hybrid forum, the London Commercial Court, was created in 1895. After some thoughtful reflection, competitors followed suit and gave birth to the Dubai International Commercial Courts (DICC) in 2004, the Civil and Commercial Court in the Qatar International Dispute Resolution Centre in 2009, the Singapore International Commercial Court (SICC) in 2015, the Chamber for International Commercial Disputes of the District Court of Frankfurt/Main and the China International Commercial Courts 2018, the International Chamber of the Paris Court of Appeal in 2018 and the Netherlands Commercial Court (NCC) in 2019. Lately, projects have been initiated in Brussels, Zurich and Geneva.

enthusiasm, to spread reason. To reason. Over and over again. As coolly as possible. We are the cold ones, the rational ones, the reasonable ones. Our mission, our function, our daily practice – it's all about reason. We rationalize. We cerebrate. We explain. In these capricious times, we are the 'practical reason of the earth'. Our reason, our capacity to contain our emotions is our pride.

The application of law, we argue, is a rational task. We claim and plead this point, we insist on it, over and over again. Until 'they' are persuaded. And our own we indoctrinate in this belief. Systematically. Until we believe it too. And then we take this comforting belief to colour everything else we do. And so we come to believe that everything else we do, everything which surrounds the central task of law application, we also do rationally. When we assess legal phenomena, when we reflect on what we do, when we discuss and comment on our regimes, our institutions, the changing times, we believe we are all reason, all rationality. And 'they', everyone else, tend to believe it too. That's how good we are. Good at marketing our rationality.

But of course it's wrong. It is nonsense. It is delusion, and self-delusion. We lawyers have feelings too. (Ooooh, so cute...) We care about some things and even some people. Our kin, our colleagues, our friends (who sadly so often happen to be the same), our careers, just ourselves. Sometimes we actually do give a hell of a damn. We care.

And as we care, we sometimes just... get excited about things. When news come in that sound good for our industry, we don't just take note with circumspection, with cold rationality. We rejoice. We kinda feel good. We are downright thrilled. We salivate, rub our hands together. And yes, these feelings (that's what these things are called) colour our reasoning. Reason alone does not quite explain how we perform our non-law-application functions, how we assess our regimes, our institutions, the changing times, how we get the measure of the burgeoning hybrid dispute resolution fora, the new hybrid international commercial courts. This is nothing to be ashamed of. For us, it is nothing else than good, promising news. It feels like a welcome, salutary evolution, one that just might save arbitration from its ever more vocal discontents, save it from itself. An evolution that gives us a thrill, a thrill of legitimacy. Finally we are good. Yes, this 'legitimation thrill', this joy informs our approach of this phenomenon, of these hybrid dispute resolution fora. But that might not be such a good idea. Let us explain why.

II. Causes of Joy: Legitimation, Marketization, Relief

So what exactly is so terribly thrilling about hybrid dispute resolution fora?

The short answer is the wig. The judge's wig.

The less metaphorical answer goes as follows. Hybrid dispute resolution fora exhibit the capacity to increase the pie for the arbitration community at large, by mobilizing the power and the social legitimacy of courts and of the figure of the judge. And in addition to the wig, there is the hand. The invisible hand of the market, of competition on the market, that the hybrid fora promise will push and shove and usher us in a better direction.

The point about the power of courts is simple: hybrid fora can circumvent the problems of arbitrability and joinder. For instance, the Singapore International Commercial Court has both the authority to resolve non-arbitrable matters (such as special torts arising from contract, and international intellectual property or trust disputes) and the power to join third parties without their consent.²

The question of legitimacy is more interesting, and more complex. The core idea is the return of the state. Hybrid dispute resolution fora have the comforting label 'we are part of the state' attached to them.

Let us bring in this parallel to make the point more apparent: in the idea of an international investment court, the operative word is 'court', this thing which in our collective imagination is an organ of the state.

The sales strategy, here and there, is simple: The very word 'arbitration' is increasingly associated with critical discourses. In academia, in politics, in the media, in general societal discourses. (At this stage, imagine the board of directors of a social media company; the CEO starts the meeting with 'What we do has come under attack. We have a branding problem.') So let's call what we do a court. A court is something good. Something called a court is something good. It involves judges, *real* judges: people who live on the bench, who are chosen, empowered and paid by the state, who have a fixed monthly salary, some form of accountability. (Oh yes: and a wig.) Affixing the label of 'court' to something mobilizes symbols of justice which effectively give the thing it is affixed to a boost

² Quentin Loh, 'The Limits of Arbitration', (2014) 1 McGill J. Disp. Resol. 66, 81 and references.

in rhetorical or symbolic legitimacy: it will be perceived as more legitimate simply because it is called a court.³

How does this legitimization boost work? Two lines of thought seem credible. First, there is the idea that the involvement of the state apparatus leads to better societal representation, that states, at least democratic ones, are conceived as aggregators of interests and performances. Second, there's an assumption that the more states are involved, the more *state* interests are taken consideration of – not only the particular interests of the particular state involved, but also common state interests. Interests that states share because they are states. Interests of a common, public nature. This would add legitimacy to what arbitration can typically offer because, as Justice Quentin Loh puts it, about just one aspect of the question, 'when the issue at stake affects the public interest – a more and more common occurrence linked to the proliferation of public-private contracts entered into by States or their emanations and private partners',⁴ then hybrid dispute resolution fora with the name 'court' are rhetorically a better fit. A dispute resolution forum 'by the public for the public': one involving the broader public, incarnated by the state, for disputes which, inevitably, increasingly concern the broader public.

In that sense, hybridization is comforting because it triggers the assumption that hybrid adjudicators will give more consideration to values and interests of states and society than arbitrators do. So hybridization will not only contribute to extending the market of autonomous dispute resolution, but also help it evolve and survive the forecasted winter of arbitration if it does finally come.

Now, the argument is in fact subtler than it appears, as is often the case with sales strategies. The idea isn't simply 'let's go back to courts, to the state'. Rather, 'hybridization' is like 'transnationalization' or 'harmonization' – it expresses a diffuse sense of finding the right balance, getting the best of both worlds, keeping all the good stuff while getting rid of the bad. Lucy Reed puts it wonderfully (listen to the words!): hybridization, she explains, isn't 'an abject retreat to traditional litigation' but rather, 'leaving the Arbitration v Courts ... debate', isn't it 'the best of all possible worlds'?⁵ To be sure, finding the right balance will hardly stir much public outcry. No one has ever been excommunicated for declaring,

³ A discussion of the different forms of legitimacy (social, rhetorical, symbolic, etc.), in an arbitration context, can be found in Thomas Schultz, 'Legitimacy Pragmatism in International Arbitration: A Framework for Analysis', in J. Kalicki and M. Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series No. 20, Kluwer 2019.

⁴ Quentin Loh, cited in Marta Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) MPILux Research Paper Series 2019 (2).

⁵ Lucy Reed, 'International Dispute Resolution Courts: Retreat or Advance – The 10th John E.C. Brierley Memorial Lecture' (2018) 4 McGill J. Disp. Resol. 129, 136-7.

with a deep baritone voice (picture Morgan Freeman): 'in medio stat virtus'. Balance is an unconditional positive. At least from a marketing perspective targeting individuals who like to think of themselves as coolly rational and distinctively reasonable.

(Oh and, by the way, the idea that hybrid dispute resolution fora are thrilling because they enlarge the dispute resolution pie is not ours, a wry idea of cynical academics. It is how practitioners – representative of the arbitration industry – promoting these domestic international commercial courts put it: 'In any event, there is room for co-existence and even partnership between international commercial courts and arbitration, as both are fishing in the same pond while enlarging the pie.'⁶)

Let us move on from the legitimation drawn from the figure of the judge and the role of courts, to the idea of competition. From the wig to the hand.

The idea now is that the invisible hand of the free market economy of international litigation will push all international dispute resolution services in the direction of better services, that the hand needs competition to do its work, and that international commercial courts are the new product providing that competition. The mood is heady, bold, and free: let us stop beating about the bush, let us understand dispute resolution fora, and justice, as just any other product. One that is sold. One that comes with and needs advertisements. Let us crank up the market. We have a fine new product here, let us do more (forum) shopping, more (forum) selling. As the promoters of hybrid resolution fora put it, what is needed now is 'a serious campaign of overseas marketing'.⁷ Let us get to work, in our joy!

Is this a good idea, this idea of competition? To an international dispute resolution audience, the answer is probably a matter of gospel, of the gospel of market economics. Competition promotes financial efficiency and leads to an optimal allocation of resources. The litigation competition is a race to the top, to excellence. Increasing competition can only be applauded, can only make things more legitimate.

For the cohorts of the international dispute resolution industry, the answer could barely be any different. It is part of an ethos that has shaped international dispute

⁶ Winnie Jo-Me Ma, 2018 Taipei International Conference: Competitive, Collaborative or Cooperative Relations between Litigation, Arbitration and Mediation?, Kluwer Arbitration Blog, 23 October 2018.

⁷ Michael Hwang, 'Commercial Courts and International Arbitration—Competitors or Partners?' (2015) 31 *Arbitration International* 193, 197.

resolution throughout the 20th century:⁸ In the 1920s, the ICC championed international commercial arbitration as a means to accelerate economic development in a Europe devastated by the first World War. In the 1950s and 60s, the World Bank championed investment arbitration as a means to boost the economic development of developing countries in a post-WWII, decolonized and decolonizing world with many new governments. In the 1970s and 80s legal entrepreneurs convinced countries to adopt laws to facilitate arbitration on the grounds that it would be good for their economy. Arbitration institutions, and the arbitration industry, typically markets arbitration in terms of economic efficiency. The promotion of financial interests has always been the core of discourses about private dispute resolution. Private (and now hybrid) dispute resolution services are good for the market; the market is good for justice, and for us all.

As Yves Dezalay and Bryant Garth have repeatedly shown, the rise of international arbitration throughout the 20th century is the result of the creation of a market – the creation of a legal market by those who would benefit from it most directly and most certainly, by the arbitration industry itself.⁹ If we consider that just investment arbitration, comparatively a marginal practice, has probably generated over US\$10 billion in fees for the arbitration industry, with an additional three quarters of a billion each year, one has to admire the entrepreneurial success.¹⁰ The fact that similar forces, similar constituencies, and similar arguments are now pushing these developments (if you'll allow casual observations of two untrained sociologists to count as fact) seems to signal that this entrepreneurial movement has simply found new terrain for expansion.

Then again, perhaps it isn't that simple. Perhaps it isn't simply expansion. Perhaps it will turn out to be, and only time will tell, not quite an 'object retreat', as Lucy Reed put it, but a prudent retreat to safer grounds. A discreet return of the state, hybridization – these would seem to make international commercial courts safely legitimate. The argument would go like this: The most pressing criticism made against international arbitration's legitimacy are related to its private nature. This is taken care of now. It is hard to see which fundamental concerns states, NGOs, and academics on the political left could still have.

⁸ Thomas Schultz, 'The Ethos of Arbitration', in T. Schultz and F. Ortino (eds), *The Oxford Handbook of International Arbitration*, Oxford University Press 2910 (forthcoming).

⁹ Yves Dezalay and Bryant Garth, 'International Commercial Arbitration: The Creation of a Legal Market', in T. Schultz and F. Ortino (eds), *The Oxford Handbook of International Arbitration*, Oxford University Press 2910 (forthcoming).

¹⁰ Cédric Dupont, Thomas Schultz, and Merih Angin, 'Double Jeopardy? The Use of Investment Arbitration in Times of Crisis', in D. Behn, O.K. Fauchald, and M. Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives*, Cambridge Univ. Press, 2019 (forthcoming).

And so the arbitration community, which has been under constant and increasing fire these last years, could finally heave a sigh of relief. Granted, hybrid dispute resolution is not exactly arbitration any longer. But hybrid dispute resolution fora would definitely contribute to lowering the temperature surrounding the arbitration controversy, while safeguarding most of the dominant interests and values of the arbitration community. They ensure that the actors of international trade will still have access to consensual, impartial, possibly confidential and highly competent dispute resolution mechanisms. Hybrid dispute resolution fora, then, might not entirely save the day for arbitration. But they just might help save the relevant professional field, which most likely would get a good share of the new hybrid pie. In fact, the arbitration community is already eagerly involved in the hybrid dispute resolution field.

III. Causes of Doubts: 'Their' Legitimacy

So we are good, right? We, the arbitration industry, we the international commercial dispute resolution community, we are good? Things are in place – hybrid dispute resolution fora – to keep us all going, right? Under this new form or another, the spirit of arbitration will survive. Private dispute resolution is safe. Party autonomy is safe. Our community is safe. Even better: once again, we find ourselves at the forefront of the legal avant-garde. Why worry? We skim over the latest volume of our favourite arbitration and dispute resolution law reviews, attend the weekly conference on the future of arbitration, and soon enough our souls find peace. All those who understand something about this agree! *We* all agree. And surely no one will dispute that *we* know best. Phew! Private dispute resolution is good, it is right, it is the best for our world, and its end has yet to come. It is, in one word, legitimate. Hybrid dispute resolution fora will make our field even better, even more 'good', even more legitimate. Relax, yes *we* are good, *we* all say it.

Eh. Wait. What just happened is groupthink. What happens in most of the field is groupthink.

Groupthink is a theory in social psychology which suggests that a group too homogeneous in its composition loses out in thinking quality, tends to develop illusions of invulnerability and unanimity, closed-mindedness and pressure towards uniformity and self-censorship. As Irving Janis put it, what happens is 'a

deterioration of mental efficiency, reality testing, and moral judgment that results from in-group pressures.¹¹

Groupthink, combined with this idea from above that we, the lawyers, are the rational ones, the reasonable ones, help us be free of doubt, to soldier on. Joyfully. But where to? Are hybrid dispute resolution fora really the magic bullet of legitimacy for our field?

Let us take a step back from the usual discussions about hybrid dispute resolution fora. Let us try to think with different ideas. The step back will take us right into legitimacy. What is it anyway we might now ask? And does it make sense to ask whether an institution is 'legitimate' tout court, without any further qualification?

Legitimacy means different things to different people, has different meanings in different discourses, and is used for different purposes.¹² Among these meanings, the ones we are interested in for the current discussion revolve around assessment. The assessment of institutions, of their existence, their particular shape, their operations. And the consequences of our assessment.

In that sense, notions of legitimacy are used to account for people's support and espousal of institutions, and conversely their disapproval and neglect and attack of them. These positions towards institutions are based, at least partly, on people's assessment and perception of them. People's position on the legitimacy of an institution, in the most ordinary sense of the word, is essentially the sum of their different assessments and perceptions expressed in the binary mode of legitimate / illegitimate. 'The legitimacy' of an institution, in that sense, plays a critical role in its life and death. Or, less dramatically, for its evolution over time.

From this an important point follows: legitimacy inquiries can help us understand the impact of people's views on the birth, survival, death, or evolution of given institutions in given contexts – but that it is really all. Legitimacy inquiries, at least in that non-Kantian sense, cannot lead to the identification of intrinsic merits of institutions, of qualities of universal value that institutions would have, on a more or less permanent basis, and that could explain, ensure, justify or augur of their success. Brutally simplified, legitimate institutions, in that sense, are always only legitimate to given people at a given point in (social) space and time; they are always only good in the eyes of someone, nothing more. Asking whether an institution is legitimate, then, without further qualification, can only be misleading. An institution cannot be legitimate in the abstract, once and for all, with regard to everyone. Legitimacy, in that sense, it is the object of a constant

¹¹ Irving L. Janis, *Victims of Groupthink*, Houghton Mifflin, 1972, 9.

¹² Thomas Schultz, 'Legitimacy Pragmatism'.

controversy, a never-ending negotiation, a permanent struggle – a permanent *power* struggle when interests are at stake.

Wait again. In the preceding paragraphs, we sneaked in a distinction which we should now make explicit, be it only because what will come in our argument is based on that distinction. So: legitimacy considerations – i.e. whether a given institution will be supported or pushed back against – can turn on two distinct, though overlapping, approaches: substantive assessments and rhetoric.

The questions substantive assessments ask is this: who benefits from a given institution, in the rational-choice theory sense of seeing one's actual interests being furthered but also in the behavioural-economics approach of seeing one's emotional and other non-rational preferences being furthered?¹³ Does a given institution, as it currently stands or in the way it evolves, benefit a certain group, community, category of people? How do institutional changes impact the interests and values of all affected people? The assumption behind the questions is simple: people are likely to support institutions which they perceive to serve their interests and values, and to oppose, or try to change those which don't. In other words, the inquiry posits a correlation between the values and interests a regime serves and the colouration of its supporters' cluster. The more powerful such a cluster is, the more stable the institution would be.

Then again, understanding how and to which extent interests and values are served is far from a mechanical task, leaving ample room for ambiguity and subjectivity. And where there is room for ambiguity and subjectivity, there also is room for influence and rhetoric – for 'advertisement'. Simply put, we may perceive something as legitimate because it 'sounds good', in the sense that it is rhetorically convincing. This would be the case, for instance, if the object in question mobilizes symbols of 'goodness', of acceptability, of justice. Rhetoric, or advertisement, is a tool. A powerful tool, which consists of mobilizing symbols to boost, or to undermine, the support granted to an institution. A tool that promoters of institutions do use, and which plausibly plays a decisive role.

The substantive assessments of hybrid dispute resolution fora have so far essentially been done by us, for us. Our substantive assessment, as our discussion above already sketched, is confined to the interests of our community and of the current users of international commercial dispute settlement – the actors of international trade if you will. The perspective is clear in the existing commentaries: hybrid dispute resolution fora are there to serve the interests of

¹³ For such an approach to investment arbitration, Cédric Dupont, Thomas Schultz, and Jason Yackee, *Investment Arbitration as a Political System*, Oxford University Press, 2020 (forthcoming).

their users. The language, there, is straightforward: 'Any commercial dispute resolution mechanism is ultimately placed at the service of users';¹⁴ 'to service the needs of the City of London (financial centre) and the business community';¹⁵ and so on.

Those who assess hybrid dispute resolution fora, the idea then follows, must do so in this light, from this perspective. And indeed the nearly exclusive criteria by which these fora are judged are the deserved 'expectations'¹⁶, 'needs'¹⁷ and 'preferences',¹⁸ 'benefits',¹⁹ 'comfort'²⁰ and 'advantages'²¹ of 'international business-to-business actors',²² and of international 'legal practitioners'.²³

From this perspective, with these criteria, the diagnosis is comforting. For us, as we've kept saying, there is joy.

But this may well be joyful groupthink. For what about the interests and values of others? What groupthink makes us do is consider our interests and values through the lens of substance, of substantive assessments, and the interests of others through the lens of rhetoric. We assess whether developments – such as the hybridization of international dispute resolution – benefit our community and where the answer is yes, we work on advertising them, framing these developments in a way that will make them appear attractive to larger audiences. We try to convince others that what is good for us is good for them. Our language, the words we use, the way we mobilize symbols and use soothing notions such as 'hybridization' – this is rhetoric, indeed advertising. As Sir William Blair puts it,

¹⁴ Justice Steven Chong, 'The Singapore International Commercial Court: A New Opening in a Forked Path', British Maritime Law Association Lecture, 21 October 2015, 19

¹⁵ Gary Bell 'The New International Commercial Courts — Competing With Arbitration? The Example of The Singapore International Commercial Court' (2018) 11 *Contemp. Asia Arb. J.* 193, 194.

¹⁶ Reed, 'International Dispute Resolution Courts', 132-133, 147.

¹⁷ Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', Opening Lecture for the DIFC Courts Lecture Series 2015, 42-43; Andrew Godwin, Ian Ramsay, and Miranda Webster, 'International Commercial Courts: The Singapore Experience', (2017) 18 *Melb. J. Int'l Law* 219, 259; Quentin Loh, 'The Limits of Arbitration', 82; Chong, 'The Singapore International Commercial Court', 19.

¹⁸ Hwang, 'Commercial Courts and International Arbitration', 200.

¹⁹ Johannes Landbrecht, 'The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?' (2016) 34 *ASA Bulletin* 112, 112.

²⁰ Loh, 'The Limits of Arbitration', 82.

²¹ Vivian Ramsey, 'The Challenges to International Arbitration' (2017) 19 *Asian Dispute Review* 54, 57.

²² Reed, 'International Dispute Resolution Courts', 147.

²³ Landbrecht, 'The Singapore International Commercial Court', 122.

‘some of the vast amount written on the subject seems more of a sales pitch than an attempt at analysis’.²⁴

Of course, we tend to talk of universal rights, of the general interest, of universal and formal justice. Of course, we seek the best possible solution for all. Of course, we wish everyone would be happy. But, frankly, can we deny that our substantive assessment is focused on very specific values and interests? Don’t we tend to equal the interests of international trade with the general interest, on the ground that global economic growth can only benefit the whole? Let’s face it: as we have found that hybrid resolution fora are good for us and our friends, we advocate them. Critical thoughts, marked as unhelpful, are quickly put away.

But let us not be fooled by groupthink, by our self-understanding of rationality and reasonableness and think that our perspective is objective, that this new legal institution will receive the support that we think, in our joy, it will inevitably attract. Rhetoric, advertisement, will buy us time, but in the long run substantive assessments of the interests and values of others are critical. The question may prove crucial even if we only cater for the interests of our community: if what we develop, in this case hybrid dispute resolution mechanisms, is not really good beyond for ourselves and negatively impact states, common interests, society at large, then we should expect a pushback, a backlash from those people, those forces who don’t benefit, and possibly suffer, from what we do.

So let us deconstruct our own arguments, the arguments of our field.

To begin with, we know that economic growth doesn’t benefit everyone. We know, for instance, that trickle-down economics don’t work.²⁵ The economic rise of just some categories of individuals may in fact increase resentment because of inequity aversion. We should not forget that access to international dispute settlement remains a privilege only the very few enjoy. Arbitration may offer justice, but the fact is that the overwhelming majority of people and companies will never have access to it. If the right to choose one’s judge, autonomy, impartiality and efficiency in dispute settlement are so fundamental, why should international dispute resolution mechanisms remain luxury goods? The development of hybrid resolution is unlikely to change anything in this respect. It will merely offer new opportunities to the privileged few.

²⁴ William Blair, ‘Contemporary Trends in the Resolution of International Commercial and Financial Disputes’, Institute of Commercial and Corporate Law Annual lecture delivered at Durham University, 21 January 2016, 4.

²⁵ John Quiggin, *Zombie Economics: How Dead Ideas Still Walk Among Us*, Princeton University Press 2010.

What, then, about the label of the state? Is it only a label, or are we right to form expectations from its involvement in hybrid dispute resolution fora? Will hybridization increase the representivity of international dispute settlement adjudication? Will adjudicators give attention to broader interests and values? Probably not. Nothing indicates that hybrid court judges will be more representative than the existing pool of international arbitrators: the appointment process will not be much more participative, or democratic; the individuals appointed as international commercial judges will probably resemble today's arbitrators very much – wig added.²⁶ In fact, as this new institution is designed to take market shares from local courts, not arbitral tribunals, it would further replace local judges in all their diversity with a much more homogeneous global group of commercially oriented dispute resolution individuals.²⁷ In fact, hybrid adjudicators would probably also be as deterritorialized as arbitrators often are; they would then not, as opposed to locally grounded judges, make decisions that affect the community they live in.

Hybrid dispute resolution fora also aren't likely to take common state interests into particular account – these interests we described above as those that states share because they are states, and which are of a common, public nature. Hybrid mechanisms rather place states in direct competition, thus changing the setting from solidarity of interests to competition of interests. States then have an incentive to advance their particular interests as potential hosts of international dispute settlement bodies,²⁸ to the possible detriment of interests they share with other states. In other words, to prioritize their direct financial interests over broader considerations. And the most efficient way for a state to be a good host is to grant as much autonomy to potential users and players as possible: enabling them to shape the procedure, to determine the substantive rules applicable to the merits, and to apply these rules with some artistic freedom. But are autonomy and artistic freedom really good for everyone? For those who truly are autonomous, perhaps. In sum, we may witness the start of a new race to the bottom, a race which will hardly lead to shift the political orientation of international dispute resolution.

²⁶ Stephan Wilske, 'International Commercial Courts and Arbitration - Alternatives, Substitutes or Trojan Horse' (2018) 11 *Contemp. Asia Arb. J.* 153, 166: '[the] judges [are] all male, all rather senior and all with a rather British cultural background. Accordingly, whoever expects diversity to be reflected in the composition of the bench should pursue other options.' Hwang, 'Commercial Courts and International Arbitration', 195: 'It is interesting to note that, when the first cohort of overseas judges were appointed to the bench of the DIFC Courts, all of them were practising arbitrators, and hence were familiar with arbitration theory and practice.'

²⁷ On the homogeneity of the arbitration community, see Schultz, 'The Ethos of Arbitration'.

²⁸ Wilske, 'International Commercial Courts', 156.

And hybridization? Is this the unconditional positive that the industry's marketing efforts suggest? At the level of generalities about the ways in which we think and argue and persuade, alarms should go off. Consider this: Imagine you say the sky is blue and I claim no, it is yellow: should we happily settle on the idea that it is green? Arguing that a compromise between two positions is the best solution *because* it is that compromise has a name: it is an argumentum ad temperantiam, a golden mean fallacy – a classic argumentative fallacy. There is no reason to assume that, in legal and institutional conflicts, the middle ground is best, that some equidistant third alternative could bring ideal harmony between conflicting values, interests, positions or structures. There is no reason to assume that hybridization (or harmonization and transnationalization) are per se equally good for everyone, that they inevitably are the best possible alternative. Don't get us wrong: we aren't arguing that the combination of opposite positions and values is necessarily a bad thing – engaging in dialectic thinking for instance generally appears promising, when the realization of a concept 'passes over into and is preserved and fulfilled by its opposite'.²⁹ But simply choosing a middle ground should make us expect to find an outcome that looks like something a committee has made. It *can* be good, but this requires a specific and detailed analysis. The thought process, the idea of choosing a middle ground should simply make us look twice instead of simply glancing over it, which is what the advertisement character of the word 'hybridization' would have us do. And as we've sketched above, hybrid dispute resolution for a seem like arbitration repackaged rather than like a real innovation which would solve arbitration's problems.

IV. Conclusion: Vulnerability and Beyond

So what does the wig add? It may allow us to conquer new markets, to use better rhetoric to deflect criticism. But the wig may also slip and cover our eyes. It may make us not see that we, the arbitration community at large, are vulnerable if we continue to preoccupy ourselves principally with our own financial interests and those of our wider community of international economic actors. Granted, extending the ambit of autonomous dispute resolution may have positive financial externalities. But it is far from certain that these will be shared and it is doubtful that they will be accompanied by a corresponding increase in societal representitivity.

²⁹ Merriam-Webster Dictionary of English, entry 'dialectic', referring here to Hegelian thought.

Brutally simplified in the end, by promoting this evolution, we will perhaps do something good for the economy, in particular for the economic elites which tend to resort to these sorts of dispute resolution mechanisms. But in doing so we may well fuel the backlash against the entirety of what we do. We are not invulnerable. A wig doesn't quite protect.

But it doesn't end here. Yes there is joy in conquering markets and in marketing conquests. But there also might be joy in thinking about the evolution of our field in new ways, with different perspectives, to start asking questions we have so far largely left aside: are there avenues that we have not thought of which may foster both economic efficiency and societal representitivity? Could the involvement of the state make more inclusive and participative appointment processes possible? Is there a way to extend our market to the benefit of larger communities, to better share their positive externalities, to knead the financial leaven back into the social dough? There certainly is.

Bibliography

- BELL, GARY 'The New International Commercial Courts – Competing With Arbitration? The Example of The Singapore International Commercial Court' (2018) 11 *Contemp. Asia Arb. J.* 193.
- BLAIR, WILLIAM, 'Contemporary Trends in the Resolution of International Commercial and Financial Disputes', Institute of Commercial and Corporate Law Annual lecture delivered at Durham University, 21 January 2016
- CHONG, STEVEN, 'The Singapore International Commercial Court: A New Opening in a Forked Path', British Maritime Law Association Lecture, 21 October 2015.
- DEZALAY, YVES / GARTH, BRYANT, 'International Commercial Arbitration: The Creation of a Legal Market', in T. Schultz and F. Ortino (eds), *The Oxford Handbook of International Arbitration*, Oxford University Press 2910 (forthcoming).
- DUPONT, CÉDRIC / SCHULTZ, THOMAS / ANGIN, MERIH, 'Double Jeopardy? The Use of Investment Arbitration in Times of Crisis', in D. Behn, O.K. Fauchald, and M. Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives*, Cambridge University Press, 2019 (forthcoming)
- DUPONT, CÉDRIC / SCHULTZ, THOMAS / YACKEE, JASON, *Investment Arbitration as a Political System*, Oxford University Press, 2020.
- GODWIN, ANDREW / RAMSAY, IAN / WEBSTER, MIRANDA, 'International Commercial Courts: The Singapore Experience', (2017) 18 *Melbourne Journal of International Law* 219.
- HWANG, MICHAEL, 'Commercial Courts and International Arbitration—Competitors or Partners?' (2015) 31 *Arbitration International* 193.
- JANIS, IRVING L., *Victims of Groupthink*, Houghton Mifflin, 1972.
- JO-ME MA, WINNIE, 2018 Taipei International Conference: Competitive, Collaborative or Cooperative Relations between Litigation, Arbitration and Mediation?, *Kluwer Arbitration Blog*, 23 October 2018.
- LANDBRECHT, JOHANNES, 'The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?' (2016) 34 *ASA Bulletin* 112.
- LOH, QUENTIN, 'The Limits of Arbitration', (2014) 1 *McGill J. Disp. Resol.* 66.
- MENON, SUNDARESH, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', Opening Lecture for the DIFC Courts Lecture Series 2015.
- QUIGGIN, JOHN, *Zombie Economics: How Dead Ideas Still Walk Among Us*, Princeton University Press 2010.
- RAMSEY, VIVIAN, 'The Challenges to International Arbitration' (2017) 19 *Asian Dispute Review* 54.
- REED, LUCY, 'International Dispute Resolution Courts: Retreat or Advance – The 10th John E.C. Brierley Memorial Lecture' (2018) 4 *McGill J. Disp. Resol.* 129.

- REQUEJO ISIDRO, MARTA, 'International Commercial Courts in the Litigation Market' (2019) MPILux Research Paper Series 2019.
- SCHULTZ, THOMAS, 'Legitimacy Pragmatism in International Arbitration: A Framework for Analysis', in J. Kalicki and M. Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series No. 20, Kluwer 2019.
- SCHULTZ, THOMAS, 'The Ethos of Arbitration', in T. Schultz and F. Ortino (eds), *The Oxford Handbook of International Arbitration*, Oxford University Press 2910 (forthcoming).
- WILSKE, STEPHAN, 'International Commercial Courts and Arbitration - Alternatives, Substitutes or Trojan Horse' (2018) 11 *Contemp. Asia Arb. J.* 153.