

## ARBITRATION IN THREE DIMENSIONS

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**Abstract** The law applicable to arbitration is not the law applicable in arbitration. The latter determines arbitrators' decisions. The former refers to the source of their authority: the legal order that governs arbitration. According to the territorialist thesis, an arbitration can have no foundation other than that of the legal order of the particular State in which the arbitration takes place. This outdated conception is disproved by the simple factual observation that a plurality of legal orders may give effect to arbitration. Some French scholars promote the notion of an autonomous arbitral order. Inasmuch as they ultimately seek to establish this order by positing its recognition by the very State orders from which they claim autonomy, their idea is circular and in effect no more than a dressed-up variant of ordinary horizontal pluralism. But the model of horizontal pluralism fails to account for important orderings of arbitral activity. Arbitration in modern society is accurately perceived as a complex, three-dimensional form of pluralism, in which legal orders (i) are not exclusively those of States and (ii) frequently overlap.

### I. INTRODUCTION

This article explores the legal ordering that gives effect to the social institution we call arbitration. A critical look at the competing conceptions leads to the insight that arbitration derives its legitimacy and effectiveness from an indefinite number of potentially relevant legal orders. The purpose of examining this pluralistic environment, in which modern arbitration thrives, is not so much to evaluate it as merely to observe that it exists, that it is ascendant, and that the fluid combinations of legal orders in which it operates are not limited to those of the law of States. They may therefore overlap. The reality of modern arbitration, in other words, is three-dimensional.<sup>1</sup>

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<sup>1</sup> Endless metaphorical possibilities for visualizing legal pluralism are suggested in a section called 'Mapping Law' of William Twining's *General Jurisprudence* (CUP, Cambridge, 2009) 67–68. He evokes the difficulty of conceiving the continually changing Bengal archipelago, where sandbanks wax and wane, and the fluid water itself has many dimensions, such as depths and shallows, currents and rivulets; 'navigation requires considerable local knowledge and of changing conditions so that visitors would normally rely on local boat people . . . ' (68). Other scholars speak of 'networks' or 'levels', eg F Ost and M Van de Kerchove, *De la pyramide au*

## II. MATTERS OF DEFINITION

Arbitration paradoxically seeks the cooperation of the very public authorities from which it wants to free itself. The 'law of arbitration', as traditionally conceived, is the manifestation of this tension. What will the State tolerate? To what will it lend its authority and power? Are arbitrations by necessity legally connected to a particular jurisdiction? If so, is it correct to say that only the law of that jurisdiction may give effect to awards? Can arbitration function without the support of the law of a particular State? These questions become more tangible when they arise in an international context. As borderless communities integrate, and as the once exclusive orderings of states become more diffuse, these inquiries become indispensable.

Our questions may be examined by reference to four more or less competing propositions. The first is that any arbitration is perforce national, and lives or dies according to the law of the place of arbitration. This might be called the *territorial* thesis. The second is that arbitration may be given effect by more than one legal order, none of them inevitably essential. This is the *pluralistic* thesis. The third is that arbitration is the product of *an autonomous legal order accepted as such by arbitrators and judges*. The fourth is that arbitration may be fully effective pursuant to *conventional arrangements that do not depend on national law or judges at all*. Whether such arrangements may qualify as legal orderings may be debated. My answer is affirmative, and so this fourth proposition ultimately merges with and expands the second: it accounts for an important feature of pluralism in the ascendancy.

These abstract propositions are more readily evaluated if we refer to the concrete stuff of lawyers' daily work. Consider the position of a fictional Maître Dupont, appointed by a Swiss chamber of commerce to decide a dispute between two Swiss parties who do not even hold passports. What would Maître Dupont conclude if she sought to identify the legal foundation for her authority?

She might start with this reasonable working hypothesis. She expects that she will receive evidence and written submissions; will hear from parties, witnesses and lawyers; will evaluate contentions put to her with respect to alleged breaches of contract; and will finally prepare and render an award which upholds or rejects claims. She assumes that the parties, like it or not, will comply with her decision. Such is the usual narrative of an arbitration.

*réseau: vers un nouveau mode de production de droit?* (Facultés Universitaire Saint-Louis, Brussels, 2000); and M Goodale and S Merry, *The Practice of Human Rights: Tracking Law Between the Global and the Local* (CUP, Cambridge, 2007) 17–18. Metaphors are tricky; *comparaison n'est pas raison*. 'Levels' may wrongly suggest hierarchy; 'networks' may wrongly suggest design. The metaphorical enterprise will not be pursued here beyond the simple refutation of the vision of law as a horizontal (two-dimensional) patchwork.

This sequence of events, she may reflect, seems to be a very juridical process, yet has very little to do with the authority of the Swiss Confederation. She is not a public official, nor even appointed by a public official. At no point, from beginning to end, were any public officials involved, or even informed. Every theoretical question leads to another: Is any legal foundation for her authority required beyond that of the parties' agreement? Is there a legal order that determines the nature and effects of arbitration? What is, in particular, the source of the right and duty to arbitrate, of the authority of the arbitrator, or of the effectiveness of awards? Must that source be a specific national legal order?

The prospect of taking the full step to first principle—the definition of a legal order—is not certain to make the reader rejoice. This is a domain to which erudite and disputatious scholars have devoted pages as countless as the stars, destined to be read, it seems, chiefly by others intending to add to the production. Perhaps it is possible to keep matters simple.

Many individuals may think themselves happy to live very far from 'the law' and its travails. They are wrong, because we are all continuously affected by law—but in implicit and episodic ways, and with contingent complications to which we pay little heed. For example, when the most unadventurous Swiss citizen sends a cheque to a French manufacturer in advance payment for some goods, whether he knows it or not he is relying more on the French legal order than on the Swiss—for example to know, in the event of the manufacturer's bankruptcy, whether he is the owner of goods in the warehouse or just a creditor at risk.

To return to Maître Dupont, are she and her arbitration part and parcel of the Swiss legal order because Swiss courts would have the power to enforce her award if it satisfied certain Swiss norms, or to annul it if it did not? We want to answer yes. The immanent presence of the Swiss legal system—its norms, its institutions, its culture—doubtless helps explain why the participants in Maître Dupont's case behave as they do. So 'yes' is not wrong. Yet it is not enough, as we will discover when we consider the first proposition.

### III. THE TERRITORIAL THESIS

Our planet is divided into plots, each attributed to a jealous State. What happens within that plot can have no legal significance if it is not given that effect by those who exercise power in the name of the State holding dominion there. Every event must be localized within one of these plots. To give legal effect to events occurring inside the plot by reference to external norms is aberrant as a matter of political philosophy, and nonsense as a matter of law. This is the territorial thesis. It is outdated, but its influence lingers.

It has become part of Francis Mann's legacy to be identified as the inflexible proponent of the territorialist thesis. This reputation is built on these two

oft-quoted passages from an essay he published in 1967 under the title '*Lex Facit Arbitrum*':

Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law.<sup>2</sup>

The *lex arbitri* cannot be the law of any country other than that of the arbitration tribunal's seat. No act of the parties can have any legal effect except as the result of the sanction given to it by a legal system. Hence, it is unavoidable to ascertain such system before the act of the parties can be upheld. When we say in the conflict of laws: 'contracts are governed by the law chosen by the parties,' we do so, and can do so, only by reason of the fact that the rule is part of the law of a specific legal system.<sup>3</sup>

On a subject of this importance, it is unacceptable to treat these brief passages as a *locus classicus*. The focus of Mann's article, it is important to observe, was the law to be applied by arbitrators—not the legal foundation of arbitration. It was a sustained attack on those who argued for the freedom of arbitrators to base their decisions on perceptions of equity or of supranational norms. A central tenet of the article was that arbitrators must obey the private international law of the seat of arbitration: 'Any other solution would involve the conclusion that it is open to the arbitrator to disregard the law'.<sup>4</sup> Mann insisted that the only kind of law that could govern transactions involving non-states was the law of a given national State. He may well have been seeking to protect arbitrators from taking what he perceived as excessive license, leading to perceptions that arbitration is a tool for law-avoidance in conflict with the public interest. Be that as it may, the article makes no distinction between identifying the law followed in making an award, on the one hand, and, on the other, the law that gives effect to the undertaking to arbitrate, to the arbitral process, and to the award. This confusion means that the passages quoted above are incidental assertions having uncertain connections with Mann's core analysis. To offer such generalizations seriously, one must perforce position oneself somewhere in the universe of legal theory. But Mann gave us nothing of the sort—only affirmation.

Reflecting on the two passages, one observes a false comparison in each. In the first, 'every system' of private international law is compared to 'every arbitration'. To be logical, Mann should have made a choice. On the one hand, he could have compared 'every system of private international law' to 'every system of arbitration law' and thus affirmed both to be specific features of national law—not a very interesting idea. To the contrary, if his aim was to find a comparison for 'every arbitration', it ought to have been 'every matter

<sup>2</sup> In P Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff, The Hague, 1967) 159.

<sup>3</sup> *ibid* 161.

<sup>4</sup> *ibid* 167.

that arises under private international law', leading to the proposition that both are 'subject to a specific system of national law'. If Mann had thus put the question accurately he should readily have noticed that he was wrong. Problems arising under private international law are characteristically subject to a multiplicity of systems, and so it is with many arbitrations.

In the second passage, 'acts of the parties' are compared to stipulations of applicable law, to the effect that in each case they are given effect only by operation of 'a specific legal system'. Mann's thesis was that parties can choose only a single national law as the governing law of a contract. Whatever one may think of this notion (a very different subject), it obviously does not mean that 'acts of parties' may not be given effects—the same, or different—by more than one national legal system.

Refinements of the territorial thesis have emerged on both sides of the English Channel, broadly insisting that arbitrators are bound to deem the 'law of the arbitration' to be that of the place of arbitration, stressing that this still leaves parties considerable freedom: namely to select the legal order that will govern their activity by choosing the place of arbitration.<sup>5</sup>

This is one theory among others. No matter how 'realistic' its proponents claim to be, they cannot anchor it in positive law. In essence, they argue that predictability would be enhanced if it were universally accepted that arbitration had no greater or lesser effect than that given by the law of the place of arbitration. True, many enforcement jurisdictions may act on the basis that they will reject any award shown to have no legal effect in the place where it was rendered. But it is curious to insist on the authority of a preordained *lex arbitri* all the while observing that it is not preordained at all, since the parties may *choose* their legal order.

Nor is consistency ensured by imposing the hypothetical will of the legislator of the place of arbitration. This would make sense if there were only two possibilities, and the law of the place of arbitration was exalted over the law of the enforcement forum. But who knows how many conceivable enforcement *fori* may present themselves as promising? Nor are the possibilities exhausted there. There are also courts asked to decide a dispute notwithstanding the presence of an arbitration clause, or to grant provisional measures in aid of arbitration. Such courts may be situated in yet other countries. The attitudes toward arbitration of their legal orders may be highly relevant to the efficacy of the mechanism. There is no assurance that all enforcement jurisdictions ultimately approached will politely agree among themselves when analysing the implications of what happened in the place of

<sup>5</sup> See eg J-F Poudret and S Besson, *Droit comparé de l'arbitrage international* (2002) published in English as *Comparative Law of International Arbitration* (Sweet & Maxwell, London 2007), a book which in many ways be deemed the Francophone antidote to the French doctrine as presented by E Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (2008); and R Goode, 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' [2001] *Arb Int* 19.

arbitration. (For example, whether a foreign award is illegitimate because the losing party was deprived of a *reasonable* opportunity to present its case, and that this was *likely* to have a *material* effect on the outcome, depends on the eye of the beholder and the narrative skill of advocates.) The theory does not, moreover, sit well with the observation that national jurisdictions may—as Switzerland does<sup>6</sup>—enable parties to opt out of any judicial review of awards involving only foreigners, or, more fundamentally, that the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards mandates enforcement without the need for any expression of approval of the courts of the place of arbitration.<sup>7</sup> And finally, who would seriously argue that an award set aside in country X because it was rendered by a female or irreligious arbitrator should be rejected by the courts of country Y, making the judges of the latter complicit in a violation of international public policy?

One can understand the territorialist model as a product of attitudes prevalent until the middle of the 20th century. It simply does not fit the realities of an international society no longer constrained within national units: a world in which moreover national legal systems understand this new flux. Consider what was just recalled about Switzerland; the law there allows foreign parties to stipulate that there may be no recourse against awards. (That few avail themselves of this option does not make it less valid as an example.) So even if the losing party contends that the arbitral tribunal violated its right to be heard, it would not have the right to seek to have the award set aside by the Swiss courts. This serious alleged defect would naturally be subject to the control of courts asked to enforce the award. But then we instantly see that Mann's famous sentences are wrong. If the courts of another country examine the award and find it eligible for enforcement, it cannot possibly be said that this is so because the award finds its foundation in Swiss law, given the explicit exclusion of any possible Swiss judicial stance with respect to it. The point is driven home when one considers that a third country would be fully entitled to take a different view, and declare that the award was obtained through a defective process. Once more, the Swiss position would be hypothetical—and irrelevant. The two other legal orders will legitimately have treated the same phenomenon—the award—in different ways. Surely the word *pluralism* is apposite.

#### IV. THE PLURALISTIC THESIS

Arbitration is not the rejection of law; it depends on law. True, it reproves much of law, especially its apparatus, and claims a special place in the law; but that is an application for advanced membership, not apostasy. Commentators have debated the necessity for arbitration to be a part of a particular

<sup>6</sup> Art 190(2), 1995 Private International Law Act.

<sup>7</sup> Arts III and IV, 330 UNTS No. 4739.

national order. Some have followed Mann, insisting that nothing that purports to have occurred in the 'place' of arbitration (ie the venue of hearings, the city where an award is signed or delivered, or the pure fiction of a deemed judicial 'seat') may have any legal significance except that attributed to it by the legal system there.<sup>8</sup> Others contend that the forces of internationalisation have now produced awards which do not owe their force to the law of the place of arbitration.<sup>9</sup>

Courts have been influenced by this debate, unfortunately in divergent ways. On the one hand, for example, the French *Cour de cassation* has repeatedly asserted that an award rendered '*en matière internationale*' is not 'integrated' into the legal order of the State where it was issued and may therefore be apprehended like wildfowl by the forum where it happens to alight.<sup>10</sup> On the other, a number of US federal courts of appeal have invented a distinction of 'primary/secondary' jurisdictions in terms of controlling awards, and assigned the 'primary' appellation to the country where awards are rendered.<sup>11</sup> These US courts have stated that this is their understanding of the New York Convention, which in fact nowhere mentions these terms. It is very difficult to see why their use is helpful, let alone necessary. States where enforcement may be sought have a far more tangible interest in the matter than the putative 'primary' jurisdiction which is often either chosen fortuitously, or precisely because of its *lack* of connection with the dispute.

The matter is of considerable practical importance, and therefore needs to be examined and resolved. Consider the case of an arbitration taking place in country A. An award is rendered there. Assume the courts of that country reserve the power to overrule an arbitral tribunal if they find a simple error of law, and that there is thus a possibility of appeal. Most countries' judicial systems, whether by the operation of multilateral conventions or by unilaterally applied principles of comity, are prepared to enforce a foreign arbitral award only if they are satisfied that the award is 'binding'. The law of A will naturally have rules to determine whether an award rendered in A is binding. That law may hold an award not to be binding until it has resisted appeal (or unless no appeal has been lodged within a certain period). Yet nothing would prevent country B from legislating—and acting upon—a rule that an award by an arbitral tribunal constituted according to contractual agreement, wherever rendered, is binding for the purpose of enforcement in B at the moment it is pronounced.

<sup>8</sup> WW Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983), 32 ICLQ 21 and the references therein.

<sup>9</sup> J Paulsson, 'Delocalisation of International Commercial Arbitration: When and Where It Matters' (1983) 32 ICLQ 53 and the references therein.

<sup>10</sup> Cass. civ. I<sup>re</sup> (23 March 1994) *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)* [1994] JDI 701

<sup>11</sup> *Termorio SA v. Electralanta SA* ESP, 487 F.3d 928 (D.C. Cir. 2007).

So-called 'delocalised awards' are *not* thought to be independent of any legal order.<sup>12</sup> 'Delocalisation' refers to the possibility that an award may be accepted by the legal order of an enforcement jurisdiction whether or not the legal order of its country of origin has also embraced it. 'Plurilocalisation' would perhaps have been more accurate. This is no stranger than, say, the analysis of a contract signed in Munich by a Japanese consortium and an American contractor pertaining to engineering services in the Middle East. Legal consequences may flow from this contract because of the importance attributed to it by the legal orders represented by municipal courts in San Francisco, Tokyo, Alexandria, or elsewhere, depending on a multitude of potentially relevant jurisdictional criteria. Whether the contract failed to respect unusual *German* requirements of form is unlikely to matter. No-one is seriously likely to complain that the birth of the legal obligation in the Munich airport was impermissibly miraculous because it sprang from the brow of the parties and was thus 'independent' of the German legal order.

Nor is there anything surprising about the fact that the same set of facts lead the legal system of one country but not another to conclude that an obligation has been created. It would be perhaps simpler, more convenient, more harmonious, if the law were the same everywhere. But we do not live in a monolithic world. This is also true with respect to obligations resulting from arbitral activity. In our example, the courts of country A might in the end conclude that the award is of no legal consequence; yet in country B the award is enforced. National orders are different; they may assign different outcomes to the same event.

When the effects of arbitration are limited to a single national context, it may seem pointless to question the obvious: when both arbitrants are English, when the dispute concerns a contract drafted in the English language and governed by English law, when the tribunal is comprised entirely of English arbitrators sitting in London, when the economic consequences depend on the fate of financial instruments domiciled in London banks—what other legal order but that of England could define the nature and consequences of the process? The answer is obvious, but not because London is the place of arbitration. In other words, as a rhetorical question this was always a damp squib—and at any rate, as a practical matter, unlikely to lead lawyers astray.

As the number of trans-border arbitrations grew exponentially over the past half-century, it became unavoidable that a number of national legal orders could have an impact on the arbitral process. For two reasons, however, it took time to take stock of this development and to perceive the conceptual shift it commanded.

First, international arbitrations throughout the 19th century, and well into the 20th, were conducted pursuant to treaties.<sup>13</sup> Their legal order was perforce

<sup>12</sup> See J Paulsson, 'Arbitration Unbound' (1981) 30 ICLQ 358.

<sup>13</sup> MO Hudson, *International Tribunals Past and Future* (Questia, 1944).

that of public international law. The underlying disputes were occasionally commercial in origin, but the claims were made by States, on behalf of their nationals, against other States.<sup>14</sup> There was, at least conceptually, only one over-arching international legal order: the so-called law of nations.

Secondly, the environment of international private commercial relations bore little relation to today's world. The number of sovereign States formally qualified to establish national legal orders was only a fraction of what it is today. International commerce was of a far lesser macroeconomic magnitude. It tended to involve simple, short-term transactions. And of course much overseas trade was of an intra-imperial nature, with the effect that disputes were subject to a metropolitan legal order, be it English or Dutch, Portuguese or Soviet. Arbitrations involving exotic arbitrants were not necessarily very international at all.

This situation did not leave much room for truly international commercial arbitration. A commercial dispute between French and German parties very likely involved one or the other physically carrying out its business in the country of its counterpart. It therefore made sense to go to court there. (Today negotiators of international contracts need not leave their desks, and may be entering into variants of the same contract in a great number of countries.) And to the extent that there were international agreements to arbitrate, the resulting awards were in fact treated elsewhere—if at all—as pronouncements of the legal system of the country where they took place.

No better illustration can be given than to consider that when the Geneva Convention on the Execution of Foreign Arbitral Awards was concluded in 1927,<sup>15</sup> the delegates, notwithstanding the vigorous promotion in the wake of World War I of a system designed to create interdependence and reciprocal confidence, acknowledged that an award could not even begin to have obligatory force outside its country of origin until that country had positively declared the award to have executory force under its law.<sup>16</sup> Plainly, there was no question as to what legal order gave controlling effect to the award.

In the mid-20th century, life on this planet changed in three fundamentally important ways. The aftermath of World War II was a period of imperial dismantlement. With dizzying speed, a world in which a majority of people were not citizens of their own countries, but of colonies, was turned right side up. It is an astonishing fact that a majority of States established by 1970 had not even existed 25 years before. The single year 1960 saw the accession to independence of the greatest number of States ever seen. Each was now in a position to create its own legal order. Each now had borders that defined

<sup>14</sup> For a prominent example among a multitude, see *US v Salvador* (El Triunfo), award of 8 May 1902, XV UNRIIAA 467.

<sup>15</sup> 92 LNTS 302 (1929); see AJ van den Berg, *The New York Convention of 1958*, 6–7, 113–118 (1981).

<sup>16</sup> Van den Berg *ibid* 7.

*international* trade. The phenomenal expansion of international economic exchanges, which we now tend to take for granted, was a separate but certainly not merely coincidental development.

The third change was noticed only by a handful of people concerned with the details of the arbitral process, which they hoped to adapt to this complex new world. Yet the New York Convention's reengineering of the 1927 Geneva Convention introduced something radically new. Henceforth awards were entitled to enforcement in all signatory countries, under the control of their judges, without a prior declaration of enforceability from a court of the country of origin.<sup>17</sup> Specialists have ever since referred to this as the abandonment of the need for double *exequatur* (a technical term for the order that an award shall have executory force).

The pluralistic thesis is perhaps most accurately described as the perception that a multiplicity of legal orders may ensure the efficacy of arbitration. This insight may not lead to tidiness and predictability. But the vision of an unknown set of potentially relevant legal orders corresponds to the reality of international life. The territorialists may well say that their steady focus on the law of the place of arbitration enhances predictability, but as already observed that can be so only to the extent that one is concerned with inconsistency between the law of the place of arbitration, on the one hand, and the law of *one particular* place of execution, on the other. The territorialist doctrine cannot account for the fact that two enforcement fori, each considering whether to recognize an award, may perfectly well come to different conclusions, for example as to the arbitrators' respect for due process as a precondition of enforcement. More generally, article V(2) of the New York Convention plainly leaves it to any of a multitude of enforcement fori to evaluate the conformity of an award with their particular conceptions of arbitrability or public policy. It is impossible to deny the plurality of legal orders that may give effect—or not—to arbitration agreements and awards. It is not a theory. It is simply an observation.

Like so much of life, this pluralism may be chaotic. Depending on the international features of a particular case, the potential plurality is infinitely variable. It is not defined *ex ante*. True, many cases involve no factors extraneous to the national setting. But in the end, the potential legal orders that may be called upon to make arbitration effective in any given case will not have been finally identified until the arbitrants have finally lain down their arms. The legal order of the place of arbitration may play no role whatever in the practical outcome. On the contrary, the legal order of a country which was not even contemplated at the time of signing the arbitration agreement may be decisive because that is where the award debtor now has assets. Above all, in most situations, as in Maître Dupont's case, even the model of plurality does

<sup>17</sup> See (n 7).

not, in fact, need to operate at all. Arbitration makes its entry and exit without the manifestation of any national legal order other than the diffusely focused expectations of the parties.

#### V. THE THESIS OF AN AUTONOMOUS ARBITRAL LEGAL ORDER

A vision idea has been growing for half a century in the minds of a succession of French scholars. Its resonance, in France and elsewhere, has extended to judicial pronouncements, but not to legislation. The latest avatar of this intellectual project is a succinct monograph published by Emmanuel Gaillard in 2008, *Aspects philosophiques du droit de l'arbitrage international*,<sup>18</sup> in which the author answers the 'fundamental preoccupation' with respect to arbitrators' 'power to judge' by reference to something he says, with ostensible simplicity, operates outside any national legal order, be it that of the place of arbitration or of the place of execution of an award. This is '*l'ordre juridique arbitral*'.

It is easy to see why the proponents of this postulate reject the territorialist approach; their perceptions of its deficiencies are the same as those developed above. But why are they not content with the pluralistic thesis?

Gaillard does not challenge its correctness, but rather its consequences—the danger that we may founder on something he refers to as 'the reef of *lex executionnisme*'.<sup>19</sup> He explains that this shipwreck would be the result of having to consider that the legal foundation of any award is the totality of all legal systems which might be called upon to enforce it. This would, he argues, give primacy to the least favourable norm—'*in defavorem arbitrandum*'. Hence the need for a new conception of an autonomous legal foundation for arbitration.

Gaillard's logic might have found itself on solid ground if our pluralistic world actually worked in this fashion. Fortunately it does not. Arbitrators do not examine the validity of the arbitration clause, or of their appointment, under the laws of every country that might conceivably be approached as an enforcement forum. Nor do they have a duty to do so. Indeed that task would be impossible, unless they could read the parties' minds, predict future tracing of assets, and find a crystal ball to reveal where the *res judicata* embodied in an award might variously be brought to bear by any number of affected parties. Moreover, if Gaillard's vision were correct, any tribunal including a woman, or an atheist, should declare itself lacking authority because somewhere a possible execution forum might require that arbitrators be male, or that they profess a certain faith.

<sup>18</sup> An English translation appeared in 2010, entitled *Philosophical Aspects of the Law of English Arbitration*. (Martinus Nijhoff, Leiden, 2010). The present article refers to the original text.

<sup>19</sup> Gaillard (n 5) 58–60.

Gaillard's references to the rules of the ICC and the LCIA,<sup>20</sup> to the effect respectively that arbitrators shall make every effort 'to make sure that the Award is enforceable at law' and 'to ensure that an award is legally enforceable', is misplaced. It would seem rather perverse to conclude that their duty to strive for the highest degree of *enforceability* of awards means that arbitrators must reject claims because somewhere, in a place where enforcement may conceivably be sought, there is a possibly applicable rule which might be interpreted to the effect that the award would *not* be recognized.

It is hard to resist the impression that the filaments of the proposed *ordre juridique arbitral* float in the ether like gossamer:

- they 'correspond' to a 'strong perception' on the part of arbitrators that they do not render justice in the name of any state, yet have a jurisdictional role 'in the service of the international community';
- they are produced by arbitrators 'penetrated' by the idea of applying substantive 'transnational' rules rather than fixing on a single national law determined by rules of conflict of laws;
- they reflect a 'vast movement acknowledging the merits of recourse to arbitration' in international trade;
- the proposed order is reflected in a 'current' of 'transnational' law, yielding a 'positivist perspective' due to the 'broad agreement' of states with respect to the criteria by which arbitration is recognised as valid and worthy of their sanction;
- a 'bonus' is given to laws which are part of the 'dynamic' of the 'general evolution' as opposed to those which remain 'outside this movement';
- we thus move from the 'monolocalisation' of arbitration to its 'multi-localisation' and finally reach a triumphant 'transnational representation' of arbitration derived from 'tendances susceptible to flow from the normative activity of the community of States'.<sup>21</sup>

Most of Gaillard's demonstration falls ironically into the same trap as that of Mann's 1967 article—albeit with the objective of promoting a contrary thesis—namely looking at substantive rules for deciding a dispute as though they were reflections of a legal order giving effect to the process itself. When Gaillard focuses on the 'more delicate' matter of the *recognition* of the '*ordre juridique arbitral*',<sup>22</sup> he says that it 'flows from the will of States, which does not prevent it from being seen as an autonomous legal order'<sup>23</sup>—and thus puts his entire construct fatally in harm's way. For the international legal order of States has been painstakingly (and even so incompletely) constructed on the basis of unanimity. States have never accepted that the norms of the international community are derived from 'progressive tendencies' embraced by

<sup>20</sup> International Chamber of Commerce Rules of Arbitration, Art. 35 (1999); London Court of International Arbitration Rules, Art. 32.2 (1999).

<sup>22</sup> *ibid.* 84.

<sup>21</sup> Gaillard (n 5) 60 ff.

<sup>23</sup> *ibid.* 91.

other States; they insist on their own individual adhesion. They are even less likely to embrace such amorphous norms as limitations on their laws, in their national space, when dealing with a private-law feature like arbitration.

Gaillard contends that this order is not, as he puts it, ‘opposed to national law, but on the contrary is founded on the normative activity of States’.<sup>24</sup> The ‘objective of the exercise’ is to distinguish the rules that have been ‘widely acknowledged’ from those which proceed from ‘*un particularisme exacerbé ou désuet*’.<sup>25</sup> This naturally puts a premium on the discernment of authoritative jurists, who might inspect an array of laws assembled before them like so many cadets, giving a thumbs-up when they somehow perceive that one of them is ‘widely acknowledged’, or a thumbs-down when they somehow determine that another is just a bit too jejune or retrograde. Surely such pronouncements are unlikely to go down well with judges who would be violating their oath of office if they showed fealty to a ‘transnational’ order rather than to that of the State to which they have sworn allegiance.

Above all, even if this thesis were correct, it is difficult to see how it achieves anything not already available under the pluralistic thesis. If national judicial authorities embrace awards that apply transnational norms or trade practices, there is no warrant for concluding that they thereby acknowledge another ‘legal order’ any more than their recognition of ‘customs of the diamond trade’ as trade usages means that they recognise a legal order established in Antwerp. What courts say is quite simply an expression of the legal order of which they are a part; it can be nothing else.

Perhaps one day national judges will embark on learned assessments whether certain phenomena are to be given legal effect, irrespective of what their own positive law would say, because such is the consensus of the ‘normative activity’ of progressive States—perhaps vanguard states which are (still?) in the minority but deserving of greater weight than the unconverted majority. But that will, it seems, have to await a new race of judges with a radically new perception of their duties.

Gaillard seeks support in various French judicial pronouncements to the effect that arbitrators are not ‘integral parts of the judicial organisation of the State’ of the legal seat of arbitration.<sup>26</sup> Such comments, however, prove only that the *French* legal order is willing to give effect to arbitral awards when enforcement is sought *in France* without concerning itself with the views of the courts of the seat. It does not demonstrate the existence of an autonomous ‘arbitral legal order’. It is but the reaction of a single national legal order among the multiplicity of orders which may have the occasion to play a role in

<sup>24</sup> *ibid* 77.

<sup>25</sup> *ibid*.

<sup>26</sup> For example, see Cass. civ. I<sup>re</sup> (23 March 1994) *Société Hilmarton Ltd. v. Société Omnium de traitement et de valorisation (OTV)* [1994] JDI 701, Cour d’appel of Paris (14 January 1997) *République Arabe d’Egypte v. Société Chromalloy Aero Services*, [1998] JDI 750, Cour d’appel of Paris (10 June 2004) *Société Bargins Agro Industries v. Société Young Pecan Company*, [2006] Rev arb 154.

the life of an arbitration. Nor does the author's emphasis when citing the reference of the *Cour de cassation* in the notorious *Putrabali* case<sup>27</sup> to the foreign award's status as '*une decision de justice internationale*' add anything to the balance; those words are immediately followed by these: 'the validity of which is examined by reference to the rules applicable in the country where its recognition and enforcement are sought'.<sup>28</sup> In other words, it is another acknowledgement of the variety of potential orders. It is hard to see why anything more is necessary—unless it is somehow suggested that the liberal rule of recognition developed in France must be followed elsewhere because it is commanded by an autonomous legal order. But that would be a vast and radical leap, and does not appear to be even implicitly demonstrated by Gaillard—any more than by the eminent authors he cites, from René David to the present day,<sup>29</sup> who cannot be assumed to have had the same project in mind.

The hollowness of the claims for this autonomous legal order was exposed by the English courts in the case of *Dallah v Pakistan*.<sup>30</sup> Dallah is a Saudi trading group which had secured an award of some US\$20 million in an ICC arbitration in Paris against the Government of Pakistan.<sup>31</sup> The relevant contract had been entered into between Dallah and a Pakistani trust created by Presidential Ordinance but dissolved a few months after signature. Dallah considered that the Government of Pakistan should be deemed a party to the contract. This gave rise to a debate which the Government argued should be decided under its law, while Dallah urged the application of Saudi law. The arbitral tribunal rejected both arguments, holding that the issue of the Government's status in the arbitration should be decided by 'those transnational general principles and usages which reflect the fundamental requirements of justice in international trade, and the concept of good faith in business'.<sup>32</sup> Applying these concepts to the facts of the case, the arbitrators held that the Government was an 'alter ego' of the Trust and therefore a 'true party' to the contract.<sup>33</sup>

Asked to enforce the award, English judges at three levels unanimously and unsurprisingly found that they had plenary authority to examine whether the award was susceptible to enforcement in England against the Government of

<sup>27</sup> Cass. civ. 1<sup>re</sup> (29 June 2007) *PT Putrabali Adyamulia v Rena Holding et al* [2007] Rev arb 507.

<sup>28</sup> *ibid* 514, quoted in Gaillard, *op. cit.* 96.

<sup>29</sup> Including Bruno Oppetit, Pierre Mayer, Henri Motulsky, and Thomas Clay.

<sup>30</sup> *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46; *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755; *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm).

<sup>31</sup> All aspects of the ICC award referred to herein appear in the High Court judgment cited in note 30.

<sup>32</sup> This rather un-English formulation was produced by a tribunal which included Lord Mustill.

<sup>33</sup> See (n 30) 30.

Pakistan.<sup>34</sup> They noted that the words of the Arbitration Act 1996,<sup>35</sup> echoing those of article V(1)(a) of the New York Convention, required that the validity of arbitration agreements be tested against ‘the law of the country where the law was made’. Accordingly, they first determined the criterion by which the opposability of the arbitration agreement to the Government of Pakistan should be determined under French law. This criterion, they found, was not a matter of an alter ego status, but rather evidence of the Respondent’s acceptance of the arbitration clause. Next, they conducted a de novo review of the facts to establish whether they were sufficient, as a matter of evidence or presumption, to conclude that there had been such an acceptance.

In the Court of Appeal, Lord Justice Rix’s judgment reflected on the possibility that Dallah’s case might be assisted by invoking the discretion that exists under the New York Convention to enforce awards notwithstanding their annulment in the country of origin, but noted that this possibility appeared to depend on a French ‘theory of arbitration’, not recognized in England, to the effect that arbitrators derive their authority from a transnational legal order.<sup>36</sup>

There may be such a *theory* circulating in France, but it simply cannot be French *law*. If the French courts were to say that they adopted the doctrine of the duty to mitigate damages because it is necessary for everybody to obey the Man in the Moon, that does not make the Man in the Moon a universal lawgiver. It means only that the French courts recognize a duty to mitigate damages. That is all an organ of the French legal order can do, ie to establish a rule *for itself*. A proclamation to the effect that this is done to give effect to a supranational order would simply be *ultra vires*. French law cannot will into existence something which is larger than itself. Courts in other countries may well follow the same rule, be it the duty to mitigate or a particularly favourable way of treating arbitration. That does not prove the authority of the Man in the Moon, no matter how adamantly commentators insist that he deserves the credit. It means only that each of a number of legal orders has, for whatever reasons—similar, different, or contradictory—adopted the rule in question. The text books of comparative law have for generations been filled with examples. There is nothing new here at all.

Lord Justice Rix was on the right track, it seems, when he immediately went on, after having alluded to the French theory of a transnational legal order, to suggest that the true basis for the possibility of the enforcement in France of awards annulled elsewhere was not ‘a free-standing discretion’, but simply a rule of French law.<sup>37</sup> This is the precise insight of the Swiss scholars Jean-François Poudret and Sébastien Besson, who notably reasoned in their *Comparative Law of International Arbitration* that the ‘new’ French

<sup>34</sup> See (n 30).

<sup>36</sup> *Dallah Real Estate & Tourism Holding Company v Government of Pakistan* [2009] EWCA Cir 755; [2009] 30 EG 67 (CS), para 75.

<sup>35</sup> s 103(2)(b).

<sup>37</sup> *ibid* 75.

conception of the separability of arbitration clauses, to the effect that they are to be examined under an anational norm, is 'in reality part of French law and not of any international or transnational system'.<sup>38</sup> This passage was cited with decisive approval in Lord Mance's leading judgment in the UK Supreme Court.<sup>39</sup> Poudret and Besson's next paragraph was particularly clear:

The result of this [French] case law is that the arbitration agreement is subjected to a material rule which recognises its validity provided it does not violate international public policy. Although this has been the subject of controversy, the rule is an international rule of French law and not a transnational rule.<sup>40</sup>

This amplification of the point was quoted, again with decisive approval, in Lord Collins's judgment in the Supreme Court: the dead end, one should conclude, for a conception which promised much more than it could deliver.<sup>41</sup>

The development of international arbitration owes a disproportionately large debt to French law and to the conceptual advances of French judges and scholars. Nowhere else have the twin lodestars of freedom and internationalisation, combined in the conception of a voluntary process that accommodates the realities of a transnational society, shone so bright.<sup>42</sup> Yet the zeal of those who make extravagant claims may do more harm than the resistance of non-believers and scoffers. The proposition that an effective legal order may be built upon diaphanous abstractions like *positive perspectives* or *transnational dynamics* is more likely to impede than to facilitate respect for the arbitral process.

#### VI. THE FLUID REALITY

Reality does not so much contradict the three theses we have now examined as it ignores them. It notionally collides with the territorial postulate but this hardly matters since that thesis is outdated. Reality is more consistent with the pluralistic concept but, as we shall see, tends to transcend it without hesitation. Finally, reality can safely disregard the third model, because as seen it is no more than pluralism, masquerading as something grander. Even the pluralistic model, however accurate as far as it goes, is too restrictive and therefore unsatisfactory. It leaves out too much of the picture. We must revise it if we are to perceive the role of arbitration accurately.

As the foundation of arbitration, or more precisely a *sufficient* foundation for *some* arbitrations, this revised conception does not depend directly either on law or judges. It therefore does not seek to attach itself, in the manner of the Parisian thesis, to the somewhat dreamy and self-contradictory premise of

<sup>38</sup> Poudret and Besson (n 5) para 180.

<sup>40</sup> Poudret and Besson (n 5) para 181.

<sup>42</sup> For a recapitulation in English of France's unique contribution as it could be assessed already two decades ago, see A von Mehren, 'International Commercial Arbitration: the Contribution of by French Jurisprudence' (1986) 46 Louisiana L Rev 1045.

<sup>39</sup> [2010] UKSC 46, para 16.

<sup>41</sup> [2010] UKSC 46, para 115.

an 'autonomous' order *recognized* by the very State orders from which it purports to be free.

Some would object that if it does not secure a place in the ordering of a State, this fourth conception cannot refer to a legal order at all. Even if that objection were accepted (although the discussion below does not), this fourth perspective must be considered seriously, because it corresponds undeniably to a social institution which is often highly effective in practice. It is obviously the most autonomous of all ways of perceiving arbitration. When this revised model of pluralism operates, arbitrants would no doubt on occasion be pleased to qualify for assistance from the machinery of the State. On occasion, that same machinery may intervene to exclude the possibility of arbitration. But the point is that this is a vision of arbitration which functions routinely without judicial assistance. At the greatest level of generality, this notion of private social systems which secure the enforcement of rights and obligations defined by its constitutive group is not unique to arbitration. Such systems may be admirable or not, from the extremes of criminal syndicates and oppressive religious sects to benign trade associations and sports federations. Some such arrangements may operate, to a greater or lesser extent, against the background of expectations of what would happen if disputants went to law. In other context, there simply is no relevant or realistically available public jurisdiction.

A seminal exposition of this vision of legal orders was published in 1918 by Santi Romano under the title *L'ordinamento giuridico*—'The Legal Order'.<sup>43</sup> It remained an Italian secret for half a century, until Spanish, French and German translations appeared. A worthy adversary of Kelsen, who ended up at Berkeley publishing lengthy works for many years in English, Romano never left Italy and wrote in his native language. It is a considerable loss for the Anglophone world.

Law must ultimately be founded in social reality, Romano reasoned. Social reality may create a legal order that ignores the formalistic insistence on an elusive ultimate norm, be it Kelsen's *Grundnorm* or—to anticipate—Hart's (secondary) rules of recognition. To posit that a legal order cannot exist without a moral foundation struck Romano as naïve and analytically unhelpful. But of course he could have conceded the point without altering his overarching insight; many subnational social groups proceed from moral precepts. For Romano, every organized social group is a kind of legal order. It may be superior or inferior to a nation-state, or even parallel: the international community, an institutionalized church, subnational collectivities, professional and trade organizations, associations of myriad types—even families, including criminal 'families'.<sup>44</sup>

<sup>43</sup> The book was updated in 1945 to respond to critiques. The references here, due to my linguistic limitations, are to the second edition of the French translation: by L François and P Gothot, *L'ordre juridique* (Daloz, Paris, 2002).

<sup>44</sup> There is a vital difference between enforcing a leader's command 'because he wants your coat' and 'because we depend on discipline'. The former is an arbitrary and personal exercise of

Social groups capable of generating a legal order are not, in Romano's view, limited to those without which the individual cannot survive; they include voluntary communities (or interest groups) from which the individual may exit. Distinct legal orders may then survive within a greater legal order which tolerates and indeed nourishes them, but does not care to impose itself in the domain for which the subgroup in question prescribes its rules. It is a commonplace observation that empires at their apogee, confident in their power, from Rome to Britain, have tended to permit a profusion of local legal arrangements.

Santi Romano was obviously a pluralist. A foreign judgment enforced by a State has not been 'naturalised', he reasoned; the effect of enforcement is given to the judgment by virtue of a 'national' norm; no foreign legal order could so ordain.<sup>45</sup> This deftly disposes of Francis Mann's territorialist simplicities, and seems wholly consistent with pluralistic thesis as described above.

But we did not need Santi Romano to leave the territorialist thesis behind us. His remarkable contribution is rather a vision of pluralism which goes further than to consider the relationship between national legal orders among themselves, and allows us to see the success of arbitration through the prism of legal orders different from that of the nation-state, and in some contexts more efficient than the latter. In this fundamental respect a close reading of Herbert Hart shows that he moved (doubtless unconsciously) some distance away from Kelsen and toward Romano. With respect to parliamentary omnipotence, for example, Hart conceded in *The Concept of Law* that ultimately the determination of what is 'accepted' is an 'empirical' matter; that the authority of courts to decide what is constitutional depends on the circumstance that 'a vast area of law . . . raises no doubt'; that in the end 'all that succeeds is success'.<sup>46</sup> Yet again:

[T]he rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. *Its existence is a matter of fact.*<sup>47</sup>

power; the latter has to do with the group's self-regard as an enduring normative ordering, however primitive (in this case little more than a rule of recognition of authority). Max Weber was saying as much when he distinguished between enforcement of conduct 'because of considerations of expediency or the other material circumstances' and enforcement of 'conformity to a norm as such, i.e. because of its being formally accepted as binding', on pp 12–13 of the familiar Shils/Rheinstein translation of portions of the 2nd edn of *Wirtschaft und Gesellschaft* (1925), published in 1954 by Harvard University Press under the title *Max Weber on Law in Economy and Society* (Max Rheinstein, ed).<sup>45</sup> François and Gothot (n 43) 138.

<sup>46</sup> HLA Hart, *The Concept of Law* (2nd edn, Clarendon, Oxford, 1994). 150, 152, 153. Hilary Mantel imagines that Thomas Cromwell said it better in an interior monologue, as chief minister of Henry VIII drafting the Act of Restraint of Appeals in 1533 (by which Rome's legal dominion over England was severed): 'When you are writing laws you are testing words to find their utmost power. Like spells, they have to make things happen in the real world, and like spells, they only work if people believe in them.' H Mantel, *Wolf Hall* (Fourth Estate, London, 2009) 574.

<sup>47</sup> Hart *ibid* 110 (emphasis added).

Where the structures of the state do not ‘succeed’, we observe as ‘a matter of fact’ that other arrangements fill the void. Indeed such non-state mechanisms may surpass or ignore less vital institutions proposed by the state. As Pierre Mayer has noted, once one sees that the ultimate rule depends on the fact of its social acceptance the vision of a legal order cannot be reduced to an abstract normative system.<sup>48</sup> Pretensions of legitimacy are not the real thing. It is necessary, and sufficient, that the relevant body of norms be acknowledged as a matter of social reality. Dismissing objections to Santi Romano on account of his alleged ‘confusion’ of social order as opposed to a disembodied complex of norms, Mayer concludes (in his introduction to the most recent French translation of Romano’s masterpieces):

In the end, we may well ask whether the true oddity is not this furious insistence on excluding the slightest portion of living reality from the definition of a phenomenon which, after all, characterises man’s life in society.<sup>49</sup>

Precisely because it is in so many ways replicates the judicial forms of an adversarial process, arbitration is an obvious potential vehicle for social arrangements constituting legal orders outside the conventional statist model. This is not to say that an ‘arbitral legal order’ trumps national orders. Render unto Caesar the things that are Caesar’s; when a state accepts to give effect to such private arrangements, such as arbitral awards, it does so by application of a norm of its own, that is to say the expression of its own legal order. Santi Romano’s insight is that other legal orders may function without intersecting with national orders at all. There are signs that Romano’s reality is in the ascendancy. It may fill the vacuum when public institutions fail. It may be the hallmark of a fluid legal universe, with significant elements of self-governance, as the arbitrants themselves, replacing the legislature and the executive arms of the state, create norms and ensure their sanctions. This immensely important phenomenon, and its limits, compels us to make important conceptual moves.

#### VII. THE NECESSITY OF INVENTION

Decent justice is a luxury available to more or less important segments of the population in rich countries—and to hardly anyone elsewhere. The have-nots can hardly be told to content themselves with hopes for justice for their descendants. One cannot fail to reflect that the thirst for reliable methods for solving disputes will in these circumstances generate alternatives—ranging

<sup>48</sup> Preface to the second French translation of *L’ordre juridique* (p 7).

<sup>49</sup> *ibid* 9. Le plus étrange n’est-il pas finalement cet acharnement à exclure jusqu’à la moindre parcelle de réalité vivante de la définition d’un phénomène qui caractérise, malgré tout, la vie de l’homme en société?

from informal pronouncements by trusted elders in poor Anatolian villages to elaborate arbitral awards rendered in the context of vast business transactions. Those who would seek to prohibit such alternatives in order to preserve the primacy of public courts should first consider whether the public systems to which they command their fellows to cast their fate are dysfunctional.

Vast resources have been expended studying matters of governance throughout the world, first and foremost legal systems. A great body of detailed reports on the state of judiciaries around the world are readily available from international organisations, national development organizations, and private foundations. Anyone with access to a computer can quickly access thousands of pages written by development specialists. They tend to be disheartening.

Typical conclusions are illustrated by the very titles of two World Bank reports of investigations concluded in the early years of the new Century. One, called 'The Inequality of Influence',<sup>50</sup> looked at some 6500 business firms in 27 transition countries, and particularly examined the concept of *crony bias*, associated with the subversion of institutions, corruption, and—for those who are not in on the game—the inclination at all cost to stay away from courts. The other, authored by a former Director of the World Bank Institute, bore the blunt title 'Misrule of Law'.<sup>51</sup>

Most of these studies conclude that ordinary citizens expect little from the courts, and that indeed they are right, as a consequence of long delays, political influence in the courts, ignorant judges, corruption, hostility toward women and the poor, prohibitive costs, and lack of transparency. Perhaps the bleakest outlook is that of countries characterized by fragile or paralysed institutions, where disputes are resolved, or not, as a matter of personal influence.

Judicial dysfunctionality is a great handicap to social and economic development, and disproportionately harms the poor. This is why international institutions interested in development expend so much effort on matters of governance. The return-on-effort is modest at best. As the chief economist of the International Monetary Fund wrote in 2004, 'institution building' has not benefitted from 'much guidance from academia'. He continued, starkly:

[A] better starting point for analysis than a world with only minor blemishes may be a world where nothing is enforceable, property and individual rights are totally insecure, and the enforcement apparatus for every contact must be derived from first principles . . .<sup>52</sup>

<sup>50</sup> J Hellman and D Kaufmann (2003), available at [zunia.org/uploads/media/knowledge/0308005.pdf](http://zunia.org/uploads/media/knowledge/0308005.pdf).

<sup>51</sup> D Kaufmann, 'Misrule of Law: Does the Evidence Challenge Conventions in Judiciary and Legal Reforms?' (2001), available at <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/misruleoflaw.pdf>.

<sup>52</sup> R Rajan, (2004) 40 *Finance and Development* (quarterly publication of the IMF), 57.

When the legal order provided by a State proves unsatisfactory to particular segments of society, alternative methods are devised. These methods may seem more or less legitimate. At one extreme, the relevant State may have become a sorry fiction, unable to provide either security or justice. Such circumstances are likely to engender sympathetic understanding for the emergence of alternative arrangements by which citizens strive to attain a measure of predictability in their lives. At the other extreme, the relevant state may be an example of acceptable efficiency and democratic refinement, and the creators of the alternative arrangement a band of rascals who wish to enrich or empower themselves by means of ruse or violence. In between, there are groups who simply want a more efficient system for the enforcement of rights and obligations, with respect to which our sympathy is likely to depend on the degree to which we find that their arrangements are compatible with the values and objectives of society at large: public policy.

Yet all social groups, as Santi Romano saw it, produce legal orders. Since law is the reflection of a social ordering, it excludes any feature which at its heart is the product of arbitrariness or opportunistic force. The legal order emerges from a necessity of coexistence: overcoming the weakness of individuals by providing a lasting basis for life in society 'through the creation of social entities more enduring and stronger than individuals'.<sup>53</sup> And so a system emerges from the accretion of a multitude of arrangements.

This vision has the considerable advantage of realism. It is all-embracing and therefore untidy. All processes qualify. The norm is secondary. What counts is the acknowledged authority. Crime families or religious groups are thus to be considered legal orders as long as they provide a *modus vivendi* 'more enduring and stronger than individuals', and preclude 'arbitrariness or opportunistic force'. The norms are not what make the system; it is the system which uses them to its ends. The rules of a particular group may, to outsiders, seem odious or irrational, but they are effective for that group and therefore constitute a legal ordering. True enough, the code of a criminal gang or that of a cult may (apart from their distastefulness to citizens of the wider society) be vastly less complete than the collected laws of a State, but that is not a significant criterion in comparison to the test of significant regulation of social life. Some ostensible national legal orders, irrespective of the voluminous tomes of laws nominally in force, represent virtually nothing in terms of regulating life in society, whereas a perfectly effective legal order may be achieved by a single rule if it is sufficiently anchored in the community: 'the Chief Druid shall be elected on the 1st of May each year, and everyone shall do as he or she says until the next election'.

Real-life examples of legal orderings involving arbitration are seldom primitive. To the contrary, their constitutional instruments are frequently elaborate. To a significant degree, this is so precisely because they were

<sup>53</sup> *L'ordre juridique* (n 43) 15.

conceived to avoid the need for controversial interpretation by State organs—indeed to function without any intervention by State authorities.<sup>54</sup>

To examine the interpenetration of State and non-state legal orderings, one naturally turns to examples of well-established private arbitral institutions operating across borders. They have flourished for many decades, and have done so by evolving in response to the dynamics of their transnational environment. As a result, they have transformed both their nature and their operations. This is specifically so with respect to their *relative* position in relation to national orders. As late as the 1950s, the International Chamber of Commerce's arbitration system was a diffident, puny institution in comparison to the potent state orders then holding sway. Today, ICC arbitrations—and other similar types of arbitration—provide the *normal* method by which international commercial disputes are resolved, and an overwhelming proportion of such disputes are so resolved without any need to refer to State authorities of any kind. For their part, the states extant today are a motley crew. Anyone who wishes to insist that various failed states, simply because their flags festoon the UN Plaza, are more entitled to be considered 'legal orders' than, say, the institution of UNCITRAL arbitration as supported by the New York Convention, is perhaps a prisoner of hollow definitions.

Arbitration under rules developed by the ICC was launched at a congress held in London in 1921, shortly after the founding of the ICC itself. Owen Young, Chairman of the Commercial Arbitration Committee of the US Chamber of Commerce and a well-known businessman, urged that it was important to create effective solutions 'outside the law'. He introduced this striking notion by saying that the ICC's success in the field of international commercial arbitration

will depend on the recognition by the Chamber and by its individual members of the inherent difficulties and complexities of the situation. The most important of these difficulties lies in the fact that, generally speaking, the business men of continental Europe rely upon a legal sanction for the carrying out of arbitral decisions, whereas in the United States, as well as in England and the South American countries, a moral sanction has been shown to be, certainly for the present, more effective than a legal sanction. To ensure the cooperation of these countries, therefore, some system of arbitration *outside the law* must be provided.

Young went on to imagine that some arbitral awards would not be enforced by legal processes,

but upon a moral sanction, such as can be exercised by the International Chamber of Commerce itself, and by member National Committees, with all the

<sup>54</sup> See eg G Teuber, 'Global Bukowina: Legal Pluralism in World Society' in G Teuber, (ed), *Global Law Without a State* (Dartmouth, Hanover, 1997); R Cooter, 'Decentralized Law for a Complex Economy: The Structural Approach in Adjudicating the New Law Merchant' (1996) 144 U Pa L Rev 1643; CR Drahozal, 'Private Ordering and International Commercial Arbitration' (2009) 113 Penn St L Rev 1031.

force that business men of a country can bring to bear upon a recalcitrant neighbour.

Before agreeing to conduct an arbitration outside the law, even when both parties should join in a request, the International Chamber should be convinced that the business men of both countries concerned are sufficiently well organized and that the business organizations are willing to exert moral pressure, if need be, in favor of carrying out the arbitration decision outside the law, and are sufficiently influential to make such pressure effective.<sup>55</sup>

The expression 'outside the law' was perhaps not well chosen, since it is so readily converted to 'out-law'. That is indeed how it is occasionally perceived by critics who detect, in all initiatives to avoid the ordinary public courts, an intent to undermine the implementation of public policy.<sup>56</sup>

One way to control arbitration would be to forbid it entirely. To do so, however, one would have to dismiss an apparent worldwide consensus that arbitration has made positive contributions to the rule of law in ways indispensable to exchanges that benefit the international community. The freedom to arbitrate seems to be broadly acknowledged as a universal value, reflected today in the success of the UNCITRAL Model Law on International Commercial Arbitration.<sup>57</sup> To dismantle arbitration would also imply refusal to accept the use of such tools in environments of institutional disarray, where transnational exchanges would otherwise comport unacceptable risks. It would mean the rejection of all attempts to secure justice in contexts where there is no functioning public judiciary. History suggests that this objective (independently of its doubtful merits) would be unrealistic.

The example of commercial arbitration has been studied extensively in terms of its interface with national courts (viewed both as facilitators and supervisors). It is the principal focus of most arbitration treaties.<sup>58</sup> It may be instructive to consider two newer entrants.

There is a single global Internet, of which the essential core element is the so-called root zone of the Domain Name System (DNS). As a purely operational matter, this root is controlled by the Commerce Department of the US Government. For the government of a single State to regulate such an important global resource would be highly controversial, likely to generate political pressure to create competing systems. This would be a retrograde development, a Tower of Babel in cyberspace. The US Government has therefore entered into contracts with a not-for-profit corporation, ICANN, to provide singularly important regulatory services: allocating and assigning domain names and IP ('Internet protocol') addresses, coordinating the

<sup>55</sup> ICC Rules of Conciliation and Arbitration, Brochure No 2, page 2, quoted in GL Ridgeway, *Merchants of Peace* (Columbia University Press, New York, 1938) 322 (emphasis added).

<sup>56</sup> For an example of unmatched hostility, see H Kronstein, 'Business Arbitration—Instrument of Private Government' (1944) 54 Yale L J 36.

<sup>57</sup> UN A/40/17, annex 1.

<sup>58</sup> See eg, M Mustill and S Boyd, *Commercial Arbitration* (3rd edn, Butterworths, London, 2008).

DNS root name server system, and organising the process of policy development . . . related to these technical functions.<sup>59</sup>

Controversies have arisen with respect to numerous policy issues. Against the background of the possibility that the US Government could reclaim the power and functions it contracted to ICANN, the latter operates under Articles of Incorporation and Bylaws in conformity with its state of incorporation (California).<sup>60</sup> Critics of ICANN's governance have complained that this outsourcing of regulation impairs accountability, in that ICANN's decisions escape the ordinary requirements of administrative law, such as transparency, due process, and judicial review. As one persistent critic has put it, the DNS should not be regulated 'through contracts and winks'.<sup>61</sup> On the other hand, that these functions should be subject to US administrative law would most certainly be perceived as national assertion of dominance over an international resource, and so ICANN continues, as a work in progress, to seek to satisfy its global constituencies through refinements of three principal features. First, its work is done in conditions of remarkable transparency, with meetings, contracts, and protocols routinely made accessible to the public for timely comment<sup>62</sup>. (Some Board meetings, however, are closed, and doubters surmise that the real decision-making takes place there, with little serious regard to the ostensible consultation process. Such questioning of governance are of course typical of all systems.) Secondly, its Bylaws require a cosmopolitan Board including members from all continents, as well as a Governmental Advisory Committee 'open to all national governments'—which holds frequent meetings around the world that resembles typical conclaves of international organisations.<sup>63</sup> Thirdly, an 'independent review board . . . operated by an international arbitration provider' may be asked by a complainant to declare whether actions of ICANN's Board are consistent with its Articles and Bylaws, which themselves require that ICANN act 'in conformity with international law'.<sup>64</sup>

This is doubtless a peculiar legal construct. It defies categorization; it cannot accurately be described as the manifestation of the legal order of a State, and yet it constitutes the ordering of an important and remarkably cosmopolitan community, made up of delicate compromises, adjusting over time as its members appraise events, processes, and decisions. If this is not law in action, in the effervescence of conceptual ferment, what is?

<sup>59</sup> Internet Corporation for Assigned Names and Numbers, <http://www.icann.org> website, page 'Documents'.

<sup>60</sup> *ibid.*, pages 'Articles of Incorporation' and 'Bylaws'.

<sup>61</sup> A Michael Fromkin, 'Form and Substance in Cyberspace' [2002] *Small & Emerging Business Law* 96.

<sup>62</sup> See the ICANN/Government Advisory Committee website: <http://www.icann.org/about-gac/>.

<sup>63</sup> Bylaws IV.3; Articles, Art 4.

<sup>64</sup> The mechanism is described in the Declaration dated 19 February 2010 in the matter of *ICM v ICANN*, the outcome of the first Independent Review Process, posted at <http://www.icann.org/en/irp/icm-v-icann.htm>.

Another remarkable non-state ordering has emerged in the world of international sporting competition, which in modern times has become a vast industry. It has generated a highly effective arbitral mechanism. Although in existence for scarcely more than two decades, the Court of Arbitration for Sport, located in Lausanne, is extremely active and the awards of arbitrators operating under its rules are given full and immediate effect.<sup>65</sup> It is easy to see why this is so in disciplinary cases; an athlete who is suspended for a doping offence will simply not be given the credentials to compete, because the federations who organise competitions adhere to regulations which accept CAS awards as ultimate appellate decisions. But CAS also achieves finality and efficacy with respect to *contractual* disputes, in unique and instructive ways, as the following example will show.<sup>66</sup>

In early 2002, a Brazilian football player signed a four-year contract to play for a Mexican club called Sinergía Deportiva, or more commonly *Tigres*. He was first paid a transfer fee of US\$1 million, and was thereafter entitled to receive a monthly salary until the end of the fourth season.

The player stayed with the team for one year only, and then, in disregard of his contractual obligations, returned to Brazil for good. The international football federation, FIFA, promptly suspended him from playing worldwide. Within a few months, a Brazilian labour court ruled that he was entitled to pursue his career. That judgment freed him to take employment with a Brazilian team known as Atlético Mineiro.

*Tigres* felt hard done by. They had paid one million dollars in order to procure the services of the player for four seasons, not just one. But how were they to be made whole? True, the club had an employment contract with the player. True, they might get a judgment in their favour from a Mexican court. But then what? Even without any complicating factor, one cannot expect that a Mexican judgment would readily be declared enforceable in Brazil. Even if by unexpected good fortune it were homologated—to use the term favoured in Brazil—how could it be enforced against the player? What reason would there be to suppose he had saved his money in a single, convenient, transparent account to accommodate the Mexican judgment creditor? And of course there was the complicating factor that a Brazilian court had declared that the player was entitled to pursue his career with a local team. This entitlement, as one would expect, was proclaimed in stirring language about every individual's right to work. If *Tigres* operated in the familiar environment of imperfect coordination among state legal orders, their prospects were grim.

Not so in the modern context of the globalized football industry and CAS. *Tigres* had no difficulty in enforcing their claim. They first complained to

<sup>65</sup> See IS Blackshaw et al, (eds), *The Court of Arbitration for Sport 1984–2004* (CUP, Cambridge, 2006).

<sup>66</sup> CAS awards are published (in most cases) and available on the archival list of [jurisprudence.tas-cas.org/sites](http://jurisprudence.tas-cas.org/sites).

the FIFA Players' Committee, which found the player to have breached his contract, and ordered him to restitute the US\$1,000,000 transfer fee. If he failed to pay, Atlético Mineiro would be jointly liable. This decision was challenged by the player and by Atlético Mineiro before CAS, and three arbitrators were duly appointed.

Full arguments were heard before the arbitral tribunal—notably as to the interpretation of the employment contract and as to the principle of joint liability. As to the former, applying Swiss law and the FIFA Regulations, the arbitrators concluded that the damages should be reduced to US\$750,000 on account of the one year the player did perform.<sup>67</sup> As to the latter, the position was clear: the FIFA Rules explicitly hold teams jointly liable for the breach of a prior contract committed by any player they chose to employ. Accordingly, if the player were to fail to pay the US\$750,000 within 30 days of the award, Atlético Mineiro would be required to make the payment.

Atlético Mineiro could be counted upon to make the payment, because otherwise it would face a disciplinary action by the Brazilian federation in the form of a relegation from the premier division. For the club not to do what was necessary to avoid that sanction—ie to pay *Tigres*—was really quite inconceivable. The Brazilian federation, in turn, could be counted on to ensure compliance by its member, Atlético Mineiro, because otherwise the federation would face disciplinary action by FIFA in the form of exclusion from international competition. Brazil excluded from the World Cup? 'Inconceivable' is not an adequate word!<sup>68</sup>

What about the Brazilian judgment which declared the player free to pursue his career with Atlético Mineiro? To the extent that it is in contradiction with the CAS award (or, more likely, vice versa: a Brazilian judge declaring that the CAS award infringed on the players' rights as perceived in Brazil) there is undoubtedly a possible tension between international federations and national authorities. This possible conflict has materialized in many sports, for example in cycling, where Spanish competitors in an international championship event in Spain are subjected to the rules of the *Union Cycliste Internationale*, with reference to CAS as the ultimate authority, but there is also a Spanish Royal Decree on Sports which gives exclusive final jurisdiction to the courts in matters of doping (apparently due to a fear that local sports bodies may be too tolerant of their star performers). The award in *UCI v Aitor Gonzalez & Real Federación Española de Ciclismo*<sup>69</sup> reasoned that Spain can certainly regulate

<sup>67</sup> *Club Atlético Mineiro et al v Club Sinergia Deportiva (Tigres)* Award (2 May 2005), *ibid*.

<sup>68</sup> On more than one occasion *Brazilian* athletes and teams have benefited from the international regime in circumstances where it is doubtful that national proceedings could have been effective, for example the award by which the Ittihad Club of Saudi Arabia was ordered to pay nearly US\$2.8 million to the Brazilian club Vitória de Bahia (7 August 2007; application for annulment rejected by the Swiss Federal Tribunal, 4 April 2008, 4A\_528\_/2007). The international system would doubtless break down in the absence of reciprocal benefits.

<sup>69</sup> 19 December 2006.

whatever happens on Spanish territory, but if no accommodation is made for the primacy of international regulations the consequence would inevitably be that international competitions (which by necessity must be ruled by perfectly uniform rules) would simply be organised elsewhere. There have been some tense momentary standoffs (not, as it happens, involving Spain) but so far national and international regulators have respected an intelligent division of domains.

These examples show that the promises and dangers of a great variety of self-contained systems of decision-making and compliance must be understood. They are real. They uniformly involve lawyerly presentations, insistence on fundamental principles of the adversarial system, and decision-making which is conscious of institution-building objectives. If this is not called law, we need new definitions.

#### VIII. ABANDONING AN OUTDATED MODEL

The fluid legal order in which arbitration operates undoubtedly works in practice, but, as the familiar jest has it: will it work in theory? The sting in this witticism is not that theory is inevitably useless, but that when a phenomenon may be observed in practice it is useless to propose a theory that does not accommodate reality. Looking at the world today, we must abandon the formalistic dead end of the exclusively statist model.

Little is gained in devising abstract and infinitely debatable definitions and then disqualifying all social arrangements which do not fit. Looking backward and sideways at other human civilisations, we need to explore how societies have sought to achieve social order, and to test models by reference to reality, rather than to reject reality because it does not correspond to our *idées fixes*. And looking forward—since ‘social order’ alone is unlikely to satisfy our ambitions—is not the great prize to understand how societies may reconcile social order and policy, on the one hand, with the imperatives of individual human rights? Arbitration, national and international, will be an important part of the world we are building, and many ideas once thought fundamental must be jettisoned.

The irrelevance of courts is already apparent in some environments, even with respect to enforcement. The multitude of States now crowding the world atlas are appallingly disparate in terms of their institutional capabilities. It would be tragic if we had no choice but to look to them as the sole founts of law and order. Consider the list of paralysed States which nonetheless fulfil the formal requisites of Statehood. They are members of the United Nations; they enjoy official diplomatic relations; their borders are formally acknowledged. But on the ground, on the national level of these putative entities, there is nothing that could decently be called law, and in some cases this has been so for generations: no constitutional legislature, no law enforcement, no judiciary—nothing but a bleak mockery of each of these basic institutions of polity.

But of course even in these terrifying places there are social groups, and where there are social groups there will be legal orders. Santi Romano was not the first to challenge the putative sovereign exclusivity of States as proprietors of legal orders. For one, Eugen Ehrlich, a pioneer of legal sociology and a doubter of Kelsen's hierarchical vision of the structure of law,<sup>70</sup> wrote in 1913 that: 'It is not an essential element of the concept of law that it be created by the State, nor that it constitute the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision'.<sup>71</sup> Laying the foundation for much subsequent legal anthropology, Ehrlich thus accepted that societies lacking formal organs for the establishment of laws and for their administration could provide what Ehrlich called 'living law' as distinguished from the law of the State. A decade later, Max Weber declared robustly, in *Economy and Society* (1922), that the 'assumption' of the State's possession of 'coercive means' superior to all others is 'anti-sociological'. So much for Kelsen. Weber cited ecclesiastical law as well as communal orderings within imperial Austria, saying that they retained their nature as law 'even when it comes into conflict with 'state' law, as it has happened many times and as it is bound to happen again . . .'. He went on to conclude:

[W]e categorically deny that 'law' exists only where legal coercion is guaranteed by the political authority. There is no practical reason for such a terminology. A 'legal order' shall rather be said to exist wherever coercive means, of a physical or psychological kind, are available; i.e., wherever they are at the disposal of one or more persons who hold themselves ready to use them for this purpose in the case of certain events; in other words, whenever we find a consociation specifically dedicated to the purpose of 'legal coercion' . . . It goes without saying that this kind of coercion may be extended to claims which the state does not guarantee at all; such claims are nevertheless based on *rights* even though they are guaranteed by authorities other than the state.<sup>72</sup>

Opponents of this vision insist that it may be of interest as a matter of sociology, but is deficient as a matter of legal analysis. Enter Romano. His

<sup>70</sup> Both men taught at the University of Vienna, but Ehrlich's home was in the Austro-Hungarian province of Bukovina, where he was struck by the co-existence of Austrian law and resistant local normative traditions.

<sup>71</sup> Ehrlich's rationale is reflected in the following passage, which is resonant of Romano's thinking:

The law does not consist of legal propositions, but of legal institutions. In order to be able to state the sources of the law one must be able to tell how the state, the Church, the commune, the family, the contract, the inheritance, came into being, how they change and develop.

*Fundamental Principles of the Sociology of Law* 84 (1913; WL.Moll trans 1936) 83.

<sup>72</sup> M Weber, *Law in Economy and Society* M Rheinstein (ed), (Harvard University Press, Cambridge, 1954) 16-17.

was not the perspective of a sociologist; he was a lawyer through and through.<sup>73</sup> He might have entitled his book *Legal Institutions* because for him the expressions are synonymous, but preferred ‘legal order’ precisely because he did not want his analysis to be equated with sociological inquiry.<sup>74</sup>

There are political groups with semblances of the medieval mini-states; the modern equivalents of baronies and principalities held together by the raw power to impose and to protect. Kelsen would be useless there, since his fundamental norm is a starting point. Kelsen, one supposes, would just have to wait patiently—for how many generations?—until some force emerges to create the order, as he saw it, with a proper *Grundnorm* and with proper sanctions, thus raising itself to the pedestal where a legal scholar would deign to consider it.<sup>75</sup>

The very concept of a legal order is not particularly ancient; our ancestors did not, it seems, begin to develop it until well into the 19th Century. We could undoubtedly survive without it. Yet the concept has a number of advantages that facilitate communications about laws, notably their applicability, their internal hierarchy, and their relationship with the law of another order. For our purposes, we need only to consider that a legal order is a set of norms acknowledged by a social group as authoritative, and leave the qualifications that may be claimed with respect to each element of that phrase to a more rarefied debate.

That should suffice for a critical examination of this putative representation of the *two only conceivable types of legal order*:

THE INTERNATIONAL  
LEGAL ORDER:

- universal ambit
- exclusive institutions

THE LEGAL ORDERS  
OF STATES:

- territorial ambit
- unitary institutions

<sup>73</sup> Apart from *L'ordinamento giuridico*, his two main works concerned administrative and constitutional law. His career was essentially that of a law professor, but one of sufficient eminence to have led to a Senate seat and the presidency of the Council of State.

<sup>74</sup> See Mayer (n 47) 5.

<sup>75</sup> A basic problem with Kelsen was put this way by J Stone, in *The Province and Function of Law* (Stevens, London, 1947) 108: ‘It is difficult to see what the pure theory of law can contribute to a system which it assumes to be law, but which it derives from a basic law which it cannot find.’ Harald Laski was blunter when he observed that Kelsen’s ‘pure science of law’ is ‘an exercise in logic and not in life’, H Laski, *A Grammar of Politics* (3rd edn, Allen and Unwin, London, 1958) vi.

This tidy model is coherent with a number of simple propositions.

- (i) The international order covers the planet. It is explicitly consensual; its norms are those accepted by States. (Its institutions are never referred to as ‘sovereign’.) These norms are applied by courts of final jurisdiction, be it the International Court of Justice, the International Criminal Court, the WTO Appellate Body, or some other specifically empowered organ.
- (ii) National orders cover the territories claimed by States. Their norms are promulgated in accordance with national constitutional arrangements, typically by legislatures, and are thus imposed on all who fall within their ‘sovereign’ jurisdictions. These norms are applied by constitutionally designated supreme courts. (There may be more than one, eg to allow a specialised jurisdiction for administrative law.)
- (iii) The national legal orders are mature, because the members of the international community are by definition sovereign and the authority of their laws is unquestioned in their territory. International law is designed to deal with relations among these sovereigns. It is a rudimentary order because its authority is limited to what sovereign States are pleased to assign to it.
- (iv) The institutions of the two orders are exclusive in the sense that they are not concurrent. The institutions of a State have rules for resolving possible conflicts of jurisdiction, and the same holds true of the institutions established by the international ‘community’ (ie its constituent States).

There are certainly instances where this model can function. Two States promulgate national laws reflecting conflicting claims over territory between them. They then agree that their border will be determined by the International Court of Justice. The border is duly determined in accordance with international law as the ICJ understands that law under its Statute. That judgment is effective, because each party—even if disappointed with the outcome—finds it in its interest to treat it as such for a variety of conceivable reasons, including that it understands that the UN Security Council may otherwise take action under the UN Charter.

But this neat construct simply does not correspond to the modern world. There are today many international orders, some of them having universal aspirations, others not. Those that do not, for example, include the orders created by treaties instituting regional courts of human rights, most remarkably in the case of European States which are simultaneously bound by the treaties of the European Community and the European Convention on Human Rights, which extends beyond the frontiers of the EC. Among the international orders aspiring to universality are, eg, the World Trade Organization and the International Criminal Court.

Arrangements arising in the international space may also call upon the application of norms by hybrid organs. Consider the many hundreds of bilateral investment treaties now in force. They are signed by States, and so by definition have a place in the national legal order. Yet they allow for private parties, as beneficiaries of the treaty, to seek international arbitration against one of the signatory States. Such arbitrations may apply national as well as international law. They may give rise to applications to national courts to take a position with respect to the effects of these arbitrations: a matter for the national order in question. They may give rise to disputes between the States signatory by reference to the conduct as one of them as a disputant with a national of the other: a matter for the international order.

National orders may themselves have to give way to the superior normative force of a regional order, to the point that national courts may be required to seek an advisory opinion from the EJC on a point of European law, and must in any case apply European law directly in matters covered by it.

Above all, the simple figure above is defective in terms of what it does not depict, namely the legal orders created by social groups which are neither States nor international organizations of States.

Pluralism in its simplest sense may be called *horizontal*, in that it envisages the cooperation of a multiplicity of territorially sovereign legal systems. This conception fits rather tidily with traditional conceptions of legal orderings as inherently connected with the territorial domination of States. But the premise of law as within the exclusive dominion of States has for some time been shaken by the observation that legal pluralism is in fact three-dimensional. Its *vertical* dimension reveals itself when more than one legal order occupies the same space. Like the ICANN and CAS examples described above, many of these non-state systems unmistakably—even assertively—view themselves as legal orderings. They legislate, they establish adjudicatory bodies involving formal adversarial procedures in which professional lawyers participate (and even specialize), and they expect that their array of internal sanctions is such that they need no assistance of State officials to make their outcomes effective.

In the light of such developments, it seems that the proponents of pluralistic, overlapping legal orders create an unnecessary difficulty for themselves if they concede that non-state orders do not view themselves as engaged in governance. To take one prominent example, Boaventura de Sousa Santos, who observes with approval ‘the great variety of legal orders circulating in society’, seems to be unaware how far things have gone when he quite inaccurately accepts that State law is distinctive in being ‘the only self-reflexive legal form, that is the only legal form that thinks of itself as law’.<sup>76</sup>

Conversely, sceptics make their case easier by asserting, without any basis for doing so, that non-state arrangements cannot qualify as legal orders

<sup>76</sup> B de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in Paradigmatic Transition* (London, Routledge, 1995) 429.

because they do not have the ambition of governing; they are not, in Simon Roberts' phrase, 'projects of government'.<sup>77</sup> True enough, one must share the unease felt by those who fear that an exuberant rush to see legal orders everywhere, even in the most ephemeral arrangements covering only the tiniest slices of life in society, will expand the concept into meaninglessness. There is force in Roberts' argument, as encapsulated in the final sentence of his 2004 Chorley Lecture: 'Uncoupled from governing, de-centred law—like decentred regulation—may well be found everywhere; but in representing it like that, we risk losing all sense of what it is'.<sup>78</sup>

This notion of law 'uncoupled from governing' merits greater scrutiny. The truth is that the formal apparatus of positive law proclaimed by a great number of institutionally defective States are de facto 'uncoupled from governing', while a number of non-state orderings are fully engaged in governing significant spheres of activity. True, vast meaning should not be ascribed to trivialities like 'the law of queues' or 'the law of faculty meetings'—whatever their interest to sociologists—but that does not exclude the possibility that non-state arrangements may lay serious claims to qualify as legal orders: they are impersonal; they intend to govern important aspects of social life, and to do so exclusively; and their potential to endure seems superior to that of a number of troubled States.

Whatever the reason for the expansion of arbitral and other non-state methods of resolving disputes, it seems futile to resist their claims to belong to the genus of legal processes. That some make excessive claims for pluralism does not deprive the concept of force and value. To the contrary, there is solid ground at the centre; exaggerations may and should be ignored. What we need is a minimum of terminological discipline. Neil MacCormick was particularly clear in making the distinction between informal normative orders, which is not to be thought of as law, and formal institutional normative orders, which are.<sup>79</sup> He used as a recurrent illustration the social phenomenon of queues, which of course is apt to evolve into part of an institutionalised order whenever it becomes subject to explicit authority. Specific implications of the categorization may be given. For instance,

informal norms emerge from practices based on mutual expectations and beliefs, and any attempts to formulate in express terms the implicit norm depends on interpreting the practice and its point. Here, interpretation precedes formulation. But in the case of rules explicitly issued, interpretation succeeds formulation.<sup>80</sup>

<sup>77</sup> S Roberts, 'After Government? On Representing Law Without the State' (2005) 68 *Modern Law Review*.<sup>78</sup> *ibid* 24.

<sup>79</sup> N MacCormick, *Institution of Law* (OUP, Oxford, 2007) chs 1 and 2. (MacCormick nowhere mentions Romano.)

<sup>80</sup> Coincidentally, the queue is precisely one of the phenomena—along with 'looking, staring and glaring'—subjected to sustained analysis by Michael Reisman in *Law in Brief Encounters* (Yale University Press, New Haven, 1999). Reisman took the matter of informal norms as far as one could, revealing it, one might say, as a form of sophisticated and instructive entertainment

Just so, we find that the legal orders that comprise the fluid environment of the arbitral process must be one where *interpretation follows formulation*. This requires institution-building. Not all who claim to act institutionally can back it up. Some State orders cannot; some non-state orders can.

Yet private normative orderings cannot expect to survive long outside or below the radar of a broader constitutional order. They have not created a general system holding sway over an entire polity. There will be occasions, more or less frequent, when the private ordering requires assistance, or makes claims which the general constitutional order must notice and check if it is to maintain its own integrity and objectives. To take our subject: arbitral awards could be illusory, and their very inefficacy apt to undermine the private ordering, without the occasional cooperation of the larger order. At the same time, excessive claims of autonomy may be perceived by the larger order as threats to be rebuffed and neutralized. This confirms that the pluralistic model, expanded to include non-state legal orders, must be seen as three-dimensional. The dimension of depth is required to account for the fact that legal orders in modern international society overlap, and therefore partially overlay each other.

An accurate perception of this landscape should (i) make non-state institutions more confident in the potentialities of their authority, (ii) broaden the horizons of parties and arbitrators, and (iii) moderate the defensive claims of exclusivity which still permeate some State institutions. Arbitration thrives in a type of dynamic tension akin to the force that propulses a catamaran as it knifes through roiling waters in a stiff breeze. If the crew is timorous, the vessel stalls; if they seek too much power, it capsizes. Just so, private orderings must be ambitious to be useful; but if they overreach, repudiation is likely to replace tolerance.

which could be replicated endlessly following—or refining—his model. But there are diminishing returns; good entertainment knows when to stop.

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