The International Chamber of Commerce, Multilateralism and the Invention of International Commercial Arbitration

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International commercial arbitration is one of the most successful – yet indirect and largely ignored – heirs to the Treaty of Versailles. It was born in Paris in 1923, in the unique political, economic and institutional context that followed the end of World War I and the creation of the League of Nations. But whereas the League soon disappointed its sponsors and the International Labor Organization (ILO), for instance, maintains only modest activity, arbitration has grown into one of the major institutions of the global economy.

Two multinationals in conflict over the execution of a contract today will very rarely go to an official, public court: they will typically select a specialized arbitration forum, choosing one independent arbiter each with joint say in selecting a third, who will preside over the panel. The parties may also choose the arbitration law that will govern their proceedings and the contract law that will apply. Not least, national states now execute arbitration awards almost as easily as official judgments: on the back of an award the winning party can access bank accounts, real estate assets or securities. International commercial arbitration is a tough and powerful institution, and without it, global capitalism would look very different.

The problem at the core of the coming discussion comes from the oceanic gap between this present practice of arbitration and the fully open-ended, indeterminate, and often frankly millenarist discourse of those early years. When the patrons of the newly created International Chamber of Commerce (ICC) decided that it would host an arbitration court for private, commercial disputes, they had remarkably limited agreements on the problems they would face and they solutions they might envisage. In fact, for many militants of arbitration since the last decades of the nineteenth century, arbitration could be almost anything you wanted once you invited a third party to help you out of a dispute. Open any publication that pretends to tell the development of arbitration and it will probably start with a few cameo references to how Greek traders settled conflicts on the shores of the Aegean Sea, or how the medieval fairs proceeded on the same occasions. But Mom could also arbitrate between your two younger brothers.

However, a series of associated terms do typically appear: arbitration is easy, reasonable and peaceful, so that, for many of its advocates in the literature, it's almost not an institution but a spontaneous expression of the cooperative spirit, the morality, or the essential goodness of men (women being typically not considered). Paradoxically, this normative call for peace, justice and reconciliation lent

substantial legitimacy to the ICC project, while also leaving the dozen people that staffed the ICC Court in the 1920s with extremely limited guidelines. They could freely imagine, experiment and appraise alternate options without many pre-constraints. Arbitration became at that point an utterly pragmatic project, although one that had to emerge and take form in a most disputed terrain, where market, business interests, sovereignty and new multilateral organizations directly met.

The Discourse of Arbitration: From Utopia to Legal Engineering.

Starting in the 1870s, in the wake of the Crimean and Franco-Prussian wars, across the Western world arbitration became the codename for a remarkably broad, progressive, often utopian imaginary, widely shared by politicians and ordinary citizens, civic movements and churches. It thus came to be associated with the sunny promise of a peaceful world, where disputes would be settled amicably with the help of a few wise (white) men, and where the warring instincts of hardheaded sovereigns would be tamed at last. In no small way, arbitration was, in the years up to 1914, the most potent discursive force that was opposed to the hard, divisive legacy of the long nineteenth century, both on the political and also the economic sides; that is, Westphalian politics, laissez-faire capitalism, and social individualism. Most striking, however, at least from a twenty-first century perspective, is the very indeterminacy of the project: the underlying suggestion that goodwill and reason could substitute for hard rules and real bargains allowed for just about any collective project to invest in the appeal to arbitration. Nothing bad, it seems, could come from arbitration. It was altogether a ubiquitous discourse and a profoundly unpolitical one.

Take the "Speech on international arbitration" given by one Henry Richard at the Dublin Chamber of Commerce, on September 2, 1872: *"the platform we occupy is one broad enough to admit men of all ranks, all races, all religions, of all at least, who are willing to prolong the echo of the angelic anthem sung over the cradle of the babe in Bethlehem, 'Glory to God in the highest, on earth peace, good-will toward men'…. There is no necessary and inevitable law that condemn[s] mankind for ever to rend and devour each other like wild beasts; [that] it is possible to … submit the differences between them to some common jurisdiction, by which a decision should be pronounced in accordance with reason and justice…*".

Also consider the 1899 writings of Benjamin Trueblood: "*What has created the fresh interest is the absolute moral and material necessity of arbitration both as a means of avoiding the widespread ruin which war now produces, and as an expression of the increased conscientiousness, reasonableness and forbearance of men in regard to their differences and*

their growing disposition to cooperate …. It is the resistless logic of modern human progress which is bringing arbitration into such esteem" (103). He continues, "*Arbitration gives time for passion to cool. It affords opportunity to hunt up all the facts in a given case …. It costs a mere pittance compared with war. It carries questions of right and justice to the forum of reason …. // It leaves no bitter ranklings behind, no broken family, no devastated lands, no international feuds…. It removes prejudice and misjudgments. It creates sympathy and fellowship*" (109/11).

Lastly, read also the following (very bad) ode to arbitration, published anonymously in Melun, France in 1876:

> On verra tous les arts, tous les hommes renaître,
> L'arbitrage fleurir, la guerre disparaître ;
> Le bien-être s'étendre, à l'ombre de la paix,
> Et marcher, dans le monde, à de nouveaux progrès ;
> Mais puisse le soleil, où brille ta puissance,
> Dans son cours, ne rien voir de plus grand que la France !

Hundreds of pages like these could be included, drawing from grand speeches by great statesmen, to sermons by pseudo-prophets, trade unionists, *chansonniers* or concerned citizens, and also Chambers of Commerce [organizations, etc.]. Indeed, in June 1914, the International Congress of Chambers of Commerce, held that year in Paris, adopted a resolution …

If we want, however, to move beyond the utopian – if not the millenarist – dimension of the discourse of arbitration, with its most confused expectations, the best wedge to look for are the opposite terms that are negatively implied as retrograde and immoral, hence Sovereignty and State power, and, in some variants, individualistic, "anomic" capitalism. On this point, arbitration of conflicts between sovereign states became, in the pre-1914 years, a generic, fully consistent principle of international governance, which was actually expected to replace the divisive, conflictual model of the Concert of Nations. This viewpoint was especially the case for Americans, who became its main advocate and shaped the term, in classic Rooseveltian manner, as an alternative to the backward, oppressive rule of old European powers. In this sense, the theme of arbitration stood discursively, before 1914, in the exact place where classic, liberal multilateralism would later emerge, first with the League of Nations, then after 1945.

What Versailles and the experience of the War changed was that quasi-judicial processes were not seen anymore as the foundation of a new, sustainable, stable international order. The notion of an "international administration," which emerged during the war, made that shift clear, and the early years of the League soon confirmed that much more structured forms of collective action

between sovereigns were needed, which would thus have to concede more resources and discretion to joint action. But the interventions of the League, especially the Economic and Financial Section, also revealed many underlying problems of coordination and cooperation, which suddenly "popped up" in the Geneva offices and which had never before been considered in discussions and agreements between sovereigns: commercial arbitration indeed, but also bankruptcy, double taxation, the recognition of foreign firms and banks, intellectual property, etc. At this point, it became clear that international cooperation needed, again, more institutionalized – hence constraining – collective rules. The generic discourse of arbitration thus became, during the 1920s, part of this broader "international architecture", rather than being its key ordering principle. This position is still more or less the same today, at least as long as we look only at inter-state arbitration, although it is now seen mostly as an instrument, one that clearly no longer carries any idealistic or mobilizing force.

Arbitration, Economic Liberalism and Interwar Corporatism

The sheer indeterminacy of the arbitration project allowed it, however, to be re-invested in diverse domestic, political economic environments endowed with contrasting ideological horizons. Today, international commercial arbitration is rightly seen as a core institution of global capitalism and it is probably fair to say that, for many of its actors and scholars, it is associated with a broad discourse that values open markets, contractual autonomy and resistance to public regulations. This latter dimension has become particularly strong since the 1990s with the development of investment arbitration, which deals with disputes between private investors and host countries (or local authorities), as opposed to commercial arbitration between private parties.

But the close association between private arbitration and the "neo-liberal" discourse has not always been the rule. In the United States in particular, domestic private arbitration emerged in the context of a broad drive for judicial reforms that started with the Progressive era, around 1910, and extended until the New Deal. This multifaceted movement started in particular from a critique of the adversarial court system and the abstract, formalistic, "mechanic" jurisprudence inherited from the latter decades of the nineteenth century. Social reformers, for instance, saw in this older model of litigation a threat to local communities and, in particular, to the capacity of new immigrants to integrate into American society and adhere to its values. Then came also the socialist, then the Bolshevik threat, which was seen as calling for a strong policy of "Americanization".

In the legal academia, the Realists became early on the major force for reform, both intellectually and via their influence on government and public administration. Their insistence in particular on procedural law and the courts' practice, hence of how judgments are made and precedents established, led them to look with sympathy on reformed or alternate models of dispute-resolution, which would be less divisive and possibly less ignorant of the social or communitarian dimension of economic and social life.

Benjamin Cardozo, and later Jerome Frank and Felix Frankfurter, are well known names on this point. Roscoe Pound was another leading figure in the early Realist generation, who became, in particular, a staunch defender of arbitration. A man of considerable influence, with a career that extended over several decades, he actively supported the reform drive that led to the landmark 1925 US Arbitration Act. In the following years, he became President of the American Arbitration Association (AAA), and remained afterwards a distant protector. His private correspondence, kept at the Harvard Library, includes abundant evidence of his continuing relations with the AAA until the 1950s.

Significantly, across Western countries a number of early leaders in the development of international commercial arbitration had their intellectual roots in similar movements, either in the legal academy or in civil society. Against the older fixation on the State as the only source of law, hence on its hierarchic and constitutionalized character, a new generation of scholars in different countries argued that the legal system was much more plural and fragmented than assumed. That the law, in other terms, could be produced and enforced by different social bodies, associations, communities and indeed professional organizations. Rules issued by trade associations, English or American, or various forms of "droit corporatif", whether domestic or international, became, at that point, issues of interest in the law of markets.

Take the German lawyer Martin Domke (1892-1980), who had been excluded from the Berlin Bar in 1933 and who became, in the postwar years at the AAA, the key intermediary between the US and the European experiences of commercial arbitration. Domke's law thesis, defended in Greifswald in the early 1920s, had been directed by Theodor Sternberg (1878-1950), one of the leading representatives of the *Freie Recht* school: one of the most innovative, if highly marginal, currents in pre-1914 Germany, which also directly influenced François Gény (1851-1959) in France. Frances Kellor (1873-1952), the intellectual and entrepreneurial driving force of the AAA until her death in 1953, was not only the first female graduate of the Cornell School of Law; she then moved to Chicago and studied sociology, especially among immigrant communities, before focusing on a

Progressive program of judicial reform and embracing arbitration. Last, Edouard Dolléans, the Secretary General of the ICC Court of Arbitration from 1923 became in 1936 an advisor in the Front Populaire government and then proceeded to take on labor arbitration cases under the out-of-court "Sur-arbitrage" practice briefly during those years. He ended his life as a prolific historian of France's trade union movement since the nineteenth century.

In the United States of the 1920s, however, the business sector was the main force behind both the 1925 Arbitration Act and the creation of the AAA. Large firms and banks had become increasingly dissatisfied with the long delays suffered in courts as with their difficulty to seize and address the new, more technical cases that came with large-scale industrialization, the emergence of large conglomerates and (gradually) a regulatory State, endowed with much more authority and resources than before. Beginning in the 1910s, chambers of commerce, in particular the New York Chamber, took the lead in the long campaign in favor of a Federal Arbitration Statute, which they obtained in 1925 – having essentially drafted it themselves [ref.]. During that time, practically all the great names of finance and industry had joined the cause, from Warburg to GE Electrics to …. This group then immediately moved on and created the American Arbitration Association. Its incredible success, in the following years, shows neatly that the problems with the courts and the appeal of arbitration was much broader than the list of New York grandees might suggest. Within a few years, the AAA had formed a dense network of branches and outposts across the whole country, even in small towns. The shift out of court and into arbitration was almost immediate and laid the foundation for a specifically American development of Alternative Dispute Resolution. [data, illustrations, ref].

Plurality of interest, hence the potential for ambiguity and conflicts, was also pervasive in this early American adhesion to arbitration. From the early 1920s, arbitration was also a key element in the development of trade associations, which became increasingly active in regulating competition within branches by way of standard contracts, occasional price controls, business practices, codes of ethics – and internal arbitration. The broad theme, again, is that open, individualistic competition was too divisive and that the modern economy, with its huge firms, large workforce and the emergence of mass consumption, called for "managed competition", or "economic democracy". In some cases, this approach would also extend to labor relations, with the negotiation of standard wage contracts.

Contrary to the current association of arbitration with "neo-liberalism", the practice of arbitration by trade associations thus became a mainstay of a specifically American form of corporatism

(Javits 1932, Brand 1988). Initially, this trend was supported by Herbert Hoover, during his term as Secretary of Commerce (1921-1928): whereas he is widely seen as a perfect representative of the Republican pro-business wing, he was altogether a strong defendant of the 1925 Act, the AAA and trade associations. This trend became even more influential with the Great Depression and reached its maximum influence during the first years of the New Deal, with the National Recovery Administration [more]. At that point, the move away from the open market and into administered competition brought the US economy quite far towards the direction of a corporatist model, along lines that were not so different from those observed at the same time across Europe and Latin America. Resistance emerged, however, much more rapidly in the US: not only did the US Supreme Court strike down core elements of the first New Deal, already by 1937 a left-wing critique of trade-based arbitration arose, arguing that in practice, the biggest firms ruled these collective bodies and oppressed Main Street family firms (Himmelberg 1976, Jaffee 1937). Hence, the call for a return to the rule of law, to individual rights and also to the virtues of anti-trust legislation. We can thus see here the very first expression of a now common critique of arbitration as intrinsically biased in favor of big business, against consumers, small suppliers or insurance takers (Kronstein 1944).

The broad theme of arbitration also had, during those years, significant appeal as a model for the "international governance" of markets. A classic example is offered by the pre-1914 commodity market in London, which was organized and regulated by private trade associations who set standards for products, drafted standard contracts that included all the market rules, and arbitrated disputes. These English-law market platforms were essentially operated on a private, self-sustained basis and they effectively coordinated market intermediaries and merchants from across the world, while avoiding, in particular, all the costs and uncertainties that typically derive from conflicts of law and conflicts of jurisdictions (Sgard 2019). In other words, private ordering and arbitration worked again, in these cases, at a substantial distance from sovereign powers and sovereign interferences, although the London trade associations were subject to the London high courts. In other words, they worked on the basis of private rules and within a well-defined settlement with State power.

The 1889 English Arbitration Act, the first modern statute on the subject, formalized in detail a new rule of interaction between sovereign judicial power and the right given to businesses to opt out of official courts and establish their own private tribunals – though under conditions and within clearly defined limits. All other arbitration statutes until today, and across the world, would be founded on exactly the same form of bargain – a bargain between sovereignty and private

interests which allowed the latter to opt out of official jurisdictions and build their own private tribunals, while benefiting from the last-resort support and the legitimacy of public confirmation.

Continental legists and political economists studied and commented favorably on the London trade associations and saw in them a corporatist model for international market governance. Judge Marc Ancel, from the Paris Court of First Instance, defended them in the following terms in a conference given in 1939 at the Institut de Droit Comparé de l'Université de Paris: « *on aboutit par là à un système universalisé, à un droit international au sens étroit du mot, à un just intergentes par opposition au jus gentium qui tend à reconstituer cette coutume internationale des marchands que connaissait le Moyen-age et qui s'est absorbée, par la suite, dans le droit particulier de chacun des pays d'Europe.* »

In the introduction of a remarkable three-volume study of the international silk market, prepared in Lyon by a Japanese student, Edouard Lambert, from the Université de Lyon (who was himself an interesting, though somewhat marginal, figure in the French legal academy of those years), thus argued that: « *le droit corporatif apparaît, non pas comme une dépendance ou une adaptation des droits législatifs et judiciaire, mais comme un droit qui suit des voies particulières, a un esprit, des méthodes et des sanctions propres*. *L'autonomie croissance du droit corporatif est assurée par l'action combinée de trois forces : l'arbitrage corporatif, les codifications d'usages et le contrat-type* » (Ishikazi, 1928, xxvii/xxviii).

The ICC and the Project of an Arbitration Court.

In a remarkable way, the chambers of commerce – and later the ICC's Arbitration Court itself – found themselves at the crossroads of these many influences. From it's inception, the latter progressively imagined, developed and tested its own rules, an experience that led them from the green pastures of a free-wheeling utopia of peace among the markets, to a functioning, private, extra-territorial court ensconced in a tight bundle of agreements and transaction among private actors and with sovereigns. [more].

At Versailles, the phrase "international commercial arbitration" does not appear in the 1919 Treaty and it was certainly not a leitmotiv of the negotiations, or even dinner chat, at Versailles. The only direct connection came from the establishment, during those years, of a Mixed-Tribunal between former enemies in order to settle private disputes left over from the war, like contracts and debts that had been suspended in 1914, or stocks of goods and subsidiaries of firms that had

been seized early on in the conflict. During the following years, a number of experts and arbiters would actually move back and forth between these Tribunals and the ICC Court. But out-of-court solutions also had to be found for hundreds of disputes between British and American firms that arose immediately after the war ended, as masses of procurement contracts with armies and ship-owners were suddenly cancelled.[1]

But on the other hand, no interaction or visible influence has been noticed with the Permanent Court of Arbitration in The Hague, a point that neatly suggests that the expertise of the chambers of commerce in matters of arbitration developed very much on its own and out of a specific body of experience where inter-State arbitration was not a concern. More intriguing, here, is the relatively limited influence of the London Court of Arbitration, which before the war had developed a practice of private dispute resolution quite similar to what the ICC would later do. Its relative marginality in the London jurisdictional landscape and the resistance it encountered from lawyers are possible explanations for this discretion. (Sgard, 2016).

The first step towards the creation of the ICC Court was taken at Atlantic City in October 1919, at the Kth International Congress of Chambers of Commerce, where the national chambers of commerce formally established the International Chamber of Commerce (ICC) as a permanent organization, along the lines of the new League of Nations and with the aim of becoming its natural interlocutor on the side of businesses, on par indeed with the ILO. During its early years, the new ICC was shaped by the powerful gravitation forces exercised by the League, its staff and its many working groups. The fact that the ICC also became at that time a backhand channel of influence and information for American interests in Europe is part of the story, but not all of it.

While lobbying was indeed the main raison d'être of the ICC, at Atlantic City the Congress members also launched the project of an Arbitration Court. This loose project had been making recurring appearances at the Congress since 1906 [check]: international businesses, it was argued, also needed their own private dispute-resolution forum, firmly established out of the purview of State jurisdictions, with their arcane procedures, their difficulty to cooperate and their occasional incompetence. The creation of the Court was confirmed at the next Congress, in 1920 in London. A series of preparatory meetings took place from February 1921 until May 1922, and the Court

[1] Arbitration Committee, NY Chamber of Commerce, Minutes, 12 May 1921. Columbia University Libraries.

was inaugurated in January 1923 with the President of the Republic and a representative of the League in attendance, and the first official cases were taken on.[2]

At this point, the sponsors of the new Arbitration Court drew enthusiastically on the generic, utopian discourse on arbitration, though they insisted more than usual on its anti-State/ anti-sovereignty variation. Commercial arbitration, they argued, was an expression of the peaceful instincts of mankind and, indeed, of commerce. Pragmatism, honesty and well-meaning sentiments among merchants were expected to solve all future disputes by their own virtue. Once they had escaped the shadow of cynical, warring states, peace and good manners would reign, and the most limited institutional construction would surely be enough to ensure it. Take, as a banal example, the speech delivered by R. S. Fraser, a leader of the British chambers of commerce, at the 1912 International Congress held in Boston:

"*Commercial men realize to the full the limitations of politicians and diplomatists [sic], and that it is for the commercial world to take its destinies into its own hands and do their thinking for themselves as to the problem of day-to-day, including the organization of peace, of which commercial arbitration is an integral part (…). Indeed, it may be claimed that commercial arbitration constitutes the foremost plank in the platform of world-wide peace and solidarity*".

The chambers of commerce thus endlessly re-hashed the old trope inherited from Montesquieu of commerce as an inherent force for peace. This trope would be, for decades, a kind of all-purpose, default ideological prop which would even find its way into the first official history of the ICC, *Merchants of Peace*, published by George Ridgeway in 1959. What the incredible popularity of the theme of arbitration offered to chambers of commerce was essentially a powerful legitimizing discourse, with a capacity to associate their own, specific endeavors with a high-value though largely un-specified ideological appeal.

An unpleasant commentary, at this point, would fast-forward the reader some thirty years later to point fingers at how the ICC, once relocated in Stockholm in 1940, arbitrated disputes within Germany-occupied Europe – with awards in German. The versatility of the arbitration paradigm is almost limitless. Each actual model or experiment thus has to be invented, developed, tested and appraised on its terms. Its formal indeterminacy allows it to be shaped to very different needs and

[2] There are indications that the staff of the Arbitration Court had already resolved some cases before it was formally established – but they are not counted in the official stats.

circumstances, and also to different ideological demands and to the specific toolbox, or repertoires, of its architect.

Inventing the ICC Court of Arbitration

In 1920, the more immediate problem, however, was that the utopian, anti-political discourse on arbitration did not equip the leaders of the Arbitration Court with even the most limited practical guidance. Once they had obtained the support needed to launch their project, they had to negotiate how, in practice, they could establish a court sufficiently predictable, consistent and competent to attract cases. This indeed was the first step out of utopia and the experience of the ICC Court fully exemplified the difficulties to be addressed. Look at the docket of the Arbitration Court in the interwar years and you'll see a long series of absolutely ridiculous cases: bowler hats, bicycles, fountain pens, etc. In fact, it was only during the 1970s that the ICC Court was firmly established as a trusted, legitimate dispute resolver.

The first framework for a real-world, functioning court was thus proposed by the Americans, in practice the very same people from the New York Chamber who were, at that time, leading the domestic campaign in favor of a Federal Arbitration Act. In their view, the international expansion of commercial arbitration was to be the continuation of the same efforts, and they do not seem to have considered that this development would raise essentially new problems, in terms of jurisprudence, doctrine and procedure. They were probably, at this point, under the spell of the utopian, non-institutionalized dream of how international arbitration could work: simply, a series of bilateral agreements with foreign chambers of commerce would settle who would take on which bilateral contractual disputes.

The prototype of this type of accord was negotiated with the Chamber of Buenos Aires in 1915 and would then be proposed (actually, copy-pasted) to a series of similar bodies in Latin America. A few years later, the very same approach was proposed to the Paris Court, even though there is little indication that the Latin American model had delivered any result. [quote, Owen Young]. More significant is the absence here of any involved legal discussion similar to those that would later take place at the ICC on issues such as the choice of contract law or the enforcement of arbitration awards by national judiciaries.

For a very short period of time, the New York group was indeed in close relationship with the Paris group. They even sent to Paris Owen Young, who had already been involved in the Argentine

experience, in order to defend a draft set of rules for the new court. But apparently this project did not hold water, and quite soon, the British took the lead in Paris and leveraged to considerable effect the long-standing, well-tested experience of the London trade associations. Almost all amendments to the first draft rules were proposed by British representatives, who drew explicitly on their past experience, on issues like the remuneration of arbiters, the possibility for the parties to rely on counsel or, even more critically, whether the arbiters would decide cases on the basis of law or equity. On all these issues, which would haunt the Court for decades, neither the Americans, nor the Continentals nor the Court staff had any clear opinion or expertise.

At the exact same time, however, in Geneva the League of Nations had started discussing the project of a protocol through which governments would commit to make arbitration clauses legally binding in their domestic legislation. In other words, once such a clause was included in a bilateral cross-border contract, local courts would have to enforce it, hence they would decline to hear any related case submitted by one of the parties. There is no clear sign that the ICC or its newly minted Arbitration Court contributed directly to these discussions. But already in July 1921, the ICC had adopted a resolution supporting this move, and further signs of approval followed. [ref]. But, clearly, the main sponsor of the Geneva project at the time, the British Board of Trade, was very well informed of the goings-on in Paris and maintained close relations with the British Chamber of Commerce. The same names keep appearing in the respective archives, whether in London, in Paris or Geneva, though the leadership and forethought were at that time located in the former city.

However, this period of international synchronicity was short-lived. By 1925, both the English and the Americans had lost any interest in the Paris experiment and, quite soon, the former would rather find themselves in opposition to its proposals. As a result, the ICC Court soon became, and remained until the 1970s, a Continental, Civil Law club, with only a few token English and American lawyers attending the Paris meetings, most often because they were themselves practicing in Paris.

In stark contrast with the 1923 episode, the second League text on arbitration, the 1928 Geneva Convention on the Execution of Arbitral Awards, was clearly an ICC project, launched at the Third ICC Congress held in Brussels in 1925 and actively supported by the League's Economic and Financial Section: the archives show intense exchanges between the two small teams, in Paris and Geneva. But this time most member-states, including Britain, thoroughly resisted their demand that arbitration awards be executed by national judiciaries, imposing a number of limiting constraints and pre-conditions. After some hard-driving interventions, in particular by the British

Chancellor's office, they added a series of locks to the Convention, so that the road to judicial confirmation of awards remained exceedingly difficult.

Significantly, immediately after its return from Stockholm, where it had been during the war, the ICC Arbitration Court not only resumed its operations but also started planning for the future. Already in June 1946 it convened an international conference to consider the future of commercial arbitration – though by then, the Americans from the AAA had entirely forgotten that the Paris organization was their own brainchild. But neither the Americans nor the British ever tried to take back control, rather remaining on the margins of the developing "ICC project": when the ICC and its supporters started again campaigning for the enforcement of arbitration awards, in the early 1950s, along exactly the same lines as in the late 1920s, they did not draw at all on the support of either hegemon – London or New York. Although both countries sent a representative to the eventual 1958 UN Conference, they abstained on the final vote on the Convention on the Recognition and Execution of Arbitral Awards, which is still today the touchstone of the regime and is widely quoted in arbitral decisions and commented in the legal literature. In practice, this text was a brainchild of the ICC Arbitration Court, like many other innovations of those years: the 1960 European Convention on Arbitration or the UNCITRAL framework law. In other words, we are in this area entirely outside of the classic story of enlightened American hegemony that so deeply structures the common narrative of the twentieth century, with the great collapse of the 1933-1945 years in the middle.

Should we thus infer that international commercial arbitration was in fact a French project, opportunistically seized upon after the Anglo-Saxons had retreated? A kind of "national champion by stealth", or an indication of how France would have governed the world economy if it had ever become a hegemon? Not in the least. The ICC court certainly established cozy relationships with the Parisian high courts from the 1950s on, but it remained entirely ignored by the political and technocratic elites and did not receive any official support or recognition until the late 1970s. One has to wait until the sixtieth anniversary of the court, in 1983, to see again a government official honoring the Arbitration Court, in the person of Robert Badinter, President Mitterrand's Minister of Justice. That being said, the ICC court is not seen today as a specifically French institution.

New Rules of Engagement with Sovereigns

Already as early as the mid-1920s, the ICC Arbitration Court had grown into a self-standing international actor, with a project, a capacity to discuss, adopt and enforce its own rules and,

gradually over time, an increasing attraction for businesses with a contractual dispute to resolve. This court shaped over the intervening decades the whole development of international arbitration, in terms of rules and procedures, but also by obtaining the constructive support of national governments, hence by renegotiating in a detailed and novel way new rules of interaction between sovereignty and private interests. This is where the Court remains entirely faithful to the sometimes-utopian discourse of the early twentieth century, though it asks for more than goodwill and good faith.

For sure, dozens of arbitration forums have been established from the 1950s onwards, so that the ICC did not become a monopoly court, as some had envisaged, but it did establish the basic features of this new model of private jurisdiction. Moreover, it was not merely a first mover, whose initiative was unexpectedly emulated: from the very beginning its principals saw themselves as the architects of an entirely novel institution, hence as the promoters of a new international public good. Reading the hundreds of pages of archives at the ICC, one feels, if not the sense of a mission, at least that of a project, or a common horizon, that guided the very small group of institutional entrepreneurs. The ICC thus remains today, the *primus inter pares* or the "Old Lady" of the profession, where the difficult cases often end up and around which a large part of the profession congregates. Even Paris has remained the capital of international commercial arbitration, merely because the ICC was established there in 1920, by chance – it could as well have been Brussels, The Hague or Geneva.

To understand better how and why the ICC project emerged, survived and developed, three features stand out. One, as just said, is the capacity of the Arbitration Court to develop and capitalize its experience, so that the institution could grow and increase its capacity to shape the evolving regime of international commercial arbitration.

Second, the International Chamber of Commerce clearly gave institutional leverage, resources, stability over time, and legitimacy. The Court could thus build its own credibility from within this protective framework. A stand-alone court would have been confronted from the onset with much more serious and probably fatal challenges. At the same time, the ICC gave the Arbitration Court the capacity to enter multilateral organizations and lobby for international texts that would serve its project. This strategy directly anchors this experience in the post-Versailles world of multilateralism, though in a remarkably non-Westphalian way: what the ICC invented early on, in Geneva, is the now well-studied practice of a private organization, or indeed a transnational lobby, entering an international organization and developing a relationship with the staff, on the basis of

a relation of mutual recognition. What support this horizontal relation is the fact that both entities are indeed international: they recognize a problem of international governance and address it from a specific, de-territorialized perspective. In the present case, that disposition, or strategic outlook on international norm-making, emerged very early on after the League of Nations was established, and it landed an outstanding success with the 1958 UN Convention on Arbitration, which was entirely its brainchild. At the exact same time as new policy issues were revealed, as they "popped up" on the desks of the new international officials in Geneva, the ICC started to interact with them outside the formal rule of delegation and negotiation that the States had agreed upon.

At the same time, the success of the ICC Arbitration Court in shaping a new international regime was not just a matter of international militancy and quasi-judicial procedure. It had a substantive object, a set of real-world problems which it eventually allowed to be solved in an efficient and trusted manner. At this point, accounting for the long-run history of private arbitration necessitates that we start from two key patterns of the twentieth century: the cycles of internationalization and the rapid development of regulatory states. Arbitration, moreover, was not just shaped by these two deep-seated trends, it was in fact instrumental in resolving the tensions they brought about, hence in articulating them together within a liberal world order where private actors, like those represented by the ICC, have always kept considerable influence. This situation asked, however, that the legal craftsmen and institutional entrepreneurs who led the ICC Court assumed, quite explicitly, that they were entering a high-stakes game: its eventual success hinged on the gradual, step-by-step redesign of the rules of engagement between, on the one hand, markets, contract-based activity and private interests, and, on the other, a rather compact, concentrated conception of sovereignty.

The problematic relation between state construction and economic integration has, indeed, a long history. But whereas the common approach typically insists on macro-policies, the growth regime or the social compact, arbitration in fact touches directly upon a much more minute yet essential institution of both capitalism and modern States: its legal system, which formalizes or crystalizes a core expression of sovereignty. At this point, dispute resolution – which arbitration is about – addresses directly defining issues of social and economic regulation, and thus it also questions how far political authority can extend its powerful hand over citizens and merchants, civil society and markets. Moving to arbitration means that the relationship to public jurisdiction and public order is thoroughly redefined, or indeed renegotiated. This renegotiation is exactly what was

started in the 1920s, in a curious mix of clear-sightedness (opting out of the sovereign's courts is no benign affair) and improvisation, experimentation and imagination.

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