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The Evolution and Future of International Arbitration

International Arbitration Law Library

VOLUME 37

Editor

Professor Julian D.M. Lew QC has been involved with international arbitration for more than 40 years as counsel, as arbitrator and as an academic. He has held the position of Professor and Head of the School on International Arbitration, Centre for Commercial Law studies, Queen Mary University of London since its creation in 1985. He is now an independent arbitrator at 20 Essex Street, London.

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Chapter 31

INTERNATIONAL ARBITRATION SCHOLARSHIP: FORMS, DETERMINANTS, EVOLUTION

Thomas Schultz*

I. INTRODUCTION

31.1 We have spilled much ink, we as a community, in our discussion of international arbitration. Much of it we have used on specific technical aspects of the laws and rules that apply to it, or that apply in it. A great deal too has gone to how good procedures are to be conducted. And increasingly, of late, we have written on how arbitration works beyond the rules – the rules which reflect some (but only some) of its true operations. We have taken interest in its broader social and economic significance. We are, now and then, zooming out from the bolts and screws and consider it at the level of an entire system. Engagements with problems that truly vex – truly vex beyond offering legal conundrums or presenting complicated logistical puzzles – no longer stand out today as so many sore thumbs. Or much less so.

31.2 Why? And where is it going? Why and how is international arbitration scholarship evolving? What are, to start with, its forms today? And why did we scholars make it what it is? Surely there is something – or rather many somethings – that determine what we write. What could they be?

31.3 These are the principal questions I seek to entertain in this chapter, which constitutes my report as research rapporteur for the conference celebrating the 30th Anniversary of the Queen Mary School of International Arbitration. It is also, to be fair, part of a bigger project that tries to understand how the thinking about law more generally is produced.¹

31.4 To be clear I do not offer here an elaborate study in the sociology of professions. Nor do I attempt to engage in advanced considerations of what forms the arbitral epistemic community or communities,² and what forces animate that community. These are or would be meaningful endeavours, but they are not mine. The outline I offer is of necessity a sketch; I merely want to map a few conventional types of arbitration scholarship and mark some of the possible places where interests can be found that incentivise or constraint research in the field. The ambition is that these types and these interests can inform our perspective when we ponder how the thinking about arbitration law and practice is produced. Accordingly, the propositions I formulate are submitted, in this essay, to rational assent, not to empirical demonstration. Possibly a research programme could be developed to test these propositions. But this is not the point of this essay. Its point is heuristic.

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1. See for instance Thomas Schultz, *Diritto transnazionale senza Stato: quali le cause della resistenza?*, 20 *Ars Interpretandi – Rivista di ermeneutica giuridica* (2015), forthcoming.
2. Andrea Bianchi, *Epistemic Communities in International Arbitration*, in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook of International Arbitration*, (Oxford University Press, forthcoming).

31.5 I believe there is an important general point about arbitration that comes from thinking in particular about how *scholarship* on arbitration is produced. The general point is about what is likely to become of arbitration, about the support it will garner, the pains that will be visited on it, and the changes and adaptations that will be required of it – required of it and of its participants and stakeholders. Arbitration is indeed a fairly technical field, a fairly complex area of the law. And so it often appears that political powers have difficulties in understanding its intricacies, let alone in developing a reliable understanding of their own, distinct from what our discourses showcase – this is the very idea of regulatory capture by an epistemic community. It seems credible, however, that these same political powers will have no difficulty in forming an opinion about the allure of the consequences of sundry arbitral regimes, and if their understanding of either the causes or the consequences is muddled by unhelpful discourses, unhappy things are not unlikely to follow.

31.6 The chapter moves in four parts. I begin with an overview of different forms of arbitration scholarship, what they seek to achieve and how, what form of thinking they correspond to and how they progress, all of this in quite general terms. This part ends with an impressionist account of the evolution of arbitration scholarship over the last 30 years.

31.7 With Part II, I turn to what incentivises and constrains scholarship in the field. I first enter a general approach, which draws heavily on the concept of reasons-for-action, which I combine with basic law & economics tenets. I further introduce a classic distinction between two types of such reasons-for-action.

31.8 In Part III, I apply this general approach to identify ways in which the pursuit of other people's interests may determine what kind of arbitration scholarship we produce. In Part IV, the focus shifts, within the same approach, to the advancement of our own interests when we write on arbitration.

31.9 A final clarification bears noting: my stance is not evaluative. The intent of my chapter is not to dwell on the virtues and demerits of arbitration scholarship, or even, as I already said, to supply evidence of what it is we really do. I simply offer, without much further adornment, a lens for everyone to look at arbitration scholarship from the vantage of their own search.

II. TYPES OF SCHOLARSHIP

31.10 Let me start with a cursory portrayal of arbitration research and why we do it.

31.11 General things first. So in general, it is said that the purpose of mostly any academic discipline, be it within hard sciences, social sciences, or humanities, is to articulate propositions.³ These propositions together form a system of thought.⁴ And this system of

3. This is of course such a general statement that much of the philosophy of science could be referred to. For useful starting points, see, on law, François Ost, *Science du droit* 540, in André-Jean Arnaud (ed), *Dictionnaire encyclopédique de théorie et de sociologie du droit*, (LGDJ 1998), and more generally on scientific work, see Isabelle Stengers, *Cosmopolitiques – tome 1: la guerre des sciences* (La Découverte and Les Empêcheurs de penser en rond 1996); B. Latour, *How to Talk About the Body? The Normative Dimension of Science Studies*, 10 *Body & Society* 205 (2004); Bruno Latour, *Pandora's Hope: Essays on the Reality of Science Studies*, (Harvard University Press 1999).

4. For a focus on the 'systems' dimension of systems of thought, or more specifically on the internal consistency of a set of propositions, as opposed to their individual resistance to falsification, see

thought, appraised at least against the basics of critical thinking, creates knowledge that is eventually susceptible, if not of verification and falsification⁵ (think “empirical studies”), then at least of rational assent, of rational approval.⁶ In other words, it ultimately seeks to improve our understanding of what has happened and what is likely to happen.⁷

31.12 Such a system of thought is generally organised around a paradigm,⁸ a central idea, a central understanding. The whole purpose of law as a scientific discipline can for instance be described as a “cognitive activity seeking to provide a representation of the legal phenomenon in conformity with the scientific paradigm that was endorsed.”⁹ So it all depends on the paradigm that was endorsed. In other words, a central paradigm, and often a number of smaller secondary paradigms, structure and validate the thinking in the field. Such paradigms could for instance be a central understanding of what arbitration itself is, or a central understanding of core ideas in arbitration, such as consent, or public policy, or competence-competence, or that investment arbitration protects investors, or that investment arbitration multilateralises bilateral treaties. From this central idea, or ideas, follow rules of truth shared by members of the discipline: inferences from the paradigm about what is legally valid and what is not, what is an accurate explanation of reality and what is not.

31.13 Then of course, after a while, trouble comes to town. Anomalies appear. Things, phenomena not explained by the paradigm are spotted ever more frequently. And they vex. The validity of the paradigm is questioned. New candidate ideas line up to become the next paradigm. The paradigm in place resists for a time, due to various stakes involved and the beliefs and values that undergird this particular paradigm. But eventually it resigns, allowing a new one to come to the throne and rule the field, determining what is true and what is false in the field, what can be and what cannot, what is legally valid and what is not.¹⁰ In other words, when the system of thought in place no longer provides the comparatively best explanation of reality, the best understanding among competing understanding of what has happened and what is likely to happen, then the system of thought changes, taking us somewhat nearer (when all goes well) to an accurate representation of an observer-independent reality (what philosophers call “truth”).¹¹ And so our understanding progresses through research. This, in essence, is the scientific theory of law as a scientific discipline.

Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes* 130, in Imre Lakatos and Alan Musgrave (eds.), *Criticism and the Growth of Knowledge, Proceedings of the International Colloquium in the Philosophy of Science*, (CUP 1970).

5. Karl R Popper, *Conjectures and Refutations*, (Routledge 1963).
6. David Hartley, *Observations on Man: His Frame, His Duty and His Expectations* 324 (Richardson 1749): “rational assent ... to any proposition may be defined as readiness to affirm it to be true, proceeding from a close association of the ideas suggested by the proposition, with the idea or internal feeling belonging to the word truth; or of the terms of the proposition with the word truth.”
7. See Karl R Popper, *Conjectures and Refutations*, (Routledge 1963).
8. Thomas Kuhn, *The Structure of Scientific Revolutions* (2d ed., University of Chicago Press 1970).
9. François Ost, *Science du droit* 540, in André-Jean Arnaud (ed), *Dictionnaire encyclopédique de théorie et de sociologie du droit*, (LGDJ 1998).
10. Thomas Kuhn, *The Structure of Scientific Revolutions*, (2d ed., University of Chicago Press 1970).
11. This, of course, is a somewhat idealised account of scientific discovery, idealised here in order to mark its difference with other types of scholarship. To start with, the idea that one can reach an accurate representation of an observer-independent reality (even though this is not what I suggested) should be approached with much circumspection. On this issue in legal research, see

31.14 Of course, in law generally, much of what is published in law reviews or in law books does not try to do that. It does not really try to produce knowledge filtered by critical thinking. It has more of an advocacy spin. It tries to produce opinion. It is something closer to religion than to social sciences or the humanities (notice the connotation of the word “doctrine”). When we engage in this type of advocacy, what counts is whether we are able to persuade. (I make no claim as to whether this is better or worse, but I do make the claim that it is different from what I discussed in the previous paragraphs.)

31.15 And so this type of scholarship finds inspiration in the art of persuasion.¹² It also may well find *aspiration* in powerful ideological systems, at its most dramatic even espousing logophobia, in the sense of “a sceptical doctrine about rationality ... [where] rationality cannot be an objective constraint on us but is just whatever we make it, and what we make it depends on what we value”.¹³ Logophobics, to take it to an extreme, “have developed an arsenal of strategist obfuscate clear thinking, which they deploy whenever pressed by a sceptic”.¹⁴ Only persuasion counts. Logical fallacies are not merely condoned. They are practiced, refined, admired if they carry the audience. We take into the law review and the law book the craft developed by advocates for courts – developed for their most mesmerising feats in court. Mesmerising. Not logically conclusive. The law reviews and the law books then dispense the label of “scholarship”.

31.16 I did mention a parallel with religion. The point is that religions prevail over each other not because they provide a better account of reality, an account marked by fewer falsifications, but merely because they become stronger, more powerful. (Probably this is not always the case, but it seems credible enough to give us a workable heuristic model.) Think of the Crusaders – they certainly seemed to think so. And the same happens to legal thinking. Legal thinking changes not only like paradigms, whose individual fading explanatory relevance calls for the rule of a new paradigm. Legal thinking also changes like religion. Central ideas in a field, including in law, can also be imposed by brute force. My central idea is better than yours because I am stronger, and I impose it. I impose it by inundating the field with publications by my gang mates, by organising conferences around my central idea, by launching journals that take my approach, by telling my students (in a broad sense) that mine is the only correct way of thinking, exclusively marks the proprieties. And so my school eventually prevails over yours.

31.17 Just one light example will do: today much bombast and invective and displays of raw lobbying power mark much of the thinking about the question whether, in the context of the Transatlantic Trade and Investment Partnership (TTIP), EU-US investment disputes should be solved by arbitral tribunals or a permanent international investment court. Much less attention is devoted to, for instance, finding evidence, historical parallels, developing theories that help us understand the difference, and try to predict what would likely happen.

31.18 Other forms of legal scholarship have other sources of inspiration. To see the point, let me first say that we seem to have a general issue with role models when we

for instance Andrea Bianchi, *Reflexive Butterfly Catching: Insights from a Situated Catcher* 200, in Joost Pauwelyn et al. (eds.), *Informal International Lawmaking*, (Oxford University Press 2012).

12. See for instance James Boyd White, *The Legal Imagination*, (University of Chicago Press 1985), and Austin Sarat, Matthew Anderson, Cathrine O. Frank, *Introduction: On the Origins and Prospects of the Humanistic Study of Law* 1, in Austin Sarat, Matthew Anderson, Cathrine O. Frank (eds.), *Law and the Humanities, An Introduction* (Cambridge University Press 2010).

13. N. Shackel, *The Vacuity of Postmodernist Methodology*, 36 *Metaphilosophy* 295 (2005).

14. M. Pigliucci, *Logophobia*, 33 *Skeptical Inquirer* 24 (2009).

write on law, when we produce legal research, when we wear our hats of legal scholars. It is, to be sure, a truism for me to say that role models often determine, or at least influence, the way we think, the type of thinking we believe is appropriate. Then again, the implication of the truism is that, as scholars, it would make sense for us to have as role models exceptional scholars (exceptional as in “exceptionally good”, not as in “exceptionally famous”), be they in our field or in a neighbouring discipline. Individuals who have marked the field with their ideas. Individuals whose ideas we remember; individuals who are themselves remembered only incidentally as the intriguing machinery that produced these ideas. Should we not dream of being the person who brought down a central paradigm in our field, or who came up with a new key idea in our discipline? Or at least contribute a small but significant piece to either of these enterprises?

31.19 As it happens, much of legal scholarship seems to identify itself with the work of an appellate court, chastising or complimenting the lower court, engaging in an “imitation of judicial idioms, tasks, gestures, professional anxieties, and the like.”¹⁵ Why, really, when we look for a role model for our scholarly activities do we look to individuals who are precisely not scholars, but judges – individuals who are neither more nor less admirable but have a very different social role and whose work is structured by very different constraints and incentives than ours? (Are there so many frustrated would-be appellate judges who turn to legal scholarship for an outlet?) They – the judges – have the practical task of providing a satisfactory judicial solution to the case at hand and to think of its broader repercussions.¹⁶ As Pierre Schlag puts it, “[t]heir words ... visit legal acts on ... parties, and third parties”.¹⁷ We have the intellectual task of providing a satisfactory scholarly treatment of a question that relates to law. They provide decisions; we provide ideas (or just information). The difference matters, be it only because the degree of intellectual sophistication most appropriate to handle these tasks, the suitable ideational toolboxes, are significantly different. Pierre Schlag again, *pace* the judicial profession: “Judicial discourse is not intellectually edifying. It *is not designed to be*.”¹⁸ A legal decision may be intellectually hogwash, but socially genius, and thus a good decision. Whether the same is true for legal scholarship is entirely more questionable.

31.20 Another role model is possibly even more representative of the psychological workings of legal scholarship. Indeed at other times legal scholars seem to identify themselves with members of parliament, giving the thumbs up to someone’s proposal, ridiculing another, taking sides in a project of “norm-advocacy”.¹⁹ Norm-advocacy is the practice of choosing some norm (a *norm*, not a concept) and doing whatever it takes to have it adopted – adopted by an official body or by a community of other individuals who likewise “vote” on such norms, which again could be the community of legal scholars. To be clear, I am not arguing that this sort of scholarship is not useful. It tries to be part of the substance of the law, to shape doctrines, to offer solutions to judges, arbitrators, and legislators, to influence them. That may well be part of our role as *citizens*, here as special citizens because of our specialized knowledge in certain legal areas. But is this

15. P. Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art)*, 97 Georgetown Law Journal 803, 812 (2009).

16. P. Schlag, *Anti-Intellectualism*, 16 Cardozo Law Review 1111 (1995).

17. P. Schlag, *Jurisprudence Noire*, 101 Columbia Law Review 1733, 1739 (2001).

18. P. Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art)*, 97 Georgetown Law Journal 803, 813 (2009) (the emphasis is mine).

19. P. Schlag, *A Comment on Thomas Schultz’s Editorial*, 5 Journal of International Dispute Settlement 235, 236 (2014).

our role as scholars? Schlag once more: “adoption ... is oddly treated as a sign of good scholarship as opposed to what it is (or might be) – namely, a sign of good service.”²⁰

31.21 Yet another role model that seems to influence our thinking as legal scholars is that of the journalist. We are in the realm of what we could call reporting or, indeed, “case-law journalism”²¹ or legislative journalism: describing cases and legislative amendments, without really using them to form an overarching system of thought, without really trying to rationalise what is being studied.

31.22 Yet another type of scholarship focuses on the idea that law, of course, is not only a theoretical corpus. It is also a social practice. The way law is actually practiced shapes the real-world contents of the law (law on the books is shaped into law in action by practice, as the customary terminology would put it). So scholarship sometimes tries to lead the law somewhere by influencing how it is practiced. This leads to a type of scholarship in arbitration that deals with, for instance, how witnesses are and should be cross-examined.

31.23 Then of course, there are writings that seek neither to advance our knowledge of law as a theoretical corpus or as a social practice, and not even to form opinion about a legal matter, but that seek to advance our knowledge of the author of the writings: if you need to hire a lawyer who is good at a certain set of legal question, then I am your man. Let me write something that demonstrates how good I master these questions. It is bit like playing the violin in a masterclass. Undoubtedly beautiful to observe. But to be taken for what it is.

31.24 Much of what I have described so far are points that apply to legal scholarship generally. Let me turn more specifically to arbitration.

31.25 First of all, it bears noting that arbitration has grown socially: there are quite more people who write on arbitration today than there were 30 years ago. There are more journals too, and more books. So there is more of it. But is it better?

31.26 I would say it is. Be it only because arbitration scholarship, today, is more diversified. I am oversimplifying, but were there used to be mainly doctrinal work and case-law journalism, there is now, in addition to that, conceptual work, epistemological work, sociological work, socio-legal studies, critical systemic work, and much more. The methods are more diverse (think of the growth of empirical studies, for instance). There are more diverse political discourses about arbitration, discourses about the social values that arbitration sustains, and whether the sustainment of these values is socially, economically, politically, a good idea or not. There is more interdisciplinary work, trying to bring into arbitration theoretical developments happening elsewhere, reaching out further into neighbouring fields (political science, economics, philosophy, psychology, literature). To young people, but to everyone really, this would signal that we have more choices now when we engage in arbitration research. The field has become more ecumenical.

31.27 And there seem to be more people who write on arbitration whose socio-professional recognition does not depend, or depends to a lesser degree, on their practice of arbitration. This is of import because our socio-professional interests, inevitably, shape our epistemology, they influence what we consider valid, interesting, admissible research.

20. P. Schlag, *The Faculty Workshop*, 60 Buffalo Law Review 807, 813 (2012).

21. P. Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art)*, 97 Georgetown Law Journal 803, 821ff (2009).

Quite clearly indeed, one's epistemology, what one is ready to recognise as true, valid knowledge, is influenced by one's interests. (In technical philosophical language: theory acceptance is driven by reasons-for-action as much, if not more so, as it is by epistemic reasons.)²² Again: one's epistemology is influenced by one's interests. Think of a government lawyer, or a former government lawyer, who has interests (psychological or more tangible ones) in promoting or sustaining the power of governments. Such a person, because of his or her interests, is likely to have an epistemology that prevents him from recognising, possibly even in his or her most candid moments, that non-state actors can create norms of, say, customary international law.²³ If one's interest is that governments stay strong, one's epistemology is likely to be such that only governments can create law, can create norms of international law.

31.28 A similar observation can be made about the epistemic community of arbitration – that is, the community of so-called experts (that would, well, be us) that shapes the episteme of arbitration. The community that shapes the knowledge we have of the field, the way in which we come to apprehend it theoretically, to use it practically and to explain its operation. That community has become much more diversified, much more fragmented into sub-communities, including for instance the commercial lawyers, the trade lawyers, the public lawyers, and the public international lawyers.²⁴ These are parallel, juxtaposed communities of individuals who think about international arbitration. These are parallel, juxtaposed drawings of the contours of international arbitration law and practice. They are parallel, juxtaposed epistemic fields. Each sub-community has a somewhat different understanding of arbitration, and they do not necessarily really talk to one another. The stars of one sub-community may have a very different standing in another sub-community – if they are known there at all.

31.29 As a result, there are more diverse discourses in arbitration today than there were 30 years ago. This matters because it means more experimentation with new ideas, and thus a greater likelihood that something really new emerges: unconscious thought structures (“epistemological obstacles”, in Gaston Bachelard's terminology²⁵) become diluted as individuals with more diverse backgrounds join the discussion, and thus stand less in the way of change. I said it the previous paragraph about communities; let me say it again here about ideas: there is much less of a “centre” and a “periphery” of the discipline than there used to be, or rather there are a number of centres which all see the rest as periphery.

22. Joseph Raz, *From Normativity to Responsibility* 36–37, (Oxford University Press 2011): “Reasons for action, I will assume, are facts which constitute a case for (or against) the performance of an action. Epistemic reasons are reasons for believing in a proposition through being facts which are part of a case for (belief in) its truth (call such considerations ‘truth-related’). ... theory acceptance is ... acceptance of theories, not belief in them. ... accepting a proposition is conducting oneself in accord with the belief that there is sufficient reason to act on the assumption that the proposition is true: acceptance of the proposition that P entails belief, but not belief that P. Rather it entails belief that it is justified to act as if P. Thus acceptance combines epistemic and practical reasons, though its target is action rather than belief. Acceptance dominates many areas of practical thought.”

23. Michael Wood, *Second Report on Identification of Customary International Law*, International Law Commission, A/CN.4/672, 2014.

24. A. Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 *American Journal of International Law* 45 (2013).

25. Gaston Bachelard, *The Formation of the Scientific Mind: A Contribution to a Psychoanalysis of Objective Knowledge (Philosophy of Science)*, (Clinamen 2007).

31.30 Given the communal and ideational connections between these centres (they are not watertight, they communicate, exchange ideas), meaningful ideas developed in each of these then have the potential to become a candidate for paradigm also in another centre – what in the language of the day we often call cross-fertilisation. Epistemological breaks (again Bachelard's terminology²⁶) may ensue, as unconscious thought structures become conscious and are abandoned, in the light of the conscious examination now possible, because of their insufficient analytical purchase. A new candidate for paradigm may fare better and take over. These are what we need to make the field progress. These are what is generally considered to make for a healthy scientific discipline.²⁷

31.31 The bottom line is this: We are probably still far behind other legal fields, such as international law, which clearly is no longer the intellectual wasteland that it was said to be 20 years ago.²⁸ My sense is that arbitration is following a similar route, thanks in part, precisely, to the fact that international lawyers, but also political scientists, economists, and even militant NGOs, have joined the fray.

III. DETERMINATION OF SCHOLARSHIP

31.32 So what is it that produces the landscape of scholarship I have described so far? What drives its evolution? Why are some of the aspects of scholarship I described more present in arbitration, and others less? Why are there things we never do, never say, even though they intuitively seem to be worthwhile pursuits? What are the possible determinants of our scholarly activity in the field of arbitration?

31.33 Most things we do in life (or perhaps actually all of them) is governed by incentives and constraints. We want to do certain things and shirk or oppose others. We can do certain things and cannot do certain others. Incentives and constraints determine what we do. Now is this a truism? Quite.

31.34 Yet it is a truism that has proven remarkably interesting in understanding law itself. The simple idea that there are determinants that make us do what we do is at worst mildly informative and at best illuminating in understanding the behaviour of judges – why do they decide the way they do? Why do they interpret the law the way they do? This is the core of law & economics approaches and of legal realism. It works to understand arbitrator behaviour too.²⁹ My claim is that it is at least also a quizzical heuristic to understand our own behaviour when we write on arbitration.

31.35 To be sure, the ways to account for the different determinants of our behaviour are numerous. As a basic structure, I use a simple distinction many philosophers are fond of:

26. Gaston Bachelard, *The Formation of the Scientific Mind: A Contribution to a Psychoanalysis of Objective Knowledge (Philosophy of Science)*, (Clinamen 2007).

27. François Ost, *Science du droit* 540, in André-Jean Arnaud (ed), *Dictionnaire encyclopédique de théorie et de sociologie du droit*, (LGDJ 1998).

28. B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 15, (Sage 1993). See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* xiii, (Lakimiesliiton Kustannus 1989); Arthur Nussbaum, *A Concise History of the Law of Nations* 293, (Macmillan 1947).

29. T. Schultz, *Arbitral Decision-Making: Legal Realism and Law & Economics*, 6 *Journal of International Dispute Settlement* 231 (2015); Bruce L. Benson, *Arbitration* 159, in Boudewijn Bouckaert and Gerrit De Geest (eds.), *Encyclopedia of Law and Economics, Volume V. The Economics of Crime and Litigation*, (Edward Elgar 2000).

prudential vs moral reasons-for-action.³⁰ (Granted, this distinction has never, to the best of my knowledge, been used in either the law & economics literature, except by me, or in the sociology of professions, or in political science-informed discussions of epistemic communities. But I find that the distinction elucidates my points more than it muddles them. So the graft is a worthwhile attempt.)

31.36 Prudential reasons-for-action relate to the pursuit of an actor's own interests. People act in a certain way for prudential reasons if they believe it is in their interest to do so, that they would be better off if they act in that way. Put differently, prudential reasons-for-action are reasons potentially or actually influencing someone's behaviour which "are focused exclusively or primarily on his own interests and only derivatively if at all on the interests of other people."³¹

31.37 People act in a certain way out of moral reasons-for-action if they believe it is "morally" good to act in such a way. There are no metaphysics here: morality is simply, in a computational way of sorts, a question of interests. Pursuing morality merely means to pursue the advancement of the interests of others. Moral reasons-for-action, then, are reasons potentially or actually influencing someone's behaviour which "are focused exclusively or primarily on other people's interests and only derivatively if at all on his own interests (apart from interests, such as a concern for acting in a morally proper fashion, which are themselves defined by reference to the well-being of other people)."³²

31.38 Let me translate this into non-philosophical language. We may do something because we believe it is in our own interest to do so. In this case we obey a prudential reason-for-action. Or we do something because we believe what we do is good for someone else. In this case we obey a moral reason-for-action. And so we may be torn, as happens so often in practice, between two courses of action, one advancing our interests but harming someone else's interests, the other advancing someone else's interests but harming our own. But to be clear, while these two types of reasons-for-action may pull in different directions, as the dilemma I just mentioned illustrates, they need not. They need not conflict, and they are not necessarily mutually exclusive; it is not necessarily one *or* the other. We can also do something because we believe it is good for both us *and* someone else.

31.39 I must enter one clarification, tedious as it may be, lest my endeavour is mistaken for a project I do not pursue: my endeavour is to develop a heuristic through abstract reasoning. I do not pursue a sociological project. Just as others have used the phrase "reasons-for-action" elsewhere, here too it refers "not only to factors that actually do motivate people, but also to factors that *would* motivate them if they were to understand the serviceability of those factors for the furtherance of their general objectives."³³ In other words, the prevalence of these factors in the actual determinants of actual scholarship is not a question I investigate, or even could investigate through abstract reasoning: this is an empirical point which would require a lot of social-scientific research, which would lead to a contribution to the sociology of professions. Interesting as this may be, this is not what I do or probably even could do: the research would be shrouded in complications and would require a great number of qualifications, since the actual

30. See for instance Immanuel Kant, *Groundwork for the Metaphysics of Morals* 199, (Oxford University Press 2002, first published 1785).

31. M. H. Kramer, *On the Moral Status of the Rule of Law*, 63 Cambridge Law Journal 65, 66 (2003).

32. *Ibid.*

33. *Ibid.*

determinants of concrete pieces of arbitration scholarship are “a matter that will hinge on contingent features of human psychology and sociocultural influences.”³⁴ In plain English: the interests, incentives and constraints I identify below are interests, incentives and constraints regardless whether they are actually understood or not, whether they are actually acted upon or not, whether they actually make a difference to scholarship or not. Scholars may not be aware of them when they write or may not be influenced by them in any meaningful fashion for any other reason. My point is that these reasons are serviceable for certain objectives, not that they are indeed followed.

31.40 Let me reiterate my set of questions without the jargon (yet the precisions from above of course still apply): What can scholarship on international arbitration be good for? What advances other people’s interests when we write on arbitration, and what are these interests? And what advances our own interests when we write on arbitration, and, again, what are these interests? There are things we write that we believe are good for us – us as authors as we write – and there are things we believe are good for other people, for groups that do not include us as a major stakeholder. What are these things? I will review these interests (which are as many determinants of arbitration scholarship) according to the distinction I just introduced, addressing in turn moral and prudential reasons-for-action.

IV. PURSUING OTHER PEOPLE’S INTERESTS

31.41 Probably the most obvious reason-for-action we have when we produce arbitration scholarship is to advance knowledge and the understanding of arbitration. There is a great array of ways to do this: they range from the simplest reporting of information on minute legal points (the crudest forms of case-law journalism and legislative journalism) to the most daring constructions of systems of thought meant to account for the entire system of arbitration (the most large-scale attempts to bring forward a new candidate for paradigm), and include: offering more or less sophisticated compilations of cases, statutes, and rules; adducing quantitative and qualitative empirical findings; imagining heuristic devices; telling happy anecdotes, and sad ones; whistleblowing about structural imperfections and professional misconduct; trumpeting major breakthroughs and successes; crafting plain or more rococo and labyrinthine doctrinal accounts; doing actual journalism; and many more. The ways to contribute to our knowledge and understanding of arbitration are variegated to extremes. Some, of course, are more serviceable than others.

31.42 Strictly speaking, this is a moral reason-for-action: we try to advance other people’s knowledge and understanding, not our own. We are thus focused primarily on other people’s interests, or else we would not publish what we found. (It is true, though, that sometimes scholarship in the area reads like a note to self, as if the author wanted primarily to clarify things for himself – or perhaps for one particular client – and then might as well publish it. But let us keep away from this diversion.) So this moral reason-for-action pushes us (if we think in the terms I sketched above) in the direction of articulating propositions, forming systems of thought, and engaging with central ideas, or paradigms, in the field.

34. *Ibid.*

31.43 This may seem all quite plain, and in many ways it is, but it needed reminding, just as the scientific theory of law as a scientific discipline needed reminding above, in order to base the coinage.

31.44 Now of course I do not mean that this is the only reason-for-action that makes us publish whatever we believe advances knowledge and understanding, or else we may as well not identify ourselves as the author. As I said above, reasons-for-action are not necessarily mutually exclusive. Several are typical coexistent, and may but need not conflict. This coexistence and conflict is precisely what undergirds my discussion here.

31.45 Then there is another quite evident moral reason-for-action we have in our scholarly gymnastics, as we move from the theory/knowledge-oriented to the practice-oriented: we may choose to “free-lance for the state”, to borrow from Pierre Schlag’s lexicon.³⁵ This is an incentive to write, and to write certain things. Our reason here to produce research is to help the state. We try to help the state in its judicial function, by spoon-feeding the courts, clarifying the law for them, presenting it in a way that makes it more expedient to use, pointing out a real or hypothetical decision’s consequences and ripple effects we think the court did not or would not see. We try to help the state in its legislative function by canvassing the terrain they may or should move into, by offering solutions, by presenting certain options in a favourable light and others as dramatic mistakes.

31.46 All of this of course also applies to arbitration, beyond the state: we may freelance for arbitrators and counsel in arbitration, suggesting (sometimes quite directly by sending through uninvited email attachments or SSRN links) possible arguments to rely on (with or without the hope that they will cite us in return); summarising entire areas of the law; offering footnote fodder; redesigning processes to make them faster, easier, more user-friendly – ‘iPhoning’ arbitration, as I suggested elsewhere.³⁶

31.47 Some of these activities are axiologically neutral. But more often than not they are not: clarifying the law for the courts and arbitral tribunals and parliaments is rarely a neutral operation (not that the articulation of propositions, systems of thought, and paradigms is really neutral either, but there is a difference in degree). When we do this we really respond to (or our behaviour just happens to be aligned with) the promotion of certain values within the state or within the ecosystem of arbitration. Norm-advocacy projects, as I suggested above, are more or less overt, more or less straightforward political projects.

31.48 In international arbitration, and in particular in investment arbitration, many scholarly outputs are quite strongly and directly political: “the world needs a strong hand to protect investors and investment arbitration is that hand” nicely converts into specific legal norms to be advanced in scholarly fashion; “investment arbitration overly undermines the policy space of states to advance worthy social projects” translates just as well. You get the point.

31.49 And so, much of the backlash-against-arbitration story is an ideational political debate, in the sense that what really fuels the debate is antagonism about the political values that investment arbitration should pursue, our appreciation of its socio-political legitimacy, not a massive exercise of the ‘exit strategy’ that the various actors could opt

35. P. Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art)*, 97 *Georgetown Law Journal* 803, 808 (2009).

36. T. Schultz, *Arbitration as an iPhone, or Why Conduct Academic Research in Arbitration?*, 2 *Journal of International Dispute Settlement* 279 (2011).

for. In other words, what is happening is that (political) norm-advocacy projects are being pursued in scholarship, projects that growl at the current output of investment arbitration as a political system, much more than treaties are being renegotiated in a way that effectively lashes back at investment arbitration.

31.50 These political projects constitute moral reasons-for-action. Whether these are good or bad projects is itself a political (or just possibly economic) question. Whether it is good or bad that arbitration scholarship takes such political positions is a more intricate question and probably a barely avoidable fact. What is avoidable is the presentation of such norm- and value-advocacy as being purely technical, neutral, stating the law, clarifying it for the sake of clarity. Granted, the boundaries are not watertight between, on the one hand, neutral technical efficiency and clarification and, on the other hand, other axiological projects; between, on the one hand, descriptive statements and, on the other, normative statements. But too much confusion is just too much.

V. PURSUING OUR OWN INTERESTS

31.51 As I already mentioned, it would be an awkward representation of human psychology that our actions, even when we write scholarly work, are not influenced by a pursuit of self-interest – prudential reasons-for-action in the language used above. There is nothing wrong in this in the abstract – in the sense of morally wrong. The more intriguing question, of course, is to understand what these interests in the furthering of the self may be and, if taken all together and against the background of any other interests and constraints, assess whether they result in situations that would call for an adjustment, by one means or another, of the overall resultant of all these determinants. In plain English: does the inevitable pursuit of self-interest in the production of scholarship on international arbitration lead to a situation that we think is better unchanged than changed? The purpose of my reflections, as I also said above (repeatedly, the mark the point) is not an assessment of that resulting situation. They more modestly focus on the identification of the possible interests that we pursue for ourselves when we produce arbitration scholarship.

31.52 I will leave aside the most trivial prudential interests, whose examination yields the least heuristically advancement. These include factors such as the simple pleasure of formulating ideas, of being read by others, of being cited; the prestige that sometimes follows from quantitatively and qualitatively significant scholarly outputs; the deference and authority that may follow from such prestige; the satisfaction derived from advancing our own conception of... almost anything; the interest one may have in advancing the school of thought to which one belongs; the satisfaction derived from exhibiting analytical capacity or other skills valued by those who care about thinking and ideas; the need for faculty members and aspiring faculty members and grant holders to just write something; the need for practicing lawyers to market themselves through visible publications, and thus to also just write something; and the pursuit of leisure itself (which is not an incentive to engage in scholarly activity, but to engage in it in a certain way, favouring more efficient, lighter, work). A dissection of the workings of these determinants of arbitration scholarship is unlikely to teach us much – except for the fact that there is much that is being written that likely is superfluous, but that already is conventional wisdom. Then again, is it really superfluous? Superfluous means more than enough. But enough for what purposes? Perhaps – undoubtedly in fact – for the purposes of the advancement of knowledge and understanding, but that is a problem regarding moral

reasons-for-action. Is what is being produced more than enough for the purposes of our own prudential interests?

31.53 Let me introduce here a distinction between two types of prudential reasons-for-action: collective and individual. The former relate to actions that advance directly the interests of a group of which we are, or believe to be, or hope to be, a member, and thus advance indirectly our own interest. The boundaries of the group need not be defined very clearly but it must be smaller than the group of all parties affected in any way by arbitration scholarship, or else we are back within the ambit of moral reasons for action. Individual prudential reasons-for-action are those that relate to actions that seek to advance directly our own, individual, interests.

31.54 Collective prudential reasons-for-action we may have when we produce scholarship on arbitration may include, first of all, the protection of the industry of arbitration. If one entertains some form of hope to derive some form of income (or prestige, or visibility, which may be currencies in themselves or may be factors of actual income), sometime, from arbitration practice, as arbitrator, as counsel, as expert, as advisor to any of the preceding, then one has an incentive to write about arbitration, and to write certain things about it.

31.55 At its most extreme, this may take the form of attempts to prevent arbitration from disappearing as a business, to prevent it from being replaced by a dispute resolution mechanism designed in such a way as to deny us any possible or meaningful business. To put it simply, it is serviceable for arbitration business to preserve its existence as just that, a business. Now of course, if we are realistic, its disappearance is extraordinarily unlikely to occur anytime soon anyway. It seems to be a safe bet to say that arbitration as a business will not fold within the lifetime of even the youngest person who reads the current text. Just as car-making as a business will not stop within a lifetime. Just as the banking industry will not stop within a lifetime. But of course the scale of the business is a matter that obtains by degrees.

31.56 A much more meaningful threat is that the system of arbitration is altered in such a way as to redistribute the resources, in a way that harms, from a business perspective, those who now benefit the most from it. One may think about it as one would think about electric cars replacing gasoline cars, and what incentives this creates for the leading makers of gasoline motors, or significantly different regulations for the banking industry and what incentives this creates for today's leading financial institutions. This creates an incentive to produce studies that do not protect the auto industry per se, but more precisely the auto industry in its current form, that do not protect the banking industry per se, but more precisely the leading financial institutions, that do not protect the arbitration industry per se, but more precisely the arbitration industry in its current form. This incentive may be more of a problem. Insisting on cars running on nothing else than gasoline for the next decades, on banks remaining regulated the way they are (or were a few years ago) may be a quite damaging stance to take for the industry as a whole in the long term.

31.57 So this incentive is a reason to produce scholarship that is not only protective of arbitration as an institution, but also of the current setup and workings of arbitration. I am unaware of a study that has exhaustively surveyed the sources of critical studies of arbitration, and the respective importance of these sources and the robustness of the criticism. This chapter is scarcely the place for such an exhaustive survey (or even a laconically selective one), but let us note that much of the most robust criticism of the way arbitration works *today* seems to come steadily from sources outside those who

(usually) produce arbitration scholarship – they come from NGOs, international organisations, governments, journalists. The reaction of those who usually produce arbitration scholarship to such criticism, in particular to the strongest forms of criticism, seems to lack serious engagement with it, and on a number of occasions withdraws to argumentative fallacies, including ad hominem attacks (“These *people* are not credible.”); black or white fallacies (“Either you are in favour of arbitration and you protect it, or you are against it and you want to kill it. If you criticise it, it means you are not in favour of it.”); and the use of straw men (misrepresenting the criticism to more easily counter it). Flat out denials, or at least nearly flat out ones, abound.

31.58 Such argumentative gymnastics, entertaining as they are if one enjoys good debating spirits, might just be an appropriate response to the incentives I have mentioned heretofore, but this is more likely so in the short than in the long run. It is not an unlikely proposition that the “backlash” against arbitration, which at some stage may well have real business consequences, is due as much if not more to the (internal) categorical denials of problems than to an (external) oversensitivity or misunderstanding of them. As John Stuart Mill put it, argument and dissent are of great import, because it is in the collision of half-truths, which is what most of our opinions are, that real truths might emerge³⁷ – but that requires real collision, in the form of critical thinking.

31.59 Now to be sure, the opposite reason-for-action also exists. If one believes one has no chance of getting any “job” (in the broadest sense of that word) in the current setup of the system but would ideally wish to obtain one, then one has a reason, an incentive, to change it. A new setup means new opportunities. New cards mean a new game. The more individuals there are who write on arbitration and who do not believe to be able to get a job out of it in the current system, the higher the chance that there will be a higher number of suggestions to change the system.

31.60 As I said above, the scale of the business of arbitration is a matter that obtains by degrees. This first means that the more arbitrations there are, the more business there is. If I again focus on my hypothetical individual who entertains hope to derive income (or prestige or visibility) from arbitration practice, this individual has an incentive to produce a certain type of scholarship on arbitration – a type of scholarship that increases the number of arbitrations. Increasing the size of the pie means to increase the chance of obtaining a bigger slice of it, or to obtain just some slice. A serviceable response to this incentive may be a scholarly defence of doctrines or opinions resulting in the lowering of jurisdictional standards; or in the firming up of mechanisms that create new avenues to file claims (think of MFN clauses, for instance); or in allowing new types of disputes to be brought to arbitration (think of mass claims, for instance). All of this is good for business – at least in the short run, at least until the last straw breaks the camel’s back.

37. John Stuart Mill, *On Liberty* 43–44, 50, (Batoche Books, Kitchener ON 2001, first published 1859): “The received opinion may be false ... or the received opinion being true, a conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth. But there is a commoner case than either of these; when the conflicting doctrines, instead of one being true and the other false, share the truth between them; and the nonconforming opinion [the one not endorsed by the authorities] is needed to supply the remainder of the truth. ... First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.”

31.61 This account is of course a simplification. Indeed the serviceability for business of certain arguments meant to increase the number of arbitrations is more nuanced. Consider the TTIP, for instance. Disparaging attempts to replace investment arbitration by a permanent investment court, as the European Commission currently recommends for the TTIP, may well only be useful (from the business perspective I focus on here) if one hopes to obtain appointments as an arbitrator in TTIP disputes. If, however, one's hope is to source work more generally in arbitration practice, including as counsel, expert, or consultant in investor-state dispute settlement (ISDS, here in the sense of arbitration and other adjudicative proceedings), this may create a reason to advance the opposite argument. A calculation of interests and likelihood may indeed lead one to the belief that it is a better bet to replace arbitration in the TTIP by a permanent court, because it increases (in one's hypothetical assessment of the situation) the chance of the TTIP negotiations coming through, or because it appears that a permanent court will in the long run be perceived as more legitimate than arbitration, which may mean less interference from states, and possibly even their assistance, in its expansion. Brutally simplified, a permanent court decreases the opportunities of becoming an arbitrator (there are simply fewer jobs as arbitrators/judges on the investment court), but it may increase the number of cases and thus the opportunities of deriving income from the system as counsel or expert or consultant.

31.62 Increasing the pie of arbitration business is also an incentive to produce another type of scholarship (beyond, then, arguments that focus on the legal and political hurdles to the existence of arbitrations): scholarship that relates to what happens during an arbitration. If one hopes to derive income (or prestige, or visibility) from arbitration practice, one has a reason to produce scholarship that contributes to making arbitrations run more smoothly, more efficiently, to the greater satisfaction of the parties. The point is simple: if the procedures leave the parties more satisfied, they are more inclined and likely to use arbitration again.

31.63 But efficiency is a two-edged sword. Efficiency means the quality of being able to deliver a certain result with minimal expenses. Now, the more financial resources are spent by the parties on arbitration, the more there is to be redistributed among the various actors who hope or do derive income from it. More expenses mean a greater pie. If a person's objective (even if it is one among several objectives) is to increase the likelihood to derive income from arbitral practice, then that person has a reason (which may be one among several reasons, possibly pulling in different directions) to produce scholarship which, on the one hand, contributes to making arbitration sufficiently efficient for the parties to want to use it as often as possible, and, on the other hand, as inefficient as possible in order to maximise expenses.

31.64 A simple way out of this tension is to move the goal posts. If, again, efficiency means the quality of being able to deliver a certain result with minimal expenses, then moving the goal posts means to change the result we want delivered. It means to remodel the objective, the purpose, the role of arbitration. The purpose of arbitration is not simply to settle a business dispute and allow the parties to get back to business. It is (at least) to settle it in an acceptable way. "Acceptable" means, in the words of William Park for instance, who includes but goes beyond efficiency, to resolve the dispute in an accurate manner (he sometimes calls it "adjudicatory truth-seeking"),³⁸ ensuring

38. W. W. Park, *Arbitrators and Accuracy*, 1 *Journal of International Dispute Settlement* 25, 27 (2010).

due process or fairness (“intelligent litigants usually craft their rules with deference to the adage that one person’s delay is another’s due process”),³⁹ resulting in a justified, enforceable award.⁴⁰ Probably everyone who is involved with arbitration would agree with Park, mostly quite straightforwardly – including the parties. They indeed, and that is the point, most likely adhere to this idea. (I too concur, but that is both an unscientific statement and irrelevant – irrelevant at least to the argument itself.)

31.65 The point is that these objectives – at least accuracy and due process – obtain by degrees. When we write on arbitration and hope to derive an income from arbitral practice, one of the incentives we have, one of the prudential reasons-for-action we have to produce a certain type of scholarship, is to maximise the expected (thus, in several ways, *required*) level of accuracy and due process. We have a reason to progressively alter the social norms in the profession, if not the legal norms, both of which shape the expectations of the parties and thus their willingness to incur costs, so that ever more accuracy and due process is required. (To avoid any misunderstanding: my argument here entails no criticism of Park’s position. I explain why just a bit later.)

31.66 From a slightly – and really just slightly – different perspective, we have an incentive to produce scholarship that progressively leads arbitration down the avenue described by Alec Stone Sweet and Florian Grisel: from the initial contractual model of arbitration, in which arbitrators “resolve discreet dyadic disputes”,⁴¹ are the agents of the parties, and are accountable to them only; to the judicial model of arbitration, in which the arbitrators reach beyond the interests of the contracting parties to include “wider social interests”⁴² and become agents of “the wider stakeholder community”,⁴³ which means the stakeholders of the regime itself including future disputants, arbitration institutions, probably law firms (as distinguished from the parties), etc.; to the constitutional model of arbitration, in which arbitrators become agents of a yet “wider international legal order”⁴⁴ and play a role in international governance itself, jumping out of the arbitral regime as it were to take into consideration high-level exogenous norms, typically heavily loaded axiologically, from trade, human rights, the protection of the environment, etc. The point for us here is that this evolution from one model to the next entails more “organizational complexity”,⁴⁵ more rules and factors and interests to take into consideration, which tends to require more work, and more sophisticated work, thus more nuance, more arguments, more witness evidence, more expert witness evidence – just more. Thus more expenses. Thus a greater pie.

31.67 Now, to be clear, the fact that we have a prudential reason-for-action to favour certain expectations from arbitral proceedings by no means implies that we may not also have both an epistemic reason for such a position (a reason to genuinely believe it) and a moral reason-for-action for such a position (we defend such a position in scholarly

39. *Ibid.* 34.

40. W. W. Park, *Arbitration in Autumn*, 2 *Journal of International Dispute Settlement* 287 (2010); W. Park, *The Four Musketeers of Arbitral Duty: Neither One-for-All nor All-for-One*, 8 *Dossiers of the International Chamber of Commerce Institute of World Business Law* 25 (2011).

41. Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Delegation, Judicialization, Governance* 23, in Walter Mattli & Thomas Dietz (eds.), *International Arbitration and Global Governance: Contending Theories and Evidence*, (Oxford University Press 2014).

42. *Ibid.* 32.

43. *Ibid.* 34.

44. *Ibid.* 34.

45. *Ibid.* 23.

fashion because we mean to advance the interests of the parties or those of a wider community of stakeholders). This, based on everything I know about the man, is precisely Park's case. No criticism is levelled either, in any way, at Stone Sweet and Grisel: their account is principally heuristic anyway, and thus neither descriptive nor prescriptive. Really, I do not argue that this sophistication of arbitration is not *also* a moral reason-for-action, that the pursuit of accuracy and due process, or the inclusion of wide social interests and high-level value-charged norms, may not also be good for the parties and beyond. My arguments in the previous main section of this chapter in fact recognise just as much. My argument here is simply that this is a reason-for-action we *do* have if one of our purposes is to benefit financially from arbitration practice.

31.68 Let me close this section with a light parallel: If the intended result is to drive from London to the Scottish Highlands, a 15 year-old Toyota will do just fine. If the intended result is to drive from London to the Scottish Highlands *comfortably*, then this may lead to the need for a Porsche Cayenne. If I am a car salesman, I have a reason to stress comfort, to enthuse about the evolution towards ever more sophisticated vehicles – in scholarly fashion if I must and can. In a scholarly fashion that may (as I believe it is in the examples I used) but also may not proceed from a neutral stance on the question whether the Porsche is really needed.

VI. CONCLUSION

31.69 There are probably few vexations of arbitration that cannot be fixed. And fixing them can certainly be one of the purposes that authors of scholarship in the field can set for themselves. From the point of view of most, this would likely constitute a useful, legitimate purpose. A great variety of forms of scholarship – from the grandest ideas to the finest fine-tuning – can serve this purpose.

31.70 Will scholarship be able to fix these vexations before they cause serious annoyance – harm to certain parties, to society more generally, to arbitration business itself? Has some such harm not already occurred?

31.71 A light reference comes to mind. “Prediction is difficult”, the Danish humorist Piet Hein said, “in particular about the future.” To which, of course, we might answer, with physics Nobel prize recipient Dennis Gabor, that the “future cannot be predicted, but futures can be invented. It was man's ability to invent which has made human society what it is”. And what is indeed already reasonably palpable is the shift in the forms of scholarship we produce, and in the reasons that make us produce scholarship in general and certain types of scholarship in particular. This shift is likely to produce a greater diversity of ideas, knowledge, and opinion. More ways to invent more futures. That, surely, is good news.