Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes

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Over the past 20 years, international commercial arbitration has been transformed and institutionalized as the leading contractual method for the resolution of transnational commercial disputes. It has become an important institution of the growing international market. Although the process is far from unidirectional, this work of social construction can be described as a rationalization in the Weberian sense and also as an "Americanization" that has permitted U.S. litigators to shape the rules to favor their adversarial skills and approaches. An informal justice system has come increasingly to resemble "offshore litigation."

Drawing on Bourdieu's analytical tool of the legal "field" and, in particular, using the notion of an "international legal field," this case study reveals how the continuing competition for business and for legitimacy—between civil law and common law, "grand old men" and "technocrats," academics and practitioners—constructs and transforms the system of (international private) justice. As is true generally with respect to law, the details of the competition serve to build the careers of practitioners, to develop the area of practice, and to produce and legitimate the relevant "law."

International commercial arbitration has become big legal business, the accepted method for resolving international business disputes (Salacuse 1991).[1] Success can be seen in high-profile disputes, such as those arising from the nationalizations of oil concessions in the 1970s and 1980s (Lillich 1994), huge international construction projects such as the tunnel under the English channel (World Arbitration & Mediation Report 1993:86), and

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We have cited numerous interviews here. The respondents to our interviews have been numbered, and the citations (e.g., "Int. 85:17") are to the numbered interview and the page number in that transcript.

[1] As stated matter-of-factly by a leading international practitioner, "in today's world the dispute resolution mechanism will invariably be arbitration" (Aksen 1990:287).

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such international incidents as the French sinking of the *Rainbow Warrior* on its Greenpeace mission (Chatterjee 1992), which have increasingly been submitted to international panels of arbitrators. Success is also evident in the tremendous growth since the late 1970s in the number of arbitration centers,[2] arbitrators,[3] and arbitrations.[4] International commercial arbitration therefore represents an international dispute resolution device of tremendous practical importance.[5] The practical importance also raises a number of theoretical concerns. The basic question is how an international justice system for commercial transactions, served by a transnational legal profession and indeed a transnational private judiciary, has been constructed over the past 20 to 30 years.

The topic of a developing "international justice" touches on issues of state sovereignty, the governance of the economy, the legal profession, and law. International commercial arbitration therefore is bound to raise important scholarly themes in economics, political science, and sociolegal studies. We focus here on a few key themes, but we hope that our narrative will invite other readings and scholarly connections. The basic themes are: (1) how law gains legitimacy from competition for the business of governing economic relations; (2) how arbitration as an alter-

[2] The Parker School affiliated with Columbia Law School lists over 120 centers even if, consistent with the conventional account, we eliminate those concerned exclusively with maritime or commodities disputes (Parker School of Foreign & Comparative Law 1992). We know of centers not mentioned in that list as well. Some indication of the "action" in new centers and rules is that in the two and one-half years from July 1991 to December 1993, the *World Arbitration & Mediation Report* published articles about at least 7 new international centers (Singapore, Sydney, Bahrain, Vietnam, and in the United States Oregon, North Carolina, and Denver) and 13 new or proposed new rules or laws for international arbitration cases (Germany, Geneva, Singapore, 2 in Russia, Ukraine, Egypt, Tunisia, American Arbitration Association, Bermuda, Finland, Algeria, and Italy).

[3] One indicator of who the "recognized arbitrators" are is the "list of a thousand" self-identified arbitrators published by the Parker School (1992), which the publisher was compelled to double in size after the first edition in 1990.

[4] There are no global statistics, nor could there be, since there are no agreed-on criteria for what should be counted. Note also that there are quite a number of ad hoc arbitrations—not affiliated with any arbitral institutions—that are not recorded anywhere. The growth of the International Chamber of Commerce (ICC) docket, however, is probably some indication, especially since its market share may be declining with the development of several serious competitors. The ICC had 333 cases in 1991, 337 in 1992, and 352 in 1993 (World Arbitration & Mediation Report 1994:216). The first 3,000 ICC requests for arbitration came between 1923, when the ICC was founded, and July 1976. The next 3,000 came in the next 11 years (Craig, Park, & Paulsson 1990:4). The American Arbitration Association reported about 300 international cases for 1991, although the stakes were generally smaller than in the ICC cases; and the London Court of International Commercial Arbitration reported about 30 to 40 (Int. 95:4). Some 300 cases are pending before the Chinese International Economic and Trade Arbitration Commission (Moser 1993:41). As noted in the text, however, statistics are very misleading in this field, further distorting a subject that is difficult to capture.

[5] "[I]nternational arbitration has become a field of intense competition: competition between arbitral sites; between the arbitral institutions; between counsel; between arbitrators; and even between the periodicals of international arbitration" (Werner 1985:5; see Berger 1993:1-6).

native dispute device is transformed from competition for sales and legitimacy; and (3) how "international" regulation is constructed from competition among national approaches.

One central theme in sociolegal research is how the legitimacy of law is maintained so that it can provide a basis for governing in matters that involve powerful economic and political entities (Hunt 1993).[6] The study of international commercial arbitration allows us to see how competition among key actors and groups serves to construct legal legitimacy and at the same time promote law in the service of merchants. Competition for both business and legitimacy, in addition, produces a Weberian evolution of "charisma to routine" (Weber 1978:246–54, 784–816).

The competition that produces both law and legitimacy applies not only to the establishment and promotion of state or statelike justice but also to the various forms of alternative dispute resolution. International commercial arbitration, long seen by many of its proponents as an "alternative," has received little attention in studies of alternative dispute resolution (but see Carbonneau 1989). Our study of international commercial arbitration suggests a need to reconsider how we approach "alternatives" with labels like "arbitration" or "mediation." The taxonomies are misleading, since they obscure the contests and processes masked by the formal terms. Thus, for example, "international commercial arbitration" (or, we suggest, mediation or litigation) does not refer to the same thing as it did 20 years ago. "Arbitration" has become increasingly formal and more like U.S.-style litigation as it has become more successful and institutionalized (on the variability of mediation, see McEwen, Mather, & Maiman 1994).

The discussions of the role of law and transformations of alternative dispute resolution do not depend on whether the setting is national or international.[7] Our study also allows us to focus on the importance of the *international* dimension of international commercial arbitration. Law and society scholars who have looked outside their legal systems have tended to focus on comparisons between legal professions (Abel & Lewis 1988–89), between national and cultural approaches to regulation (Kagan 1994), and between legal systems (Winn 1994; Upham 1994; but see Collier 1994). We can illustrate through

[6] Our study of legitimacy is mainly of arbitration entrepreneurs who promote the legitimacy of particular conceptions of arbitration. For empirical support for the proposition that the subjects of legal regulation also act in part out of beliefs in legitimacy, see Tyler & Mitchell (1994).

[7] The term "transnational" would also serve our purposes, but we prefer to adopt the more common term, "international." The activities and perspectives of nation-states are, in any event, quite present in the development of international commercial arbitration. The term "global" might also be used to characterize the success of international commercial arbitration, but obviously the extent of the involvement by Third World countries in particular is quite uneven. We shall, however, refer to "transnational" business disputes, since they are in fact simply disputes that cross borders.

the study of international arbitration how international institutions develop out of competing *national* approaches—a "regulatory competition" (Charny 1991; Trachtman 1993).[8] From this perspective, as we shall see, recent transformations make "internationalization" in arbitration look very much like "Americanization."

The study of the construction of international legal institutions, finally, should be related to the more general scholarship at the border of economics and sociology. Economists and sociologists of institutions and the social construction of markets have tended to neglect the role of law and legal practices both in shaping the market and in providing competitive advantages to certain players (Granovetter & Swedberg 1992; Powell & DiMaggio 1991). Law is implicitly dismissed as simply the inevitable result of a "need" felt by business actors (Milgrom, North, & Weingast 1990; Casella 1992). The particulars of legal practices, which emerge from intense competition and active promotion, become quite important in the shaping of markets generally as well as in the increasingly important market in services (Sassen 1991).

The findings reported here come mainly from interviews with lawyers and arbitrators about the field of international commercial arbitration. Since the proceedings are private and for the most part inaccessible to researchers, we have not been able to get "inside" an arbitration. This potential disadvantage, however, promotes a research strategy that, we think, is actually better suited to the topic and to the questions raised above. What arbitration "is" as an international justice system and a dispute resolution device and how it is changing can be seen by examining the characteristics and approaches of the individuals and groups who "make up" the field of international commercial arbitration.

I. International Commercial Arbitration

Before exploring questions of research strategy in more detail, we provide some background on international commercial arbitration (for texts, see, e.g., Redfern & Hunter 1991; Craig, Park, & Paulsson 1990; Berger 1993). When businesses enter into transnational relationships such as contracts for the sale of goods, joint ventures, construction projects, or distributorships, the contract typically calls for arbitration in the event of any dispute arising from the contractual arrangement. The main reason given today for this choice is that it allows each party to avoid being forced to submit to the courts of the other. Another is the secrecy of the process. International arbitration can be "institutional," following the procedural rules of the International

[8] Our focus here is on changes at the international level. We intend to explore national transformations arising from activity at the international level in our forthcoming book.

Chamber of Commerce in Paris, the American Arbitration Association, the London Court of International Commercial Arbitration, or many others; or it can be ad hoc, often following the rules of the United Nations Commission on International Trade Law (UNCITRAL) used also for the arbitrations by the Iran Claims Tribunal at The Hague.

The arbitrators are private individuals selected by the parties, and usually there are three arbitrators. The parties each select one, and the parties jointly, the arbitrators, or an institutional appointing authority select the third. They act as private judges, holding hearings and issuing judgments. There are few grounds for appeal to courts, and the final decision of the arbitrators, under the terms of a widely adopted 1958 New York Convention, is more easily enforced among signatory countries than would be a court judgment.

There is considerable competition for the business of representing parties, providing institutional support, and serving as arbitrators. The increasing competition is an important aspect of international arbitration today, but it is also essential to see that there are a relatively small number of important institutions, chief among them the International Chamber of Commerce, and of individuals in each country who are the key players both as counsel and as arbitrators. There is a kind of "international arbitration community"—quite often referred to as a "club"—connected by personal and professional relations cemented by conferences, journals, and actual arbitrations.[9] As we shall see, since these individuals act in relation to each other and in support of international commercial arbitration, it makes sense to employ a research strategy that explores their orientation to a "field " of international commercial arbitration.

II. Research Strategy

Despite the networks and relationships associated with international commercial arbitration, it is important to begin by recognizing that there is no objective thing called "international commercial arbitration." More important from a social-scientific perspective, we must study the question of boundaries in order to see how a given domain—transnational business relationships—is regulated and how institutions develop and change. The problem is a general one in the study of topics that exist only symbolically, such as law, the legal profession, or the state (Bourdieu & Wacquant 1992:240–47); but the problem is especially apparent with topics that are relatively new and weakly embodied in institutionalized forms. As Bourdieu observes, a term like "profes-

[9] Their domination, as we suggest below, comes in part from their success in defining themselves through writing, conferences, and meetings as the community of experts in international commercial arbitration.

sion" is "the *social product* of a historical work of construction of a group and of a *representation* of groups that has surreptitiously slipped into the science of this very group" (ibid., p. 243).

It is important in social research, therefore, not to reproduce uncritically the discourse of those who proclaim that transnational business disputing or international commercial arbitration *by definition* refers to the particular representation that supports their position. Success in international commercial arbitration, indeed, comes in part by persuading others that the position of particular groups and individuals *does* represent international commercial arbitration. There is, therefore, an incentive—not unusual in law or, for that matter, in any marketing exercise—to try to "make it by faking it," exaggerating the experience of individuals and institutions in order to allow them to gain acceptance as successful. Contests about definitions and details of practice, in short, must be part of the object of study.

We use the analytical tool of a legal field or, more particularly for international arbitration, an "international legal field." While not without its own problems, the use of Bourdieu's tool of the "field" is, we believe, the approach best suited for this particular object of study. This approach has affinities with the "new institutionalism" in sociology (e.g., Powell & DiMaggio 1991), with network analyses of economic and social relations, and with recent scholarship in political science identifying and studying international "epistemic communities" (Haas 1992) or "transnational issue networks" (Keck & Sikkink 1994). These approaches tackle the similar issue of how an activity such as international commercial arbitration (or the international environmental or human rights movements) emerges and changes. So far, however, these scholars have paid little attention to the role of law and lawyers. More important, perhaps, they have also tended to downplay the conflict and competition that the notion of field makes evident. International commercial arbitration, we find, is partly an epistemic community or issue network organized around certain beliefs in an ideal of international private justice, but it is also an extremely competitive market involving big business and "megalawyering." To understand it requires an understanding of both the ideals *and* the competition for business (Gordon 1984).

When we use "national or international legal field," we refer to a symbolic terrain with its own networks, hierarchical relationships, and expertise, and more generally its own "rules of the game," all of which are subject to modification over time and in relation to other fields (Bourdieu & Wacquant 1992:94–100). While a researcher inevitably "constructs" the object of study by imposing some boundaries, the concept of field is sufficiently open and sufficiently systematic to facilitate the exploration of what Bourdieu terms "relatively autonomous social microcosms, i.e., spaces of objective relations that are the site of a logic and a

necessity that are *specific and irreducible* to those that regulate other fields" (ibid., p. 97). The Bourdieu model also recognizes the role of conflict. Within a field, "agents and institutions constantly struggle, according to the regularities and rules constitutive of this space of play (and, in given conjunctures, over those rules themselves)" (ibid., p. 102).

This article is part of a work in progress, based on more than 250 lengthy interviews, conducted in English or French in 11 countries (with both of us present for virtually all of them). The informants have come from 25 countries—mainly in Europe, the United States, and the Middle East, but also in Asia and Latin America. We have interviewed most of the leading members of the international arbitration community and the representatives of the leading institutions, attended two conferences, and scanned the massive literature on this subject.

We selected our informants through snowball sampling beginning from a wide variety of points—lawyers in large or internationally oriented law firms, English barristers or judges in the commercial bar or courts, academic writers about arbitration or alternative dispute resolution, editors of journals, persons named as arbitrators in arbitrations that have been made public, arbitration institutions, in-house counsel, and conference participants. Since we have been concerned in our larger work with the development of the international private justice system, its relationship to national legal systems and professions, and north-south issues, we have conducted a relatively large number of interviews. There is a remarkable convergence among the individuals familiar with international business transactions and commercial arbitration. They agree on the identity of the key players, what in general constitutes international commercial arbitration, and how it has changed. The considerable disagreement, rooted in the social characteristics or "symbolic capital" of the players, is expressed in debates about the desirability of the changes and what the future requires.

Our interviews were used to construct a "map" of the field (see Fig. 1 for a simplified representation). Semistructured interviews reveal the social capital and personal trajectories of individuals in the field, that is, what they bring concretely to international arbitration, as well as the principles and ideas underlying the field in the minds and strategies of the people who operate in and around it.[10] The results of our mapping process are organized around the themes of legitimacy and credibility. International commercial arbitration is a symbolic field, and therefore the competitive battles that take place within it are fought in

[10] Not surprisingly, respondents tend to "use us" to present their own pictures of this legal field, but we encourage it. Their use of us helps us identify what they seek to appear to be and what they reject, thereby helping us define the principles of opposition that structure the field and shape change over time.

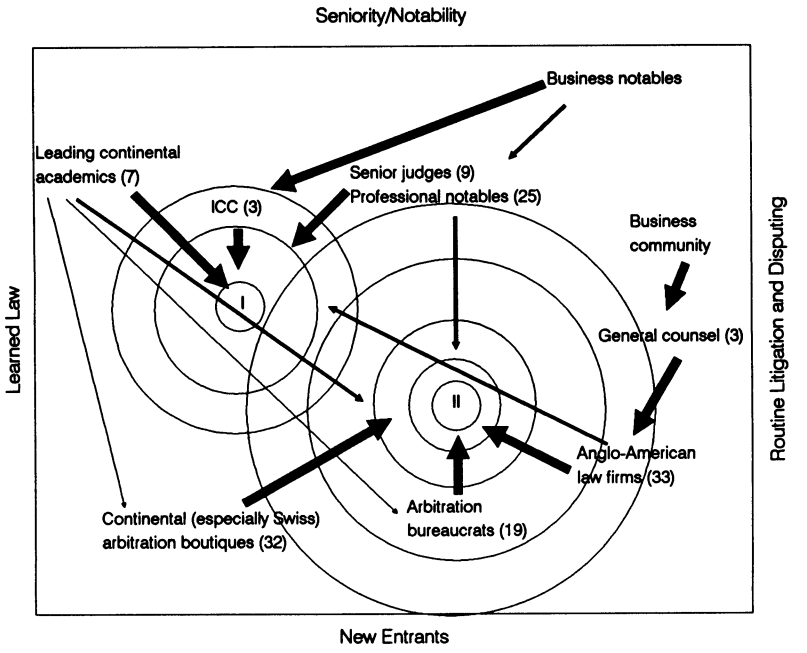

Figure 1. International commercial arbitation as a field of structured opposition

Explanation of the figure

The shift toward new entrants, routine arbitration, and Anglo-American conceptions is represented by a move from I to II (roughly 1970–90) 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.

Phase I

1. This phase is characterized by the reinvention, promotion, and institutionalization of international commercial arbitration out of the contributions of leading Continental academics, the International Chamber of Commerce, senior judges and professional notables. We call this pioneering generation the "grand old men."
2. The leading academics contributed the "technology," especially the lex mercatoria.
3. The International Chamber of Commerce provided the institutional support and legitimacy in the world of business.
4. Senior judges brought the acceptance and recognition of the official justice system.
5. Professional notables brought connections and legitimacy with the domestic legal professions.
6. The Anglo-American law firms played a relatively small role.

symbolic terms among moral entrepreneurs. Battles fought in terms of legitimacy and credibility, moreover, serve a double role. On the one hand, they build the careers and markets for those who are successful in this competition. And on the other hand, they build the legitimacy and credibility of international legal practices and international institutions (cf. the "schizophrenia" of the legal profession as described by Gordon 1984).

III. Oppositions and Complementarities in the Field of International Commercial Arbitration

The field of international commercial arbitration is given its structure and its logic of transformation through oppositions and complementarities that we shall now begin to map. The key source of conflict, and also of transformation, is that between two generations—"grand old men" versus "technocrats." We therefore begin this section by showing what this conflict and the symbolic battles around it reveal about international commercial

Explanation of the figure—*Continued*

Phase II

1. This phase is characterized by the routinization and general acceptance of international commercial arbitration for business transactions, and its conduct as a form of "offshore litigation." The new center of gravity is farther from academic law and hostile to the lex mercatoria. A more precise division of labor can be seen in the new phase.
2. The Continental boutiques, containing many disciples of the earlier generation, provide the core of arbitrators for most cases.
3. The arbitration bureaucrats (including the ICC today), many of whom are also disciples of the earlier generation, contribute specific arbitration know-how and management.
4. The senior academics, senior judges, and professional notables continue to provide credibility and stature for the very high stakes and politically sensitive cases. (Notables from areas new to arbitration also help to establish arbitration in new areas).
5. The Anglo-American law firms provide much of the resources, clients, emphasis on fact-finding, and adversarial lawyering, and they also provide the major connections to general counsel and the business community.

This is not to say that the construction of this "global justice" for transnational business disputes was "caused" only through some dynamic within the field of international commercial arbitration. The relationship is much more complex. The relative positions and indeed even the entry onto the field of many key players, as will be seen below, relate to other factors of considerable importance—in particular, the growth of international trade and the power of Anglo-American law firms (in turn bolstered by their clientele). Our ambition, however, is not to confirm the simple promotional story of the inevitable growth of international commercial arbitration in response to the growth of international trade and commerce. It is to explain why the phenomenon termed international commercial arbitration has become more institutionalized and has a particular set of characteristics which, we submit, are not "mere" details but rather are important aspects of the emerging global economy.

arbitration. We then focus on a related conflict, between academics and practitioners. After we describe these oppositional relationships, we turn in the next sections to the way the conflicts have been managed in the case of one key institution, the International Chamber of Commerce (ICC) in Paris, and the role of large Anglo-American law firms in the transformation of relatively informal arbitration into "offshore litigation." The conflicts, the management, and the power of the large law firms are key ingredients in the success and current status of international commercial arbitration.

A. Grand Old Men and Technocrats

The starting point of the generational warfare is diverging ideas of arbitral competence—the characteristics that qualify one to be an arbitrator. For the pioneers of arbitration, exemplified especially but not only by very senior European professors imbued with the traditional values of the European legal elites,[11] the dominant opinion has been that arbitration should not be a profession: "arbitration is a duty, not a career" (Int. 173:3). For true independence of judgment, in the words of another senior insider, "the person who goes into this business as an arbitrator to make a living should not be encouraged" (Int. 37:2). Arbitrators, they insist, should render an occasional service, provided on the basis of long experience and wisdom acquired in law, business, or public service.[12] Those who hold this opinion are, indeed, individuals who have risen to the top of their national legal professions and gained financial independence before being asked to serve as arbitrators.

The specific criteria for these "grand notable" arbitrators allow for numerous variations. Various countries and legal systems have differing hierarchies in their legal professions. The great professors and a few high judges have for a long time controlled the arbitration terrain of continental Europe,[13] while the comparable role is assumed in the Anglo-American system by the most respected of the practitioners, senior barristers or Queen's Coun-

[11] Osiel (1989:2033–39) provides a good discussion of the European aristocratic values. This is not to say that the values do not echo in the United States, only that in the United States there has been, as Osiel (p. 2046) notes, "a relatively unqualified embrace of the modern world of commerce and corporations." Compare Kronman 1993, who seeks to reassert the aristocratic values.

[12] Jean Robert, one of the respected founding fathers of international commercial arbitration, reportedly stated, "arbitrators are the well-paid unemployed." A leading member of the pioneering generation noted that to be "really independent," one had to be over 75 years of age and not dependent on further arbitration business (Int. 158:8).

[13] This generation in Europe could also be defined as somewhat "marginal" in the sense that its members were not content to simply work their way up national hierarchies through patience and technical skill. They used their personal qualities and social characteristics to redefine the traditional careers and maintain an openness to new opportunities and approaches that were not strictly "legal" but rather at the crossroads of law, politics, and business.

sel (QCs), or senior partners in firms of solicitors or U.S. law firms. Retired judges such as Lord Wilberforce have been important as well to England. The arbitration market has selected those at the top of their domestic professions to become senior arbitrators: "high profile, high visibility . . . national aura behind them" (Int. 51:18).

These relatively few "grand old men,"[14] as they are often referred to (there were no women), have played a central role in the emergence and the recognition of arbitration,[15] and they continue to have a quasi-monopoly for very large matters. As a U.S. litigator stated, "There are some categories of disputes where you're going to need the grand old men who are known to each other" (Int. 38:18). Stated another long-time observer of the field, "in these big, big cases, you go for people who have already years of experience" (Int. 10:12). But these "divas"—sometimes defined also as dinosaurs—are increasingly criticized by a new generation of practitioners who came to arbitration because of the rapid growth of this market in the 1980s.[16]

To the aura or the charisma of their elders, these new arrivals oppose their specialization and technical competence. In the words of a Swiss member of the new generation, "arbitration was characterized by a limited, small group of impeccable, outstanding professionals—characters known around the world. . . . Today I have difficulty in seeing the outstanding personality [among] a big crowd of people" (Int. 166:33).[17] Put in more aggressive terms by a member of the same cohort, an arbitrator cannot now just step in "with all . . . [the] glorious past" and provide the "great old man's opinion" (Int. 184:6). Indeed, charisma is said even to be a source of error. In the words of an ICC insider, "some of the biggest problems that we see are probably with some of the big names" (Int. 134:14). Why? "They're probably just more full of themselves than other people" (ibid.). Furthermore, "Sometimes an eminent arbitrator feels he doesn't have to explain things" (ibid., p. 25). A leading figure of the

[14] Fig. 1 gives numbers of the individuals we interviewed, by general characteristics, but we would define 10–15 of the senior individuals we interviewed as the most perfect embodiment of the pioneering generation's characteristics.

[15] More generally, we can say that it is typical that when a new symbolic field is being constructed, it requires the personal legitimacy of "grand old men" or their equivalent to provide it with sufficient legitimacy to survive. Almost by definition, this process will apply to a specific time in the history of the legal field. Our preliminary research suggests that we can find precisely the same phenomenon in the early development of the field of international human rights.

[16] "I have two lists . . . two ways of thinking. I have what I call the big hitter . . . a grand monsieur . . . a man of 65 or 70—a professor—. . . the French or German-style professor, or the ex-judge—retired judge" (Int. 82:14). The grand old man is for "a case that has political ramifications. . . . You need him for his eminence and respect" (ibid., p. 17).

[17] Virtually all the 33 arbitration "specialists" we interviewed (see Fig. 1), as well as many of the "arbitration bureaucrats," are major players in this generation.

same generation thus describes the new generation as "technically better equipped in procedure and substance" (Int. 148:6).

They present themselves in this new generation as international arbitration professionals[18] and also as entrepreneurs selling their services to business practitioners, contrasting their qualities[19] to the "amateurism" or "idealism" of their predecessors.[20] This idea of change is well captured in an article by Jan Paulsson (1985:2), a leading member of the new generation:

> [T]he age of innocence has come to an end . . . [and] the subject has inevitably lost some of its charm. Once the delightful discipline of a handful of academic *aficionados,* somewhere on the fringes of private international law, it has become a matter of serious concern for great numbers of professionals determined to master a process because it is essential to their business. They labour, but not for love.

Indeed, now that arbitration has become accepted in commercial international mores, they assert, even citing Max Weber in one instance, the time has come for the "routinization of charisma" essential to the transition from the stage of artisans to that of mass production (Int. 104). This transition requires the "rationalization" of arbitration know-how.

These technocrats now rely on institutions like the International Chamber of Commerce, which they have not only come to direct but also have used for their education in arbitration. The quick route to arbitration expertise is through the major institutions, which hire young lawyers to administer the arbitrations.[21] These organizations, which the pioneers used for evangelical purposes to promote arbitration, now have added a more techni-

[18] The international characteristics of this generation are also captured in the following quotation (Int. 108:45):

> [W]e had recently an arbitration and we did it in English. Place of arbitration was Vienna. And the way we conducted it was very much influenced by our common background of time in the United States. That was the one thing we had in common. Next thing we had in common was that we all knew some Latin. And some knowledge of Roman law. Third thing that we had in common was the German legal theory, which in Turkey, Switzerland, and Germany was also a common thing. And the fourth thing was that we all watched CNN and read the *Financial Times* . . . ."

[19] Several young Swiss arbitrators highlighted the difference they saw between generations by stating that while they would stay awake all night to finish an arbitration and produce an award, the senior Swiss arbitrators would terminate the hearing at 5:00 P.M. for dinner and an evening at the opera.

[20] We find this same opposition elsewhere, in, for example, economics. Engineers and also lawyers at a certain moment began to define themselves as economists to align themselves with the new expertise, but they were later dismissed by a new generation trained in the more technical aspects of economics (Wade 1990).

[21] The method is not only quick but also one of the only ways to resolve arbitration's "catch-22": It is necessary to have a reputation in international arbitration to gain access to arbitration. The new generation can through these institutions gain a control over "the production of producers"—arbitrators and arbitration lawyers. There are other ways to enter, but they are difficult. For example, large law firms offer possibilities to younger lawyers, but they tend still to treat arbitration as only part of general litigation. It is hard to become a recognized expert.

cal involvement in the administration of the arbitrations themselves.

The large Anglo-American law firms, which dominate the international market of business law, are also central to this conflict between grand old men and technocrats. With the growth of trade and the success of the pioneers in building international arbitration, these firms now consider it important to include this speciality in the gamut of services that they put at the disposition of their multinational clients. The attitude of the large law firms has been to favor overtly this routinization and rationalization of arbitration, which permits them to introduce themselves into the closed "club" and to introduce the legal techniques that are the basis for their preeminence. As a U.S. lawyer stated about the Swiss, "It's the younger generation that I like, because all of them have gone to school in the United States. They all speak fluent English. They know how to deal with Americans and English, and they move cases along" (Int. 37:34). Another U.S. expert, describing a particular individual of the new generation, is quite revealing:

> He'll make a fortune in this work if he keeps growing. And one of the reasons is he's not in the sense that you use that word, a "star," because he's never going to act like that. What you see is what you get. He'll do his work, he'll do it well, and people will keep coming back to him. But he won't be a pontificating presence. (Int. 7:26)[22]

This opposition between grand old men and young technocrats—supported by Anglo-American firms—is one of the keys that permits decoding a great number of the debates and the fights that affect this field of practice. One controversy, discussed further below, is whether the major institutions, the ICC notably, are now too involved in the actual work of the arbitrators. A second is whether arbitration is becoming too much like litigation. The senior generation is highly critical of both these trends. A leading senior arbitrator thus reported that procedural infighting was "suicidal" to arbitration (Int. 173:6) and that he was likewise "absolutely opposed to drowning arbitration in paperwork" (ibid.). He also noted that the ICC's weakness was that its arbitra-

[22] Marc Blessing, the new President of the Swiss Arbitration Association, succeeding one of the great "stars" of the senior generation, Pierre Lalive, makes the same point in his description of what he aspires to in arbitration: "a continuing challenge to overcome obstacles and to grow—not to grow to a 'super arbitrator,' but to an arbitrator with dignity, an open heart and mind and, above all: modesty" (Arbitration Materials 1991:253).

tion was "overly regulated" by the secretariat,[23] who had "never seen arbitration from the inside."[24]

This cleavage about the conduct of arbitration also shows up in debates that appear to be much more academic. The best known of such debates concerns the so-called *lex mercatoria*, conceived by many as a return to an international law of business—a new "law merchant" independent of national laws (see generally Carbonneau 1990; de Ly 1992). Avoiding open criticism of the powerful grand old professors from France and Switzerland who reinvented this theory and applied it to commercial arbitration, the new generation prefers to focus on how it is applied by "other" arbitrators. A U.S. arbitration expert in a large law firm in Paris thus stated about the lex mercatoria:

> [I]t's something that can be subject to abuse where an arbitrator doesn't feel like going through a difficult choice of law . . . or simply decides that something is lex mercatoria because that's an answer he feels is right. . . . The question is . . . whether commercial parties feel that it provides sufficient security and predictability. And how well arbitrators who don't have the abilities of [Berthold] Goldman [a senior French professor and the "father" of the lex mercatoria] are able to apply the theory and come up with suitable answers that are perceived as fair and reasonable by both parties" (Int. 104:23; see also Paulsson 1990:68; Int. 10:14)

It is as if only a few arbitrators with incontestable authority have the right to invoke the notion of lex mercatoria. All others must restrain themselves and carefully explicate the legal reasoning that prevents their decision from being condemned as arbitrary. As the quotation also indicates, Anglo-American practitioners tend not to support the Continental, academic, lex mercatoria (see the line-up in Carbonneau 1990).

But beyond the contest between generations about what and whose characteristics should be at the center of international commercial arbitration, this fight for power contains the true transformation that is taking place—the passage from one mode to another for the production of arbitration and the legitimation of arbitrators. As is true for the entire field of business law, the Anglo-American model of the business enterprise and merchant competition is tending to substitute itself for the Continental

[23] An article by Gillis Wetter (1990) of Sweden is unique for articulating these concerns in strong language. For example, he states that the "ICC Court . . . is an administrative institution that engages in rather far-reaching involvement in arbitration proceedings, yet offers relatively little administrative or intellectual support to arbitration tribunals" (p. 95). Stephen Bond (1990), then Secretary General of the ICC and a member of the new generation, wrote an equally strong response that was published in the same journal.

[24] A criticism that can also be made of our work. For an older but fascinating account of arbitration, which supports our attention to symbolic capital and the role of authority and expertise within the arbitral tribunal, see Mentschikoff & Haggard 1979a, 1979b.

model of legal artisans and corporatist control over the profession (Dezalay 1992). In the same way, international commercial arbitration is moving from a small, closed group of self-regulating artisans to a more open and competitive business.

The arrival of new generations and greater competition, beginning in the late 1970s, can be seen as part of this process. We must be careful, however, not to overlook the personal dimension in this story. The gap between the small group of artisans and today's arbitration professionals is not as pronounced as it might appear. A good number of these "angry young men" of arbitration are "new" arrivals only in the strict sense of the term. They are also the inheritors—or more precisely the disciples—of the grand old men.[25] They have been able to avoid waiting patiently for the retirement of their mentors in order to succeed them, which was the tradition in the artisanal model (and also in the classic Continental academic model). They have sought to skip these stages and profit from a boom in arbitration that created a demand exceeding the capacity of the grand masters and the artisanal mode of production. The desire to promote their own technical competencies has led them to a position that devalues the wisdom and generalist experience of their notable mentors, who they now characterize as dinosaurs. Since they are for the most part too young to compete with the charisma of grand old men, they must emphasize their technical sophistication.

The positions in these contests, however, are more tactical than permanent. It is not at all clear that these young technocrats are ready to renounce completely the attractions of charismatic arbitration, which have advantages both for the arbitrators and for the parties in conflict. Not surprisingly, a certain number of these technicians are seeking to take the prominence gained as international arbitration specialists and reinvest it in a more generalist professional profile.[26] The strategy of diversification

[25] Suffice it to note that many leaders of the new generation were closely connected with the most well-known senior arbitrators. Among other examples, we may point to the close connections between Albert Jan van den Berg and Peter Sanders in The Netherlands; the connection of numerous Swiss arbitrators to Pierre Lalive and the Lalive firm; the many disciples of the great French Professor, Rene David, including Yves Derain, Julian Lew, and van den Berg; prominent French disciples to Pierre Bellet and Berthold Goldman. Indeed, the observation can be generalized. Even within U.S. law firms, we found that leading arbitration notables of the new generation, such as James Carter and David Rivkin, were promoted by notable mentors—Jack Stevenson and Robert von Mehren. The systems of patronage may no longer be as extreme as the European legal dynasties of the past, but there are artificial recreations of the same phenomenon. Because of the small size of the groups we investigated and the early stage of the development of the field, our project has noted connections that we are certain would be revealed much more generally in detailed studies of other areas of legal practice.

[26] A once quite active Swiss arbitrator, now involved in electoral politics, thus noted (Int. 178:5):

> I used to be fairly legalistic as an arbitrator. Give me the facts. Give me the law. And I'll decide it, okay. . . . I was impressed . . . when I was . . . secretary at several panels, for several arbitration panels where Pierre Lalive was the chair-

may permit them to come back into arbitration (or go elsewhere) as new versions of a senior arbitration elite, combining the qualities of expert and the social capital and experience of the charismatic notables.[27]

While it is useful to decode the contests through which the field and the markets of arbitration are constituted, the opposition between notables and technocrats may lead to confusion. The risk is that objective content will be given to notions that exist only in opposition. The notables and the technocrats are defined only in a relative manner, the one by relation to the other and also in a quite specific context. The same caution applies to the other major cleavage, which opposes practitioners and academic jurists.

B. Academics and Practitioners

The polarization between academics and practitioners has elements in common with that between notables and technocrats, but the practice versus academia conflict exists also on its own. It provides another key principle for understanding the positions and fights for influence in a field of practice in great measure conceived by and for (mainly Continental) academics but dominated increasingly by (mainly Anglo-American) practitioners. The controversy around the lex mercatoria is indicative also in this respect. The Anglo-American practitioners are nearly unanimous in their denunciation of a doctrinal construction that, according to them, allows academics to avoid the rigorous analysis of the facts, the formal law, and even the terms of the contract.[28]

In this controversy as well, it is clear that each side seeks to promote the value of the know-how or the competence that it has mastered the best. Academics—with a competitive advantage in theory—emphasize the lex mercatoria elaborated in countless academic books and articles. Practitioners promote the virtues of solid caselaw and thorough analysis of the facts. But this opposition is also only a relative one. The practitioners of arbitration even in the Anglo-American countries carefully cultivate an intellectual image through publication and university affiliations.

man. He . . . hardly ever decided a case. They would all be settled at some point. And that takes a lot of skill . . . from the chairman—skills which I clearly didn't have some years ago. And I think maybe I'm developing them a little more now. Probably a matter of aging. . . .

[27] An ambitious U.S. arbitration expert we asked about "future grand old men" identified the "people my age who are clearly extremely good lawyers and who've devoted a good chunk of their career to international arbitration and so as a matter of course enter in the public eye" (Int. 38:22).

[28] A well-known English QC from the commercial bar captures the feeling: "These people are just deciding by the seat of their pants. There's no such thing as the lex mercatoria" (Int. 87:34). An American lawyer in Paris makes the same point: "And we don't want lex mercatoria. We want to know what law it is. In fact we want to know which procedural law it is. We don't want to leave it up to the arbitrator" (Int. 100:12).

Lord Michael Mustill (1987), for example, one of the leading English commercial judges, took the time to master the subtleties of the lex mercatoria in order to criticize it at a suitably high level. On the other side, the academics who are in the arbitration world—including the Continental ones—are often described as far from the pure academic model. One French academic imbued with the values of the academy thus looked down on academic arbitrators: "abundance of arbitrations" is not "abundance of intelligence" (Int. 209).

As a result of the contests for preeminence in the field, each of the competing groups seeks to gain a diversified portfolio of arbitration capital. That is, professors must show they can master business practicalities, and practicing lawyers must seek to show competence in sophisticated academic theories. Each group, in short, is in fact closer to the other than appears in the first place, and they complement each other admirably. The academic theorization of arbitration—"developed by the French and Swiss professors largely" (Int. 85:28)—gave the field its *lettres de noblesse* as a sophisticated legal expertise suitable for high-level practitioners. This academic pedigree has helped promote the acceptance and recognition of arbitration throughout much of the world.

In the same way, this rapprochement between or homologation of professors and practitioners has served to open an arbitration market well beyond what could have been created by a small group of learned jurists more preoccupied with doctrinal advances than with marketing. Transformations promoted by practitioners, likewise, have overcome the professors' resistance to basic Anglo-American conceptions of litigation—especially giving more attention to questions of fact and having more openness to procedural tactics. Accordingly, the large Anglo-American law firms have become more willing to invest in this process. Anglo-American arbitrators have also changed through some rapprochement, becoming more open to Continental practices such as active judicial questioning and limits on pretrial discovery (Lowenfeld 1985).

The opposition and the complementarity between these poles structures the field of arbitration, creating a dynamic that we can see in retrospect has allowed this field of practice to change and renovate itself over the past two decades. At the same time, the diversity of resources and competencies among the available—and competing—"private judges" has allowed different kinds of conflicts—great or small, exceptional or routine—to call on different types of arbitrators. As a result, international arbitration can reap the symbolic benefits and material prosperity of its generally accepted legitimacy in international business transactions.

IV. The Management of Antagonisms and the Production of Universals: The International Chamber of Commerce

We can pursue these themes and hope to avoid the problems of a simplistic or objectifying schematization by focusing in more detail on the emergence of modern arbitration around international commercial arbitration's preeminent institution—the International Chamber of Commerce (ICC) in Paris (Ridgeway 1938). The success of the missionary enterprise of the founders[29] led to the diffusion of the ICC arbitration clause into business transactions around the world. With a rapid growth of international trade and commercial conflict, the resulting case boom challenged the ICC's structure. According to one of the key figures in this period of the ICC:

> [I]n the late 70s [the ICC] started having problems because the number of cases increased quite dramatically. And the ICC, I think, at the time still only had five or six people in the secretariat. And that's when, I guess in 1980 or 81, there was this very significant effort by the ICC to organize itself administratively, to hire more people. (Int. 104:2)

The ICC, as we shall see, necessarily became a more bureaucratic institution.

A. New Arrivals and the Expansion of the Market

The ICC had to administer the influx of new cases and, more important, to respond to the new problems posed by the arrival of a new clientele and, to a lesser degree, new arbitrators. The new arrivals were unfamiliar with the usages of an international arbitration coterie that was at the same time learned, militant, and a little marginal because of its shared hobby. The expansion of the market of Euro-dollars, then the manna of petro-dollars thanks to the oil crises in the 1970s, both enlarged and *reoriented* international trade. North-south conflicts became more important as the ICC became the focal point for the major arbitrations tied to the very large construction projects located especially in the Arab countries.

This opening to north-south conflicts coincided, somewhat paradoxically, with an accelerated American involvement in the practice of arbitration. One reason is that, since the North American exporters were confronted with problems in the execution of their contracts, their law firms invested in the forum already

[29] Among countless examples of the role of the ICC in universalizing arbitration, we can point to ICC leaders' travels around the world to sell the concept of arbitration; the role of the ICC in the 1958 New York Convention, which set the stage for the easy enforcement of arbitral awards in all signatory countries; and the relationship of the ICC to International Council of Commercial Arbitration (ICCA), which sponsors the most important conferences and uses them to gain new terrain for arbitration.

accepted for these contracts—international arbitration, typically in Paris or Switzerland (and later through the Iran Claims Tribunal operating in The Hague).[30]

Another reason for increased American (and English) involvement is that the multinationals of law arrived on the arbitration scene with technical facilities that were unique in the market. Serving both multinational enterprises and not infrequently Third World countries,[31] they were well equipped for the mass of facts characteristic of these mega-litigations with gigantic amounts in controversy. As a result, the ICC saw both new parties from the south and new law practices from the north. And the market expanded considerably.

B. Competition in the Field

This rapid expansion of the market of arbitration naturally awakened new appetites (Clow & Stewart 1990). The ICC thus found itself more and more in competition with new arbitral institutions aiming at such and such segment of this very diverse market. One segment of the market could be defined in geographical terms, like east-west or Euro-Arab relations. Stockholm, for example, made its reputation with Soviet-U.S. disputes in particular and east-west in general. Another segment might involve a specific type of case, like those concerning intellectual property. There are also efforts to promote alternative technologies for the administration of business disputes.[32]

The multiplication and diversification of places and institutions of arbitration promotes further competition. The ICC, for example, has been forced to adjust its general fee schedule downward to attract business clients, and some institutions seek to gain the favor of arbitrators by emphasizing that they allow the arbitrators to negotiate any fee arrangement they can obtain. Multinational law firms accelerate this competition by their ability to forum shop—both in contractual negotiations and after disputes arise—among institutions, sets of rules, laws, and arbitrators (on the origins of this approach in the U.S. federal system, see Purcell 1992).

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[30] According to a British lawyer with a multinational law firm, referring to ICC arbitrations, "in the Middle East with the oil explosion and the huge contracts that were let in the late 60s and 70s, they gave rise to a good number of disputes. And there were a number of us in Western Europe who made a lot of money resolving them" (Int. 85:17).

[31] The story of Third World arbitration is developed more in Dezalay & Garth, forthcoming.

[32] Ironically, the promoters of alternative dispute resolution represent an echo, now from a new place, of precisely the arguments that the arbitration community once used to challenge the hegemony of the formal state justice systems.

C. The ICC and the Universality of Arbitration

Even if the ICC has lost its quasi-monopoly position, it remains the central institution. A long-time British observer thus points out, "But the ICC is a great institution. I mean it's the leading arbitral, international arbitral institution in the world by a long way" (Int. 85:18; see also Int. 91:16; Int. 66:26; Int. 52:12; Int. 95; Int. 69). Potential clients see the ICC as trustworthy and respectable because of its senior status and because it has preserved the missionary idealism of its origins. An American critic of the ICC agrees: "The ICC has of course the great advantage that they were in it from the beginning. And they have created this aura that if you have an ICC arbitration that the award is good and it will be enforced everywhere" (Int. 57:6).

As the status of the ICC indicates, history is a key legitimator in the legal field. No one can compete with tradition without ending up underscoring that one group is a new arrival and another the established elite, akin to the aristocracy. The passage of time also tends to obscure the politics that created an institution, thereby giving it an aura of naturalness. And this kind of legitimacy is probably especially important in a field where it is important to be able to claim a distance from business and politics.[33]

The ICC is the most universal of the arbitration institutions, able to brag even about having becoming a sort of United Nations (Int. 106:4) of commerce and of international arbitration. With members from some 100 nations and national committees in 60, it offers a powerful image of neutrality and legitimacy. In addition, ICC arbitration benefits from a double sponsorship—that of the world of business, since the parent organization remains a major business group, and that of the world of learned jurists to which belong the founding fathers and an important fraction of arbitrators today. Finally, the ICC has benefited from a close relationship with the state, evident in both the support it obtained from the French government and the "public-private" career profiles of key figures in the arbitration community (e.g., the retired French judge, Pierre Bellet).

The ICC has therefore become one of the principal places where the "politics" of arbitration is elaborated and expressed. There are innumerable committees and multiple networks of influence that gravitate around this institution. The "court," for example, which is really an oversight committee that reviews arbitration appointments and decisions, appears to be particularly sensitive to the business clientele; the Institute of International Business Law and Practice focuses on the academic side; and the Secretariat guides the court and seeks to manage growth and change. Through exchanges and contests expressed in these and

[33] It is also interesting that one feature of the lex mercatoria is that it builds links to medieval times, suggesting that it is quite normal to have a special merchant law.

other ICC forums and networks, the ICC is able to make policy to regulate the relations of arbitration with the worlds of national law (essentially the new legislation and jurisprudence in matters of arbitration) and politics.[34]

The emergence of institutional networks around the ICC can also be seen as a true microcosm of the legal field. Between the first generation of charismatic pioneers and the technocrats of the rising generations, one finds a sort of striking abridgment of the principal stages in the grand Weberian canvas (Weber 1978:246–54, 784–816). We see first the legal *honoratiores*, embodying the wisdom of law and the social legitimacy necessary to the management of social conflicts. We then find institutionalization and the creation of a division of labor, which permits the development of a collective legitimacy dependent not on individual notables but rather on "the ICC" or even "law" or "international commercial arbitration."[35]

It is clear, however, that this project of routinization—even judicialization—of arbitration, supported strongly by the ICC bureaucracy while denounced as treason by the founding fathers, cannot be completely accomplished. Despite the changes, there remains a vital element of personal relations in this field. The system of selection and self-regulation of arbitrators created by the pioneers and resembling a "club" is still quite essential to the prosperity of international commercial arbitration.

Despite the conflicts and differing positions taken with respect to the conduct of arbitration, the participants in the debates are still in key respects members of a common community. This community, like all organizations where professional relations are reproduced through an extraordinary network of personal ties, has a tendency to fix itself by ensuring that social interests are organized to make themselves better heard. The main organs of the ICC, by allowing this more personal debate and interchange, contribute crucially to the management of conflicts toward the success of international arbitration.

[34] One recent example was the issue of the appropriate attitude to adopt with respect to contracts and arbitration threatened by sociopolitical disturbances, such as the collapse of the Soviet bloc. Another is the difficult problem of what to do with the bribes or *baksheesh* that surface in accounts of much international trade and investment. The ICC provides committees and forums to debate and resolve such issues.

[35] An insider of the secretariat during the time of change thus noted, "When I started then it was more or less a group of friends, for the club. . . . And then with the expansion of the number of cases [it] was not any longer possible just to deal on a personal basis" (Int. 108:18).

D. Between the Club and the Market

The secretariat of the Court of Arbitration of the ICC makes no secret of its desire to open the arbitration market beyond the narrow circle of the "grand old men."[36] Certainly these efforts can be justified by the growth in the number of cases submitted to the ICC, as well as by their great geographical diversity (see Bond 1990). The arrival into arbitration of the Third World and of the Anglo-Americans rendered necessary the recruitment of new arbitrators who did not fit the profile of the Continental academic or the other pioneers (ibid., p. 120). Many new users are bound to nominate arbitrators—and a fortiori lawyers—from their own legal settings. According to Stephen Bond, then the Secretary-General of the ICC, "In such instances, given the importance of party autonomy and consensus as basic principles of international commercial arbitration, the ICC has not refused confirmation of such persons, even when they are unknown to the Court itself" (ibid., p. 121).

These newcomers, however, are by definition not the progeny of the club. Their entry into the practices and norms of the club cannot be ensured by a long apprenticeship or by an informal process controlled by a small group of senior men. The institutionalization of these tasks of enlisting new arbitrators and observing their performance, in fact, justifies the growth and transformation of the ICC bureaucracy (the secretariat) and also the court of arbitration. This "bureaucratization" of the ICC, and also the retention of two of the most controversial aspects of the ICC procedure—the terms of reference and the review of the arbitrators' opinions by the court—can therefore be seen as part of the effort to bring in newcomers, accommodate their situation, and preserve the universality of the ICC and arbitration.[37]

This set of events helps to explain better the current ambivalence of the founding fathers with respect to the ICC—seen in their attitude toward "bureaucratization." It is an organization

[36] As a key representative of the secretariat mentioned, "there was an effort to broaden the pool" (Int. 104:7). And new nationalities were also brought in partly because "[i]t's important for the perception of the ICC as being international. And it's important in the perception of international arbitration as an institution, it's being universal."

[37] The terms of reference is a document that the parties must develop at the outset of the arbitration. Even those generally critical of the terms of reference, which includes most American and British lawyers, state that the terms of reference are "helpful if you've got inexperienced arbitrators or unprofessional arbitrators or those who might be likely to misbehave in some way" (Int. 53). An English barrister notes that the English "hate the terms of reference. Now that is because they've never been exposed to an arbitration where there is some deficiency or some imbalance between the parties or their legal representative whether it's cultural or legal" (Int. 93:7). We suggest that this kind of process, which serves to produce belief in the rules of the game at the outset and build a common language, is quite common in places where the system has not yet been routinized.

The ICC court reviews decisions and has the power to ask arbitrators to rewrite. According to an ICC insider, the ICC court returns to the arbitrators for revision about 15-20% of the awards rendered.

that they helped to build, and which celebrates them at all conferences and ceremonial occasions. But, at the same time, it is now dispossessing them from what constitutes a large part of their power. They are losing the informal control they could assert on a community of disciples, where loyalty could be rewarded by suggesting names for arbitration or for the activities of legal representation. We have here the classical scenario of an institution that is devouring its founding fathers in order to better follow their work.

V. The ICC and the Recentering of the Field of International Commercial Arbitration: The Arrival and Role of the Anglo-American Law Firms

The tensions implicated by these transformations are not explained only by a crisis of growth. They are also the corollary of displacement from the center of gravity of arbitration. The recentering favors the world of Anglo-American law firms, which have used their power in the international business world to impose their conception of arbitration and more largely of the practice of law.[38] It is thus no accident that, within the ICC itself, the politics of rationalization has been conducted since the beginning of the 1980s by young Anglo-American lawyers recruited from outside the club and whose key words have been transparency, rationalization, and competition.[39] The Anglo-Americans, including the two most recent Secretary-Generals (from the United States), have clashed with leading members of the senior arbitration club over a number of issues, including the need for bureaucratization. A recent example, which provides a good illustration of the conflict and the trend in management, has been the ICC's effort to expand the requirements for ICC arbitrators to disclose relationships with counsel and other arbitrators.

A. Conflicts of Interest, Independence, and Transparency

According to an observer sympathetic to the controversial approach taken by the ICC Secretariat:

> [T]he court took the view that the "declaration of independence" which is required to be signed by all proposed arbitrators should include a mention of any significant relationship between arbitrators proposed and counsel for parties in the arbitration. And there, what the Swiss [and many Europeans] objected to . . . is that the relationships that may exist between

[38] Arbitration is only one example of a recentering in favor of the Anglo-Americans that we find more generally through the internationalization of legal practice (Dezalay 1992; Garth 1980:130–42).

[39] As stated from the more recent perspective, "That frustration from the American community has to some degree gotten soft. And I think it's been helped a lot because . . . [of the] American secretary general of the ICC" (Int. 100:8).

> counsel and arbitrators are irrelevant, because they cannot possibly call into question the independence of the arbitrator. It's only the relationships with parties that arise. (Int. 134:6)

The senior generation wants no disclosure of relationships between counsel and arbitrators. The ICC, supported by U.S. lawyers, has opted to support greater disclosure (compare Lowenfeld 1991; see Lalive 1991).

Conforming to the liberal logic that the new Anglo-American generation embodies, it is partly a matter of introducing competition in a strongly cartelized market. This objective can be pursued by multiplying the number of producers, and the large Anglo-American firms have had a role in increasing the number of arbitration suppliers (e.g., London, Sweden, Vienna) competing with the ICC. But it is even more essential and also more difficult to introduce a minimum of transparency in a community of specialists characterized by personal relations so complex and so entangled that they interdict access to this market by nonspecialists.[40] Broad disclosure can provide that kind of transparency.

Because of a mixing of roles, the same individuals who belong to the networks around the central institutions of arbitration are found in the roles of lawyers, co-arbitrators, or chairs of the arbitral tribunal. The principal players therefore acquire great familiarity with each other, and they develop also, we suspect, a certain connivance in the role held by the adversary of the moment. The extraordinary flexibility of this rotation of roles contributes greatly to the smooth running of these mechanisms of arbitration.[41] It promotes the reaching of acceptable awards under a regime where the players do not speak of contradictions and antagonisms that, if formulated explicitly and disclosed, would create some difficulties of legitimation. "Adversaries" can protect the processes providing their legitimacy and prosperity.

The potential problem confronted by outsiders and invoked by the ICC Secretariat is evident in the words of a leading arbitrator of the new generation:

> This is a mafia. There are about, I suppose, 40 to 50 people in Western Europe who could claim that they make their living doing this. I'm one of them. It took me, oh, probably close to 15 years to get to the point that when I go as I do regularly to the Swiss Arbitration Association meeting twice a year, or I go to an ICC gathering, or an ICCA gathering that I will know and be recognized, and know and talk to a number, you know, the

[40] We do not mean that outsiders do not participate in ICC arbitrations, only that the repeat work and most effective representation will be within the club.

[41] Such relationships contribute to the usually smooth functioning of legal means of resolving disputes, since the advocates can both represent their clients forcefully and avoid dramatic clashes through their personal relations with opposing counsel (e.g., Mnookin & Kornhauser 1979). Certainly the English system of barristers who know each other well arguing before judges who come also from barristers' chambers is another example.

> leading figures. And . . . that's how you just get into it. Now why is it a mafia? It's a mafia because people appoint one another. You always appoint your friends—people you know. It's a mafia because policymaking is done at these gatherings. (Int. 85:27)

A self-identified U.S. "associate member" of the club stated, "They nominate one another. And sometimes you're counsel and sometimes you're arbitrator" (Int. 50:9).[42]

At the same time, it is clear that this somewhat mysterious accumulation and confusion of roles represents a formidable handicap for the occasional players. To risk playing on the field of international arbitration, one must be one of the initiated or draw on the services of one of the initiated. In fact, the majority of specialists of arbitration earn much more from their activity as lawyers than from their activity as arbitrators. Service as arbitrator helps chiefly to build and maintain prominence in the arbitration world.[43] By contrast, lawyering represents a quite profitable activity for the almost obligatory specialists who serve outsiders confronted with the procedure of arbitration. The approach of the ICC Secretariat to some extent challenges this subtle mixing of roles, but clearly personal relations and membership in the "club" remain quite important to success. The ICC is working on behalf of its view of legitimacy to give outsiders a little more access to the otherwise hidden connections between the arbitration players.[44]

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[42] A U.S. litigator stated, "I've appeared in Scandinavia, in the U.K., in France, in Switzerland, and in Italy, and I run into the same lawyers everywhere[,] it's the same names. . . . And so there are people who are almost always involved in some fashion or other if there's an arbitration involving a national event of their country. . . . [O]nce you go off shore, . . . it is a very fungible group and it's the same people over and over [as lawyers and arbitrators]" (Int. 51:11). A senior English arbitrator noted the dilemma: "You're often appointed a party arbitrator by someone with whom you have worked before," and "you know you're going to work with him again. Does that unconsciously bias one? I think that's a difficult one." But "not everybody is 100 percent honest and you know it's a very great advantage to find someone whose character you really do know and can depend on" (Int. 97:13–14).

[43] This division between arbitrators and counsel, where the counsel is compensated more materially and the arbitrator more symbolically, is a general phenomenon of the legal world. For example, British QCs, when they are named to the bench, gain the prestige of becoming judges, lose some of their income, and fulfill the function of judging needed for the survival of the system. And those who will take the cut in pay are typically those who are more interested in promoting the universals and legitimacy of the system.

[44] This handicap, according to the ICC insiders of the current generation, causes distrust as well. "Appearance is very important. . . . I think one can assume in many international cases the level of mistrust, suspicion of the other party, is greater than in a domestic situation." The disclosure of relationships between counsel and arbitrators could thus have real impacts: "If there is a party who, if there is disclosure of something and the court is more or less uncertain as to whether or not there is really a problem of independence . . ., the court, I think, is more willing to say let's replace the person. . . . Because what we want in the end is for parties to comply with the awards that are rendered" (Int. 134:7).

B. Anglo-American Law Firms and Arbitration Insiders

This problem for outsiders highlighted by the ICC Secretariat can apply not only to individuals from areas new to international commercial arbitration but also to the large international law firms themselves. As noted above, the insiders' arbitration club, though expanded since the days of the pioneers, still enjoys a quasi-monopoly on the functions of arbitrator. This monopoly is difficult for multinational law firms to support. When large multinational law firms decided to intervene on the scene of arbitration, they could not be content with being seated around a table dominated by others. It is not simply a matter of gaining access to and learning the rules of the game; they insist—and have the power to insist—also on being able to play according to their own terms. That is, they insist on utilizing their language and the legal technology that assures their preeminence on the international market of business law. It has therefore been necessary for them not only to enter the closed club of ICC arbitration but also to impose a redefinition of the rules of the game.[45]

While this strategy is perfectly rational from a strict economic and professional point of view, we believe there is also a more subjective dimension to the contests. The Anglo-American practitioners seek revenge against the intellectual Parisian salons. To understand the importance of the sociocultural shock that promotes this desire, we must consider the context of the 1970s, the time of the first great arbitrations tied to the construction of large factories in the oil-producing countries. On both sides of the arbitration world, the level of incomprehension was total (see case study in Dezalay & Garth, forthcoming). The professional groups in effect could not recognize each other and nourished solid prejudices with respect to each other.

The litigators debarked at Paris (or later The Hague for the Iran Claims Tribunal) with a certain condescension about the procedure of arbitration—in their eyes nothing but a bastard form of process, a sloppy litigation. They were confronted by a community of learned patricians who, while they considered themselves to be cosmopolitans, were more familiar with the theory than with the legal practice of the Anglo-American world (Int. 136:4). They knew little of a recent evolution under the influence of a young generation of litigators, whose aggressive tactics, a "vulgar justice," were gaining ground in what was a gentlemen's world in Wall Street (see Caplan 1993:121–75).

The divide was therefore not only between two cultures but also between two generations—even two social classes. A sophisticated U.S. lawyer long active in international arenas put it this way:

[45] The terminology fits the perceptions of participants: for example, according to a senior observer, "The [U.S.] lawyers are changing the rules of the game" (Int. 10:7).

> [Y]ou take the sort of dyed-in-the-wool, hard edge, brass knuckles American litigators whose style varies from region to region and, you know, put them into a sort of conventional, somewhat European, international arbitration and that's like inviting that thing off the street into a grand salon—makes about the same impression sometimes. (Int. 7:6)

These pretentious boyish litigators sought to impose the barbarian manners of the Far West and the marginal East in the salons of old Europe. They were perceived as completely ignorant of the proper European ways of combining business disputes with the lofty production of jurisprudence, doctrine, and legal theory. They also tended to misjudge the Europeans because arbitration, in the opinion of the Americans, was associated with the relatively low status and perceived intellectual content of U.S. domestic arbitration (the less formal, compromise-oriented arbitration largely practiced in labor and smaller commercial conflicts under the auspices of the American Arbitration Association).

Arbitration, we could say, was mistranslated. The misunderstanding was total between these litigators, on one side, who wanted to fight on their own terrain of facts with their usual weapons of adversary procedure, discovery, cross-examination; and the arbitrators on the other, for whom the noble terrain was that of law (see Int. 49). Certainly after the first misunderstanding, each side sought to bridge the gap. But in this private justice in the service of merchants, the relation of the forces was such that one made more inroads than the other.

The European arbitrators, including some of the most notable, were reconverted to the English language and to the usages of Anglo-Americans. Berthold Goldman, for example, one of the most famous pioneers, learned English at 40 years of age; and his flexibility was noted: "cross-examination is not accepted in France . . . barbaric . . . primitive. And except for people like Goldman, . . . he's been cross-examining" (Int. 136:8). An American litigator with considerable arbitration experience noted that the senior arbitration experts "began to realize that clients seemed to like this [cross-examination and expert testimony] and it was clearly affecting their business and so I mean there were only two things they could do. . . . And I found again in my experience they embraced it" (Int. 51:32). The leading Continental arbitrators allowed the tactical maneuvers that permitted winning or losing through contested searches for facts.

The multinational law firms recognized on their side that the arbitration game in the European context was rather more sophisticated than the domestic variant that they looked down on in the United States, and they chose to invest in this new legal terrain. They attached themselves to the services of the initiated in order to avoid faux pas and to dress up their arguments in the distinguished language of lex mercatoria. But one can under-

stand the resentment of these litigators, who were forced to pay the fees of the initiated under the pretext that one must have the required expertise in the learned language that was then *de rigueur* in the Parisian club of arbitration. From this perspective we can see the vigor of the offensive brought by the American lobby to enlarge the club and to rationalize the practice of arbitration so that it could become offshore—U.S.-style—litigation.

This warlike terminology may promote confusion. The fact that it does not appear as aggression is critical in this operation of redefinition and of recentering. Even if the attacks and the relations of force were quite real, the violence would remain symbolic in this symbolic field. The export of legal technologies involves less gunboat politics and more the strategy of the Trojan Horse. This operation began in the interior of the club and with the support—at least the connivance—of the founding fathers. The "fifth column" in this process has been the Parisian offices of the American firms. For a small number of expatriate lawyers, often married to Europeans, the practice of international arbitration represented an excellent opportunity. It permitted them to profit from their double expertise and to serve as brokers between two cultures.

Interest in arbitration helped to recruit top local talent, contributing to the local implantation of these large Anglo-American firms and favoring the constitution of a nucleus of Euro-lawyers. In the 1970s, this establishment in Paris did not provoke the local barriers that tend to result from such efforts today. The bar did not then feel at all concerned about the quite limited international market. A few modernists—even visionaries—saw there an opportunity and incitement to reform legal practice and to develop Paris as an offshore legal market. They welcomed the chance to help reshape the domestic legal field.[46]

On their side, the founding fathers of arbitration could only enjoy these efforts of the brokers who, by opening arbitration to all the North American markets, enlarged considerably the demand for an expertise that they had mastered better than anyone. The Americanization of arbitration thus occurred with much less reluctance than has been perceived, since, at least in the beginning, it appeared to the pioneers as a recognition of the merits of arbitration and an investment in the practical field (see International Chamber of Commerce 1984). The new consumers permitted the pioneers (finally) to receive very handsome dividends on their arbitration capital—a savoir faire and an experience accumulated for decades.

[46] The first efforts to reform the French legal profession, which culminated only in some higher status of the *conseils juridiques* and a merger of *avocats* and *avoues*, took place at this time. The image of a grand unified profession did not arrive until the end of the 1980s.

C. Arbitration as Litigation

But the reality of the relation of forces between the small club of learned artisans and the great conglomerates of legal experts was that, rather quickly, those who had opened the doors of their club to the Anglo-American practitioners found themselves disturbed by the transformation of approaches to arbitration under the influence of the "American lobby." Perhaps the trees had initially hidden the forest. The "Americans in Paris" may actually have fallen for the charm of Continental-style arbitration. But behind them was lined up an army of great law firms who, by the simple fact of their mode of organization, could only throw into profound disorder a game of arbitration conceived essentially by and for the civilian academic. As a British solicitor long active in arbitration observed, "if you ever want a bunch of lawyers who are completely inflexible about international arbitration and how to conduct it, it's the Americans" (Int. 85:21). Electing arbitration, says an American close to the new generation, "doesn't meant that I necessarily want to give up all the trappings of full-scale litigation and what might come with it" (Int. 134:16). And indeed, the Americans have imposed many of those "trappings."

As a result, noted a prominent U.S. arbitrator, "American style practice has taken off. . . . A lawyer comes with a team—more attention to fact, motions, objections, delays. Beginning to look more like litigation" (Int. 50:3). A French leader of the older generation made the same point: "the role of the U.S. firms is growing," and they "utilize more and more Anglo-American devices" (Int. 115:4). It is no surprise that the leading arbitrators of the new generation emphasize their case management skills. The most common statement about a very popular arbitrator today, Karl-Heinz Bockstiegel, is that he is "great in procedural management" (Int. 148:9).

The artisan and the factory cohabit with difficulty. Like the relations of the general practitioner physician and the modern hospital, the model of specialization and differentiation found in the great corporate structures inevitably calls into question the traditional Continental approach. With respect to the arbitration club, there has been pressure on the more or less cooperative mixing of roles that characterized the specialists of arbitration. We have seen the impact in the issue of conflicts of interest, but it goes deeper. The new protagonists have made the problem even more serious by refusing to consider the practice of international commercial arbitration as a specialty unto itself. Only a handful of law firms with long-time offices in Paris, and thus rather marginal in the hierarchy of U.S. litigating firms, have chosen to invest in arbitration in the more traditional way by setting up small teams of specialists.

The large American law firms continue to consider international arbitration as but one kind of "litigation" (or, more recently, "dispute resolution") among others. As a partner in a leading New York law firm observed, "Arbitration is considered by us to be an adjunct to litigation—litigation in the courts. It's simply a different forum" (Int. 47:3). In reaffirming their competence to treat this type of matter, these large law firms reject the specificity of the terrain of arbitration. They repeat that it is but one in a menu of competences and solutions that they can propose to clients to resolve a difficulty. That, at least, is the approach of the litigators, who have acceded in the past several years to a dominant position in the large law firms (Nelson 1988). This territorial demand is easily understood. One does not renounce voluntarily, when in full vigor, a rather prestigious and lucrative practice, especially if this form of competence appears indispensable to success in the market of international transactions. But their insistence on their own approach and their refusal to make international arbitration a specialty make it necessary for the law firms to translate arbitration to fit the litigator's knowledge and self-concept.

This category of practitioners has been constituted from the two great groups that had dominated the field of legal practice in the United States: the corporate lawyers, who held the upper hand in the large firms of Wall Street thanks to their competence as negotiators in the creation of contracts; and the trial lawyers, whose talent was exercised essentially in jury trials. Since enterprises began to change the legal scene through mergers and acquisitions, and also as a result of antitrust and other litigation, a new knowledge field has eveloped, that of specialist in taking charge of conflict situations (e.g., Caplan 1993). The art consists precisely in knowing how to combine judicial attacks and negotiation behind the scenes to lead to an optimal solution from the viewpoint of the client's interest. These experts in the tactical administration of disputes consider judicial recourse not as an end in itself but only as an argument and a means to exert pressure (cf. Margolick 1993). The negotiators consider judicial recourse as a weapon to be deployed in a conflict that will almost surely end before trial (e.g., Galanter 1985).

The specialists of this parajudicial negotiation are then at the antipode of the traditional Continental model found not surprisingly within the "club" of international commercial arbitration. That model is of an "auxiliary justice" where the duty of counsel is to clarify and aid the judge in rendering good justice. The conflict specialists from the United States (or elsewhere) do not feel any responsibilities except to their client. Furthermore, they offer their clients the ability to operate for tactical reasons in many jurisdictions or types of proceedings at once. This "legal superarmament" of multiple attacks and forum shopping escalates the

warfare considerably on behalf of clients able to afford it. And for various reasons, it is a service that has been successful in building the power and success of U.S.-style litigation for corporate clients in the 1980s.[47]

The large law firms have tended to practice the very same strategy when handling international disputes. Yet this pragmatic and tactical approach is opposed to the tacit usages of the arbitration club. In the community of the initiated, the proximity and interchangeability of roles makes the advocates comport themselves in a very subtle manner as auxiliaries of the arbitral tribunal. Defending the interests of their clients does not in a case push them to actions that jeopardize their own credibility or, worse still, the social legitimacy of arbitration.[48] Such an attitude would have been equivalent to professional suicide in building the practice of international commercial arbitration.

But it is not the same for the litigators. They have a different reference group and criteria for success. While the career of arbitrators is in large part dependent on the goodwill of the grand old men who control access to and prominence in the field of arbitration, litigators depend only on their capacity to satisfy important clients. That is what determines their position in the hierarchy of the law firm (Nelson 1988). In short, where one group is obliged to be quasi-referential with respect to the dogmas and the customs on which is reposed the collective faith in arbitration, the others have but one ambition—winning a good result. To get that result, they are ready to exploit any procedural tactics and forums available to them. They are willing to create difficulties for their colleagues and the arbitral tribunal and even to damage the image of this justice—which had pretended to be rapid and less costly because informal.[49] One understands the irritation of the founding fathers confronted by these newcomers who permit themselves to transform the nature of arbitration by multiplying the incidence of procedure and technical appeals.

The litigators respond matter-of-factly that it is only a matter of fulfilling their duty as lawyers and protecting, by all legal means at their disposal, their clients' interest. Even to win some time, after all, is not of negligible value economically. At the same time, this general strategy, which conforms so perfectly to their mission as defenders of their clients' interests, permits them also to promote their own conception of arbitration. If arbitration is no longer a last resort but rather one tactical recourse

[47] It is now somewhat under attack by proponents of a truce to the "arms race," such as the Center for Public Resources.

[48] Examples of this role abound. Recent documentations of such practice in the civil law world include Olgiati 1995.

[49] A lawyer for a large U.S. firm in Paris says simply: "You know the first advice you give to a defendant in an ICC case is take your time. When they ask for the deposit, don't pay it" (Int. 129:10). The skill is "to spin out the dispute for years" (Int. 129:9).

among others, it is no longer correct to make of it a protected preserve for a group of the initiated. On the contrary, specialists or law firms that can play simultaneously in many places hold the position of strength.

D. The International Field Transformed: Toward a Delocalized Market for the Management of International Commercial Disputes

Competition and rationalization, especially as promoted by U.S. litigators, leads to the judicialization of international commercial arbitration. Some commentators, especially from the senior generation, see in this evolution toward the judicialization of arbitration the preview—and the cause—of its decline. What good, they say, is it to opt for arbitration when this alternative is at the same time slower and more costly, but also more uncertain, than recourse to the courts? This pessimistic vision, which is in fact a plea for a return to the past, appears overstated. It is true that the system has been transformed, and the qualities that made arbitration successful for the pioneers seem to be little in evidence. But arbitration is far from withering away. It is in full vigor.[50]

Far from dissolving, the community of arbitration specialists appears to have moved a long way toward forming the nucleus of a sort of offshore justice. This expression, which hints at fiscal paradises exploited by the operators of the great financial centers, is rather far from the unified international private system of justice—organized perhaps around one great lex mercatoria—that might have been imagined by some of the pioneering idealists of law. The current model can be understood much better as simply a delocalized and decentralized market for the administration of international commercial disputes, connected by more or less powerful institutions and individuals who are both competitive and complementary.

VI. Conclusion

In conclusion, we first highlight what the research approach brings to the study of a symbolic object such as international commercial arbitration. Our research strategy has been to "map the field" by interviewing at some length individuals found by

[50] Not surprisingly, the current situation is celebrated by U.S. litigators in part because arbitration has been "judicialized." A recent U.S. volume "designed as an intellectual pause for reflection" on the state of international commercial arbitration and subtitled *Towards "Judicialization" and Uniformity?* brought one of the editors, a prominent member of the arbitration community, to the following conclusion: "International arbitration thus is in large measure a substitute for national court litigation," necessary only because the parties from different nationalities do not wish their "rights and obligations to be determined by the courts of the other party's state of nationality" (Brower 1994:x). From this perspective, the closer arbitration is to the general model of courts the better.

tracing the national and international networks that surround international commercial arbitration. By so doing, we can see the relative positions of groups and individuals in terms of oppositions and complementarities in the field. The players on the field compete vigorously but in terms of the "universals" accepted—as a ticket to admission[51]—by all the players. For example, we see the grand old men and the technocrats, the professors and the practitioners, asserting that the particular mix of "symbolic capital" that each represents—age and experience, technical know-how, theoretical sophistication, ability to represent clients vigorously, prestige in a particular national legal culture—happens to be the endowment best suited for the legitimation of arbitrators and therefore for the long-term success of international commercial arbitration. The competition among actors in this field—and, we submit, in law generally—simultaneously builds the market for particular legal services and the legitimacy of the resulting law.

This intense competition among merchants of law acting as moral entrepreneurs also requires some institutional management. Our research suggests that the International Chamber of Commerce, once the preserve of a small group of arbitration aficionados, was able to play that role and help to facilitate the transformation of the field in the 1980s. International commercial arbitration has to a great extent now been institutionalized as the generally accepted private legal process applicable to transnational business disputes.[52]

The transformation of the field (represented in Fig. 1) can be examined in both a general and a particular sense. There is,

[51] The moral tenor of the debates comes in part from the fact that potential arbitrators must invest over a long period, promoting a kind of "cult of disinterestedness," and because the potential arbitrators must demonstrate a distance from the "parochial" and "particular" aspects of their national portfolios. Persons with strong moral beliefs and an interest in universals are attracted. At the same time, the tendency of those in the field to try to diversify their portfolios to accommodate new positions and entrants allows the field to enlarge its coverage to become more universal in another sense.

[52] This account of the phenomenon of institutionalization, while based on Bourdieu, obviously has similarities to certain aspects of the "new institutionalism" in American sociology. There are many similarities, for example, between our approach and that taken by Paul DiMaggio (1991) to the process of "constructing an organizational field as a professional project" with respect to art museums in the United States. We share an emphasis on the complex interactions between professionalism and institutionalism, and on the transformation and institutionalization that takes place with its growth. The most notable differences between his study and our approach are: first, since his research was based on archival records, it did not examine the importance of social capital despite its obvious relevance to the story; second, DiMaggio's effort to document the development of an institution tends to avoid probing connections to the larger world around the processes he studies (e.g., the changes in municipal politics or in the role of foundations); and third, while our approach fits reasonably well with the one he describes, our focus is on conflict in the discourses and strategies of the relevant actors rather than specifically on institutions. And while we here examine the core of international arbitration, our larger work (forthcoming) will include the broader framework of north-south issues, the transformation of business disputing, and other means of handling business conflict.

first, a general story of rationalization and institutionalization and, second, an equally important story of details of the transformation. Those details are bound to exert a powerful influence on the conduct of international dispute resolution and on competition in the market for legal services.

The boom in the market for international commercial arbitration, the arrival of new players, and the competition and power of the large multinational law firms contributed to the break with the traditions of the small, learned, cosmopolitan group that built the International Chamber of Commerce and the basic institutions of international commercial arbitration. The growth and accelerated competition, we have seen, were reflected in an accelerated Weberian transformation—the "routinization of charisma" and the ascendancy of "legal rationality." The general or Weberian line of this story, we suggest, will be repeated elsewhere in the successful development of international or other legal fields. The social capital and charisma (and even idealism) of elite lawyers respected for their careers and accomplishments helps to legitimate the legal institutions and approaches they favor.[53] International businesses and national commercial entities, for example, have been more likely to accept the idea of arbitration by lawyers if the chosen lawyers are recognized member of an elite with credibility in the worlds of business and politics. Once the idea of arbitration is sufficiently established, however, it can become more rationalized and generalized as it gains further economic and numerical success.

It must be remembered, however, that even when successful over a long period, such a Weberian transformation is only a matter of degree. The conflicts that produce the transformation continue to have an impact on the field. The grand notable arbitrators are still influential, for example, and their services are called on when disputes are outside the routine, requiring more political sensitivity and indeed more of the authority and clout that comes with their status.

Further, as noted above, the retrospective logic of the successful Weberian scenario should not be invoked to imply that the specific characteristics of this international legal field were natural or inevitable—the product of a slogan like "globalism." The particular features cannot be understood if we limit ourselves to a retrospective account suggesting the inevitability of today's "more rational" version of international commercial arbitration. The fact that international commercial arbitration currently combines a certain amount of Continental legal theory, a major Parisian institution at the core of the field, and a practice that resembles offshore litigation as promoted by U.S. liti-

[53] The social capital and charisma, especially in Europe, was also needed to overcome the resistance to the involvement of lawyers in practices closely connected to business.

gators—rather than, for example, a less adversarial Continental style of litigation or a central focus on London or New York's institutions for arbitration—comes from the specifics of the international legal field as it was first constituted and later transformed.

While international commercial arbitration has become more formal and expensive, more like U.S. litigation, it does not make sense to describe "arbitration" as a "given" process inevitably like U.S. litigation (or otherwise, as in the pioneer days of a less formal, more "gentlemanly" international arbitration). Arbitration has evolved in response to particular social factors, and the competition we have seen *continues* about the meaning and legitimacy of particular aspects of international commercial arbitration. Any resolution of the debates is bound to be provisional. We can provide an account here of only a relatively short period.

This article, furthermore, can only explore a limited part of the landscape of business disputing. As suggested in the larger work from this project (Dezalay & Garth, forthcoming), the mechanisms of business disputing should be seen as part of one general system. The system includes arbitration controlled by courts, arbitration that is parallel to courts, and various court and out-of-court possibilities, such as mediation. What happens in the arbitration of business disputes affects the entire landscape of business disputing. Each possibility is transformed in time and in relation to the others. More generally, studies of "processes," such as mediation, benefit by confronting any potential means of resolving disputes as part of a complex and changing ensemble.[54]

Finally, we emphasize also the importance of studying the details of the construction of legal practices and institutions that are "international." We must go beyond recognizing that "international" institutions and international legal practices have grown. What we see through the study of the emergence of the field of international commercial arbitration is that the "international" is constructed largely from a competition among national approaches. Since lawyers and others are trained nationally, and for the most part they make their careers nationally, it is not surprising that they seek as a matter of course to deploy their ways of thinking and practicing in the construction of international institutions. This process makes the "international" the site of a regu-

[54] A recent article by McEwen et al. (1994) on divorce mediation, for example, emphasizes the important and often neglected point of the "highly variable character of divorce mediation itself" (p. 149). The article further shows how a court-provided mediation service in Maine has become quite legalized despite the use of nonlawyer mediators. The authors did not interview the supporters of other conceptions of mediation (or promoters of still other approaches)—including nonlawyer mediation proponents—for this particular study, but we suspect that it would be useful also to approach the topic with a broader framework and a focus on the contested terrain about "mediation" and the competing approaches.

latory competition among essentially national approaches, whether we are concerned with protection of the environment, human rights and constitutionalism, securities regulation, or international commercial arbitration. International commercial arbitration can therefore be understood as an amalgam of national approaches in which the U.S. approach to litigation has recently gained the upper hand.[55] It is not a brand-new form of international justice. The competition that produces both the legitimacy and the prosperity of international commercial arbitration, to be sure, involves both national and international elements. Indeed, there probably could not be an "international" field without the existence of national competition between locally oriented practitioners, on the one hand, and better-connected, more cosmopolitan sectors, on the other. But within the international sector, the competition among national approaches to law and to the governance of business conflicts can be determinant in the constitution of the international.

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[55] This does not mean that international commercial arbitration is destined to remain like U.S. litigation. Indeed, to the extent that U.S. litigation gains in importance, it opens the way for further U.S. influence such as through U.S. alternative dispute resolution. The irony is that those who are proposing more ADR in international commercial arbitration echo the arguments made a generation ago to help persuade international businesses to go to arbitration rather than to national courts.

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