

# Sociology of international arbitration

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## ABSTRACT

Since the first comprehensive work in sociology of international arbitration in 1996 by Dezalay and Garth, international arbitration has changed considerably. This article considers those changes, through the prism of sociology. Although the essential players (parties and arbitrators) remain the same, arbitration nowadays includes a host of new actors: the numerous service providers, including the ‘merchants of recognition’ that distribute legitimacy within the field of international arbitration; and the value providers who provide guidance as to the way international arbitration should develop and how arbitral social actors should behave. This article also describes the main rituals in international arbitration that structure the manner in which social actors are expected to behave, as well as the manner in which actors interact in the field of international arbitration. In particular, it shows how international arbitration, as a social field, has evolved from a solidaristic to a polarized model in which a variety of actors share different sets of values and beliefs. After drawing a distinction between functions and roles and its impact on the assessment of conflicts of interest, the author explores how norms are generated in a polarized field.

## 1. INTRODUCTION

After having studied the philosophy of arbitration,<sup>1</sup> I now propose to explore the sociology of arbitration. Reassuring as it may be, I have no intention, however, of tackling every single field of human science in relation to international arbitration, although I must say that a study of psychology and arbitration might be really interesting. It could feature a chapter on arbitral narcissism, with long awards written not only for the parties but for the public at large, a chapter on arbitral envy of course, and one on arbitral anger, apparent in certain dissenting opinions. But the most fascinating topic would probably be the psycho-analysis of international arbitration. A study on why, for example, people are saying in some quarters that arbitral case law is inconsistent because, unlike national systems, arbitration has no Court of ‘Castration’.

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1 Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, Leiden, the Netherlands, 2010).

Arbitration has so far given rise to a few isolated sociological studies. Some of them were carried out by arbitration lawyers who seemed hesitant to escape from the somewhat rigid framework of the law of arbitration. They describe the proliferation of arbitral institutions, study the conditions of independence and impartiality of arbitrators or other legal features of arbitration.<sup>2</sup> A number of quantitative analysis and databases which provide a rich basis for sociological studies were also put in place in the USA and the UK.<sup>3</sup>

The main genuine study on sociology of arbitration remains that of Dezalay and Garth, *Dealing in Virtue*, first published in 1996 with a foreword by Pierre Bourdieu.<sup>4</sup> In a distinctly Bourdieusian approach, the authors showed how certain players, in particular the founding fathers of modern international arbitration, generated symbolic capital for themselves in discussing ‘transnational rules’—at the time referred to as ‘*lex mercatoria*’.<sup>5</sup> They described more generally how the interactions of major social players led to the construction of a transnational system of private justice. The notion of ‘symbolic capital’ developed by Bourdieu<sup>6</sup> is indeed a very powerful analytical tool to understand that domination relationships within a given field are to be understood not only in economic terms (welfare, money), but also in symbolic terms (honours, prestige, recognition). This concept is particularly important in our field as many of us have—for better or for worse—a greater symbolic capital than an economic one.

- 2 See, as early as 1976, Bruno Oppetit, ‘Éléments pour une sociologie de l’arbitrage’ (1976) 27 *L’Année Sociologique* 178; Jean-Baptiste Racine, ‘Éléments d’une sociologie de l’arbitrage, Actes de la journée d’étude du groupe sociologie de l’arbitrage du Comité français de l’arbitrage’ (2012) 4 *Revue de l’arbitrage* 709.
- 3 See, for example, for quantitative studies in international arbitration: Christopher R. Drahozal, ‘Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration’ (2006) 22 *Arbitration International* 291; Susan Franck, ‘Empirically Evaluating Claims About Investment Treaty Arbitration’ (2007) 86 *North Carolina Law Review* 1; Susan Franck, ‘Empiricism and International Law: Insights for Investment Treaty Dispute Resolution’ (2008) 48 *Virginia Journal of International Law* 767; see also Queen Mary School of International Arbitration and PWC, *International Arbitration: Corporate Attitudes and Practices* (2006); Queen Mary School of International Arbitration and PWC, *International Arbitration: Corporate Attitudes and Practice* (2008); Queen Mary School of International Arbitration and White & Case LLP, *2010 International Arbitration Survey: Choices in International Arbitration* (2010); Queen Mary School of International Arbitration and White & Case LLP, *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* (2012); Queen Mary School of International Arbitration and PWC, *Corporate Choices in International Arbitration: An Industry Approach* (2013).
- 4 Yves Dezalay and Bryant G Garth, *Dealing in Virtue*, with a foreword by Pierre Bourdieu (The University of Chicago Press, Chicago, Illinois, 1996).
- 5 Comp with Christopher R. Drahozal, ‘Contracting out of National Law: An Empirical Look at the New Law Merchant’ (2004–2005) 80 *Notre Dame Law Review* 523, 549–51, limiting Dezalay and Garth’s contribution to the underlying assumption that certain actors represented themselves as ideally positioned to serve as arbitrators in international matters by using *lex mercatoria* as an advertising tool.
- 6 See, eg Pierre Bourdieu, *Distinction – A Social Critique of the Judgment of Taste* (Harvard University Press, Cambridge, Massachusetts, 1984) (first published in French as *La Distinction, Critique sociale du jugement* (Les Éditions de Minuit, 1979)); Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1986–1987) 38 *Hastings Law Journal* (first published in French as *La force du droit : Pour une sociologie du champ juridique*, in *Actes de la recherche en sciences sociales* No 64, at 3 (1986)); Pierre Bourdieu, ‘Social Space and Symbolic Power’ (1989) 7 *Sociological Theory* (first published in French as *Espace social et genèse des classes*, in *Actes de la recherche en sciences sociales* No 52–53, at 3 (1984)); Pierre Bourdieu, *The Logic of Practice* (Stanford University Press, Stanford, California, 1990) (first published in French as *Le Sens pratique* (Les Éditions de Minuit, Paris, France, 1980)).

Sociology, just like law, is far from being a unified discipline. It has given rise to many controversies and debates among various schools of thoughts. From Durkheim and its structuralist approach,<sup>7</sup> Marx and class segmentation,<sup>8</sup> to Weber and the methodological individualism,<sup>9</sup> there is a wealth of analytical tools, each of which can be useful to understand a phenomenon as complex as international arbitration. It is not particularly productive to debate on their relative merits. Each of them provides a distinctive tool to explore a different facet of the same reality.

It is somewhat difficult for lawyers to distance themselves from legal rules and procedures—and all the controversies we enjoy discussing in arbitration circles—to take a step back and look at arbitration as a *social phenomenon*, with its actors, their social behaviour and their interactions.

In an effort to take that step back, I will first describe how international arbitration constitutes what some sociologists call a social field, with its actors and rituals. I will then describe how, within this field, social actors interact.

## 2. INTERNATIONAL ARBITRATION AS A SOCIAL FIELD

Sociologists have often endeavoured to identify fields that constitute a recognized area of institutional life and understand how these fields are constituted, structured, and how they evolve. A field is broader than an industry. An industry comprises a set of equivalent actors offering similar products or services. A field comprises ‘key suppliers, resource and product consumers, regulatory agencies and other organizations that produce similar services or products’.<sup>10</sup> There is no doubt that the international arbitration world possesses all the key features of a ‘recognized area of institutional life’ with a constellation of actors performing various roles and functions such as key suppliers, consumers, regulatory agents, and organizations, all of which share a ‘common meaning system’ and interact more frequently with one another than with other social agents.<sup>11</sup> Within the social field of international arbitration, we will focus in turn on the identification of the actors and a key feature of their social behaviour, their rituals.

### 2.1 The social actors

Three series of social actors with distinctive features can be identified.

7 See Emile Durkheim, *The Rules of Sociological Method, with an Introduction* by S. Luke (The Free Press, New York, NY, 1982) (first published in French as *Les règles de la méthode sociologique*, 37–38 Revue Philosophique (1894)).

8 See Karl Marx, *Capital: Critique of Political Economy* (3 vols., Penguin Classics, Harmondsworth, Middlesex, England, 1990, 1992) (first published in German as *Das Kapital, Kritik der politischen Ökonomie* (Verlag von Otto Meisner, 1867, 1885, 1894)).

9 See Max Weber, *Economy and Society – An Outline of Interpretive Sociology* (G Roth and C Wittich eds, University of California Press, Berkeley, California, 1978) (first published in German as *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie* (Mohr Siebeck, Tübingen, Germany, 1922)).

10 Paul J Di Maggio and Walter W Powell, ‘The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields’ (1983) 48 *American Sociological Review* 148.

11 See also W Richard Scott, *Institutions and Organizations* (4th edn, SAGE Publications, Los Angeles, California, 2014); Melissa Wooten and Andrew J Hoffman, ‘Organizational Fields: Past, Present and Future’ in R Greenwood, and others (eds), *The SAGE Handbook of Organizational Institutionalism* (SAGE Publications, Los Angeles, California, 2008) 131.

### 2.1.1 *Essential actors*

The first category of social actors encompasses the actors without which international arbitration would not exist. They are the essential actors, which only comprise the parties and the arbitrators. There is no arbitration without parties or without arbitrators, but arbitration can exist without anyone else.

The parties probably are the social category that feels the most neglected in contemporary arbitration.<sup>12</sup> Rightly or wrongly, they often express the view that arbitration, as an institution, has evolved without taking into account their primary needs or concerns. Of course, what parties really want is to always prevail, to prevail fast, pay as little as possible and recover the entirety of their costs. On a more serious note, and disregarding the views of disgruntled parties who lost a case that they did not expect to lose, one cannot forget that arbitration is intended for the parties and not for all the other actors that gravitate around it.<sup>13</sup>

By contrast, the arbitrators, as a social group, probably are the category that has attracted the most attention from a sociological standpoint.<sup>14</sup> The most striking feature of the evolution of this social category probably is the emergence of a class of professional arbitrators. Until recently, the function of arbitrating was viewed as occasional by nature.<sup>15</sup> This is no longer the case today. Being an arbitrator has become a social-professional category of its own.<sup>16</sup>

As the essence of arbitration is to be a private form of justice, arbitrators charge for their services. In that, they are service providers, but of course, not the only

12 See, in that respect, the Corporate Counsel International Arbitration Group (CCIAG), created in 2009, which '[a]ims to be the premier forum to represent the interests and views of corporations in relation to the conduct, practice and scope of international arbitration and other forms of early and alternative dispute resolution'. <<http://www.cciag.com>> accessed 11 February 2015.

13 There is a wealth of studies on the geographical origin of the parties, their industries and supposed preferences in terms of venue and applicable law. Most arbitral institutions publish regular statistics in this respect on a yearly basis. See, eg *ICC Statistical Report 2013*, 25(1) ICC International Court of Arbitration Bulletin 5 (2014); *LCIA Registrar's Report, Casework 2013*, available online: <<http://www.lcia.org/LCIA/reports.aspx>> accessed 11 February 2015. for investment arbitration, see World Bank, *The ICSID Caseload: Statistics*, Issues 2014-1 and 2014-2, available online: <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>> accessed 11 February 2015. Permanent Court of Arbitration, *113th Annual Report-2013*.

14 On the evolution of the arbitrators' profile in three stages, that of the 'Grand Old Men [*sic*]', the 'Technocrats' (identified in Dezalay and Garth (n 4) at 34 et seq.), and, currently, the 'Managers', see Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators – Fifteen Years after Dezalay and Garth' (2012) 28 *Arbitration International* 161.

15 See, eg Thomas Clay, 'Qui sont les arbitres internationaux – Approche sociologique' in J Rosell (ed), *Les arbitres internationaux: Colloque du 4 février* (Société de Législation Comparée, Paris, France, 2005) at 13, 31: 'L'arbitrage n'est . . . pas un métier; c'est une mission, une fonction temporaire, mais pas une profession. Tous ceux qui sont arbitres ont en principe un autre métier, une occupation principale qui leur garantit une rémunération régulière et leur fournit un statut social. L'arbitrage est leur activité annexe.' ('Arbitration is not . . . a profession; it is a mission, a temporary function, not a profession. All those who act as arbitrators have, in principle, another job, a main occupation that provides them with a steady income and a social status. Arbitration is their side activity.')

16 See, eg Catherine A Rogers, 'The Vocation of International Arbitrators' (2005) 20 *American University International Law Review* 957, 976–77: 'I do not seek to evaluate whether international arbitrators actually satisfy the criteria for any particular definition of a profession, but rather to suggest that international arbitrators demonstrate some of the markers of professionalization and have consciously invoked the nomenclature of professionalism.'

service providers. An ever more increasing number of specialized service providers gravitate around the essential actors of international arbitration.

### 2.1.2 Service providers

The identification of service providers in international arbitration will be limited to social groups who dedicate their activity exclusively, or almost exclusively, to international arbitration. This is not to say that there is not a host of occasional players acting in all kinds of capacities in international arbitration. What is sociologically relevant is the emergence of specialized groups of actors sharing a common understanding of what arbitration is and how it works, and who spend more time interacting with one another than with other social actors.<sup>17</sup>

The number of counsel exclusively dedicated to international arbitration is ever increasing. Professional guides over the past years provide strong evidence for this proposition.<sup>18</sup>

Arbitral institutions have also grown exponentially, both in number of players and in size. They have embraced diversified strategies to differentiate themselves. While some actors positioned themselves as global (International Chamber of Commerce (ICC), The London Court of International Arbitration (LCIA), The International Centre for Dispute Resolution (ICDR), Stockholm Chamber of Commerce (SCC), . . .), others promoted themselves as regional players (The China International Economic and Trade Arbitration Commission (CIETAC), The Singapore International Arbitration Centre (SIAC), The Dubai International Arbitration Centre (DIAC), Cairo Regional Centre for International Commercial Arbitration (CRCICA), among many others). Subject-matter diversification has also been an effective strategy for institutions. Investment arbitration remains the archetype of a successful specialized offer. It started with the creation of The International Centre for Settlement of Investment Disputes (ICSID) in 1965, the market being nowadays dominated by two major players, ICSID and the The Permanent Court of Arbitration (PCA). The Court of Arbitration for Sport (CAS) or the World Intellectual Property Organization (WIPO) provide other successful examples of such strategy.

ICSID and the PCA exemplify the fact that, in certain of their functions, international organizations themselves can act as service providers with respect to international arbitration.<sup>19</sup>

Although, like international organizations, States act in various capacities, they can also behave as service providers. That is the case when they compete to attract or retain major arbitration institutions in their territory,<sup>20</sup> or when they develop legislation with the primary objective of attracting arbitration in their territory. In promoting

17 On this essential feature of a social field, see page 3 above.

18 Compare the 1999 edition of *Who's Who Legal - Commercial Arbitration* in Callum Campbell (ed), (Law Business Research, London, 1999), identifying 253 individuals from 69 countries, with the 2014 edition which identifies 624 individuals from 84 countries, the 'broadest geographical spread to date' <<http://whoswholegal.com/news/analysis/article/30934/most-highly-regarded-firms-arbitration-2014/>> accessed 11 February 2015. See also Chambers Global's rankings for 2014 identifying 21 ranked firms (spread in 5 bands) and 72 ranked lawyers.

19 See the website of both organizations.

20 'ICC to stay in Paris' *Global Arbitration Review* (31 January 2011); Marie Bellan, 'La Chambre de commerce internationale devrait rester dans la capitale' *Les Echos*, 4 February 2011.

themselves as ‘arbitration hosts’, they seek to promote the interests of their legal community and more generally their economy, including local hotels and facilities.<sup>21</sup>

Other specialized service providers include expert witnesses, in particular quantum and valuation experts,<sup>22</sup> arbitration court reporters, interpreters, and more recently arbitration case management firms, and publishers of international arbitration literature.

Although not yet developed as a fully specialized professional segment focusing on arbitration, public relation agents are increasingly used in the context of arbitration, as illustrated in the *Chevron v Ecuador* matter.<sup>23</sup>

Recourse to mock arbitrators is also on the rise, to rehearse high stake arbitral hearings following the US-style mock jury trials.<sup>24</sup>

Third-party funders who finance arbitrations and/or acquire arbitral awards at a discount prior to ensuring their enforcement have also become specialized players in the field of international arbitration.<sup>25</sup>

Professional guides, reviews, and ancillary publications ranking arbitration experts—be they arbitrators, advocates, institutions, and potentially all the other actors of the arbitration world—such as *Chambers Global*,<sup>26</sup> *Legal 500*,<sup>27</sup> and *Global*

21 Arbitration being an important sector of the economy, an intense lobbying activity is carried out in many countries by the local legal community and other interested parties to develop an arbitration-friendly environment, both in terms of facilities and legal framework. See, eg Nicolas Ulmer and Lionel Serex, ‘Switzerland: Update on Recent Arbitral Developments and Tendencies’ *LexisNexis Legal Newsroom*, International Law, (26 January 2011); Christophe Seraglini and others, ‘The Battle of the Seats: Paris, London or New York?’ *Practical Law Company* (6 December 2011); Elizabeth Olson, ‘Cities Compete to Be the Arena for Global Legal Disputes’ *New York Times* (11 September 2014); ‘London or Paris?’ *Global Arbitration Review* (April 2006); ‘Amendments Planned to Singapore’s Arbitration Law’ *Global Arbitration Review* (8 November 2011); Michael Pryles, ‘Singapore: The Hub of Arbitration in Asia’ available online: <<http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia>> accessed 11 February 2015; *MIAC 2012 - An African Seat for the 21st Century*, Papers from the joint conference of the Government of Mauritius, LCIA-MIAC Arbitration Centre, ICC, ICCA, ICSID, LCIA, PCA and UNCITRAL held in Mauritius on 10 and 11 December 2012 (International Bureau of the Permanent Court of Arbitration ed, 2012).

22 See, eg Who’s Who Legal – Commercial Arbitration, ‘Expert Witnesses Marketplace Analysis’ (October 2014); for surveys on expert witnesses, see Queen Mary School of International Arbitration and White & Case LLP, *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process 24–32* (2012); Queen Mary School of International Arbitration and PWC, *Corporate Choices in International Arbitration: Industry Perspectives 13–14* (2013).

23 See Michael D Goldhaber, *Crude Awakening: Chevron in Ecuador* (RosettaBooks, New York, NY, 2014).

24 See Edna Sussman, ‘Improving your Arbitration Presentation with a Mock Arbitration: Two Case Studies’ (2012) 5 *New York Dispute Resolution Lawyer* 15; Stephen Tuholski, ‘Mock Arbitrations: Getting the Most Value of Your Project’ (2012) 5 *New York Dispute Resolution Lawyer* 20.

25 For a description of this industry, see, for example, Jonathan D Glater, ‘Investing in Lawsuits, for a Share of the Awards’ *New York Times* (3 June 2009); Philippe Pinsolle, ‘Le financement de l’arbitrage par les tiers’ [2011] *Revue de l’arbitrage* 385; Bernardo M Cremades, Jr, ‘Third Party Litigation Funding: Investing in Arbitration’ [2012] *Spain Arbitration Review* 155; BM Cremades and A Dimolitsa (eds), *Third Party Funding in International Arbitration* (ICC Publ No 752E, ICC Services-Publications Department, Paris, France, 2013); Rebecca Lowe, ‘Speculate and Arbitrate to Accumulate’ *IBA Global Insight* (April–May 2013); Victoria Shannon, ‘Recent Developments in Third-Party Funding’ (2013) 30 *Journal of International Arbitration* 443.

26 See the 2014 *Chambers Global Guide* rankings for international arbitration.

27 See, eg the 2014 *Legal 500* rankings for international arbitration in the UK and the 2014 *Legal 500* rankings for international arbitration in France.

*Arbitration Review*,<sup>28</sup> have become essential actors in the arbitration field. The same way sociologists sometimes refer to lawyers as ‘merchants of law’,<sup>29</sup> this new social group could be labelled as ‘merchants of recognition’.

### 2.1.3 Value providers

The third category of social actors in the international arbitration field is that of value providers. A number of social agents’ ambition is to provide guidance as to the way international arbitration should develop and arbitral social actors should behave. Leaving aside their ability to develop, over time, rules of law susceptible of being applied as such by arbitrators or State courts, these actors are recognized, at varying degrees of legitimacy, as having the social ability to provide such guidance.

States have both the legitimacy and the ability to influence the manner in which arbitration develops. They do so directly within the limits of their territory by regulating arbitrations taking place in that territory and recognizing awards which satisfy certain requirements. Yet in regulating these arbitrations and recognizing such awards, States not only generate norms with a certain territorial reach; as social actors, they also express values which may have a much broader destiny. That is the case, for example, every time a State issues a decision or adopts a statute with features that may serve as a model for others players within the international arbitration field. When the French Court of cassation affirmed in *Putrabali* that an international award is a ‘decision of international justice’,<sup>30</sup> it expressed values as to what arbitration is, or should be, to a broader audience than the parties concerned or the French legal circles. Similarly, when the House of Lords recognized the severability of the arbitration agreement in *Fiona Trust*, it set forth an international standard in addition to providing a solution for the case at hand.<sup>31</sup> When States participate in the works of international organizations dealing with international arbitration matters, they also act primarily as value providers: their voice counts only if it is seconded by other States or meets a consensus within the organization.

28 See, eg *Global Arbitration Review*, GAR 100 – 7th edition (2014), including the ‘GAR 30 – commentary and analysis’, available online: <<http://globalarbitrationreview.com/gar100/>> accessed 11 February 2015.

29 Yves Dezalay, *Marchands de droit: La restructuration de l’ordre juridique international par les multinationales du droit* (Fayard, Paris, France, 1992); see also Yves Dezalay and Bryant G Garth, ‘Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes’ (1995) 29 *Law & Society Review* 27.

30 This statement was made in order to justify the fact that recognition of an award should focus on the award itself, not ancillary decisions pertaining to assess its validity at the place in which the award is rendered, see Cass 1e civ, 29 June 2007, *PT Putrabali Adyamulia v Rena Holding*, 2007(3) *Revue de l’arbitrage* 507, with note by E Gaillard at 517 (for an English translation, see *French International Arbitration Reports 1963–2007*, Case No 62, at 539 (T Clay and P Pinsolle eds, Juris Publishing, 2014)).

31 *House of Lords, Premium Nafta Products Limited (20th Defendant) and others (Respondents) v Fili Shipping Company Limited (14th Claimant) and others (Appellants)*, [2007] EWCA Civ 20, ¶ 32; see also *Fiona Trust and Holding Corporation and Others v Yuri Privalov and Others*, [2007] EWCA Civ 2 and *Fiona Trust & Holding Corp & others v Yuri Privalov & others*, [2006] EWHC 2583 (Comm). In French law, the principle is referred to as *le principe d’autonomie de la clause compromissoire* and has been accepted as early as 1963. See Cass 1e civ, 7 May 1963, *Ets Raymond Gosset v Carapelli, JCP, Ed G, Pt II*, No 13,405 (1963), with note by B Goldman note; 91 *JDI* 82 (1964), with note by J-D Bredin; 1963 *Rev crit DIP* 615, with note by H Motulsky; *Dalloz, Jur* 545 (1963), with note by J Robert (for an English translation, see *French International Arbitration Law Reports 1963–2007*, Case No 1, at 1 (T Clay and P Pinsolle eds, Juris Publishing, 2014)).

International organizations, such as the United Nations, including United Nations Conference on Trade and Development (UNCTAD) and United Nations Commission on International Trade Law (UNCITRAL), and the The Organisation for Economic Co-operation and Development (OECD), constitute the main fora in which values for international arbitration are expressed. Without focusing at this stage on the social actors' interaction in the law-making process within international organizations,<sup>32</sup> it is worth emphasizing that, for the most part, international organizations are primarily value providers, as opposed to mere legal norm generators. In order to acquire the authority of positive law, the product of their activity needs to be adopted as treaties by States or, from the perspective of domestic law, translated into their legislation. By contrast to isolated States, international organizations seek to generate consensus among a large number of players. In that, they can be described as collective value providers.

NGOs have penetrated the field of international arbitration as a direct consequence of the exponential growth of investment arbitration. Through *amicus curiae* briefs,<sup>33</sup> participation in the works of international organizations,<sup>34</sup> numerous publications and aggressive press campaigns, NGOs have promoted values such as the defence of human rights, of the environment, or transparency in the field of investment arbitration.<sup>35</sup> Some organizations have taken a radical view, denying the legitimacy of investment arbitration altogether.<sup>36</sup> Others have taken a contrary view and support investor–State arbitration as a legitimate way to foster investment and promote the rule of law in international dealings.<sup>37</sup> Yet others seek to promote the views of specific groups of actors.<sup>38</sup>

Unlike NGOs which directly focus on the promotion of the values they embrace, arbitration clubs assemble social actors with common characteristics and interests with the

32 On this interaction, see page 17 below.

33 See, eg Art 37(2) of the 2006 ICSID Rules of procedure for arbitration proceedings (Arbitration Rules) on Submissions of Non-disputing Parties. More generally on this topic, see, for example, Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29 *Berkeley Journal of International Law* 200; Eric De Brabandere, 'NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes' (2011–2012) 12 *Chicago Journal of International Law* 85; Lucas Bastin, 'Amici Curiae in Investor-State Arbitration: Eight Recent Trends' (2014) 30 *Arbitration International* 125.

34 See page 17 below.

35 See, eg *Methanex Corp v United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001, ¶ 49; *Suez, Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal SA v The Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, 12 February 2007; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 5, 2 February 2007. See also the participation of Non-Governmental Organizations to the UNCITRAL 61st Session, 15–19 September 2014, Vienna, UN Doc A/CN.9/826, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-first session*.

36 See, in particular, the works of the Corporate Europe Observatory and Transnational Institute; Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice* (Corporate Europe Observatory and the Transnational Institute, 2012); Cecilia Olivet and Pia Eberhardt, *Profiting from Crisis* (The Transnational Institute and the Corporate Europe Observatory, 2014). See associated video clips on the same topic at <<http://stopttip.net/investor-state-dispute-settlement-isd/>> accessed 11 February 2015.

37 See, eg European Federation for Investment Law and Arbitration (EFILA).

38 See, eg CCIAG (n 12).



view of promoting their own values. Some clubs, such as International Council for Commercial Arbitration (ICCA)<sup>39</sup> or the International Arbitration Institute,<sup>40</sup> have a general reach, gathering actors with an overall interest in international arbitration. Others bring together groups defined by geography,<sup>41</sup> age—with the young<sup>42</sup> and now the ‘very young’<sup>43</sup> arbitration practitioners—or gender.<sup>44</sup> The only clubs missing in arbitration are those reflecting social class divides. The Proletarian Arbitration League has yet to be created.

Professional organizations, such as the International Bar Association (IBA), play a major role in the field of international arbitration in developing rules or guidelines on a number of features of the international arbitration procedure. They distinctively are value providers in that the instruments they generate provide a vision of how arbitration actors should behave. The effectiveness of these instruments is strictly dependent on their persuasive value and the authority of the institution they emanate from, as they need to be adopted by the parties or by the arbitrators to become legally binding.<sup>45</sup>

Academic institutions specializing in arbitration, such as the Queen Mary School of International Arbitration, the Geneva MIDS programme or the International Academy for Arbitration Law,<sup>46</sup> and more generally academics focusing on international arbitration,<sup>47</sup> also are value providers as they shape the manner in which arbitration is conducted or perceived through scholarly articles, conferences, and teachings.

Discussion lists dedicated to international arbitration also strongly contribute to the shaping of values underpinning international arbitration.<sup>48</sup> By commenting on arbitration events (awards, contemplated legislation or court decisions) in real time, the social actors active on these channels have developed a new strategy to gain symbolic capital, based on speed and repetition.

After having ignored this private form of dispute settlement for years, the media are now actively engaged in the debate on the legitimacy and the salient features of international arbitration. Even in the field of commercial arbitration, secrecy has

39 International Council for Commercial Arbitration.

40 International Arbitration Institute; <<http://www.iaiparis.com/>> accessed 11 February 2015.

41 Most countries with a significant activity in arbitration have witnessed the creation of a number of groups gathering practitioners and academics in the field. See, eg the Brazilian Arbitration Committee or the Paris Home of International Arbitration.

42 See, eg Young ICCA; Young ICDR/AAA; ICC Young Arbitrators Forum; LCIA Young International Arbitration Group; ASA Below 40; Young SIAC. See also, regarding established rankings for young practitioners, *Global Arbitration Review*, 45 *Under 45* (2011). Young arbitration practitioners have also launched law reviews. See, eg YAR – Young Arbitration Review.

43 See Paris Very Young Arbitration Practitioners (PVYAP); London Very Young Arbitration Practitioners.

44 See Arbitral Women.

45 The 2010 IBA Rules on the Taking of Evidence in International Arbitration and the 2014 Guidelines on Conflicts of Interest in International Arbitration have been a huge success in practice. The 2013 Guidelines on Party Representation in International Arbitration are more controversial, but are likely to play a significant role in shaping counsel behaviour in the years to come.

46 ‘Arbitration Academy Launches in Paris’ *Global Arbitration Review* (6 July 2011).

47 See further, on the increasing number of Master degrees specializing in international arbitration, ‘Mastering the Trade’ *Global Arbitration Review* (26 November 2012).

48 See, eg OGE MID, available online: <<http://www.transnational-dispute-management.com/ogemid/>> accessed 11 February 2015. or LinkedIn discussion groups where members post ideas and topics for discussion allowing other members to engage in virtual conversations.

been increasingly criticized in the media.<sup>49</sup> The blossoming of investment arbitration has generated a flurry of commentaries mostly hostile to arbitration in an investor–State context. The most recent and striking example of such hostility may be witnessed in the controversy surrounding the negotiation of the Transatlantic Trade and Investment Partnership (TTIP) and, for some, its most controversial feature, the investor–State dispute settlement (ISDS) provision.<sup>50</sup>

The following diagram represents the multiplicity of players currently involved in the social field of arbitration (Figure 1).

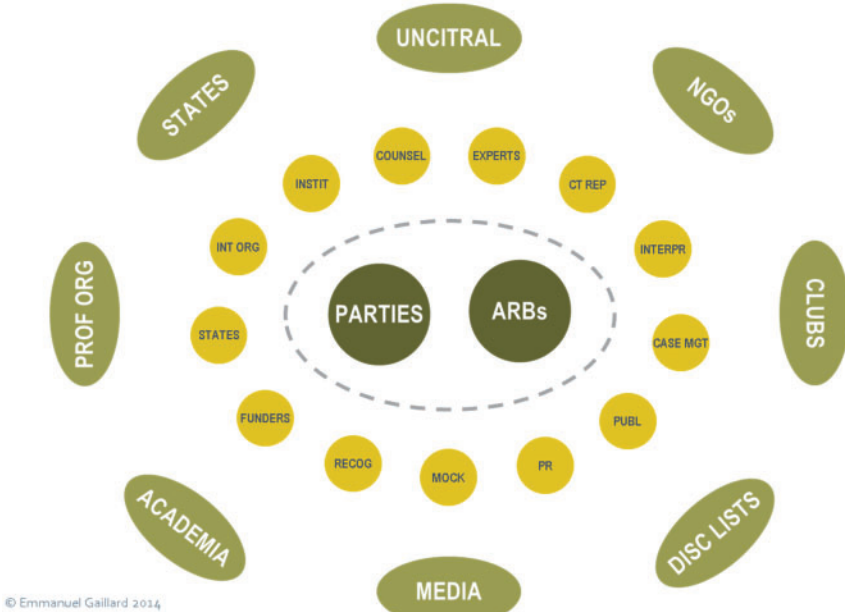


Figure 1

## 2.2 The rituals

As actors belonging to the same social field, international arbitration players have developed specific rituals, which structure the manner in which they are expected to behave during key moments of their social life. By rituals, I refer to full-blown rituals, as opposed to ‘ritual-like activities’ such as coffee breaks during which one frantically consults his or her mobile device. Rituals are characterized by a largely inflexible pattern of performance, adherence to form, symbology and a socially compulsory nature despite a lack of apparent benefit.<sup>51</sup> One may identify at least three rituals in international arbitration.

49 See, eg ‘Investment, Arbitration and Secrecy – Behind Closed Doors’ *The Economist* (23 April 2009).

50 See, eg ‘Jean-Claude Juncker Plays with Future of EU-US Trade Deal’ *Financial Times* (23 October 2014); B Segol, ‘TTIP will not be Approved Unless ISDS is Dropped’ *Financial Times* (27 October 2014); ‘Will Juncker junk ISDS?’ *Global Arbitration Review* (30 October 2014).

51 On these characteristics, see Aaron CT Smith and Bob Stewart, ‘Organizational Rituals: Features, Functions and Mechanisms’ (2011) 13 *International Journal of Management Reviews* 113.

### 2.2.1 *Arbitral hearings*

The first obvious ritual in international arbitration is the arbitral hearing. Central to the arbitral proceeding, the hearing follows a highly standardized pattern in which actors feel compelled to behave in a certain way even though no rule of law mandates them to do so. The parties and the arbitrators will generally be seated around a U-shape table, with the claimant's representatives on the left of the arbitral tribunal and those of the respondent on the right side. The arbitrator appointed by the claimant will sit to the right of the president, further away from the party that appointed him or her, and the arbitrator appointed by the respondent on the other side. The lawyers will remain seated when pleading and will not wear a wig, robe or court dress, as the atmosphere is supposed to be more congenial than that of a State court. Although none of these features is essential to the proper functioning of an arbitration, their ritualized nature is evidenced by the fact that any deviation from this typical behaviour generates a mysterious sense of discomfort. The symbolic nature of each of these aspects of the hearing ritual likely explains this feeling. The fixed seating arrangement is meant to avoid leaving any party with a sense of being prejudiced by the disposition of the room. The distance between the arbitrator and the party which appointed him or her is a symbol of the arbitrator's independence. The business attire of all participants, just like the fact that lawyers remain seated when pleading the case, symbolizes the business-like nature of the process and its lesser adversarial nature.

The diversification of the type of disputes susceptible of being resolved through arbitration has led to a corresponding diversification of the hearing rituals. Highly politicized investment disputes require prestigious venues possessing all the ornaments associated with the image of international law, such as the Peace Palace in The Hague. Conversely, commercial arbitrations opposing long-term business partners will be conveniently handled in ordinary conference rooms cluttered with a forest of computers, connoting the efficiency of a business-like setting.

### 2.2.2 *Recognition tournaments*

A second and more recent category of rituals in international arbitration consists of what is known, in sociological analysis, as recognition tournaments.<sup>52</sup> Created in 2010, the Global Arbitration Review (GAR) Awards were met with immediate success. They distinguish not only the best arbitration experts, the best arbitration practices, the best boutiques or regional practices as other guides do,<sup>53</sup> but also the best prepared or most responsive arbitrator, the most innovative institution, the best arbitration speech, the 'up-and-coming regional institution of the year', or the best development of the year in international arbitration. A special award is also given each year to a highly regarded individual for his or hers lifetime achievements.<sup>54</sup> The process obviously meets the standard of rituals with its physical enactment in a specified sequence, little variation, formality and embedded symbolism.<sup>55</sup>

52 See, eg N Anand and Mary R Watson, 'Tournament Rituals in the Evolution of Fields: The Case of the Grammy Awards' (2004) 47 *The Academy of Management Journal* 59.

53 See page 7 above.

54 See, eg 'Paris Hosts Largest-Ever GAR Awards' *Global Arbitration Review* (13 February 2014).

55 See Smith and Stewart (n 51) 117.

Like every competition of the same nature, these recognition tournaments may be viewed in different ways. For some, they play a significant role in the creation and maintenance of the social structure by distributing prestige and legitimacy in the field. In that, they foster social coherence. In neo-marxist terms, recognition tournament rituals naturalize and justify social stratification.<sup>56</sup> Yet, they may also accelerate the emergence of new elites. They also serve the important function of legitimizing the field vis-à-vis outside players.

Organizational research makes one point clear: boycott is not an option. Even Sartre not picking up his Nobel Prize in 1964 did not play well.<sup>57</sup> Lack of participation is an insult not only to the organizers, but also to the rest of the field players. As eloquently put by James F. English:

[a]ny display of indifference or ingratitude on the part of the honored recipient must be calculated with great care or it will provoke the indignation not only of the presenters of the prize, but of the entire participating community (including, for example, the other nominees as well as all past recipients). For this reason it has always been difficult to profit, in symbolic terms, by refusing a prize outright.<sup>58</sup>

Tournament rituals are here to stay. The next interesting development will be competition among merchants of recognition to organize such rituals. Competition in legitimacy distribution has only started.

### 2.2.3 *Periodic mass gatherings*

The third ritual in the field of international arbitration is periodic mass gatherings. A large number of international arbitration lawyers, true experts and sometimes aspirational players, periodically gather in various parts of the world to attend international arbitration conferences. ICCA has organized such conferences since 1961,<sup>59</sup> which are held every two years since 1976,<sup>60</sup> in locations as diverse as Vienna, Seoul, Paris, New Delhi, London, Beijing, Montreal, Dublin, Rio de Janeiro, Singapore, Miami, and soon, Mauritius and Sydney. The choice of the next venue itself is highly ritualized, with national teams presenting their candidacy and the selection process carried out by the Governing Board<sup>61</sup> along the lines of that of the choice of next venue for the Olympic Games.<sup>62</sup> Since 1997, the International Bar Association has organized a yearly 'Arbitration Day', also in places that alternate throughout the world, such as

56 For an analysis on how rituals serve 'not to unite the community, but to strengthen the dominant groups within it', see Steven Lukes, 'Political Ritual and Social Integration' (1975) 9 *Sociology* 289, 300.

57 Jean-Paul Sartre, 'Sartre on the Nobel Prize' *The New York Review of Books* (17 December 1964).

58 James F English, 'Winning the Culture Game: Prizes, Awards, and the Rules of Art' (2002) 33 *New Literary History* 109, 119.

59 The list of all past ICCA Congresses and related Interim Meetings is available online; <<http://www.arbitration-icca.org/conferences-and-congresses.html>> accessed 11 February 2015.

60 Except for the extraordinary 50th ICCA Conference anniversary held in Geneva in 2011.

61 eg the bidding procedure to host an ICCA Congress usually commences four years in advance of the event and is coordinated by specific guidelines administered by the ICCA Bureau, as indicated on the ICCA website.

62 The Olympic Games' two-year bid process for the election of the host city is administered by the International Olympic Committee and governed by Rule 33 of the Olympic Games Charter and its By-laws.

Dubai, London, Seoul, Stockholm, Bogota, Paris and Washington, DC. Likewise, since 1983, ICSID, the ICC, and the American Arbitration Association (AAA) have organized a yearly tri-partite 'Joint Colloquium on International Arbitration', held respectively in Paris, Washington, and New York. The Energy Charter Treaty Secretariat, in conjunction with other legal institutions such as the Arbitration Institute of the Stockholm Chamber of Commerce, similarly organizes regular conferences since 2005.<sup>63</sup> Virtually every arbitral institution, if not every significant arbitral player, organizes periodic conferences on arbitration.

The number of players attending these events is larger and larger. The Miami ICCA conference exceeded the one-thousand-participant mark for the first time in 2014.<sup>64</sup> The International Bar Association (IBA) Arbitration Day held in Paris in 2014 gathered no less than 900 participants.<sup>65</sup> These gatherings meet the characteristics of rituals as they feature a performance which is largely inflexible, with participants acting consistently with prescribed expectations. The symbolic value of these events is real, not only for speakers who reinforce their symbolic capital in demonstrating their cognitive legitimacy, but also for all participants whose presence demonstrates adherence to the values of the community.

Arbitration players who regularly attend these mass gatherings experience in their flesh that 'rituals operate as gatekeepers by excluding non-believers unprepared to engage in costly actions incommensurate with benefits'. In other words, '[c]ostly ritual behaviours represent hard to fake signs of commitment to a group, discouraging insincere members from joining'.<sup>66</sup>

### 3. INTERACTION AMONG SOCIAL ACTORS IN THE FIELD OF INTERNATIONAL ARBITRATION

Now that the players in the arbitration field and their structuring rituals have been identified, we will focus on their interactions with a view to analysing how the field has evolved.

#### 3.1 From a solidaristic to a polarized arbitration field

The most striking evolution in the arbitration field over the past 40 years has been the transition from a 'solidaristic' to a 'polarized' model.

By solidaristic model, I am referring to a model with a small number of occasional players, acting in turn in different capacities (advocate, arbitrator, expert) and

63 See 'Investment Arbitration and the Energy Charter Treaty', Stockholm, 9–10 June 2005 (with a publication in 2006, *Investment Arbitration and the Energy Charter Treaty*); 'Investment Protection and the Energy Charter Treaty' Washington, DC, 18 May 2007 (with a publication in 2008, *Investment Protection and the Energy Charter Treaty*); 'Energy Dispute Resolution Conference: Investment Protection, Transit and the Energy Charter Treaty' Brussels, 22–23 October 2009 (with a publication in 2011, *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*); '10 years of Energy Charter Treaty Arbitration' Stockholm, 9 and 10 June 2011; '20 years of the Energy Charter Treaty' Paris, 7 March 2014.

64 See 'Schwebel opens ICCA Miami with defence of BITs' *Global Arbitration Review* (7 April 2014).

65 See Sam Chadderton, 'Arbitration; What Does the Future Hold?' *IBA Global Insight*, available online: <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=16a5fa49-45dc-402e-bd79-6908ff8a0216>> accessed 11 February 2015.

66 Smith and Stewart (n 51) 120–21; see also William Irons, 'Religion as a Hard-to-Fake Sign of Commitment' in R Nesse (ed), *Evolution and the Capacity for Commitment* (Russell Sage, New York, NY, 2001) 292.

possessing a strong common set of shared values. This model presents three characteristics: a limited number of repeat actors; lack of specialization of functions; and the fact that each social actor has a strong sense of the expected behaviour in each role (maximum possible objectivity for the president, mild support to the party from the party-appointed arbitrator, reasonable independence of counsel from his or her client, with the clear notion that an advocate is not delivering expert witness testimony when presenting his or her client's position).

By polarized model, I mean a model which comprises a large number of players; in which those players tend to occupy specific functions, as opposed to alternating between them; and in which certain social agents have become champions of certain causes which are not necessarily shared by other players in the field. In an arbitration world which counts thousands of actors, a strategy of diversification has been successfully implemented by some social agents. Champions of certain causes have emerged, the most strident of which having gained immediate notoriety. The pamphlet *'Profiting from Injustice'*, which presents investment arbitration as the sole creature of lawyers pursuing their own personal gain, remains the best example of such strategy.<sup>67</sup> More generally, the aggressive criticism of the model in which the same players alternate functions on the ground that it generates conflict of interests has contributed to the segmentation of functions within the arbitration field, with some actors operating more often as co-arbitrators, others as president and yet others as counsel. While this phenomenon is the direct by-product of the surge of investment arbitration, the segmentation of the arbitration market is not limited to this form of arbitration. Another illustration may be found in the narrow field of gas price review arbitrations, where expert witnesses have often chosen to act exclusively on the buyer side or on the seller side. A field with a multiplicity of actors occupying specialized functions, at times defending sectorial interests, can be characterized as polarized.

Significant field changes never occur instantaneously. Yet a clear trend can be identified towards the evolution of international arbitration from a solidaristic to a polarized model.

### 3.1.1 *Distinguishing functions and roles*

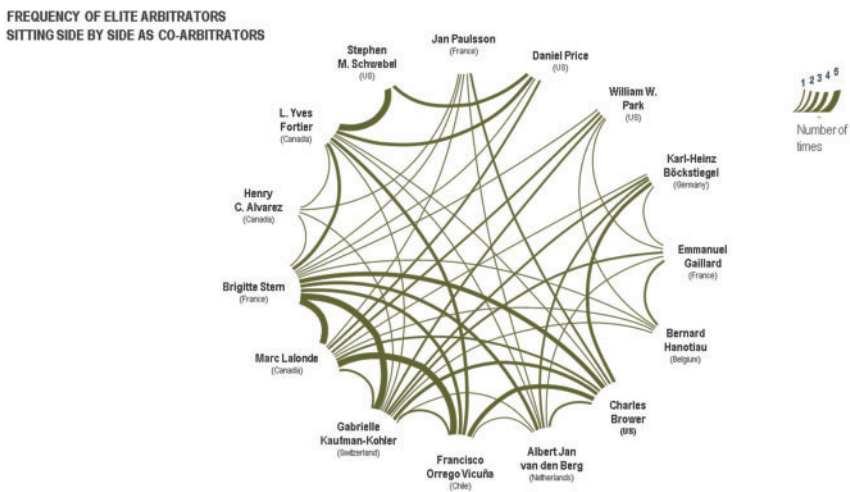
In an increasingly complex and polarized arbitration world, the distinction between functions and roles might prove a useful tool to understand the respective positioning of the social actors, the principles guiding their behaviour, and their strategies. The term 'function' refers to the specific position occupied by the social actor, such as expert witness, counsel, co-arbitrator or president of an arbitral tribunal. The term 'role' connotes the social activity consisting in defending certain values or beliefs. In investment arbitration, which is the most polarized sub-field of international arbitration, a given player may perceive his or her role as defending States or defending the interests of foreign investors. Such role will be performed throughout all the activities of that player, from academic writings to sitting as a party-appointed arbitrator or acting as chair of an arbitral tribunal. Because the role is grounded in a set of given values and beliefs, it is a social parameter which is less prone to change than functions for all social actors.

<sup>67</sup> *Profiting from Injustice* (n 36) 42.

The current trend in assessing conflicts of interests in international arbitration is to focus on functions. It is sometimes argued that a social agent routinely performing the function of counsel has a structural conflict of interest which should preclude him or her from acting as co-arbitrator, president or member of an *ad hoc* committee in ICSID arbitration. An analysis focusing on roles as defined above, rather than on functions, or at least in conjunction with the concept of function, might be a more fruitful exercise, as it is the role, not the function, which polarizes the field.

### 3.1.2 Decrypting repeat players interactions

The distinction between functions and roles might also contribute to the decrypting of repeat players interactions. The most critical voices on investment arbitration have underscored the fact that some arbitrators often end up sitting together. They go as far as stating that '[t]he survival of international investment arbitration may well depend on keeping the arbitrators club small, heavily interconnected, and cohesive'.<sup>68</sup> To support this argument, in 2012, they created an interesting diagram illustrating 'the frequency of elite arbitrators sitting side-by-side as co-arbitrators' (Figure 2).<sup>69</sup>



Source: Corporate Europe Observatory, *Profiting from Injustice* (2012)

Figure 2

Although the graphical display is extremely well-done, such a presentation misses the point entirely. The diagram is meant to evidence the existence of a small club functioning as a cohesive, interconnected group. But what may have been true at a time when the solidaristic model prevailed, no longer was true in 2012. First, it fails to capture the hundreds of occasional or less frequent appointments which should be featured around the activity of the perceived core players.<sup>70</sup> Second, and more

68 *ibid* 42.

69 *ibid*.

70 For a more accurate depiction of the arbitrators' interaction in the field, see Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 *European Journal of International Law* 387-424. In particular, see chart at p. 410.

importantly, it misses the reason why repeat players are nominated by the parties. In most cases, the appointments are made by the parties themselves, not by the institutions. So it is the conservatism of the parties, both on the State side and on the investor side, which explains the chart. Anecdotal evidence shows that institutions actively seek to appoint newcomers and promote diversity. It is the parties who resist change.

### 3.2 Norm generation in a polarized field

The interaction between social actors also leads to the formation of rules of law, as opposed to mere socially accepted practices or rituals. In a polarized field, the key consideration for social actors is that of integration or conflict. Actors having embraced different social values may simply fight with one another. A more complex interaction is that of integration or assimilation. Only a handful of social actors in the field of international arbitration have both the legitimacy and the ability to bring together a large number of actors with substantially different views in order to generate a consensus or at least a compromise. UNCTAD and the OECD come to mind. Yet the most prominent of all unquestionably is UNCITRAL, which has evidenced its capacity to invite to the same working sessions actors with widely different agendas, and to generate norms that make room for the different positions.<sup>71</sup> NGOs, arbitration clubs, professional organizations such as the IBA all contributed, next to States, to the recent works of UNCITRAL. Academics and all those who regularly express views on arbitration also participated in those works in different capacities (Figure 3).

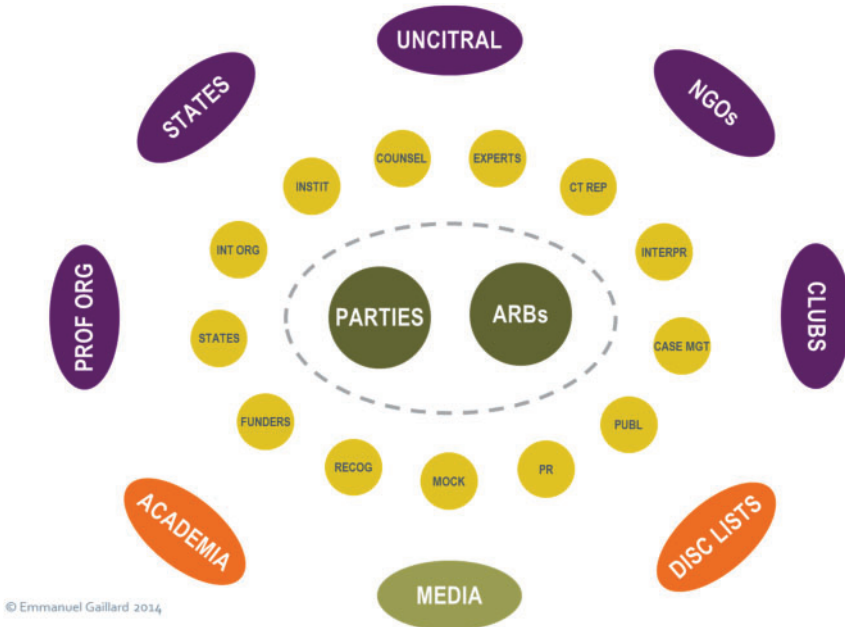


Figure 3

71 See, eg UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, 2014.



Institutional analysis teaches that 'every social system is a field of tension, oscillating between conflict and cooperation'.<sup>72</sup> Some institutions have the ability to absorb even the most extreme forms of challenge and to foster cooperation within a field, allowing its perpetuation in a manner acceptable by the largest possible number of actors. In the field of international arbitration, UNCITRAL is a masterful example of such ability.

#### 4. CONCLUSION

By now, we are all well-versed in sociology. We will no longer receive a GAR Award, but an 'objectivised piece of symbolic capital'. We will no longer post a message on Oil, Gas, Energy, Mining, Infrastructure Disputes (OGEMID); we will 'develop a new strategy to gain symbolic capital'. And, more importantly, we will no longer grumble against the length of the flight when going to Sydney to attend the next ICCA Conference; we will simply 'perform a hard-to-fake ritual distinguishing ourselves as true believers, as opposed to insincere players'.

72 See Anand and Watson (n 52) 61.