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Foreword by

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DEALING IN VIRTUE

International Commercial Arbitration and the Construction of a Transnational Legal Order

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Foreword

This book might benefit from the current fashion (for indeed there is no other word for it) of highlighting and grouping together a series of loosely related phenomena under the rubric *globalization*. Although this can only have resulted from a profound misunderstanding, I am glad of it. For I am convinced that this analysis can bring about a real paradigm shift in an area until now given over to long-winded and dangerous approximations of "essayism."

To speak of a global—or, better, international—legal field is immediately to escape the temptation to explain the processes of unification observed in very different domains of practice in one of two ways: either as a quasi-mechanical effect of the intensification and acceleration of circulation and exchange, leading to an ecumenical reconciliation of all cultural traditions, or as an effect of imperialism exercised by a few great industrial powers capable of exporting and imposing, on a universal scale, not only their products but also their style of life. The notion of field (in the sense of fields of forces and fields of struggle to conserve and transform the relationship of forces) requires a position beyond the sophomoric alternatives of consensus and conflict, and thus permits us to understand and analyze the process of unification as a product of competition and conflict.

By collaborating in this research, Yves Dezalay and Bryant Garth have been able to combine their own familiarity (linked to their national origins and disciplinary training, involving two of the great legal traditions confronting each other) with their learned knowledge of a great number of national legal spaces (including their own). They have managed to show that 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. Since lawyers and others are trained nationally, and for the most part they make their careers nationally, it is not surprising that they seek as a matter of course to deploy their ways of thinking and practicing in the

construction of international institutions. This process makes the international the site of a regulatory competition between essentially national approaches. In the conquest of new markets for their legal services, the large law firms rely on the fact that legal capital plays a decisive role in the regulation of commerce and also in organizations for the defense of "human rights," organizations that, along with great international institutions like the IMF and the World Bank, are often the Trojan Horses of the "Chicago boys" and their strategies of legal-economic import-export—that associate ethical idealism and economic realism. But these new "bourgeois conquerors" must take into account the resistance of national legal fields threatened by the new world legal order or, more exactly, the balance of power and conflict—found within these national fields—between modernists, who take the position of the international, and traditionalists, who play for protectionist closure and the maintenance of national tradition.

Thinking in terms of "field" also allows one to recapture the global logic of the new world legal order without resorting to generalities as vague and vast as their object. Instead, one can observe and analyze the more concrete strategies by which particular agents, themselves defined by their dispositions (tied to a social position and a trajectory in a national field), their properties, and their interests, construct an international legal field while at the same time transforming their national legal fields. This approach leads, for example, to the discovery that within each national field the partisans of "global" and "local" are not distributed randomly, since international strategies are really accessible only to those with (very) privileged social origin, possessing dispositions and competences (notably linguistic) that do not come from classroom instruction.

The national members of this new international elite, a *noblesse de robe,* by exercising their talents in the major transnational entities, humanitarian organizations, or even great legal multinationals, help to bring juridical forms to a higher level of universalization in and by a confrontation of different and at times opposed visions. Always at play in this confrontation, both as weapon and as stakes, is the law (whether the rights of business, the rights of man, or the rights of businessmen)—that is, piously hypocritical reference to the universal.

Pierre Bourdieu

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how international commercial arbitration was transformed through the intersection of U.S. litigators and the European arbitration elite. Finally, it shows that the "national" approach—U.S. litigation—that helped develop and transform international business disputing is itself a social construction that is also, in part, a product of international developments.

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Merchants of Law as Moral Entrepreneurs: Constructing International Justice out of the Competition for Transnational Business Disputes

A central theme in sociolegal research is how the legitimacy of law is maintained so that it can provide a basis to govern matters that involve powerful economic and political entities (Hunt 1993).[1] The study of international commercial arbitration allows us to see how international private justice—lacking the legitimacy of the state court system—has become established and recognized almost universally as legitimate for business disputes. Competition among key actors and groups, as we shall see in this chapter, serves to construct legal legitimacy and at the same time promote law in the service of merchants. The competition, however, is not simply a matter of striving for business by offering better services. International commercial arbitration is a symbolic field, and therefore the competitive battles that take place within it are fought in symbolic terms among moral entrepreneurs. Battles fought in terms of legitimacy and credibility then serve a double role. They build careers and markets for those who are successful in this competition, and they build the legitimacy and credibility of international legal practices and international institutions (cf. the "schizophrenia" of the legal profession as described by Gordon 1984).

This is not to say that the construction of this global justice for transnational business disputes was "caused" only through some dynamic within the field of international commercial arbitration. The relationship is much more complex. The relative positions and indeed even the entry onto the field of many key players, as will be seen below and in chapter 4, relate to other factors of considerable importance—in particular, decolonization, the growth of international trade, and the power of Anglo-American law firms (in turn bolstered by their clientele). Our ambition, however, is not to confirm the simple promotional story of the inevitable growth of international commercial arbitration in response to the growth of international trade and commerce. It

1. Our study of legitimacy is mainly of arbitration entrepreneurs who promote the legitimacy of particular conceptions of arbitration. For empirical support for the proposition that the subjects of legal regulation also act in part out of beliefs in legitimacy, see Tyler and Mitchell (1994).

is to explain why the phenomenon termed international commercial arbitration has become more institutionalized and has a particular set of characteristics that, we submit, are not mere details but rather are important aspects of the emerging global economy.

Oppositions and Complementarities in the Field of International Commercial Arbitration

The field of international commercial arbitration is given its structure and its logic of transformation through oppositions and complementarities that we shall now begin to map. The key source of conflict, and also of transformation, is that between two generations—"grand old men" versus "technocrats." We therefore begin this section by showing what this conflict and the symbolic battles around it reveal about international commercial arbitration. We shall then focus on a related conflict, between academics and practitioners. After these oppositional relationships have been described, we shall turn in the next sections to the way that the conflicts have been managed in the case of one key institution, the International Chamber of Commerce in Paris, and to the role of large Anglo-American law firms in the transformation of relatively informal arbitration into "offshore litigation." The conflicts, the management, and the power of the large law firms are key ingredients in the success and current status of international commercial arbitration.

Grand Old Men and Technocrats

The starting point of the generational warfare is diverging ideas of arbitral competence—the characteristics that qualify one to be an arbitrator. For the pioneers of arbitration, exemplified especially, but not only, by very senior European professors imbued with the traditional values of the European legal elites,[2] the dominant opinion has been that arbitration should not be a profession: "Arbitration is a duty, not a career" (int. 173, 3). For true independence of judgment, in the words of another senior insider, "The person who goes into this business as an arbitrator to make a living should not be encouraged" (int. 37, 2). Arbitrators, they insist, should render an occasional service, provided on the basis of long experience and wisdom acquired in law, business,

2. A good discussion of the European aristocratic values is in Osiel (1989, 2033–39). This is not to say that the values do not echo in the United States, only that in the United States there has been, as Osiel notes, "a relatively unqualified embrace of the modern world of commerce and corporations" (2046). Compare Kronman 1993, which seeks to reassert the aristocratic values.

or public service.[3] Those who hold this opinion are, indeed, individuals who have risen to the top of their national legal professions and gained financial independence before being asked to serve as arbitrators.

The specific criteria for these "grand notable" arbitrators allow for numerous variations. Different countries and legal systems have different hierarchies in their legal professions. The great professors and a few high judges have for a long time controlled the arbitration terrain of Continental Europe,[4] while the comparable role is assumed in the Anglo-American system by the most respected of the practitioners, senior barristers or Queen's Counsel (QCs), or senior partners in firms of solicitors or U.S. law firms. Retired judges such as Lord Wilberforce have been important as well to England. The arbitration market has selected those at the top of their domestic professions to become senior arbitrators: "high profile, high visibility . . . national aura behind them" (int. 51, 18).

These relatively few grand old men,[5] as they are often referred to (there were no women), have played a central role in the emergence and the recognition of arbitration,[6] and they continue to have a quasi monopoly for very large matters. As a U.S. litigator stated, "There are some categories of disputes where you're going to need the grand old men who are known to each other" (int. 38, 18). Stated another longtime observer of the field, "In these big, big

3. Jean Robert, one of the respected founding fathers of international commercial arbitration, reportedly stated that "arbitrators are the well-paid unemployed." One leading member of the pioneering generation noted that to be "really independent," one had to be over seventy-five years of age and not dependent on further arbitration business (int. 158, 8).

4. This generation in Europe could also be defined as somewhat marginal in the sense that they were not content to simply work their way up national hierarchies through their patience and technical skill. They used their personal qualities and social characteristics to redefine the traditional careers and maintain an openness to new opportunities and approaches that were not strictly "legal," but rather at the crossroads of law, politics, and business.

5. Figure 1 gives numbers of the individuals we interviewed according to general characteristics, but we would define ten to fifteen of the senior individuals we interviewed as the most perfect embodiment of the characteristics of the pioneering generation.

6. More generally, it is typically the case that when a new symbolic field is being constructed it requires the personal legitimacy of "grand old men" or their equivalent to provide it with sufficient legitimacy to survive. Almost by definition, this process will apply to a specific time in the history of the legal field. Our preliminary research suggests that we can find precisely the same phenomenon in the early development of the field of international human rights.

cases, you go for people who have already years of experience" (int. 10, 12).[7] But these "divas"—sometimes defined also as dinosaurs—are increasingly criticized by a new generation of practitioners who came to arbitration because of the rapid growth of this market in the 1980s.

To the aura or the charisma of their elders, these new arrivals oppose their specialization and technical competence. In the words of a Swiss member of the new generation, "Arbitration was characterized by a limited, small group of impeccable, outstanding professionals—characters known around the world. . . . Today I have difficulty in seeing the outstanding personality [among] a big crowd of people" (int. 166, 33).[8] Put in more aggressive terms by a member of the same cohort, an arbitrator cannot now just step in "with all . . . [the] glorious past" and provide the "great old man's opinion" (int. 184, 6). Indeed, charisma is said even to be a source of error. In the words of an ICC insider, "Some of the biggest problems that we see are probably with some of the big names" (int. 134, 14). Why? "They're probably just more full of themselves than other people" (id., 14). Furthermore, "Sometimes an eminent arbitrator feels he doesn't have to explain things" (id., 25). A leading figure of the younger generation thus describes his generation as "technically better equipped in procedure and substance" (int. 148, 6).

They present themselves in this new generation as international arbitration professionals,[9] and also as entrepreneurs selling their services to business practitioners, contrasting their qualities[10] to the "amateurism" or "idealism" of

7. "I have two lists . . . two ways of thinking. I have what I call the big hitter . . . a grand monsieur . . . a man of sixty-five or seventy—a professor. . . the French- or German-style professor, or the ex-judge—retired judge" (int. 82, 14). The grand old man is for "a case that has political ramifications. . . . You need him for his eminence and respect" (id., 17).

8. Virtually all of the thirty-three arbitration specialists that we interviewed and noted graphically in figure 1, as well as many of the "arbitration bureaucrats," are major players in this generation.

9. The international characteristics of this generation are also captured in the following quotation: "[W]e had recently an arbitration and we did it in English. Place of arbitration was Vienna. And the way we conducted it was very much influenced by our common background of time in the United States. That was the one thing we had in common. Next thing we had in common was that we all knew some Latin. And some knowledge of Roman law. Third thing that we had in common was the German legal theory, which in Turkey, Switzerland, and Germany was also a common thing. And the fourth thing was that we all watched CNN and read the *Financial Times*, and you know" (int. 108, 45).

10. Several young Swiss arbitrators highlighted the difference between generations, in their opinion, by stating that, while they would stay awake all night to finish an arbitration and produce an award, the senior Swiss arbitrators would terminate the hearing at 5:00 P.M. for dinner and an evening at the opera.

their predecessors.[11] This idea of change is well captured in an article by Jan Paulsson, a leading member of the new generation (also described in chapter 2):

> the age of innocence has come to an end . . . [and] the subject has inevitably lost some of its charm. Once the delightful discipline of a handful of academic *aficionados* on the fringe of international law, it has become a matter of serious concern for great numbers of professionals determined to master a process because it is essential to their business. They labor, but not for love. (Paulsson 1985, 2)

Indeed, now that arbitration has become accepted in commercial international mores, they assert, even citing Max Weber in one instance, that the time has come for the "routinization of charisma" essential to the transition from the stage of artisans to that of mass production (int. 104). This transition requires the "rationalization" of arbitration know-how.

These technocrats play key roles now in institutions like the International Chamber of Commerce, which they not only have come to direct but also have used for their education in arbitration. The quick route to arbitration expertise is through the major institutions, which hire young lawyers to administer the arbitrations.[12] These organizations, which the pioneers used for evangelical purposes to promote arbitration, now have added a more technical involvement in the administration of the arbitrations themselves.

The large Anglo-American law firms, which dominate the international market of business law, are also central to this conflict between grand old men and technocrats. With the growth of trade and the success of the pioneers in building international arbitration, they now consider it important to include this speciality in the gamut of services that they put at the disposition of their

11. We find this same opposition elsewhere, for example in economics. Engineers and also lawyers at a certain moment began to define themselves as economists to align themselves with the new expertise, but they were later dismissed by a new generation trained in the more technical aspects of economics (see Wade 1990).

12. The method is not only quick, but also one of the only ways to resolve the catch-22 of arbitration: It is necessary to have a reputation in international arbitration to gain access to arbitration. The new generation can through these institutions gain a control over the production of producers—arbitrators and arbitration lawyers. There are other ways to enter, but they are difficult. For example, the large law firms offer possibilities to younger lawyers, but they tend still to treat arbitration as only part of general litigation. It is hard to become a recognized expert.

multinational clients. The attitude of the large law firms has been to favor overtly this "banalization" and rationalization of arbitration, which permits them to introduce themselves into the closed "club" and to introduce the legal techniques that are at the basis of their preeminence. As a U.S. lawyer stated about the Swiss, "It's the younger generation that I like, because all of them have gone to school in the United States. They all speak fluent English. They know how to deal with Americans and English, and they move cases along" (int. 37, 34). Another U.S. expert, describing a particular individual of the new generation, is quite revealing:

> He'll make a fortune in this work if he keeps growing. And one of the reasons is he's not in the sense that you use that word, a "star," because he's never going to act like that. What you see is what you get. He'll do his work, he'll do it well, and people will keep coming back to him. But he won't be a pontificating presence. (Int. 7, 26)[13]

This opposition between grand old men and young technocrats—supported by Anglo-American firms—is one of the keys that permits decoding a great number of the debates and the fights—in scholarship as well as in institutions—that affect this field of practice. One controversy, discussed further below, is whether the major institutions, the ICC notably, are now too involved in the actual work of the arbitrators. A second is whether arbitration is becoming too much like litigation. The perspective of the senior generation is highly critical of both of these trends. A leading senior arbitrator thus reported that procedural infighting was "suicidal" to arbitration and that he was likewise "absolutely opposed to drowning arbitration in paperwork" (int. 173, 6). With respect to the ICC, the same individual noted that the weakness of the ICC was that its arbitration was "overly regulated" by the secretariat[14] who had "never seen arbitration from the inside" (id., 6).[15]

13. The new president of the Swiss Arbitration Association, succeeding one of the great stars of the senior generation, Pierre Lalive, makes the same point in his description of what he aspires to in arbitration: "a continuing challenge to overcome obstacles and to grow—not to grow to a 'super arbitrator,' but to an arbitrator with dignity, an open heart and mind and, above all: modesty" ("Profile of Arbitrator, Marc Blessing" 1991, 253).

14. A published article by Gillis Wetter (1990) of Sweden is unique for articulating these concerns in strong language. For example, he states that the "ICC Court . . . is an administrative institution that engages in rather far-reaching involvement in arbitration proceedings, yet offers relatively little administrative or intellectual support to arbitration tribunals" (1990, 95). Stephen Bond, then secretary-general of the ICC and a member of the new generation, wrote an equally strong response, published in the same journal (1990).

15. A criticism that can also be made of our work. An older, but fascinating, account of arbitration, which supports our attention to symbolic capital and the role of authority and expertise within the arbitral tribunal, is Mentschikoff and Haggard 1977.

This cleavage about the conduct of arbitration is also present in debates that appear much more academic. The best known of such debates concerns the so-called *lex mercatoria*, conceived by many as a return to an international law of business—a new "law merchant" independent from national laws (see generally Carbonneau 1990; de Ly 1992). Avoiding open criticism of the powerful grand old professors from France and Switzerland who, as discussed in chapter 4, reinvented this theory and applied it to commercial arbitration, the new generation prefers to focus on how it is applied by "other" arbitrators. A U.S. arbitration expert in a large law firm in Paris thus stated about the *lex mercatoria*,

> It's something that can be subject to abuse where an arbitrator doesn't feel like going through a difficult choice of law . . . or simply decides that something is *lex mercatoria* because that's an answer he feels is right. . . . The question is . . . whether commercial parties feel that it provides sufficient security and predictability—and how well arbitrators who don't have the abilities of [Berthold] Goldman [a senior French professor and the "father" of the *lex mercatoria*] are able to apply the theory and come up with suitable answers that are perceived as fair and reasonable by both parties. (Int. 104, 23; see also Paulsson 1990, 68; int. 10, 14)

It is as if only a few arbitrators with incontestable authority have the right to invoke the notion of *lex mercatoria*. All others must restrain themselves and carefully explicate the legal reasoning that prevents their decision from being condemned as arbitrary. As the quotation also indicates, Anglo-American practitioners tend not to support the Continental, academic *lex mercatoria* (see the lineup in Carbonneau 1990; Mustill 1987).

But beyond the contest between generations about what and whose characteristics should be at the center of international commercial arbitration, this fight for power contains the true transformation that is taking place—the passage from one mode to another for the production of arbitration and the legitimation of arbitrators. As is the case for the entire field of business law, the Anglo-American model of the business enterprise and merchant competition is tending to substitute itself for the Continental model of legal artisans and corporatist control over the profession (Dezalay 1992). In the same way, international commercial arbitration is moving from a small, closed group of self-regulating artisans to a more open and competitive business.

The arrival of new generations and greater competition, beginning in the late 1970s, can be seen as part of this process. We must be careful, however, not to overlook the personal dimension in this story. The break between the

small group of artisans and today's arbitration professionals is not as pronounced as it might appear. A good number of these "angry young men" of arbitration are "new" arrivals only in the strict sense of the term. They are also the inheritors—or more precisely the disciples—of the grand old men.[16] They have been able to avoid waiting patiently for the retirement of their mentors in order to succeed them, which was the tradition in the artisanal model (and also in the classic Continental academic model). They have sought to jump these stages and profit from a boom in arbitration that created a demand that exceeded the capacity of the grand masters and the artisanal mode of production. The desire to promote their own technical competencies has led them to a position that devalues the wisdom and generalist experience of their notable mentors, whom they now characterize as dinosaurs. Since they are for the most part too young to compete with the charisma of grand old men, they must emphasize their technical sophistication.

The positions in these contests, however, are more tactical than permanent. It is not at all clear that these young technocrats are ready to renounce completely the attractions of charismatic arbitration, which present advantages both for the arbitrators and for the parties in conflict. Not surprisingly, a certain number of these technicians are seeking to take the prominence gained as international arbitration specialists and reinvest it in a more generalist professional profile.[17] The strategy of diversification may permit them to

16. It will suffice to note that many of the leaders of the new generation were closely connected to the most well known senior arbitrators. Among other examples, we may point to the close connections between Albert Jan van den Berg and Pieter Sanders in the Netherlands; the connection of numerous Swiss arbitrators to Pierre Lalive and the Lalive firm; the numerous disciples of the great French professor, René David, including Yves Derain, Julian Lew, and van den Berg; prominent French disciples to Pierre Bellet and Berthold Goldman. Indeed, the observation can be generalized. Even within U.S. law firms, we found that leading arbitration notables of the new generation, such as James Carter and David Rivkin, were promoted by notable mentors—Jack Stevenson and Robert von Mehren. The systems of patronage may no longer be as extreme as the European legal dynasties of the past, but there are artificial recreations of the same phenomenon. Because of the small size of the groups we investigated and the early stage of the development of the field, our project has noted connections that we are certain would be revealed in similarly detailed studies of other areas of legal practice.

17. A formerly quite active Swiss arbitrator, now involved in electoral politics, thus noted,

> I used to be fairly legalistic as an arbitrator. Give me the facts. Give me the law. And I'll decide it, okay. . . . I was impressed . . . when I was . . . secretary at several panels, for several arbitration panels where Pierre Lalive was the chairman. He . . . hardly ever decided a case. They would all be settled at some point. And that takes a lot of skill . . . from the chairman—skills which I clearly didn't have some years ago. And I think maybe I'm developing them a little more now. Probably a matter of aging. (Int. 178, 5)

come back into arbitration (or go elsewhere) as new versions of a senior arbitration elite, combining the qualities of expert and the social capital and experience of the charismatic notables.[18]

While it is useful to decode the contests through which the field and the markets of arbitration are constituted, the opposition between notables and technocrats may lead to confusion. The risk is that an objective content will be given to notions that exist only in their opposition. The notables and the technocrats are defined only in a relative manner, the one by relation to the other and also in a quite specific context. The same caution applies to the other major cleavage, which opposes practitioners and academic jurists.

Academics and Practitioners

The polarization between academics and practitioners has elements in common with that between notables and technocrats, but the practice-versus-academia conflict exists also on its own. It provides another key principle for understanding the positions and fights for influence in a field of practice in great measure conceived by and for (mainly Continental) academics but dominated increasingly by (mainly Anglo-American) practitioners. The controversy around the *lex mercatoria* is indicative also in this respect. The Anglo-American practitioners are nearly unanimous in their denunciation of a doctrinal construction that, according to them, allows academics to avoid the rigorous analysis of the facts, the formal law, and even the terms of the contract.[19]

In this controversy as well, it is clear that each side seeks to promote the value of the know-how or the competence that it has mastered the best. Academics—with a competitive advantage in theory—emphasize the *lex mercatoria* elaborated in countless academic books and articles. Practitioners promote the virtues of solid case law and thorough analysis of the facts. But this opposition is also only a relative one. The practitioners of arbitration even in

18. An ambitious U.S. arbitration expert we asked about "future grand old men" replied, "The people my age who are clearly extremely good lawyers and who've devoted a good chunk of their career to international arbitration and so as a matter of course enter in the public eye" (int. 38, 22).

19. A well-known English QC from the commercial bar captures the feeling: "These people are just deciding by the seat of their pants. There's no such thing as the *lex mercatoria*" (int. 87, 34). An American lawyer in Paris makes the same point: "And we don't want *lex mercatoria*. We want to know what law it is. In fact we want to know which procedural law it is. We don't want to leave it up to the arbitrator" (int. 100, 12).

the Anglo-American countries carefully cultivate an intellectual image through publication and university affiliations. Lord Michael Mustill, for example, one of the leading English commercial judges, took the time to master the subtleties of the *lex mercatoria* in order to criticize it at a suitably high level (Mustill 1987). On the other side, the academics who are in the arbitration world—including the Continental ones—are often described as far from the pure academic model. One French academic imbued with the values of the academy thus looked down on academic arbitrators: "abundance of arbitrations" is not "abundance of intelligence" (int. 209, 1).

As a result of the contests for preeminence in the field, each of the competing groups seeks to gain a diversified portfolio of arbitration capital. That is to say, professors must show they can master business practicalities, and practicing lawyers must seek to show competence in sophisticated academic theories. Each group, in short, is in fact closer to the other than appears in the first place, and they complement each other admirably. The academic theorization of arbitration—"developed by the French and Swiss professors largely" (int. 85, 28)—gave the field its *lettres de noblesse* as a sophisticated legal expertise suitable for high-level practitioners. This academic pedigree has helped promote the acceptance and recognition of arbitration throughout much of the world.

In the same way, this rapprochement (or homologation) between professors and practitioners has served to open a market of arbitration well beyond what could have been created by a small group of learned jurists more preoccupied with doctrinal advances than with marketing. Transformations promoted by practitioners, similarly, have overcome the professors' resistance to basic Anglo-American conceptions of litigation—especially more attention to questions of fact and more openness to procedural tactics. Accordingly, the large Anglo-American law firms have become more willing to invest in this process. Anglo-American arbitrators have also changed through some rapprochement, becoming more open to Continental practices such as active judicial questioning and limits on pretrial discovery (Lowenfeld 1985).

The opposition and the complementarity between these different poles structures the field of arbitration, creating a dynamic that, we can see in retrospect, has allowed this field of practice to change and renovate itself over the past two decades. At the same time, the diversity of resources and competencies among the available—and competing—"private judges" has allowed different kinds of conflicts—great or small, exceptional or routine—to call on different types of arbitrators. As a result, international arbitration can reap the symbolic benefits and material prosperity of its generally accepted legitimacy in international business transactions.

The Management of Antagonisms and the Production of Universals: The International Chamber of Commerce

We can pursue these themes and hopefully avoid the problems of a simplistic or objectifying schematization by focusing in more detail on the emergence of modern arbitration around international commercial arbitration's preeminent institution—the International Chamber of Commerce in Paris (Ridgeway 1938). The success of the missionary enterprise of the founders[20] led to the diffusion of the ICC arbitration clause into business transactions around the world. With a rapid growth of international trade and commercial conflict, the resultant case boom challenged the ICC's structure. According to one of the key figures in this period of the ICC,

> in the late seventies [the ICC] started having problems because the number of cases increased quite dramatically. And the ICC, I think, at the time still only had five or six people in the secretariat. And that's when, I guess in 1980 or '81, there was this very significant effort by the ICC to organize itself administratively, to hire more people. (Int. 104, 2)

The ICC, as we shall see, necessarily became a more bureaucratic institution.

New Arrivals and the Expansion of the Market

The ICC had to administer the influx of new cases and, more importantly, to respond to the new problems posed by the arrival of a new clientele and, to a lesser degree, new arbitrators. The new arrivals were unfamiliar with the usages of an international arbitration coterie that was at the same time learned, militant, and a little marginal because of its shared hobby. The expansion of the market of Eurodollars, then the manna of petrodollars thanks to the oil crises in the 1970s, both enlarged and *reoriented* international trade. North-south conflicts became more important as the ICC became the focal point for the major arbitrations tied to the very large construction projects located especially in the Arab countries.

This opening to north-south conflicts coincided, somewhat paradoxically, with an accelerated American involvement in the practice of arbitration. One

20. Among countless examples of the role of the ICC in universalizing arbitration, we can point to the travels by ICC leaders around the world to sell the concept of arbitration, the role of the ICC in the 1958 New York Convention, which set the stage for the easy enforcement of arbitral awards in all signatory countries, and the relationship of the ICC to the International Council for Commercial Arbitration (ICCA), which sponsors the most important conferences and uses them to gain new terrain for arbitration.

reason is that, since the North American exporters were confronted with problems in the execution of their contracts, their law firms invested in the forum already accepted for these contracts—international arbitration, typically in Paris or Switzerland (and later through the Iran–United States Claims Tribunal operating in The Hague).[21]

Another reason for increased American (and English) involvement is that the multinationals of law arrived on the arbitration scene with technical facilities that were unique in the market. Serving both multinational enterprises and not infrequently third-world countries, they were well equipped for the mass of facts characteristic of these megalitigations with gigantic sums in controversy. As a result, the ICC saw both new parties from the south and new law practices from the north. And the market expanded considerably.

Competition in the Field

This rapid expansion of the market of arbitration naturally awakened new appetites (Clow and Stewart 1990). The ICC thus found itself more and more in competition with new arbitral institutions aiming at such or such segment of this very diverse market. One segment of the market could be defined in geographical terms, like East-West or Euro-Arab relations. Stockholm, for example, made its reputation with Soviet-U.S. disputes in particular and East-West in general (see chap. 9). Another segment might involve a type of specific case, like those concerning intellectual property. There are also efforts to promote alternative technologies for the administration of business disputes.[22]

The multiplication and diversification of places and institutions of arbitration promotes further competition. The ICC, for example, has been forced to adjust its general fee schedule downward to attract business clients, and some institutions seek to gain the favor of arbitrators by emphasizing that they allow the arbitrators to negotiate any fee arrangement they can obtain. Multinational law firms accelerate this competition by their ability to forum shop—both in contractual negotiations and after disputes arise—among institutions, sets of rules, laws, and arbitrators (Purcell 1992).

21. According to a British lawyer with a multinational law firm, referring to ICC arbitrations, "In the Middle East with the oil explosion and the huge contracts that were let in the late sixties and seventies, they gave rise to a good number of disputes. And there were a number of us in Western Europe who made a lot of money resolving them" (int. 85, 17).

22. Ironically, the promoters of alternative dispute resolution represent an echo, now from a new place, of precisely the arguments that the arbitration community once used to challenge the hegemony of the formal state justice systems (see chap. 8).

The ICC and the Universality of Arbitration

Even if the ICC has lost its position of quasi monopoly, it remains the central institution. A longtime British observer thus points out, "But the ICC is a great institution. I mean it's the leading arbitral, international arbitral institution in the world by a long way" (int. 85, 18; see also int. 91, 16; int. 66, 26; int. 52, 12; int. 95; int. 69). Potential clients see the ICC as trustworthy and respectable because of its senior status, and because it has preserved the missionary idealism of its origins. An American critic of the ICC agrees: "The ICC has of course the great advantage that they were in it from the beginning. And they have created this aura that if you have an ICC arbitration that the award is good and it will be enforced everywhere" (int. 57, 6).

As the status of the ICC indicates, history is a key legitimator in the legal field. No one can compete with tradition without ending up underscoring that one group is a new arrival and another the established elite, akin to the aristocracy. The passage of time also tends to obscure the politics that created an institution, thereby giving it an aura of naturalness. And this kind of legitimacy is probably especially important in a field where it is important to be able to claim a distance from business and politics.[23]

The ICC is the most universal of the arbitration institutions, able to brag even about having become a sort of United Nations (int. 106, 4) of commerce and of international arbitration. With members from some one hundred nations and national committees in sixty, it offers a powerful image of neutrality and legitimacy. In addition, ICC arbitration benefits from a double sponsorship—that of the world of business, since the parent organization remains a major business group, and that of the world of learned jurists, to which belong the founding fathers and an important fraction of arbitrators today. Finally, we can also note that the ICC has benefited from a close relationship with the state, evident in both the support it obtained from the French government and the "public-private" career profiles of key figures in the arbitration community (e.g., the retired French judge, Pierre Bellet).

The ICC has therefore become one of the principal places where the "politics" of arbitration is elaborated and expressed. There are innumerable committees and multiple networks of influence that gravitate around this institution. The court, for example, which is really an oversight committee that reviews arbitration appointments and decisions, appears to be particularly sensitive to the business clientele; the Institute of International Business Law

23. It is similarly interesting that one feature of the *lex mercatoria* is that it builds links to medieval times, suggesting that it is quite normal to have a special merchant law.

and Practice focuses on the academic side; and the secretariat guides the court and seeks to manage growth and change. Through exchanges and contests expressed in these and other ICC forums and networks, the ICC is able to make policy to regulate the relations of arbitration with the worlds of national law (essentially the new legislation and jurisprudence in matters of arbitration) and politics.[24]

The emergence of institutional networks around the ICC can also be seen as a true microcosm of the legal field. Between the first generation of charismatic pioneers and the experts of the ascending generations, one finds a sort of striking abridgment of the principal stages in the grand Weberian canvas (Weber 1978, 246–54, 784–816). We see first the legal *honoratiores*, embodying the wisdom of law and the social legitimacy necessary to the management of social conflicts. We then find institutionalization and the creation of a division of labor, which permits the development of a collective legitimacy dependent not on individual notables but rather on "the ICC" or even "law" or "international commercial arbitration."[25]

It is clear, however, that this project of routinization—even judicialization—of arbitration, supported strongly by the ICC bureaucracy while denounced as treason by the founding fathers, cannot be completely accomplished. Despite the changes, there remains a vital element of personal relations in this field. The system of selection and self-regulation of arbitrators created by the pioneers and resembling a club has remained quite essential to the prosperity of international commercial arbitration.

Despite the conflicts and differing positions taken with respect to the conduct of arbitration, the participants in the debates are still in key respects members of a common community. This community, like all organizations where professional relations are reproduced through an extraordinary network of personal ties, has a tendency to fix itself by ensuring that social interests are organized to make themselves heard better. The main organs of the ICC, by allowing this more personal debate and interchange, contribute crucially to the management of conflicts toward the success of international arbitration.

24. One recent example was the question of the appropriate attitude to adopt with respect to contracts and arbitration threatened by sociopolitical disturbances, such as was the case recently with the destruction of the Soviet bloc. Another is the difficult problem of what to do with the bribes, or baksheesh, that surface in accounts of much of international trade and investment. The ICC provides committees and forums to debate and resolve such issues.

25. An insider of the secretariat during the time of change thus noted, "When I started then it was more or less a group of friends, for the club. . . . And then with the expansion of the number of cases [it] was not any longer possible just to deal on a personal basis" (int. 108, 18).

Between the Club and the Market

The secretariat of the Court of Arbitration of the ICC makes no secret of its desire to open the market of arbitration beyond the narrow circle of the grand old men.[26] Certainly these efforts can be justified by the growth in the number of cases submitted to the ICC, as well as by their great geographical diversity (see Bond 1990). The arrival into arbitration of the third world and of the Anglo-Americans rendered necessary the recruitment of new arbitrators who did not fit the profile of the Continental academic or the other pioneers (Bond 1990, 120). Many new users are bound to nominate arbitrators—and a fortiori lawyers—from their own legal settings. According to Stephen Bond, then the secretary-general of the ICC, "In such instances, given the importance of party autonomy and consensus as basic principles of international commercial arbitration, the ICC has not refused confirmation of such persons, even when they are unknown to the Court itself" (Bond 1990, 121).

These newcomers, however, are by definition not the progeny of the club. Their entry into the practices and norms of the club cannot be ensured by a long apprenticeship or by an informal process controlled by a small group of senior men. The institutionalization of these tasks of enlisting new arbitrators and observing their performance, in fact, justifies the growth and transformation of the ICC bureaucracy (the secretariat) and also the Court of Arbitration. This "bureaucratization" of the ICC, and also the retention of two of the most controversial aspects of the ICC procedure—the terms of reference and the review of the arbitrators' opinions by the court—can therefore be seen as part of the effort to bring in newcomers, accommodate their situation, and preserve the universality of the ICC and arbitration.[27]

26. As one key representative of the secretariat mentioned, "There was an effort to broaden the pool." And new nationalities were also brought in partly because "it's important for the perception of the ICC as being international. And it's important in the perception of international arbitration as an institution, it's being universal" (int. 104, 7).

27. The terms of reference are a document that the parties must develop at the outset of the arbitration. Even those generally critical of the terms of reference, which includes most American and British lawyers, state that the terms of reference are "helpful if you've got inexperienced arbitrators or unprofessional arbitrators or those who might be likely to misbehave in some way" (int. 53, 8). Similarly, an English barrister notes that the English "hate the terms of reference. Now that is because they've never been exposed to an arbitration where there is some deficiency or some imbalance between the parties or their legal representative whether it's cultural or legal" (int. 93, 7). We suggest that this kind of process, which serves to produce belief in the rules of the game at the outset and build a common language, is quite common in places where the system has not yet been routinized.

The ICC court reviews decisions and has the power to ask arbitrators to rewrite.

This set of events helps to explain better the current ambivalence of the founding fathers with respect to the ICC—seen in their attitude toward "bureaucratization." It is an organization that they helped to build, and that celebrates them at all conferences and ceremonial occasions. But, at the same time, it is now dispossessing them from what constitutes a large part of their power. They are losing the informal control they could assert on a community of disciples, where loyalty could be rewarded by suggesting names for arbitration or for the activities of legal representation. We have here the classical scenario of an institution that is devouring its founding fathers in order to better follow their work.

The ICC and the Recentering of the Field of International Commercial Arbitration: The Arrival and Role of the Anglo-American Law Firms

The tensions implicated by these transformations are not explained only by a crisis of growth. They are also the corollary of displacement from the center of gravity of arbitration. The recentering favors the world of Anglo-American law firms, who have used their power in the international business world to impose their conception of arbitration and more largely of the practice of law.[28] It is thus no accident that, within the ICC itself, the politics of rationalization has been conducted since the beginning of the eighties by young Anglo-American lawyers recruited from outside of the club, and whose key words have been transparency, rationalization, and competition.[29] The Anglo-Americans, including the two most recent secretaries-general of the ICC (from the United States), have clashed with leading members of the senior arbitration club over a number of issues, including the necessity of bureaucratization. A recent example, which provides a good illustration of the conflict and the trend in management, has been the effort of the ICC to expand the requirements of ICC arbitrators to disclose relationships with counsel and other arbitrators.

Conflicts of Interest, Independence, and Transparency

According to an observer sympathetic to the controversial approach taken by the ICC secretariat,

> The court took the view that the "declaration of independence" which is required to be signed by all proposed arbitrators should include a mention of any significant relationship between arbitrators proposed and counsel for parties in the arbitration. And there, what the Swiss [and many Europeans] objected to . . . is that the relationships that may exist between counsel and arbitrators are irrelevant, because they cannot possibly call into question the independence of the arbitrator. It's only the relationships with parties that arise. (Int. 134, 6)

The senior generation wants no disclosure of relationships between counsel and arbitrators. The ICC, supported by U.S. lawyers, has opted to support greater disclosure (compare Lowenfeld 1991; see Lalive 1991).

Conforming to the liberal logic that the new Anglo-American generation embodies, it is partly a matter of introducing competition in a market that was strongly cartelized. This objective can be pursued by multiplying the number of producers, and the large Anglo-American firms have had a role in increasing the number of arbitration suppliers (e.g., London, Sweden, Vienna) competing with the ICC. But it is even more essential and also more difficult to introduce a minimum of transparency in a community of specialists characterized by personal relations so complex and so entangled that they interdict access to this market by nonspecialists.[30] Broad disclosure can provide that kind of transparency.

Because of a mixing of roles, the same individuals who belong to the networks around the central institutions of arbitration are found in the roles of lawyers, coarbitrators, or chairs of the arbitral tribunal. The principal players therefore acquire a great familiarity with each other, and they develop also, we suspect, a certain connivance with respect to the role held by the adversary of the moment. The extraordinary flexibility of this rotation of roles contributes greatly to the smooth running of these mechanisms of arbitration.[31] It promotes the reaching of acceptable awards under a regime where the players do not speak of contradictions and antagonisms that, if formulated explicitly and disclosed, would create some difficulties of legitimation. "Adversaries" can protect the processes that provide their legitimacy and prosperity.

According to an ICC insider, the ICC court returns to the arbitrators for revision about 15–20 percent of the awards rendered.

28. Arbitration is only one example of a recentering in favor of the Anglo-Americans that we find more generally through the internationalization of legal practice (Dezalay 1992; Garth 1980, 130–42).

29. As stated from the more recent perspective, "That frustration from the American community has to some degree gotten soft. And I think it's been helped a lot because . . . [of an] American secretary-general of the ICC" (int. 100, 8).

30. We do not mean that outsiders do not participate in ICC arbitrations, only that the repeat work and most effective representation will be within the club.

31. These kinds of relationships, discussed also in chapter 4, contribute to the smooth functioning generally of legal means of resolving disputes, since the advocates can both represent their clients forcefully and avoid dramatic clashes through their personal relations with opposing counsel (e.g., Eisenberg 1976; Mnookin and Kornhauser 1979). Certainly the English system of barristers who know each other well arguing before judges who come also from barristers' chambers is another example.

The potential problem confronted by outsiders and invoked by the ICC secretariat is evident in the words of a leading arbitrator of the new generation:

> This is a mafia. There are about, I suppose, forty to fifty people in Western Europe who could claim that they make their living doing this. I'm one of them. It took me, oh, probably close to fifteen years to get to the point that when I go as I do regularly to the Swiss Arbitration Association meeting twice a year, or I go to an ICC gathering, or an ICCA gathering that I will know and be recognized, and know and talk to a number, you know, the leading figures. And if you . . . that's how you just get into it. Now why is it a mafia? It's a mafia because people appoint one another. You always appoint your friends—people you know. It's a mafia because policymaking is done at these gatherings. (Int. 85, 27)

A self-identified U.S. "associate member" of the club stated, "They nominate one another. And sometimes you're counsel and sometimes you're arbitrator" (int. 50, 9).[32]

At the same time, it is clear that this somewhat mysterious accumulation and confusion of roles represents a formidable handicap for the occasional players. In order to risk playing on the field of international arbitration, it is necessary to be one of the initiated or to draw on the services of one of the initiated. In fact, the majority of specialists of arbitration earn much more from their activity as lawyers than from their activity as arbitrators. Service as arbitrator helps above all to build and to keep up prominence in the arbitration world.[33] By contrast, the activity of lawyer represents a quite profitable activity for the almost obligatory specialists who serve outsiders confronted with the procedure of arbitration. The approach of the ICC secretariat to some extent challenges this subtle mixing of roles, but clearly personal relations and membership in the "club" remain quite important to success in this field. The ICC is working on behalf of its view of legitimacy to give outsiders a little more access to the otherwise hidden connections between the arbitration players.[34]

32. A U.S. litigator stated, "I've appeared in Scandinavia, in the U.K., in France, in Switzerland, and in Italy, and I run into the same lawyers everywhere it's the same names. . . . And so there are people who are almost always involved in some fashion or other if there's an arbitration involving a national event of their country. . . . [O]nce you go offshore, . . . it is a very fungible group and it's the same people over and over [as lawyers and arbitrators]" (int. 51, 11). A senior English arbitrator noted the dilemma: "You're often appointed a party arbitrator by someone with whom you have worked before," and "You know you're going to work with him again. Does that unconsciously bias one? I think that's a difficult one." But "not everybody is 100 percent honest and you know it's a very great advantage to find someone whose character you really do know and can depend on" (int. 97, 13–14).

33. This division between arbitrators and counsel, where the counsel is compensated more materially and the arbitrator more symbolically, is a general phenomenon of the legal world. For example, British QCs, when they are named to the bench, gain the prestige of becoming judges, lose some of their income, and fulfill the function of judging that is necessary for the survival of the system. And those who will take the cut in pay are typically those who are more interested in promoting the universals and legitimacy of the system. From a more economic perspective, Richard Posner makes precisely the same point about U.S. judges (1995, 133).

34. This handicap, according to the ICC insiders of the current generation, causes distrust as well. "Appearance is very important. . . . I think one can assume in many international cases the level of mistrust, suspicion of the other party is greater than in a domestic situation." The mandatory disclosure of relationships between counsel and arbitrators could thus have real impacts: "If there is a party who, if there is disclosure of something and the court is more or less uncertain as to whether or not there is really a problem of independence. . . , the court, I think, is more willing to say let's replace the person. . . . Because what we want in the end is for parties to comply with the awards that are rendered" (int. 134, 7).

35. The terminology fits the perceptions of participants: for example, according to a senior observer, "The [U.S.] lawyers are changing the rules of the game" (int. 10, 7).

Anglo-American Law Firms and Arbitration Insiders

This problem for outsiders highlighted by the ICC secretariat can apply not only to individuals from areas new to international commercial arbitration, but also to the large international law firms themselves. As noted above, the insiders' club of arbitration, while expanded since the days of the pioneers, still enjoys a quasi monopoly on the functions of arbitrator. This monopoly is difficult for multinational law firms to support. When large multinational law firms decided to intervene on the scene of arbitration, they could not be content with folding chairs around a table dominated by others. It is not simply a matter of gaining access to and learning the rules of the game; they insist—and have the power to insist—also on being able to play according to their own terms. That is to say, they insist on utilizing their language and the legal technology that assures their preeminence in the international market of business law. It has therefore been necessary for them not only to enter the closed club of ICC arbitration, but also to impose a redefinition of the rules of the game.[35]

While this strategy is perfectly rational from a strict economic and professional point of view, we believe there is also a more subjective dimension to the contests. The Anglo-American practitioners seek revenge with respect to

the intellectual Parisian salons. To understand the importance of the sociocultural shock that promotes this desire, it is necessary to consider the context of the 1970s, the time of the first great arbitrations tied to the construction of large factories in the oil-producing countries. On both sides of the arbitration world the level of incomprehension was total (see case study in chap. 5). The professional groups in effect could not recognize each other, nourishing solid prejudices with respect to each other.

The litigators debarked at Paris (or later The Hague for the Iran–United States Claims Tribunal) with a certain condescension about the procedure of arbitration—in their eyes nothing but a bastard form of process, a sloppy litigation. They were confronted by a community of learned patricians who, while they considered themselves to be cosmopolitans, were more familiar with the theory than with the legal practice of the Anglo-American world (int. 136, 4). They knew little of a recent evolution under the influence of a young generation of litigators, whose aggressive tactics, a "vulgar justice," were gaining ground in what was a gentlemen's world on Wall Street (see Caplan 1993, 121–75).

The divide was therefore not only between two cultures, but also between two generations—even two social classes. A sophisticated U.S. lawyer long active in international arenas put it this way:

> You take the sort of dyed-in-the-wool, hard-edge, brass knuckles American litigators whose style varies from region to region and, you know, put them into a sort of conventional, somewhat European, international arbitration and that's like inviting that thing off the street into a grand salon—makes about the same impression sometimes. (Int. 7, 6)

These pretentious litigators sought to impose the barbarian manners of the far West and the marginal East in the salons of old Europe. They were received as completely ignorant of the proper European ways of combining business disputes with the lofty production of jurisprudence, doctrine, and legal theory. They also tended to misjudge the Europeans because arbitration, in the opinion of the Americans, was associated with the relatively low status and perceived intellectual content of U.S. domestic arbitration (the less formal, compromise-oriented arbitration largely practiced in labor and smaller commercial conflicts under the auspices of the American Arbitration Association).

Arbitration, we could say, was mistranslated. The misunderstanding was total between these litigators, on one side, who wanted to fight on their own terrain of facts with their usual arms of adversary procedure, discovery, cross-examination; and the arbitrators on the other, for whom the noble terrain was

that of law (see int. 49). Certainly after the first misunderstanding each side sought to bridge the gap. But in this private justice in the service of merchants, the relation of the forces was such that one made more inroads than the other.

The European arbitrators, including some of the most notable, were converted to the English language and to the usages of Anglo-Americans. Berthold Goldman, for example, one of the most famous pioneers, learned English at forty years of age; and his flexibility was noted as follows: "Cross-examination is not accepted in France . . . barbaric . . . primitive. And except for people like Goldman, . . . he's been cross-examining" (int. 136, 8). An American litigator with considerable arbitration experience noted that the senior arbitration experts "began to realize that clients seemed to like this [cross-examination and expert testimony,] and it was clearly affecting their business, and so I mean there were only two things they could do. . . . And I found again in my experience they embraced it" (int. 51, 32). Leading arbitrators allowed the tactical maneuvers that permitted winning or losing through contested searches for facts.

The multinational law firms recognized on their side that the arbitration game in the European context was rather more sophisticated than the domestic variant that they looked down upon in the United States, and they chose to invest in this new legal terrain. They attached themselves to the services of the initiated in order to avoid faux pas and to dress up their arguments in the distinguished language of *lex mercatoria*. But one can understand the resentment of these litigators, who were forced to pay the fees of the initiated under the pretext that one must have the required expertise in the learned language that was then de rigueur in the Parisian club of arbitration. From this perspective we can see the vigor of the offensive brought by the American lobby to enlarge the club and to rationalize the practice of arbitration such that it could become offshore—U.S.-style—litigation.

This warlike terminology may promote confusion. The fact that it does not appear as aggression is critical in this operation of redefinition and of recentering. Even if the attacks and the relations of force were quite real, the violence would remain symbolic in this symbolic field. The exportation of legal technologies involves less gunboat politics than the strategy of the fifth column. This operation began in the interior of the club and with the support—at least the connivance of the founding fathers. The fifth column in this process has been the Parisian offices of the American firms. For a small number of expatriate lawyers, often married to Europeans, the practice of international arbitration represented an excellent opportunity. It permitted them to profit from their double expertise and to serve as *courtiers* between two cultures.

Interest in arbitration helped to recruit top local talent, contributing to the local implantation of these large Anglo-American firms and favoring the constitution of a nucleus of Eurolawyers. In the 1970s, this establishment in Paris did not provoke the local barriers that tend to result from such efforts today. The bar did not then feel at all concerned by the quite limited international market. A few modernists—even visionaries—saw there an opportunity and incitement to reform legal practice and to develop Paris as an offshore legal market. They welcomed the chance to help reshape the domestic legal field.[36]

On their side, the founding fathers of arbitration could only enjoy these efforts of the *courtiers* who, by opening arbitration to all the North American markets, enlarged considerably the demand for an expertise that they had mastered better than anyone. The Americanization of arbitration thus occurred with much less reticence than has been perceived, since, at least in the beginning, it appeared to the pioneers as a recognition of the merits of arbitration and an investment in the practical field (see ICC 1984). The new consumers permitted the pioneers (finally) to receive very handsome dividends on their arbitration capital—a savoir faire and an experience accumulated for decades.

Arbitration as Litigation

But the reality of the relation of forces between this small club of learned artisans and these great conglomerates of legal experts was that, rather quickly, those who had opened the doors of their club to the Anglo-American practitioners became bothered by the transformation of approaches to arbitration under the influence of the "American lobby." Perhaps the trees had initially hidden the forest. The "Americans in Paris" may actually have fallen for the charm of arbitration in the Continental manner. But behind them was lined up an army of great law firms who, by the simple fact of their mode of organization, could only throw into profound disorder a game of arbitration conceived essentially by and for the civilian academic. As a British solicitor long active in arbitration observed, "If you ever want a bunch of lawyers who are completely inflexible about international arbitration and how to conduct it, it's the Americans" (int. 85, 21). Electing arbitration, says an American close to the new generation, "doesn't mean that I necessarily want to give up

36. The first efforts to reform the French legal profession, which culminated only in some higher status of the *conseils juridiques* and a merger of *avocats* and *avoués*, took place at this time. The image of a grand unified profession had to wait until the end of the eighties.

all the trappings of full-scale litigation and what might come with it" (int. 134, 16). And indeed, the Americans have imposed many of those trappings.

As a result, noted a prominent U.S. arbitrator, "American style practice has taken off. . . . A lawyer comes with a team—more attention to fact, motions, objections, delays. Beginning to look more like litigation" (int. 50, 3). A French leader of the older generation made the same point: "The role of the U.S. firms is growing," and they "utilize more and more Anglo-American devices" (int. 115, 4). It is no surprise that the leading arbitrators of the new generation emphasize their skills of case management. The most common statement about a very popular arbitrator today, Karl-Heinz Bockstiegel, is that he is "great in procedural management" (int. 148, 9).

The artisan and the factory cohabit with difficulty. As with respect to the general-practitioner physician and the modern hospital, the model of specialization and differentiation found in the great corporate structures inevitably puts into question the traditional Continental approach. With respect to the arbitration club, there has been pressure on the more or less cooperative mixing of roles that characterized the specialists of arbitration. We have seen the impact in the issue of conflicts of interest, but it goes deeper. The new protagonists have made the problem even more serious by refusing to consider the practice of international commercial arbitration as a specialty into itself. Only a handful of law firms installed for a long time in Paris, and for that reason rather marginal in the hierarchy of U.S. litigating firms, have chosen to invest in arbitration in the more traditional manner by constituting small teams of specialists.

The large American law firms continue to consider international arbitration as but one kind of "litigation" (or, more recently, "dispute resolution") among others. As a partner in a leading New York law firm observed, "Arbitration is considered by us to be an adjunct to litigation—litigation in the courts. It's simply a different forum" (int. 47, 3). In reaffirming their competence to treat this type of matter (at least after the litigators gained ascendancy), these large law firms reject the specificity of the terrain of arbitration. They repeat that it is but one in a menu of competences and solutions that they can propose to their clients in a case of difficulty. That at least is the approach of the litigators, who have acceded in the past several years to a dominant position in the large law firms (Nelson 1988). This territorial demand is easily understood. One does not renounce voluntarily, when in full vigor, a rather prestigious and lucrative practice, especially if this form of competence appears indispensable to success in the market of international transactions. But their insistence on their own approach and their refusal to make international

arbitration a specialty make it necessary for the law firms to translate arbitration to fit the knowledge and self-conception of the litigator.

This category of practitioners has been constituted by borrowing but also by opposition between the two great groups that had dominated the field of legal practice in the United States: the corporate lawyers, who held the upper hand in the large firms of Wall Street thanks to their competence as negotiators in the creation of contracts; and the trial lawyers, whose talent was exercised essentially in conducting jury trials. Since enterprises began to change the legal scene through mergers and acquisitions, and also as a result of antitrust and other litigation, a new knowledge has been developed, that of specialist in taking charge of conflict situations (e.g., Caplan 1993). The art consists precisely in knowing how to combine judicial attacks and negotiation behind the scenes in order to lead to an optimal solution from the point of view of the interest of the client. These experts in the tactical administration of disputes consider judicial recourse not as an end in itself, but only as an argument and a means of pressure (cf. Margolick 1993). The negotiators consider judicial recourse as one of the weapons that can be deployed in a conflict that will almost surely end prior to a trial (e.g., Galanter 1985).

The specialists of this parajudicial negotiation are then at the antipode of the traditional Continental model found, not surprisingly, within the club of international commercial arbitration. That model is of an "auxiliary justice," where the duty of counsel is to clarify and aid the judge in rendering good justice. The conflict specialists from the United States (or elsewhere) do not feel any responsibilities except to their client. Furthermore, they offer their clients the ability to operate for tactical reasons in many jurisdictions or types of proceedings at once. This "legal superarmament" of multiple attacks and forum shopping escalates the warfare considerably on behalf of clients able to afford it. And for various reasons, it is a service that was successful in building the power and success of U.S.-style litigation for corporate clients in the 1980s.[37]

The large law firms have tended to practice the very same strategy when handling international disputes. Yet this pragmatic and tactical approach is opposed to the tacit usages of the arbitration club. In the community of the initiated, the proximity and interchangeability of roles makes the advocates comport themselves in a very subtle manner as auxiliaries of the arbitral tribunal. Defending the interests of their clients does not in a case push them to actions that jeopardize their own credibility or, worse still, the social legitimacy of arbitration.[38] Such an attitude would have been equivalent to professional suicide in building the practice of international commercial arbitration.

37. It is now somewhat under attack by proponents of a truce to the "arms race," such as the Center for Public Resources.

But it is not the same for the litigators. Their reference group and their criteria for success are different. While the career of arbitrators is in large part dependent on the goodwill of the grand old men who control access to and prominence in the field of arbitration, litigators depend only on their capacity to satisfy important clients. That is what determines their position in the hierarchy of the law firm (Nelson 1988). In short, where one group is obliged to be quasi-referential with respect to the dogmas and the customs upon which is reposed the collective faith in arbitration, the others have but one ambition—that is, winning a good result. To get that result, they are ready to exploit any procedural tactics and forums available to them. They are willing to create difficulties for their colleagues and the arbitral tribunal and even to damage the image of this justice—which had pretended to be rapid and less costly because informal.[39] One understands the irritation of the founding fathers confronted by these newcomers who permit themselves to transform the nature of arbitration by multiplying the incidents of procedure and technical appeals.

The litigators respond matter-of-factly that it is only a matter of fulfilling their duty as lawyers and protecting, by all legal means at their disposal, their clients' interest. Even to win some time, after all, is not of negligible value economically. At the same time, this general strategy, which conforms so perfectly to their mission as defenders of the interests of their clients, permits them also to promote their own conception of arbitration. If arbitration is no longer a last resort but rather one tactical recourse among others, it is no longer correct to make of it a protected preserve for a group of initiated. On the contrary, specialists or law firms that can play simultaneously in many places are in the position of strength.

The International Field Transformed: Toward a Delocalized Market for the Management of International Commercial Disputes

Competition and rationalization, especially as promoted by U.S. litigators, leads to the judicialization of international commercial arbitration. Some commentators, especially from the senior generation, see in this evolution toward the judicialization of arbitration the preview—and the cause—of its decline.

38. Examples of this role abound. Recent documentations of this kind of practice in the civil-law world include Olgiati 1995.

39. A lawyer for a large U.S. firm in Paris says simply: "You know the first advice you give to a defendant in an ICC case is take your time. When they ask for the deposit, don't pay it" (int. 129, 10). The skill is "to spin out the dispute for years" (id., 9).

What good, they say, is it to opt for arbitration when this alternative is at the same time slower and more costly, but also more uncertain, than recourse to the courts? This pessimistic vision, which is in fact a plea for a return to the sources, appears overstated. It is true that the system has been transformed, and the qualities that made arbitration successful for the pioneers seem to be little in evidence. But arbitration is far from withering away. It is in full vigor.[40]

Far from dissolving itself, it seems the community of arbitration specialists has moved a long way toward forming the nucleus of a sort of offshore justice. This expression, which alludes to fiscal paradises exploited by the operators of the great financial centers, is rather far from the unified international private system of justice—organized perhaps around one great *lex mercatoria*—that might have been imagined by some of the pioneering idealists of law. The current model can be understood much better as simply a delocalized and decentralized market for the administration of international commercial disputes, connected by more or less powerful institutions and individuals who are both competitive and complementary.

Conclusion

In this chapter we have mapped the relative positions of groups and individuals in the field of international commercial arbitration. We have been able to see both oppositions and complementarities. The players on the field compete vigorously, but in terms of the universals accepted—as a ticket to admission[41]—by all the players. Examples have included the grand old men and the technocrats, the Continental professors and the U.S. litigators, each promoting

40. Not surprisingly, the current state is celebrated by U.S. litigators in part because arbitration has been "judicialized." A recent U.S. volume "designed as an intellectual pause for reflection" on the state of international commercial arbitration and entitled *Towards "Judicialization" and Uniformity* brought one of the editors, a prominent member of the arbitration community, to the following conclusion: "International arbitration thus is in large measure a substitute for national court litigation," necessary only because the parties from different nationalities do not wish their "rights and obligations to be determined by the courts of the other party's state of nationality" (Brower 1993, x). From this perspective, the closer arbitration is to the general model of courts, the better.

41. The moral tenor of the debates comes in part from the fact that potential arbitrators must invest over a long period of time, promoting a kind of cult of disinterestedness, and because the potential arbitrators must demonstrate a distance from the parochial and particular aspects of their national portfolios. Persons with strong moral beliefs and an interest in universals are attracted. At the same time, the tendency of those in the field to try to diversify their portfolios to accommodate new positions and entrants allows the field to enlarge its coverage to become more universal in another sense.

its own mix of symbolic capital—for example, age and experience, technical know-how, theoretical sophistication, ability to represent clients vigorously, prestige in a particular national legal culture. What each group represents tends also to be what they contend is best suited for the legitimation of arbitrators and therefore for the long-term success of international commercial arbitration. The competition among these different actors in the field of international commercial arbitration—and, we submit, in law generally—thus simultaneously builds the market for particular legal services and the legitimacy of the resultant law.

This intense competition among merchants of law acting as moral entrepreneurs, in addition, requires some institutional management. Our research suggests that the International Chamber of Commerce, once the preserve of a small group of arbitration aficionados, was able to play that role and help to facilitate the transformation of the field in the 1980s. International commercial arbitration has to a great extent now been institutionalized as the generally accepted private legal process applicable to transnational business disputes.[42]

The transformation of the field, represented in figure 1, can be examined in both a general and a particular sense. First, there is a general story of rationalization and institutionalization, and second, an equally important story of details of the transformation. Those details are bound to exert a powerful influence on the conduct of international dispute resolution and on competition in the market for legal services.

The boom in the market for international commercial arbitration, the arrival of new players, and the competition and power of the large multinational law firms contributed to break the traditions of the small, learned, cosmopoli-

42. This account of the phenomenon of institutionalization, while based on Bourdieu, obviously has similarities to certain aspects of the "new institutionalism" in American sociology. There are many similarities, for example, between our approach and that taken by Paul DiMaggio to the process of "constructing an organizational field as a professional project" with respect to art museums in the United States (DiMaggio 1991). We share an emphasis on the complex interactions between professionalism and institutionalism, and on the transformation and institutionalization that takes place with its growth. The most notable differences between his study and our approach are first, since his research was based on archival records, it did not examine the importance of social capital despite its obvious relevance to the story; second, the effort to document the development of an institution in the DiMaggio account tends to avoid probing connections to the larger world around the processes he studies, for example, the changes in municipal politics or in the role of foundations; and third, while our approach fits reasonably well with the one he describes, our focus is on conflict found in the discourses and strategies of the relevant actors rather than specifically on institutions.

tan group that built the International Chamber of Commerce and the basic institutions of international commercial arbitration. The growth and accelerated competition, we have seen, were reflected in an accelerated Weberian transformation—the routinization of charisma and the ascendancy of legal rationality.

The general or Weberian line of this story, we suggest, will be repeated elsewhere in the successful development of an international or other legal field. The social capital and charisma (and even idealism) of elite lawyers respected for their careers and accomplishments helps to legitimate the legal institutions and approaches that they favor.[43] International businesses and national commercial entities, for example, have been more likely to accept the idea of arbitration by lawyers if the chosen lawyers are recognized members of an elite with credibility in the worlds of business and politics. Once the idea of arbitration is sufficiently established, however, it can become more rationalized and generalized as it gains further economic and numerical success.

It must be remembered, however, that even when successful over a long period of time, such a Weberian transformation is only a matter of degree. The conflicts that produce the transformation continue to have an impact on the field. The grand notable arbitrators are still influential, for example, and their services are called upon when disputes are outside the routine, requiring more political sensitivity and indeed more of the authority and clout that comes with their status.

Further, as noted before, the retrospective logic of the successful Weberian scenario should not be invoked to imply that the specific characteristics of this international legal field were natural or inevitable—the product of a slogan like globalism. The particular features cannot be understood if we limit ourselves to a retrospective account suggesting the inevitability of today's "more rational" version of international commercial arbitration. The fact that international commercial arbitration currently combines a certain amount of Continental legal theory, a major Parisian institution at the core of the field, and a practice that resembles offshore litigation as promoted by U.S. litigators—rather than, for example, a less adversarial Continental style of litigation or a central focus on London or New York's institutions for arbitration—comes from the specifics of the international legal field as it was first constituted and later transformed.

While international commercial arbitration has become more formal and expensive, more like U.S. litigation, it does not make sense to describe arbitration as a given process inevitably like U.S. litigation (or otherwise, as in the pioneer days of a less formal, more "gentlemanly" international arbitration). Arbitration has evolved in response to particular social factors, and the competition we have seen *continues* about the meaning and legitimacy of particular aspects of international commercial arbitration. Any resolution of the debates about arbitration—as with respect to law—is bound to be provisional.

43. The social capital and charisma, especially in Europe, was also necessary to overcome the resistance to the involvement of lawyers in practices closely connected to business.

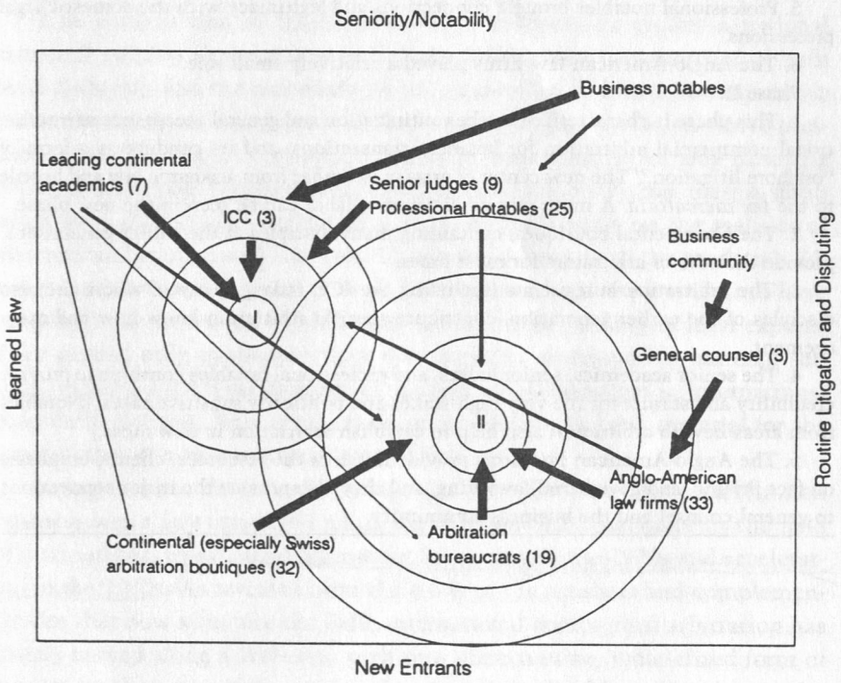

Figure 1. International Commercial Arbitration as a Field of Structured Opposition

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.

Phase I.

1. This phase is characterized by the reinvention, promotion, and institutionalization of international commercial arbitration out of the contributions of leading Continental academics, the International Chamber of Commerce, senior judges, and professional notables. We call this pioneering generation the "grand old men."

2. The leading academics contributed the "technology," especially the *lex mercatoria.*

3. The International Chamber of Commerce provided the institutional support and legitimacy in the world of business.

4. Senior judges brought the acceptance and recognition of the official justice system.

5. Professional notables brought connections and legitimacy with the domestic legal professions.

6. The Anglo-American law firms played a relatively small role.

Phase II.

1. This phase is characterized by the routinization and general acceptance of international commercial arbitration for business transactions, and its conduct as a form of "offshore litigation." The new center of gravity is farther from academic law and hostile to the *lex mercatoria.* A more precise division of labor can be seen in the new phase.

2. The Continental boutiques, containing many disciples of the earlier generations, provide the core of arbitrators for most cases.

3. The arbitration bureaucrats (including the ICC today), many of whom are also disciples of the earlier generation, contribute specific arbitration know-how and management.

4. The senior academics, senior judges, and professional notables continue to provide credibility and stature for the very high-stakes and politically sensitive cases. (Notables from areas new to arbitration also help to establish arbitration in new areas.)

5. The Anglo-American law firms provide much of the resources, clients, emphasis on fact-finding, and adversarial lawyering, and they also provide the major connections to general counsel and the business community.

4

Setting the Legal Scene for North-South Conflicts and the Collective Construction of the Universality of Law

The construction of transnational legal institutions evokes a national historical process that resulted simultaneously in the construction of both royal authority and the autonomy of law (Kantorowicz 1961). The difference is that the transnational process has been distinguished by the pervasive presence of conflict. Royal legalists constructed their own legitimacy from the power of legitimation conceded to them by the monarchy, but their distant, transnational successors gained their position by drawing on the realities of international commercial conflicts. In order to coexist with the modern holders of economic and political power, international legal experts did not have to invent[1] the notion of a "public" service entrusted entirely to legal experts. They needed only to propose their own services, developed in national settings, to defend the legal interests of the new social operators in international economic relations. New conflicts therefore became the raw material for the construction of a transnational legal order.

As suggested in the preceding chapter, a boom in international arbitration business was a key factor in fueling the changes that took place in the field of international commercial arbitration, beginning in the 1970s and accelerating in the 1980s. As revealed from the study of the conflicts and complementarities that now structure the field, international commercial arbitration has clearly moved along a Weberian path to a more routine, judicialized form of dispute resolution, and the center of power of the field has shifted from the small group of Continental professors to the increasingly powerful transnational law firms dominated by the Anglo-Americans. Part of this change, we also suggested, involved a relative decline in the role of the *lex mercatoria.*

This chapter explores the same time period from a different, but closely related and indeed parallel, perspective. It focuses on north-south conflicts, which made up most of the celebrated arbitrations of the period. The main question is how political and economic conflicts between north and south

1. As had Aguesseau, in a celebrated discourse in the Paris parliament (see Karpik 1992).