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General Introduction

This book is an exploration of the history of international commercial arbitration – the mechanism by which parties' mutual rights and liabilities are determined with binding effect by a third person, the arbitrator, instead of by a court of law.\(^1\) It divides the history of international commercial arbitration into three broad waves or periods, which I call the Age of Aspirations, the Age of Institutionalization, and the Age of Autonomy. I argue that this history oscillates between moments of renewal and moments of anxiety. During periods of renewal, new instruments, devices, and institutions were created to carry international commercial arbitration forward. These initiatives were then reined in during periods of anxiety, seemingly out of fear that international commercial arbitration might go too far (e.g., by encroaching on state sovereignty). The resulting tension or pendulum-like movement – from renewal to anxiety and from anxiety to renewal – is a key feature of the history of international commercial arbitration and helps explain the course of its development.

In this chapter, I explain the general background and justification of the study (Section 1.1) and its objectives and arguments (Section 1.2). I also describe the sources used and make a few caveats (Section 1.3).

1.1 Background and Justification

This study is based on a startling paradox: despite the ever-growing importance of international commercial arbitration in today’s world (Section 1.1.1), relatively little scholarly attention has been devoted to its modern history and evolution (Section 1.1.2).

1.1.1 Setting the Stage: The Current Landscape of International Commercial Arbitration

It has become customary to describe international commercial arbitration as the preferred method for resolving business disputes between parties from different countries. The data made available by the International Chamber of Commerce (ICC) show that since its creation in 1923, the International Court of Arbitration (hereinafter the “ICC Court”) has administered 25,000 cases. While the first 3,000 cases were filed over a period of 53 years, the next 3,000 cases took only 11 years to arrive. During the first eighteen months of its existence, the ICC Court received sixty-eight cases from seventeen countries. In 2019, it recorded 851 new cases, involving 2,498 parties from 147 countries and independent territories. These figures testify to the “explosive” growth and “meteoric rise” of international commercial arbitration.

Although no exhaustive study has yet been made of this sector’s weight in the global economy, it is clear that the economic implications of international arbitration are enormous. The surveys conducted by the Queen Mary School of International Arbitration in London have repeatedly shown that international arbitration plays a key role in today’s business world. It has been found that membership of the 1958 New York Convention, the leading treaty in the field, leads to an increase in the use of arbitration as a preferred dispute resolution mechanism. In the 2015 survey, 90 percent of participants named international arbitration as their preferred dispute resolution mechanism. In the 2018 survey, that figure reached 97 percent.
in bilateral trade. Furthermore, the amounts in dispute keep reaching new heights. The most striking and highly publicized example is the Yukos saga. In July 2014, an arbitral tribunal sitting in The Hague under the auspices of the Permanent Court of Arbitration ordered the Russian Federation to pay more than USD 50 billion in damages to the former majority shareholders of Yukos Oil Company. While most international commercial arbitration cases do not compare with “mammoth arbitrations” of this kind, they typically involve large amounts. As the ICC has reported, the aggregate value of all pending disputes before the ICC Court at the end of 2019 was USD 230 billion, with an average value of USD 140 million and a median value of USD 10 million.

Not only has the market for arbitration grown exponentially, so too has the market in arbitration. Law firms, counsel, arbitrators, arbitral institutions and centers, and even international arbitration journals compete for power, influence, and prestige. As Oppetit wrote in 1998, not without some dismay at the path arbitration was taking, “highly valued both by governments and in economic circles, much in favor with the judiciary, arbitration has become a key part of merchant society institutions: there now exists a true arbitration market in every sense of the word.” In fact, arbitration has become the daily business of several hundreds, if not thousands, of practitioners around the world.

International commercial arbitration has also been embraced with enthusiasm in academic circles and is now a vibrant area of study and research. As recalled by a leading US arbitration lawyer, “[i]n 1960,
international arbitration was not a familiar subject among US lawyers. There were no law schools in the US teaching the subject" and "no textbook or coursebook to be used. The contrast with today could not be starker. Over the past few decades, we have seen an inexorable rise in the number of schools offering courses and promoting research in international arbitration. There are now countless outlets for research in this area, including peer-reviewed journals, websites, and forums reporting the latest news and trends in the field. In addition to being a market and a thriving area of study and research, international commercial arbitration can be considered an "international legal field," as defined by Bourdieu. The notion of "an arena where struggle takes place" and a "symbolic terrain with its own networks, hierarchical relationships, and expertise, and more generally its own "rules of the game" prompts an analysis of international commercial arbitration in sociological terms. Gaillard, for instance, has identified three categories of actors in the field of international commercial arbitration – "essential actors," "service providers," and "value providers" – and has described the various rituals they perform as part of their activity in the field. Closely


related to the notion of field is the idea of an “epistemic community” – that is, “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area.” People involved in the field of international commercial arbitration have clearly formed an “epistemic community” of professionals who share a set of normative beliefs and values – a distinct legal “culture” specific to international commercial arbitration.

1.1.2 Literature Gap and Reassessments

Despite all the “wealth and legal, economic and sociological complexity” of international commercial arbitration, its history – or, even better, its genealogy – has attracted relatively little scholarly attention. This is not to say that there have been no attempts to retrace or understand its evolution. Roebuck compiled a remarkable bibliography of “sources for the history of arbitration,” which filled an entire issue of Arbitration International. As will be explained in Chapter 2, numerous studies have appeared on the ancient history of international arbitration, stretching as far back as Mesopotamia and Ancient

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25 Karton, Culture, 5. For an early essay on the topic, see Tom Ginsburg, “The Culture of Arbitration,” Vanderbilt Journal of Transnational Law, 36 (2003), 1335. Won Kidane has authored a book entitled The Culture of International Arbitration (New York: Oxford University Press, 2017), but his argument is that the leading theories of international arbitration do not adequately account for the impact of local cultures; as such, he is more interested in the role of cultures in arbitration than a single culture of arbitration.


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Greece. It has indeed become standard practice for textbooks and treatises to begin with references to this distant past. In addition, an increasing number of scholars have analyzed the construction of the contemporary regime of international commercial arbitration.

In France, David, the eminent comparative law scholar, devoted multiple studies, as well as a chapter in his autobiography, to international arbitration, including a historical study of arbitration in the nineteenth and twentieth centuries. Hilaire’s work also paved the way for much historical work in the field. Closer to us, Jallamion has studied the practice of arbitration in civil matters from 1650 to 1789, initially focusing on Montpellier and later expanding the scope of her research.

Also in France, Grisel has worked on the application and creation of law in international arbitration, along with Stone Sweet, he has been engaged in a large-scale project on the judicialization of international commercial arbitration, which also draws on archival material to chart the history and evolution of the field. Lemercier and Sgard have been investigating the

29 For a recent essay dividing the history of interstate arbitration into five “moments” (starting with the “Greek moment”), see Alexis Keller, “Inter-State Arbitration in Historical Perspective,” in Thomas Schultz and Frederico Ortino (eds.), The Oxford Handbook of International Arbitration (Oxford: Oxford University Press, 2020), 843–73.
modern history of international commercial arbitration, drawing on a wide range of primary and secondary sources and completing a final report in 2015.\(^{37}\) Finally, Gaillard’s Hague Academy course, though primarily concerned with the “legal theory” of international arbitration, imparts a vision of its overall development – or that of its “mental representations.”\(^{38}\)

In England, Mustill helpfully tried to sketch the history of international commercial arbitration,\(^{39}\) while Veeder authored numerous studies on famous arbitrations or key episodes in the history of international arbitration.\(^{40}\) Hale drew on various historical sources when exploring the transnational commercial dispute resolution regime,\(^{41}\) and Schultz’s study of “transnational legality,” though a work of legal theory, also contains useful insights into the formation of the current international arbitration regime.\(^{42}\) A recent collection of essays also


\(^{41}\) Hale, *Between Interests and Law*. My project and Hale’s are distinct in that Hale uses the history of the ICC to address the question of variations in institutional attitudes towards global governance, whereas I explore the modern origins of the international arbitration regime. In other words, Hale uses international arbitration as a laboratory for shifts in global governance, whereas my goal is to retrace the very history of international commercial arbitration.

contains fascinating studies on specific episodes in the history of international adjudication, including international arbitration. Even though some of these works seem to be part of a broader effort “to write a critical history of international arbitration in commercial and investment matters,”[44] historical scholarship relating to international commercial arbitration is much less developed or comprehensive than that relating to investment treaty arbitration. In fact, recent scholarship has explored the history of investor-state arbitration. For instance, building on earlier work by Anghie and Lipson,[45] Miles has traced the origins of international investment law in the commercial and political expansionism of Western states from the seventeenth to the early twentieth century and cogently argued that “these origins still resonate within its modern principles, structures, agreements, and dispute resolution systems.”[46] Yackee has provided a detailed account of “the first investor-state arbitration” – the 1864 dispute between the Suez Canal Company and Egypt, which was arbitrated by a commission headed by Napoleon III.[47] Several recent works have been devoted to the history of the investment treaty regime[48] or have tried to put the investment treaty regime in its historical context.[49] The attempt to understand the roots and causes of the current investment treaty regime is unmatched in the world of international commercial arbitration.

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43. Ignacio de la Rasilla and Jorge Viñuales (eds.), *Experiments in International Adjudication: Historical Accounts* (Cambridge: Cambridge University Press, 2019).
Parra’s comprehensive history of the International Centre for Settlement of Investment Disputes (ICSID), now in its second edition,50 may have filled a “glaringly empty space on the serious bookshelf,”51 but no similar attempt has been made with regard to the ICC or other leading arbitral institutions. Mustill’s statement that “[a]rbitration has a long [p]ast, but scarcely any [h]istory”52 – though no longer fully accurate – seems to apply to international commercial arbitration more than it does to investment treaty arbitration. One of the aims of this book is to help fill that gap.

1.1.3 Reassessing Some Aspects of Dealing in Virtue

Another of the book’s goals is to challenge key aspects of one of the most successful and enduring works about the modern evolution of international commercial arbitration, Dezalay and Garth’s Dealing in Virtue.53 Published in 1996, this work sought to “trace in the mechanism of this increasingly global private justice the emergence of a transnational legal profession, institutionalized in new kinds of ‘courts’ – international commercial arbitration – and a special body of ‘law’ – the so-called lex mercatoria.”54 Viewing international commercial arbitration as a “process of social construction,”55 Dezalay and Garth explained how international arbitrators had succeeded in “gaining enough identification with virtue . . . to be entrusted with and to profit from major business disputes.”56 Relying on Bourdieu’s structural analysis, they mapped the field of international commercial arbitration, showing how it “reveals and contributes to the reorganization and reshuffling of hierarchies of positions, modes of legitimate authority, and structures of power.”57

54 Ibid., 3.
55 Ibid., 5.
57 Dezalay and Garth, Dealing in Virtue, 17, 61.
According to Dezalay and Garth, the contrast between “grand old men” and “young technocrats” was one of the most important divides in the field of international arbitration – a “key source of conflict, and also of transformation.” The “grand old men” were part of the pioneering generation of arbitration; they already had legitimacy and “national aura” before starting as arbitrators and saw arbitration as a “duty, not a career.” Dezalay and Garth argued that, beginning in the late 1970s and accelerating in the 1980s, a new generation of “young technocrats” used their technical expertise to criticize the “‘amateurism’ or ‘idealism’ of their predecessors.”

Dezalay and Garth’s book was very much a pioneering work, the first full-scale inquiry into the construction of international commercial arbitration from a sociological perspective. It was largely a success, quickly stimulating discussion and earning praise. The book is still often cited and remains one of the most popular works in the field.

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58 Ibid., 34.
59 Ibid., 34–35.
60 Ibid., 36–37.
61 Ibid., 10.