The Evolution of International Arbitration's Scholarship and the International Arbitration Law Library Series

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The publication of the 60th volume of the International Arbitration Law Library Series ("IALL" or "Series") is a remarkable anniversary. The purpose of this blog post is to offer a brief assessment of the Series' contribution to the field in the light of the evolution of international arbitration's scholarship in the last 40-50 years.

It was in 1993 that Kluwer Law International ("Wolters Kluwer") published the first title in the Series, by Moshe Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*. It is suitable to remember that, having registered only a single case in that year, ICSID was hardly prominent outside a very small circle of practitioners. Hirsch's monograph on ICSID was one of the very first titles on a subject that would come to dominate international arbitration's scholarship in the next 25 years.

It is also appropriate to remember that, at the time the Series was introduced, arbitration was not considered a distinct legal field. It was treated as an integral part of other areas of law. For example, in Germany and in a number of other

German influenced jurisdictions, such as Austria, the Netherlands, Greece, and Italy, arbitration was mainly treated as procedural law. This explains why arbitration laws in these countries were included in the national codes of civil procedure. Moreover, in France[fn]See the seminal Hague Lectures of Berthold Goldman, *Les Conflits de Lois dans l'Arbitrage International de Droit Privé*, 109 Collected Courses 347 (1963).[/fn] and Switzerland, arbitration had been viewed as private international law or a conflict of laws subject, while in some parts of the common law world, arbitration had traditionally been treated as a version of ordinary contract law. This explains why at this time scholarly work in arbitration largely drew on theories, concepts, and doctrines of private international law, civil procedure, contract, and company law.

Equally importantly, arbitration was not considered a subject of academic importance, not least because of its close relevance to legal practice. Arbitration courses were not included in generalist law degrees (such as J.D. or LL.B. programs) or in LL.M. curricula (the only exception being the arbitration course developed and first taught in 1985 by Professor Julian Lew at the School of International Arbitration at Queen Mary University of London). As was then generally accepted, if one wanted to *learn* about arbitration, one should do so by *practicing* arbitration in a *law firm*.

The fact that arbitration law was mainly developed by practitioners had important ramifications on the scope of arbitration scholarship and the methods of research that were employed for research in arbitration. Practicing arbitration lawyers were not concerned with the concept or legal theory of arbitration or how socio-legal jurisprudence may relate to the subject of arbitration. Their focus was on scholarship that would directly respond to the problems they were facing in their arbitration practice. Their methods of inquiry were not empirical, scientific, contextual or interdisciplinary; their primary method of analysis was the traditional approach taken for legal research, namely doctrinal analysis that focuses exclusively on legal statutes and case law. Arbitration scholarship did not originally engage with the crucial movements and theories of international legal scholarship that advanced the concept of international law. Interdisciplinary research did not originally appear in arbitration scholarship, and arbitration law was never critically examined through the lens of political theory, international affairs or economics.

Equally, at that time, arbitration scholarship did not critically engage with legal theory and socio-legal jurisprudence. With the exception of a small number of

French theorists,[fn]See generally, Daniel Cohen, *Arbitrage et Société* [Arbitration and Society] (1993); Bruno Oppetit, *Theorie de l'arbitrage* (1998); E. Loquin, *L'application des règles nationales dans l'arbitrage commercial international*, in *L'apport de la jurisprudence arbitrale*, 87 (1986).[/fn] the majority of arbitration scholars paid little to no attention to such subjects. Legal theory was often regarded as an academic "tempest in a teapot" or a discussion that "does not fully accord with what happens in the real world of international commercial arbitration".

As a result, the main focus of arbitration scholarship was originally narrow. The agenda of arbitration scholarship and conferences until as recently as twenty years ago was dominated by practically oriented topics, such as the validity of arbitration agreements, the power of tribunals to provide interim relief, the role of non-signatories in arbitration, and procedural matters including the taking of evidence, enforcement of arbitral awards, the appropriate standards of impartiality of arbitrators, and cost-control and effective case management of arbitration proceedings.

The inception of the Series, thus, came at a time when the field of international arbitration was seeking to grow out of its subordinate and practical origins, and develop theoretical foundations as an autonomous legal field. It is thus fair to observe that Wolters Kluwer took a considerable risk in establishing the first academic series dedicated to a field which at the time was at a nascent stage.

Today, international arbitration is a thriving academic field. In contrast to when Professor Lew established his first course, there are now dozens of Law Schools offering dispute resolution LL.M. and Diploma courses worldwide. In parallel, there are several academic journals specialising in international arbitration, numerous conferences held every year, and a large number of arbitration articles and books published annually.

Looking back with the reassuring luxury of hindsight, the inception of the Series was a visionary decision. Of course, it was fitting to entrust the editorial supervision of the Series to Professor Lew, who has, arguably, contributed to the development of international arbitration as a distinct academic field more than anyone. He was among those who wrote the first monographs on international arbitration. In addition to founding the School of International Arbitration, Queen Mary University of London which was the first academic institution dedicated to the

teaching and research of international arbitration, Professor Lew wrote the first doctoral thesis in English on the subject of international arbitration. His monograph on the *Law Applicable in International Commercial Arbitration* was published in 1978 and – together with Philippe Fouchard's *L'arbitrage Commercial International* (1965), Pierre Lalive's Hague Course on *Problèmes Relatifs a l'Arbitrage International Commercial* (1967), Albert Jan Van Den Berg's *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) and W. Laurence Craig, William W. Park and Jan Paulsson's *International Chamber of Commerce Arbitration* (1984) – is widely considered one of the theoretical foundations of arbitration as an autonomous international field.

Reflecting Professor Lew's vision for introducing the first English series of volumes on quality theses and monographs, the Series' approach to commission and publication of volumes has been comparative, international, and inclusive. The Series has published a wide range of dispute resolution works, from mediation and commercial arbitration to energy, maritime, and investment arbitration; from private law to public international law; from conflict of laws to contract and procedural law.

The inclusive approach and cosmopolitan outlook of the Series reflects a dynamic idea of arbitration law that transcends the often narrow boundaries of legal fields and legal traditions. Indeed, arbitration scholarship in the last twenty years has become more diverse and interdisciplinary. This is not only because non-arbitration scholars have developed an interest in arbitration, but also because arbitration scholars have started to examine arbitration against a wider context.

Investment arbitration was the catalyst here, which prompted scholars to examine how arbitration interacts with public international law and human rights, for example. Other scholars, mainly French theorists, critically engaged with legal theory and socio-legal jurisprudence, arguing that the increase of institutional actors in arbitration, including arbitral institutions, specialised law firms, professional arbitrators, and experts, has changed the social structure of international arbitration. Arbitration has equally attracted interest from international relations scholars to critical legal theorists, constitutional and administrative law scholars. Very interestingly too, research on arbitration is now conducted with the use of non-traditional methods of research, at least for arbitration. While traditional methods of doctrinal analysis are still the most popular method of research in international arbitration, a wave of studies has been

produced in the last twenty years using social science methods of research. Poignantly, such scholarship has made us realise that international arbitration is more than a body of black letter laws, that it affects society, the wider public, and the rule of law.

In this regard, the Series was influenced by, and contributed to, the growth, diversity, and interdisciplinarity of international arbitration's scholarship as an academic subject, publishing arbitration related titles on human rights, the environment, but also works on empirical research, economic analysis, and psychology.

Perhaps the single achievement that I, as co-editor of the Series, am most proud of is that all these years the Series displayed a distinct sense of academic purpose, publishing the works not only of established practitioners (see, for example, Gabrielle Kaufmann-Kohler (with co-author Thomas Schultz, Bernard Hanotiau, Mark Kantor, Franco Ferrari (with co-editor Friedrich Rosenfeld), Luke Nottage (with co-editors Shahla Ali, Bruno Jetin, and Nobumichi Teramura) and Hamid Gharavi) but also – and importantly – the prototype works of young and talented academics and practitioners (see, for example, Monique Sasson, Rémy Gerbay, Mary Mitsi, Ileana Smeureanu, Alfonso Gómez-Acebo, Zena Prodromou and Ali Yesilirmak).

Since the inception of the Series, international arbitration has been one of the most diverse, dynamic, and indeed exciting fields of international law. The Series has inevitably benefited from the extraordinary growth of arbitration. But we also want to believe that the Series' contribution to the scholarship of international arbitration has been real and important.

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