1

Arbitration as a Dispute Resolution Process: Historical Developments

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1.1 Introduction

The basic mechanism of appointing a third party to settle disputes cuts across societies and historical periods. Agamemnon settled the dispute between Ajax and Ulysses over the armour of Achilles by organizing a contest between the two heroes.[1] Similarly, Thucydides noted the numerous attempts to settle disputes between Greek city-states through arbitration during the Peloponnesian War.[2] Social scientists and lawyers have highlighted the ways in which dispute settlement processes akin to arbitration have existed in various social groups at different stages of human history.[3] Throughout the previous centuries, arbitration has been used to solve disputes between traders, companies, states, and private individuals. Famous examples include the development of arbitration as a dispute settlement mechanism among traders in the Middle Ages,[4] between states starting from the late eighteenth century,[5] and within trade associations starting in the nineteenth century.[6] Although arbitration has a rich past as a method of settling disputes, efforts to retrace its history have been sporadic and limited in scope.[7] This situation is probably due to the difficulties arising from the daunting – and perhaps impossible[8] – task of

[1] *See*, for instance, Sophocles (transl. by O. Taplin), *Four Tragedies* (Oxford University Press, 2015), 132.

[2] *See* Thucydides (transl. by J. Mynott), *The War of the Peloponnesians and the Athenians* (Cambridge University Press, 2013), 19, 26, 84, 285, 309, 342.

[3] *See*, for instance, L. Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry', *Journal of Legal Studies*, 21 (1992), 115; J. Fishburne Collier, *Law and Social Change in Zinacantan* (Stanford University Press, 1973), ch. 2; H. Sumner Maine, *Ancient Law* (Cosimo, 2005), ch. 1.

[4] *See* M. E. Basile, *et al.*, *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and its Afterlife* (The Ames Foundation, 1998).

[5] *See* M. Schinazi, *The Three Ages of International Commercial Arbitration: Between Renewal and Anxiety* (PhD thesis, dir. E. Gaillard and M. Xifaras, Cambridge University Press, 2021), pt. 1.

[6] *See*, for example, L. E. Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions', *Michigan Law Review*, 99 (2001), 1724.

[7] *See* the overview of the literature in the introduction to Schinazi, *The Three Ages of International Commercial Arbitration*.

[8] *See* P. Legrand, 'On the Singularity of Law', *Harvard International Law Journal*, 47(2) (2006), 517.

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extracting common institutional features from the various historical and legal contexts in which these features have arisen.[9]

Instead of tracing a general history of international arbitration, the present chapter focuses on the ways in which arbitration has emerged as the favoured method of settling international business disputes over the last century. The number of cases resolved through international arbitration has risen steadily during this period. Moreover, international arbitration has undergone a process of institutionalization over the same time period: arbitral institutions have come to virtually monopolize the settlement of international business disputes and exercise a decisive influence on the evolution of international arbitration.[10]

Rather than retrace the historical origins of international arbitration, the current chapter will take up the narrower task of examining its development in the last century throughout the study of the two most important institutions for commercial and investment arbitration: the International Chamber of Commerce (ICC) and the International Centre for the Settlement of Investment Disputes (ICSID). In focusing on the history of the ICC and ICSID, this chapter will adopt a common analytical approach to the evolution of the two institutions.

This chapter will also rely on the important literature that has been produced in the social sciences on the emergence and evolution of institutions. This literature has been generally ignored by legal scholars (including in the field of international arbitration[11]), despite its fundamental relevance and theoretical scope. The goal is not to reflect on the possible limitations or shortcomings of this literature,[12] but rather to use it as a reference point for the analysis of international arbitration.

Of particular relevance is scholarship on systems of private governance (also called 'private orders'), which has explored the ways in which social systems relying on norms, rather than rules, promote long-term cooperation and well-being in human societies.[13] The present chapter will rely on a simplified account of this analytical

[9] *See*, in this regard, the historical overview of international arbitration provided by G. B. Born, *International Commercial Arbitration*, 2nd ed. (Kluwer, 2014), ch. 1. *See also* the extensive scholarship of D. Roebuck on the history of international arbitration.

[10] This influence was noted, *inter alia*, in A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017), ch. 2, and G. Marchisio, *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law* (Kluwer, 2017), ch. 3. This focus on the ICC and ICSID does not purport to explore the whole history of international arbitration during this time period as it does not take into account the important contributions made by other institutions such as UNCITRAL.

[11] *See*, however, Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017).

[12] *See* F. Grisel, *The Limits of Private Governance: Norms and Rules in a Mediterranean Fishery (Hart, 2021).*

[13] The literature on private ordering is very rich. *See*, for example, R. C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard University Press, 1991); R. C. Ellickson, *The Household: Informal Order around the Hearth* (Princeton University Press, 2007); L. Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry', *Journal of Legal Studies*, 21 (1992), 115; E. P. Stringham, *Private Governance: Creating Order in Economic and Social Life* (Oxford University Press, 2015); B. D. Richman, *Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange* (Harvard University Press, 2017).

framework, based on the distinction between 'relation-based' and 'rule-based' governance.[14] The first model (relation-based governance) assumes that under certain conditions (namely, perfect information and the repetition of social interactions), social agents may operate at an optimal social equilibrium by cooperating with one another. This model works best in tight-knit communities where these conditions are more likely to be present.[15] The second model (rule-based governance) is adapted to a world where these basic conditions no longer exist, and where formal entities are needed to promote, maintain and enforce cooperative norms between individuals. The evolutionary development predicted by the analytical approach is that 'self-governance must eventually give way to formal rule-based governance' as 'economies become larger and more globalized'.[16]

This prediction appears to hold true in the context of international arbitration. Drawing on the examples of the ICC and ICSID, this chapter will show how international arbitration has successively embraced a 'relation-based' and then a 'rule-based' model of governance. Initially, the systems of dispute resolution promoted by the ICC and ICSID displayed the features of the relation-based model. The ICC and ICSID sought to promote self-governance by pooling information concerning traders. A related goal was to encourage repeat business by creating an equitable method of dispute settlement that relied, a large extent, on the participation of its users. The second step came, however, when self-governance failed to sustain cooperation, leading both the ICC and ICSID to promote a rule-based model of governance where third party-arbitrators and arbitral institutions gained increasing powers over the disputing parties. As a final step, arbitral tribunals evolved towards a fully judicialized system of dispute resolution, causing them to increasingly resemble national courts.[17]

1.2 The Search for a Method of Dispute Resolution: Exploring Relation-Based Governance

This section explains how the ICC and ICSID initially embraced relation-based governance by promoting systems of dispute resolution that were ultimately guided by the maintenance of business relationships. The ICC and ICSID primarily sought to minimize disputes, or even avoid them altogether, rather than resolve them. To this end, both institutions sought to promote self-regulation by business actors (as

See also C. Drahozal, 'Private Ordering and International Commercial Arbitration', *Penn State Law Review*, 113 (2009), 1031.

[14] *See* A. K. Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (Princeton University Press, 2004), ch. 3; A. K. Dixit, 'Institutions and Economic Activity', *The American Economic Review*, 99 (2009), 3. *See also* Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), ch. 1.

[15] *See* the literature cited in N. P. Li and S. Kanawaza, 'Country Roads, Take Me Home . . . to my Friends: How Intelligence, Population Density, and Friendship Affect Modern Happiness', *British Journal of Psychology*, 107 (2016), 675, 678.

[16] Dixit, *Lawlessness and Economics* (2004), 78.

[17] This last evolutionary step is further described in Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017).

opposed to regulation by a third party). A presentation of the origins of the ICC and ICSID will cast light on the features of this relation-based model.

1.2.1 *Institutionalizing Third-Party Dispute Resolution*

The ICC Court of Arbitration and ICSID emerged to provide responses to the growing need for dispute resolution in international trade that arose throughout the twentieth century. This need manifested itself in the fact that traders, investors, and states turned to the ICC or to the World Bank for support in settling their disputes. Both institutions responded favourably to these requests, on the grounds that their overall mandate included contributing to global peace[18] and promoting foreign investment.[19] By offering a platform for businesses to settle their disputes, the ICC and the World Bank pursued their mission of contributing to greater international peace and prosperity. These dispute settlement activities were mostly consensual, as disputing parties turned towards these institutions seeking mediation or conciliation, rather than arbitration of their disputes.[20]

Businesses began turning to the ICC Banking Commission in the early 1920s in order to obtain support and resources for settling their disputes.[21] The first arbitration cases were submitted to the ICC in 1921, before the adoption of the first ICC Rules of Arbitration in 1922, and the first arbitral award was rendered in 1922, before the creation of the ICC Court of Arbitration in 1923.[22] Thus, the practice of ICC arbitration to a large extent antedated its institutionalization.

The chronology of events was similar at the World Bank, to which foreign investors and states turned for the settlement of disputes in the 1950s (prior to the creation of ICSID). These disputes often concerned expropriations that had occurred in post-colonial states after the Second World War. For instance, the World Bank was called on to resolve the dispute between the Iranian government and the Anglo-Iranian Oil Company after the nationalization of the Abadan oil refinery in 1951 (the largest oil refinery in the world at the time).[23] The World Bank's vice-president, Robert Garner, mediated this dispute,[24] and although these mediation efforts failed, they paved the way for a successful settlement in 1954 (after the

[18] Statutes of the ICC (1920), Art. 1(2). [19] IBRD Articles of Agreement, Art. 1(2).

[20] E. R. Black emphasized the fact that the World Bank had never been asked to arbitrate disputes, but simply to offer 'good offices, services, mediation', *see* The World Bank/IFC Archives, Oral History Program, Transcript of interview with E. R. Black held on 6 August 1961, available at https://oralhistory.worldbank.org/transcripts/transcript-oral-history-interview-eugene-r-black-held-august-06–1961-main-transcript (last accessed 7 September 2019), 51.

[21] F. Grisel *et al.*, 'Aux origines de l'arbitrage commercial contemporain: l'émergence de l'arbitrage CCI (1920–1958)', *Revue de l'arbitrage*, 2 (2016), 403, 407.

[22] Grisel *et al.*, 'Aux origines de l'arbitrage commercial contemporain' (2016), 403, 407.

[23] *See* The World Bank/IFC Archives, Oral History Program, Transcript of interview with R. Garner held on 19 July 1961, available at https://oralhistory.worldbank.org/transcripts/transcript-oral-history-interview-robert-garner-held-july-19-1961 (last accessed 7 September 2019), 56–66.

[24] Garner gave an interesting account of his mediation efforts between the Anglo-Iranian Oil Company and Iran, *see* The World Bank/IFC Archives, Oral History Program, Transcript of interview with R. Garner held on 19 July 1961, 56–66.

overthrow of Prime Minister Mossadegh).[25] Similar efforts were made after the Suez crisis and the Egyptian government's nationalization of foreign assets in 1956. The President of the World Bank, Eugene Black, successfully settled the dispute over the valuation of the British and French assets seized by the Egyptian authorities.[26] Other disputes, such as the Indus Basin dispute between India and Pakistan and the dispute between private French bondholders and the city of Tokyo, were resolved through President Black's efforts at conciliation in the late 1950s.

The need to create institutions specializing in the settlement of commercial and investment-related disputes grew naturally out of these conciliation efforts conducted by the ICC and the World Bank. In fact, the World Bank's experience in mediating disputes was a strong 'selling point' when the World Bank's General Counsel Aron Broches, along with President Black, endorsed the creation of an institution specializing in the settlement of investment disputes.[27] For instance, Black made the following comments when introducing the idea of a specialized institution to resolve investor-state disputes before the Board of Governors of the International Bank for Reconstruction and Development (IBRD) in 1961:

> [T]he Bank as an institution, and the President of the Bank in his personal capacity, have on several occasions been approached by member governments to assist in the settlement of financial disputes involving private parties. We have, indeed, succeeded in facilitating settlements in some issues of this kind, but the Bank is not really equipped to handle this sort of business in the course of its regular routine . . . The fact that governments and private interests have turned to the Bank to provide this assistance indicates the lack of any other specific machinery for conciliation and arbitration which is regarded as adequate by investors and governments alike. I therefore intend to explore with other institutions, and with our member governments, whether something might not be done to promote the establishment of machinery of this kind.[28]

The ICC Court of Arbitration and ICSID were therefore established in order to institutionalize the existing dispute settlement activities of the ICC and the World Bank.[29] However, it has not yet been explained why the ICC and ICSID were so successful at supplanting traditional avenues of dispute resolution.

In exploring the potential reasons for this success, it should first be noted that disputing parties initially submitted claims to other more traditional avenues for the

[25] The World Bank/IFC Archives, Oral History Program, Transcript of interview with R. Garner held on 19 July 1961, 65.

[26] *See* The World Bank/IFC Archives, Oral History Program, Transcript of interview with E. R. Black held on 6 August 1961, 42–7.

[27] *See* The World Bank/IFC Archives, Oral History Program, Transcript of interview with A. Broches held on 20 October 1990, available at https://oralhistory.worldbank.org/transcripts/transcript-oral-history-interview-aron-broches-held-october-20-1990 (last accessed 7 September 2019), 28.

[28] Excerpt from address by President E. R. Black to the Annual Meeting of the Board of Governors (19 September 1961, Vienna) in ICSID, *The History of the ICSID Convention*, vol. II, pt. 1 (ICSID, 1968), 3.

[29] This goal was explicit in the case of ICSID, *see* Note by the General Counsel transmitted to the Executive Directors (19 January 1962) in ICSID, *History of the ICSID Convention* (1968), 7: '[the present proposals] aim at "institutionalizing" the Bank's present dispute settlement activities'.

settlement of international disputes, but these efforts were largely unsuccessful. For example, the UK submitted claims on behalf of the Anglo-Iranian Oil Company against Iran before the International Court of Justice (ICJ), but the Court dismissed the case on jurisdictional grounds in 1952.[30] Similarly, the dispute between French bondholders and the city of Tokyo had been litigated before French and Japanese courts for decades to no avail prior to being submitted for mediation by President Black.[31] Existing national and international tribunals lacked the legal structures necessary to settle international business disputes in efficient ways.[32] Similarly, ad hoc arbitration was not an option in high-stakes cases where the defendants were likely to renege on their promise to submit to arbitration. For instance, the oil concession agreement between the Anglo-Iranian Oil Company and the Government of Iran contained an arbitration clause; however, Iran argued that it was not obligated to submit to arbitration after it repudiated this clause in 1951.[33] In a world where traditional dispute settlement bodies were unavailable or ineffective, business parties turned to the ICC and the World Bank as possible avenues for the settlement of their disputes.

So long as national and international tribunals were insufficiently effective and arbitration agreements (and arbitral awards) not fully enforceable, businesses and states had no alternative but to attempt to settle disputes on their own or turn to third-party institutions such as the ICC or the World Bank. These institutions were ideally positioned in the transnational arena, at the intersection of various geographically based (local/national/international) and agency (state/firm) structures, giving them access to information related to business actors, which could improve the prospects of settlement agreements and arbitral awards being enforced. For example, the ICC created a network of 'National Committees' which cultivated close ties to local industries. In 1935, the ICC boasted that it was 'in close touch with all the great industrial and trading industries of nearly every country in the world', with membership from 'all the most important economic bodies in the world'.[34] The World Bank similarly situated itself at the crossroads of capital markets: it maintained close associations with capital-exporting countries (which made voluntary contributions to the Bank's lending activities) in the course of monitoring the activities of its borrowers (typically capital-importing countries).[35] As a consequence, the World

[30] ICJ, *Anglo-Iranian Oil Co. Case (UK* v. *Iran)*, Judgment, 22 July 1952, ICJ Reports 1952, 93.

[31] *See* The World Bank/IFC Archives, Oral History Program, Transcript of interview with A. Broches held on 23 May 1984, available at https://oralhistory.worldbank.org/transcripts/transcript-oral-history-interview-aron-broches-held-april-18-and-may-23-1984-second (last accessed 7 September 2019), 35.

[32] State courts often lacked the independence to resolve these disputes (especially when their nationals were involved). International courts (such as the ICJ) could only be seized by states exercising diplomatic protection on behalf of their nationals. The *Barcelona Traction* case illustrates both issues. *See* ICJ, *The Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, Judgment, 5 February 1970, ICJ Reports 1970, 3; J. Brooks, 'Privateer – II', *The New Yorker* (20 May 1979).

[33] A. R. Parra, *The History of ICSID* (Oxford University Press, 2012), 17–18.

[34] ICC, *International Commercial Arbitration – Practical Hints* (ICC, 1935), 7.

[35] Parra, *The History of ICSID* (2012), 21–2.

Bank kept a record of investor-state disputes arising in capital-importing countries (for example, expropriations or nationalizations) that were likely to affect the willingness of capital-exporting countries to contribute financially to its lending activities. President Black reported this monitoring activity in the context of the Egyptian nationalization of Belgian assets in 1960:

> [A]t the time of the Congo situation, [Nasser] seized all Belgian properties. I have sent word to him and his government that we're not going to make any loans to them now until they settle with the Belgians. We won't lend money to any country that seized property, until they make proper payment.[36]

This relational arrangement was all the more important given that national courts were badly equipped to enforce contracts or judgments with an extraterritorial element. In addition, parties were unlikely to use ad hoc methods of private ordering since one of the conditions of self-governance (i.e., repeated business interactions) was unlikely to be met at the transnational level owing to the atomized character of these business relationships. In other words, a third-party institution was needed to facilitate discussions and for 'good offices', but also to provide centralized information in order to enhance future enforcement. The ICC and the World Bank could play that role because of their unique position at the intersection of various (private and public) networks. A similar model – in which a third party facilitating the settlement of disputes gathered information on the business actors – was employed by the arbitral tribunals which emerged from the Champagne Fairs of the Middle Ages.[37] In a landmark article, Milgrom, North, and Weingast analysed how these tribunals ensured the effectiveness of a reputation-based system by encouraging merchants to behave honestly, imposing sanctions on violators, gathering information about how others had behaved in the past, and providing evidence of cheating.[38] Similarly, the ICC and the World Bank positioned themselves as repositories of information that facilitated dispute settlement, rather than offering themselves as true dispute settlement institutions or alternatives to local courts. Their role as the hub of an information network resulted in their preference for conciliation and, in the case of the ICC, in the consensual nature of the early arbitration system.

1.2.2 The Early Emphasis Placed on Conciliation

From the outset, the ICC and ICSID showed a strong preference for conciliation over arbitration. Conciliation differs from arbitration in that the parties are free to adopt or reject a settlement proposed by a conciliation body, whereas the disputing parties are bound to respect the terms of an arbitral tribunal's award. In accordance with their objectives of promoting greater peace and prosperity, the ICC and ICSID sought to preserve the continuity of business relationships by favouring conciliatory

[36] The World Bank/IFC Archives, Oral History Program, Transcript of interview with E. R. Black (1961), 46.

[37] P. R. Milgrom, *et al.*, 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges and the Champagne Fairs', *Economics and Politics*, 2 (1990), 1.

[38] Milgrom *et al.*, 'The Role of Institutions in the Revival of Trade' (1990), 1.

modes of dispute settlement. However, for both entities, this preference for conciliation was unsuccessful, because the disputing parties increasingly showed a preference for more institutionalized forms of dispute resolution.

When it launched its dispute resolution system in the 1920s, the ICC strongly encouraged parties to seek conciliation rather than to resort to arbitration.[39] This apparent preference for conciliation was in reality dictated by pragmatism and common sense, as the existing legal framework lacked the means of enforcement necessary for arbitration. In 1922, the ICC insisted that disputes should be settled through conciliation 'without recourse either to the Courts or to arbitration properly so called'.[40] In its 1922 Rules, the ICC distinguished between conciliation services, arbitration services 'without legal sanctions', and arbitration services 'with legal sanctions'.[41] The first part of the 1922 Rules accordingly laid out 'rules of procedure for the conciliation and good offices'. Pursuant to these rules, parties could submit their disputes to a standing body called the 'Administrative Commission', which was in charge of making 'friendly suggestions' on how to settle disputes.[42] National Committee delegates of the same nationality as the disputing parties sat on this Administrative Commission.[43] The goal was to use the networks which the ICC had developed at the local level in order to induce parties to agree to and enforce settlements. The ICC Rules of Conciliation and Arbitration reflect this goal by providing that, if one or both of the parties failed to appear, the Administrative Commission was empowered to communicate the proposed settlement to the relevant National Committees and to request them 'to use their influence with the parties to accept the settlement proposed by the Commission'.[44] The goal clearly was to pressure the parties into accepting settlements by appealing to reputational bonds at a local level.[45]

At first, this policy appears to have been relatively successful. For instance, between 1923 and 1928, seventy-one cases were resolved through conciliation or agreement of the parties 'at the suggestion of' the ICC'.[46] By contrast, only twelve cases were resolved through arbitration during this time period.[47] Between 1934 and 1938, 81 per cent of the cases brought to the ICC were settled through conciliation.[48]

[39] ICC, *International Commercial Arbitration – Practical Hints* (1935), 3: '[c]onciliation should be tried before arbitration.'

[40] ICC Rules of Conciliation (Good Offices) and Arbitration (1922), Introduction (as cited by S. Hamilton, 'ICC Conciliation: A Glimpse into History', *ICC International Court of Arbitration Bulletin, Special Supplement 2001 – ADR: International Applications* (2001), 23, 24.

[41] G. L. Ridgeway, *Merchants of Peace – Twenty Years of Business Diplomacy through the International Chamber of Commerce 1919–1938* (Columbia University Press, 1938), 322.

[42] ICC Rules of Conciliation (Good Offices) and Arbitration (1922), Section A, Art. I.

[43] *See* 'La procédure de conciliation de la Chambre de Commerce Internationale', *L'Economie internationale*, 10(2) (1938), 22.

[44] ICC Rules of Conciliation and Arbitration (1927), Art. 3(3).

[45] Elinor Ostrom noted how some institutions are organized in 'multiple layers of nested enterprises' in order to operate over a larger territory. *See* E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990), ch. 3.

[46] *Journal of the International Chamber of Commerce*, 17 (1928), 21.

[47] *Journal of the International Chamber of Commerce*, 17 (1928), 21.

[48] *Brochure from the International Chamber of Commerce* (ICC, February 1938), 14.

The purpose of the ICC was very clear: by encouraging parties to rely on conciliation, the ICC made repeat business among them more attractive and likely – in 1935, the ICC accordingly advised that 'the more conciliatory the parties show themselves, the more likelihood there is that they will remain on good terms and continue to do profitable business together in the future'.[49] In 1954, the ICC re-affirmed its position that '[c]onciliation is always to be preferred to Arbitration'.[50]

However, with time, the ICC progressively came to prefer arbitration over conciliation.[51] As a sign of this changing policy, the ICC referred to 'optional conciliation' (instead of 'conciliation') in 1933.[52] Its 1934 Rules clarified that the initiation of an arbitration was not conditional on prior conciliation between the parties.[53] In 1969, the ICC reported a 'relatively modest number of conciliation cases'.[54] In 1997, only seven requests for conciliation were filed with the ICC (as compared with 462 requests for arbitration).[55] In 1998, the ICC renamed its rules 'ICC Rules of Arbitration' (replacing the former 'ICC Rules of Conciliation and Arbitration').[56]

In fact, a review of the figures made public by the ICC in 1928 might offer an explanation as to why the recourse to conciliation initially prevailed over arbitration, but then progressively declined. Prior to 1928, 147 out of 260 matters had been dropped because the defendant declined to submit to arbitration, deeming itself 'not . . . bound by the arbitration clause'.[57] In other words, plaintiffs often wished to submit their claims to arbitration for the majority of disputes, but could not do so because arbitration clauses (and arbitral awards) were not enforceable at the time. Because of these enforcement issues, conciliation may have been a second-best option for the disputing parties. As we shall see, these enforcement issues were resolved over time, such that the ICC was able to accommodate the growing demand for arbitration.

Similarly, ICSID offered and promoted conciliation services from its inception, but without success. In fact, as we have seen, the ICSID system arose out of a need to institutionalize the intervention of the World Bank (or its prominent representatives) as conciliators in the late 1950s and early 1960s. The ICSID Convention put conciliation on an equal footing with arbitration, devoting a full section to its

[49] ICC, *International Commercial Arbitration – Practical Hints* (ICC, 1935), 4.
[50] ICC, *Practical Hints on International Commercial Arbitration* (ICC, 1954), 4.
[51] Hamilton, 'ICC Conciliation: A Glimpse into History' (2001), 23, 29.
[52] ICC, *Resolutions Adopted by the Seventh Congress of the International Chamber of Commerce Vienna, May 29th–June 3rd 1933*, Brochure no. 83 (ICC, 1933), Resolution no. 19, 23.
[53] 'Un nouveau texte du Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale', *L'economie internationale*, 6(1) (1934), 11.
[54] '50 ans d'arbitrage de la CCI', *Nouvelles de la CCI*, XXXV(5–6) (1969): 'le nombre relativement modeste des recours à la conciliation'.
[55] '1998 Statistical Report', *ICC International Court of Arbitration Bulletin*, 10(1) (1999), 4.
[56] It should be noted, however, that the ICC replaced the Conciliation Rules with ADR Rules in 2001. The ADR Rules have not had significant success so far: twenty-one new cases were filed under the ICC ADR Rules in 2012, as compared with 759 arbitration cases ('2012 Statistical Report', *ICC International Court of Arbitration Bulletin*, 24(1) (2013)).
[57] *See* the figures reported in *Journal of the International Chamber of Commerce*, 17 (1928), 21.

conciliation services.[58] Early on, ICSID officials favoured these conciliation services,[59] but this policy was relatively unsuccessful – since the creation of its conciliation services, only thirteen such cases have been submitted to ICSID, as compared with 886 arbitration cases.[60] In the mid-2000s, ICSID tried to revive its conciliation procedure. The ICSID Secretariat decided that, when acknowledging receipt of a request for arbitration, it should draw the disputing parties' attention to the possibility of using ICSID conciliation services.[61] This policy was also discussed in the following extract from a discussion paper released by ICSID in 2004:

> ICSID also provides facilities for the settlement of disputes by conciliation. The Centre now actively promotes conciliation as a relatively low-cost alternative to arbitration that may better preserve business relationships between the parties. On receipt of a request for arbitration, ICSID calls the attention of the parties to the conciliation alternative. Mediation may in some cases be a more effective means of reaching an amicable settlement than the comparatively formal conciliation procedures. In addition to promoting its conciliation facilities, ICSID has therefore begun to examine the possibility of helping to sponsor the establishment of a mediation service for investor-to-State disputes.[62]

A follow-up paper published by ICSID in 2005 hailed the '[u]niformly positive comments' received from the public on the proposed creation of mediation services.[63] Since then, however, ICSID does not appear to have taken further steps to implement this service subsequent to this paper.

The examples of the ICC and ICSID illustrate how efforts to promote consensual methods of dispute resolution (such as mediation and conciliation) have been pursued without much success, but the reasons for this failure have not yet been explored.[64] This failure can to a large extent be explained by the fact that the ICC and ICSID attempted to implement a relation-based model, with all of its inherent limitations. The relation-based model works under certain conditions: namely, if information concerning business actors is freely available and if actors anticipate that their business relationships will continue over the long term (if this latter condition is not fulfilled, an 'end-game' problem might arise and encourage the actors to cease cooperating). In practice, the first condition appears to have created difficulties because arbitral institutions have proved unable to successfully act as information hubs (*see* below), while the second condition has been similarly

[58] ICSID Convention, 1965, s. 3.

[59] *See*, for example, A. Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States', in Académie de Droit International de La Haye (ed.), *Recueil des Cours*, vol. 136 (Brill Nijhoff, 1973), 332, 341: '[i]n my view conciliation under the Centre's auspices may in certain situations be preferable to arbitration.'

[60] *See* the list of cases available at http://icsid.worldbank.org (last accessed 24 March 2022).

[61] Parra, *The History of ICSID* (2012), 257.

[62] ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration', Discussion Paper (22 October 2004), para. 18.

[63] ICSID Secretariat, 'Suggested Changes to the ICSID Rules and Regulations', Working Paper (12 May 2005), para. 5.

[64] *See*, however, in relation to investment disputes, W. M. Reisman, 'International Investment Arbitration and ADR: Married but Best Living Apart', *ICSID Review*, 24(1) (2009), 185, 191.

problematic in the context of economic crises where business actors no longer anticipated continuing relationships with their counterparts.

As a result of these structural defects, the desire for conciliation-based systems yielded to the necessity to provide a more legalistic and formal dispute resolution system, although an attempt was still made to maintain some of the characteristics of the relation-based model.

1.2.3 Reviving the Medieval Law Merchant

The example of the ICC is striking as an effort to combine a more formalized dispute resolution system with features of the relation-based model. The ICC appears to have pushed for a mixed model because it concluded that no other system was sufficiently reliable to sustain an efficient system of dispute resolution. The influence of this relation-based approach has left traces in at least three areas: the enforceability of arbitration clauses, the appointment of arbitrators and the enforcement of awards.

1.2.3.1 The Enforceability of Arbitration Clauses

At the time when the ICC was created, some legal systems did not fully recognize the enforceability of contractual agreements to submit to arbitration. This was the case for instance in France until at least 1925. Despite this, the ICC still sought to promote the inclusion of arbitration clauses in international contracts, arguing that it was in a position to ensure their enforceability without relying on national legal systems. For instance, in 1924, the ICC advised businesses to include its model arbitration clause in their contracts, on the grounds that it was able to enforce these clauses through pressure and by retaliating against non-compliant parties:

> This clause has great value as it has behind it the prestige of the International Chamber of Commerce, a federation of 600 industrial Organizations, Chambers of Commerce, Associations of Bankers and Shipping Associations belonging to 40 of the principal countries of the world. Anyone who signed this clause and attempted to repudiate his obligation by refusing to accept arbitration by the International Chamber of Commerce when a dispute arose, would be subjected to pressure on the part of the International Chamber of Commerce and of the commercial organization, whether national or local, to which he belonged. Should he persist in his refusal, he would run the risk of ruining his commercial reputation and losing his credit.[65]

The ICC's goal was clear: instead of relying on legal means of enforcement, it enhanced the strength of its arbitration clauses by means of its networked structure, which could be used as an information hub through which the contractual obligation to arbitrate could be enforced. This fits perfectly with the relation-based model, in which institutions can, on Dixit's account, 'disseminate information about any misbehaviour more quickly and widely, and can better arrange sanctions such as denial of future trading opportunities'.[66]

[65] *See* ICC, *The Arbitration of the International Chamber of Commerce* (ICC, 1924), 3.
[66] Dixit, *Lawlessness and Economics* (2004), 50.

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In parallel to this policy, the ICC sought to improve the legal framework that guaranteed the enforceability of arbitration agreements. For instance, it actively encouraged the efforts that led to the adoption of a statute guaranteeing the validity of arbitration clauses in France in 1925.[67] The ICC also encouraged states to sign and ratify the Geneva Protocol on Arbitration Clauses.[68] It is interesting to note that the policy of the ICC was fundamentally pragmatic, in that it encouraged the use of conciliation, while constructing a legal framework that would make possible the future development of international arbitration.

1.2.3.2 The Appointment of Arbitrators

The ICC's relation-based model also governed the appointment of arbitrators. In the 1920s and 1930s, the ICC appointed arbitrators in coordination with its National Committees. The ICC Arbitration Rules of 1922 provide that the Court of Arbitration 'shall request the National Committees to furnish it with the names of technically qualified arbitrators, as and when required, for appointment as arbitrators in the cases submitted to it, and from amongst them the Committee shall proceed to appoint'.[69] The Explanatory Commentary on the 1922 Rules also indicates that, at the time, arbitrators were rarely jurists or lawyers;[70] instead, most arbitrators were influential actors in various branches of trade and industry.[71] The ICC insisted on the 'trust' relationship between parties and arbitrators that were selected from among 'all the great industrial and trading industries of nearly every country in the world'.[72] As part of this trust relationship, it was not unusual for arbitrators to work for free. For instance, in ICC Case no. 301, the arbitrator did not request the payment of a fee.[73]

The original features of ICC arbitration reflected a conception of arbitrators as prominent members of a community, who exercised authority and gained prestige (rather than money) from the settlement of important disputes within this community. This conception of the role of arbitrators remained widespread for some time, as shown, for example, by the decision of the US Supreme Court in *Commonwealth Coatings* v. *Continental Casualty Co.*, to the effect that arbitrators were 'men of affairs, not apart from, but of, the marketplace'.[74] Promoting the appointment of arbitrators drawn from the marketplace itself was a way to sustain the circulation of information concerning cheaters and to

[67] These efforts are retraced in Schinazi, *The Three Ages of International Commercial Arbitration*, pt. 1, ch. 2; *see also* Grisel *et al.*, 'Aux origines de l'arbitrage commercial contemporain' (2016), 1, 17.

[68] *See* Grisel *et al.*, 'Aux origines de l'arbitrage commercial contemporain' (2016), 1, 18. There is debate in the literature as to whether the ICC had any active role in the negotiations leading to the Protocol. *See* Schinazi, *The Three Ages of International Commercial Arbitration*, pt. 2, ch. 1.

[69] ICC Rules of Conciliation (Good Offices) and Arbitration (1922), Arts. VI/XXVI.

[70] ICC, Explanatory Commentary of the Rules of Conciliation (Good Offices) and Arbitration, Appendix to Brochure no. 21 (ICC, 1925), 4.

[71] ICC, *International Commercial Arbitration – Practical Hints* (1935), 6–7.

[72] ICC, *International Commercial Arbitration – Practical Hints* (1935), 7.

[73] ICC, *International Commercial Arbitration – Practical Hints* (1935), 10.

[74] US Supreme Court, *Commonwealth Coatings* v. *Continental Cas.*, Decision, 18 November 1968, 393 U.S. 145 (1968), 150.

encourage self-regulation. The cooperation-based nature of international arbitration was emphasized in the extant literature. For instance, one of the first scholars to study ICC arbitration described international arbitration as 'a truly private jurisdiction, sustained by corporative authority, and whose decisions are backed by sanctions that are psychological but nonetheless efficient'.[75]

1.2.3.3 The Enforcement of Awards

Most importantly, the ICC developed a system of enforcing arbitration awards that relied on self-enforcement mechanisms that are typical of private orders.[76] The ICC played an active role in this system of self-regulation by publicizing the names of non-complying parties, while requesting its National Committees to pressure these parties to abide by the terms of the arbitral awards. The ICC Arbitration Rules of 1922 reflect these efforts by providing that '[t]he parties are *in honour* bound to carry out the award of the arbitrators'.[77] These same Arbitration Rules provide for the ICC to pressure a losing party into accepting an award, for instance by publicizing its name as well as the details of the unenforced award, or by requesting its National Committees to take action against non-complying parties:

> b) In the event that the party against whom the award has been rendered fails to comply with the terms thereof within a period of 30 days, counting from the notification of the award, the party in whose favour the award has been rendered may notify the National Committee or the Organization Member of the International Chamber of Commerce, as the case may be, that the award has not been carried out by the opposite party; thereupon the Court shall notify the Chamber of Commerce or other business organization to which such defaulting member may belong and shall request such Chamber of Commerce or business organization to apply such disciplinary measures as it may think fit and proper under the circumstances, in respect of the defaulting member.
> c) The Court of Arbitration of the International Chamber of Commerce shall also have the right to request that the name of the defaulting party be published in the official publications of the International Chamber of Commerce, in those of the National Committees, together with the text of the award so remaining unexecuted.[78]

Under this system, the ICC served as a conduit for moral sanctions and as a repository of information. The goal was to threaten or harm the reputation of the defaulting party, so that the latter would voluntarily comply with the arbitral award. In this system, the dispute resolution institution plays a role similar to that identified by Milgrom, North, and Weingast, in which an institution maintains a centralized bank of information and shares it with business actors in order to

[75] R. Vulliemin, *De l'arbitrage commercial particulièrement en matière internationale* (Rousseau & Cie, 1931), 161: 'une véritable juridiction privée, appuyée sur l'autorité de la corporation et dont les décisions sont munies de sanctions qui pour être d'ordre psychologique n'en sont pas moins efficaces'.

[76] *See*, for instance, L. Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry', *Journal of Legal Studies*, 11 (1992), 115, 138 *et seq*.

[77] ICC Rules of Conciliation (Good Offices) and Arbitration (1922), Arts. XX/XLI (emphasis added).

[78] ICC Rules of Conciliation (Good Offices) and Arbitration (1922), Arts. XX/XLI (emphasis added).

promote self-regulation. In this way, the institution becomes an information hub – or the place where a ledger is kept – providing a complete record of transnational business disputes.

These self-enforcement mechanisms do not exclude the possibility of legal enforcement before local courts, but the ICC reports in 1924 that '[t]he moral penalties are nearly always a sufficient guarantee for the execution of the award without having to refer to Civil Courts'.[79]

Despite the publicity given to its relation-based system of enforcement, the ICC quickly abandoned it in the face of several problems. The reasons for this change of policy are multifaceted and will be identified below. What appears to have been of crucial importance are the difficulties involved in sustaining the core conditions of self-governance, namely the possibility of long-term business relationships and the free circulation of information concerning members.

1.3 The Emergence and Consolidation of Rule-Based Governance: The Judicialization of International Arbitration

Relation-based governance declined as arbitral institutions progressively faced constraints that undermined the foundations on which this type of governance was based. In this context, the judicialization of international arbitration unfolded at a rapid pace, with both commercial and investment arbitration progressively taking on the features of rule-based governance.

1.3.1 The Demise of Relation-Based Governance in International Arbitration

The relation-based model is premised on two conditions. First, actors must have an incentive to cooperate by entering into long-term, potentially indefinite relationships with other business actors. Axelrod emphasizes the 'importance of long-term interaction for the stability of cooperation'.[80] Second, the information concerning these business actors must be shared effectively, whether directly or indirectly (i.e., through an institutional mechanism). Ostrom highlights the role of 'monitoring' (based on free flows of information or, alternatively, on an institutional hub of information) in the successful organization of self-governance.[81] However, arbitral institutions such as the ICC were unable to guarantee both conditions.

[79] ICC, *The Arbitration of the International Chamber of Commerce* (1924), 8.

[80] R. Axelrod, *The Evolution of Co-operation* (Penguin Books, 1990), 60.

[81] Ostrom, *Governing the Commons* (1990), 93–4: '[i]t is obvious from our case studies, however, that even in repeated settings where reputation is important and where individuals share the norm of keeping agreements, reputation and shared norms are insufficient by themselves to produce stable cooperative behaviour over the long run. If they had been sufficient, appropriators could have avoided investing in resources in monitoring and sanctioning activities. In all of the long-enduring cases, however, active investments in monitoring and sanctioning activities are quite apparent'.

1.3.1.1 The Impairment of Long-Term Business Relationships

Self-governance can emerge when business actors expect their business relationships to continue in the future. If business actors anticipate that their business relationships are going to end, they will tend to renege on their promises to cooperate and breach contractual undertakings. They might deem themselves no longer bound by arbitration clauses or decide not to comply with arbitral awards. This 'end-game' problem may arise for a variety of reasons. For instance, a party may decide to put an end to a business relationship in order to gain short-term benefits, or a trader may anticipate dire economic conditions that will affect the prospect of future business relations and thus create an incentive for breaching contractual undertakings. These 'end-game' problems can in turn generate a demand for legal certainty, as certain actors may seek to protect their existing contractual relationships and litigants may demand more predictability in the settlement of their disputes.

The latter scenario occurred in the late 1920s in the context of the Great Depression. During that period, the ICC saw a steep increase in the number of cases submitted to its arbitration system.[82] Disputing parties began acting in ways that betrayed a lack of confidence in the future and a corresponding need for legal certainty. For example, in written correspondence with the ICC at the end of 1929, the general counsel of a Wisconsin-based company made clear that his firm expected legal certainty from the dispute settlement process offered by the ICC, and could not 'believe that [the ICC] can seriously mean to state ... that arbitration tribunals will interpret a dispute between two contracting parties on the basis of some vague general considerations of equity, and will totally disregard the specific written undertakings of the parties'.[83]

After the devaluation of the pound sterling in September 1931, the ICC came under similar pressure to increase legal certainty by publicizing awards and scrutinizing not just the form but also the substance of draft awards.[84] The publication of awards was intended to allow parties to consult the emerging case law of the ICC in order to anticipate how their own disputes would be resolved, while the extended review of draft awards by the ICC Court was intended to increase the predictability of the whole system by improving consistency across decisions.[85]

[82] M. Rothé, *La clause compromissoire et l'arbitrage depuis la loi de 1925* (Domat-Montchrestien, 1934), 144–5: '[u]ne circulaire du Secrétariat général en date du 15 janvier 1932 a fait connaître que la crise actuelle a eu, entre autres conséquences, celle d'augmenter le nombre des litiges soumis à la Cour d'arbitrage de la Chambre de commerce internationale. En particulier, de nombreuses difficultés soulevées à propos de contrats conclus en livres sterling par la récente dépréciation internationale de la livre sont actuellement en voie de règlement. Plus que jamais, dit le document auquel nous nous référons, les industriels, commerçants et banquiers ont intérêt à attribuer d'avance dans leurs contrats avec l'étranger, compétence à la Cour d'arbitrage de la Chambre de commerce internationale ; ils s'épargnent ainsi des frais de justice considérables et de longs délais dans le règlement des affaires.'

[83] Correspondence between the Commercial Attorney of Company X and the ICC (Paper no. 3897); *see also* F. Grisel, 'Droit et non-droit dans les sentences arbitrales CCI: une perspective historique', *ICC International Court of Arbitration Bulletin*, 25(2) (2014), 13, 16.

[84] Grisel *et al.*, 'Aux origines de l'arbitrage commercial contemporain' (2016), 403, 422.

[85] F. Grisel, 'Control of Awards and Re-centralisation of International Commercial Arbitration', *Civil Justice Quarterly*, 25 (2006), 166.

The need for a system of provisional measures also arose at this time. The 'urgent cases'[86] that arose during the Great Depression prompted the ICC to give power to the President of its Court of Arbitration (before an arbitral tribunal had been constituted) or to the arbitral tribunal itself (once it had been constituted) the power to appoint one or several experts 'to make statement of facts, adopt all conservatory measures and if necessary to sell, after having stated the facts, the goods in dispute for the account of their lawful owner . . .'.[87]

In sum, the end-game problems raised by the Great Depression moved the ICC towards rule-based governance. Business actors could no longer rely on a relation-based model, as the economic crisis severely damaged the prospect of long-term business relationships. In this context, the expectation that business partners would renege on their contractual promises increased sharply, and self-regulation based on the expectation of repeated interactions became problematic.

1.3.1.2 The Failure to Manage Information through Institutional Means

The system put in place by the ICC for the enforcement of awards through information-sharing devices progressively fell into disfavour. The informational remedies designed by the ICC appear to have been inadequate in the context of a growing adversarialism among disputing parties. In this context, the ICC increasingly ran the risk of being perceived as lacking neutrality in the settlement of business disputes. As early as 1927, the ICC revised its system of self-enforcement, fearing that it would be sued for libel by disgruntled losing parties whose names had been publicized pursuant to the ICC Rules of Arbitration. The *travaux préparatoires* leading to the revision of its rules of arbitration in 1927 reflect the limitations of the system put in place by the ICC:

> The old Rules provided for the publication of the names of parties who refused to comply with arbitral awards. This provision was never applied. It was without practical value. An award not complied with might be annulled by the Courts, in which case the party whose name had been published could have sued the Court of Arbitration for libel and claimed damages for the injury sustained. So the Court of Arbitration could only take such a measure after the Courts had ordered the enforcement of the award, that is when such publication was no longer of any practical value. So the Committee decided to delete the paragraph altogether.[88]

Following these discussions, the ICC abandoned the practice of publicizing the names of losing parties who refused to comply with the terms of arbitral awards, but retained the right to notify local Chambers of Commerce and business organizations and to ask them to take 'suitable measures' against non-complying parties.

[86] *See* R. Marx, 'The Court of Arbitration of the International Chamber of Commerce – Revision of the Rules', *World Trade*, 11 (1931), 301, 302: '[e]xperience has shown that urgent cases may arise which necessitate, outside the monthly meetings of the Executive Committee, a decision concerning conservatory measures to be taken in the interest of one or other of the parties'.

[87] ICC Rules of Conciliation and Arbitration (1932), Art. 11.

[88] ICC Brochure no. 50, *Report of the Secretary General Comparing the Old and New Rules and Describing the Principal Amendments* (1927), 6.

Article 25 of the ICC Rules of Conciliation and Arbitration adopted in 1927 reflects this compromise:

> 2. In case the party against whom the award is made does not comply therewith within thirty days of the notification of the award, the party in whose favour the award is made may so inform his National Committee or Organization Member of the International Chamber of Commerce as the case may be.
> 3. The latter in such event shall inform the Court of Arbitration which shall then ask the Chamber of Commerce or any other organization to which the recalcitrant member belongs to take suitable measures.[89]

In 1947, the third paragraph of this provision was amended to provide for the Court of Arbitration to 'ask the [ICC] National Committee, or in the absence of a National Committee, any other organization to which the recalcitrant member belongs, to take suitable measures'.[90]

However, the ICC had trouble using these powers effectively. In ICC Case no. 786, for example, the winning party (a French company) requested the assistance of the ICC Court of Arbitration against the losing party (a British company), because the latter refused to comply with the terms of an arbitral award.[91] The ICC Court of Arbitration requested its UK National Committee to take 'suitable measures' against the losing party.[92] However, the UK National Committee refused to do so on the grounds that the losing party was not an ICC member and that any action against this party could be potentially harmful to the ICC: 'We feel it to be both unavailing and harmful to ICC work, for us to press a firm, not one of our members, to carry out an award which they refuse to recognize.'[93] When recommending the suppression of these powers from the Rules of Arbitration in 1955, the ICC Secretary General, Frédéric Eisemann, emphasized the 'inefficient or even impossible' character of the 'moral pressures' exercised by the ICC through its National Committees.[94]

The relation-based system for the enforcement of arbitral awards therefore seems to have been abandoned because of its inefficiency. Two explanations can be offered for the impracticality of this system. First, the difficulties of enforcing awards through reputational devices had grown substantially in a business universe that became increasingly large and complex, and in which information was increasingly difficult to gather through institutional means. The UK National Committee of the ICC was unable to exercise pressure on a company which was not a member of the ICC and with which it had no prior relationship. Second, the ICC's involvement in

[89] ICC Rules of Conciliation and Arbitration (1927), Art. 25.
[90] ICC Rules of Conciliation and Arbitration (1947), Art. 26(3).
[91] Transcript of the 204th session of the Court of Arbitration, 11 April 1951, ICC Document no. 410–50. *See* Grisel *et al.*, 'Aux origines de l'arbitrage commercial contemporain' (2016), 403, 440. The award was rendered by P. Sanders and published in *Arbitrale Rechstpraak*, 365 (1951), 511.
[92] Grisel *et al.*, 'Aux origines de l'arbitrage commercial contemporain' (2016), 403, 440.
[93] Transcript of the session of 4 July 1941 of the Court of Arbitration, ICC Document no. 410–63.
[94] *See* 'Le nouveau règlement de conciliation et d'arbitrage', note presented by F. Eisemann at the session of 22 June 1955 of the Court of Arbitration, ICC Document no. 410/346, 7.

the enforcement of awards was less defensible in an adversarial environment where disputing parties were progressively developing a preference for due process. In that context, to avoid the appearance of partiality, it was important for the ICC to no longer be seen as intervening on behalf of one party to facilitate the enforcement of an arbitral award.[95]

The decline of relation-based governance paved the way for the legal enforcement of arbitral awards before national courts. It seems that the ICC had been using moral pressure as a second-best alternative to legal enforcement from the beginning. Indeed, the ICC appears to have favoured judicial enforcement before national courts (as opposed to self-enforcement) from the outset, but could not count on a sufficiently reliable legal framework to achieve that goal. During the Congress held in London in 1921, the ICC recommended that the national courts of member states improve their regime of legal enforcement (*exequatur*) of arbitral awards.[96] In order to enhance legal enforcement of these awards, the ICC actively encouraged the creation of a multilateral treaty very early in its existence; in 1926–7, the Arbitration Committee of the ICC requested the League of Nations to consider the question of the enforcement of arbitral awards and participated in drafting a convention concerning the execution of foreign arbitral awards. The final text, drafted by the League of Nations with the support of the ICC,[97] was signed on 26 September 1927 in Geneva,[98] and established uniform conditions for the enforcement of arbitral awards among state parties. These efforts were redoubled with the ICC's active involvement in the negotiations leading to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958.[99]

The ICC acted on two parallel fronts: it contributed to creating uniform grounds for the enforcement of arbitral awards while at the same time adapting its rules to the possibility of such enforcement. This possibility was reflected in the ICC Arbitration Rules adopted in 1947, which provided that '[n]othing in the aforementioned provisions shall in any way prejudice the right of the successful party to seek

[95] Some arbitral institutions still provide today for similar mechanisms to favour the enforcement of arbitral awards. *See*, for instance, the CAM-CCBC Arbitration Rules (2011), Art. 11.2: '[i]f the arbitral award is not complied with, the injured party can communicate this fact to the CAM-CCBC so that it can disclose this fact to other arbitration institutions and chambers of commerce or analogous entities in Brazil or abroad'. An ICC official reported to the author that, even today, companies make enquiries concerning the existence of a 'black list' in which the ICC would compile the names of non-compliant parties.

[96] ICC, *Resolutions Adopted at the London Congress 1921* (ICC, 1921), 20: 'in all countries an effort be made to secure legislation that will render executory the awards of foreign arbitrators without reference to the nationality of the parties, without further discussion upon the merits, limiting the enquiry merely to ascertaining whether or not the rules of procedure in force in the country where the award was made have been complied with, and whether or not such awards contain anything contrary to public order in the country in which the enforcement or *exequatur* is demanded'.

[97] ICC, *Résolutions votées au Congrès de Stockholm (27 juin–2 juillet 1927)*, Brochure no. 60, Resolution no. 8.

[98] *See* Ridgeway, *Merchants of Peace* (1938), 329.

[99] *See* F. Grisel, 'Treaty-Making Between Public Authority and Private Interests: The Genealogy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards', *European Journal of International Law*, 28(1) (2017), 73.

enforcement of the award'.[100] After submitting a preliminary draft convention to the United Nations in 1953, the ICC abandoned all reference in its 1955 Rules of Arbitration to the policy of applying moral pressure to enforce awards. Under the new rules, the ICC Court of Arbitration had to make 'best efforts for the award to be enforceable at law',[101] a phrase that appears in the most recent version of the ICC Arbitration Rules.[102]

Although ICSID has never formally relied on reputational mechanisms to enforce its awards, some practitioners of ICSID arbitration have highlighted the so-called 'World Bank factor' arising from that organization's lending activities: they suggest that states are reluctant to renege on their promise to comply with ICSID awards,[103] because this could negatively affect future loan negotiations with the World Bank.[104] As a consequence, they argue that the affiliation of ICSID with the World Bank indirectly supports the enforcement of arbitral awards by states.

For both the ICC and ICSID, rule-based governance became the dominant model, almost completely replacing the relation-based model. Both arbitral institutions gradually designed rules and procedures in order to accommodate their users' demands – the ICC describes arbitral institutions as 'private legislators'[105] that must continually respond to the needs of business users by codifying rules and procedures.[106]

1.3.2 The Emergence and Consolidation of Rule-Based Governance in Commercial Arbitration

In the post-war period, ICC officials concentrated their efforts on elaborating streamlined procedures pertaining to the constitution of arbitral tribunals, the conduct of arbitral proceedings and the enforcement of arbitral awards. These efforts at codification were undertaken in response to user demands for 'judicial' certainty and due process in arbitration.[107] I will focus here on three examples of this process.

[100] ICC Rules of Conciliation and Arbitration (1947), Art. 26 (emphasis added).
[101] ICC Rules of Conciliation and Arbitration (1955), Art. 31 (emphasis added).
[102] ICC Rules of Arbitration (2021), Art. 42: '[i]n all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law'.
[103] ICSID Convention, Art. 53(1).
[104] L. Reed *et al.*, *Guide to ICSID Arbitration* (Kluwer, 2010), 16.
[105] 'Un nouveau texte du Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale', *L'economie internationale*, 6(1) (1934), 11: '[e]n effet, cette jurisprudence selon laquelle les dispositions légales doivent céder le pas à la volonté des parties – jurisprudence due en partie à l'autorité dont jouit la Cour d'Arbitrage de la C.C.I. dans le monde – ouvre un vaste champ d'activité aux organisations arbitrales ainsi promues au rang de législateurs privés'.
[106] 'L'action de la C.C.I. dans le domaine juridique', *L'economie internationale*, 15(2) (1949), 17: '[l]e Règlement [d'arbitrage de la CCI], auquel il est à souhaiter que les hommes d'affaires de tous les pays recourent toujours davantage, est donc une œuvre vivante qui emprunte ses dispositions aux besoins de ceux qu'il sert'.
[107] The 'judicialization' of international arbitration is further described in Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017).

1.3.2.1 Arbitrators as Impartial and Independent Judges of International Business Disputes

During this period, the conception of the role of arbitrators evolved. For example, the ICC gradually promulgated rules concerning the impartiality and independence of arbitrators. Previously, the ICC had linked the notion of 'fairness of the trial' with the personal qualities of the arbitrators assigned to decide disputes submitted to arbitration.[108] The arbitral process was deemed to be fair on the grounds that the ICC appointed as arbitrators those individuals who were best suited to impartially resolve business disputes. As we have seen, the ICC insisted on the 'trust' relationship that parties should have with their arbitrators, which is a distinguishing feature of the relation-based model. According to the ICC, the establishment of trust relationships derived from its ability to select the best arbitrators from the business world:

> The International Chamber is . . . in close touch with all the great industrial and trading industries of nearly every country in the world and can always find the right man, no matter what qualifications the parties are entitled to expect. If arbitrations have to take place in a country far distant from the domicile of either or both of the parties – in Shanghai or Buenos Aires, Quebec or Calcutta, Mexico or Helsingfors – the International Chamber is always able to find a competent arbitrator of neutral nationality and proved impartiality.[109]

As its system of arbitration evolved and came under increasing strain from litigants, specific provisions were added to the ICC Rules aimed at ensuring the impartiality and independence of its arbitrators. The first relevant provision appeared during the Great Depression, when the ICC codified the right of parties to challenge arbitrators. This amendment to the 1932 Rules of Conciliation and Arbitration enabled the ICC Court of Arbitration to decide challenges made against arbitrators (without specifying the grounds upon which these challenges could be based).[110] A member of the ICC Court explained that this amendment was necessary to ensure the confidence of the parties in the impartiality of their arbitrators:

> [T]he Executive Committee [of the ICC Court of Arbitration] has in the past allowed arbitrators to be challenged, for instance in cases where business relations had at one time existed between the arbitrator and one of the parties. The confidence of both parties to the dispute in the impartiality of the arbitrator is one of the elements most essential to successful arbitration, and it is this very factor of confidence on which the argument is based in favour of the settlement of disputes between nationals of different countries by international arbitration instead of in a law court in which the foreign party frequently, though possibly

[108] ICC, *International Commercial Arbitration – Practical Hints* (1935), 4: 'the presence of an arbitrator nominated by the parties adds nothing to the fairness of the trial, the single arbitrator being quite capable as an umpire of arriving at an impartial and just decision', and '[the arbitrator] is an expert selected for his knowledge of the business, his common sense and impartiality, rather than for his legal attainments'.

[109] ICC, *International Commercial Arbitration – Practical Hints* (1935), 7.

[110] ICC Rules of Conciliation and Arbitration (1932), Art. 12(3).

> without justification, has not complete confidence . . . In view of this position, it was not considered sufficient to leave the right to challenge the arbitrator to be inferred from [the old rules].[111]

The second provision appeared later when the practice of the parties appointing arbitrators (as opposed to the nomination of arbitrators by the institution) became generalized. This practice first appeared in the ICC Arbitration Rules of 1947, in which each party was granted the possibility of nominating a coarbitrator.[112] This practice has become dominant over time – between 2007 and 2011, 95 per cent of the coarbitrators in three-member tribunals were appointed by the parties themselves, rather than by the ICC Court.[113] Of course, the parties might expect the arbitrator that they have selected to be positively predisposed towards their respective positions.[114] A prominent arbitrator testified to the potential issues raised by the appointment of arbitrators by disputing parties:

> I have strong reservations about the desirability of permitting party-appointed arbitrators. Even when a party-appointed arbitrator properly discharges his or her obligation impartially to decide the case, an appearance of partiality on the part of the party-appointed arbitrator is almost inevitable.[115]

The ICC anticipated these difficulties as early as 1975, when it amended its Arbitration Rules to require that a '[party-appointed arbitrator] shall be independent of the party nominating him'.[116] The ICC Arbitration Rules were again amended in 1988 to extend this requirement by providing that '[e]very arbitrator appointed or confirmed by the Court [including party-appointed arbitrators] must be *and remain* independent of the parties involved in the arbitration'.[117] In 2012, the requirement was broadened from 'independence' to 'impartiality'.[118]

The creation of 'judicial' duties of impartiality and independence marks the evolution towards rule-based governance, in which the third party tasked with resolving a dispute cannot be viewed as having close ties to the disputing parties (in contrast to relation-based governance which assumes that the arbitrator is a member of the community in which the dispute arises). Another sign of this judicialization process concerns the conduct of the proceedings.

1.3.2.2 The Conduct of the Proceedings

In recent decades, litigants before ICC tribunals have behaved in ways that are increasingly adversarial, using procedural devices that are characteristic of litigation

[111] Marx, 'The Court of Arbitration of the International Chamber of Commerce' (1931), 301.
[112] ICC Rules of Conciliation and Arbitration (1947), Art. 12(1).
[113] ICC, *The Secretariat's Guide to ICC Arbitration* (ICC, 2012), 3–457 (Table 17).
[114] On this phenomenon, *see* S. Lazareff, 'L'arbitre singe ou comment assassiner l'arbitrage', in G. Aksen, *Liber Amicorum in Honour of Robert Briner* (ICC, 2005), 477, 483.
[115] H. Smit, 'Dissenting Opinions in Arbitration', *ICC International Court of Arbitration Bulletin*, 15 (1) (2004), 37 (note 15).
[116] ICC Rules of Conciliation and Arbitration (1975), Art. 2(4).
[117] ICC Rules of Conciliation and Arbitration (1988), Art. 2(7) (emphasis added).
[118] ICC Rules of Arbitration (2012), Art. 11(1).

before courts. An ICC tribunal dismissed a case for lack of jurisdiction for the first time in 1951,[119] and challenges to the jurisdiction of arbitral tribunals are now routinely advanced. In addition, disputing parties have increasingly incorporated choice-of-law clauses into their contracts beginning in the 1960s and 1970s. As a consequence, arbitrators have more frequently applied the national law chosen by the parties rather than their own sense of business equity. Parties have also claimed that mandatory laws can displace the terms of contractual agreements. For instance, a sole arbitrator applied a mandatory rule of French law in five related cases between 1951 and 1955,[120] inaugurating a practice that would develop further in subsequent years.

The ICC began offering new services including fast-track arbitration, a programme to provide tribunals with 'neutral' technical experts and a system for processing requests from parties for interim relief (recently, an emergency arbitration service has also been made available). These procedural developments have deeply impacted the composition and work of arbitral tribunals. One can observe, for instance, an increasing number of legal specialists (a category that includes attorneys, law professors, and judges) among ICC arbitrators over the years.[121] Figure 1.1 shows the growing proportion of these specialists in the period from 1922 to 1972. The present period is, in effect, one of full-fledged judicialization.

1.3.3 The Emergence and Consolidation of Rule-Based Governance in Investment Arbitration

The judicialization of ICSID arbitration has unfolded in ways that can be distinguished from the evolution of ICC arbitration. Indeed, the procedural framework set out under the ICSID Convention has been remarkably stable, remaining untouched since 1965. Unlike the ICC framework, which has become gradually more judicialized over time, the ICSID framework was to some extent judicialized from the outset. The 1965 ICSID Convention already offered a rule-based model, to which disputing parties increasingly turned over time. In 2006, four amendments were made to the ICSID procedural rules which further pushed the ICSID framework closer to a 'judicial' model. The first change was the broadening of the disclosure requirements for arbitrators. This modification created a 'continuing obligation' for arbitrators to disclose facts that might affect their independence. The second change was the admission of *amicus curiae* submissions from non-litigant parties. The result of this procedural change was to provide access to the proceedings to the broader public, which had traditionally been excluded from participation in arbitral proceedings. The third change accomplished the same goal by allowing the public to attend arbitral hearings, unless either party objected. The fourth change was

[119] *See* ICC Case no. 787 (award rendered in 1951).

[120] *See* ICC Cases no. 760, 761, 762, 763 and 764 (the Paris Court of Appeals approved the decision of the sole arbitrator to apply French mandatory law on 13 April 1953).

[121] On this sociological evolution, *see* F. Grisel, 'Competition and Cooperation in International Commercial Arbitration – the Birth of a Transnational Legal Profession', *Law & Society Review*, 51(4) (2017), 790.

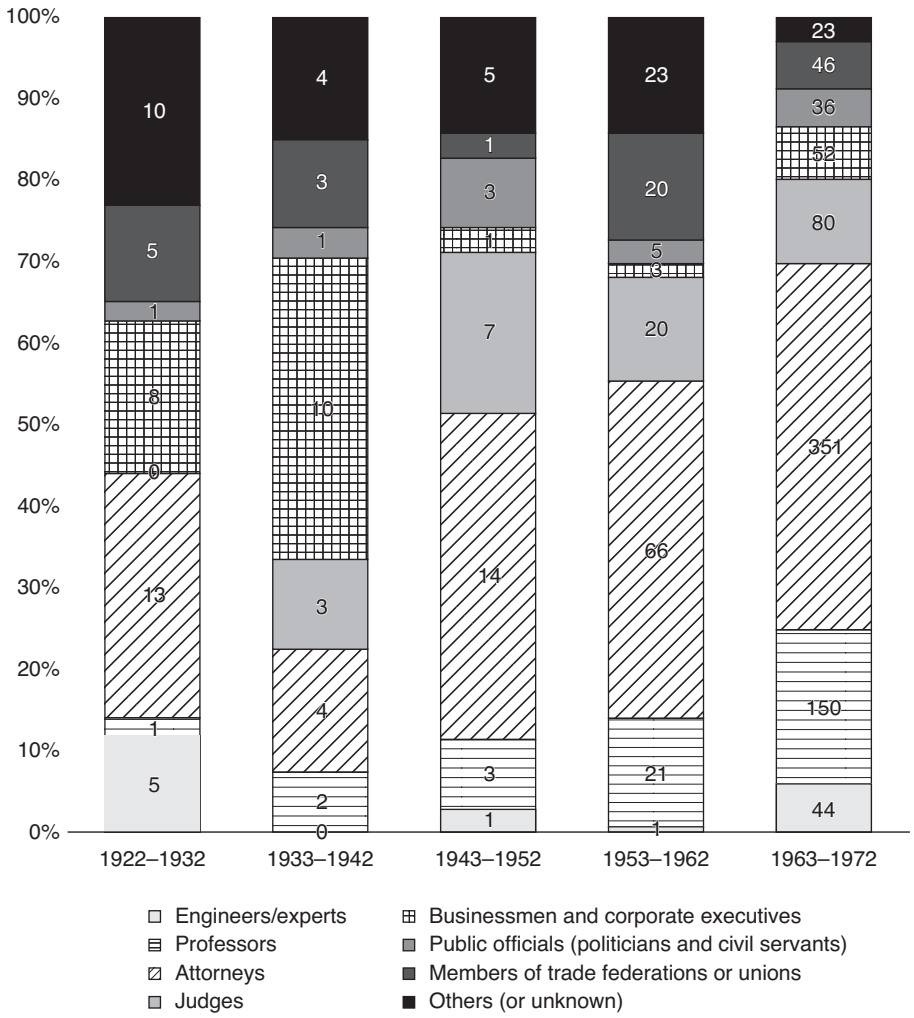

Figure 1.1: The Sociological Evolution of ICC Arbitrators (1922–72)[122]

intended to respond to the increasing adversarialism in ICSID proceedings, and specifically to situations where a party claims that its opponent's case is devoid of merit at an early stage of the proceedings. The ICSID Arbitration Rules were amended to allow a party to seek early dismissal of a case only on the grounds that it was 'manifestly without legal merit'.[123] ICSID arbitration, like ICC arbitration, came under pressure from disputing parties to evolve towards a fully developed rule-based model, increasingly resembling that of courts.

[122] Reproduced from Grisel, 'Competition and Cooperation in International Commercial Arbitration' (2017), 790, 808.
[123] ICSID Arbitration Rules (2006), Rule 41(5).

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1.4 Conclusion

To conclude, international arbitration has been characterized by a fundamental evolution which occurred throughout the twentieth century and has continued into the twenty-first century. This type of dispute resolution has evolved from a model in which parties are discouraged from having recourse to adversarial proceedings. Under this model, arbitrators are members of the relevant business community and apply equity rather than law to resolve disputes. Their final decisions are enforced on a voluntary basis, rather than through appeals to state courts. The goal of this relation-based model was to promote self-governance and encourage business actors to cultivate long-term relationships. However, the fundamental characteristics of this model – namely, the expectation of long-term business interactions and perfect information – came under increased pressure with the unfolding of economic crises and the increasingly adversarial behaviour of disputing parties in arbitral proceedings. Under these circumstances, an alternative model developed in which arbitrators are expected to apply clearly defined rules and to adopt a legalistic approach to reaching decisions, while arbitral awards are enforced before state courts. The ICSID dispute resolution system adopted features of this rule-based model from the beginning of its existence, but also sought to promote a relation-based model emphasizing conciliation, to no avail. The ICC arbitration system gradually developed rule-based features over its long history, a phenomenon that has been largely ignored by scholars of international arbitration to date. This historical development is an example of social evolution in which governance systems grow organically in scope and complexity to match the needs of the communities they seek to regulate.