

Advance Praise for *The Three Ages of International Commercial Arbitration*

One of the great strengths of this remarkable book is that it makes use of countless new documents and archival research – such as unpublished ICC arbitral awards, rare periodicals, and all successive versions of the ICC Rules of Arbitration – to retrace the modern history and evolution of international commercial arbitration. Through this in-depth research, Dr. Schinazi is able to explore the field's inner dynamics. An elegantly written book, *The Three Ages* is a must-read for anyone interested in the history of international arbitration and international law in the making.

– Yas Banifatemi,
Founding Partner,
Gaillard Banifatemi Shelbaya Disputes;
Lecturer, Panthéon-Sorbonne University;
Visiting Lecturer, Yale Law School and Harvard Law School

Dr. Schinazi's *The Three Ages of International Commercial Arbitration* is brilliant and momentous – nothing short of a tour de force. It is a meticulously researched but also deeply rich and imaginative work, eclipsing anything that has been produced up to now on the genesis and evolution of international commercial arbitration. I confess to finding it a real page-turner.

– George Bermann,
Gellhorn Professor of Law
and Monnet Professor in European Union Law,
Columbia Law School

This is one of the most detailed works exploring the International Chamber of Commerce's past since Ridgeway's 1938 *Merchants of Peace*. Dr. Schinazi's book offers a detailed panorama of the arbitration landscape to coincide with the ICC's centennial. Readers will discover a wealth of hitherto unpublished information about the ICC and the beginnings of its International Court of Arbitration. This is a major book about the history and evolution of the ICC arbitration system, informed by keen insights drawing on legal theory and intellectual history. It is

a delight to see the book in print, the fitting culmination of Dr. Schinazi's doctoral research.

– Emmanuel Jolivet,
General Counsel,
International Chamber of Commerce
and International Court of Arbitration

As a practicing lawyer and later a Supreme Court Justice, I have always been fascinated by international commercial arbitration institutions, including the ICC. Now, after reading Dr. Schinazi's brilliant work, I can better understand the development and essence of those modern institutions over the ages. The book is therefore immensely important for researchers as well as practitioners in the field of international arbitration. It seems to me that we are now facing a New Age in this field due to the huge influence of social networks and the opportunities they present. I hope that Dr. Schinazi will provide similar illumination on these aspects, too, in the future.

– Justice Hanan Melcer,
Deputy President, Supreme Court of Israel

At last an in-depth historical presentation! Arbitration has firmly established itself as the choice method of dispute resolution in the international legal order, progressively and almost imperceptibly overshadowing state courts. It is important to understand how this development came about, and the key can be found in Dr. Schinazi's remarkably intelligent and synthetic account. The insights he offers are essential to understanding not only the current situation but also its risks and prospects.

– Pierre Tercier,
Emeritus Professor, University of Fribourg;
Honorary President, ICC International Court of Arbitration

Dr. Schinazi's meticulously researched monograph extends the turn to history in international legal scholarship to international arbitration. Relying on impressive archival research at the International Chamber of Commerce and beyond, *The Three Ages* uncovers the ideas and actors over two centuries that led to the emergence of the modern system of international commercial arbitration. A thoughtful, original book, and beautifully written to boot. Highly recommended!

– Michael Waibel,
Professor of International Law,
University of Vienna

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THE THREE AGES OF INTERNATIONAL COMMERCIAL ARBITRATION

Drawing on a wide range of previously unpublished sources, this unique history of international commercial arbitration in the modern era identifies three periods in its development: the Age of Aspirations (c. 1780–1920), the Age of Institutionalization (1920s–1950s), and the Age of Autonomy (1950s–present). Mikaël Schinazi analyzes the key features of each period, arguing that the history of international commercial arbitration has oscillated between moments of renewal and anxiety. During periods of renewal, new approaches, instruments, and institutions were developed to carry international commercial arbitration forward. These developments were then reined in during periods of anxiety, for fear that international arbitration might be overstepping its bounds. The resulting tension between renewal and anxiety is a key thread running through the evolution of international commercial arbitration. This book fills a key gap in the scholarship for anyone interested in the fields of international arbitration, legal history, and international law.

Mikaël Schinazi is an international dispute resolution lawyer and a visiting lecturer at Sciences Po Law School, Paris. A member of the New York Bar, he holds a BA *magna cum laude* with highest honours from Harvard University, an LLB from the University of Cambridge (John Eliot Scholar), an LLM from Columbia Law School (Harlan Fiske Stone Scholar), and a PhD in law from the Institut d'Études Politiques de Paris (Sciences Po).

THE THREE AGES OF
INTERNATIONAL
COMMERCIAL
ARBITRATION

MIKAËL SCHINAZI



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In memoriam Emmanuel Gaillard (1952–2021)

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FOREWORD

When, in the winter of 2013, Mikaël Schinazi approached me to discuss his project of undertaking doctoral studies on the modern history of international commercial arbitration, I immediately found the project to be both innovative and fascinating. While it is obvious that the field has grown exponentially over the past few decades, and now occupies a key position in the broader legal landscape, the reasons as to *why* and *how* this happened have not been fully elucidated. A major work in this area remains Yves Dezalay and Bryant Garth's 1996 *Dealing in Virtue*, but this sociological study, as Schinazi aptly notes in his introduction, no longer reflects the complex reality of the field. A few other scholars (mostly in France and England) were also conducting research in this area, but they were writing mostly from the vantage point of their respective disciplines and, for the most part, outside the legal field.

This was therefore an excellent topic for a doctoral dissertation, although an extremely difficult one. As any scholar of international arbitration is well aware, many primary and secondary sources are confidential or difficult to access. The topic was also vast. While I share Schinazi's reluctance to trace the origins of international commercial arbitration to the ancient world, starting the narrative in the late eighteenth century, as he does, was a daunting task. Schinazi, however, was ideally positioned to tackle this challenge, possessing stellar credentials, the required background (in both law and history), and a rigor and intellectual maturity beyond his years.

Schinazi first started exploring the various sources and archives available to him. He went to the National Archives in France and England. He visited courts and tribunals. He went to many research libraries in Paris, as well as various libraries and archives outside Paris, exploring, for instance, the Clémentel papers in the city of Clermont-Ferrand. (Étienne Clémentel, a now largely forgotten figure of the French Third Republic, played a key role as the founding president of the International Chamber of Commerce, as Schinazi explains in the book.)

At times, his research felt like a detective story, tracking down and interviewing the families of various individuals who played a key role in the modern history of arbitration. (Did their fathers or grandfathers leave unpublished papers, letters, or documents behind them? Why did they become interested in international arbitration in the first place?) As with any good historical work, some of Schinazi's efforts were unsuccessful. But many led to important breakthroughs, as when Schinazi gained access to all the archives of the International Chamber of Commerce and its Court of Arbitration in Paris, the world's preeminent arbitral institution, which only a handful of scholars had been able to explore in depth. (The ICC, and in particular its General Counsel Dr. Emmanuel Jolivet, should be thanked for granting Schinazi full access to its archives.) This is the first book to make use of so many new documents – including more than 130 mostly unpublished arbitral awards, rare periodicals, and all successive version of the ICC Rules of Arbitration – to retrace the modern history of international commercial arbitration.

Through this research, Schinazi was able to divide the history of the field into three broad waves or periods, which he calls the Age of Aspirations (*ca.*1780–1920), the Age of Institutionalization (1920s–1950s), and the Age of Autonomy (1950s–present). Schinazi clearly explains that this division of time is deliberately approximative. He further argues (borrowing from the terminology used by David Kennedy in a different context) that this history oscillates between moments of renewal and moments of anxiety, an idea which I find highly convincing but with which others may, of course, disagree.

Schinazi's comprehensive presentation of the primary and secondary sources and excellent knowledge of both the theory and the practice of international commercial arbitration are used to contradict some well-worn myths about the history of the field. They are also used to trace the genealogy of key concepts and ideas. I was especially impressed by Schinazi's thorough analysis of the origins and evolution of the so-called "French school of international arbitration" (in Part III of the book), which blends legal and intellectual history, brings to life the main protagonists (Goldman, Fouchard, and others), and cogently discusses their ideas.

One may expect that the questions raised in this book – and the answers provided by Schinazi – will be of interest to at least three audiences. Academics working in the fields of international arbitration (both commercial and investor-state), public international law, legal history, and intellectual history will find answers to some of their

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questions about the origins of the modern regime of international arbitration and the International Chamber of Commerce, which has been in operation for a century. Arbitrators, lawyers, and practitioners will be interested in finding out more about the evolution of international commercial arbitration – how it originated and where it might be heading. This is especially true in a field where theory and practice are so closely connected. Finally, members of the broader public interested in current debates and controversies over the state of international arbitration (especially in the investment treaty context) may find that an awareness of the historical background can provide new perspectives on these debates.

Schinazi's dissertation was a delight to supervise, along with my colleague Professor Mikhaïl Xifaras. It was unanimously described as an outstanding work of scholarship by all five members of his PhD defense committee, all of whom are warmly thanked for agreeing to serve on the PhD defense committee: Professors Horatia Muir Watt, Carine Jallamion, Joshua Karton, and Jérôme Sgard, and Mr. V. V. Veeder QC, a dear friend and brilliant colleague, who left us in 2020. The book is now an absolute pleasure to read, and a treasure trove of new information. It is to be expected that it will continue to garner praise and become a reference work for those seeking more information about the modern history and evolution of international commercial arbitration.

Emmanuel Gaillard

Professeur agrégé des Facultés de droit

Visiting Professor, Yale Law School and Harvard Law School

Founding Partner, Gaillard Banifatemi Shelbaya Disputes

January 15, 2021

ACKNOWLEDGMENTS

This book is dedicated to my doctoral supervisor, Professor Emmanuel Gaillard, who passed away unexpectedly on April 1, 2021, as the book was about to go to print. Professor Gaillard was a source of inspiration for academics and lawyers around the world. As will become clear in the book's final chapters, his vision framed international arbitration's development into its current state. Over the past eight years or so, he provided constant advice, support, and mentorship. I am grateful for his faith in me and my ideas. Professor Gaillard made seminal intellectual contributions to the field, but above all else I will remember him for his wit, youthful energy, and kindness. Like so many others, I feel privileged to have known him.

This book is based on a doctoral thesis completed at Sciences Po Law School in Paris, France. I would like to express my sincere gratitude to Professor Mikhaïl Xifaras, who jointly supervised the project along with Professor Gaillard. Both supervisors provided incisive comments on successive versions of my draft. I thank them for being demanding but never impatient, honest but always optimistic, and for making sure that I brought my work to fruition.

In addition to my supervisors, I would like to thank all the jury members for agreeing to serve on the PhD defense committee: Professors Carine Jallamion, Joshua Karton, Horatia Muir Watt, Jérôme Sgard, and Mr. V. V. Veeder QC (whose kindness, both at the PhD defense and after, is fondly remembered). They agreed to spend precious time and effort reading a long – and surely imperfect – document, and this work greatly benefited from their thorough feedback.

I also wish to express my deepest thanks to Dr. Yas Banifatemi of Gaillard Banifatemi Shalbaya Disputes (formerly of Shearman & Sterling LLP), who first hired me as a legal assistant ten years ago, in 2011, and has advised me ever since. I have had the great privilege of being able to seek Dr. Banifatemi's advice on a wide range of academic, professional, and personal matters over the years, and I am grateful for her guidance and mentorship.

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While writing a dissertation can be a solitary endeavor, I was fortunate enough to be surrounded by a group of more experienced scholars, who were interested in some of the same issues and research questions. I would like to thank, at Sciences Po, Professor Jérôme Sgard and, in the early stages of my research, Professor Claire Lemerrier; at King's College London (and now Oxford University), Professor Florian Grisel; and, at the International Chamber of Commerce (ICC), Dr. Emmanuel Jolivet and Mr. Alexander Fessas. At the ICC, I also benefited from the guidance and expertise of the jurists and research librarians Ms. Sylvie Picard Renault, Mr. Damien Schoenstein, and Ms. Stéphanie Torkomyan, all of whom answered many questions and received me several times during my research. Many scholars and experts offered their time and advice. In addition to the individuals listed earlier, I greatly benefited from informal conversations with Professors Frédéric Audren, Thomas Clay, Julie Saada, Emmanuelle Tourme-Jouannet, and Dina Waked.

When revising my thesis and locating photographs for this book, I had the pleasure of meeting Dr. Marie-Christine Kessler, a political scientist and Étienne Clémentel's granddaughter, and Dr. Guy Rousseau, a history professor, both of whom provided illuminating insights into Clémentel's early life and work. Dr. Louise Arizzoli provided the photograph of Clémentel posing near his bust by Auguste Rodin; and Dr. Sigvard Jarvin kindly sent me photographs of two eminent Swedish scholars, Algot Bagge and Emil Sandström, which unfortunately could not be included in this book.

At Cambridge University Press, I would also like to thank Mr. Tom Randall for believing in this project and the production team for giving me the pleasure of seeing it turn into print. I am also grateful to the three anonymous reviewers chosen by Cambridge University Press.

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