



THE ROLE OF UNCITRAL IN NORM-MAKING IN THE FIELD OF INTERNATIONAL ARBITRATION: A CRITICAL ANALYSIS OF THE RECEPTION OF BOURDIEU BY GAILLARD

ANA COIMBRA TRIGO
Doutoranda em Direito

RESUMO

A arbitragem internacional vive uma crise de legitimidade devido à crescente polarização de interesses dentro deste campo. Uma compreensão da luta de poderes neste campo permitirá a identificação de fornecedores de valores com a capacidade de superar conflitos. Estudaremos a teoria e os conceitos de Pierre Bourdieu e analisaremos criticamente a recepção deste autor efetuada por Emmanuel Gaillard. Concluiremos que o quadro teórico mencionado poderá permitir-nos compreender melhor o papel da UNCITRAL como um interface com a capacidade e legitimidade para produzir normas transnacionais e assumir um papel de integração

PALAVRAS-CHAVE

Arbitragem internacional; Bourdieu; Gaillard; Campo; Capital Simbólico; Poder; Formação de normas; CNUDCI

ABSTRACT

International arbitration is in a legitimacy crisis due to the increasing polarization of interests within the field. An understanding of the struggle of powers in this field will allow the identification of value providers with the ability to overcome conflict. We will study Pierre Bourdieu's theory and concepts and engage in a critical analysis of Emmanuel Gaillard's reception of Bourdieu. We will conclude that the mentioned theoretical framework can allow us to better understand the role of UNCITRAL as an interface with the ability and legitimacy to produce transnational norms and take on a role of integration.

KEYWORDS

International Arbitration; Bourdieu; Gaillard; Field; Symbolic Capital; Power; Norm-making; UNCITRAL

1. Introduction

International arbitration has over the years heard its legitimacy increasingly questioned by stakeholders in the field, but also by external voices. This legitimacy crisis relates both to the secretive and private nature of this dispute resolution process, but also the competence and neutrality of arbitrators¹. The nature of the arbitral process and its stakeholders has also morphed over time, with new actors and different interests. The conflict inherent to such discussions and evolution is today evident in the discussion surrounding investor-State dispute reform².

It is therefore fitting to search for analytical tools to assist us in understanding the struggle inherent to the conflicts between the social actors of international arbitration in relation to issues of transnational law making. In this regard, considering the United Nations Commission on International Trade Law (“UNCITRAL” or “Commission”) mandate to further the progressive harmonization and unification of the law of international trade, it is relevant to understand this Commission’s role in international commercial arbitration, as a value provider with the ability to overcome conflict and the legitimacy to produce transnational norms.

¹ Philip Le Boulanger, “Bibliographie - Dealing in Virtue, International Commercial Arbitration and the Construction of a Transnational Legal Order”, 1997, p. 320. Also Emmanuel Gaillard, “Sociology of international arbitration”, 2015, pp. 15-16.

² For reference, Malcolm Langford, Michele Potestà, Gabrielle Kaufmann-Kohler, Daniel Behn, “Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions An Introduction”, 2020.

For this purpose, we will call on Bourdieu's theory and concepts of Field, Juridical Field and Symbolic Capital to examine international arbitration's actors and their respective interaction. In this endeavour, we will consider and comment on Gaillard's reception of Bourdieu's theory and his conclusions.

In terms of the structure of the present paper, we will first analyse the historical and theoretical context of Bourdieu and study his fundamental concepts of Field and Symbolic Capital and legal concept of Juridical Field (Chapter **Erro! A origem da referência não foi encontrada.**). We will study Bourdieu's theory applied to international arbitration and will critically analyse Gaillard's reception of Bourdieu's theory in international arbitration, including the discussion regarding the role of UNCITRAL in norm-making. We will then explain how this theory and its reception can help us in our international arbitration research (Chapter **Erro! A origem da referência não foi encontrada.**). Finally, we will present our conclusions (Chapter **Erro! A origem da referência não foi encontrada.**).

2. Bourdieu's theory and concepts

a. Historical and theoretical context

Pierre Bourdieu held the Chair in Sociology at College de France, Paris. He was appointed *Directeur d'Etudes at l'Ecole des Hautes Etudes en Sciences Sociales* in 1964, where he was also Director of the Centre for European Sociology since 1968. He was

founder and editor of the influential journal *Actes de la recherche en sciences sociales*³. Bourdieu was the author and co-author of approximately twenty books⁴.

Bourdieu characterized its own work as “constructivist structuralism or structuralist constructivism”⁵, aiming to encapsulate both the existence of objective structures in the social world that are independent of the will of the agents and that guide and constrain them, and a twofold social genesis that refers both to a scheme of perception, thought and action, as well as the social structures mentioned⁶.

Bourdieu believed that social order could be explained through the *paradigm of domination*: class relations are governed not only by possession or property, but also by “symbolic goods”, essentially knowledge and culture, that, even more than cash money, allow the dominant to ensure their domination⁷. These symbolic goods are domination tools by excellence, which the dominant will employ in the power struggle against the dominated⁸ to maintain the distinctive gaps between social classes⁹. This scholar held that certain social actors produce a certain *legitimacy*, allowing them to have their competence, their status or the power they hold recognized without constraint, and with the assent of others, that is, the dominated¹⁰.

³ Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field”, 1987, p. 805.

⁴ Pierre Bourdieu, *The Force of Law*, cit., p. 805.

⁵ Pierre Bourdieu, “Social Space and Symbolic Power”, 1989, p. 14.

⁶ P. Bourdieu, “Social Space...”, cit., p. 14.

⁷ Pierre Bourdieu, *The Logic of Practice*, Book 1, 1990, pp. 128-129.

⁸ P. Bourdieu, *The Force of Law*, cit., p. 844.

⁹ P. Bourdieu, *The Logic of Practice*, cit., pp. 132-133.

¹⁰ P. Bourdieu, *The Logic of Practice*, cit., p. 131.

In sum, Bourdieu theoretical thesis argues that there is permanent *struggle* in a social field. This is in strike contrast with other authors that describe society as organized in structures¹¹, spheres¹² or systems¹³.

In addition, it is worth noting that Bourdieu also developed a sociology that was critical of law. He censured formalism, which argues that law is autonomous in relation to the social world (namely Kelsen), and instrumentalism, which defends that law is a tool in service of the dominant groups (namely Althusser), because these ignore the historical conditions that emerge from struggles within the political field, and thus allow for the creation of an autonomous social universe¹⁴.

b. Fundamental concepts

Having described Bourdieu's theoretical background, we now turn to the specific concepts developed by this author, those of "Field" (Section 2.b.i.**Erro! A origem da referência não foi encontrada.**) and "Symbolic Capital" (Section 2.b.ii.).

i. Field

¹¹ As does Karl Marx. However, the authors disagree regarding the treatment of social classes – see P. Bourdieu, "Social Space...", cit., p. 17; and P. Bourdieu, The Force of Law, cit., p. 815.

¹² As does Max Weber. See for comparison, P. Bourdieu, "Social Space...", cit., p. 18.

¹³ As does Niklas Luhmann. See for comparison, P. Bourdieu, The Force of Law, cit., 816.

¹⁴ P. Bourdieu, The Force of Law, cit., p. 814. See also Soraya Nour, "Os juristas e o direito em Bourdieu", 2016, pp. 158-159.

One of Bourdieu's key concepts is that of Field. Of relevance to this paper, this concept can have two relevant applications.

First, the concept of Field can be construed as *battlefield*. In this sense, a Field is an area of structured, socially patterned activity or "practice", defined by discipline or profession (such as literary field, scientific field, political field, academic field, juridical field, religious field, journalistic field, etc.)¹⁵.

Each social field is the *site of struggle* for control, which leads to an implicit hierarchical system within that field that establishes a borderline among different actors and groups of actors¹⁶. Within each Field, their members, depending on their particular position and trajectory in the social structure, will follow certain patterned ways of understanding, judging, and acting¹⁷. This will allow for internal resemblance within the group, providing consistency and a sense of internal identity¹⁸.

Society, in the sociology of Bourdieu, is therefore a set of relatively autonomous social fields in which struggles occur between different classes¹⁹.

Second, the concept of Field can be understood, or equated, to that of a *market*. In this context, a Field is a place where producers and consumers of certain goods interact.

¹⁵ P. Bourdieu, *The Force of Law*, cit., p. 805; S. Nour, "Os juristas...", cit., p. 161.

¹⁶ P. Bourdieu, *The Logic of Practice*, cit., p. 131; P. Bourdieu, *The Force of Law*, cit., p. 808.

¹⁷ P. Bourdieu, *The Force of Law*, cit., p. 811.

¹⁸ P. Bourdieu, *The Force of Law*, cit., p. 812; P. Bourdieu, *The Logic of Practice*, cit., pp. 131-132. See also, S. Nour, "Os juristas...", cit., p. 159.

¹⁹ P. Bourdieu, *The Logic of Practice*, cit., pp. 130-131.

Producers are individuals with specific capital, that compete for the accumulation of the form of capital best suited to enable them to secure their dominance²⁰. Here, symbolic wealth is considered also productive capacity²¹.

ii. Capital, and in specific Symbolic Capital

The previous notion of Field is indissociable to that of “Capital”, as can be seen from the second construction of the concept of Field. As such, Bourdieu argues that the Field is a conflicting space in which the dominant agents strive to reproduce their domination, through the constitution, consolidation and transmission of Capital²².

The position (dominant or dominated) of agents in the social space depends on the importance and structure of their Capital. In the words of Bourdieu²³: “Agents are distributed in the overall social space, in the first dimension, according to the overall volume of capital they possess and, in the second dimension, according to the structure of their capital, that is, the relative weight of the different species of capital, economic and cultural, in the total volume of their assets.”

In this sense, agents need an amount of capital to enter the field and subvert domination, so that the established power allocation changes²⁴.

²⁰ P. Bourdieu, *The Force of Law*, cit., p. 835, here understood in the context of the Juridical Field.

²¹ P. Bourdieu, *The Force of Law*, cit., p. 812.

²² P. Bourdieu, “*Social Space...*”, cit., p. 21.

²³ P. Bourdieu, “*Social Space...*”, cit., p. 17.

²⁴ P. Bourdieu, *The Logic of Practice*, cit., pp. 140-141.

There are several types of Capital²⁵. *First*, “symbolic capital”, which corresponds to interests related to honour (honours) and recognition (including intellectual recognition). *Second*, there is “social capital”, which is constituted by the social relations that a group generates and preserves to ensure its domination. *Third*, “economic capital”, a term that relates to the material goods any member of a social group possesses. *Fourth*, “cultural capital”, which refers to the intellectual qualifications of social actors.

Relevant to our analysis is the notion and function of Symbolic Capital. This type of capital will include specifically authority, knowledge, prestige, reputation, academic degrees, and debts of gratitude²⁶.

Bourdieu argues that Symbolic Capital represents social authority acquired in previous struggles, which an individual or group has accumulated in a symbolic form, and it is a power granted to those who have sufficiently obtained recognition²⁷. This allocation of symbolic capital will ensure that the relations among agents are settled based on the legitimate order of access to the goods included in this capital, and to the groups defined by exclusive ownership of these goods²⁸.

²⁵ P. Bourdieu, “Social Space...”, cit., p. 17.

²⁶ P. Bourdieu, *The Force of Law*, cit., p. 812.

²⁷ P. Bourdieu, “Social Space...”, cit., pp. 21-22.

²⁸ P. Bourdieu, *The Logic of Practice*, cit., pp. 131-132. An easy example to follow is that of educational certificates, whereby the same social value is attributed to all holders, and compels the free circulation of cultural capital; the holders of these certificates are related to a single standard, and can convert their cultural capital into money, guaranteed by law. This cultural capital is thus objectified in these credentials.

Symbolic Capital is therefore also power. And symbolic power can only be exercised through the complicity of those who are dominated by it but are unaware²⁹.

Bourdieu posits that Symbolic Capital, besides creating its own clientele, can be converted into the more traditional form of economic capital, and vice-versa, to which it is intrinsically linked³⁰. From a transactional standpoint, it is also said that the exchange value of Symbolic Capital is continuously being estimated and appraised by every individual possessing or coming into contact with it³¹.

c. Legal concept

In addition to the analysed concepts, Bourdieu also addressed the law. Bourdieu's "Force of Law" represents, exemplifies, and investigates the intersection of two such fields, the sociological and the juridical³². Bourdieu argues that sociology seeks to utilize the privilege of external perspective to illuminate the juridical field in a way that is hardly visible from within the field itself³³. Let us analyse his concept of "Juridical Field" and the adjacent internal power struggle (Section 2.c.i.) and external power struggle (Section 2.c.ii.), and the process and effects of codification (Section 2.c.iii.).

²⁹ P. Bourdieu, *The Force of Law*, cit., p. 844.

³⁰ P. Bourdieu, *The Logic of Practice*, cit., pp. 118-119, 122.

³¹ P. Bourdieu, *The Force of Law*, cit., p. 812.

³² P. Bourdieu, *The Force of Law*, cit., p. 813.

³³ P. Bourdieu, *The Force of Law*, cit., pp. 813, 816.

i. Juridical Field and the internal power struggle

Two power struggles are specific of the Juridical Field. First, an internal struggle. Bourdieu argues that “the juridical field is the site of a *competition for monopoly of the right to determine the law*”³⁴. As such, there is a competition over the production and sale of legal services, as a particular category of market products³⁵.

More than a competition, there is a conflict, and in some way a contradiction between lawyers to attain domination. There is an internal struggle in the Juridical Field between the legal actors for the recognized power to read the law, and to project the respective regulation and its view of the world. As such, in the words of Bourdieu³⁶: “Within this field there occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognized capacity to interpret a corpus of texts sanctifying a correct or legitimized vision of the social world.” This is in contrast with Luhmann’s theory of autopoietic systems, where developments in law come from within the legal sphere³⁷.

Tellingly, Bourdieu goes further in his analysis of how the *allocation of power* is given effect in the Juridical Field. He concludes that in different legal traditions, depending on the role of law in the broader field of power, there are different holders of different types of

³⁴ P. Bourdieu, *The Force of Law*, cit., p. 817.

³⁵ P. Bourdieu, *The Force of Law*, cit., p. 835.

³⁶ P. Bourdieu, *The Force of Law*, cit., p. 817; S. Nour, “Os juristas...”, cit., pp. 163-164.

³⁷ P. Bourdieu, *The Force of Law*, cit., p. 816.

juridical capital, in battle, and gives the example of Romano-Germanic and the Anglo-American traditions. In these traditions, the degree of formalization or normalization depends, in this view, on the relative strength of either theoreticians or practitioners within the power structure of the field in a particular point in time, who will be able to impose their vision of the law and its interpretation³⁸.

However, Bourdieu recognizes that beyond the inherent *hostility* of this tension, which is due to divergent interests and world views in the particular work of interpretation of these jurists, there also is *complementarity*, because adversaries will in the end collaborate to develop an innovative body of rules and procedures with a claim to universality and legitimacy³⁹.

ii. Boundaries and the external power struggle

The second power struggle will be between jurists and lay people.

Bourdieu establishes certain boundaries regarding the Juridical Field. He argues that the judicial space divides those who can speak the *language of law* (those who possess the Capital) and those who cannot⁴⁰: “those qualified to participate in the game and those who, though they may find themselves in the middle of it, are in fact excluded by their inability to

³⁸ P. Bourdieu, *The Force of Law*, cit., pp. 822-823.

³⁹ P. Bourdieu, *The Force of Law*, cit., p. 821.

⁴⁰ P. Bourdieu, *The Force of Law*, cit., p. 828.

accomplish the conversion of mental space—and particularly of linguistic stance—which is presumed by entry into this social space”.

Going beyond the internal struggle already described, Bourdieu presents the division of power of *lawyers versus laypeople*. Those in the Juridical Field are constantly struggling with those outside the field to gain and maintain acceptance of their view of the relation of law and society⁴¹.

In tandem, and despite this division of power, Bourdieu states that in this separation of the Juridical Field from the social space, lawyers will act as *mediators*⁴². They will “play the game” by the rules of the field (that the dominant established), and do so “juridically”, giving up recourse to violence. As such they will act as unofficial intermediaries in the effort to reach an amicable solution. As Bourdieu posits, the Juridical Field is a social space organized around the conversion of direct conflict between directly concerned parties into juridically regulated debate between professionals acting by proxy⁴³.

From another perspective, lawyers will enact the symbolic struggle existent in the social world, between actors in conflict and with distinct and contradictory world views, but in the Juridical Field. In other words, lawyers will engage in trials, which will represent the paradigmatic staging of the symbolic struggle inherent to the social world, where opposing worldviews will be confronted⁴⁴.

⁴¹ P. Bourdieu, *The Force of Law*, cit., p. 809.

⁴² P. Bourdieu, *The Force of Law*, cit., p. 831.

⁴³ P. Bourdieu, *The Force of Law*, cit., p. 831; S. Nour, “Os juristas...”, cit., p. 164.

⁴⁴ P. Bourdieu, *The Force of Law*, cit., p. 837.

iii. Power and effects of codification

Bourdieu argued that the internal logic of juridical work is codification, which, together with the respective social recognition, grant law its efficacy⁴⁵. Those responsible for producing and applying the law will share interests with other power holders of other power in social fields, such as politics and economics, which will inform the logic and content of legal texts⁴⁶.

This author went on to explain a dynamic, functional and complementary operation of codification. Legal theorists pull the law in the direction of pure theory, ordered in an autonomous and self-sufficient system. Through the freedom of interpretation granted to them in the application of rules, judges introduce the changes and innovations which are indispensable for the survival of the system, when dealing with concrete life situations. The theorists will then integrate these changes into the system itself, to ensure the necessary coherence and the permanence of a systematic set of principles and rules⁴⁷.

This codification will generate rationalization, universalization and normalization. Rationalization refers to predictability and calculability of the standards formally enshrined in law⁴⁸. Universalization refers to the creation of a set of coherent legal standards and formal legal procedures that through the process of codification became universal and lead

⁴⁵ P. Bourdieu, *The Force of Law*, cit., p. 840.

⁴⁶ P. Bourdieu, *The Force of Law*, cit., p. 842.

⁴⁷ P. Bourdieu, *The Force of Law*, cit., p. 824.

⁴⁸ P. Bourdieu, *The Force of Law*, cit., p. 849.

to the imposition of legitimacy in a social order⁴⁹. Normalization refers to the acceptance of that which is regular, which is in the law⁵⁰.

3. Bourdieu's theory and international arbitration

Having explained Bourdieu's theory and concepts, we will now examine Gaillard's study of the sociology of arbitration (Section 3.a.) and then present our critical analysis (Section 3.b.). Lastly, we will describe the relevance of Bourdieu and Gaillard in our research in international arbitration (Section 3.c.).

a. Gaillard and the sociology of international arbitration

Gaillard asserts in his article "Sociology of international arbitration"⁵¹ that international arbitration is a field, in the sense that was conceptualized by Bourdieu⁵². This scholar describes how international arbitration constitutes both a social field and a market and highlights two key aspects in this regard.

Gaillard states that international arbitration witnesses several social actors, including suppliers, consumers, and regulatory agents that interact with each other. These actors will

⁴⁹ P. Bourdieu, *The Force of Law*, cit., p. 846

⁵⁰ P. Bourdieu, *The Force of Law*, cit., p. 848.

⁵¹ In *Arbitration International*, 2015, pp. 1–17.

⁵² Gaillard also mentions other authors that have studied sociology or arbitration, including Yves Dezalay and Bryant G. Garth, who wrote *Dealing in Virtue*, 1996, with a foreword by Bourdieu.

perform their roles and functions, and still share a “common meaning system”, and interact more frequently with each other, than with other social agents. Therefore, this author concludes that international arbitration is a *social field*⁵³.

In addition, Gaillard emphasizes that the concept of *Symbolic Capital* is applicable in the field of international arbitration and permits an analysis of the domination relationships established therein. In the view of this author, this concept of Bourdieu is a powerful tool to understand the relations of domination, both in economic and symbolic terms, and especially so in the field of international arbitration, where many of the actors in this field will possess “a greater symbolic capital than an economic one”⁵⁴.

Gaillard’s position of the social actors (Section 3.a.i.), rituals (Section 3.a.ii.), interaction among social actors and consequent norm-making (Section 3.a.iii.) and role of UNCITRAL (Section 3.a.iv.) will be described next.

i. Social actors

Gaillard describes three categories of social actors in the field of international arbitration: essential actors, service providers and value providers.

First, the category of *essential actors* is composed of only two actors: parties and arbitrators⁵⁵. Without them, international arbitration does not exist. Arbitration is based on

⁵³ E. Gaillard, “Sociology...”, cit., p. 3.

⁵⁴ E. Gaillard, “Sociology...”, cit., p. 2.

⁵⁵ E. Gaillard, “Sociology...”, cit., p. 4.

party autonomy. Parties to a contract may wish to submit their current or future disputes to neutral third-party adjudicators, i.e. arbitrators, that will decide the dispute in a private and binding manner, through an enforceable arbitral award. Notably, Gaillard mentions that arbitrators appear as an emerging class.

Second, appears the category of *service providers*, which includes all the social groups that dedicate their activity exclusively to international arbitration and share a common understanding of what arbitration is and how it works⁵⁶. Contrary to the category above, Gaillard identifies here eight sub-categories of social actors.

Counsel appears first. These are teams of lawyers exclusively dedicated to representing parties in international arbitration proceedings. Second are arbitral institutions, which administer arbitration proceedings under their rules (or other rules), that parties can refer to in their arbitration or submission agreements, and that develop a strategy based on geographical presence (national, regional, global) and subject-matter diversification. Third are States. These may act as “arbitration hosts”, when chosen as seat and venue of arbitration proceedings. States will receive the arbitrators, the parties and the lawyers, and therefore promote services and goods located in its territory. The fourth category is that of expert witnesses, court reporters, interpreters, case management firms, and literature publishers. All these entities will provide various services to the parties and the arbitrators, as well as public relation agents, in cases where the disputes are high-profile and need to be managed, the fifth category. Sixth, mock arbitrators may also provide services to

⁵⁶ E. Gaillard, “Sociology...”, cit., pp. 5-7.

rehearse hearings, and seventh, third-party funders may finance disputes or acquire awards prior to enforcement. Finally, there are professional guides and publications ranking arbitration experts. Gaillard titles these entities the “*merchants of recognition*” that “*distribute legitimacy*”⁵⁷.

Finally, are the *value providers*. Gaillard contends that these are social actors that are recognized, at varying degrees of legitimacy, to have the social ability to provide guidance as to the way international arbitration should develop and how arbitral social actors should behave⁵⁸. In this category, another eight social actors are identified.

First, again States. They have their ability to influence how arbitration develops recognized, considering their added value domestically, by passing relevant legislation or generating case law, including in what regards the recognition of foreign awards by application, *inter alia*, of the standards provided in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (“New York Convention”) and the UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006) (“Model Law”). In addition, the same happens at the international level, where States strive to export their values and participate in international organizations, where their voice will count if met with consensus. Second are international organizations, emphasized as being “collective” value providers: Gaillard mentions, besides UNCITRAL, also the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD). Third are NGOs: their relevance is

⁵⁷ E. Gaillard, “Sociology...”, cit., p. 7.

⁵⁸ E. Gaillard, “Sociology...”, cit., p. 7.

twofold, since these organizations strive to both promote external values in the field of international arbitration (such as the defence of human rights, environment, transparency), beyond those of the essential actors, but also to question the legitimacy of arbitration as a whole. Fourth, Gaillard mentions arbitration clubs, institutions that aggregate actors with common interests, and carry out the promotion of their own values. Fifth, are professional organizations that develop rules and guidelines of a practical nature that will succeed based on their persuasive value and authority near parties. Sixth are academic institutions specializing in arbitration. Seventh are email discussion lists where the participants can discuss current issues of interest; Gaillard highlights that these can be part of a new strategy to gain Symbolic Capital, based on speed and repetition⁵⁹. Finally, in the eight category is the media, which also questions the legitimacy of this dispute resolution method, namely in the context of investor-State arbitration.

ii. Rituals

Following the description of the social actors relevant in the field of international arbitration, Gaillard goes on to describe their *rituals*. These are characterized as being inflexible patterns of performance, that require observance to form and are symbolic, and that have a socially obligatory character despite the absence of apparent advantage⁶⁰.

⁵⁹ E. Gaillard, “Sociology...”, cit., p. 9.

⁶⁰ E. Gaillard, “Sociology...”, cit., p. 10.

Three rituals were identified. First, *arbitral hearings*. The standards of conduct here are followed by parties, arbitrators, counsel and other hearing participants (arbitral institutions, court reporter, stenographer, witnesses, experts). These patterns will determine how the parties set up the room, where the parties and counsel sit and where the arbitrators sit in relation to the parties. Moreover, the informality of the ambiance is characteristic, since these hearings are normally conducted in a business-like environment, rather than a courtroom, and arbitrators do not wear judge-like attire. These are non-essential features of the hearing; however, it is highlighted that deviation from these patterns causes discomfort to all those involved because of their “symbolic” nature⁶¹.

Second, what Gaillard calls *recognition tournaments*. These are contests where certain (and increasingly more) platforms will rank and distinguish social actors. In Gaillard’s view, these tournaments amount to the objectivization of Symbolic Capital. These competitions can be viewed as bringing about social coherence (distribution) and stratification (elites), but also the legitimization of the field before the eyes of outside players⁶².

Third, *periodic mass gatherings* are highlighted. These are events and conferences where speakers will exhibit their know-how, and thus reinforce their Symbolic Capital, but also where participants will show up and make it a point of being seen to demonstrate their observance to the values of the community. These are normally costly rituals, seeking to exclude “non-believers”⁶³.

⁶¹ E. Gaillard, “Sociology...”, cit., p. 11.

⁶² E. Gaillard, “Sociology...”, cit., p. 12.

⁶³ E. Gaillard, “Sociology...”, cit., p. 13.

iii. Interaction and norm-making

Considering the described social actors and rituals, Gaillard argues that international arbitration evolved in the last 40 years from a solidaristic field to a polarized one.

This scholar argues that international arbitration used to be a *solidaristic field* where there was a limited number of repeat social actors who were generalist practitioners, since there was a lack of specialization of functions, who, in any case, shared a strong common set of values and expected behaviours⁶⁴. Now international arbitration is seen as a *polarized field* with a large number of players, who occupy specific and specialized functions, and whose diversification is a strategy, and thus there is strive to be “champions of certain causes” that are not shared by other players⁶⁵.

The consequence of this polarization will be twofold: the interaction between social actors may lead to conflict, but also ultimately to integration⁶⁶.

Conflict exists because social actors will embrace different social values and will fight with one another to defend them. In tandem, socially accepted practices or rituals will not be unanimously accepted. Integration will come about and be promoted only by social actors with the legitimacy and the ability to join a large number of actors with considerably unlike

⁶⁴ E. Gaillard, “Sociology...”, cit., pp. 13-14.

⁶⁵ E. Gaillard, “Sociology...”, cit., p. 14.

⁶⁶ E. Gaillard, “Sociology...”, cit., p. 16.

views and achieve consensus or compromise among them. This will lead to the formation of rules of law, rather than accepting mere social practices.

iv. The role of UNCITRAL

It is in this context that Gaillard highlights the role of UNCITRAL. This Commission has evidenced its capacity to invite to the same working groups different social actors, with their own extremely distinct interests, and to generate norms that are able to accommodate these different positions⁶⁷. In the working groups of the Commission meet representatives of States, who deliberate, but also other observers, including those of arbitral institutions, NGOs, arbitration clubs, professional organizations and academics.

In this sense, UNCITRAL is a masterful example of 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 arbitration⁶⁸.

b. Reception of Bourdieu by Gaillard: A critical analysis

⁶⁷ E. Gaillard, “Sociology...”, cit., p. 16.

⁶⁸ E. Gaillard, “Sociology...”, cit., p. 17.

In what is relevant to our research, several critical observations come to mind when examining Gaillard analysis of the field of international arbitration under Bourdieu's theoretical construction. We will address these separately, speaking in turn of international arbitration as a Field (Section 3.b.i.), the evolution of the Symbolic Capital of arbitrators (Section 3.b.ii.), the power struggles that lead to polarization (Section 3.b.iii.), the norm-making power and process (Section 3.b.iv.) and the role of UNCITRAL (Section 3.b.v.).

i. International arbitration as a Field

First and foremost, it is clear that there is an unequivocal reception by Gaillard of the theory of Bourdieu, in its main concepts. Three remarks can be made in this regard.

First, Gaillard accepted Bourdieu when declaring that arbitration is a *field* and a *market*, where there is a struggle between social actors and providers of services and consumers, but also when alluding to the rituals of social actors that foster *identification* and are forged in social *interaction*. This dual element (competition and identification) seem to take place currently at a global scale.

Second, Symbolic Capital is recognized as potentially the *most relevant type of capital* possessed by the “dominant” social actors in the field, and thus the transactional manifestations of this capital are repeatedly highlighted. We will analyse below the evolution of the Symbolic Capital of arbitrators.

Third, the rituals of social actors described also fit into Bourdieu's analysis of a patterned and strict behaviour amongst group of agents in a certain field. These will be further analysed when relevant as well.

ii. Evolution of the Symbolic Capital

Gaillard remarked the evolution of Symbolic Capital (and thus power) in the field of international arbitration.

The 1996 study of Dezalay and Garth “Dealing in Virtue” was referenced as a proposed marker. This study highlighted, in Gaillard’s view, that to the *founding fathers* of modern international arbitration Symbolic Capital related to the setting up of a transnational system of private justice and the ability to discuss transnational rules. Therefore, this study showed that the founding fathers of modern international arbitration created and maintained Symbolic Capital by discussion *lex mercatoria*, that is, transnational rules, and demonstrated how the interactions amongst the major social actors in the field of arbitration led to the construction of a transnational dispute resolution system⁶⁹.

In contrast, Gaillard posits that now, the Symbolic Capital of arbitrators is subjected to a process of *objectivization* through recognition tournaments and fast and reactive actions of social actors; moreover, there is a strong incentive to network and to participate in ranking contests that measure such objectivization. In the same vein, “cognitive legitimacy” was no longer sufficient – as was in the “old days” -, but “adherence” demonstrations were required within the international arbitration field, including in mass gatherings.

⁶⁹ E. Gaillard, “Sociology...”, cit., p. 2.

These remarks focus on arbitrators, who have a product to sell in the arbitration market. To these we also add, in what is relevant to parties and counsel, the increasing availability of graduate study programs offered by universities and certified training programs offered by institutions, arbitration clubs and alike. These can also be considered a form of objectified capital, – the certificates of participation – which allow these social actors to gain Symbolic Power and enhance their productive capacity next to their peers.

This development in the processes by which actors accumulate Symbolic Power are still, from the perspective of Bourdieu, means to gain social authority. These demonstrations and efforts are struggles that allow their initiators to attain a certain level of recognition, accepted in their field, which they can later convert to economic capital.

iii. Power struggles leading to polarization

Gaillard suggests that the increasing diversification of interests of the social actors in this field has led to a *power struggle*, which in turn, permitted an evolution towards a polarized field. Two remarks can be made in this regard.

At the forefront of Bourdieu's theory is the existence of dominant and dominated actors in any given field, where the dominant occupies such a class based on the importance and structure of their capital. The phenomenon in international arbitration, as understood by Gaillard seems to have been as follows: as the quantity of social actors increased in this field, their capital strategy evolved to ensure specialization of functions and services, which led to a diversification in values, and then a diversification strategy in defending these

different values. The motivation would be to stand out in a crowd, with the inevitable result of driving social actors apart.

This can also be read as a manifestation of the competition for power, in Bourdieu's construction. Each social actor would be willing to promote its own services in the field and offering a distinct and tailor-made service would be a market strategy to that effect. If successful, this would allow to foster their Symbolic Capital as well.

An additional reference should be made regarding the parties. Gaillard highlighted that even though *parties* are essential actors in the field of international arbitration, they were more often than not the most ignored⁷⁰.

This is line with the boundaries Bourdieu draws in the Juridical Field between lawyers and laypeople. In fact, Bourdieu speaks that parties were "*reduced to the status of clients*"⁷¹ in this interaction. We can also import the theoretical analysis of trials in the Bourdieu analysis of lawyers as mediators. In international arbitration, hearings, which Gaillard describes as rituals, will embody laypeople disputes in a legal setting, even if without the formality associated with state courts. Therefore, ignoring parties in international arbitration is a tendency that can be understood in this theoretical push to maintain that boundary. However, if parties are social actors in the field, their struggle for power will also progress. More sophisticated parties will set up internal in-house counsel teams that will increasingly manage and accompany the disputes, including in trials, and will seek to assert their views

⁷⁰ E. Gaillard, "Sociology...", cit., p. 4.

⁷¹ P. Bourdieu, The Force of Law, cit., p. 844.

and interests in the procedures. The boundary may thus blur and shift to include these practitioners.

iv. Power and process in norm-making

In terms of norm-making, Gaillard suggests that there has been an evolution from the production of guiding principles to the production of hard rules, as a consequence of polarization. This is not an entirely new critique, since it was already approached in 1996 by Dezalay and Garth, where these authors argued that the transnational legal elites were turning international arbitration, accessible and informal in origin, into a formal and expensive system of dispute resolution⁷².

In any case, this comment merits additional reflection. This trend towards formalization can be seen as a consequence of the prevalence of the dominant group, allowing it to impose their world view upon other rising interest groups. This connects directly with Bourdieu's thesis on the struggle for domination, where the dominant will impose an endorsed representation of the social world that favours their view and interests, particularly in cases of socially stressful situations⁷³. This trend would give body to the universalization and normalization effects, where a set of formally coherent laws would officialise the legitimate style of living, which would then inform the behaviour of other social actors, ensuring the efficacy of law⁷⁴.

⁷² S. Nour, "Os juristas..." cit., p. 171.

⁷³ P. Bourdieu, *The Force of Law*, cit., p. 848.

⁷⁴ P. Bourdieu, *The Force of Law*, cit., p. 846.

On the other hand, and from a market perspective, considering Bourdieu's theoretical framework explored above, this could also be seen as a mere self-feeding effort. This means that increasing "juridicization" would generate new legal needs, and thus legal interests of those providers who possess the qualifications to find in those needs a new market⁷⁵.

From the above observations would result that, even though a coherent formal set of rules would be obtained, an ingrained disparity would exist at its source.

v. The role of UNCITRAL

In this context of conflict, Gaillard introduces and emphasizes the case of UNCITRAL. The fact that the Commission is a "collective" value provider and has the ability to integrate amidst conflict is seen as legitimacy-in-action for Gaillard⁷⁶.

We agree in general with these observations but propose additional reflections.

UNCITRAL has progressively codified legal rules relevant to international arbitration over the years, in the forms of recommendations, model laws, rules, conventions, among other instruments⁷⁷. So far, UNCITRAL has achieved several milestones in the field of international arbitration, having in its record the Model Law – adopted in 84 States⁷⁸– and UNCITRAL Arbitration Rules, but also the Convention on Transparency in Treaty-based

⁷⁵ P. Bourdieu, *The Force of Law*, cit., p. 836.

⁷⁶ E. Gaillard, "Sociology...", cit., p. 17.

⁷⁷ "A Guide to UNCITRAL", United Nations Commission on International Commercial Law, 2013.

⁷⁸ See "Commercial Arbitration", UNCITRAL, undated. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (last accessed 7 February 2021).

Investor-State Arbitration and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

These instruments will later have to be adopted or translated to national legislation by States. However, as explains Gaillard, these normative instruments are seen as the international standards, exuding values, rather than generating norms⁷⁹.

The legitimacy underlying UNCITRAL instruments is further consolidated when one considers the legal procedure for codification. It arises from State negotiation, which can span over years, and contributions from all stakeholders present in the Commission's working groups⁸⁰. Tellingly, UNCITRAL is able to mediate conversations allow the integration of States with different legal traditions (including those from Common law and Civil law families), as well as other social actors with other interests, who are also present in the working groups as observers. Working groups deliberate traditionally based on consensus⁸¹, which means that voices of these social actors will only be relevant (and thus they will only be able to disseminate their values) to the extent that a compromise is achieved.

From the perspective of Bourdieu's theory, this allows for the tacit grating and maintaining of faith in the juridical order and its stability⁸². In addition, Bourdieu also

⁷⁹ E. Gaillard, "Sociology...", cit., p. 8,

⁸⁰ UNCITRAL instruments are first discussed in working groups, that draft an instrument, this instrument will later be approved by the Commission, which also sets the agenda of UNCITRAL, and finally the UN General Assembly will ratify the Commissions decisions. See "A Guide to UNCITRAL", cit..

⁸¹ "A Guide to UNCITRAL", cit., p. 6.

⁸² P. Bourdieu, The Force of Law, cit., p. 810.

acknowledged that, in fact, juridical labour benefits from the entire set of social actors, and not only the legislator. He argued that all actors, conditioned by their positions in different social fields would transform their personal desires or grievances into social problems, pushing for these changes to come about and solve them⁸³. Bourdieu proposed that juridical labour required tension to grow, and only this struggle would lead to legitimacy, and not the mere effect of general recognition nor the support of the dominant interests. In this sense, the totality of the relations between the Juridical Field and the field of power, and through it, the whole social field⁸⁴.

There are authors that state that the working core lawmakers at UNCITRAL represent a very small subset of developed state and non-state actors, which interferes with this commission's legitimacy and efficacy, since the former will prevent widespread adoption of the instruments resulting from its work⁸⁵. This ties directly with Bourdieu's analysis of the dominant and obviously dominated, the relations between the field of law and other fields of power, and the imposition of an official representation of the social world by the powerful. However, the same authors recognize that, considering that legitimacy rests on perception, it may be that entities are satisfied with the existence of an opportunity to be heard, and as long as the end-result instrument allows them sufficient flexibility to adapt to local circumstances⁸⁶.

⁸³ P. Bourdieu, *The Force of Law*, cit., p. 847.

⁸⁴ P. Bourdieu, *The Force of Law*, cit., p. 841.

⁸⁵ Susan Block-Lieb, Terence C. Halliday, and Josh Pacewicz, "Who Governs? Delegations in Global Trade Lawmaking", in *Regulation & Governance*, p. 280.

⁸⁶ S. Block-Lieb et al., "Who Governs?...", cit., pp. 294-295.

Participation of all state and non-state actors should be promoted. The window that Bourdieu left open in regard to complementarity – and that Gaillard expanded when speaking of integration – can be emphasized to better frame this concern. Considering UNCITRAL’s unique characteristics and norm-making process, its role as an interface between social actors arises at the transnational level. Moreover, the widespread adoption of arbitration related instruments would also confirm this position.

UNCITRAL is now discussing other topics amongst its working groups that are relevant to international arbitration, including in Working Group II the issue of Expedited Arbitration and in Working Group III the topic of Investor-State Dispute Settlement Reform. The latter is considered a prime example of a hot topic where the legitimacy of that dispute resolution method is being questioned.

In sum, in the power struggle that underlines the international arbitration field, UNCITRAL rises as the integration champion amongst polarized groups, pushing for the development of rules to be integrated at a national level, but which benefit from wide consensus and legitimacy amongst social actors.

c. Relevance in the research of international arbitration

The theoretical framework of Bourdieu and its reception by Gaillard are relevant in the study of international arbitration. In a field that some argue has evolved from competition to cooperation, through bridges built by skilled brokers, members of multiple social groups, who reconstructed international arbitration by blending professional and legal practices into

a specific coherent transnational culture⁸⁷, UNCITRAL can be seen as result of this interdiscursive structure, beyond the state level. Its role and relevance in global law making – in its mission to seek the progressive harmonization and unification of international trade law – cannot be ignored.

The legal framework of international arbitration is constituted by the principles set out in the New York Convention and the Model Law. The former is a multilateral convention dealing with common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards, and although it was prepared by the United Nations prior to the establishment of UNCITRAL in 1969, the promotion of the New York Convention is an integral part of UNCITRAL's work⁸⁸. The latter is a model law with modern features to meet the specific needs of international arbitration, designed to assist States in reforming their arbitration laws, and was prepared by UNCITRAL, in a first version in 1985, and a revised version in 2006⁸⁹.

The principles and rules set out in these instruments will inform what is considered the transnational law of arbitration, that is, the autonomous rules and principles that regulate international arbitration and which derives from arbitral practice and institutional rules⁹⁰.

⁸⁷ Florian Grisel, "Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession", in *Law and Society Review*, p. 793. This author challenged Dezalay and Garth's study, including the influence of Bourdieu's structural approach, considering the importance of both conflict and cooperation. This author notes that Bourdieu was Dezalay's PhD supervisor.

⁸⁸ "Foreign Arbitral Awards", UNCITRAL, undated. Available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (last accessed 7 February 2021).

⁸⁹ See "Commercial Arbitration", UNCITRAL, cit..

⁹⁰ Luís Lima Pinheiro, *Arbitragem Transnacional*, 2005, pp. 198, 440-448.

The fact that these instruments, along with others already mentioned, derived from UNCITRAL's work elevates the relevance of this Commission. Understanding the relations of all agents involved in their fruition, along with the interactions amongst those actors, especially the theory of norm-making in a polarized field, contributes to the understanding of UNCITRAL as a source of transnational law and inspiration to national arbitration law. This will be relevant in any study pertaining to international arbitration, as we intend to conduct.

4. Conclusion

Bourdieu sees social areas as Fields, where groups with conflicting actors struggle for domination, by acquiring and accumulating different types of capital, including Symbolic Capital. Norm-making is a process whereby the dominant group tends to formalize their worldview, as they will have the right to determine the law.

Gaillard's study describes the social actors, rituals and interaction in international arbitration, including how norm-making has evolved from a solidaristic field to a polarized field. Gaillard adopts Bourdieu's theoretical framework and expands on previous writings in the field, highlighting UNCITRAL's ability and legitimacy to achieve integration reflected in norm-making.

The role and relevance of UNCITRAL as an interface also in the transnational arbitration context is therefore evidenced. Bourdieu's thesis provides an important analytical tool in the research of international arbitration, allowing conflict and collaboration to be the sociological backdrop to transnational norm-making.

Bibliography

Academic works:

- Emmanuel Gaillard, “Sociology of international arbitration”, in *Arbitration International*, 2015, Oxford University Press, Vol. 31, pp. 1-17.
- Florian Grisel, “Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession”, in *Law and Society Review*, Vol. 51, N. 4, 2017, pp. 790-824.
- Luís Lima Pinheiro, *Arbitragem Transnacional. A Determinação do Estatuto da Arbitragem*, Coimbra, Almedina, 2005.
- Malcolm Langford, Michele Potestà, Gabrielle Kaufmann-Kohler, Daniel Behn, “Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions An Introduction”, in *Journal of World Investment & Trade*, Brill, Nijhoff, Vol. 21, Issues 2-3, June 2020, pp. 167-187.
- Philip Leboulanger, “Bibliographie - Dealing in Virtue, International Commercial Arbitration and the Construction of a Transnational Legal Order”, in *Revue de l'Arbitrage*, Paris, Comité Français de l'Arbitrage, Vol. 1997, Issue 2, 1997, pp. 318-321.
- Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” (Translation by Richard Terdiman), in *The Hastings Law Journal*, UC Hastings College of the Law, Vol. 38, July 1987, Introduction, pp. 805-853.
- Pierre Bourdieu, “Social Space and Symbolic Power”, in *Sociological Theory*, Spring, Vol. 7, No. 1, 1989.
- Pierre Bourdieu, *The Logic of Practice, Book 1 Critique of Theoretical Reason* (Translated by Richard Nice), Stanford University Press, 1990.
- Soraya Nour, “Os juristas e o direito em Bourdieu”, *Tempo Social, Revista de sociologia da USP*, Vol. 28, No. 1, 2016, pp. 157-178.
- Susan Block-Lieb, Terence C. Halliday, and Josh Pacewicz, “Who Governs? Delegations in Global Trade Lawmaking”, in *Regulation & Governance*, Fordham University School of Law, 7, 2013, pp. 279-298. Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/614 (last accessed on 7 February 2021).

- Yves Dezalay and Bryant G. Garth, *Dealing in Virtue. International Commercial Arbitration and The Construction of a Transnational Legal Order*, Chicago, Chicago Series in Law and Society, 1996.

Legal Instruments:

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
- UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments of 2006)
- Law no. 63/2011, of 14 December - Portuguese Arbitration Law)
- UNCITRAL Arbitration Rules (2013)
- UNCITRAL Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)
- UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

Other works:

- “A Guide to UNCITRAL. Basic facts about the United Nations Commission on International Trade Law”, United Nations Commission on International Commercial Law, Vienna, January 2013. Available at: <https://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> (last accessed 7 February 2021).
- “Commercial Arbitration”, Model Law, Arbitration, UNCITRAL, undated. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (last accessed 7 February 2021).
- “Foreign Arbitral Awards”, Conventions, Arbitration, UNCITRAL, undated. Available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (last accessed 7 February 2021).