

The Sociology of International Arbitration

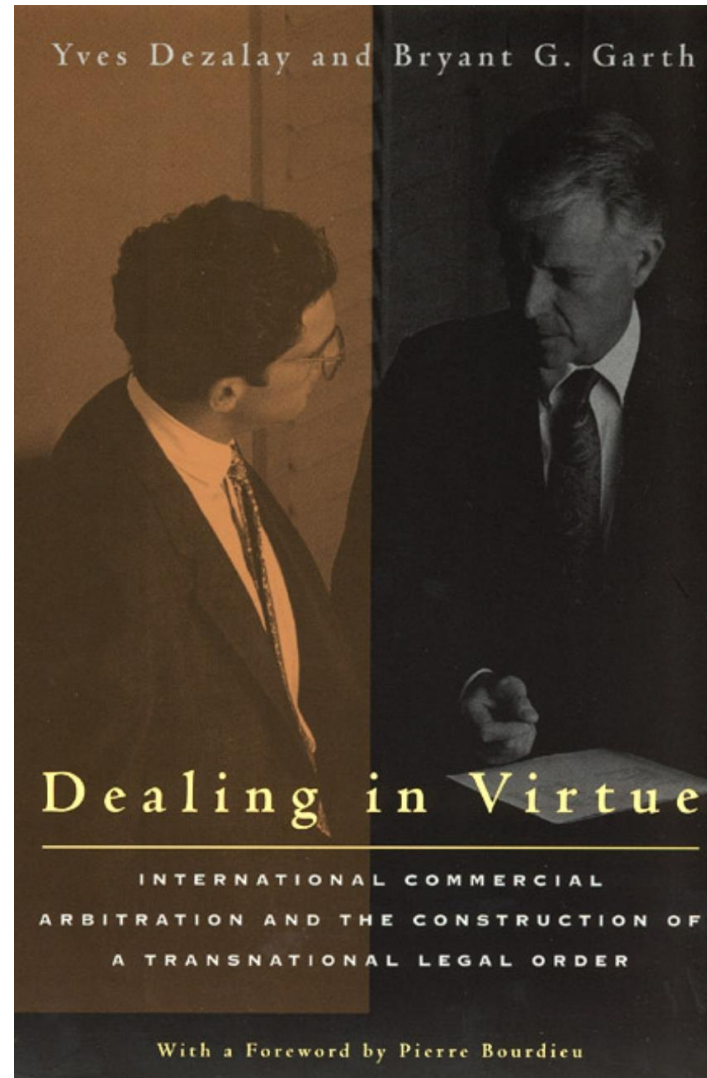
Florian Grisel



Outline

1. International arbitration as a competitive field
2. International arbitration as a cooperative field
3. The cooperative field at work: the New York Convention of 1958

1. International arbitration as a competitive field



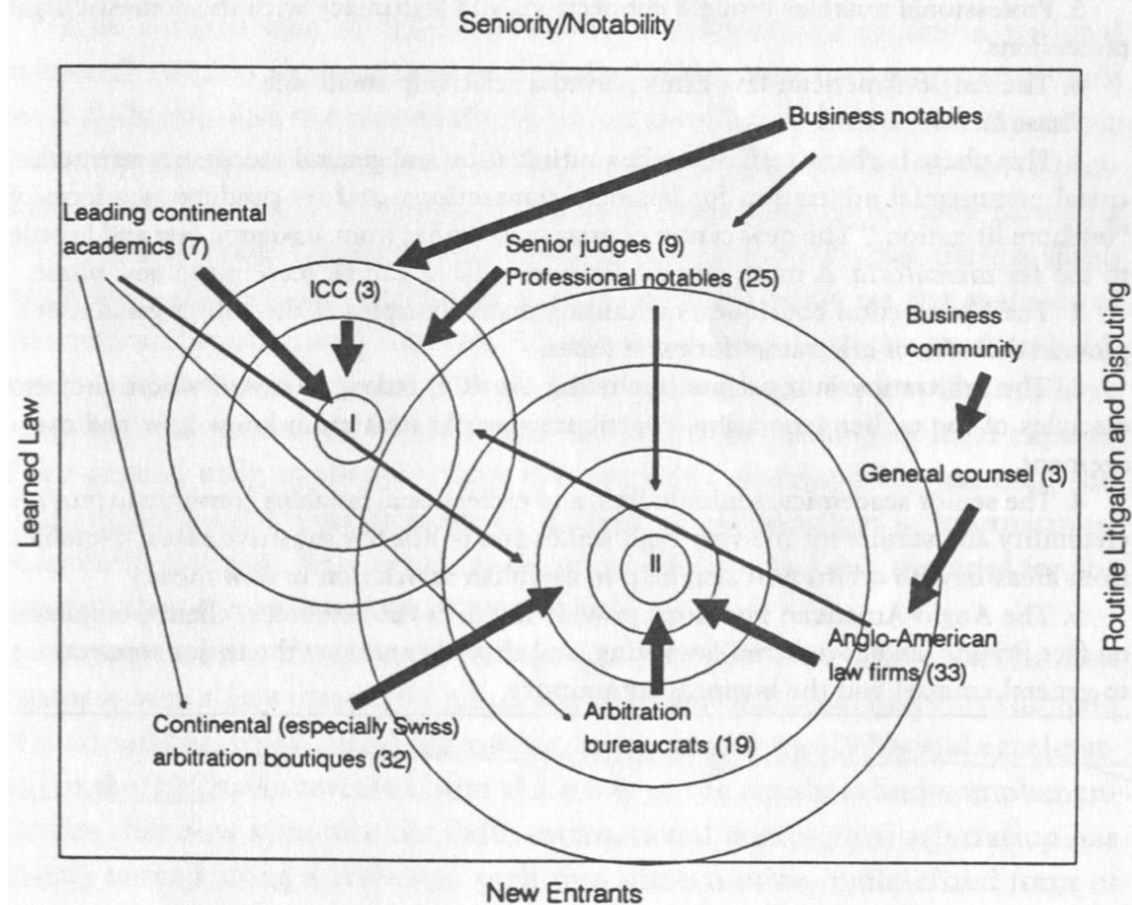
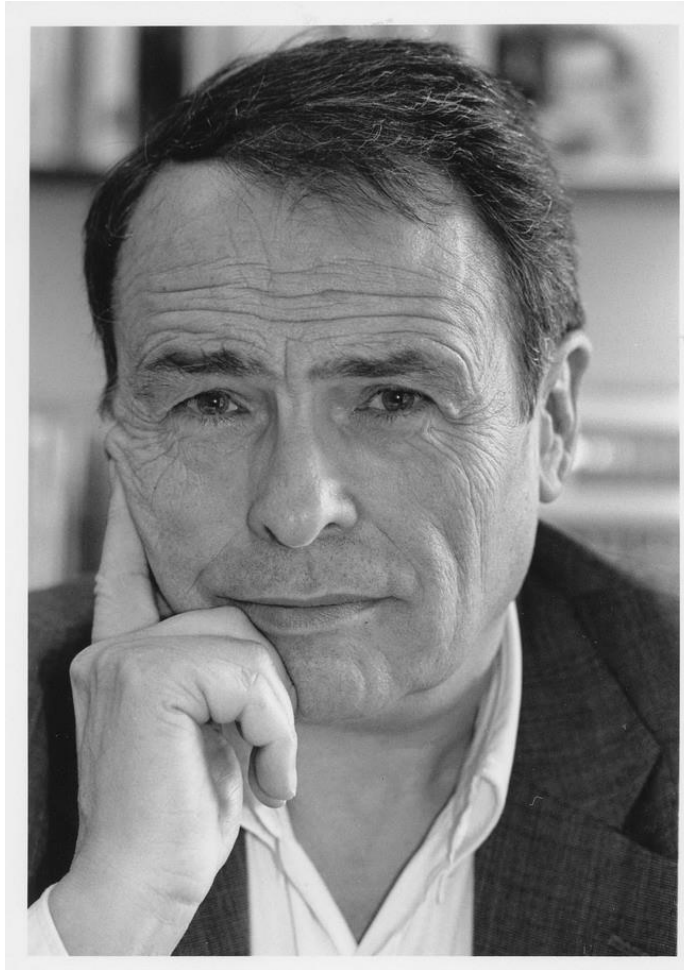


Figure 1. International Commercial Arbitration as a Field of Structured Opposition

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

Pierre Bourdieu's field theory and its limits



Pierre Bourdieu (1930-2003)

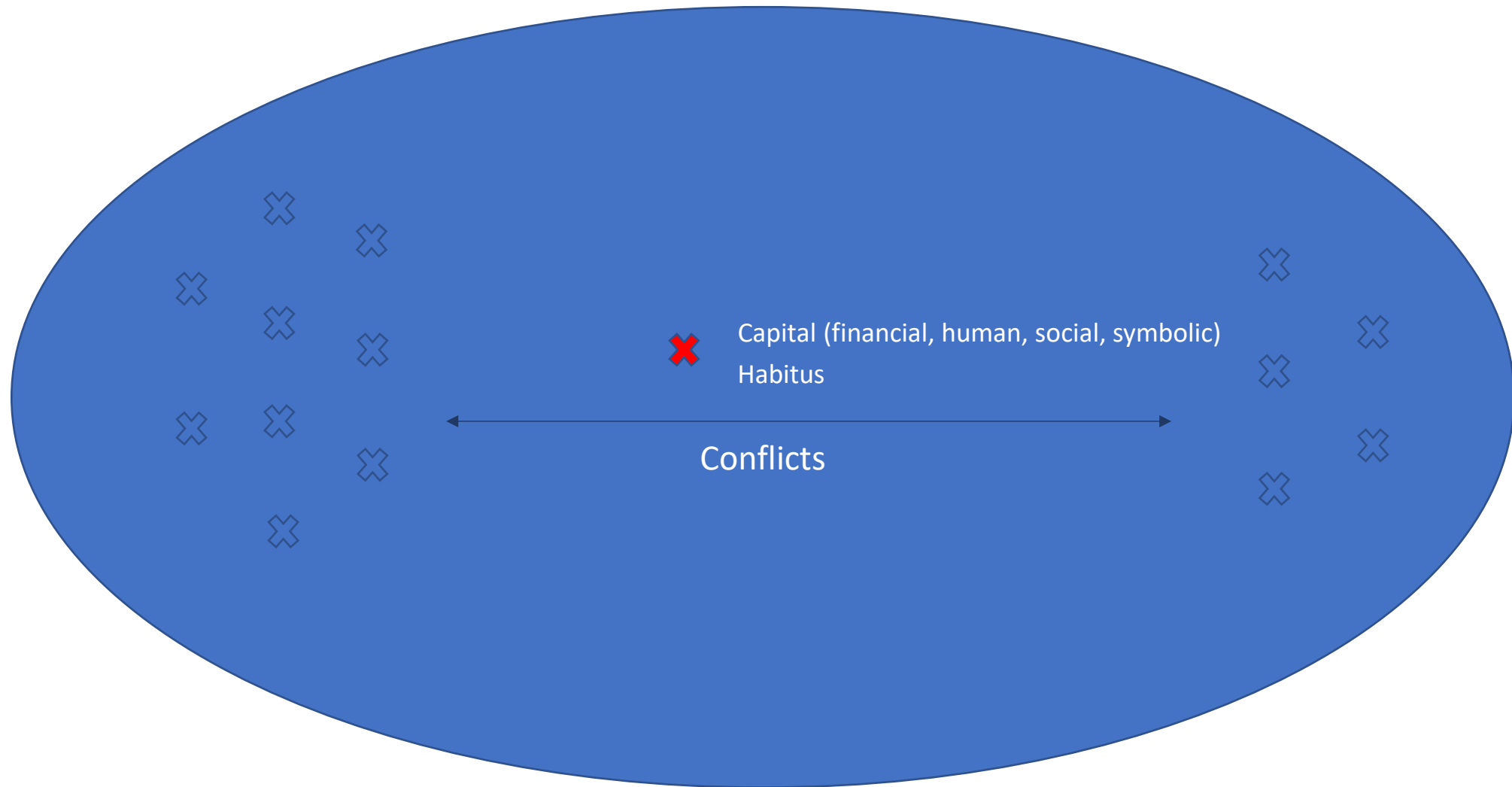
Bourdieu's social field: a place of struggles

The notion of 'field': 'an area of *structure*, socially patterned activity or practice'

"In analytic terms, a field may be defined as a network, or a configuration, of objective relations between positions. These positions are objectively defined, in their existence and in the determination they impose upon their occupants, agents or institutions, by their present and potential situation (situs) in the structure of the distribution of species of power (or capital) whose possession commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions (domination, subordination, homology, etc.).' 'The principle of the dynamics of a field lies in the form of its structure and, in particular, in the distance, the gaps, the asymmetries between the various specific forces that confront one another."

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

Bourdieu's social field



Dealing in Virtue, Pierre Bourdieu's Foreword

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

Early critiques of Dezalay and Garth

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

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

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

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

2. International arbitration as a cooperative field

The case of the International Chamber of Commerce

Sources:

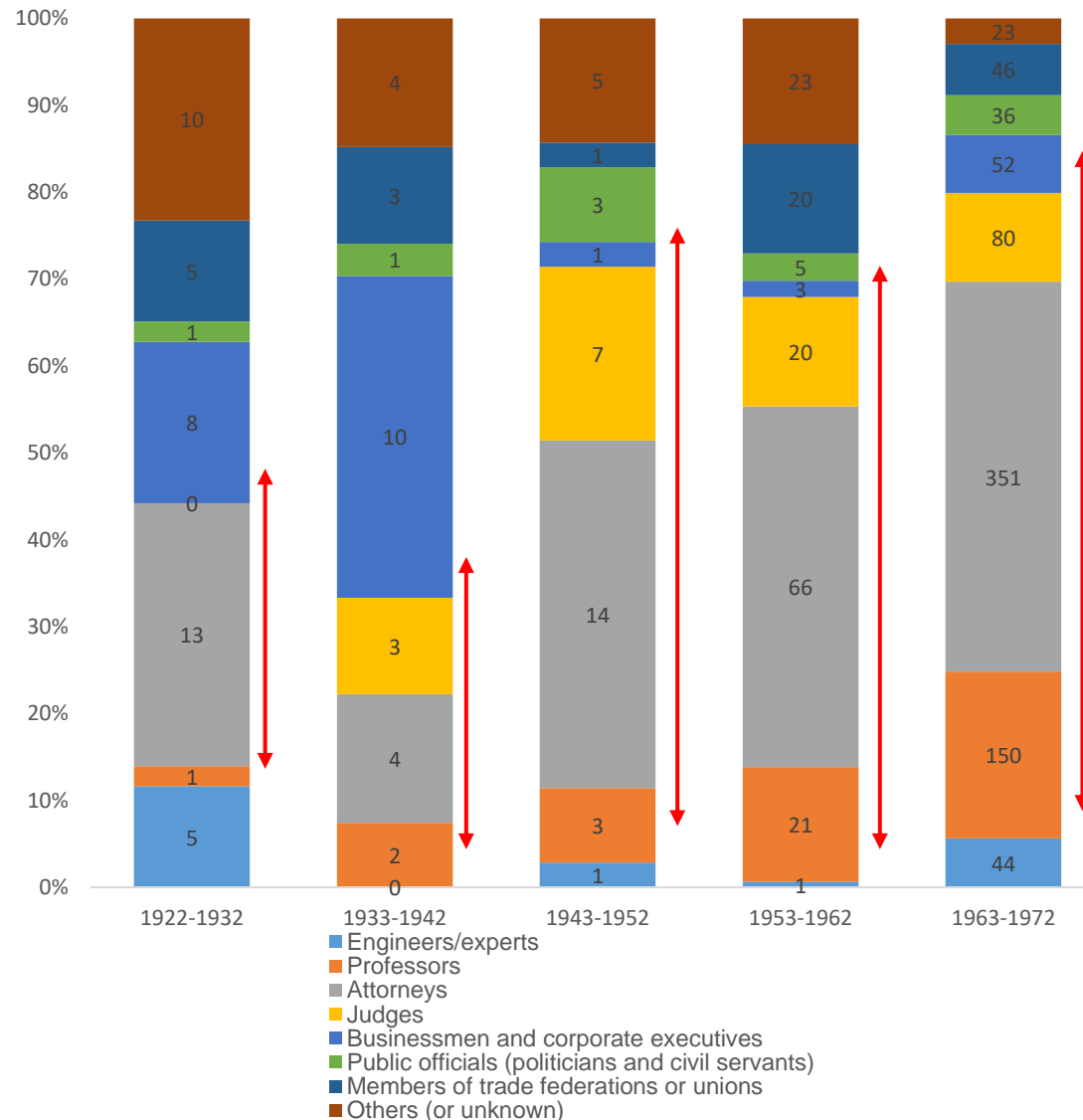
ICC archives

644 awards rendered between 1922 and 1973

1000 appointments of arbitrators in these cases



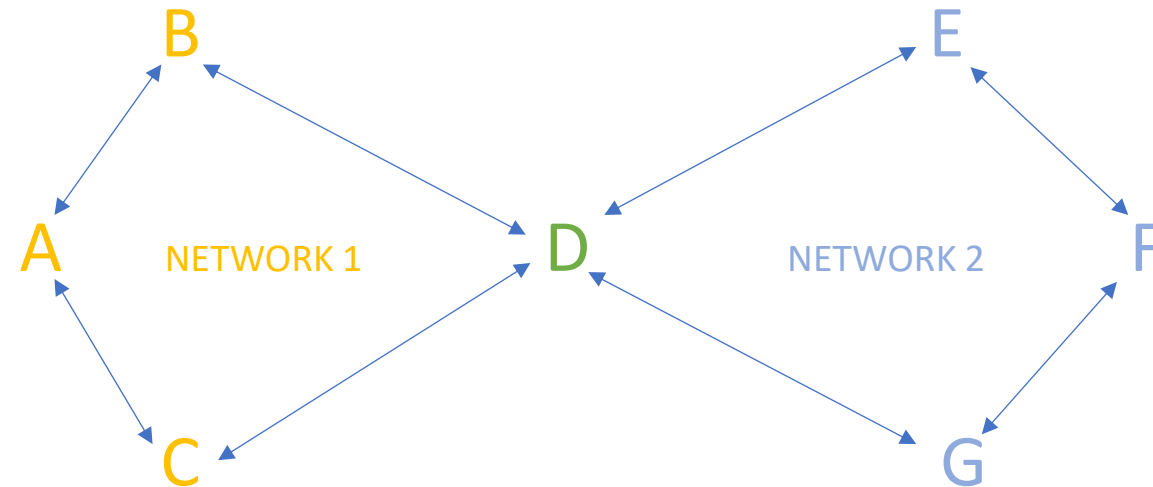
The professional backgrounds of ICC arbitrators (1922-1972)



The leading arbitrators at the ICC (1922-1973)

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

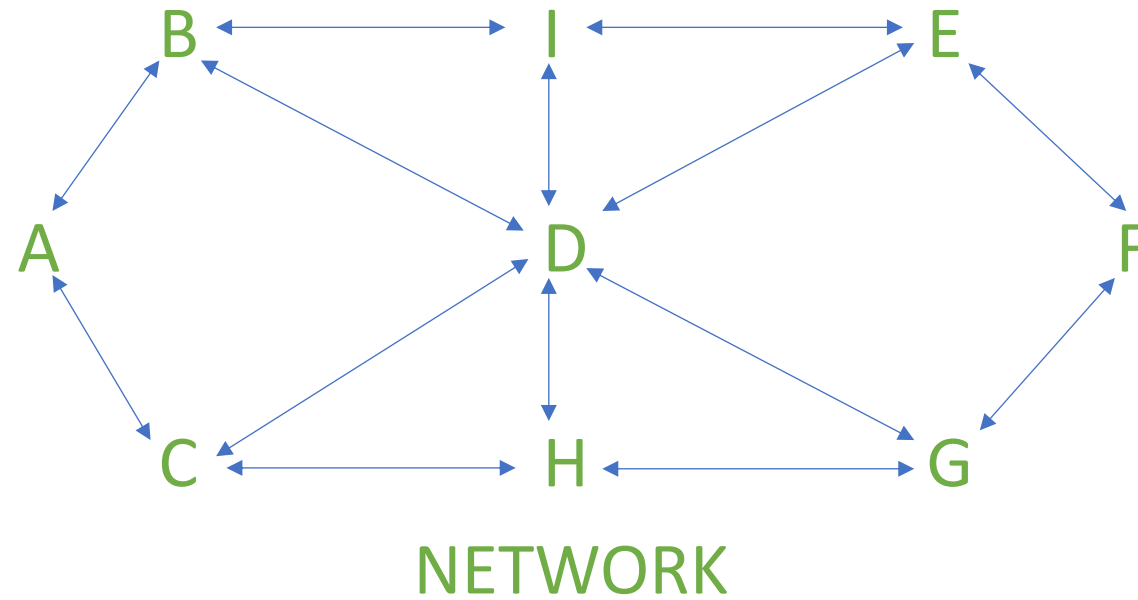
“Secant marginals,” travelers and mediators



Social reproduction in international arbitration

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

Social reproduction in ICA



4. The cooperation field at work: the NY Convention of 1958

The Genesis of the NY Convention

- The Geneva Convention on the Execution of Foreign Arbitral Awards (1927) suffered from two defects (the requirement to prove that the award is final (Art. 1(d)) and made in accordance with the law governing the arbitral procedure (Art. 1(c)))
- in 1951, the ICC gathered a sub-committee (among its 8 members, 2 “secant marginals”: Ernest Barda and Pieter Sanders) that issued a Preliminary Draft Convention that addressed these defects (deletion of the finality requirement and requirement that the award is made “in accordance with the agreement of the parties or, failing agreement between the parties in this respect, in accordance with the law of the country where arbitration took place”)

4. The cooperation field at work: the NY Convention of 1958

The Negotiation of the NY Convention

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

Thank you!



790

Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession

Florian Grisel

This paper revisits the sociology of international commercial arbitration on the basis of unexploited archives and data. This material casts new light on the competition between “grand old men” and “young technocrats” in the 1980s and 1990s, a theme that has structured the analysis of international commercial arbitration since the pioneering work of Yves Dezalay and Bryant G. Garth (*Dealing in Virtue*). In contrast, the data show that the crucial transformative period actually took place between the 1950s and 1970s, when a relatively well-defined group of individuals emerged as the leading arbitrators at the International Chamber of Commerce. These individuals— the “secant marginals”—succeeded in constructing a cooperative interface (rather than competition) between otherwise separate legal systems and professions. In doing so, they created the conditions necessary for the emergence of a new transnational legal profession. At a more general level, the article proposes an alternative narrative of globalization, wherein actors operating at the intersection of various systems, create new arenas of governance on the basis of inter-system cooperation.

For in the meantime the tightrope walker had begun his performance: he had come out of a small door and was walking along the rope, which was stretched between two towers so that it hung over the people and the marketplace. When he was just halfway across, the small door opened once again, and out jumped a colorful, buffoonish fellow who quickly followed after him. “Move it, lamefoot,” he cried in a terrible voice, “get going, lazybones, chiseler, wher-face! So I don’t tickle your heel with my foot! What do you think you’re doing here between these towers? Back in the tower is where you belong, behind bars, you who bar the way of one who is your better!”

Friedrich Nietzsche, *Thus Spoke Zarathustra*¹

Please direct all correspondence to Florian Grisel, Centre national de la recherche Scientifique, Centre de Théorie et analyse du droit, 200 avenue de la République, Nanterre, France; email: floriangrisel@gmail.com

The author would like to express his deep thanks to the editors and anonymous reviewers of the *Law & Society Review* who have offered valuable feedback on this article. The author is also deeply grateful for the extremely helpful guidance provided by Robert C. Ellickson, Maria Hauser, Jan Paulsson, Alec Stone Sweet, Albert Jan van den Berg, V.V. Veeder, and Patrick Weil.

¹ Transl. by Thomas Wayne, Part I, Title 6.

Law & Society Review, Volume 51, Number 4 (2017)
© 2017 Law and Society Association. All rights reserved.

The European Journal of International Law Vol. 28 no. 1
© The Author, 2017. Published by Oxford University Press on behalf of EJIL Ltd.
All rights reserved. For Permissions, please email: journals.permissions@oup.com

Treaty-Making between Public Authority and Private Interests: The Genealogy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Florian Grisel*

Abstract

The bulk of the literature on transnational governance focuses on the bottom-up emergence of private rules, neglecting top-down processes such as treaty making. This article seeks to remedy this gap, using original archival material to show how a transnational network of experts associated with the International Chamber of Commerce influenced the negotiations of the United Nations Conference on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and its final content. In doing so, this article will analyse the ways in which the complex allegiances developed within the International Chamber of Commerce enabled it to match public authority and private interests in a transnational legal process where states no longer held a monopoly.

Transnational situations, then, may involve individuals, corporations, states, organisations of states, or other groups. A private American citizen, or a stateless person for that matter, whose passport or other travel document is challenged at a European frontier confronts a transnational situation. Equally one could mention the International Chamber of Commerce exercising its privilege of taking part in a conference called by the Economic and Social Council of the United Nations.

Philip C. Jessup, *Transnational Law*

International commercial arbitration is commonly seen as a paradigm of a global phenomenon that is non-hierarchical, self-regulated and transnational.¹ One of its

* Chargé de recherche, Centre national de la recherche scientifique, Université Paris Ouest Nanterre La Défense, Paris, France; Senior Lecturer in Transnational Law, King’s College London, London, United Kingdom. Email: floriangrisel@gmail.com.

¹ See, e.g., B. Gaillard, *Legal Theory of International Arbitration* (2010).

EJIL (2017), Vol. 28 No. 1, 73–87

doi:10.1093/ejil/cha008

