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978-1-107-13091-3 - Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets

Edited by Grégoire Mallard and Jérôme Sgard

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CHAPTER ONE

CONTRACTUAL KNOWLEDGE:
ONE HUNDRED YEARS OF
LEGAL EXPERIMENTATION
IN GLOBAL MARKETS*Grégoire Mallard and Jérôme Sgard*

The word *contract* carries different weight in different contexts. Bankers and politicians, diplomats and economists, lawyers and judges all have complex understandings of what a *contract* is and what it means for them. In the recent sovereign debt negotiations with the Euro group and the International Monetary Fund (IMF), the newly elected radical left government of Alexis Tsipras asked their European peers to substitute for the previous “program” of structural reforms a new “contract” – a “social contract” – between the Greek government and its creditors (Quatremer 2015). The Greek leaders also inscribed their negotiation in a longer temporality than their European counterparts: arguing for a partial cancellation of the debt that Greece owed to Germany, Tsipras (2015) reminded his fellow Europeans that Germany had itself failed to compensate Greece for the costs of reconstruction after World War II (WWII) – including money directly borrowed by Germany from Greece during the war. This proposal was not at all what the European leaders expected to hear: for them, the only “contracts” in play were those of Greece’s debt and related agreements with the European Union (EU) and other International Financial Institutions (IFIs) entered into as part of a stabilization program.

The episode pitted two understandings of the “contract,” as well as two different temporalities, against one another: the first rests on the concept of the “general will,” which Tsipras identified (following Rousseau at some distance) with the suffrage of the Greek people, and which allowed the Greek government to frame its claims in the context of a larger history that touched the core of its people’s identity. The

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other is the juridical legitimacy of the agreed-upon legal “covenant” signed by the contracting partners a few years earlier, according to the maxim *pacta sunt servanda*.

This episode in 2015 was not an isolated incident. Over previous years, the Greek sovereign debt crisis had already become the locus where international actors tested competing conceptions of contracts, and the solidity of the boundaries defining the legitimate way to make and un-make contracts. Already in 2010 and 2011, when the EU group’s efforts to restructure the Greek debt forced private banks, bondholders and government officials to join them and the IMF at the table, the evaluation of Greece’s ability to honor its debt contracts was the focus of many controversies. At the time, the legitimacy and credibility of the pronouncements of the rating agencies was the object of many criticisms: the financial health of the Eurozone rested on the (private) judgment of rating agencies on the budget and social policies adopted by the sovereign Republic of Greece. Whether they displayed rating inertias, as in the case of Moody’s, or whether they proceeded too clearly to downgrade Greece’s rating, apparently causing an acceleration in the crisis, the rating agencies were criticized for their role.

The Greek sovereign debt crisis and the fragmented, unstable scene in which it played out illustrates in other words what Teubner (1996) calls “a global Bukovina”: a metaphor he draws from the tiny north-eastern province of today’s Romania, which before 1914 was governed by an incredible amalgamation of allegiances and legal orders – parochial and imperial, political and communitarian, linguistic and religious. An important casualty of the crisis is that the very notion of a “contract,” with its strong legal underpinning in private law, has been blurred to the point that it now encompasses ambiguous and contested principles and expectations by which third-parties outside the contracted exchange claim a stake at the table of negotiation. Professional lawyers, IMF economists and socio-legal scholars would probably tell us that we should not generalize from the Greek crisis, as a debt bond between thousands of private investors and a sovereign state belongs to a rather special class of transactions. Yet, this Greek bond is still formatted, talked about and regulated as, indeed, a contract.

The same problems that have plagued sovereign bond contracts have also affected more traditional private law contracts as well. Take the nearest equivalent to the Greek crash in a “pure” private setup, namely

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the collapse of Lehman Brothers. The dead body of the bank with its zillions of financial contracts piled up in its broken balance sheets immediately became the object of competing claims by many jurisdictions and authorities, some public and others private, many of them American though not all; some of them may have even come from sunny, pastoral Bukovina. Financial lawyers told the story of contracts being cut into pieces, dispatched, repackaged and then sold again into successive generations of, yes, contracts. Still today we are not so sure that the forensic experts have actually found whose solitary, individual commitment and wealth rested in these unholy remains.

In this volume we start from this point: across the world economy and over time the notion of what a contract is has proved inherently unstable and contested. The contract now implies very different understandings, expectations and social sanctions than in previous eras, not just for the parties that enter into them, but for the social order that supports and confirms market exchanges. How contracts have been framed, the understanding they have supported and the social efficacy that have come with them have always been contingent upon core political and philosophical understandings that can often be assimilated with the classic construction of sovereignty: for John Locke and Adam Smith, but also for Thomas Hobbes and Jean-Jacques Rousseau, the sovereign is the one that protects the physical integrity and the property rights of citizens (or subjects), as well as their contracts (Rousseau [1762]1971). Thus, in a context in which the very notion of sovereignty has been also debated, challenged and reframed to fit with the demands of the global economy, it comes as no surprise that the notion of the contract is open to many debates.

The ambition of this book is to trace the development over the last hundred years of the meaning of the *contract* and how it relates to the broader legal and social constructs in which international markets are embedded. In doing so, we want to extend the discussion on law and global governance to past historical periods: typically, this broad research current never ventures beyond the 1980–90 threshold that typically marks the beginning of our present-day global era.¹ In

¹ The ahistorical bias of law and globalization scholarship is in fact quite surprising, if we remember the substantial benefits drawn in other research fields from the comparison of the present Global Era with the first Global Era, that extended roughly from 1870 to 1914. Economists, for instance, have learned important lessons on growth and productivity gains by comparing these two periods, as well as on the effects of market integration, trade diversification and capital market expansion.

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particular, we focus on the interwar decades that saw not only a high level of tension and overall instability, but also a considerable amount of institutional innovation and legal experimentation. The relative decline of Britain, the semi-isolation of the United States and, not least, the extraordinary experience of the League of Nations contributed to a context uniquely rich in ideological programs, policy proposals and legal experiments. Our intuition therefore is that this short and unstable period may shed more light on our theoretical debate than the more settled and more distant experience of the pre-1914 decades. Our aim however is not so much to “rediscover” or “revisit” a period that would have remained unduly ignored – which it is not –, nor is it to open up a subfield of historical inquiry and simply point out where issues of international governance arose.

For our analysis, we use a historical and micro-level (contractual) perspective to explore the shifting legal premises, assumptions and expectations that shaped how agents envisaged financial and commercial transactions across borders, then and now. We are primarily interested in an exploration of how lawyers, politicians, diplomats and investors fought with the evidence of a decline in the previous British governance and how this led them to imagine and experiment with new ways to envisage international contracting.² Avowedly, an underlying hypothesis at this point is that early on, perhaps on the very day when the League of Nations opened its offices and meeting rooms, early features emerged of what we now dub a “global Bukovina”: experts, professions, lobbies, epistemic communities and chambers of commerce immediately laid siege to the new organization and tried to control both its agenda and its discourse – still, before World War I (WWI), Bukovina was just a distant and backward province of the old Austro-Hungarian Empire.

In order to delineate and identify analytically this complex object, we develop the concept of *contractual knowledge*. We envisage it as an analytical interface between, on one hand, a legal discourse that is typically formalistic and anchored in the worldview of international policy-makers, hence in their practice of power, and, on the other hand, the assumptions and expectations of agents that contract on international markets or advise and shape how contracting should happen. Our

² We shall also look backwards at the pre-1914 era, though our main aim as we center on the interwar years is to shed new light on the genealogy – economic and legal – of both the classic post-1945 multilateral decades and the current Global Era.

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endeavor is to demonstrate that this perspective in general, and this concept in particular, offer a novel understanding of the governance of markets and how the legal point of view informs this governance. Contractual knowledge in other words can be understood as a range of knowledge practices associated with the negotiation and renegotiation of obligations whose origin is *contractual*, as opposed to rooted in the unilateral dimension of the transfer of resources, actual or symbolic, – such as the obligations stemming from the unilateral will of an absolute monarch (Bernardini 2007). In our definition of contractual knowledge, we thus find: (1) the legal boilerplates (Gulati and Scott 2013) and new legal provisions that have been increasingly standardized in new trade contracts, financial contracts, etc.; (2) the pricing techniques that are part of what Annelise Riles (2011) calls “collateral knowledge,”³ which are typically used to finalize contractual exchanges, as well as all the forms of calculation or “calculative devices” (Callon and Muniesa 2005) used by international arbitration experts to determine the amount of awards in case of dispute; (3) the knowledge produced by and about the authoritative institutions in charge of legalizing market transactions, from the moment negotiations open to the moment when disputes erupt and contracting parties seek litigation or arbitration (such as public or professional regulatory agencies, or arbitration tribunals); (4) the historical narratives, philosophical justifications and political ideologies that contracting parties deploy to justify the making and un-making of contracts (here, think again about Adam Smith and the long lineage of classic political economy).

Contractual knowledge is thus a composite mix of legal and paralegal expertise, which goes beyond the sterile, scholastic opposition between “the law in the book” and “the law in action”: it sums up in a pragmatic perspective the assumptions and understandings that partners share in order to make contracting possible and, in particular, in order to anticipate how the future state of the world may affect them and how they may protect themselves against possible risk. Like neoinstitutional economists, we see contracts as bundles of rights that fix prices and quantities of exchanged goods (North 1990), as well as the rules that contracting partners are supposed to respect during and after the exchange. Examples reach from a “spot” exchange for a barrel of crude oil or a sandwich, to a long-term debt or a micro-credit

³ For instance, the knowledge that goes into the pricing of collaterals exchanged on the side of market transactions.

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contract, or again to the acquisition of complex industrial equipment with a large package of long-term, after-sale services. Typically, many contracts include so-called contingent clauses that state in advance what course of action the parties should follow if commitments are broken or if a given external event occurs; alternately, they may decide *ex ante* whether they would go to court or ask an arbiter to decide a dispute; and at this point, significant precedents may have been issued and stored by a regulatory authority to be used as a default rule, either coercively or not. The notion of contractual knowledge thus unpacks and makes explicit the institutional and cognitive assumptions that give epistemic credence to the economists' core concept of rational expectations. What brings together our perspective and that of economists is that we assume, in our case explicitly, that participants to market exchanges share common assumptions regarding what contracts imply and how, more generally, the market works: what makes them possible *ex ante* (thanks to measuring and pricing devices), but also the social rules and sanctions that frame the unfolding of commitments over time, and how far their reach may extend.⁴

This concept of *contractual knowledge* is not an entirely new idea, as Emile Durkheim already emphasized in *Division of Labor* the importance of the “non-contractual elements of the contract,” – for example, those tacit as well as explicit norms about the social rules and sanctions against non-compliance –, but surprisingly, the study of contractual knowledge has seldom been undertaken by social scientists.⁵ Against the notion that contracts only belong to the realm of private and individualistic action, we thus insist that contracts make sense only within a *habitat*, whose constitution is part of the social and, in particular, the legal construction of society. From that specific habitat, contractual knowledge inevitably extends to, and is invested by political or constitutional meta-rules that inform more generally our view of how society is, or should be governed. In today's thoroughly integrated economy, the relationship between contracts and sovereign authorities takes utterly different forms whether they unfold at the domestic

⁴ We certainly do not assume that social agents always follow principles of forward-looking, means-end, instrumental rationality; in fact we are agnostic on this point, which means that the question does not affect the present discussion. Rather, we oppose the view of contracts as simple, bilateral bonds that conjoin and seal the two parties' preferences in a social vacuum.

⁵ By paying attention to the plurivocality of contractual forms of knowledge, we will thus move beyond the purely functionalist view of contracts – and more generally, of law –, which has been adopted by social scientists since at least the times of Max Weber (1978[1922]).

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level, where a strong hierarchy of norms and courts rules over social exchange, or at the international level, where they take very specific and often intriguing forms (Arendt 1951; Latour 2004). Critically, the absence of a minimal degree of constitutionalization of the international legal order most often means that there is no superior text or epistemic authority that can establish basic rights, standards of fairness and shared principles of due process (Koskenniemi 1997, 2007). At best a process of constitutionalization can be observed within given subfields (Keohane, Moravcsik and Slaughter 2000; Slaughter 2000), where a body of meta-norms may gradually emerge and be accepted by most actors (Stone Sweet 1994, 1999, 2009); but in our view at least, there is no clear sign that this process will lead to a consistent, structured and binding international legal order (Teubner and Beckers 2013).

To trace the origins and evolution of contractual knowledge in global markets,⁶ we have actually chosen to focus on contractual obligations that bind together sovereign entities – states, mostly represented by their diplomatic corps and finance ministries, as well as international organizations, mostly IFIs – and private interest representatives – big banks, but also multinational law firms. We focus empirically on trans-border contractual bonds, with a specific emphasis on contractual agreements involving large exchanges of assets, as in sovereign debt markets. Hence, our focus is on contracts envisaged from a rather standard economic perspective, with due regard given to the usual problems of opportunism, uncertainty and information, but we also consider the organizational practices developed within the international institutions that were put in charge of accompanying the opening of markets, codifying legal interpretations and adjudicating disputes in case of contractual breaches. Here, our book focuses on a wide range of institutions and actors; to cite just a few: the interwar Reparations Commission and different cartels, various economic offices of the League of Nations, the International Chamber of Commerce (ICC), the International

⁶ Still, we do not need to go back to Roman times when tracing the notion of the contract: suffice to say, as Bruno Bernardini (2007:12) reminds us, that the two notions of contract and obligation – or *obligatio* in Roman law – are intrinsically linked, and they were first applied in order to ascribe some legal framework to trans-border exchanges, so as to create “reciprocal” and “conditional” but still “legally binding” terms for the exchange. The first definition of a contract and the “contractual obligation” it generates – or *sullagma* in Greek – comes from Labeo, a Roman jurist from the time of Augustus. For Labeo, a contract is characterized by the special type of obligation it institutes: a “reciprocal obligation” (Bernardini 2007:68), rather than a unilateral one for instance.

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Monetary Fund (IMF), the World Trade Organization (WTO), the UN Conference on Trade And Development (UNCTAD), etc.

In the next section of our introduction, we describe the various narratives available about the evolution of global market governance during the last century. We underline how two narratives map onto the evolution of global governance: the evolution in the power distribution in the system of states, and the creation of an ecosystem of legal institutions and actors in charge of promoting and interpreting international private law. The transition from the First Global Era (roughly, from 1870 to 1914) to the interwar period and then the post-WWII order is often portrayed by world-system and hegemonic theorists as the demise of the British-led imperial form of governance and the emergence of a multi-lateral project, which was both implemented and replaced by American hegemony after 1945. The legal ambiguity and instability that marked the interwar period would then reflect the decline of an earlier order of international contracting, which, from a legal perspective, was not international, but in fact English: Britain ruled (most of) the world, and English law and English court ruled (most of) the international markets, to an extent unmatched today by American power and law. Yet, scholars of international private law have also stressed the extraordinary proliferation of transnational institutions in charge of standardizing and codifying contractual knowledge as well as litigating contractual disputes based on such evolving bodies of doctrine in this period. These developments have marked the language, hopes and forms of cooperation found among transnational networks of international law specialists and practitioners. They may actually explain why the interwar period saw the emergence of an early form of legal deformalization, or legal fragmentation (Kennedy 2006; Mallard 2014), and why in some cases the expectations and experimentations formed around contracts have stabilized and why in other cases they have drifted apart or converged.

We thus propose an analytical framework that we believe can help social scientists, anthropologists and historians capture the various factors responsible for the evolution of contractual knowledge in different periods (the Victorian era, the interwar period, the postwar era and the post-Bretton Woods era). Finally the last section of this introduction discuss how our book chapters draw from this analytical framework, and how they confirm, challenge or bring nuance to our two master narratives. The intersections and possible zones of conflict between the two

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master narratives are thus studied case by case, through smaller-scale descriptions of historical processes associated with contractual innovation and debates about specific forms of global governance. We address a variety of practices associated with evolving forms of contractual knowledge: (1) the evolution of writing practices in the realm of sovereign debt contracts; (2) tools and resources like the mobilization of social capital or the standardization and codification of interpretive rules by which international organizations consolidate their power over the interpretation of contracts; and (3) the market structures in the transnational field of contractual knowledge that emerged over the last century. Each contribution thus describes some aspect of the complex and often contingent evolution of micro-level practices associated with the production of contractual knowledge: how cross-border contracts were written; how domestic or international arbitration courts interpreted their meaning; how informal and tacit rules of knowledge accreditation evolved during the last hundred years. At the same time, we move from the micro-level to the more institutional and structural level, by describing the market structure of various fields in which contractual knowledge is being produced.

Our collection of case studies not only provides socio-legal scholars, institutional economists and historians with tools to understand how, over the last hundred years, legal actors and institutional entrepreneurs have shaped emerging fields of contractual exchange, hence international markets; It also provides them with an analysis of the power struggles between broad political ideologies and legal philosophies, read within the evolution of the construction and formal interpretation of contracts, but also connected to the informal values, interpretive schemes and repertoires of collective action that have been mobilized in the transnational legal fields that structure the international economy (Abbott 1988; Dezalay and Garth 1996). This focus on explicit and tacit contractual knowledge allows us to observe how public and private authorities and jurisdictions, as professional elites, have shaped global markets as they have attempted to gain jurisdiction over the making of international contracts. It provides a rich object for our analytical framework that adopts a broad definition of the law as a historically specific object of conflicts, both symbolic and material, which creates representations, supports expectations, coordinates strategies and distributes opportunities and resources that affect the outcomes of contractual exchange for a wide range of actors.

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CONTRACTUAL KNOWLEDGE IN
HISTORICAL PERSPECTIVE**The global governance of markets from the British to the American centuries: an externalist approach**

The classical narrative that is most often used to present the history of the governance of international markets typically starts by paying respects to “hard power” before identifying shifts and cycles in the power relations between states and empires, from which it derives the history of the geo-economy of market structures (Bordo, Taylor and Williamson 2003). Hence, this narrative usually starts with a reference to the Champagne fairs and medieval Venetian trade, before moving to Genoa and Amsterdam, then to Britain and later the United States. In this narrative, intermediary periods, when no superior power ruled the world, are marked by protracted political conflicts, epistemic opacity in law and thus economic disorganization. Since Kindleberger’s theory of hegemonic stability, the classic and perhaps only example of such an anomic era is the interwar period, when the United States (US) withdrew from the League of Nations and Britain’s relative decline was too advanced to reestablish its pre-1914 supremacy (Kindleberger 1986). Along similar lines, “world-system” theorists (Braudel 1992; Arrighi 2010; Wallerstein 2011) thus argue that the law matters little per se; it may only reflect or formalize the balance of hard factors that structure the world society, namely military and economic power (O’Brien 2002). Law, in this view, only distributes the rewards of globalization in a way that favors the hegemon and helps it consolidate its power through economic globalization (O’Rourke and Williamson 2000; Byers 2003; Krisch 2003).

We certainly agree that the First Global Era is a paradigmatic case to illustrate this functional/strategic use of the law of international markets by the hegemon. The question is what kind of law we are talking about. Historians, whether of the legal profession or not, typically Point to the core norms of nationality, sovereignty and territoriality, which structured in a most powerful way what was then understood as international law (Kennedy 1996; Grewe 2000; Koskeniemi 2001; Mazower 2012). Yet there is little to be found under this title that actually governed commercial or financial transactions, not to mention foreign direct investments: classic textbooks from this period reflect a very limited interest in this trivial matter (Fiore 1875). Neither was it a great attraction during the pre-1914 meeting of the