

The Sociology of International Arbitration

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Outline



1. International arbitration and the resolution of global business disputes



2. Legal globalization from above: international arbitration as a competitive field



3. Legal globalization from below: the International Chamber of Commerce



4. The cooperative field at work: the New York Convention of 1958

1. International arbitration and the resolution of global business disputes

Who said....?

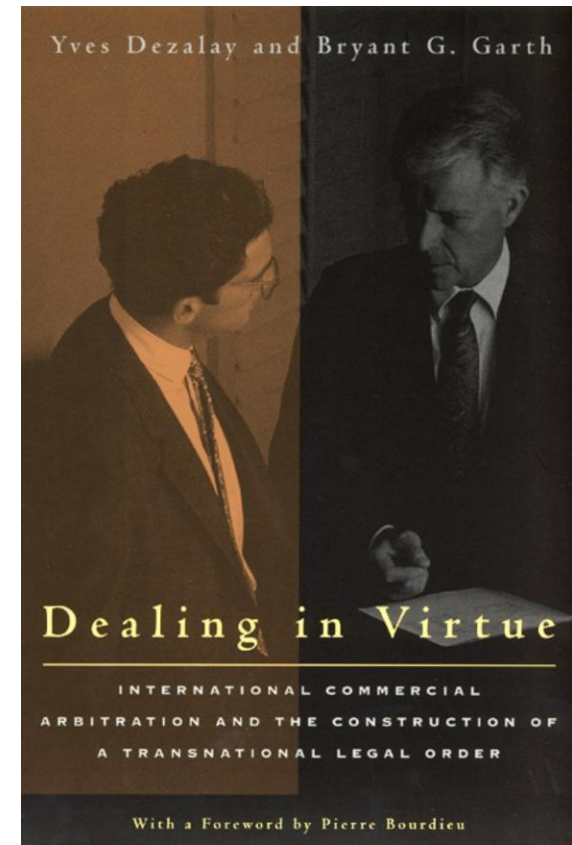
“As arbitration clauses are widespread in some sectors of economic activity, there has been a serious impediment to the development of the common law by the courts in the UK, particularly through the Commercial Courts in London [...].”

Lord Chief Justice Thomas (2016)

1. International arbitration and the resolution of global business disputes

- 90% of global businesses prefer arbitration for cross-border disputes (Queen Mary Survey 2021).
- 172 countries enforce arbitral awards under the New York Convention — far more than court judgments.
- High-value cases: disputes often exceed hundreds of millions USD; for instance, *Dow Chemical v. Petrochemical Industries Company of Kuwait* (ICC, 2008) with an award of USD 2.16 billion in damages to Dow Chemical

2. Legal globalization from above: international arbitration as a competitive field



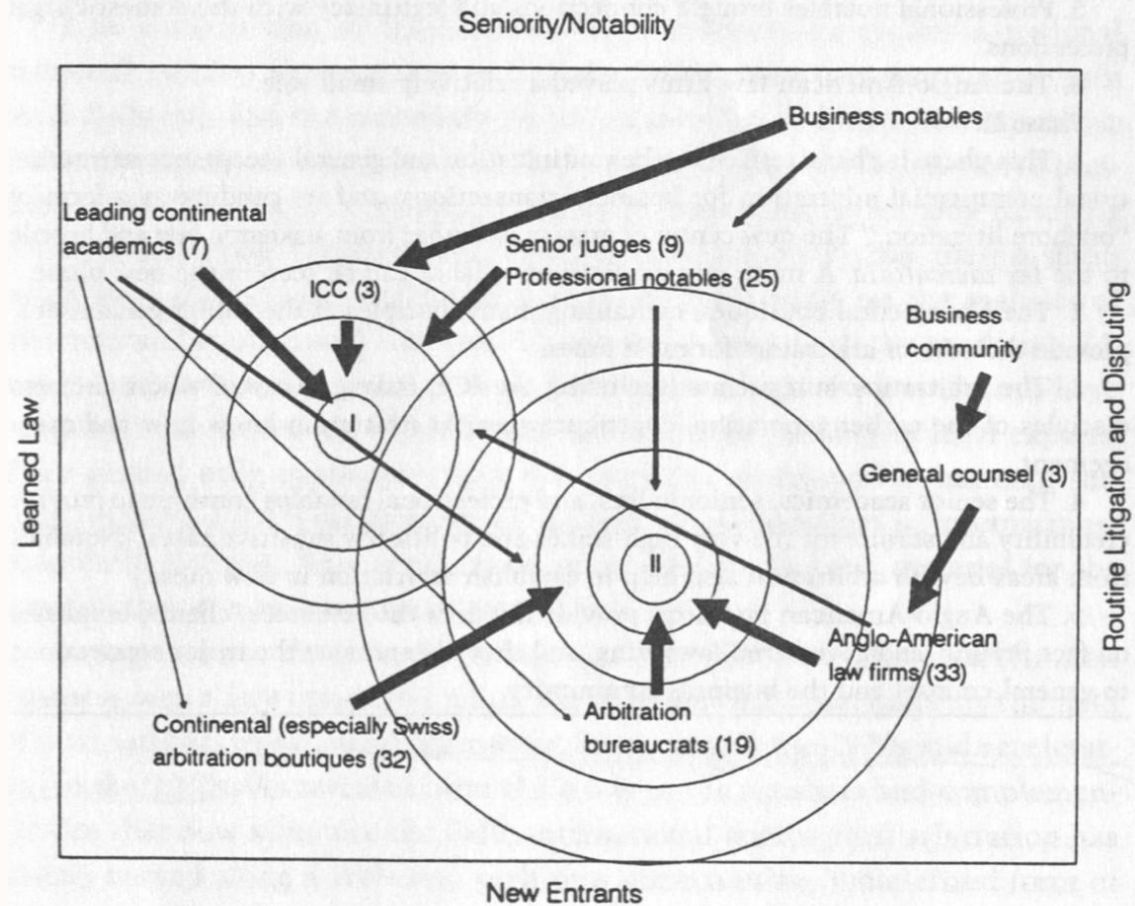


Figure 1. International Commercial Arbitration as a Field of Structured Opposition

NOTES: The shift toward new entrants, routine arbitration, and Anglo-American conceptions is represented by a move from I to II (roughly 1970–1990) in the “center of gravity” in the field of international commercial arbitration. This figure is limited to one period of transformation and largely to the central actors within the arbitration field. It seeks to show how the different actors are positioned with respect to the core of international commercial arbitration around 1970 and around 1990. The arrows show the direction of influence. The thin arrows show the more or less “disciple” relationship between two generations. The two thicknesses of other arrows show the relative strength of the influence. The numbers in parentheses are the number of people we interviewed who can be placed in these positions.

Grand old men



Berthold Goldman (1913-1993)
A law professor from Continental Europe

Young technocrats



Jan Paulsson (1949-)
A US-educated attorney practicing in a UK law firm

Pierre Bourdieu and the notion of ‘field’

The ‘field’: ‘an area of *structure*, socially patterned activity or practice’

‘The principle of the dynamics of a field lies in the form of its structure and, in particular, in the distance, the gaps, the asymmetries between the various specific forces that confront one another.”

P Bourdieu & L Wacquant, *An Invitation to Reflexive Sociology*, 97

Dealing in Virtue, Pierre Bourdieu's Foreword

“[...] conflicts between jurists of different countries seeking to impose their judicial forms, or their modes of producing law, contribute to the progressive (and unfinished) unification of the global legal field and the global market of legal expertise. The international is constructed largely from the competition among national approaches.”

Critiques of Dezalay and Garth

“there is little basis, in my view, for the authors’ contention that conflict between an aging cadre of notables, i.e., ‘grand old men,’ and a younger generation of ‘technocrats’ has helped to shape the modern development of international commercial arbitration. [...] many of those prominent in international arbitration are at the same time academics and practitioners, which makes it even more difficult to speak of cleavage between the two.”

Eric A. Schwartz, former ICC Secretary General (1997)

“Whilst some (grand old men) have developed academic careers to complement their role as active practitioners, their ‘symbolic capital’ arises first and foremost from long experience as contentious lawyers with significant international commercial arbitration practices (although few, if any, would profess to being entirely specialized in that field) and whose stature has grown with the development of international commercial arbitration itself over the past twenty to twenty-five years. To ignore them is to miss a step in the development.”

John Beechey, former Chairman of the ICC International Court of Arbitration (1997)

2. Legal globalization from above:

• international arbitration as a competitive field

- Overemphasis on competition as the key driver of the arbitration field --> how about cooperation across professional, national, generational divides?
- Confusion between the organizational level (arbitration centers such as the International Chamber of Commercial) and the field level (resolution of global business disputes)?

3. Legal globalization from below: the International Chamber of Commerce

The International Chamber of Commerce (ICC)

- Founded in 1919, based in Paris
- Rules of Arbitration first issued in 1922
- Key role in the adoption of the New York Convention (1958)
- More than 29'000 cases
- In 2023: 890 new cases, involving parties from 141 countries, with arbitrators from 89 countries, and places of arbitration in 116 cities located in 63 countries



International Chamber of Commerce

The world business organization

3. Legal globalization from below: ICA as a cooperative field

Sources:

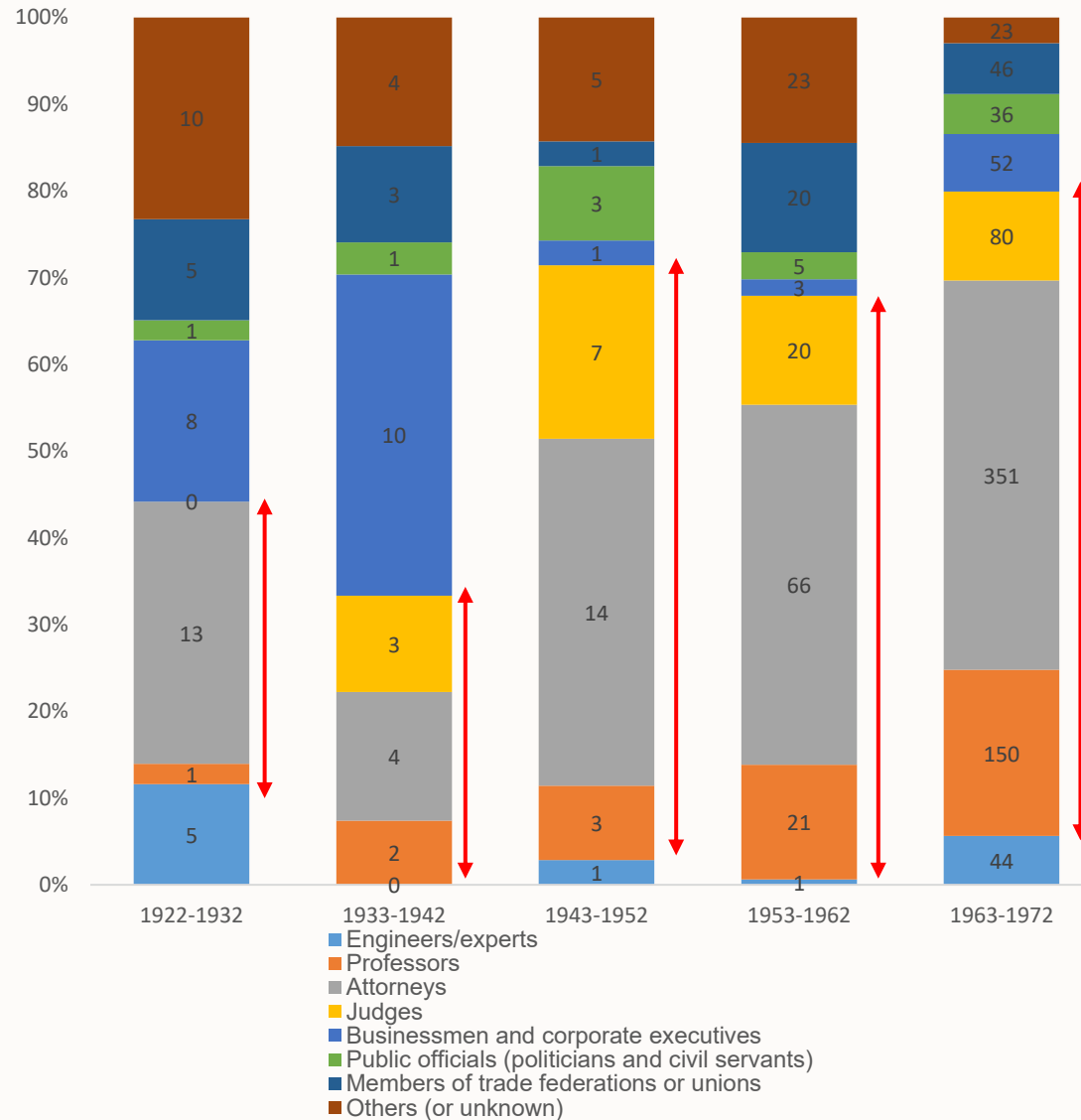
ICC archives

644 awards rendered between 1922 and 1973

1000 appointments of arbitrators in these cases



ICC arbitrators and their profession(s) (1922-1972)



The leading arbitrators at the ICC (1922-1973)

Name	Gender	Nationality	Year of birth	Main profession	Number of appointments
Ernest Barda	M	Italian	1903	Attorney	13
Ottoarndt Glossner	M	German	1923	Attorney	11
Berthold Goldman	M	French	1913	Professor	13
Lazare Kopelmanas	M	French	1907	International civil servant	13
Gunnar Lagergren	M	Swedish	1912	Judge	13
Ernst Mezger	M	German	1909	Attorney	10
Henri Monneray	M	French	1914	Attorney	12
André Panchaud	M	Swiss	1901	Judge	13
Pierre-Jean Pointet	M	Swiss	1910	Professor	16
Paul van Reepinghen	M	Belgian	1912	Trade federation	28

Ernest Barda (1903-1966)

- Italian citizen born in Egypt
- PhD at the University of Paris on specific performance in English law
- Conseil juridique (non-barred lawyer)
- Academic activities through the *Société de Législation Comparée*
- ICC arbitrator in 13 cases

→ A new elite at the margins of socio-legal fields (marginaux sécants or secant marginals)?

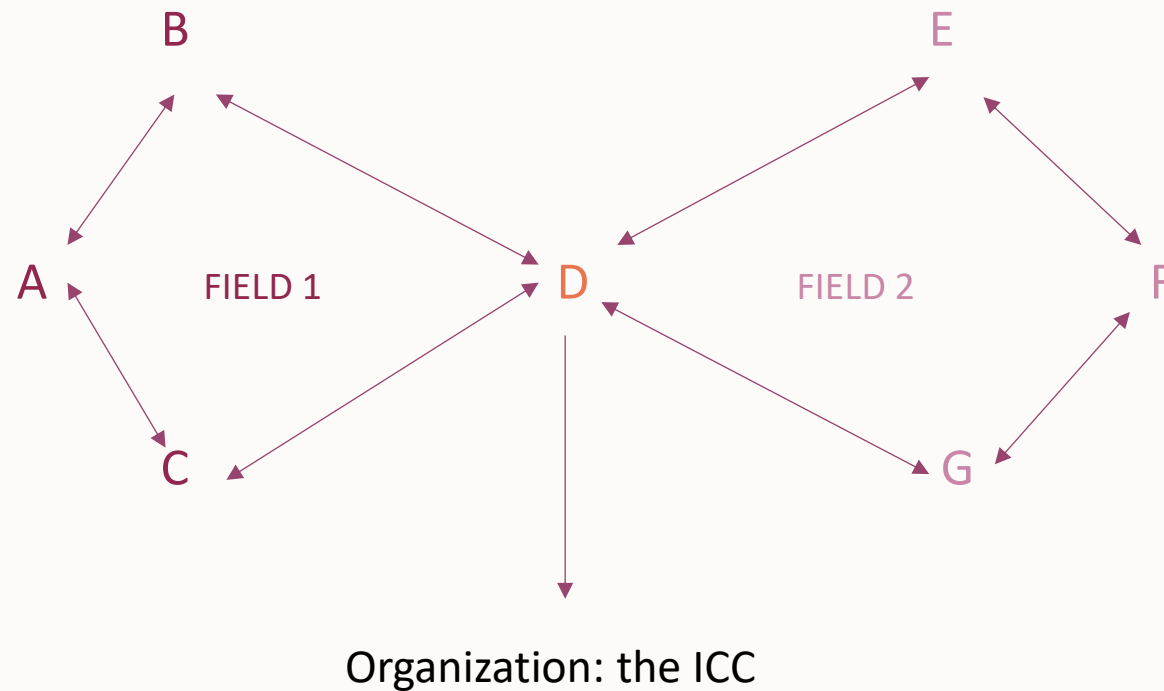
Berthold Goldman

• Grand old man *or* marginal *sécant*?

- **Professor of Law and President of the University of Paris (1974)**
- Born in Romania in 1913, migrated to France in 1930
- First academic position in “Indochina”
- Pioneer in new legal areas (EU law, competition law, arbitration law)
- Theorist of the new “lex mercatoria”
- Hit by a wave of antisemitism when appointed at the University of Paris
- D&G noted Goldman’s intellectual flexibility (learning English at the age of 40, adopting cross examination – unlike most French law professors, etc)



“Secant marginals,” cosmopolitan travelers and professional hybrids



Jan Paulsson

Is he really a young technocrat?

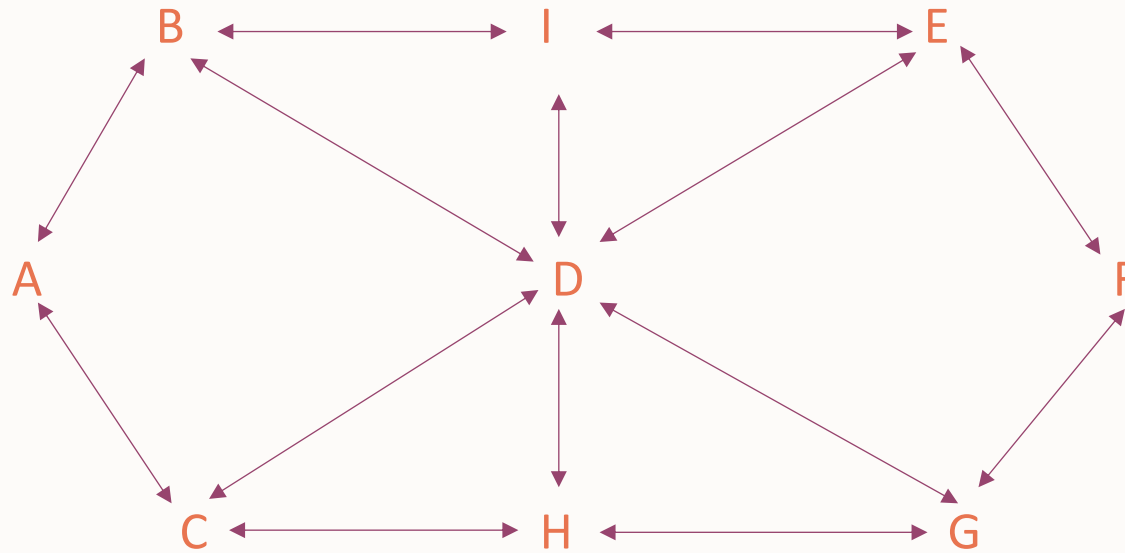
- Born in Sweden and raised in Liberia
- Educated in the US (Harvard, Yale) and France (University of Paris)
- Partner at Freshfields, and co-founder of Three Crowns
- Resident of Bahrain with passports from Sweden and France
- Emeritus professor at the University of Miami



Name	Gender	Nationality	Birth	Academic activities	Position in an arbitral institution	Attorney or barrister
Judith Gill	F	UK	1959	Y	Y	Y
Bernard Hanotiau	M	Belgium	1947	Y	Y	Y
Gary Born	M	USA	1955	Y	Y	Y
Toby Landau	M	UK	1967	Y	Y	Y
Audley Sheppard	M	New Zealand	1960	Y	Y	Y
AJ van den Berg	M	Netherlands	1949	Y	Y	Y
Emmanuel Gaillard	M	France	1952	Y	Y	Y
L. Yves Fortier	M	Canada	1935	N	Y	Y
VV Veeder	M	UK	1948	Y	Y	Y
David W. Rivkin	M	USA	1955	N	Y	Y
Pierre Bienvenu	M	Canada	1957	N	Y	Y
Gabrielle Kaufmann-Kohler	F	Switzerland	1952	Y	Y	Y
Alexis Mourre	M	France	1963	Y	Y	Y
Stephen Jagusch	M	New Zealand	1967	Y	Y	Y
Constantine Partasides	M	UK	1969	Y	N	Y
Henri Alvarez	M	Canada	1954	Y	Y	Y
Klaus Sachs	M	Germany	1951	Y	Y	Y
Yves Derains	M	France	1945	Y	Y	Y
Laurent Lévy	M	Switzerland/Brazil	1948	Y	Y	Y
Julian Lew	M	UK	1948	Y	Y	Y
Donald Donovan	M	USA	1955	Y	Y	Y
Jan Paulsson	M	France	1949	Y	Y	Y
Michael Pryles	M	Australia	1945	Y	Y	Y
Eduardo Silva Romero	M	Colombia/France	1971	Y	Y	Y
William Rowley	M	Canada	1943	Y	Y	Y

Source: *Who's Who Legal (2015)*

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4. The cooperative field at work: the New York Convention of 1958

The Genesis of the NY Convention

- The Geneva Convention on the Execution of Foreign Arbitral Awards (1927) suffered from two defects (the requirement to prove that the award is final (Art. 1(d)) and made in accordance with the law governing the arbitral procedure (Art. 1(c)))
- In 1951, the ICC gathered a sub-committee (among its 8 members, 1 “secant marginal”: Ernest Barba + Pieter Sanders and René Arnaud) that issued a Preliminary Draft Convention that addressed these defects (deletion of the finality requirement, and requirement that the award is made “in accordance with the agreement of the parties or, failing agreement between the parties in this respect, in accordance with the law of the country where arbitration took place”)

4. The cooperative field at work: the New York Convention of 1958

The Negotiations of the NY Convention

- The Economic and Social Council of the UN (ECOSOC) rejected the ICC Preliminary Draft Convention, and issued its own draft convention on the recognition and enforcement of foreign arbitral awards in 1955
- During the treaty negotiations in May-June 1958, the Netherlands issued a proposal (the “Dutch proposal”, brought by Pieter Sanders), which was backed by other states and led to a final position that was very close to the ICC Preliminary Draft Convention
 - Several “secant marginals” were actively involved in this process : Pierre-Jean Pointet for Switzerland, Ottoarndt Glossner for Germany, Lazare Kopelmanas for the UN, Ernest Barda at the early stages (and other ICC representatives, such as René Arnaud and Pieter Sanders).

What have we learned?

- The ICC (as an organization) has successfully operated at the intersection of various socio-legal fields (common law / civil law, for instance)
- The new field of international arbitration has emerged at this intersection (and the ICC has played an active role in its emergence)
- International commercial arbitration as a new form of global law is a by-product of cooperative interactions
- States are largely absent from these interactions, which does not mean they are unimportant (as illustrated by the negotiation of the New York Convention)