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Stateless Law and International Arbitration

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To Anne-Laure

Preface

What is international arbitration really? Is it about law? Is it about recreating a new legal order for certain business transactions? Is it about elbowing aside the laws of states? Or is it about providing another type of services to the parties? But what is law in the first place? And what does it mean to create a legal order? What does it mean to provide law to people?

This book is about these kinds of puzzles. It is about the place where the idea of law and the idea of arbitration intersect. Its purpose, though, is not to provide easy answers to the riddles. It is not a cooking recipe. It is not a manual. It is not a policy paper. Its purpose is to spur people on to think about law, and about international arbitration, and about how the two of them go together.

It is a book about thinking about law, not about doing law, and not about thinking about how to do law. Thinking about law and doing law (and thinking about the latter) are clean, separate things. That distinction is unfortunately too often forgotten in certain fields of the law. There is no shortage of books on how to do law in arbitration. Many of them are truly excellent. This book has a different aim. So do not be dispirited by the time it would take to convert ideas found in this book into things to do in practice. If that is what you are trying to do, you might mean to read a book I have not written. Do not baulk, either, at my unusual lack of systematic distinctions between commercial arbitration, investment arbitration, sports arbitration, arbitration of the quality of grain, consumer arbitration, domain-name "arbitration-like" dispute resolution, and so on. Contrasts between them are of great importance in practice. But the thoughts that need to be thought concern all of them. The conclusions, of course, may well differ, but conclusions are not the point of this book. The point of this book is to take a step back and try to think differently about arbitration in general, and to think about stateless law from a specific angle.

I once gave a talk on one of the subjects of this book. After the talk, when we were all merrily having drinks, someone came up to me and said something along these lines: "Before your talk, I thought of arbitration as I think of this glass here: just a glass with a drink in it. Now I actually discern the molecules in the drink, and recognize the glass itself is liquid." Although that overstates the point (and surely the contents of the glass were of greater interest than my talk), the metaphor captures the idea: the purpose is primarily to think about the same things differently, not necessarily to change them. Changes will come later. I am an academic lawyer. That is the core of my job.

I have endeavored to make this book as accessible as possible. Of course I try to make original contributions to the matters I discuss, and therefore have to engage with quite technical questions now and then. But my greatest hope is that the book might be read by individuals who are not overly focused on the debate whether

there is such a thing as a transnational arbitral legal order. That debate is an important matter in itself, but it is used here primarily as a illustration of broader questions, such as where we should see law, how the label of law may be the product of political manipulations, what it implies to call something law, and so on. Accordingly, and as you can already tell, I have tried to keep the language as simple as possible. I probably have, on occasion, traded precision for accessibility, but I did my best to keep that to parts of the reasoning where the imprecision makes no difference for my argument.

The book was almost entirely written during a fellowship, funded by the Swiss National Science Foundation, at the Graduate Institute of International and Development Studies in Geneva. As these things go, I was quite significantly influenced by certain people at this institution. Andrea Bianchi was chief among them. What I owe him is hard to capture in a concise way. My best try is this: now I am free. I also need and want to thank all the other members of the International Law Department at the Graduate Institute, for a great time amidst the pack. Also at the Institute, but in the Political Science Department, I owe much gratitude to Cédric Dupont, for unusual support and friendliness. Beyond the Institute, my debts are primarily to François Ost at the Facultés universitaires St-Louis and to Matthew Kramer at the University of Cambridge: I owe these two Shakespeare fans a pound of flesh in the region of the heart. Many thanks also to Andrew Mitchell, at the University of Melbourne, for all manner of advice and support, to Sandy Sivakumaran, at the University of Nottingham, who gave advice nudging me in the right direction at several key junctures, to Laurence Boisson de Chazournes and Makane Mbengue, at the University of Geneva, for many discussions on the variegated colors of academia, and to my brother Johannes, at the University of Durham, for endless conversations on the sense of what we do.

Thanks also to Peer Zumbansen, at the Osgoode Hall Law School, York University in Toronto, and Ralf Michaels, at Duke Law School, for their replies to an earlier article (Peer Zumbansen, "Debating Autonomy and Procedural Justice: The Lex Mercatoria in the Context of Global Governance Debates—A Reply to Thomas Schultz" (2011) 2 *Journal of International Dispute Settlement* 427 and Ralf Michaels, "A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller's Contributions to the Jurisprudence of Transnational Dispute Resolution—A Reply to Thomas Schultz" (2011) 2 *Journal of International Dispute Settlement* 417). I had further fruitful discussions or exchanges with Jean d'Aspremont, Frédéric Bachand, Sébastien Besson, Andreas Bucher, Sylvain Bollée, Gralf-Peter Calliess, Olivier Caprasse, Vincent Chetail, Andrew Clapham, Thomas Clay, Maria de la Colina, Thomas Dietz, Zachary Douglas, Paola Gaeta, Emmanuel Gaillard, Fabien Gélinas, Tom Grant, Florian Grisel, Stephanie Hofmann, David Holloway, Jean-Michel Jacquet, Emmanuel Jolivet, Marcelo Kohen, Pierre Lalive, Sébastien Manciaux, Robert Mnookin, Sophie Nappert, William Park, Luca Pasquet, Jan Paulsson, Joost Pauwelyn, Moritz Renner, Elizabeth Tuerk, Gus Van Harten, Jorge Viñuales, Stefan Vogenauer, and Fuad Zarbiev.

Then of course nothing at all would have happened without my parents: their blind support and love made everything possible. (To be sure, all errors and

omissions in this book are theirs: I had no choice but to follow the instructions in the genes.) I just hope to be able to do the same when my turn comes with my own two daughters.

And then the key to it all: I thank my wife for keeping my feet on the ground. After all, that is where the roots are.

I have published early versions of some of the core arguments in Chapters 6–8, and minor points here and there, in the following journals: *The Yearbook of Private International Law*, published by Sellier European Law Publishers; *The American Journal of Jurisprudence*, published by Oxford University Press; *The European Journal of International Law*, published by Oxford University Press; *The Yale Journal of Law and Technology*, published by the Yale Law School; and *The Journal of International Dispute Settlement*, published by Oxford University Press. I am grateful to the publishers of these journals for permission to include revised versions of my works in the present book.

I delivered as talks an early version of Chapter 2 at the University of Oxford in May 2012, parts of Chapter 7 at the University of Cambridge in May 2006, and various parts of Chapter 8 at the University of Montreal in October 2008, at McGill University in June 2009, at the United Nations Commission on International Trade Law in March 2010, at the National Chiao Tung University in Taiwan in November 2011, and at the London School of Economics in April 2012. I taught much of the contents of Chapter 1 as parts of a course at the Graduate Institute of International and Development Studies. I encountered stimulating audiences at all of these institutions, to whom I am grateful.

Contents

Introduction

In his latest book, Robert Mnookin, one of the world's most celebrated negotiation and mediation gurus, recounts an arresting story about an arbitration he co-conducted.[1] The story includes two computer giants, golf-playing executives taking key business decisions because they like someone's face, an elevator going to secret floors not listed on its control panel and guarded around the clock ("more secure than either the Pentagon or the CIA headquarters in Langley, Virginia"[2]), huge teams of hawkish lawyers, and the concept of law without the state.

The story, in a few words, goes as follows. In the early 1980s, IBM and Fujitsu got into a fight. At that time, IBM was producing mainframe computers, and the operating system to run these big, clunky machines. It was by far the biggest player on the market. Fujitsu figured there was room for competition and entered the business of manufacturing IBM-compatible computers. That was all fine and good. But what was not fine, from IBM's point of view, was that Fujitsu had its computers run on a Fujitsu operating system, which was copied from IBM's system. The Japanese company was, in substance, seeking to avoid licensing costs for the use of the original operating system. For IBM of course, it was a copyright infringement. After a few frays, the two camps settled for battle proper: an arbitration was started.

Both sides opened their checkbooks and drummed up armies of the best lawyers they could get. Uncountable press conferences were organized on both sides. Against the background of a tense general commercial relationship between Japan and the USA, the feud between the two giants further inflamed nationalist sentiments in both countries, leading to xenophobic acts on both sides. Commercial war was raging.

At some stage in this battle, a top executive at Fujitsu took what was, in hindsight, one of the company's most felicitous decisions: the appointment of Mnookin as their arbitrator. The executive had liked his face when he came to give a talk at the company's headquarters, and thus decided that the fate of their dispute should be in the hands of this unmistakably shrewd man, and of two further arbitrators.

A few years later, the case essentially settled. The outcome was the result of an imaginative approach to blending arbitration with mediation devised by Mnookin

[1] Robert Mnookin, *Bargaining with the Devil: When to Negotiate, When to Fight* (Simon & Schuster 2010) 139–76.

[2] Mnookin, "*Bargaining with the Devil*," 170.

and Jack Jones, one of the two other arbitrators. Fujitsu obtained the right to use software copied from IBM, and even to have access to more of its source code. Access to the code, however, would only take place in a specific facility, located on the top two floors of some nondescript office building in a small Japanese town. The affairs taking place on these floors were kept a tight secret. The floors could only be accessed from an elevator which displayed no buttons for these floors. (A spy movie would definitely have been a more natural habitat for such a facility.) In return, IBM would be paid a fee, whose amount was set in an adjudicative process by Mnookin and Jones. In sum, the arbitration generated a complex, multifaceted agreement between the parties, parts of which had been produced by mediation, while others resulted from adjudicated decisions. Mnookin refers to the arrangement as the "regime" or "regimen" that the arbitration created.

Crucially, a few years before the arbitration was started, IBM and Fujitsu had already reached a first agreement. It had fallen apart though, primarily because of a cultural misunderstanding: one party considered the words of the agreement to be strictly binding, while the other thought the agreement was rather a commitment to cooperate in the future in a friendly way. In other words, sheer bindingness, or *pacta sunt servanda*, was assumed on the one hand, and something in the league of moral authority was understood on the other.

But let us return to the regime created by the arbitration. In Mnookin's words, the objective was this: "The beauty of this regimen, we thought, was that it would liberate the parties from the realm of ordinary intellectual property law, which wasn't developed enough to be of much use to them in this conflict. Instead, it empowered Jones and Mnookin to create private law that would apply only to the relationship between IBM and Fujitsu."[3]

Notice these words: *private* law. This is meant not, of course, as private law as in the classical private/public law dichotomy, where the former deals with law made by states to regulate relationships between individuals and the latter relates to law made by states to govern relationships between individuals and the government. What is meant here is private as in "private-made law," law made not by the state but by private parties (the arbitrators and the companies). Private law as opposed to state law. Private law, in Mnookin's words, as opposed to "ordinary law."[4] Private law as opposed to law tout court, one may be tempted to say.

But was this really private *law*? Mnookin is not a careless writer. He is attentive to detail. And he is particularly smart—certainly one of the smartest people I have met. To be sure, it was not a slip of the tongue. What plainly transpires in his story is that the parties wanted predictability in future dealings. They wanted guideposts for future self-directed action. Mnookin speaks of "certainty" in their continuing relationship, of "clear standards" and "precise rules,"[5] and of creating a "new regime so that both companies could get on with their real business."[6] But you also get the sense from the tale that both parties, and the arbitrators, wanted to achieve something honorable, an outcome to the case that was morally

[3] Mnookin, "*Bargaining with the Devil*," 141.
[4] Mnookin, "*Bargaining with the Devil*," 176.
[5] Mnookin, "*Bargaining with the Devil*," 164.
[6] Mnookin, "*Bargaining with the Devil*," 169.

authoritative, something that "counts" beyond its sheer bindingness. It was definitely not meant to be some obscure deal circumventing "the law," the upshot of a war, of the use of economic force. Something much more "civilized" was evidently meant. The label of law seems intuitively fitting for that purpose.

But the label of law can also be used for darker purposes. To see the point, consider the idea of "arbitration dependents." I mean people, unlike Mnookin, whose income, social status, intellectual recognition, or professional power, depends to a large extent on arbitration, on the continued existence of arbitration as we have known it for the last few decades. For such people, arbitration must not change. They would fight tooth and nail to keep the arbitration system as it is, or similar to it, to protect it from possibly destabilizing interferences. One weapon in that fight is the label of law: the elevation of arbitration to a transnational *legal* order. A metaphor might be apposite here: the idea is to bless arbitration with the holy water of legality. Law, or legality, is indeed appealing, legitimizing, and evokes justice. Labeling arbitration as a *law*-creating institution protects it. Stamping the current arbitration regime as a transnational, stateless *legal* regime cushions it in layers of respectability and allure.[7] Using the label of law in such a way is, admittedly, a fair marketing strategy for arbitration. But a marketing strategy it is.

Now, beyond the purposes in using the label of law, *can* we in fact speak of the arbitration regime as a legal regime? To start with extremes, can we call just anything law? Can we at least call law anything that is obligatory? It certainly has been tried in the history of the concept of law. We should briefly recall an old debate in legal anthropology: Bronislaw Malinowksi, a key figure in the field, in essence considered that law should be defined by function (primarily bindingness or obligatoriness) and not form.[8] This led him to such an extensive take of legality that Sally Falk Moore, another personality in legal anthropology, argued that "the conception of law that Malinowksi propounded was so broad that it was virtually undistinguishable from a study of the obligatory aspect of all social relationships."[9] Then again, does it matter that we cannot grasp law as a distinct province of study? Put differently, does it matter that we call something law? If it matters (and it does), how should its significance influence what we should be content to call law? Put differently again, how should the consequences of calling something law shape the conception of legality we use in the first place? And if we then take these musings back to arbitration, what should we make of the idea that international arbitration is an instance of transnational legality without the state? Do arbitrators make law? To be sure, they do not make any form of domestic law—they do not make French law or English law or Brazilian law. If at least one of the parties in the case is a state, arbitrators might contribute to the making of the law that governs the behavior of

[7] Critics should object that there is not one international arbitration regime, but several. The point is taken, but its impact on the argument is nil.

[8] Bronislaw Malinowksi, *Crime and Custom in Savage Society* (first published 1926, Littlefield Adams 1985).

[9] Sally Falk Moore, *Law as Process. An Anthropological Approach* (first published 1970, LIT 2000) 220.

states, which is in principle made by states: I mean public international law.[10] But do they make stateless law? Do they make private law? Can they? What would it take for them to do so?

These are the type of questions I address in this book. My purpose plainly is not to close any debate. I do not intend an exhaustive treatment of any area of legal scholarship, as lawyers sometimes maladroitly think they can provide. I do not seek to supply answers that have a pretense to finality. My purpose is to open the debate on arbitration as transnational law to new territories, in the hope that it helps us better understand both the idea of arbitration and the idea of law without the state. It is the debate that matters, and that it be informed.

The debate on the legality of non-state normative systems is much less an innocent pastime for legal scholars, philosophers, and sociologists than most people assume. Attempts to define law and to define law beyond the state are not dry, technical, semantical battles. Calling something law has consequences. It is likely to determine how we think about stateless forms of socio-legal organization and regulation. It is likely to sway the way we think about arbitration for instance. Given as much, it is likely to influence the future of arbitration. The fact that the label of law has consequences contributes to making it worthwhile to think about what we should be willing to call law. Let me say that again: the consequences of calling something law should inform what we should call law. A parallel might help: when we call something a chair, one consequence is that people will take it for granted that they can sit on it. If we craft a definition of a chair that includes objects which cannot be sat on, we likely will have miscarried, unless of course our intent is to trick people into attempting to sit on something and tumble, or to illude them into buying something that we suppose would not be bought if it did not come with the label of "chair." The same idea applies to law.

Many of the questions I address are general points about law without the state. The attempts to elucidate these questions and to suggest possible answers are meant to be generally valid, much beyond international arbitration. The illustrations and examples, on the other hand, will be drawn primarily from the field of international arbitration, in the hope to contribute to both the scholarship dealing with law without territory and the state and the scholarship on the nature of arbitration.

The point of departure is this: a battle of candidates for paradigm is brewing in law. The paradigm according to which law is necessarily state law—the law produced by a state or a collectivity of states—still profoundly marks the way we usually think about law. It still largely determines what is taught in law school. It still tells lawyers what their job is about. But that paradigm is also increasingly unsatisfactory. It captures a decreasing share of reality, as powers beyond the state are getting stronger and better organized. The number of situations and the variegatedness of behavior it allows us to understand and predict is shrinking: individuals, companies, institutions, financial markets, and many other non-state

[10] Eric de Brabandère, "Arbitral Decisions as a Source of International Investment Law" in Tarcisio Gazzini and Eric de Brabandère (eds), *International Investment Law. The Sources of Rights and Obligations* (Martinus Nijoff 2012).

actors are directing their conduct ever more often according to norms not produced by states. During a few centuries, the relationship between law and society was satisfactorily apprehended by the proxy of the relationship between law and the state: society was primarily governed within states and it was thus acceptable to represent governance by law as governance by state law.[11] But the paradigm that law is perforce state law is less and less convincing. As a consequence, broader accounts of what law may be are being pushed. These competing accounts are candidates to become, sometime in the future, the new paradigm of what we collectively recognize and treat as law.

This development, this battle of paradigm candidates, takes place in sundry fields of the law. It has long been prevalent in the field of commercial law. It is increasingly marked in international law.[12] But the mood is perhaps most expansive in the area of international arbitration—a type of commercial law at an international level. Emmanuel Gaillard, a particularly influential practitioner and scholar in this field, has spruced up the issue a few years ago. There currently are, he says, three paradigm candidates (he speaks of "representations"[13]) to account for the legal character, or legality, or legal existence, of international arbitration. That is, the existence of international arbitration as a legal phenomenon can by explained in one of three ways: either it merely forms part of the national legal order of the seat of each arbitration; or it forms part of all the national legal orders that would recognize each arbitration's award; or international arbitration, as a set of general and individual norms forming a regime, is of a legal nature because it is a legal system in itself: a transnational, stateless, arbitral legal order.[14] Gaillard himself is a proponent of the third candidate for paradigm. My point is not so much to ponder whether he is right or wrong, to extol the virtues of his views, or to carp when he enlists the help of slogans. My point is to offer ruminations on what this question of legality is all about, on the fundamental implications of this battle of paradigms, and on the analytical soundness of some of the debate's main tenets. It is to a large extent a meta-theoretical discussion: a discussion in the realm of theories about theories on arbitration and legality. It is not for someone in search of quick truths or fashionable ideas.

Readers seeking factual descriptions of arbitration regimes, or the latest news about them, would be better served by other studies, of which there really are plenty. This is a book about ideas, about ways to think about law, law without the state, and arbitration as a device of socio-legal regulation. It probably does not provide any information that will help anyone win any case before any tribunal. But perhaps it will help certain people think differently about arbitration and about law,

[11] Peer Zumbansen, "Law and Legal Pluralism: Hybridity in Transnational Governance" in Poul Kjaer, Paulius Jurcys, and Ren Yatsunami (eds), *Regulatory Hybridization in the Transnational Sphere* (Brill 2013).

[12] Andrea Bianchi, "Reflexive Butterfly Catching: Insights from a Situated Catcher" in Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012).

[13] Emmanuel Gaillard, "The Representations of International Arbitration" (2010) 1 *Journal of International Dispute Settlement* 271.

[14] Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) 13–66.

or allow them to better understand why they think about these things the way they do.

International arbitration, and more generally international dispute settlement, is commonly represented as a technical field, as a subject-matter that is all about procedural technicalities and black letter law intricacies. This must stop. We cannot shy away from our social responsibilities by taking refuge in the mechanics of the law. Dispute settlement, at heart, is anything but a dry, technical, mechanical field. It is about justice. It is about our fundamental human aspirations. It is about where there is law and where there is not. But of course there is also malice in this wonderland. This book seeks to do justice to this cheerful state of affairs, by attempting to make a dent in it.

1

Why Being Law Matters

On important issues that are difficult to grasp, the world is often divided into two rather strongly opposed camps. There are those who believe a free economy is our greatest achievement and those who doubt it. There are those who believe in all sorts of deities and that they will do something for us at some stage (and for the free economy) and those who doubt it. There are those who drink tea at the slightest provocation and those who look rather exasperated. There are those who understand the point of debating football and those who do not. Then there are those who warmly embrace any attempt to understand what law is, as if the highest calling of every lawyer is to pause and muse on what this thing is we invoke every day. And there are those who decry any such attempt as a rather pointless exercise in settling semantics, as if we understood law better the less we ruminate on what it actually is, as if conceptual analysis muddled our problem-solving reasoning.

Those who mistrust discussions about the nature of law are likely to be doing something else right now, I mean something else than actually reading this. So the reader and I might be tempted to think that there is no point in preaching to the converted. We might dispense with explaining why such contemplations are important and, just like those who are into football, undeviatingly plunge into the depths of the subject matter. We could simply, with no preliminaries, enjoy ourselves juggling with the elements that may make law *law* when we are not talking about the public legal system of the state. We might just proclaim our belonging to the social group of those who enjoy theoretical thinking, whose social norms allow us, even encourage us to mull over the contours of legality. After all, the question of what law is when it is not state law is sufficiently bewildered and convoluted in the literature to warrant a nearly endless flow of attempts at clarification (or of attempts to make the question even more complex, in order to eventually understand it, which then simplifies it). But we should not.

We should not forgo discussing why it is important to entertain the question, to expound why it is meaningful to dwell on just what legality is, because the reasons that make that question important inform how we discuss it, and what exactly we discuss. And in the final analysis these reasons imbue what we should consider to be law without the state. My discussions of why it is important to understand the nature of legality are undertaken not so much in the hope to tie in those in skeptical mode. They are rather made to take a step back from the efforts of our camp to elucidate the nature of law, not to question whether we should do it, but to put what is at stake more cleanly on the table. We might then, ultimately, negotiate at