

# ICC DISPUTE RESOLUTION BULLETIN

EXTRACT | 2020 | ISSUE 2

## ICC Dispute Resolution Bulletin | 2020 Issue 2

**E-journal of the International Chamber of Commerce (ICC)**  
**Périodique numérique de la Chambre de commerce internationale**

### Editors-in-Chief | Rédacteurs en chef

Julien Fouret  
Samaa Haridi

### Editorial Board | Comité de rédaction

Cecilia Azar  
Chiann Bao  
Utku Cosar  
Valeria Galindez  
Rémy Gerbay  
Daniel Kalderimis  
Tejas Karia  
Swee Yen Koh  
Yasmine Lahlou  
Reza Mohtashami QC  
Sara Nadeau-Séguin  
Ziad Obeid  
Ucheora Onwuamaegbu  
Dámaso Riaño  
Othmane Saadani  
Sabina Sacco  
Galina Zukova  
Alberto Zuleta

### Dispute Resolution Services Publications

Stéphanie Torkomyan, Publications Manager  
Claire Héraud, Senior Publications Assistant

Articles for publication should be sent to the Editors-in-Chief, members of the Editorial Board, or to the Publications Manager ([stn@iccwbo.org](mailto:stn@iccwbo.org)). Suggestions for book reviews are also welcome.

ICC Publication No. @20BUL2  
ISBN: 978-92-842-0577-6  
ISSN: 2520-6052

### Price | Prix

Subscription | abonnement: 180 euros (excl. VAT | hors TVA)

Per issue | par numéro: 49 euros (excl. VAT | hors TVA)

### Publication date | Date de parution

July 2020 | juillet 2020

### Published by ICC | Édité par ICC

Président, directeur de la publication: John Denton

Head Office  
33-43 avenue du Président Wilson  
75116 Paris, France

Directeur général, directeur adjoint de la publication:  
Emmanuel Jolivet

### Copyright © 2020 International Chamber of Commerce (ICC)

All rights reserved. No part of this work may be reproduced, distributed, transmitted, translated or adapted in any form or by any means except as permitted by law without the written permission of the ICC. Authors should request the permission of ICC prior to any reproduction or subsequent publication of an article (electronic or print). Permission can be requested from ICC through [copyright.drs@iccwbo.org](mailto:copyright.drs@iccwbo.org).

Tous droits réservés. Il est interdit de reproduire, de distribuer, de transmettre, de traduire ou d'adapter tout ou partie de cet ouvrage, sous quelque forme ou par quelque procédé que ce soit, en dehors des exceptions prévues par la loi, sans l'autorisation écrite de la Chambre de commerce internationale. Toute demande d'autorisation est à adresser à [copyright.drs@iccwbo.org](mailto:copyright.drs@iccwbo.org).

### Disclaimer

Except where otherwise indicated, the views expressed and statements made herein are those of their authors and should not be construed as creating any duty, liability or obligation on the part of the ICC and its constituent bodies, including the International Court of Arbitration, the International Centre for ADR and their respective Secretariats.

Sauf indication contraire, les points de vue et les commentaires exprimés dans la présente publication sont ceux de leur(s) auteur(s) et ne sauraient créer aucun devoir, ni aucune responsabilité ou obligation à la charge de la Chambre de commerce internationale ou de ses organes, y compris la Cour internationale d'arbitrage, le Centre international d'ADR et leurs secrétariats respectifs.

### Trademarks

ICC, the ICC logo, CCI, International Chamber of Commerce (including Spanish, French, Portuguese and Chinese translations), World Business Organization, International Court of Arbitration and ICC International Court of Arbitration (including Spanish, French, German, Arabic and Portuguese translations) are all trademarks of the ICC, registered in several countries.

ICC, le logo ICC, CCI, International Chamber of Commerce (y compris des traductions en espagnol, français, portugais et chinois) World Business Organization, International Court of Arbitration et ICC International Court of Arbitration (y compris des traductions en espagnol, français, allemand, arabe et portugais) sont des marques de la Chambre de commerce internationale et ont été enregistrées dans plusieurs pays.

### Subscriptions/Individual issues

[publications@iccwbo.org](mailto:publications@iccwbo.org)

The ICC Dispute Resolution Bulletin is available :

- ICC Knowledge 2 Go at <https://2go.iccwbo.org/>

- ICC Digital Library at <http://library.iccwbo.org/>

# The Three Ages of International Commercial Arbitration and the Development of the ICC Arbitration System\*

Mikaël Schinazi

Associate in Shearman & Sterling's International Arbitration Group, based in Paris.

**This article explains how the modern history of international commercial arbitration could usefully be divided into three broad phases or periods: the Age of Aspirations (from approximately the 1780s to the 1920s), the Age of Institutionalization (from the 1920s to the 1950s), and the Age of Autonomy (from the 1950s to the present). It shows how each of these ages was marked by an ongoing tension between the state and the transnational community of merchants and arbitration experts seeking to expand the reach of international commercial arbitration. The article further analyses how the ICC developed its arbitration system, codifying and developing rules and practices in relation to the conduct of arbitration proceedings, thereby making a key contribution to the history of international commercial arbitration.**

It has become customary to describe international commercial arbitration as the preferred method for resolving business disputes between parties from different countries. The data made available by the International Chamber of Commerce (ICC) shows that, since its creation in 1923, the International Court of Arbitration (hereafter, the 'ICC Court') has administered 25,000 cases.<sup>1</sup> While the first 3,000 cases were filed over a period of 53 years, it took only 11 years for the next 3,000 cases to arrive.<sup>2</sup> During the first 18 months of its existence, the ICC Court received 68 cases from 17 countries.<sup>3</sup> In 2019, it recorded 851 new cases involving 2,498 parties from 147 countries and independent territories.<sup>4</sup> These figures testify to the 'explosive' growth<sup>5</sup> and 'meteoric rise'<sup>6</sup> of international commercial arbitration.

Despite the 'wealth and legal, economic and sociological complexity'<sup>7</sup> of international commercial arbitration, its modern history has attracted relatively little scholarly attention. This is not to say that no attempts have been made to trace or understand the history and evolution of international commercial arbitration. In England, authors such as Mustill,<sup>8</sup> Roebuck<sup>9</sup> and Veeder<sup>10</sup> devoted numerous studies to the history of arbitration. In France, authors such as David<sup>11</sup> and Hilaire<sup>12</sup> paved the way for much historical work in the field, and more recent scholars such as

\* This article draws on a book forthcoming with Cambridge University Press, based on the thesis for which the author was awarded his PhD by Sciences Po Law School, Paris, in 2019 ('The Three Ages of International Commercial Arbitration', supervised by E. Gaillard and M. Xifaras). The author thanks CUP for consenting to reuse some of the material here, and the ICC for giving him access to its archives. Unless otherwise indicated, translations from the French are by the author. The author welcomes comments at mikael.schinazi@shearman.com.

1 International Chamber of Commerce website, 'ICC celebrates case milestone, announces record figures for 2019' (9 January 2020), <https://iccwbo.org/media-wall/news-speeches/icc-celebrates-25000th-case-milestone-and-announces-record-figures-for-2019/>.  
2 L. Craig, W. Park, and J. Paulsson, *International Chamber of Commerce Arbitration* (Oceana Publications, 1990) at 4.  
3 ICC Archives, *Arbitration Report* (July 1924) at 1.  
4 See Alexis Mourre, 'Message from the President' *ICC Dispute Resolution Bulletin* 2020 No. 1 at 5. See also the 2019 ICC Statistical Report published in the current issue of the *Bulletin* (at p. 15).  
5 C. Brower, 'The Global Court: The Internationalization of Commercial Adjudication and Arbitration' (1996) 26 *University of Baltimore Law Review* 9 at 10.

6 S. Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law' (2013) 36 *Fordham International Law Journal* 745 at 745.  
7 E. Gaillard, 'L'apport de la pensée juridique française à l'arbitrage international' (2017) *Journal du droit international* 529 at 542.  
8 See, e.g., M. Mustill, 'Arbitration: History and Background' (1989) 6 *Journal of International Arbitration* 43.  
9 See, e.g., D. Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (Arbitration Press, 2017); 'Sources for the History of Arbitration. A Bibliographical Introduction' (1998) 14 *Arbitration International* 237.  
10 See, e.g., V.V. Veeder, 'The *Lena Goldfields* Arbitration: The Historical Roots of Three Ideas' (1998) 47 *International & Comparative Law Quarterly* 747.  
11 R. David, 'Arbitrage du XIXe et arbitrage du XXe siècle' in *Mélanges offerts à René Savatier* (Daloz, 1965), 219.  
12 J. Hilaire, 'L'arbitrage dans la période moderne (XVIe-XVIIIe siècle)' (2000) *Revue de l'arbitrage* 187.

Grisel,<sup>13</sup> Jallamion,<sup>14</sup> Jolivet,<sup>15</sup> Lemerrier,<sup>16</sup> and Sgard<sup>17</sup> have also been investigating the modern history and evolution of international commercial arbitration. However, historical scholarship relating to international commercial arbitration appears often to be limited to a specific period, institution or famous episode in the history of arbitration. What is still missing is an in-depth and holistic account of its sources and evolution in the modern era (from approximately the late eighteenth century onwards).

This article aims to provide an initial glimpse into what such a history might look like. It divides the modern history of international commercial arbitration into three broad waves or periods, stretching from the late eighteenth century to the present (I). It further analyses how the ICC's arbitration system developed, codifying existing methods and developing its own rules and practices to deal with arbitration proceedings, thus making a key contribution to the history of international commercial arbitration (II).

## I. The three ages of international commercial arbitration

The modern history of international commercial arbitration can usefully be divided into three broad periods: the Age of Aspirations (from approximately the 1780s to the 1920s) (A), the Age of Institutionalization (from the 1920s to the 1950s) (B), and the Age of Autonomy (from the 1950s to the present) (C).<sup>18</sup>

Even though each of these three periods has its own features, a trait they all share is the ongoing tension between the state and what may be described as the 'mercatorocracy', defined by Cutler as the 'global corporate elite' made up of transnational merchants,

private international lawyers, representatives of international organizations, etc., which 'operates globally and locally to develop new merchant laws governing international commerce and the settlement of international commercial disputes and to universalize the laws through the unification and harmonization of national commercial legal orders'.<sup>19</sup> The mercatorocracy has played a key role throughout the modern history of international commercial arbitration, not as some kind of secret society but as a merchant group deeply committed to expanding the reach of, and developing rules and institutions peculiar to, international arbitration.

### A. The Age of Aspirations

The first age, from approximately the 1780s to the 1920s – a period described by some historians as the 'long nineteenth century'<sup>20</sup> – was the Age of Aspirations. It was marked by an intense exploration of arbitration in all its forms.

At regional level, arbitration was commonly used to settle commercial disputes, for example those between merchants belonging to trade associations in Europe. This was especially true of England, which had become the dominant world economic power during the Industrial Revolution. As the volume of trade increased, so too did disputes between buyers and sellers. Arbitration committees were quickly set up within the cotton, corn and coffee trade associations, to name but a few, in Liverpool and London. The London Corn Trade Association (LCTA), founded in 1878, was to play a particularly important role, arguably acting as 'the benchmark model that was emulated by other professions in the following years and decades'.<sup>21</sup> In particular, these trade associations encouraged the use of standard contracts, which became widespread, and not just in Great Britain.<sup>22</sup> Because these standard contracts contained arbitration clauses, which specified that any dispute arising out of the contract would be finally settled under the rules laid down by the trade

13 See, e.g., A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017).

14 See, e.g., C. Jallamion, 'La jurisprudence française et l'arbitrage de 1843 à 1958: De la défaveur à la faveur jusqu'à l'avènement de l'arbitrage international' (2015) *Revue de l'arbitrage* 739 (Part I) and 1037 (Part II).

15 See, e.g., E. Jolivet, F. Grisel and E. Silva Romero, 'Aux origines de l'arbitrage commercial contemporain: L'émergence de l'arbitrage CCI (1920–1958)' (2016) *Revue de l'arbitrage* 403.

16 C. Lemerrier and J. Sgard, *Arbitrage privé international et globalisation(s)*, Mission de Recherche Droit et Justice (Sciences Po and CNRS, 2015).

17 See, e.g., J. Sgard, 'A Tale of Three Cities: The Construction of International Commercial Arbitration' in G. Mallard and J. Sgard, *Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets* (Cambridge University Press, 2016), 153.

18 The chronological markers used to delimit the three periods are deliberately approximate, suggesting that these periods are open-ended and may (and often do) overlap.

19 C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003) at 4–5.

20 The expression 'long nineteenth century' was most famously used by British Marxist historian E. Hobsbawm to describe the 125-year period from 1789 (beginning of the French Revolution) to 1914 (outbreak of World War I). The Age of Aspirations described here is slightly longer, lasting until the 1920s (when arbitral institutions such as the ICC were founded).

21 Sgard, *supra* note 17 at 157.

22 See, e.g., G. Schwob, *Les contrats de la London Corn Trade Association (Vente CAF)* (Arthur Rousseau, 1928). Schwob cites a decision rendered by a court in Rennes on 4 June 1926, which stated that 'London standard contracts, especially those of the London Corn Trade Association (LCTA), have earned considerable fame in the grain trade and are commonly used in France' (*ibid.* at 7).

association, parties engaged in global trade had little choice but to submit their disputes to the arbitration mechanisms of the LCTA and other trade associations. This was one key reason for Great Britain's place as a major provider of legal services through arbitration during the long nineteenth century and beyond.

Internationally, arbitration was widely practised between states. Early adepts of arbitration placed their hopes in its ability to bring appeasement and prosperity, believing that 'it represented an essential means to achieving the lofty goal of peace through law in a complex and divided world'.<sup>23</sup> In fact, a number of key treaties and events, such as the Jay Treaty of 1794 between the United States and Great Britain, relied on recourse to arbitration.<sup>24</sup> A century later, it was also used in the famous Alabama Arbitration of 1871, in which the United States alleged that the British Government had violated its legal duty to respect neutrality during the American Civil War. After several years of unsuccessful diplomatic efforts, an agreement was reached in 1871 (the Treaty of Washington). An arbitral commission met in 1871 in Geneva's town hall (in what is still known as the Salle de l'Alabama), and ordered Great Britain to compensate the United States within a year with a payment in gold worth USD 15.5 million,<sup>25</sup> equivalent to the staggering sum of approximately USD 225 billion today.<sup>26</sup> The deliberations may not have met modern standards of neutrality and confidentiality, but the tribunal raised some questions that were clearly legal and succeeded in rendering a binding award (even providing reasons for its decision, which was not required by the arbitration agreement). Although perhaps not quite

the model for contemporary international commercial arbitration that it is sometimes made out to be, the Alabama Arbitration was a key event in the history of international arbitration.<sup>27</sup>

The main figures in the Age of Aspirations were thus (i) merchants in trade associations, and (ii) the diplomats and statesmen who gathered at diplomatic conferences with the hope of settling disputes peacefully instead of resorting to war. In this period, the tension between the state and the mercatocracy was hardly palpable, as the mercatocracy was not yet fully organized. Admittedly, there were 'clusters of organization', to use Lagarde's expression<sup>28</sup> – that is, individuals who started envisioning the arbitral process as somewhat removed from the realm of states – but arbitration remained largely local, being confined to a specific trade or geographical area (for example, British trade associations using English law). Widespread *international* arbitration remained an ideal, a set of aspirations. States occupied the centre of the stage; by and large, it was they alone that decided whether arbitration should be used and in what contexts. The Age of Aspirations lasted until the 1920s when the members of newly founded arbitral institutions began to overshadow the merchants and statesmen of times gone by.

## B. The Age of Institutionalization

By the beginning of the twentieth century, the momentum acquired by the pro-arbitration movement was such that the creation of specialized institutions devoted to international commercial arbitration became a real possibility. However, efforts to build new institutions were interrupted by World War I, which had a devastating effect on many national economies. After the war, it seemed more urgent than ever to resume the project of building permanent institutions to maintain peaceful relations between commercial parties from different countries. It was in this context that the ICC was founded in 1920, following the 1919 Atlantic City Conference.<sup>29</sup> Its Court of Arbitration opened in 1923 and started administering cases soon

23 B. Oppetit, *Théorie de l'arbitrage* (Presses Universitaires de France, 1998) at 10.

24 'Treaty of Amity Commerce and Navigation, between His Britannic Majesty; and The United States of America, by Their President, with the advice and consent of Their Senate' in H. Miller, *Treaties and Other International Acts of the United States of America*, vol. 2 (Government Printing Office, 1931), 245-274. The Jay Treaty sought to settle matters that had been left unresolved after the War of Independence, such as the British occupation of military forts, British seizure of American ships and impressment of American sailors into the Royal Navy to fight against revolutionary France, British interference in American trade and exports, the northwestern boundary between the United States and Canada and compensation for pre-revolutionary debts.

25 Award of 14 September 1872, in A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Pedone, 1923), vol. II, 889-894.

26 V.V. Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator: From Miami to Geneva' in D. Caron, S. Schill, A. Smutny and E. Triantafyllou, *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015), 127 at 133. On the amount of the award, see also R. Jenkins, *Gladstone: A Biography* (Pan Books, 2002) at 359; and, more recently, B. Loynes de Fumichon and W. Park, 'Retour sur l'affaire de l'Alabama: de l'utilité de l'histoire pour l'arbitrage international' (2019) *Revue de l'arbitrage* 743 at 747.

27 This is the view adopted by, among others, Veeder, Loynes de Fumichon and Park in the references cited in the previous footnote. For an opposing view, see Paulsson's statement that the Alabama Arbitration is a 'splendid example of the intelligent use of the arbitral process in the interest of peace', but not much more. J. Paulsson, 'The Alabama Claims Arbitration: Statecraft and Stagecraft' in U. Franke, A. Magnusson and J. Dahlquist, *Arbitrating for Peace: How Arbitration Made a Difference* (Kluwer Law International, 2016), 7.

28 P. Lagarde, 'Approche critique de la *lex mercatoria*' in P. Fouchard, P. Kahn and A. Lyon-Caen, *Le droit des relations économiques internationales: Études offertes à Berthold Goldman* (Litec, 1982), 125 at 139.

29 See, e.g., L. Magnier, *La Chambre de commerce internationale* (Arthur Rousseau, 1928); G. Ridgeway, *Merchants of Peace*:

thereafter.<sup>30</sup> A few years later, in 1926, the American Arbitration Association (AAA) was established through the merger of the Arbitration Society of America and the Arbitration Foundation.

The Age of Institutionalization (from approximately the 1920s to the 1950s) was a seminal period in the development of the contemporary regime of international commercial arbitration. It was marked by the emergence of a new class of arbitration scholars and practitioners. These individuals – early members of the mercatocracy – displayed a much more internationalist spirit than the previous generation. To realize their projects, they sought the support of states, often successfully. States continued to wield considerable influence in the Age of Institutionalization; for example, they still had complete authority in deciding under what conditions an award could be enforced abroad.<sup>31</sup>

The key figures in this period were the lawyers and scholars who, working mainly in arbitral institutions, helped to establish international commercial arbitration as a specialist discipline. While some of them had strong diplomatic or ministerial experience – a prime example is Etienne Clémentel, the first president of the ICC<sup>32</sup> – others worked in relative obscurity, devoting their time and efforts to improving the practice of arbitration. Like the diplomats of the previous age, their vision was still imbued with idealism and marked by a belief in arbitration as a force for good.<sup>33</sup> But, as will be seen below, they were also concerned with the rules and techniques that would enable the modern system of international commercial arbitration to grow and become more effective. Arguably, they were

*Twenty Years of Business Diplomacy Through the International Chamber of Commerce, 1919–1938* (Columbia University Press, 1938).

30 This author has transcribed – with some help from a team of Sciences Po students – 131 (for the most part unpublished) ICC arbitral awards from the years 1922 to 1969. It was suggested that the ICC might like to consider publishing them in the future so that other researchers can have access to them.

31 The 1927 Geneva Convention on the Execution of Foreign Awards laid down nine conditions for the enforcement of an award abroad, reflecting an inability to accept that the arbitral process could be independent of national laws. See R. Briner and V. Hamilton, 'The History and General Purpose of the Convention: The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards' in E. Gaillard and D. di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008), 3.

32 See, e.g., M.-C. Kessler and G. Rousseau (eds.), *Étienne Clémentel: Politique et action publique sous la Troisième République* (Peter Lang, 2018); G. Rousseau, *Étienne Clémentel (1864–1936): Entre idéalisme et réalisme, une vie politique* (Archives départementales du Puy-de-Dôme, 1998).

33 On this point, see also Lemerrier and Sgard, *supra* note 16, at 96–97.

responsible for constructing international commercial arbitration as it is known today, more so than the 'grand old men' described by Dezalay and Garth in their important study.<sup>34</sup> The Age of Institutionalization lasted until the 1950s, when the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') ushered in a new era for international commercial arbitration.

### C. The Age of Autonomy

The third period in the modern history of international commercial arbitration is the Age of Autonomy, which started in the late 1950s and extends to the present day. It is a period that has witnessed what Motulsky, in 1963, referred to as arbitration's 'phenomenal fortune'.<sup>35</sup> At least three types of autonomy may be found in this third age. The first is the *autonomy of the mercatocracy*. A distinct class of professionals have devoted an increasing amount of time and attention to international commercial arbitration, coming to see themselves first and foremost as experts in international arbitration. The Age of Autonomy has thus been characterized, to a large extent, by increased expertise and specialization.

Second, there is the *autonomy of the field as a whole*. Lawyers, scholars, and professors who had hitherto considered international arbitration as a subcategory of civil procedure or international law started viewing the discipline as a full-fledged field of practice and research. Law firms, attorneys, arbitrators, arbitral institutions and centres, and even international arbitration journals started competing for power, influence and prestige.<sup>36</sup> Academic programmes began to include specialized courses on international commercial arbitration, training new generations of arbitration students and scholars. Publications on international arbitration sprouted, filling entire shelves in law libraries. New professional associations were formed. Law firms developed their own specialized practice groups to work exclusively on international arbitration. This exponential growth concerned not only the market for arbitration but also the market in arbitration.

Third, autonomy has also manifested in the *autonomous character of the law* expounded by the mercatocracy. A notable feature of the Age of

34 Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago University Press, 1996).

35 H. Motulsky, 'L'internationalisation du droit français de l'arbitrage' (1963) *Revue de l'arbitrage* 110 at 110.

36 See P. Fouchard, 'Où va l'arbitrage international?' (1989) 34 *McGill Law Journal* 439; J. Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press, 2013) at 56–75.

Autonomy is that, in addition to working on actual cases, professionals have developed theories and intellectual constructs *about* international commercial arbitration. One such theory was *lex mercatoria* – the notion of a transnational law applicable to international contracts, instead of a national law. The intellectual history of *lex mercatoria* can be traced to Clive Schmitthoff's and Berthold Goldman's seminal insights in the 1960s,<sup>37</sup> which were then applied by scholars in a wide range of contexts in the 1970s and thereafter.<sup>38</sup> This theoretical exploration coincided with the emergence of a new school of thought: the French school of international arbitration.<sup>39</sup> Another theory was the arbitral legal order – the idea that arbitral awards and the arbitral process as a whole exist in their own, autonomous legal order.<sup>40</sup> It marked the emergence, from the 1980s onwards, of a second generation in the French school of international arbitration.<sup>41</sup> Members of this new generation focused less on the 'society of merchants' and more on the 'autonomy' or 'juridicity' of international arbitration.<sup>42</sup>

These theories can be seen as attempts to give arbitration a theoretical foundation and explain its development as an autonomous system of law. A unique and even startling characteristic of the Age of Autonomy is the fact that true to the etymology of the word 'autonomy' – literally 'having its own laws', from the Greek *autos* (self) and *nomos* (law) – the mercatocracy has been demanding its own laws. In more philosophical terms, it has embraced autonomy

as a 'collective enterprise',<sup>43</sup> which, to use Castoriadis's term, 'institutes' a world of imaginary significations for itself.

## II. The development of the ICC arbitration system

As explained above, in the Age of Institutionalization new institutions such as the ICC and its Court of Arbitration were created. Faced with the growing importance of international commercial arbitration and demands from its users, the ICC quickly developed its own rules and methods to deal with arbitration proceedings. It made these rules increasingly precise and sophisticated over time, thereby improving the overall effectiveness of its arbitration system. The ICC's arbitration system could be classified as *both* an 'autopoietic system'<sup>44</sup> – a closed system evolving towards increased self-regulation through more rules – and an open system, adapting itself to user feedback.

The founders of the ICC and its Court of Arbitration were in many cases familiar with, and may have been inspired by, the arbitration rules of other organizations (A). Yet the ICC was also innovatory, codifying new concepts and practices through a process of 'normative densification',<sup>45</sup> as clearly reflected in the ICC Rules of Arbitration, which are used to govern arbitral proceedings (B).

### A. Precedents to the ICC arbitration system

The ICC's arbitration system was not built from scratch; those involved in its creation were aware of the existing arbitration mechanisms in other trades and industries and drew inspiration from them. In fact, certain aspects of the ICC's dispute resolution system closely resemble other arbitration mechanisms already in existence at the time. The process followed by the ICC might be described as 'mimetic isomorphism', a concept coined by sociologists to explain organizational 'modeling', whereby the 'modeled organization' serves as 'a convenient source of practices that the borrowing organization may use'.<sup>46</sup> The originators of the ICC's arbitration system sometimes referred expressly to

37 See, e.g., B. Goldman, 'Frontières du droit et "lex mercatoria"', *Archives de philosophie du droit*, vol. 9, *Le droit subjectif en question* (Sirey, 1964), 177–192; C. Schmitthoff, 'The Unification of the Law of International Trade' (1964) in C.-J. Cheng, *Clive M. Schmitthoff's Select Essays on International Trade Law* (Martinus Nijhoff/Graham & Trotman, 1988), 170–187.

38 See, e.g., J. Stoufflet, *Le crédit documentaire: Étude juridique d'un instrument financier du commerce international* (Librairies techniques, 1957); P. Kahn, *La vente commerciale internationale* (Sirey, 1961); P. Fouchard, *L'arbitrage commercial international* (Dalloz, 1965).

39 The first generation of the French school of international law may be said to have included P. Fouchard, P. Kahn, E. Loquin, Y. Derains, etc. On the early history of the French school (also called the 'Dijon school', from the name of the city where Goldman taught from 1949 to 1960), see P. Kahn, 'Vers la quête de la *lex mercatoria*: L'apport de l'école de Dijon, 1957–1964' in K. P. Berger, *The Creeping Codification of the New Lex Mercatoria*, 2nd ed. (Kluwer Law International, 2010), 357.

40 See E. Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010).

41 The second generation of the French school of international arbitration may be said to include E. Gaillard, T. Clay, J.-B. Racine and, more recently, M. Laazouzi (see, e.g., 'L'arbitre international et les rapports entre ordres juridiques' in B. Bonnet, *Traité des rapports entre ordres juridiques* (LGDJ, 2016), 1025).

42 See, e.g., E. Gaillard, 'Thirty Years of *Lex Mercatoria*: Towards the Selective Application of Transnational Rules' (1995) 10 *ICSID Review – Foreign Investment Law Journal* 208.

43 C. Castoriadis, *The Imaginary Institution of Society*, trans. K. Blamey (MIT Press, 1987) at 107.

44 See G. Teubner, *Law as an Autopoietic System* (Blackwell, 1993). The term 'autopoiesis' is used by biologists (e.g. Humberto Maturana and Francisco Varela) to describe the self-organizing and self-referential nature of living systems.

45 The expression is from T. Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford University Press, 2014) at 127.

46 P. DiMaggio and W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 *American Sociological Review* 151.

pre-existing models while also making key innovations by devising new rules and adjusting to users' practical needs.

A telling example is the report that Roberto Pozzi, an Italian legal scholar,<sup>47</sup> wrote ahead of the ICC's 1921 London congress to prepare the ground for the drafting of the ICC's conciliation and arbitration rules. Pozzi quoted at length a resolution adopted at the 1914 International Congress of Chambers of Commerce in Paris, which stated that

measures should ... be adopted for placing at the disposal of traders and manufacturers in all countries the organisms that are necessary to the employment of arbitration in controversies arising between citizens of different countries, and any action taken with this view should conform to the precedents furnished by the Arbitration Rules of the International Cotton Federation and by those [of] the International Publishers' Congress, also taking account of the important results of the inquiry conducted by the Berlin Chamber of Commerce, and of the proposed rules compiled by the New York Chamber of Commerce, with a view, that is, to organizing international colleges of arbitrators for all trades or groups of similar trades.<sup>48</sup>

As a legal adviser to the Italian Cotton Association, Pozzi was well acquainted with these arbitration rules adopted during the decade preceding the creation of the ICC. Besides the four 'precedents' he designated above, Pozzi also mentioned a plan promoting the use of arbitration to settle disputes between US and Argentine parties.<sup>49</sup> A product of the Pan-American Financial Conference organized by the Chamber of Commerce of Buenos Aires and the Chamber of Commerce of the United States in Washington in May 1915, the plan sought to 'encourage arbitration and make it readily available for all persons engaged in trade between the two countries'.<sup>50</sup> The plan included (i) an agreement between the two chambers on the creation of an arbitration system for settling

commercial disputes,<sup>51</sup> and (ii) accompanying arbitration rules,<sup>52</sup> both of which took effect on 10 April 1916.

Pozzi discerned in the US-Argentine system two features, also present in the cotton industry, that deserved special emphasis. The first was '[a] form of arbitration clause, the use of which is recommended to those engaged in International Commerce and which, once inserted into a contract, becomes obligatory for the parties thereto'.<sup>53</sup> The second was the use of moral sanctions, 'without prejudice to legal measures, against those who, having accepted the arbitration clause, refuse to admit arbitration at the time when a controversy arises, or refuse to carry out the award of a board of arbitrators'.<sup>54</sup>

These two features became important aspects of the ICC's dispute resolution system as well. The ICC Court of Arbitration drew up an arbitration clause and strongly encouraged traders from different countries to include it in their contracts.<sup>55</sup> And, initially at least, the ICC imposed moral sanctions on parties who refused to comply with an arbitral award, for example by publishing the names of defaulting parties and appealing to local chambers of commerce to exert pressure on them.<sup>56</sup>

Other aspects of the ICC Rules can also be traced to the arbitration rules adopted under the US-Argentine plan. For example, Pozzi acknowledged that Article 10 of his 'Proposed Plan for Conciliation and Arbitration Between Traders of Different Countries' – authorizing arbitrators to render a provisional award to protect merchandise<sup>57</sup> – was directly borrowed from the US-

47 See, e.g., R. Pozzi, *Commercial Arbitration under Italian Law* (ICC International Headquarters, 1927).

48 R. Pozzi, 'Conciliation and Arbitration Between Merchants of Different Countries: Memorandum Submitted by M. Roberto Pozzi' in *Commercial Arbitration* (ICC International Headquarters, 1921) at 6-7.

49 *Ibid.* at 14.

50 *Arbitration for Disputes in Trade Between the United States and the Argentine Republic* (Chamber of Commerce of the United States, 1919) at 1.

51 'Agreement for Commercial Arbitration' in *Arbitration for Disputes in Trade Between the United States and the Argentine Republic* (Chamber of Commerce of the United States, 1919) at 9-17.

52 'Rules of Arbitration' in *Arbitration for Disputes in Trade Between the United States and the Argentine Republic* (Chamber of Commerce of the United States, 1919) at 18-29.

53 Pozzi, *supra* note 48, at 14.

54 *Ibid.* at 15.

55 The arbitration clause associated with the 1922 Rules read as follows: 'The contracting parties agree to submit to arbitration, in accordance with the Arbitration Rules of the International Chamber of Commerce, the settlement of all disputes in connection with the interpretation or the execution of this contract.' See Rules of Procedure for the Conciliation and Good Offices of the International Chamber of Commerce (1922), in International Chamber of Commerce, *Rules of Conciliation (Good Offices) and Arbitration (Fourth Edition)* (ICC International Headquarters, 1922) (hereafter '1922 Rules'), 11.

56 In the late 1920s and the 1930s, formal sanctions aimed at achieving enforcement through the application of legal rules began to take the place of moral sanctions.

57 'Proposed Plan for Conciliation and Arbitration Between Traders of Different Countries', Article 10, in *Commercial Arbitration* (ICC International Headquarters, 1921), at 28.



Argentine plan,<sup>58</sup> which provided that perishable or seasonal merchandise could be disposed of 'to avoid increased loss'.<sup>59</sup> Also, the arbitrators' right to order provisional measures found its way into the 1922 ICC Rules, which gave arbitrators 'the right to render a provisional decision, providing for such measures of preservation as may be indispensable and, when strictly necessary, disposing of the merchandise or objects in dispute'.<sup>60</sup>

These similarities with the US-Argentine plan show that arbitration rules from other organizations sometimes served as precedents for the ICC's dispute resolution system. This is hardly surprising; as Pozzi explained, arbitration rules were already in place in many trades and industries and it was only natural that the ICC should build upon this rich repository of practices. Moreover, some of the individuals involved in the creation of the ICC and its Court of Arbitration had also participated in the drafting of those arbitration rules. For instance, Charles Bernheimer, John Fahey and Owen Young were members of the Committee on Arbitration of the Chamber of Commerce of the United States, which was involved in both the implementation of the US-Argentine plan and the events that led up to the adoption of the ICC Rules. It was indeed Fahey who signed the documents that formed part of the US-Argentine plan as the representative of the US Chamber of Commerce,<sup>61</sup> and he also played a part in the creation of the ICC and its Court of Arbitration, as did Young.<sup>62</sup> Thus, the rapid spread of similar norms and models was likely due to the existence of 'a pool of almost interchangeable individuals'<sup>63</sup> across a range of organizations. But the ICC did more than 'import' rules from other arbitral organizations; it innovated, too, devising its own rules and techniques in key areas of arbitral procedure.

58 Pozzi, *supra* note 48, at 20.

59 'Agreement for Commercial Arbitration', *supra* note 51, Article XII, 16. A similar idea was expressed in the arbitration rules of the US-Argentine plan, but using different wording (see 'Rules of Arbitration', *supra* note 52, Article 2, at 20).

60 1922 Rules, Article XVIII/XXXIX. The 1922 Rules were divided into two main parts: the 'Rules of Procedure for the Conciliation and Good Offices of the International Chamber of Commerce' ('*Règlement de conciliation*') in Section A (Articles I to IV), and the 'Rules of Procedure for Arbitration of the International Chamber of Commerce' ('*Règlement d'arbitrage*') in Section B (Articles V to XXIV) and Section C (Articles XXV to XLV). Sections B and C were identical, except in respect of two articles, plus an additional article that appeared only in Section C. This explains why two numbers are used when referring to a specific Article of the 1922 Rules. So, for example, Article V of Section B and Article XXV of Section C of the 1922 Rules are the same; they are therefore referred to as Article V/XXV of the 1922 Rules.

61 'Agreement for Commercial Arbitration', *supra* note 51, at 17.

62 See, e.g., John Fahey, 'The International Chamber of Commerce' (1921) 94 *The Annals of the American Academy of Political and Social Science* 129.

63 DiMaggio and Powell, *supra* note 46, at 152.

## B. The ICC's codification efforts

The ICC's codification efforts manifested above all in the Rules, which 'define and regulate the management of cases' referred to the Court of Arbitration.<sup>64</sup>

The drafting of the ICC Rules – and their constant updating to adapt to user feedback – was arguably the clearest instance of the institutionalization of international commercial arbitration during the Age of Institutionalization.

There have been thirteen successive versions (including amendments) of the Rules from the creation of the ICC to the present day.<sup>65</sup> The Rules were first promulgated in 1922. They were recast in 1927, with amendments in 1931, 1933, 1935, 1939 and 1947. New versions of the Rules then appeared in 1955, 1975, 1988, 1998, 2012 and, most recently, 2017. The Rules contain essential regulations relating to each stage of the arbitration, from the request for arbitration to the final award, including the constitution of the arbitral tribunal, the arbitral proceedings, and the costs of the arbitration. Analysing these provisions in full<sup>66</sup> leads to a better understanding of the process of 'normative densification' that characterized the creation of the Rules.

### 1. Request for arbitration

The submission of a request for arbitration to the Secretariat marks the commencement of an ICC arbitration. The request for arbitration is a key part of the proceedings, enabling the opposing party and the ICC Court to become apprised of the principal features of the dispute and make early decisions on the arbitration.<sup>67</sup> The list of particulars to be included in the request for arbitration has progressively expanded over time, as the ICC strove to make the procedural framework increasingly clear from the outset.

Under the 'Proposed Plan for Arbitration', the 'demand' (as it was then known) consisted of four parts: the parties' names, nationalities and addresses; the purpose, date and place of the contract; the questions

64 International Chamber of Commerce website, 'Arbitration Rules', <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>.

65 The Rules have so far never been published together. Current and past versions of the Rules, but not the amendments of 1931, 1933, 1935, and 1939, are available online in the ICC Digital Library, <http://library.iccwbo.org/> (follow 'Dispute Resolution' channel, then menu item 'Rules') (last visited 17 May 2020), and researchers are not unanimous in their dating of the Rules.

66 Stone Sweet and Grisel undertook such an analysis, but only for certain stages of the arbitration. See Stone Sweet and Grisel, *supra* note 13 at 84–107.

67 J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration* (International Chamber of Commerce, 2012), para. 3-80 at 35.

to be submitted to the arbitrator in relation to the dispute; and the name of a 'technical arbitrator'. The parties were also required to attach 'as complete a file as possible on the matter'.<sup>68</sup>

The 1922 Rules, as it turned out, were even simpler, with just three main components: the names and addresses of the parties; a copy of the contract between the parties; and a 'brief statement of claims of the applicant for arbitration'.<sup>69</sup> Under the 1927 Rules, the procedure for initiating arbitration remained broadly unchanged; in addition to the elements listed above, the parties had to include 'copies of all contracts and correspondence having passed between the parties, and any other documents or information relied upon'.<sup>70</sup>

The list of details to be furnished in the request progressively grew in subsequent versions of the Rules. Under the current 2017 Rules, parties wishing to have recourse to ICC arbitration must include the name, address and contact details of each party and of the claimant's representative(s); a description of the dispute giving rise to the claims; a statement of the relief sought; the arbitration agreement; and any observations or proposals concerning the arbitrators, the place of arbitration, the applicable rules of law and the language of the arbitration.<sup>71</sup> This shows the extent to which the procedure for initiating ICC arbitration has become more detailed, which is a reflection of how exacting the ICC is in this area.

## 2. Answer to the request for arbitration

Upon receipt of a request for arbitration, respondents are given the opportunity to submit an answer in which they respond to the claims brought against them. As with the request for arbitration, the extent of the information to be included in the answer has expanded over time.

Under the 1922 Rules, the Court of Arbitration notified the respondent<sup>72</sup> of the request for arbitration 'as speedily as possible' and invited him to furnish 'similar complete data and information with statement of his

case, within a period of fifteen days from the receipt of such notification'.<sup>73</sup> There was therefore no clear list of information to be included in the answer; the respondent was simply asked to provide his statement of the case.

In the 1927 Rules, the time given to the respondent to provide an answer was extended to one month.<sup>74</sup> Like the 1922 Rules, the 1927 Rules did not include a list of information to be included in the answer; Article 7(1) simply stated that the respondent had to include 'a statement of the case in answer accompanied by all documents and information in support'.<sup>75</sup>

In 1955, the time limit was made more precise – 'one month' was replaced with 'thirty days'<sup>76</sup> – and the Rules went into greater detail on what was required in the answer, stating that the respondent should reply 'to the proposals made to him concerning the number of arbitrators and their choice. He must at the same time and within the same period furnish a statement of the case in answer and any proposals he may wish to make, accompanied by all documents and information in support'.<sup>77</sup> Over time, the provisions governing the answer to the request became more specific. The current version of the Rules lists six items of information to be supplied by the respondent in the answer within thirty days of receiving the request for arbitration.<sup>78</sup>

## 3. Written statements and counterclaims

Parties to an arbitration usually exchange two rounds of written submissions – the memorial and counter-memorial, then the reply and rejoinder. The 1922 Rules did not contain any detailed provisions on the number of written statements parties were allowed to submit. It was only in 1927 that this was limited to two on each side: 'the first being the statement of claims' and 'the second being the applicant's rejoinder to the answer of the defendant and the latter's reply to this rejoinder'.<sup>79</sup>

This is a clear instance of a rule developed in response to the practical concerns of the Court of Arbitration and its users. As the ICC Court explained when the 1927 Rules were issued, '[t]he Committee considered it necessary to limit the number of statements of case to be presented by the parties so as to prevent

68 'Proposed Plan for Arbitration', Article 7(2), *supra* note 57, at 27.

69 1922 Rules, Article X/XXX. This is mentioned in Stone Sweet and Grisel, *supra* note 13, at 91.

70 ICC Rules of Conciliation and Arbitration (1927), in International Chamber of Commerce, *Arbitration. Revision of the Rules of Conciliation and Arbitration* (ICC International Headquarters, 1927) (hereafter '1927 Rules'), Article 6(2)(c).

71 ICC Arbitration Rules (2017) and Mediation Rules (2014), in International Chamber of Commerce, *Arbitration Rules in force as from 1 March 2017; Mediation Rules in force as from 1 January 2014* (Paris: ICC International Headquarters, 2018) (hereafter '2017 Rules'), Article 4(3)(a)-(h).

72 The term 'respondent' is used for all defendant parties in this article, whether they were referred to as 'defendant' (as in the early ICC Rules) or 'respondent'.

73 1922 Rules, Article XI/XXXI.

74 1927 Rules, Article 7(2).

75 *Ibid.*, Article 7(1).

76 ICC Rules of Conciliation and Arbitration (1955), in International Chamber of Commerce, *Rules of Conciliation and Arbitration in force on 1st June 1955*, 5th ed. (Paris: International Headquarters, 1967) (hereafter '1955 Rules'), Article 9(1).

77 *Ibid.*

78 2017 Rules, Article 5(1).

79 1927 Rules, Article 18(1).

a party dragging out the proceedings in bad faith by the presentation of a succession of statements and counter-statements'.<sup>80</sup> This rule was not inflexible, however, and arbitrators could still allow parties to submit additional statements if, for example, the last statement filed by the respondent contained new arguments justifying a further rejoinder on the part of the claimant.<sup>81</sup>

Provisions on counterclaims were likewise added to the Rules as they developed. The 1922 Rules did not contain any provisions dealing specifically with counterclaims; Articles XI/XXXI simply stated that the opposing party was to submit, in his answer, 'information with statement of his case'.<sup>82</sup> Nor were counterclaims specifically mentioned in the 1927 Rules, which simply stated, somewhat more narrowly than in the 1922 Rules, that the respondent was asked to 'furnish within the time stipulated a statement of the case in answer accompanied by all documents and information in support'.<sup>83</sup>

It was not until the 1939 amendments that the matter of counterclaims was expressly addressed in the Rules. A new paragraph was added to the former Article 17, as follows:

New claims or counter-claims or new grounds in support of these claims submitted to the arbitrator or arbitrators must be formulated by the parties in writing. The arbitrator or arbitrators will then establish a record of the incident; at the request of the party against whom the new claim or grounds have been submitted, the arbitrator or arbitrators will suspend the proceedings, and, in this case, send the parties before the Court of Arbitration for a decision, and, if necessary, the establishment of an additional submission.<sup>84</sup>

Although clearly describing the procedure to be followed, this amendment did not specify a time limit. It was added in the 1955 Rules, which stated that a respondent putting forward a counterclaim had to do so 'within the period laid down for the reply to the claim' and that the other party would then have 'thirty days from notification of this counter-claim' to submit

a statement in reply.<sup>85</sup> Thus, the provisions on written statements and counterclaims are further examples of rules developed over time in response to the practical needs of users of the ICC system.

#### 4. Appointment of arbitrators

The issue of how arbitrators should be appointed preoccupied the ICC Court from the very beginning. As Arnaud explained, the choice of the arbitrator was 'the keystone of the Rules', since 'the Court does not decide any case itself, and merely appoints one or more arbitrators to do so'.<sup>86</sup> Under the 1922 Rules, national committees played a key role in selecting arbitrators.<sup>87</sup> They had to compile lists of 'technically qualified arbitrators', to which reference would be made when arbitrators were needed for specific disputes.<sup>88</sup> The names of the arbitrators chosen from the list would then be communicated to the parties in dispute.<sup>89</sup>

In the late 1920s and the 1930s, the procedure for selecting arbitrators became more complex. The 1927 Rules stated that '[a]s a general rule the Court, unless for good reason shown, shall apply to National Committees of countries other than those of the parties to the dispute'.<sup>90</sup> In other words, as from then, arbitrators had to be of a nationality other than that of the parties.

The 1931 amendments filled another gap by introducing a provision to cover the eventuality of parties failing to nominate an arbitrator. The following provision was added before the last sentence of Article 11(2): 'Should one of the parties abstain from nominating his arbitrator within the time set by the Court of Arbitration, the Court shall itself appoint the arbitrator'.<sup>91</sup> This new provision meant that parties could no longer delay proceedings by deliberately refraining from appointing an arbitrator.

85 1955 Rules, Article 10(1).

86 R. Arnaud, 'Arbitration in the International Chamber of Commerce' (1929) 1 *World Trade* 123. René Arnaud was a key early member of the Court of Arbitration of the ICC. See, e.g., Comité national français de la Chambre de commerce internationale, *Un demi-siècle au service de la Chambre de commerce internationale: Brochure publiée à l'occasion du départ en retraite de René Arnaud, Directeur Général du Comité* (International Chamber of Commerce, 1969).

87 ICC National Committees have come to play an important role in shaping the ICC's policies and alerting their respective governments to international business concerns. See International Chamber of Commerce website, 'National committees', <https://iccwbo.org/about-us/global-network/regional-offices/#1483449760709-d69727f1-f04c>

88 1922 Rules, Article VI/XXVI(a).

89 Ibid., Article XIII/XXXIII.

90 1927 Rules, Article 11(1).

91 Amendments to the ICC Rules of Conciliation and Arbitration (1931), in International Chamber of Commerce, *Resolutions Adopted by the Washington Congress* (ICC International Headquarters, 1931), Article III.

80 International Chamber of Commerce, *Arbitration: Revision of the Rules of Conciliation and Arbitration* (ICC International Headquarters, 1927) at 5.

81 Ibid.

82 1922 Rules, Article XI/XXXI(a).

83 1927 Rules, Article 7(1).

84 Amendments to the ICC Rules of Conciliation and Arbitration (1939), in International Chamber of Commerce, *Resolutions Adopted by the Tenth Congress of the ICC* (ICC International Headquarters, 1939) (hereafter '1939 amendments'), Article V.

## 5. Rules governing the proceedings

The rules governing the proceedings come into play once the arbitrators have been seized of the case. For more than a decade after the ICC Court was founded, these rules were left largely undefined, but from the late 1930s onwards they were formulated with increasing detail, while nonetheless remaining 'extraordinarily flexible'.<sup>92</sup>

The 1922 Rules contained no specific provision on this matter; Articles XIII/XXXIII simply required the national committee or organization member to 'determine and regulate the procedure'.<sup>93</sup> The 1923 Explanatory Commentary added that '[t]he procedure will necessarily include notice given to the parties or to their representatives who shall be able to furnish verbal explanations or to address documents in writing. The arbitrators will assure the reciprocal communication between the parties of the documents and notes submitted to them.'<sup>94</sup> Initially, therefore, national committees were in charge of determining the procedure.

The 1927 Rules provided some additional guidelines, with Article 16(1) authorizing arbitrators to 'take such steps as they may in their discretion consider most appropriate for the purpose of ascertaining the facts relating to the case',<sup>95</sup> and Article 16(2) requiring the Court of Arbitration and the arbitrators to 'so act as to render an award capable of legal enforcement'.<sup>96</sup>

It was in 1939 that the ICC Court took the important step of providing parties and arbitrators with clear rules on the conduct of arbitral proceedings. A new paragraph was added defining a hierarchy in the different provisions that could potentially govern proceedings before the arbitral tribunal: the ICC Rules took priority, followed, in the event that they were silent, by the law of the place of arbitration.<sup>97</sup>

The 1955 Rules added a further level to the hierarchy defined in the 1939 amendments. Pursuant to Article 16, the proceedings were to be conducted in accordance with the Rules and, where they were silent, the procedural law agreed by the parties or, failing agreement, the rules of 'the law of the country in which the arbitrator holds the proceedings'.<sup>98</sup> The principle

of a hierarchy of rules governing the proceedings has become an enduring feature of the Rules and can today be found in Article 19 of the 2017 version.<sup>99</sup>

## 6. Location of hearings and meetings

Under the 1922 Rules, the 'country and town' where the arbitration took place were 'determined by the Court of Arbitration, after examination of the request for arbitration and before the appointment of arbitrators'.<sup>100</sup> Even though arbitrators were sometimes permitted to take evidence in a country other than that where the arbitration took place by enlisting the help of a 'deputy to take such evidence',<sup>101</sup> the Court of Arbitration played a key role in selecting the location of hearings and meetings.

In 1927, the procedure for choosing the location of meetings became more detailed. Article 12 stated that '[a]rbitration shall take place in the country and place decreed by the Court of Arbitration, unless the parties shall have agreed in advance upon the place of arbitration'.<sup>102</sup> Hence, priority was given to party choice. This was an important change because, as explained in an ICC brochure, 'parties are given greater freedom of action' and 'the Court bows to the will of the parties' if they have agreed in advance upon the place of arbitration.<sup>103</sup> This procedure for selecting the place of arbitration was maintained in both the 1955<sup>104</sup> and 1975<sup>105</sup> Rules.

## 7. Timing and place of awards

Early ICC cases mostly concerned disputes over simple factual and legal issues such as the quality of goods. In such cases, knowing when and where an award was deemed to have been made was not problematic. This information was considered self-evident – awards were generally made at the arbitrator's office or the place where the goods were inspected – so there was no need to expand on this matter in the 1922 and 1927 Rules.

In 1955, however, the following provision was added: 'The arbitral award shall be deemed to be made at the place of the arbitration proceedings and on the date of signature by the arbitrator'.<sup>106</sup> This 'deeming' provision,

92 *Secretariat's Guide to ICC Arbitration*, *supra* note 67, para. 3-709 at 208.

93 1922 Rules, Article XIII/XXXIII.

94 Explanatory Commentary of the Rules of Conciliation (Good Offices) and Arbitration (ICC International Headquarters, 1923) (hereafter 'the 1923 Commentary'), Article XIII/XXXII.

95 1927 Rules, Article 16(1).

96 *Ibid.*, Article 16(2).

97 1939 amendments, Article IV.

98 1955 Rules, Article 16.

99 2017 Rules, Article 19.

100 1922 Rules, Article IX/XXIX(a).

101 *Ibid.*, Article XVI/XXXVII.

102 1927 Rules, Article 12.

103 *Revision of the Rules*, *supra* note 80, at 4.

104 1955 Rules, Article 18.

105 ICC Rules of Conciliation and Arbitration (1975), in International Chamber of Commerce, *Rules for the ICC Court of Arbitration* (ICC International Headquarters, 1975) (hereafter '1975 Rules'), Article 12.

106 1955 Rules, Article 27.

which was intended to simplify things for the arbitral tribunal and could also be important in subsequent domestic court proceedings relating to the award, was maintained in the 1975 and subsequent versions of the Rules.<sup>107</sup> Today, it can be found in Article 32(3) of the 2017 version ('The award shall be deemed to be made at the place of the arbitration and on the date stated therein').<sup>108</sup> The provision was a response to the growing complexity of cases involving parties and arbitrators from multiple countries.

No time limit was set for rendering awards under the 1927 Rules, so the ICC Court was free to decide on a time limit and the date from which it was to run. In 1955, the Court introduced a time limit of sixty days<sup>109</sup> (which in fact had already been mentioned in the 'Proposed Plan for Arbitration'<sup>110</sup> and the 1922 Rules<sup>111</sup>), but it soon proved 'hardly realistic' and 'necessitated repeated extensions'.<sup>112</sup>

In 1975, the time limit was therefore extended to six months,<sup>113</sup> which, if it was 'necessary to do so',<sup>114</sup> the Court could extend 'in exceptional circumstances and pursuant to a reasoned request from the arbitrator, or if need be on its own initiative'. Eisemann welcomed this change, explaining that 'it lightens the Court's task' and 'confirms the parties' entitlement to a serious and thorough examination of their case'.<sup>115</sup> Interestingly, the ICC Court had the power to remove an arbitrator who failed to abide by this time limit.<sup>116</sup> This was an enticement to act with efficiency that continues to this day. In what may be described as a 'groundbreaking move',<sup>117</sup> the ICC Court recently decided that arbitrators who submit their draft awards after the time specified in the Rules can expect their fees to be lowered, unless the delay is justified by factors beyond the arbitrators' control or by exceptional circumstances.<sup>118</sup>

107 1975 Rules, Article 22.

108 2017 Rules, Article 32.

109 1955 Rules, Article 23(1).

110 'Proposed Plan for Arbitration', Article 9, *supra* note 57, at 28.

111 1922 Rules, Article XV/XXXVI.

112 F. Eisemann, 'Le nouveau règlement d'arbitrage de la Chambre de Commerce Internationale' (1975) 1 *Droit et pratique du commerce international* 355 at 363.

113 1975 Rules, Article 18(1).

114 *Ibid.*, Article 18(2).

115 Eisemann, *supra* note 112, at 363.

116 1975 Rules, Articles 2(8) and 18(3).

117 International Chamber of Commerce website, 'ICC Court announces new policies to foster transparency and ensure greater efficiency' (5 January 2016), <https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/>.

118 International Chamber of Commerce website, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (January 1, 2019),

## 8. Costs of arbitration

Initially, ICC arbitration was a service provided free of charge. Faced with the growing complexity of cases, it soon became clear that arbitrators would need to be paid for their services. This early – and particularly noteworthy – development has already attracted scholars' attention.<sup>119</sup>

Articles XIX/XL(e) of the 1922 Rules stated that: 'The arbitrators shall be entitled to reimbursement of all expenses but shall render their services gratuitously, except that, in so far as it is recognized that in such countries and industries fees are customarily provided for arbitrators, the Court of Arbitration may, in its discretion, allow arbitrators' fees to be included in the costs of arbitration at rates customary to such countries or industries.'<sup>120</sup> As noted by Stone Sweet and Grisel, arbitral appointments were largely seen as honorary and 'prestige conferring'.<sup>121</sup>

The idea that arbitrators should render their services gratuitously was soon called into question: 'Several National Committees have asked that the principle of gratuitous service by arbitrators should be abolished. Experience has shown that in order to secure the services of the really expert arbitrators, it is necessary that there should be fees. So the reference to gratuitous services has been deleted ...'<sup>122</sup> As a consequence, the 1927 Rules included the following provision: 'The costs of arbitration shall include fees of arbitrators, when such fees are allowed, fees of experts if any, and all expenses of the arbitration.'<sup>123</sup>

Another thorny question was who should pay the party-appointed arbitrators. The 1927 Rules stated that the fees of party-appointed arbitrators should be paid 'by the parties who appointed them'.<sup>124</sup> Because this could give the impression that the arbitrators were acting as the parties' personal representatives, the 1933 amendments changed the way in which arbitrators were to be paid. Instead of the arbitrators being paid directly, the 1933 amendments provided that their fees

paras. 118–122, <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>.

119 See Stone Sweet and Grisel, *supra* note 13, 91; Jolivet, Grisel and Silva Romero, *supra* note 15, 8–9; Lemerrier and Sgard, *supra* note 16, at 40 and 67.

120 1922 Rules, Article XIX/XL(e).

121 Stone Sweet and Grisel, *supra* note 13, at 91.

122 *Revision of the Rules*, *supra* note 80, at 6.

123 1927 Rules, Article 22(2).

124 *Ibid.*, Article 22(3).

were to be fixed by the Court and included in the costs of arbitration, along with the fees of experts and all the expenses of the arbitration.<sup>125</sup>

In the 1950s, the Court introduced greater predictability through the use of fee schedules to calculate costs based on the amount in dispute. These schedules – one relating to ICC administrative expenses and the other to arbitrators' fees – are today set out in Appendix III of the Rules. Furthermore, parties can today obtain an estimate of the likely costs of an ICC arbitration using an online cost calculator.<sup>126</sup> The payment procedure has been clarified, too. Parties wishing to have recourse to ICC arbitration are required to pay fees in three stages: the claimant must pay (i) a non-refundable filing fee (currently USD 5,000) when it files the request for arbitration, followed by (ii) a provisional advance to cover the costs of the arbitration until the Terms of Reference have been drawn up, and then (iii) the claimant and respondent must pay an advance on costs when the case is transmitted to the arbitral tribunal.<sup>127</sup>

## 9. Scrutiny of awards

Before signing an award, the arbitral tribunal must submit it to the ICC Court to make sure that it contains no major defects that could diminish its legal effectiveness. The Court's comments on draft awards may range from the correction of typographical errors to remarks on the substance of the award. Scrutiny of the award is a key step in the arbitral process and a 'distinctive feature of ICC arbitration'.<sup>128</sup> The Court's scrutiny of draft awards is another example of a rule developed over time to improve the efficiency of the ICC's arbitration system.

The 1922 Rules were silent on this matter. Article XIV/XXXV(b) provided that a copy of the arbitrators' decision should be sent to the ICC and that the parties would receive a certified copy of the decision once the requirements relating to fees and charges had been complied with.<sup>129</sup>

It did not take long for the idea of scrutiny to emerge. The 1923 Explanatory Commentary remarked as follows on Article XIV/XXXV: 'It is understood that before signing the award, the arbitrators must submit the draft of their award to the Court of Arbitration for the examination of the Court from the point of view of form. No award can be pronounced without having been submitted to the approval of the Court of Arbitration.'<sup>130</sup> This language was incorporated into the 1927 Rules, which stated that '[b]efore completing the award the arbitrators or arbitrator shall submit the same to the Court of Arbitration for examination as to its form. No award shall under any circumstances be issued until approved as to its form by the Court of Arbitration.'<sup>131</sup>

Scrutiny of awards by the Court was seen as an important feature of the ICC system at the time. As Clémentel explained at one of the ICC congresses, members of the Executive Committee of the ICC Court 'study with minute care the cases submitted to the Court and see to it that the awards rendered are in due legal form and in case of necessity can be enforced. The parties have but little idea of the large amount of work done with striking impartiality by merchants and manufacturers, traders and bankers, who give their time, out of pure devotion, to the great cause of commercial justice.'<sup>132</sup>

In the first decade of the ICC's existence, the Court's scrutiny was limited to formal aspects of awards. '[I]t is clearly understood that this examination extends only to the form of the award and that the arbitrator is sole judge of the merits of the case',<sup>133</sup> an ICC brochure explained, even though it was 'essential' that awards should comply with the laws where enforcement might be sought.

As from 1933, the Court was authorized to comment on the substance of awards, too. Article 21 of the 1927 Rules, as amended, read: 'The Court of Arbitration is not precluded from calling the attention of the arbitrators or arbitrator even to points connected with the merits of the case, but with due regard to their liberty of decision.'<sup>134</sup> Thus, by the 1930s, the principle of scrutiny of draft awards had become firmly established as part of ICC Court practice.

125 Amendments to the ICC Rules of Conciliation and Arbitration (1933), in International Chamber of Commerce, *Resolutions Adopted by the Seventh Congress of the ICC* (ICC International Headquarters, 1933) (hereafter '1933 amendments'), Article X.

126 International Chamber of Commerce website, 'Cost Calculator', <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/>.

127 International Chamber of Commerce website, 'Costs and Payments', <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/>.

128 *Secretariat's Guide to ICC Arbitration*, *supra* note 67, para. 3-1181, at 327-328.

129 1922 Rules, Article XIV/XXXV(b).

130 1923 Commentary, Article XIV/XXXV.

131 1927 Rules, Article 21.

132 'Solemn Session of the Court of Arbitration' (1927) 15 *Journal of the International Chamber of Commerce* 37 at 38.

133 *Revision of the Rules*, *supra* note 80, at 6.

134 1933 amendments, Article IX.

## Conclusion

---

This article has shown how the modern history of international commercial arbitration could be divided into three broad periods: the Age of Aspirations, the Age of Institutionalization and the Age of Autonomy. These three ages are linked by an abiding tension between the state and the mercatocracy, defined as the transnational community of merchants and arbitration experts desirous of expanding the reach of international commercial arbitration. In fact, the history of international commercial arbitration may be seen as the search for a compromise between the assertion of state power and authority and the mercatocracy's efforts to create its own norms, rules and institutions.

The article has also analysed how, in the Age of Institutionalization, the ICC codified new rules and practices, thereby creating fertile ground for the practice of international commercial arbitration to develop in the nineteen twenties and thirties, and beyond. This was a seminal period in modern international arbitration history, in which the ICC played a central role and quickly established itself as a leading arbitral institution.