A Tale of Three Cities

The Construction of International Commercial Arbitration

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1. Introduction

Contracting for profit typically asks that sophisticated institutions help merchants and entrepreneurs as they bargain, invest, and serve their obligations. Prime concerns include the processing of information, payments or dispute-resolution, which in principle should be provided in an altogether efficient, predictable and flexible manner. In practice however well-tested, ready-made institutions rarely emerge spontaneously or converge naturally towards some rational solution to the underlying problem at stake. Experimentation on market institutions is typically long, competing rules may coexist over time and cause uncertainty, or, for instance, an institution that emerged early on and was endowed with substantial legitimacy by its patrons may eventually prove inadequate, just because it belonged to a time past. Technological change or evolving market structures can debase old institutions and those who control them.¹

International commercial arbitration is no exception, but rather a case in point. To start with, it is an alternative to a default rule whereby, in case of trouble over the execution of a cross-border contract, the parties go to a public court and expect that cooperation between national jurisdictions will eventually solve the problem. Arbitration, which rests on private tribunals and allows for more substantive and procedural choice by the parties, is generally seen as an option that is closer to market needs, possibly more efficient, but sometimes less predictable than courts. In particular, the enforcement across borders of the awards rendered by arbiters is a usual source of concern.

In today’s global markets however both judges and arbiters are seen in great numbers, in many different places and fora – local, professional, national, multilateral, transnational, etc. (Keohane et al. 2000, Alter 2008, Halliday and Shaffer 2015). Observers also tend to assume, more often than not, that arbitration is in fact a daughter of globalization: early experiments may have been observed after the 1973 first Oil shock, but the real thing would be seen only after 1990. If the focus is rather in arbitration on investment, i.e. between private investors and public authorities, then the beginning of the 21st century would be an even more advisable starting point. This actually narrow timeframe thus tends to come with the perception that, in some way, arbitration was made available just when markets needed it. Rules, procedures, facilities, enforcement guarantees, intermediaries: the whole machinery apparently came in handy when globalization took off. Because it addresses a private demand arbitration would be uniquely endowed with a capacity to self-adjust to the demands of private businesses.

This naturalized and a-historical view of arbitration is of course wrong. This institution has a long and complex history which first tells that there was nothing inevitable in the ways it evolved, matured and succeeded. During the heydays of the First Global Era, between 1880 and 1914, arbitration was widely practiced on the large English commodity markets that structured international trade: it was in the hands of so-called Trade Associations which followed their own rules and precedents, and selected their own arbiters – most of the time, dominants market insiders. These private legal orders rested to a large extent on shear market power but they were also anchored onto English law and English courts, a link that was highly valued by these Associations, even though very few cases were actually moved to public tribunals each year.

Against this background, the Interwar period saw a lot of innovations and experimentations that foreshadow the present arbitration landscape, with its strong focus on advanced equipment goods, intellectual property or complex financial structures. A part of this

¹ I owe many thanks to Claire Lemercier, from Sciences-Po, with whom part of the archival research was made and who also contributed greatly to the early formulation of the propositions that are developed here.
innovative activity took place in London, at the London Court of Arbitration (LCA); but the most successful newcomers were the International Chamber of Commerce (ICC), whose Arbitration Court was established in Paris in 1923, and the American Arbitration Association (AAA), founded in New York in 1925.

The main storyline however is not one of «hegemonic succession» or, alternately, one of sclerotic, rent-seeking insiders being pushed around by new entrants. In fact, two very different models of arbitration were proposed in each of these two latter cities. In New York, the export-oriented business and the Bar tried early on to build a model based again on a local (American) judicial order, which foreigners would be invited or compelled to join. Like in England, significantly, the law of arbitration did not make a substantial difference between domestic and international cases. The ICC, on the other hand, was built from the onset on a multilateral format, and on that novel basis its Court developed over several decades a model of arbitration that would be exclusively international and increasingly extra-territorial. No case can be taken to this Court where the two parties stem from the same country, and the arbiters would always come from a third country. The common perception of international commercial arbitration as a recent phenomenon only reflects, in practice, the emergence and remarkable success of the ICC model, which key features have now been adopted by the large majority of arbitration organizations across the world, including in New York and London.

The present contribution explores this century-long experience and tries to account for these diverse routes to modern arbitration. In so doing, it fills a gap in the literature and builds on a large trail of un-explored archives and writings. Until now, the social scientific research on arbitration has been largely influenced by the Bourdieuan approach to global legal markets developed by Dezalay and Garth (1996, 2002). They primarily envisage this story as one of constructing legitimacy, this being the result of the accumulation of social and economic capital by the business lawyers who, in practice, dominate the field and draw from it important benefits, both material and symbolic. The institutional forms taken by arbitration result primarily from the competition between national legal elites that carry with them the legitimacy they acquired at home, in their interaction with the official judiciary, the big business or the legal academy.

There is little point in contesting that power relationships underpin institutions, or that there are diverse and conflicting national ways towards globalization. This chapter adds however two important dimensions to this overall story. First it gives more weight to its properly legal and institutional dimensions: inventing an extra-territorial model of arbitration was in no way a foretold story, or a self-evident answer to the new problems raised by international markets from the beginning of the twentieth century. Similarly, the perimeter of commercial arbitration was never a given: arbitration on investment has now developed into a distinct regime, though this was not always the case; there has also been several attempts since the early 20th century to deal with sovereign debt restructuring through arbitration, but they have all failed miserably. More generally, there is no prima facie reason why the long institutional genealogy of arbitration over the last hundred years responded all along to the same social conditioning as the one we see at work in the mature field, since the 1970s or during the 2000s’. We shall see indeed that the «grand old men» who Dezalay and Garth identify as the dominant players in the field, especially around the ICC, have in fact taken over, more or less opportunistically, from a first generation of innovators: these were the ones who actually developed by way of experimentation the new legal technology of international arbitration, though with limited social and professional capital. Innovation and change came therefore from the margins of existing institutions and “fields”, and success rested eventually on a novel approach to cross-jurisdictional borders that solved problems of governance that were inherent to the long-run evolution of the international division of labor.
The other dimension that is added is the relationship to national States and governments, a point that both the sociological and the legal literature tend to underestimate. Indeed, in order to make international arbitration work, two complex transactions had to be made with the political and judicial elites, at the domestic level. First, private firms had to be allowed to opt out from official courts and to move their cases to given, more or less identified fora, with more or less precise rules and guarantees of judicial fairness. In France and in the United States, where a lot of the action would later take place, this was only obtained during the 1920s, with substantial expense of political capital. Second, for arbitration to work, states also had to agree among themselves on a set of coordinating rules that would ensure easy enforcement of arbitration awards across borders. This was the object of three international texts adopted successively by the League of Nations (1923, 1927) and by the United Nations (1958). Each of them saw long negotiations which conclusions looked more like a list of bargains and trade-offs than as a coherent and transparent rule.

The rest of paper unfolds in three main parts. The coming one focuses on the pre-1914, classic English model of arbitration and the causes of its relative decline. The following, third section explores how alternate models were developed in London and New York that maintained strong roots in the local (English and American) legal orders, hence as well in the respective legal profession, its inherited structure and its distribution of social legitimacy. The fourth and last section moves to the ICC model and underlines how its success emerged from its specific (private) multilateral structure, and from a (legal) technological innovation that was developed around the ICC Court by a small group of institutional entrepreneurs with limited professional and social capital.

2. The Nineteenth Century, English Model of Arbitration

2A- The English Trade Associations

Before 1914, the key reference in matter of arbitration was the English model, which in turn was strongly rooted in the judicial history of this country. Rather than taking the road of a specialized commercial jurisdiction, as in many Continental European countries, the institutional architecture that had emerged in the later decade of the 19th century was founded on the higher London courts on and the vertically-integrated, private Trade Association that actually governed exchanges. A precursor was the Bradford Chamber of Commerce (for wool) or the Liverpool Cotton Association, but the London Corn Trade Association (LCTA), founded in 1878, was arguably the benchmark model that was emulated by other professions in the following years and decades. The success of this model of arbitration was indeed remarkable, whether one looks at their unique international reach, low operating costs or their large recognition within the broader judicial establishment: even though Trade Association had little use of lawyers, their practice was recognized as highly professional and efficient. At least till the 1950s their experience would back up the recurring discourse about the unique experience and towering position of English arbitration in general. A number of further, structural features explain this success and also underline their contingent character.

To start with, the 1889 Arbitration Act made the (ex ante) arbitration clause entirely legal, hence enforceable: once two parties had entered such commitment, written in broad and unspecific terms, courts would decline to consider a dispute arising from the underlying

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2 See Macassey (1939) for a long term historical perspective in international commercial arbitration, with an English perspective.

3 On Trade Associations, see Ellison (1886), Chattaway (1907), Steever (1923), Barty-King (1978). The model of Trade Associations can be compared with that developed by the New York diamonds dealers, as analyzed by Bernstein (1992) or, even more closely, with the Tokyo Tuna courts, which also keep a formal, legal relationship to the official courts (Feldman 2006).

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contract and would refer it to arbiters. This gave to the whole practice of arbitration a sound basis and allowed to control opportunistic strategies by one the parties that anticipated that would loose the case.

Second, the remarkably light and efficient market governance of the Trade Associations was based on standardized contracts: if they wanted to trade through English markets, merchants from across the world had to rely upon these pre-printed forms that stated a number of key market rules and the successive steps in the execution of each trade. The parties then completed the contract with the specifics of their transaction (type of product, date of delivery, price, etc). These standardized contracts were continuously adjusted to market conditions by special committees set up by the respective associations. The London Corn Trade Association for instance had special committees for trade with Argentinian, Black Sea wheat or Mandchurian grains. In 1896 it had a total of fifty-one standard contracts, and more than sixty in the 1920s.

Critically all standardized contracts included a similar key clause: in case of dispute over the execution, it committed the signatories to arbitration by the respective Trade association. Hence dispute resolution took place in London, it was in the hand of (English) markets insiders and it was conducted under English law. In the rare cases where a point of law would be raised by a given case, it would be submitted to one of the London high courts, which offered therefore a guarantee of last resort regarding the legal and judicial integrity of the whole process. This came (again) at a low cost, because arbitration most often boiled down to issues of technical expertise like, say, the quality of grains, the degree of moisture, the consequences of a delay in delivery, etc. Hence cases were dispatched rapidly, the parties did not need to be present, neither did they rely upon lawyers or counsels, and they usually executed the award immediately. In practice, the LCTA delivered several hundred of awards each year, out of which less than five would typically be moved to a court of justice.

Lastly, the success of the Trade Associations as global regulators also rested on the very structure of international trade: international commerce was centered on Britain, most often London or Liverpool. Banks, trading houses, insurance services or shipping companies added up to a unique business environment with no serious competitors. Hence together with the vertical integration of the Association, a broader dimension of market power was key to this regulation of global markets: the enforcement of market discipline in general as of of awards in particular rested by and large on a unique capacity of private regulators threaten market exclusion or black-listing across the British market. This explains in a large measure why asking for the support of official courts in order to obtain the actual enforcement of arbitration awards was quite rare. Similarly, Trade associations had very few interactions with foreign courts and did not wish to see the extension of arbitration abroad. Problems of judicial coordination with Russian, Argentine or French courts were not a defining issue of

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4 See Rakoff (1983) for a discussion of standardized contracts. London Corn Trade Association (1947) for precise examples.

5 When consulted in 1954 on the first draft of the New York Convention (proposed by the ICC), six commodities associations jointly signed a letter emphasizing that, if English law was not to be followed and English courts were to be ousted, then: “the greatest uncertainty would prevail as to what law was to be applied in determining the dispute”, thus the trust of the parties in arbitration would be lost. National Archives, BT 11/5348, document 14.

6 Records of arbitration proceedings by the LCTA and a number of other similar organizations are kept at the Metropolitan Archives, in London.

7 For example, when asked about a draft of the 1958 New York Convention, the British Association of Commodity Associations wrote: “In the commodity trades, we certainly do not wish to encourage foreign arbitration where, apart from the possibility of unsatisfactory arbitration procedure, there is a lack of expertise.” National Archives, BT 11/5348, document 87 (1955).
market governance. On the other hand, Schwob (1928) mentions that the LCTA contracts were regularly mentioned in French court judgments.

If we summarize, this English model of arbitration-based governance thus rested on three main characteristics: disputes were about points of facts rather than points of law; awards were typically self-enforced; and the overall framework presented a clear hegemonic dimension, because international merchants and businesses had no alternative to this properly English market ecology. A significant corollary is that both the arbitration law and the Trade associations made no formal distinction between domestic and foreign cases: they were thus local and global at the same time, which is another way of saying that this architecture was imperial rather than international.

2B- Early 20th Century Challenges to the Old English Model of Arbitration

Against this background, modern trade arbitration as we know it emerged from two long-term trends that originated in the last decades before World War I. First, traders from some European countries (Germany, France, Belgium) became increasingly reluctant to joining the London institutions that, they thought, tended indeed to discriminate them. By the early 20th century, alternative market platforms, with their own arbitration facility, were thus established in port cities like Hamburg, Bremen, Antwerp, Le Havre or Marseille. These markets never reached a size comparable to that of their English competitors however: in fact, they were port terminals, not market hubs. But they strengthened the case for a reform of arbitration law in their respective countries. Louis Dreyfus, for instance, a prominent French wheat merchant, with a large operation in London, was behind the first parliamentary proposal in this direction, in 1908. Other merchants tested the English model by refusing to abide by awards, especially in Russia before 1914: enforcement against foreign parties then began to be perceived in England as a potential source of problem. After World War I, the resistance of American business community to English institutions and practices became even more vocal: at a time when the US was emerging as the dominant economic powerhouse, trading and manufacturing interests clearly militated for specifically US rules. This applied of course to arbitration, of which both the US government (for inter-state disputes) and the Chambers of Commerce had been early defenders (Koskenniemi 2007, Petersson 2013).

The second long-term trend beyond the emergence of new arbitration practices reflected the evolution of trade flow themselves: as the relative share of commodities declined against manufacturing products and equipment goods, later followed by international services, the model of the vertically-integrated Trade associations was exposed to increasing pressure. Rather than being about facts (like the quality of grains), disputes would increasingly be about after-sale services, spare parts, intellectual property rights, agency rights, sub-contracting, revenue-sharing clauses and, not least, financial contracting. And as contracts grew more complex than the typical pre-printed forms of the Trade Associations, interpreting them asked for more legal competence. Moreover, the very same trends also made the enforcement of awards potentially more problematic, as sheer market power, leveraged by private regulators, would not be applied as easily as in the classic, English model. Lastly, the expansion of

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8 This point was indeed of the main policy conclusions reached by a high-level working group convened by the Lord’s Chancellor in late 1918 and early 1919, at the time when all government agencies, in London as elsewhere, were busy working on the future, post-war international architecture. See Report to the Lord’s Chancellor on Foreign Judgments (1919).

9 see e.g. Pozzi (1921), and Ishikazi (1928) for a remarkable study of the international silk market and the trade regulation of the Lyon merchants.

10 For attempts by the LCTA to directly negotiate on enforcement with the Russian government, see LMA, series CLC/B/103/MS23172 (executive committee discussions), 1907-11 and 1914-5.
national regulatory states also made country borders more complex, hence more difficult to negotiate, other things equal: if products and processes are increasingly subjected to national standards and norms, then the legal and regulatory borders between national markets will become more difficult to negotiate, hence more difficult to negotiate, other things equal: if products and processes are increasingly subjected to national standards and norms, then the legal and regulatory borders between national markets will become more difficult to negotiate, hence more difficult to negotiate. Judges and arbiters alike would thus have to look increasingly at the various national substantive and procedural laws that may apply to each dispute: how to “prove” foreign law may thus become an issue (Nussbaum 1941), even before issues of execution and how to mobilize existing bilateral treaties come to the fore (Lorenzen 1935, Yntema 1935, Nussbaum 1942). In other words, problems of Conflict of laws and Comparative law, which were rather second order problems in the legal regulation of international markets under the English regime would rapidly come to the fore.

The overall effect of these evolutions was to increase the costs of international contracting as well as at the demand by merchants, manufacturers and bankers for advanced legal expertise and, eventually, for the benevolent willingness of official jurisdictions to help them out. Whereas in the former English model, problems of national jurisdiction were essentially circumvented, thanks to the global reliance on English law and English legal institutions, the model of arbitration that would come to dominate in the later half of the twentieth century emerged from a long and protracted discussion with national judiciaries and lawmakers of all trading countries. At the core of this secular transition lies therefore this defining legal and political challenge: whereas markets during the First global era had been governed by rules that were de facto international (and de jure English), they gradually moved towards rules that would be de jure international. The many problems raised by this new legal governance of markets and jurisdictional borders thus had to be identified, addressed and settled, explicitly and formally. New legal rules and practice, indeed a new contractual knowledge, would have to be invented, tested, agreed upon and shared among all the parties to international markets – merchants and bankers, lawyers, trade officials, judges, international organizations. Not least, states would have to compromise on their own judicial order, hence on a core component of what they perceived as their own sovereignty.

With hindsight, it should be no surprise that this experimentation was long, uncertain and contested. There was in fact no precedent, no default option on which to lean. The long genealogy of international commercial arbitration over the twentieth century reflects in practice the confused perception that a novel model of international contracting had to be invented. At the turn of the twentieth century, the very broad and ideological wording that initially imbued the discourse on international arbitration reflects this epistemic indeterminacy. The fact that the very same term was applied altogether to territorial disputes, sovereign debt issues or day-to-day commerce illustrates the point.

2C- An international public court for private disputes? The Hague model.

Since the French-Prussian war of 1870, and especially from the 1880s’ onward, interstate arbitration had been defended in general by European and American elites as a modern, progressive and peaceful instrument of international governance: one that would impose at last a sharp brake with the old logic of power relationships and imperial dominance (David Kennedy 1996, Duncan Kennedy 2006, Koskenniemi 2001 and 2005, Mazower 2012). Before 1914 the main achievement of this broad movement towards arbitration was The Hague Peace Conferences of 1899 and 1907, the first of which saw the creation of the Permanent Court of Arbitration (Koskenniemi 2007, Grewe 2000). Although only states meet in this Court, many PCA awards issued during the following years had in fact a civil or commercial dimension, one of the best-known being the dispute between private investors and Venezuela over the
later country sovereign debt (Mallarmé, 1906). Moreover, the statutes of The Hague Court left open the possibility of creating specialized chambers dealing with civil and commercial disputes. Some participants to the (parallel) Hague conferences on International Private Law saw here the possibility for developing an international jurisdiction that would have directly supported trade across national jurisdictions. The Second international Conference on the unification of the law on bills of exchange (1912) officially called for such an extension. The German representative even went one step further by suggesting that an international, de facto supra-national jurisdiction, could later become a specific source of law, that would guarantee coordination or unification across borders. In the years immediately before World War I, a small group of mostly German legal scholars published a remarkable series of essays that developed further the idea that an international Supreme Court for commercial cases could eventually become the touchstone of an international regime founded on the voluntary adhesion of states to arbitration.

There is little doubt that the founders of international commercial arbitration drew extensively on this broad and ideological vein, in order to legitimize and publicize their project. Even the powerful utopian or messianic dimension that often imbued the public discourse on arbitration founds its way into the International Congress of Chambers of Commerce and later in the language of the American Arbitration Association. In this sense, international commercial arbitration as we know it today may well be seen as the main heir to this global favor for arbitration that marked the decades immediately before and after World War I.

However their ideological inclination or opportunism, private interests did not adhere very strongly to these proposals. We find for instance at the 1912 Congress of Chambers of Commerce a strongly worded declaration in favor of arbitration in general that includes a call to extend it to commercial affairs. But the machinery of The Hague court, and the need to first obtain the support of one’s own government before reaching it, were quite at odds with the bottom-up, fast-track approaches that private interests were primarily looking for. These pro-arbitration militants thus remained strongly wedded to a private sector perspective: following the classic trope, commerce was to be a force for peace and prosperity, though it had to be allowed to self-organize. For some, private arbitration and the new coalition of “Merchants of Peace” would bring about international peace rather in spite of governments than with them.

3. Two Neo-Imperial Projects: London and New York

3A- The London Court of Arbitration (1892)

During same pre-1914 years, and with no documented relationship with the previous debates, the first practical response to the new challenges of the 20th century emerged in Britain, under the form of the London Chamber of Arbitration. This new facility was

11 See Mallarmé (1906) for a discussion of the Venezuelan arbitration. Garrié (1892) discusses the potential for arbitration to offer peaceful settlement of sovereign debt disputes; also Freund (1910).
12 Intellectual property emerged as a prominent candidate, following i.a. the 1900 Paris Treaty and a discussion at the 1904 meeting of the Institut de Droit International, in Cambridge. Wehberg (1911), Röthlisberger (1893).
13 See Actes, I, pp. 179-181 ; quoted in Mutzner 1914).
14 See Conférence internationale sur le droit des lettres de change. La Haye, 1912. Declaration by the German delegate (in French and German).
15 See Zorn (1910) Wehberg (1911), Klein (1914), Mutzner (1914). The German interest in this court-driven project of legal unification may be seen as a reflection of their own experience with legal and jurisdictional unification, from the time of the Zollverein till the establishment of the new imperial institutions, in the 1870s.
16 Call to reinvest the Hague Court, as a venue for commercial arbitration would occasionally pop up in the later decades, as in Kellor (1937); see Hurst (1925) and Sartini van den Kerckhove (1935) for a calls calls for some kind of commercial appellate court at the international level.
established jointly in 1892 by the London Chamber of Commerce and the Corporation of London (municipal authority) (Musgrave 1914, Lemercier 2012). Already by 1895 however, the Court acknowledged disappointing results and organised a series of hearings with market insiders, lawyers, arbitrators, etc (London Chamber of Arbitration, 1895). The conclusion that came out was that the services that it offered could just not compete with the rapid-pace, on-site, decade-old practice of Trade associations. On the other hand, if the LCA wanted to address other classes of disputes and firms, then it had to accept the conditions of the attorneys - primarily their monetary demands, by the way. These conclusions largely shaped the 1906 reform of the LCA (which then became a “court”) after which it found for itself a niche that actually anticipated on modern arbitration: the legal dimension of cases was more substantial than in the Trade association, hence the lawyers had a larger place; self-enforcement by way of market power and vertical integration was much less pronounced. Also, foreigners became a key clientele: from 1906 and up till the Great Depression, a great number of Belgians, Italians, French or Swedes firms arbitrated one against the other in London; before 1914, we even see in the LCA’s registers cases of Germans firms arbitrating between themselves (London Court of Arbitration, 1893-1953).

Yet, this early success failed to be confirmed, for reasons that are not entirely clear. First, the LCA lost its German clientele after World War I and, with the collapse of international markets after 1930, it withdrew within the British Empire. Still, this later trend did only reflect changing patterns of trade flows: already in 1927 the LCA had sealed an alliance with the Imperial Congress of the Chambers of Commerce, the consequence of which was probably to amplify its partial withdrawal from international commerce [check, when? Ref?]. Significantly, this choice also presented a clear domestic and sociological dimension: whatever its relative successes, and despite the fact it was in the hands of lawyers, the LCA remained throughout on the margins of the judicial establishment, hence with limited legitimacy. Contrary to the high legitimacy acquired by the older Trade Associations, the LCA was never recognised by the higher London courts and the top tier of the legal profession as a creditable, self-standing jurisdiction so that it remained dependent upon the sponsorship of the London Chamber of Commerce. In 1926 for instance, an important government committee led by Judge MacKinnon was set up at the Chancellor’s Offices in order to draft a new arbitration law, that would be actually adopted the year after. The committee first entirely ignored the LCA, then invited it, but clearly resisted granting it full legitimacy on the subject17; it even asked that the LCA did not send an attorney as a representative, because, in a convoluted way, that would have made too many of them on the committee.18

Another dimension in the eventual failure of the LCA has properly legal origin. As already said, since the adoption of the 1889 Arbitration Act arbiters in England had to closely follow English law and refer to courts any point of law that may appear unclear to them. Arbiters were thus envisaged as substitute to judges, though only from a procedural perspective: arbitration cases moved faster and were in the hands trade specialists, but the link to the official courts remained a very close one. From the 1920s onwards, a key point of contention at the international level, especially vis-à-vis the emerging practice of the International Chamber of Commerce, in Paris, would be the extent to which arbiters might interpret the law, diverge from it, or even follow the (substantive) law of another country. The

17 « There is a body that calls itself ‘The London Court of Arbitration’ which is conducted under the management of the Corporation of the City of London and the London Chamber of Commerce. You might possibly think it will be usefull to ascertain whether the Chairman or some leading member of that body should be considered. » National Archives, LCO/1200
18 For the correspondence between the LCA and the McKinnon committee, see especially National Archives, LCO/1200.
leeway that might thus be given or refused to the parties and their arbiters became very soon a source of tension, and later one of open conflict. Whereas this room for manoeuvre was seen at the ICC (as in today’s international practice) as a guarantee of adaptability and pragmatism, the English judicial establishment just saw here a license for arbitrariness and spoliation. Transparent prejudices, primarily vis-à-vis the Civil law tradition were often voiced, so that moving one step in the direction of these new, mostly Continental practices was seen as largely illegitimate. Said differently, the LCA found itself in the bizarre position of being a rather marginal institution within the English judicial landscape, while being anchored at the same time onto a model of arbitration that remained entirely rooted in local law, though also in the sociology of the English judicial profession and judiciary.

The overall result is that beyond the well-established practice of the Trade Associations, the development of modern arbitration in Britain would long remain impaired by its lack of legal flexibility as well as by the delays and costs incurred by the close relationships to the London courts. By the 1950s, for sure, the LCA was essentially a prostrated institution with an almost empty docket and no propensity whatsoever to respond to the challenges raised by the new international practice that was fast developing in Paris and New York. It was only in the late 1970s that the close oversight by official English courts was abandoned and that international commercial arbitration re-emerged in London; under the new name of the London Court of International Arbitration the LCA would then be entirely reformed and re-launched (1981, 1985).

3B- The Early American Experience with International Arbitration

With hindsight, therefore, the emergence and expansion of international commercial arbitration in New York should have been a foretold story, one indeed of “hegemonic succession”. Very soon when the industrial, financial and commercial centre of the world economy started to shift westward, private American interests showed increasing resistance to English practices and started to militate for a new and more progressive model of international market governance. The imperial dimension was however quite visible: in the future, it would be up to the Americans to organise and regulate markets, for themselves as for the rest of the world; and this would apply to capital markets, production standards, or the extra-territorial reach of domestic courts or arbitration laws [Ref, Ref]. While foreigners may have reservations, market power would eventually compel them to opt in.

This inclination was illustrated, in matter of arbitration, by the parallel development of both the domestic and the international side. Arbitration had of course been well practiced since colonial times (Macassey 1939, Jones 1956); but in spite of a number of attempts at legal reforms since the 1870s (Lemercier 2012), arbitration had developed at a rather far distance from the official judiciary, without the institutional clout and the social capital that the English Trade Associations carried. Hence, rather than having to take on established institutions and to develop its own niche, as the LCA in London, arbitration in the United States was fought for as a novel, broad-based, generic model of dispute resolution that was immediately envisioned as suitable to the very local, the national, and the international markets. The first militants of arbitration in fact applied the same generic (and often utopic) discourse to all contexts and brought forwards the same expected benefits: rapid-pace, competent, low-cost dispute resolution.

On the domestic side, the first point on the agenda was to obtain the legalization of the arbitration clause. This was achieved primarily by the two Founding Father of modern American arbitration: Charles Bernheimer (1864-1944), the long-time head of the arbitration

19 On the long dispute around the Amiable Compositeur, see for instance Cohn (1941) and Marx (1947).
committee of the New York Chamber of Commerce, and Julius Cohen (1873-1950), the Chamber’s legal counsel. They first fought for the arbitration clause within the Chamber, then at the New York Bar, before lobbying successfully for a pro-arbitration New York statute that was eventually adopted in 1920; from there on, they moved to Washington and played a large role in the adoption in 1925 of a federal statute very similar to the New York one. The “big business” dimension of their project is made clear by the list of 145 initial subscribers to the Arbitration Education Fund created by Bernheimer in 1924: twenty one were engaged in foreign trade, and forty one were bankers, among which JP Morgan, Arthur et Harry Sachs (from Goldman Sachs), Paul and Felix Warburg, Kuhn, Loeb and Co. Symmetrically, the main opposition to the new legislation clearly came from the other side of the Main Street/Wall Street divide, namely the rural, populist, mid-West states. A similar divide would most often appear, other things equal, in the other countries where arbitration was discussed in parliaments, though the strength of the initial support by the big business is probably unique to the US, or the New York environment.

The American Arbitration Association (AAA) was created in 1925, as an alliance of both Bernheimer’s foundation and a similar association supported by the New York Bar (Kellor 1948). From there on, the AAA rapidly became the dominant American institution and developed its activities across the country, including at the small-town level and in matters like industrial relationships, consumption or movie distribution. At least as important, arbitration in the US moved quite rapidly from disputes over the quality of products to disputes with a more complex, legal dimension. By the 1930s, the AAA literally paraded its capacity to take on problems of intellectual property, or mergers and acquisitions, and saw as a signal of success the fact that lawyers were taking an increasing role, both in its arbitration tribunals and in its own structure of governance.

On the international side, the push for arbitration first targeted the Western Hemisphere: closely after the First Pan-American Financial Conference, in 1915, the US Chamber of Commerce signed a cooperation agreement with the Buenos Aires Bolsa de Comercio, which then served as a template for several others accords in Latin America, in Sao Paulo, Santiago de Chile or Bogota (Proceedings, 1915). What marks out this early Pan-American model is its being based on formal agreements with sister organisations, in clear contrast with the unilateral British approach, although there was no ambiguity about who was in the driving seat: this network of bilateral accords was centred on the US and the whole project clearly benefited from the active support of the US government. This foray did not prove however an unmitigated success, far from it: arbitration laws in the respective countries were often inconsistent and the Latin American partners seem not to have been always up to the mark. The choice of arbiters for instance seems to have proved occasionally weak – hence a clear problem of trust between the parties. Apparently, the partners in this network did not share the same understanding of then overall endeavour, possibly as well the same knowledge of how international contracting should be ruled.

This experience became however a key reference after 1918, as American interests envisaged how to expand their cooperative network towards Europe: the US Chambers of Commerce was clearly the main force beyond the creation of both the International Chamber of Commerce (1920), and its ICC Arbitration court (1923). Yet, a bit like in Latin America, success was not forthcoming, in spite of the strong input of American leadership, legal expertise and superior social capital. American publications that had often been quite informative in the early years about debates in Paris, soon ignored them. In the late 1930s, the

20 Columbia University Libraries/ Rare books & Manuscripts. Box 326, Folder 1, Section V3: Bernheimer Arbitration Education Fund, 1924-1957.
AAA perceived in fact the ICC court as a foreign and rather distant organization, not as an American creature on the Old Continent.

The whole theme of international arbitration surfaced again after 1942 in the debates over the post-war international order and it took again a clear, American and imperial accent. In the May 1945 issue of the Arbitration Magazine, edited by the AAA, one reads for instance that: «The way for Americans to plan for arbitration at home is to use an appropriate arbitration clause in all their contracts, whether with other nationals in this country or with foreign traders overseas. In insisting upon security for himself in the settlement of commercial controversy, the American at the same time offers security to foreign parties to his contracts; for this security is based upon American law and established arbitration procedure, with its fine facilities and carefully preserved traditions.” (Arbitration Magazine, 1945). Shortly after 1945, this project came however to an unexpected standstill. First, the link that had been celebrated during the war with British institutions went nowhere: from 1947, experts from the AAA start criticizing the close control of arbitration by official English courts, hence the costs and delays which this rule was causing. Second, constraints within the US legal order also seem to have made things more difficult than anticipated: following US constitutional law, arbitration is a matter that partly belongs to state legislatures so that any legislative reform or treaty ratification asks considerable lobbying activity across the country. This became visible in the run-up till the landmark 1958 UN Conference on Arbitration: even though the AAA had been most active in lobbying the UN, it could not extract US adhesion to the ensuing Convention: ratification would have to wait until 1970.

Just like in the case of the London Court of Arbitration, a close relationship to the domestic legal order was initially seen as a source of predictability and indeed legitimacy; it was expected that the new institution would be able to lean on the existing domestic institutions and its guarantees and so propose to international businesses an effective and highly commendable arbitration machinery. The corollary of this strategy, however, was an arbitration that was both local and international at the same time. The experience of both the LCA and the AAA tells however that this low-cost option, based on a large inflow of domestic legal know-how, social legitimacy and geopolitical power did not provide an efficient and legitimate solution to the problem at stake. The invention and construction of a properly international practice, based on a principle of mutual recognition between national judicial orders, would come through an entirely different route; and those who traveled that route would not come from the core of national legal institutions, neither would they benefit before decades from the large support of international businesses, hence from the legitimacy that flows with it.

4. The Case for an international judicial order

4A- The International Chamber of Commerce and its Arbitration Court.

When compared to the old English imperial order and to the network-based strategy developed by the Americans, the emergence in Paris of a largely extra-territorial private arbitration court was not a banal, I-told-you-so response to the new problems of market governance that emerged from the evolving division of international labour. The fact that France is a Civil law country and that it was not a prime economic force in the 1920s underlines the point: no perceived or objective comparative advantage, whether legal, economic or political can explain why the new court was located in Paris in 1923. If the American did not want to establish the new International Chamber in London, and if Berlin was clearly not an option, then The Hague, Brussels or Geneva could have been ready options as well.
The creation of a permanent, collective organization had been however regularly discussed since the early twentieth century at the international congresses of the Chambers of Commerce: the phrase “Chambre de Commerce Internationale” had been used as early as 1874. At the same time, some of these meetings had identified cross-border arbitration as an important aim, worth lobbying for. The point was first mentioned in 1904, and a solemn declaration was adopted at the Paris Congress of June 1914, six weeks before the outbreak of war. As soon as October 1919, the US Chamber of Commerce convened its counterpart organizations from four Allied countries to a meeting in Atlantic City, where the creation of the International Chamber of Commerce was decided. Its location in Paris was agreed upon at the following, June 1920 congress, and the creation of an Arbitration Court, within the premise of the ICC, was decided in 1921. It was officially inaugurated in January 1923, with the President of the Republic and the diplomatic corps attending.

The early developments of both the ICC and its Court were very much marked by the leadership of American private interests and by the close relationship, established in the last phase of the war, between the respective heads of French and US Departments of Commerce, Etienne Clémentel (1864-1936) and Herbert Hoover (1874-1964). They belonged therefore to the network of high officials who had experimented during the war new methods of international coordination among Allied powers, many of whom would then be found at the League of Nations. The militants of commercial arbitration in the United States, which had just reached their first objective of a more supportive statutory framework in New York, were also very present in those years. The leader of this group, Charles Bernheimer, kept a close eye on the Paris experiment and even applied for membership to the ICC on a personal basis. He would be a key voice in transmitting American wishes, or suggestions, to the Paris team, which in turn proved quite open to such guidance when working on the statutes and first rules of the new court. Owen Young, then Chairman GE Electrics and RCA, and a blue-blood figure of the US establishment, intervened also in this process (Young 1921, Maier 1984). He would become its first President of the Court, shortly after Clémentel had become the first chairman of the ICC, a position that allowed him to choose the first employees of the Arbitration Court. Hence the American Arbitration Association and the ICC Arbitration Court are both children of the same American private interests as of their project to build a new, post-British governance of international markets.

Quite soon, however, this transatlantic network of notables, started to unravel. The problem is not just that Young shortly moved to the more challenging task of restructuring the German reparations debts, with the Dawes Plan (1924) and the Young Plan (1930). Neither has this turn much to do with the semi-retirement of Charles Bernheimer after the creation of the AAA, in 1925, or the nomination of Clémentel as Ministry of Finance, in 1924. More generally, US advocates of arbitration gradually lost interest in what was happening in Paris, a point that is well reflected in the relative withdrawal of American representatives from the day-to-day management of the Court. And indeed, from a statistical perspective at least, the success of the ICC Court in establishing itself as a well-recognized platform was at best moot. The total number of cases submitted remained small throughout the Interwar period: between January 1923 and October 1925, only hundred cases landed on its docket, mostly of limited commercial size – think about wedding gowns and bicycles rather than to large capital equipment or machine-tools. Moreover, the interest of American firms on this new facility

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21 Arthur Salter, who would head the League Economic and Financial Organisation is a prime example: he would guide the negotiations leading to the two League accords on arbitration, in 1923 and 1927; his alter ego, during the war, Jean Monnet would also take a prominent position at the League, between 1919 and 1923. On Clémentel, see Druelle-Korn (2004).
proved extremely limited: only eight American parties can be found in the hundred first cases, against only 46 French one, for instance.\textsuperscript{22}

In other words, it was not enough for this fledgling court to be established in, and supported by the first international private lobby, the ICC, with its powerful network of national chambers and its great patrons. Even though the ICC and the Court were supported, directly or not, by powerful US groups like General Electrics, or by dominant banks, like JP Morgan, which were all thoroughly engaged in post-war European affairs, this was just not enough to trigger a substantial flow of cases by American forms. Whereas in the early 1920s it could be seen as an American project in Europe with junior French participation, by the 1930s, it was perceived as essentially a foreign institution catering to European continental needs, following mostly civil law principles. During the war, when the ICC and its court were relocated in Stockholm (Jarvin, 2011), it almost disappeared from the radar: at that time the AAA looked towards the British and the Soviet arbitration institution as its key partners for the post-war years.

This broad account begs the question of whether anything relevant for the future of international arbitration ever happened during the interwar, in the few offices and meeting rooms where the Court worked and met. Was this an entirely futile endeavor? A bit like the League of Nations, did this Parisian experiment only leave to the next generation a list of all the errors that should be avoided at any costs?

\textit{4B. The benefits of experimentation}

Its low-key experience during the Interwar years allowed in fact the ICC Court to test, and develop and adjust its rules and procedure, through hundreds of cases and countless internal meetings confronting the views of its various national committees as well as those of professional lawyers, businessmen and sometimes even law professors. On that basis, the ICC Court built a novel approach to international arbitration, based on its own multilateral (private) structure, the full recognition that arbitration is about dispute resolution across jurisdictional borders, and from there the slow development of an alternate, extra-territorial (private) jurisdiction that would slowly reduce the implied costs and uncertainty of these border effects. In spite of its being established in a Civil law country and its catering initially to smallish Continental firms, the new legal technology of the ICC would not only be eventually adopted by a great number of international businesses; it de facto structured the social and institutional space within which, from the 1960s onward, different legal traditions, national professions and arbitration facilities would compete one against the other and share the symbolic and financial profits that the success of arbitration would soon entail. Three elements stand out in the early, foundational experience of the ICC practice.

First the ICC targeted from the onset international disputes only: as said, only case opposing firms from different countries were accepted. Against the London and the New York models, this new practice of cross-border dispute resolution was largely insulated from domestic concerns, whether of a substantive, procedural or of a more broadly political dimension. This certainly reflected the ICC own organizational structure: it was no base to enter and try to realign the well-established relations between French businesses and their old, largely self-governed commercial courts. Moreover, by the turn of the twentieth century, the division between domestic and international cases was already well established in the French arbitration law, which the ICC actually had to follow. Because the judiciary had long resisted

\textsuperscript{22} ICC Archives, report by Edouard Dolléans to the Comité d’études de l’arbitrage, 29-30 October 1925. Only four of these 100 cases led to an award being issued. In 45 cases, the defendant could not be contacted or refused arbitration (at that time, the compromissory clause still did not exist in many countries).
the development of a fully independent arbitration practice, a separate legal regime was gradually developed by the courts for cross-border cases only, so as not to handicap French exporters and importers [Ref]. During the 1930s and much more clearly after 1945, this two-track approach provided the basis for the development of a most supportive body of case law that in fact would be (and still is) closely tailored to the needs of ICC practice. The close relations between its Arbitration court, the Cour d’Appel de Paris and the Cour de Cassation is actually a key feature of this story: one may actually speak here of a long-term co-evolution of the ICC arbitration technology and the French case law, though without this ever affecting the internal judicial order (Refort 1939, Domke 1943, Carbonneau 1980 and 1984). Extranationality is rooted here, just as the imperial approach followed in England, and to a lower extent in the United States, was also rooted in the respective, domestic legal order.

The second defining element in this experience follows from here: once domestic and international cases have different legal regimes, it becomes much less problematic in the later case to give a much larger franchise to the parties, the arbiters and the arbitration fora altogether. This intuition was reflected early on in the debate about the “amiable compositeur”: a traditional form of arbitration in French law that the ICC largely adopted, which gives to the arbiters substantial room to diverge from the existing substantive law and, possibly, to take argument from accepted usages or from equity principles. This distance vis-à-vis the domestic legal order, in fact a first step towards relative extra-territoriality, was of course anathema in England, where any new point of law that arose from a given case had to be submitted to a judge. Later, the parties would also be allowed to choose the (procedural) arbitration law and the (substantive) contract law that fitted best their interest – again, an option that was entirely alien to the English and American approaches. In the 1920, when the ICC Court was launched, the common rule was that an arbitration award had to follow the law of the country where the proceedings took place, or that of the country where the arbiter actually wrote the award.

A third comparative advantage was the very structure of the Arbitration Court, which was organized along the multilateral principles of the ICC itself. The Court per se was made of a college of legal experts chosen by the national chapters of the ICC. When a case was submitted, the Court would first choose a third country which domestic national Chamber would select an arbiter with the required competence; he would then manage the proceedings, following the procedural rules of the ICC and with the organizational support of the Court. One the award had been written, it was however reviewed and possibly revised by the Court. The point was rarely to change the substance of the decision, but rather to adjust its legal form so as to maximize the chance that, in case of need, enforcement would be obtained with minimal resistance (typically in the country of party that lost the case). Early on (and still today), this gave to the ICC awards a label of judicial soundness, predictability and institutional legitimacy.

Early on this multilateral, collegial expert body started to operate as a kind of clearing house, or a brokerage, and on that basis it developed a specific know-how which would be socially sanctioned only decades later, and which very object was to navigate more safely and at lower costs the rough waters of contractual exchange across jurisdictional boundaries.  

This transnational, peer-based college that was the Court thus became the place where the

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23 This operating mode anticipated quite neatly on what Ginsburg (2003) calls “the culture of arbitration”; see Waters (1989) for the sociology of college. The more legal economic approach developed by Gilson (1984), who envisages lawyers as « transaction costs engineers », can also be easily applied to the emerging profession of arbitration lawyers. Clavin and Wessels (2005) on the horizontal approach to expertise work at the Economic and Financial Section of the League, which actually fitted directly with that developed at the same time, at the ICC.
many underlying procedural and substantive problems were identified and where answers were debated, settled and stored. There is no question that the ICC Court benefited at this point from the network of national Chambers of Commerce, both as a conduit to national sources of expertise and as a source of authority. The ICC provided in fact to its court a kind of passport that allowed it to leverage social and institutional resources across a great number of countries, despite the fact that it had no track-record and that it could not draw on the machinery of inter-governmental coordination. Obviously, a self-standing law boutique, established close to the Sorbonne or to the Harvard Law School, could not have benefit from similar infrastructure.

Still, the success arose from what the ICC Court did with these resources as it developed its novel business line. Contrary to the English and American approaches that tried to settle cross-border disputes primarily on the basis of their own domestic law, the ICC Court addressed head-on the problems raised by the jurisdictional fragmentation of markets. And so it became in practice a kind of high-skill, or *Haute couture* workshop in applied international private law. A college made of the best experts from the British Trade Associations and the London Court of Arbitration, or an assembly of the top lawyers from the AAA, would have never grow a similar knowledge, whatever their respective social capital and domestic legitimacy. Its institutional structure did not primarily offer to the ICC Court a conduit for transferring domestic legitimacy, if only because, in that case, the declining interests of its American patrons should have borne on its development – just as when the LCA had to ally itself to the Imperial Chambers of Commerce and thus to withdraw from the international market where it had thrived before 1914. The main benefit of being part to the ICC was in the close integration, on a day-by-day basis, between the “production function” of the Court, hence the specific contractual knowledge that it developed, and the multilateral structure of the ICC as a whole. It would take half a century before other arbitration organizations could build a similar comparative advantage.

4C. The Sociology of innovation

The rapid withdrawal of its great American patrons and the low-key, collegial dimension of the ICC Court go a long way in defining the sociological character of this remarkable experiment. The legal innovations that international businesses would adopt were not only long and difficult to deliver, with a lot of experimentation and tâtonnements. Until 1950 one finds few evidences that its members earned substantial social capital and wealth from their activities at the ICC. Some among them at least certainly shared the sense of a mission, namely to contribute to peace and international prosperity; but for them the law was an instrument rather than a calling, and they certainly did not envisage that the success of their career would eventually be judged by how far they had progress within the legal profession or the legal academy. Few in the first generation did teach at University, they contributed at best some small briefs to the law journals, they had no sustained relationships with the top Parisian judiciary and, for sure, they never moved to top position in the business sector. They were just professional and *bourgeois*.

Take the pre-eminent figures who actually presided over the early development of the Court. Edouard Dolléans (1878-1954), its first Secretary-General, was an Economic professor in the small city of Dijon before being picked up by Etienne Clémentel; but he left the ICC in 1936 in order to work for the *Front Populaire* government and, as a whole, he remains better remembered for his research on the history of the socialist movement in France. René Arnaud (1893-1981), his deputy, was an alumni of the *Ecole Normale Supérieure* and clearly had more right wing politics. But he did not have a law degree either and he did he did publish any textbook or treatise on arbitration, his free time being spent on remembrances of the four
years he had spent in the trenches, during World War I, or on small essays on Joan of Arc or the French Revolution of 1848. Robert Marx, a German lawyer, worked after World War I with the French-German Mixt Tribunal (an offshoot of the Versailles Treaty), before joining the German delegation at the ICC and becoming a fixture of the Court; he was excluded in 1936, however, probably because of his Jewish origins, but he was back at the Court after World War II, this time as its Secretary-General, and later as a technical adviser.  

The broad pattern remains visible well after World War II. Frédéric Eisemann (1908-1886), who was Secretary General of the Court between 1947 and 1973, hence a key actor in this story, was an Alsatian Jew who had obtained his PhD in Germany in 1931, in Giessen, and was only associated to the Paris Faculty of Law: he never became a Professor and owed his social progress exclusively to his position at the Court at the time of its rise to international preeminence. Two other influential figures from the same decades, with strong legal credentials, Charles Carabiber and Bertold Goldman (1913-1993) had immigrated from Russia and Romania, respectively. A similar profile is that of Martin Domke (1892-1980), who became a key man in the close relationship that emerged during the 1950s between the ICC Court and the American Arbitration Association (Aksen, 1981). Also a German Jew, he left Berlin in 1933 and lived in Paris until 1940, partly as the personal lawyer of Bertold Brecht, Theodor Adorno and Walter Benjamin – not least. After reaching New York in 1941 or 1942, he rapidly joined the top tier of the AAA, thanks not to his social capital, of course, but to his specific professional capital, namely his knowledge of the discipline of Conflict of Law.

Lastly, two exceptions confirm the rule. Arthur Nussbaum (1877-1964) and René David (1906-1990), both also with a Jewish background, entered early the cursus honorum of the successful law Professor. The former published between 1926 and 1931 four volumes of a yearbook of arbitration (the Internationales Jahrbuch für Schiedsgerichtswesen) that remains, by far, the most comprehensive publication on the topic during the interwar years. He left his chair at the Humboldt Universität in Berlin, in 1933, and almost immediately started a second and brilliant career at Columbia, in New York. René David also had a great career at the Sorbonne, though also at Cambridge and Columbia, while acting as a top level consultant to the League of Nation and later the United Nations. In 1932 he wrote for Unidroit (an agency of the League) a report on international commercial arbitration that would contribute to shaping the international debate till the early 1950s (David, 1932). Here is however the significant point in these two remarkable careers: despite their initial investment and impact on the debate on arbitration, both Arthur Nussbaum and René David left this emerging field soon afterwards and moved to more mainstream topics. The former never came back to arbitration, and the latter only occasionally. It seems therefore that, at least until the mid-1950s and whether you were a law professor in Berlin, New York or Paris, arbitration was not seen as a promising field of investment, either professionally or intellectually.

The move towards an established “field” of international commercial arbitration, with its stable institutional set-up and its own emerging profession, happened indeed between 1947 and 1958: that is, between the moment when the AAA abandoned its alliance with the London Court of Arbitration and joined force with the ICC, and, ten years later, the adoption of the New York Convention on Arbitration. On the one hand, the terms of the complex transactions

 Archives CCI, Cour d’arbitrage, Document 24, 120° session de la Cour, 29 juillet 1936. The Court apparently tried to re-hire Marx during the war, when it was relocated in Stockholm, in order i.a. to teach the local personnel its rules and procedures. (Jarvin 1992, 2011).

 Nussbaum (1942). In a collective farewell article, signed by six colleagues in the Columbia Law Review, at the time of Nussbaum’s retirement, the very mention of his early writings and publications on arbitration was entirely omitted (Cheatham at al. 1957).
with national governments had been de facto reached, both at the domestic and the international levels; on the other hand, the ICC legal technology was increasingly adopted by multinational firms as their first port of call when trying to settle cross-border disputes. This transition came with many signals that also indicated that arbitration was rapidly becoming institutionalized: new specialized journals were launched, structured textbooks were published, conferences followed each other at an increasing speed and, more generally, a new transnational profession of arbitration rapidly consolidated, with its own career profile and internal hierarchy. In this context, the convergence of this new profession, the extra-territorial character of the ICC practice and their international clientele was a perfect match.

In other words, the time of idealistic early entrepreneurship, with their diverse backgrounds and interests, was now over. The institution, its rules and its procedures had met their true experts, who would dominate the profession and the arbitration market in the decades to come. If anything, the first personality that responded to the new profile of the grand and dominant international business lawyer was Martin Domke, though only in the second part of his career (he reached New York aged 49, and when the New York Convention was signed he was 66); then is Piet Sanders (1912-2012) who can be counted as a founding father of the field, due i.a. to his preeminent role in the adoption of the United Nations 1958 Convention on Arbitration. They would thus be the first ones to act altogether as counsel, arbiter, law professor, government advisor, conference convener and editor.

5. Conclusion

This chapter has argued that emergence of the ICC Court as the dominant institution in the new field of international private arbitration first reflected the difficulties encountered by its counterparts, in London and New York, in addressing the new international evolutions observed from the beginning of the twentieth century. The relative decline of Britain and the move to more complex transactions, like equipment goods or intellectual property rights, gradually made clear that new methods for backing up and regulating international markets would have to found. It would not always remain possible to rely primarily on market power and the mediation and interpretation of a dominant national jurisdiction – British or American. Judges and arbiters would have thus to fully acknowledge the strength and the legitimacy of the national legal orders and their jurisdictions. And indeed, as this trend developed, the core issue in international arbitration became how to negotiate jurisdictional borders when contracting internationally.

Within this context, the success of the ICC model was first founded on the multilateral structure of the International chamber itself: the Court benefited to some extent on the aggregated legitimacy of national chambers, it relied on their network as an instrument to mobilize local knowledge and expertise, and, lastly, it easily entered into direct discussions with the new brand of multilateral organizations – the League of Nations, then the United Nations. The other key feature of this experience was the creation, very early on, of an in-house college of expert lawyers with diverse national background. Over the decades, they checked and confirmed awards and, even more importantly, this body became the place where a new practice, later a new doctrine of international arbitration was progressively debated, built up, stored and continuously tested. This new legal technology emerged during the three first decades of existence of the ICC Court, on the basis of a relatively small flow of cases, themselves of mediocre economic weight. Yet, from the 1950s onwards, this approach to international dispute settlement was increasingly endorsed by multinational firms, who thrived on the back of the gradual reopening of international markets. This was also the moment when the first generation of institutional entrepreneurs was replaced by the first representatives of a new transnational profession, with its settled practices and organizations,
recognized competence, its career paths and high rewards for those who reached the last steps of its internal hierarchy.

The overall analysis of this remarkable experiment thus start from the recognition of long run changes in the international division of labor and from the ensuing need to develop and adopt new legal technologies that would better support the new form of international contracting. The previous pages should have amply demonstrated that this reading does not come with a deterministic, rationalist or economicist reading of the whole experiment. To the contrary, imagination, experimentation, confrontation were observed all along, from the very first attempts to design a new model of arbitration, in London at the end of the nineteenth century, till the eventual success of the ICC model, sixty years later. Still, one may not account for the evolution of market institutions without acknowledging the material interests of the participants to those markets. In this measured sense, this analysis is materialist.

Change in practice also came from the margins of the social and institutional game. Those who actually developed the new ICC practice had a small background in law, many of them were Jewish immigrants from Germany or Eastern Europe, and few of them were or became card-carrying members of the legal establishment – whether judicial or academic. Neither did they move to the business sector nor did they make a fortune by reinvesting elsewhere a know-how or a social capital that they would have acquired at the ICC. Legitimacy, just like private wealth, was acquired ex post and quite late indeed, as a consequence of successful innovations wherein multinational firms would eventually identify the possibility of benefits.

We know well indeed that, historically, insiders and dominant players in the institutions of governance are not always able to design novel rules, when conditions change. It just happens that sometimes refugees and immigrants are in a better position.
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