Part I

The History, Doctrines and Sociology of the Growth of Transnational Justice

1 Development of the Principal Forms from Antiquity to Arbitromania

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1.1 From Antiquity to Arbitromania

International arbitration differs from domestic arbitration. As Jan Paulsson puts it, 'international arbitration is no more a "type" of arbitration than a sea elephant is a type of elephant'.[1] Yet as with sea elephants there are different species of international arbitration. This book is about how the lines by which international arbitration's principal forms – in the contexts of commercial disputes, disputes between a foreign investor and a State, disputes purely between States, and even between the State and its constituent part – grew separately but whose growth joined and overlapped.[2] One misconception should perhaps be dispelled at the outset; that the classifications just mentioned depend upon the identity or status of the parties. For States too, and not just private parties, may become involved in an international commercial dispute. Not just with non-State, private actors but also between themselves. The distinction that matters lies instead in the precise legal relationship giving rise to the dispute submitted to arbitration. Less rare is a dispute under a foreign investment contract between a State and a private party which is submitted to arbitration seated in a neutral place or to 'delocalised' International Centre for the Settlement of Investment Disputes (ICSID) arbitration. Thus, for the purposes of this *Companion*, an inter-State arbitration, properly called, is one whose applicable law is public international law. In the case of intra-

[1] Jan Paulsson, 'International Arbitration Is Not Arbitration', (2008) *Stockholm International Arbitration Review* 1.

[2] While sports arbitration or tourism arbitration, construction arbitration or energy arbitration may also be 'international' these are classifications by industry. They may be considered on the whole to be types of international commercial arbitration, or international investment (meaning foreign investor-State) arbitration. However, WTO dispute settlement or the United Nations Compensation Commission are considered, in this *Companion*, to be distinct from arbitration even if, in the case of WTO panels, parties are free to choose their panellists together.

State arbitration the precise nature of the parties' legal relationship – whether that is a matter of domestic law, even domestic private law, or public international law – may form a large part of the issue.

As to the development of these forms, they are not as I have mentioned entirely separate. The term *international arbitration* evokes still some recollection of nineteenth-century peace societies, but it is even more often used today in a different sense altogether, as a short-hand for a lucrative form of commercial lawyering. Still, there are surprising connections and commonalities between the two senses. American business crossed the Atlantic, with men calling themselves 'merchants of peace'[3] to make common cause with the Grand Old Men of Europe – those in the European international law professoriate well known as promoters of inter-State arbitration ('international adjudication', they called it) and who viewed themselves as a part of the Peace Movement of a previous century:[4]

> In the wake of the savagery of World War I, people of good will sought urgently for ways to avert its recurrence. Peace, it was reasonably thought would be buttressed if peoples and their governments had mutually reinforcing stakes in systems of cooperation. Trade was an obvious thing. . . . Of course, commercial transactions lead to disputes. . . . It is, therefore, essential that such disputes be resolved fairly and efficiently lest the unreliability of bargains become an impediment to trade. Thus, the idea of international arbitration as a tool of peace emerged.

In this manner international arbitration, spanning both diplomacy and international commerce since medieval times, witnessed the shrewd co-optation of the idealism of the public international law professoriate who were well versed in (1) inter-State arbitration in the early years of the twentieth century.[5] This was how (2) modern international commercial arbitration was established, resurrected – as we shall see – from a medieval past. In turn, (3) foreign investor-State arbitration grew also out of these

[3] The title of George Ridgeway's work, cited also in Paulsson, 'Not Arbitration', *op. cit.*, 5.
[4] Paulsson, 'Not Arbitration', *op. cit.*, 4.
[5] Yves Dezalay and Bryant G. Garth, 'Constructing a Transatlantic Marketplace of Disputes on the Symbolic Foundations of International Justice', in Gregoire Mallaard and Jerome Sgard (eds.), *Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets* (Cambridge: Cambridge University Press, 2016), 185, and *see* Chapter 2 in this volume.

pacifist roots, not least through the efforts of Aaron Broches at the World Bank.[6] As did (4) intra-State arbitration – arbitration between a State and a part thereof[7] – which has developed out of the Permanent Court of Arbitration having addressed itself to mixed arbitration between State and non-State entities.[8]

In a similar vein, contemporary 'international arbitration', occupying the worlds of scholarship and legal practice, remains known to and is practised by diplomats, merchantmen – and women – alike. These women and men come from every corner, including the post-colonial world.

Still, as a matter of history, it is arbitration in ancient European antiquity which commentators have invoked, assuring their readers of a prestige gained through longevity.[9] In Ancient Greece:[10]

> The city states employed arbitration to solve a wide range of cooperation problems, from the treatment of foreigners to the specification and regulation of borders. . . . Like their modern counterparts the city-states concluded many bilateral treaties. . . . The city-states inserted arbitration clauses in many of their treaties. . . . Arbitration spanned the entire system of city-states.

[6] *See* Chapter 11 in this volume.

[7] *See* Garth Schofield's discussion of the *Abyei* arbitration in Chapter 16 in this volume.

[8] It is largely in this sort of sense that arbitration between a State and a part thereof is 'international' in the first place, for it could well be a purely domestic arbitration, in other words a true elephant rather than a sea elephant. *See further* Freya Bartens, 'The Abyei Arbitration: A Model Procedure for intra-State Dispute Settlement in Resource Rich Areas?', (2011) 1 *Goettingen Int'l L Jo* 417, 428 for a discussion of intra-State arbitration's procedural roots in Radio Corporation of America v. the National Government of the Republic of China, Award of the Tribunal, 13 April 1935. On the adoption in the *Abyei* arbitration of the 1993 PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State, *see* Brooks Daly, 'The Abyei Arbitration: Procedural Aspects of an Intra-State Border Arbitration' (2010) 23 *Leiden Jo Int'l L* 801, 807–808. *See further* Brooks W. Daly et al., *A Guide to the PCA Arbitration Rules* (Oxford: Oxford University Press, 2014) for a discussion of what is now the 2012 PCA Arbitration Rules. *See also* Vaughan Lowe and Antonios Tzanakopoulos, 'Introduction: The Abyei Arbitration', in Heather Clark and Lise Bosman (eds), *The Abyei Arbitration (The Government of Sudan/The Sudan People's Liberation Movement/Army) Final Award of 2009,* PCA Award Series, (2012) Volume 9, p. 1; Wendy J. Miles and Daisy Mallett, 'The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts', (2010) 1 *Jo Int'l Disp Settl'mnt* 313.

[9] *See e.g.* D. W. Rivkin, 'The Impact of International Arbitration on the Rule of Law' (2013) 29 *Arb Int'l* 327, Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity and Institutional Rationality in International Relations* (Princeton, NJ: Princeton, 2009), 44.

[10] Reus-Smit, *op. cit.*, 44–45.

Therein lies the analogue to modern inter-State arbitration although, despite such well-established roots, the form owes more to British and American state practice in the nineteenth century. Most notably, to the Jay Treaty commissions and the *Alabama Claims* arbitration,[11] to European practice and to that century's societal peace movements. It culminated in the 1899 Convention on the Pacific Settlement of International Disputes and the Permanent Court of Arbitration.[12] Inter-State arbitration remains today the domain of eminent jurists even with the encroachment of the international law firms which seek to transform it into a technocratic form.

In ancient times there was private arbitration too, the *Iliad* is authority for that proposition.[13] But it was to be commercial arbitration during the medieval period, which in England pre-dated the common law,[14] which now governs the lawyers' historical imagination.[15] They speak of a system of arbitration so powerful that it has become the dominant mode of cross-border commercial dispute resolution – 'arbitromania'.[16] As with Homer there is Shakespeare's reference to Roman arbitration in the *Rape of Lucrece*.[17] This medieval merchant habit – in the English trade fairs, and in Germany, Switzerland, Northern Italy and France[18] – was to inspire Lord Mustill and others to speak of a 'New Lex Mercatoria'.[19] Today, it

[11] United States of America v. Great Britain (Alabama Claims), Award, 14 September 1872. *See* Chapter 14 of this volume.

[12] For a concise overview of the Anglo-European history, *see* Gary Born, *International Arbitration: Cases and Materials* (Alphen aan den Rijn, NL: Kluwer, 2011), 2–31.

[13] N. G. L. Hammond, 'Arbitration in Ancient Greece' (1985) 1 *Arb Int'l* 188 is often cited in this regard.

[14] Rivkin, *op. cit.*, 331.

[15] For criticism, *see* Chapter 6 in this volume.

[16] Such that iconic judgments, such as Mitsubishi v. Soler 473 US 614 (1985), now seem quaint – 'as international trade has expanded in recent decades, so too has the use of international arbitration'.

[17] Rivkin, *op. cit.*, 330. The relevant Western literature includes Hammond, *op. cit.*; Derek Roebuck, *Ancient Greek Arbitration* (Oxford: Holo Books, 2001); Rivkin, *op, cit.*, and the woks cited therein; Thomas Kuehn, 'Arbitration and Law in Renaissance Florence' (1987) 11 *Renaissance and Reformation* 289; Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton, 2015), 348 *et seq.* This is not to say that arbitration was not known or equally well-established in other cultures, such as in Arab culture and Islam. The nineteenth century image on the cover of this book depicts the Battle of Siffin (657 CE) in connection with which arbitration was famously unsuccessful.

[18] Born, *Cases and Materials, op. cit.*, 13–15.

[19] Michael Mustill, 'The New Lex Mercatoria: The First Twenty-Five Years' (1988) *Arb Int'l* 86. For the 'old', *see e.g.* the Introduction in Mary Elisabeth Basile et al. (eds.), *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and Its Afterlife* (Cambridge,

forms the basis not only of so much of modern international commercial arbitration but also (3) foreign investor-State (or 'international investment') arbitration.

As with any field of writing however there are competing narratives, such as in the post-colonial and Far Eastern literature. Sornarajah argues that international arbitration was for much of the developing world but a mere twentieth-century Anglo-European construct which had supplanted earlier gunboat diplomacy.[20] Shalakany, writing in the same vein, contends that international arbitration is to be more accurately perceived as an extension of the techniques of European and American extraterritoriality during the eighteenth and nineteenth centuries; in which it took the form of the European Mixed Courts in the Middle East and the Far East. These were, after all, 'mixed' – i.e. cosmopolitan – tribunals. Admittedly, the Third World resisted arbitration in the post-war twentieth-century period,[21] but it was also the Asian-African Legal Consultative Organisation (AALCO) which eventually proposed the 1985 UNCITRAL Model Law.[22] And thus, according to Shalakany, did the Asian and African nations end up embracing that which earlier had been rehearsed in their own territories.

This book addresses modern international arbitration, broadly speaking in three or three-and-a-half principal forms:

1. international commercial arbitration;
2. international investment (foreign investor-State) arbitration;
3. arbitration between States ('inter-State arbitration'); and by extension thereof
4. between the State and a sub-component of it which may be seeking autonomy, secession or independence (so-called intra- or sub-State arbitration).

Mass.: Ames Foundation, 1998); W. A. Bewes, *The Romance of the Law Merchant* (London: Sweet & Maxwell, 1923).

[20] M. Sornarajah, 'The Climate of International Commercial Arbitration' (1991) 8 *J Int'l Arb* 47, 51.

[21] Amr Shalakany, 'Arbitration in the Third World: A Plea for Reassessing Bias under the Spectre of Neoliberalism' (2000) *Harvard ILJ* 419, 431.

[22] UNCITRAL Model Law on International Commercial Arbitration (ML), adopted 21 June 1985, revised in 2006. AALCO also created the Cairo and Kuala Lumpur regional centres for arbitration.

The first is most commonplace, the most widespread, although no less intriguing. It was international commercial arbitration which instigated a lasting and rich debate over the reach of public authority over private disputes. That issue, as this chapter will endeavour to show, continues to occupy our legal imagination. But because international commercial arbitration is imagined to have grown from its medieval merchant form, it also carries within it – in terms of a professional sensibility – the same long-standing prejudice against State authority. Its ambition – it is said – is, wisely or not, to free itself entirely of the State. Julian Lew, quoting F. A. Mann, had once asked,[23]

> Do you dream? When do you dream? What do you dream about? Do you dream about international arbitration? Is there a dream for international arbitration? Is the concept of delocalised arbitration, or arbitration not controlled by national law, a dream or a nightmare? Is autonomous arbitration a reality, or is 'every arbitration necessarily . . . a national arbitration, that is to say, subject to a specific system of national law'?

Here Mann becomes a foil – the sceptic who believed every arbitration ultimately to be governed by some national law, the *lex fori*, more accurately the *lex arbitri* or *la lois de l'arbitrage*, whether that law should be the law of the seat or the national law chosen by the parties to govern their contract.[24] Mann after all was a high representative of an English sensibility:[25]

> the statement: 'arbitrations are subject to the law chosen by the parties as the *lex fori*' cannot have any validity in the absence of a legal rule to this effect. On the other hand, arbitrators are inevitably subject to the legislative jurisdiction of the country in which the tribunal functions. Whatever the intentions of the parties may be, the legislative and judicial authorities of the seat control the tribunal's existence, composition and activities. It is primarily the law of the seat that decides whether and on what conditions arbitration is permitted at all. No country other than that of the seat has such complete and effective control over the arbitration tribunal.

It was precisely this truth however which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[26] has subverted;

[23] Julian Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 *Arb Int'l* 179; F. A. Mann, 'Lex Facit Arbitrum' (1986) 2 *Arb Int'l* 241, 244.
[24] Mann 'Lex Facit', *op. cit.*, 245.
[25] *Ibid.*, 246.
[26] 10 June 1958.

doing so by remitting control to a plurality of Contracting States whose courts are generally speaking expected to enforce arbitration agreements and awards from any other New York Convention country. But that is to rush the story.

1.2 Chapter Outline

Section 1.3, on international commercial arbitration, discusses where national authority ends and arbitration's 'autonomy' begins. What is the place, if any, of national legal policies and national conflict of laws rules? By arbitration's autonomy we mean the parties' autonomy to choose the procedure and substantive laws of the arbitration, the authority of the tribunal to decide its own competence, and even the application of transnational principles rather than national rules in some of these aspects.

As for international investment arbitration between a foreign investor and its host State,[27] discussed in Section 1.4, that has an overlapping but now distinctive history. Although the pacific settlement of public debt and foreign investment disputes in modern times goes as far back as the Drago-Porter Convention of 1907,[28] modern international investment arbitration only emerged in the late 1950s with internationalised contracts, the first bilateral investment treaty, and in the 1960s with the creation of the International Centre for the Settlement of Investment Disputes (ICSID). All of this culminated in the 1990s with the sudden burst of investment treaty arbitrations.

Finally, there is inter-State arbitration – that between sovereigns, apparently beyond the reach of national legal authority. Its history diverges somewhat from that discernible shared history between the first two forms mentioned above although attributes of inter-sovereign dispute settlement continue to be seen, sitting alongside the influence of international commercial arbitration, in modern investor-State arbitration.[29] This, together

[27] Rather than arbitration between two States concerning the enforcement of a debt or an investment; *see e.g. Arbitral Opinion Relative to the Gold of the National Bank of Albania*, Brussels, 20 February 1953, (1953) 10 *Annuaire Suisse de Droit International* 11; Oliver J. Lissitzyn, (1955) 49 *Am J Int'l L* 403.

[28] *See* Chapter 13 in this volume.

[29] These include the peculiarities and sensitivities which are involved when it is a sovereign party which is before a tribunal.

with arbitration between a sovereign State and one of its components – intra-State arbitration – will be discussed in Section 1.5. As I have mentioned, inter-State arbitration owes much to British and American state practice in the nineteenth century, most notably to the Jay Treaty commissions and the *Alabama Claims* arbitration,[30] to European practice as well and to the peace movements of that century which culminated in the 1899 Convention on the Pacific Settlement of International Disputes and the Permanent Court of Arbitration.[31]

1.3 International Commercial Arbitration

The modern impetus for international commercial arbitration was to come from the establishment in Paris of the International Chamber of Commerce (ICC) in 1919. One whose International Court of Arbitration was, thereafter, created in 1923. The contribution of the ICC and of French arbitration scholars has been enormous. In the English literature a classic comparison drawn is that between the English and French approaches to arbitration, together with comparisons drawn with the other famous continental forms.[32] The following discussion introduces a complex interaction between[33]

1. the proper law of the agreement to arbitrate;
2. the *lex fori*, *lex arbitri*, *la lois de l'arbitrage* or the procedural law of the arbitration as it is variously called, including the doctrines of separability and *kompetenz-kompetenz*;
3. the *lex causae*, that is the law applicable to the substance of the dispute; and
4. the law governing the recognition and enforcement of foreign arbitral awards, most significantly the influence of the New York Convention.

[30] United States of America v. Great Britain (Alabama Claims), Award, 14 September 1872.
[31] For a concise overview of the Anglo-European history, *see* Born, *Cases and Materials*, *op. cit.*, 2–31.
[32] Not least of which is arbitration under Swiss Rules of International Arbitration. For the classic telling of the tale of the entry of American disputes lawyers into the international commercial arbitration field, *see* Yves Dezalay and Bryan Garth, *Dealing in Virtue* (Chicago: University of Chicago, 1996).
[33] Redfern and Hunter, *op. cit.*, para. 3. 07. *See further* Chapter 3 of this volume.