

# Hiding in Plain Sight: The Power of Public Governance in International Arbitration

---

C.J.W. Baaij\*

*A handful of powerful transnational private institutions provide the bulk of cross-border or international commercial arbitration (“ICA”). The conventional thinking is that these institutions have significant autonomy and principally operate global contract dispute resolution outside the influence of state institutions. This Article argues to the contrary. Its study of the birth of transnational arbitral institutions in the 1910s sheds new light on the inherent and critical dependency of arbitral institutions on judicial enforceability. The institutional power dynamics reveal that the public institutions of states, especially courts, have the ultimate control over the condition and development of ICA. Any potential weaknesses or failures of institutional arbitration are thus ultimately a matter of public governance. This conclusion prompts either a reconsideration of the courts’ hands-off approach in enforcing arbitration or a reassessment of the policy principle underlying the broad allocation of adjudicatory jurisdiction to arbitration.*

## INTRODUCTION

This Article questions the prevailing belief that transnational arbitral institutions operate largely autonomously relative to national courts. A historical documentary study of the advent of arbitral institutions in the 1910s and 1920s offers new insights into the inherent dependency of arbitral institutions on judicial enforceability. The appearing power of public governance in international arbitration compels a reassessment of the limited scope of judicial review accompanying the enforcement of arbitration agreements and arbitral awards. At a minimum, it necessitates a reevaluation of the policy principles underlying this broad allocation of adjudicatory jurisdiction to arbitration.

Cross-border or international commercial arbitration (“ICA”) is a popular means by which professional parties resolve disputes arising from cross-border commercial relationships.<sup>1</sup> The primary legal source for the nearly uni-

---

\* Adjunct-Professor at Cardozo School of Law and PwC Research Fellow in International Arbitration at Queen Mary University of London. This Article is part of the research the author performed as a J.S.D. candidate at Yale Law School. The author is indebted to Alec Stone Sweet, Daniel Markovits, Michael Reisman, Stewart Macaulay, Ian Ayres, Henry Hansmann, Aukje van Hoek, Martijn Hesselink, and Rob Schwitters for their helpful remarks on previous drafts. The Article further benefited from comments received at workshops at Yale Law School, London School of Economics, Edinburgh Law School, Amsterdam Law School, and the Law and Society Conference. The author wishes to express special thanks to the editors of the Harvard International Law Journal for their meticulous copyediting. All errors are mine.

1. See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 93–4 (2d ed. 2014) (“The enduring popularity of international arbitration as a means of dispute resolution is reflected by a number of developments. These include steadily increasing caseloads at leading arbitral institutions, with the number of reported cases increasing between three and five-fold in the past 30 years.”); Tibor Varady &

versal and largely uniform enforceability of cross-border commercial arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”).<sup>2</sup> Parties that choose arbitration delegate the binding resolution of their controversy to a private tribunal of arbitrators instead of a national court.<sup>3</sup> With the increase of global trading in recent decades, arbitration practices have expanded as well.<sup>4</sup> A majority of all cross-border agreements now contain arbitration clauses.<sup>5</sup> The aggregate size of the claims disputed at the largest arbitration providers is in the billions of U.S. dollars.<sup>6</sup>

The spread and institutionalization of ICA have raised a persistent puzzle about the distribution of power between public and private governance. A handful of powerful transnational private institutions provide the bulk of cross-border or international commercial arbitration.<sup>7</sup> The point at issue is whether arbitral institutions can be free from state control if they depend on the cooperation of the courts. This puzzle is articulated by Jan Paulsson who noted, “[t]he great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself.”<sup>8</sup>

John Barcelo III, *Introduction to INTERNATIONAL COMMERCIAL ARBITRATION, A TRANSNATIONAL PERSPECTIVE* 1, 1 (Tibor Varady & John Barcelo III eds., 5th ed. 2012). *But cf.* JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 33 (2003) (pointing out that statistical data of the number of arbitrations occurring yearly is not available).

2. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; *see, e.g.*, BORN, *supra* note 1, at 99 (“Generally referred to as the ‘New York Convention,’ the treaty is by far the most significant contemporary legislative instrument relating to international commercial arbitration.”); LEW, *supra* note 1, at 20 (“The major catalyst for the development of an international arbitration regime was the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.”).

3. BORN, *supra* note 1, at 247.

4. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (“As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade.”).

5. It has been estimated that roughly 90% of all cross-border contracts opt for arbitration. *See* Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL’Y 627, 635 (2006); Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 233 n.1 (2006).

6. *See* Bezant et al., *infra* note 26; B2B Dispute Resolution Report, *infra* note 26.

7. These include the International Chamber of Commerce Court of Arbitration (“ICC Court”), the International Centre for Dispute Resolution (“ICDR”) of the American Arbitration Association (“AAA”); the London Court of International Arbitration (“LCIA”); the Hong Kong International Arbitration Centre (“HKIAC”); and the Singapore International Arbitration Centre (“SIAC”). *See* ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION, JUDICIALIZATION, GOVERNANCE, LEGITIMACY* 45 (2017) (referencing these institutions as the global or regional institutions with the highest case load and aggregate value of claims); *id.* at 28 (“Today, far more than 90 per cent of all international arbitration takes place under the Rules and supervision of an arbitration house.”); BORN, *supra* note 1, at 174–99 (listing the leading arbitration institutions); *id.* at 171 (“[M]ost experienced international practitioners fairly decisively prefer the more structured, predictable character of institutional arbitration . . . at least in the absence of unusual circumstances arguing for an ad hoc approach.”).

8. JAN PAULSSON, *THE IDEA OF ARBITRATION* 30 (1st ed. 2014); Jan Paulsson, *Arbitration in Three Dimensions*, 60 INT’L & COMP. L. Q. 291, 292 (2011) [hereinafter Paulsson, *Arbitration in Three Dimen-*

Not having a method to assess the level of dependency of arbitral institutions on judicial enforceability creates uncertainty as to who is responsible or accountable for the successes and shortcomings of ICA. In recent years, both practitioners and scholars have raised concern about a variety of attributes of ICA. For instance, some have criticized the lack of transparency of the arbitral process due to the traditional preference that disputants opting for arbitration tend to have for confidentiality.<sup>9</sup> Others regret the lack of precedent or *stare decisis* in arbitration.<sup>10</sup> A recent concern is the risk of hidden conflicts of interests of arbitrators due to third parties funding claimants' pursuit of a claim in arbitration.<sup>11</sup> Additionally, a continuing cause of concern is the improving, yet still lacking, diversity of arbitrators regarding race and gender,<sup>12</sup> which potentially risks a bias in arbitral decision-making.<sup>13</sup>

Commentators raising issues like these tend to imply or expressly argue that it is up to the institutional providers of arbitration whether to do anything to improve these matters, and if so, what action to take for their improvement.<sup>14</sup> That position suggests that the overall condition and devel-

---

sions] ("Arbitration paradoxically seeks the cooperation of the very public authorities from which it wants to free itself.")

9. See, e.g., Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 135 (2003) ("[G]reater transparency would likely increase knowledge and understanding of the arbitral process, thereby increasing the legitimacy of the use of international arbitration more generally."); Victoria Pernt, *How Much (More) Transparency Does Commercial Arbitration Really Need?*, KLUWER ARB. BLOG (Mar. 4, 2017), <https://perma.cc/ASH6-3WLG>.

10. See Buys, *supra* note 9, at 136 ("[P]ublication of reasoned awards would lead to development of and consistency in the law of arbitration . . . . When the process has consistency and predictability, its legitimacy is enhanced because parties know what to expect."); W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1901 (2009) (accepting a form of precedent in arbitration, yet restricting the meaning of the concept to situations in which "awards have some observable relevance to the future conduct of system participants").

11. See, e.g., Valentina Frignati, *Ethical Implications of Third-party Funding in International Arbitration*, 32 ARB. INT. 505, 510 (2016) ("Indeed, the influence and control exercised by funders may affect the attorney-client (the funded party) relationship, as well as the independence of arbitrators.")

12. See, e.g., the special issue devoted to the lack of diversity in international arbitration in TDM Journal (Transnational Dispute Management), DEALING WITH DIVERSITY IN INTERNATIONAL ARBITRATION, <https://perma.cc/PN39-66G9> (last visited Jan. 31, 2018).

13. See Caley Turner, "Old, White, and Male": *Increasing Gender Diversity in Arbitration Panels*, INT'L INST. CONFLICT PREVENTION & RESOL. (Mar. 3, 2015), <https://perma.cc/WD3W-R84N> ("[G]ender biases have a significant impact on arbitrator selection and potentially on arbitral decisions as well. The addition of more female arbitrators, then, is likely to result in more fair decisions that are not based on conscious or subconscious gender biases."). Gender diversity is not part of the courts' review of arbitration unless parties contract for it. See *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502, 504 (7th Cir. 2000) ("The relief sought, which seems premised on the belief that a female litigant is entitled to be judged by a panel that includes at least one woman, borders on the fantastic."). In *Smith*, the court reasoned that whether a certain gender ratio of a panel is enforceable turns on what the parties agreed to. See *Smith*, 233 F.3d at 505 (rejecting the argument that a commitment to gender diversity articulated in a guide published by the AAA was not "sufficiently definite to be enforceable in a suit for breach of contract" against the AAA).

14. See, e.g., Sasha A. Barbone & Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators*, 84 N.Y. ST. B.A. J. 33, 34 (2012) ("Arbitral associations continue to improve the diversity of the pool of arbitrators, but it is incumbent upon corporations to be mindful of diversity relative to the ADR process."); Benjamin G. Davis, *Diversity in International Arbitration*, 20 DISP. RESOL. MAG. 13, 13 (2014) (pointing out that arbitral institutions should remedy a lack of gender diversity among arbitrators through the institu-

opment of arbitration is a matter of private rather than public governance. That presumption, in turn, commits to the widespread belief that arbitral institutions operate autonomously, outside the control or influence of state institutions.<sup>15</sup>

This Article argues against the presumed autonomy of arbitral institutions. It will demonstrate that national courts have a dominant influence on arbitral institutions. Studying the birth of transnational arbitral institutions in the 1910s sheds new light on the inherent and critical dependency of arbitral institutions on judicial enforceability. The institutional power dynamics reveal that the public institutions of states, especially courts, have the ultimate control over the condition and development of ICA. Therefore, any potential weaknesses or failures of institutional arbitration are ultimately a matter of public governance.

This Article does not make the case in favor of greater judicial review or oversight of arbitration. Its raising awareness of the power of public governance does impel the reassessment of, at least, the justification for the limited scope of judicial review in enforcement cases.<sup>16</sup> Arbitration is traditionally perceived as a matter of contract.<sup>17</sup> Indeed, courts enforce arbitration agree-

---

tional nomination and confirmation processes). As to a need for published and reasoned awards, see Sarah Rudolph Cole, *The Lost Promise of Arbitration*, 70 S.M.U. L. REV. 849, 867–68 (2017) (addressing “reasoned opinion writing requirements” imposed by institutional providers of arbitration); Buys, *supra* note 9, at 138 (“[A]rbitral institutions should consider amending their rules to create a presumption that awards will be published unless both parties object in advance.”); Catherine A. Rogers, *Transparency in International Commercial Arbitration Symposium: Secrecy and Transparency in Dispute Resolution*, 54 U. KAN. L. REV. 1301, 1319 (2006) (dubbing the push by arbitral institutions to publicize arbitral awards more often one of the “most significant transparency breakthroughs”).

15. See Sections I.A and I.B for a discussion of the leading scholarship making the case that transnational arbitral institutions principally operate autonomously relative to national legal systems or state institutions. A growing body of literature even claims to observe arbitral institutions to have been developing a transnational, private legal order, which is discussed in Section I.C.

16. This Article’s argument applies to the enforcement of both *domestic* and *foreign* international arbitration awards. Strictly speaking, the New York Convention does not apply to the vacatur or annulment of arbitral awards by courts in the jurisdiction in which the arbitration took place. Under the New York Convention, the enforcing courts are those that enforce *foreign* arbitral awards. See New York Convention, *supra* note 2, at Art I(1) (“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . .”). However, the New York Convention does apply to the enforcement of all international arbitration agreements, hence, both to courts at the situs of arbitration and to those in another signatory state to the Convention. See *id.* at art. II(1) (“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”). Moreover, a great majority of the parties to the New York Convention have adopted the UNCITRAL Model Law, which largely mirrors the provisions of the New York Convention but applies the regime to arbitral awards “irrespective of the country in which it was made.” See UNCITRAL, Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006, Arts. 35(1), 36(1) (2006), <https://perma.cc/EY5H-AZ73> (last visited Dec. 2, 2016). See also BORN, *supra* note 1, at 105–06 (“Taken together, the Convention’s provisions set forth binding international legal principles governing the entire arbitral process—including the recognition of arbitration agreements, the arbitral process, and the recognition of arbitral awards.”).

17. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974) (“The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the

ments and the ensuing arbitral awards based on the principle of the freedom of contract.<sup>18</sup> In this light, the purported autonomy of arbitral institutions could be perceived as an unprompted societal byproduct of courts respecting party autonomy. However, if the state is responsible for creating, enabling, or sustaining modern-day institutional arbitration, international arbitration is the premeditated outcome of state policy. Then, the principle of party autonomy does not necessarily suffice to justify the partial surrender of state power to the adjudicatory discretion of private courts.<sup>19</sup> In *Mitsubishi*, Justice Blackmun suggested that the narrow scope of judicial review rests in part on the belief that transnational arbitral institutions will be competent, conscientious, and impartial.<sup>20</sup> Even so, courts have not set a requirement of institutional competence for the enforceability of arbitration agreements and arbitral awards.

Part I demonstrates that a purely legal analysis of domestic legislation such as the 1925 Federal Arbitration Act (“FAA”) fails to provide an adequate account of arbitral autonomy because it does not account for the relationships of control and dependency between institutions. Part II introduces a different analysis that recognizes the institutional power dynamics by employing the concept of “social power.”<sup>21</sup> It explicates the criteria that arbitral institutions would need to meet to operate without relying on judicial enforceability. The emphasis will be on the social power of courts in particu-

---

recognition and enforcement of commercial arbitration agreements in international contracts . . . .”); *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 186–87 (2d Cir. 1999) (“Ordinarily, because commercial arbitration is a creature of contract, only the parties to the arbitration contract are bound to participate . . . . The FAA applies to private commercial arbitration conducted in this country; and it applies also to arbitrations in certain foreign countries by virtue of legislation implementing the [New York] Convention . . . .”); *Telenor Mobile Commc’ns AS v. Storm LLC*, 584 F.3d 396, 405–06 (2d Cir. 2009) (“A dispute is arbitrable only if the parties contractually bind themselves to arbitrate it . . . . The presumption that the court should decide arbitrability questions also applies when a party seeks to compel arbitration under the New York Convention.”).

18. National courts across the world recognize the contractual basis of arbitration, *see* BORN, *supra* note 1, at 214, if only because courts allow parties the freedom to largely determine the composition and jurisdiction of arbitrators, as well as the procedural modalities. *See, e.g.*, TIBOR VARADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 69 (4th ed. 2009) (“Party autonomy is certainly the *differentia specifica* of the arbitration process. The crucial difference between arbitration and courts lies in the fact that the basis of the jurisdiction of an arbitral tribunal is the will of the parties, while courts owe their competence to procedural norms of a state or of an international convention.”); LEW ET AL., *supra* note 1, at 77; JOSHUA D. H. KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 42 (1st ed. 2013).

19. *See* Thomas Carbonneau, *Freedom and Governance in U.S. Arbitration Law*, 2 GLOBAL BUS. L. REV. 59, 83 (2012) (“Power relationships—who holds decisional authority, how much of it, and when—have generated a ‘new’ debate in U.S. arbitration law. The asserted positions highlight the clash between party autonomy and State regulation and revisit the legitimacy of arbitration founded upon contract—so-called consensual arbitration. The critical questions center upon the extent, if any, of the State’s preemptive role in regulating arbitration and, relatedly, whether freedom of contract always reigns supreme in the reference to and operation of arbitral adjudication.”).

20. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–29 (1985).

21. *See* Part II for an elaboration of this concept, the sociological scholarship that developed it, and the application of it to the power dynamics between courts and arbitral institutions.

lar, as they invoke, interpret, apply, and shape the domestic arbitration laws that regulate the availability of state enforcement.

Parts III and IV examine the often-overlooked birth of the first transnational arbitral institution and its call for the first international steps towards enforcing cross-border commercial arbitration. Part III demonstrates that a network of local U.S. and Latin American trade organizations in the 1910s was capable of bringing to fruition a form of cross-border commercial arbitration despite the lack of judicial support. Part IV contrasts this instance of genuine arbitral autonomy with the dependence on judicial enforceability displayed by the first transnational arbitral institution founded in 1923, the International Court of Arbitration (“ICC Court”). These analyses reveal that transnational arbitral institutions are inherently incapable of operating outside the control and influence of states.

The Article concludes by arguing that from the outset, arbitral institutions have been nested within the legal systems of supporting states, governed by the conditions for enforcement as applied and shaped by a particular state’s courts. Eventually, the individual states supporting ICA are responsible for the state of cross-border private dispute resolution. Recognizing the dominant power of public governance in international arbitration raises the question of whether courts should develop standards for the quality of ICA and the competence of transnational arbitral institutions, or at the least develop reasons for why they should not.

## I. THE DISTRIBUTION OF PUBLIC AND PRIVATE GOVERNANCE

### A. *Between Courts and Arbitral Institutions*

Two features of contemporary ICA raise questions about the balance of power between national courts and transnational arbitral institutions. On the one hand, courts appear to play a valued role in ICA. Over the course of five decades, cross-border commercial arbitration has become enforceable in nearly all states in the world. The cornerstone of this near-universal support is the New York Convention. This international legal instrument aims to advance the effectiveness of ICA by harmonizing and liberalizing the standards by which national courts recognize and enforce cross-border arbitration agreements and foreign arbitral awards.<sup>22</sup> While in 1959 only six states had ratified the Convention, 159 have currently joined, which is almost

---

22. See *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1261 (11th Cir. 2011) (“The Convention requires courts in signatory nations to give effect to private international arbitration agreements and to recognize and enforce arbitral awards entered in other contracting states.”). BORN, *supra* note 1, at 103 (“... [T]he Convention’s introduction of uniform international legal standards mandatorily requiring the recognition and enforcement of international arbitration agreements, subject to only specified exceptions, was also a bold advance.”).

80% of all countries in the world.<sup>23</sup> Both practitioners and scholars have universally praised the Convention as one of the most successful international legal instruments to date.<sup>24</sup>

On the other hand, arbitral institutions have come to play a central role in ICA. ICA has become predominantly institutional arbitration. Businesses have come to prefer the streamlined procedures offered by the permanent arbitration institutions to setting up an ad hoc tribunal from scratch for each dispute.<sup>25</sup> Several private, transnational institutions provide the bulk of ICA procedures. The aggregate claims heard by the most significant arbitration institutions run in the billions of U.S. dollars.<sup>26</sup> Over time, arbitral institutions have generated and refined procedural rules for cross-border commercial dispute resolution, grounded in best practices and general preferences of the global business community. By standardizing the transnational rules of ICA, transnational arbitral institutions have become “de facto legislators” of global trade and commerce, authors have observed.<sup>27</sup>

The constructive role of courts in ICA is generally not a subject of debate. The judicial enforceability of arbitration agreements and arbitral awards is generally perceived to have contributed to the growth and popularity of international commercial arbitration.<sup>28</sup> Arbitral institutions have displayed their appreciation of judicial enforceability. For example, all major institutions have promoted model arbitration clauses that they believe will increase

23. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW [UNCITRAL], Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards, <https://perma.cc/4GFL-NDF3> (last visited Sept. 29, 2018).

24. See, e.g., BORN, *supra* note 1, at 103.

25. See *id.* at 172 (“[M]ost experienced international practitioners decisively prefer the more structured, predictable character of institutional arbitration, and the benefits of institutional rules and appointment mechanisms . . .”).

26. See Mark Bezant et al., *Trends in International Arbitration in the New World Order*, GLOBAL ARB. REV. 2 (Oct. 16, 2014), <https://perma.cc/6YYD-PL93> (“[T]he 2005 scorecard reported 71 commercial arbitrations with amounts in dispute exceeding US\$300 million, whereas the corresponding figure in the 2013 edition had increased to 109 cases . . . . The ICC reported that 21.8 per cent of 2013 filings [167 claims] involved amounts in dispute between US\$10 million and US\$50 million, and 8.2 per cent [63 claims] related to amounts in dispute over US\$100 million.”); American Arbitration Association, *B2B Dispute Resolution Impact Report 2015 Key Statistics*, AM. ARB. ASS’N, <https://perma.cc/BZ2R-YGWE> (last visited Jul. 21, 2017) (describing that, in 2015, the total claims in disputes administered by the AAA in 2015 totaled USD 13,365,897,914; the total in counterclaims was USD 2,706,142,073).

27. See STONE SWEET & GRISEL, *supra* note 7, at 28 (“[I]nternational arbitration centers] function as de facto legislators in the arbitral world . . . often codifying best practices that had emerged through the arbitral process itself.”).

28. See LEW ET AL., *supra* note 1, at 21; Walter Mattli & Thomas Dietz, *Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction*, in INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE 1–21, 9 (2014) (“[S]tates have made important contributions: for example, by enacting statutes to reform their arbitration laws to satisfy the business users of international arbitration, or by signing the New York Convention on the Recognition and Enforcement of Arbitral Awards. The result is a strengthening and enhanced efficiency of ICA governance.”); see also STONE SWEET & GRISEL, *supra* note 7, at 2 (“There would be no boom in international commercial arbitration . . . had the community failed to resolve a crucial problem: how to enforce its awards.”); QUEEN MARY UNIVERSITY OF LONDON AND PRICEWATERHOUSE COOPERS, CORPORATE CHOICES IN INTERNATIONAL ARBITRATION: INDUSTRY PERSPECTIVES (INTERNATIONAL ARBITRATION SURVEY) 10 (2013), <https://perma.cc/BV7P-WXWV>.

the chance that courts will enforce arbitration agreements that refer disputes to these institutions.<sup>29</sup> Moreover, the ICC Court's internal scrutiny of draft awards aims in part to increase the likelihood of enforceability in jurisdictions relevant to the case.<sup>30</sup>

However, the question that remains unanswered asks *how* much control courts exercise of transnational, institutional arbitration. The autonomy of arbitral institutions appears to be corroborated from a legal perspective, by looking to the allocation of significant adjudicatory jurisdiction to arbitration. In contrast, from the viewpoint of institutional relationships of control and influence, there is a reason to reassess that legal supposition. The diverging analyses from these two viewpoints are discussed next.

### B. Allocating Adjudicatory Jurisdiction

One might infer that arbitral tribunals have gained regulatory and adjudicatory autonomy as an increasing number of states have relinquished control of the arbitral processes.<sup>31</sup> The enforcement of arbitration is commonly understood in terms of the delegation of adjudicatory authority from courts to arbitrators to resolve commercial disputes in a legally binding manner.<sup>32</sup> The U.S. Supreme Court and federal courts have consistently interpreted the FAA as allocating a decision-making authority from courts to arbitrators,<sup>33</sup> namely the power to provide a legally binding resolution of commercial

---

29. For the major international arbitration houses, see *Model Clause*, H. K. INT'L ARB. CTR., <https://perma.cc/82PG-6T3X> (last visited Jan. 31, 2018); *Arbitration Clause*, INT'L CHAMBER COM., <https://perma.cc/U6SB-QE54> (last visited Jan. 31, 2018); *ICDR Clause Drafting*, INT'L CTR. FOR DISP. RESOL., <https://perma.cc/P5CQ-9SGK> (last visited Jan. 31, 2018); *Recommended Clauses*, LONDON CT. INT'L ARB., <https://perma.cc/V8G5-X7JS> (last visited Jan. 31, 2018); *SIAC Model Clause*, SING. INT'L ARB. CTR., <https://perma.cc/3QRW-XLRM> (last visited Jan. 31, 2018).

30. *Procedure*, INT'L CHAMBER COM., <https://perma.cc/8WKW-J7JJ> (last visited Jan. 31, 2018) (under "Awards and Award Scrutiny").

31. See STONE SWEET & GRISEL, *supra* note 7, at 65 ("[U]nder the New York Convention, national courts owe positive duties to arbitrators, leaving judges to regulate the overall system only on the margins, as exceptions to core obligations."). See also, e.g., JOSHUA D. H. KARTON, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* 22 (1st ed. 2013) ("[I]n international commerce, the relative weight of public governance mechanisms decreases while the importance of private governance mechanisms increases as compared to commerce within the territorial limits of the nation state." (quoting G.P. CALLIES & M. RENNER, *TRANSNATIONALIZING PRIVATE LAW: PUBLIC AND PRIVATE DIMENSIONS OF TRANSNATIONAL COMMERCIAL LAW* 1342 (2009))).

32. For the perception of arbitration as the "allocation of jurisdiction," see W. Michael Reisman & Brian Richardson, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, in *ARBITRATION: THE NEXT FIFTY YEARS* 17, 18–19 (Albert Jan van den Berg ed., 2012) (describing arbitration laws in terms of deciding to "delegate" or "externalize some competences to make decisions will be enforced by the operation of state power"). The United States Supreme Court indeed seemed to depict U.S. arbitration laws correspondingly. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638–39 (1985) ("If [international arbitral tribunals] are to take a central place in the international legal order, national courts will need to 'shake off . . . their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.'").

33. See *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000) ("Masrobuono dictates that general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators . . ."); *Dean Witter Reynolds, Inc. v. Sanchez Espada*,



disputes. In this respect, arbitral institutions act simply as “alternative tribunals” to courts.<sup>34</sup>

In the distribution of adjudicatory jurisdiction between courts and arbitral institutions, the role of courts is limited. In 1925, Congress enacted the United States Arbitration Act; today referred to as the Federal Arbitration Act or the FAA for short.<sup>35</sup> The scope of judicial review in enforcement cases is narrow.<sup>36</sup> Courts interpret the FAA as requiring an overall hands-off approach when declaring arbitration agreements and arbitral awards enforceable, giving arbitrators strong deference.<sup>37</sup>

Two rules illustrate the courts’ deference to arbitration. First, courts primarily ascertain if there is a written arbitration clause in a contract or a stand-alone arbitration agreement between the parties.<sup>38</sup> Courts must en-

959 F. Supp. 73, 80 (D. P. R., 1997) (“[T]he New York rule allocating decision-making authority between courts and arbitrators . . .”).

34. For the depiction of arbitration as an alternative tribunal to courts, see *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995) (describing “the State’s allocation of power between alternative tribunals”); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1211–12 (9th Cir. 1998) (“In other words, the provision might include only New York’s substantive rights and obligations, and not the State’s allocation of power between alternative tribunals.” (citing *Mastrobuono*, 514 U.S. at 60)); see also *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (“Rules for arbitration include principles that affect the ‘allocation of power between alternative tribunals.’”); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 2002); *Bechtel do Brasil Construcões Ltda. v. UEG Araucaria Ltda.*, 638 F.3d 150, 157–58 (2d Cir. 2011); *Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F Supp 2d 1177, 1184–85 (S. D. Cal. 2002).

35. H. R. Res. 646, 68th Cong. (1925) (enacted).

36. As to the enforcement of arbitration agreements, see 9 U.S.C.A. § 2 (West 1947) (stipulating that an agreement or clause therein referring a present or future dispute to arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”); 9 U.S.C.A. § 3 (West 1947) (“If any suit or proceeding be brought . . . upon any issue referable to arbitration . . . the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had . . .”). As to the enforcement of arbitral awards, see 9 U.S.C.A. § 9 (West 1947) (“If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . then . . . any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated . . .”); 9 U.S.C.A. § 10 (West 2002) (listing the exhaustive grounds for vacating awards, including cases of “corruption, fraud, or undue means,” “evident partiality or corruption in the arbitrators,” “any other misbehavior by which the rights of any party have been prejudiced” and “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made”).

37. See *BG Grp., PLC v. Republic of Arg.*, 134 S.Ct. 1198, 1206 (2014) (referring to the “deference that courts ordinarily show arbitral decisions on matters the parties have committed to arbitration.”); *E.I. DuPont de Nemours and Co. v. Grasselli Employees Independent Ass’n of East Chicago, Inc.*, 790 F.2d 611, 614 (7th Cir. 1986) (“When reviewing an arbitration award . . . the standard of review is even more deferential, since the judiciary has no power to reach and determine the merits of arbitration awards merely because of disagreement, even strong disagreement, with the arbitrator’s interpretation of the contract.”).

38. See 9 U.S.C.A. § 2; see also *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 412 (N.Y. 1982) (holding that the court shall “refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed” (internal citations omitted)).

force arbitration agreements as they would any other agreement.<sup>39</sup> Second, courts have established that the review of arbitral awards is “extremely limited,”<sup>40</sup> if not “close to non-existent.”<sup>41</sup> Judicial oversight is essentially restricted to assessing marginally basic procedural fairness.<sup>42</sup> Courts will not reconsider the arbitral decision.<sup>43</sup> The arbitrator decides the merits of the claim and the defenses against it.<sup>44</sup> The arbitral award is considered final; confirming it makes it a judgment of the court.<sup>45</sup> Nor will courts assess the arbitrator’s reasons for that decision.<sup>46</sup> Courts generally do not demand that the arbitrator justify their decisions at all.<sup>47</sup>

Underlying the judicial deference in commercial arbitration is the courts’ reliance on a federal policy strongly favoring arbitration as an alternative forum for dispute resolution.<sup>48</sup> The justification of the courts’ course is that a broader judicial jurisdiction over arbitration would restrict the allotted “authority” of the arbitrator and “threaten the independence of arbitration”

39. *See Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 682 (2010) (“[T]he FAA’s central purpose is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’” (internal citations omitted)); *see also Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 593 (2008) (Stevens, J., dissenting); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974) (“The United States Arbitration Act . . . was designed to . . . place arbitration agreements ‘upon the same footing as other contracts.’” (internal citations omitted)); *Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693, 696 (2d Cir. 1965) (“An order under the Federal Arbitration Act compelling a party to arbitrate is simply an order granting specific performance of an arbitration provision . . .”).

40. *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 29 (1st Cir. 2005) (referring to “[t]he extremely limited judicial review contemplated by the FAA”).

41. *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir. 1986).

42. *See Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998) (noting arbitration is “subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy (internal citations omitted)). The FAA permits courts, for example, to ascertain, albeit marginally, if arbitrators acted beyond their authority granted by the parties’ underlying arbitration agreement or displayed misconduct or partiality. *See* 9 U.S.C.A. § 10.

43. *See Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001) (“Courts are not authorized to review the arbitrator’s decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties’ agreement.”); *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007) (“Our review under the doctrine of manifest disregard of the law is highly deferential and such relief is appropriately rare.”).

44. *See Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991) (describing the role of the courts as being “strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator”).

45. *See Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984) (“[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.”); *see also Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

46. *See Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 671 (2010) (“It is not enough for petitioners to show that the panel committed an error—or even a serious error.”).

47. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (“Arbitrators have no obligation to the court to give their reasons for an award.”).

48. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23–24 (1983) (“The stay thus frustrated the statutory policy of rapid and unobstructed enforcement of arbitration agreements . . . Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248 (2d Cir. 1991) (“As a point of departure, we note that federal policy strongly favors arbitration as an alternative dispute resolution process.”).

from state interference.<sup>49</sup> Taking a different path would “move the locus of decision from the grievance-arbitration process to the courts”<sup>50</sup> and “judicialize the arbitration process.”<sup>51</sup>

The allocation of jurisdiction suggests significant empowerment of private institutions, especially foreign and transnational ones. U.S. courts have elucidated that judicial deference is even *greater* to providers of cross-border commercial arbitration than in domestic arbitration.<sup>52</sup> In 1970, Congress enacted the Foreign Arbitral Awards Convention Act of 1970 (“FAACA”), which implemented the New York Convention as Chapter 2 to the FAA.<sup>53</sup> The FAACA incorporated the rules of the New York Convention into the FAA, expanding the FAA to the enforcement of foreign arbitral awards.<sup>54</sup> The FAACA extended the “strong” public policy in favor of commercial arbitration internationally.<sup>55</sup> An award by a foreign or transnational provider

49. *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 29 (1st Cir. 2005) (citing *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001)).

50. *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir. 1986).

51. *Ethyl Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 768 F.2d 180, 183–84 (2d Cir. 1985) (“To this we add that for judges to have taken upon themselves to determine the correctness of the arbitrator’s award would inevitably have judicialized the arbitration process.”) *see also* *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (“Any other reading opens the door to the full-bore legal and evidentiary appeals that can ‘rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.’” (citing *Kyocera*, 341 F.3d 987, 998 (9th Cir. 2003))); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (“Broad judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”).

52. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985) (“[T]he federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce.”); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248 (2d Cir. 1991) (“The policy in favor of arbitration is even stronger in the context of international business transactions . . . .”); *see also Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1266 (11th Cir. 2011); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1063 (2d Cir. 1993). This is notwithstanding Article III of the New York Convention, which stipulates that foreign arbitration awards be enforced on the same terms as domestic awards.

53. Pub. L. No. 91-368, 84 Stat. 692 (1970).

54. *See* 9 U.S.C.A. § 207 (West 1970) (“The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”). Under Article V of the Convention, the grounds for refusing recognition and enforcement of arbitral awards include, among others, situations in which the agreement is invalid under the governing law (cl. 1(a)); the award does not fall “within the terms of the submission to arbitration” (cl. 1(c)); and if the recognition or enforcement of the award would be “contrary to the public policy of the country” of the court in question (cl. 2(b)). *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 2, art. V.

55. *Bautista v. Star Cruises*, 396 F.3d 1289, 1295 (11th Cir. 2005); *see also Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975); *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005) (noting “the strong public policy in favor of international arbitration”); *Telenor Mobile Commc’ns AS v. Storm LLC*, 584 F.3d 396, 405 (2d Cir. 2009); *Lindo*, 652 F.3d at 1272.

of commercial arbitration is given “substantial deference”<sup>56</sup> and is subject to a “very limited inquiry.”<sup>57</sup>

The courts’ interpretation and application of Chapter 2 of the FAA and the New York Convention suggest that national courts have ceded significant power to transnational arbitral institutions. Justice Blackmun, writing for the *Mitsubishi* Court, confirmed as much by justifying the limited scope of judicial review by express confidence in, and respect for the competence of foreign and transnational arbitral institutions.<sup>58</sup> The overall hands-off approach of U.S. courts in cross-border commercial arbitration appears thus to minimize public governance in favor of private governance. Given the courts’ deference to arbitration, arbitral institutions experience great freedom in deciding individual disputes. They also freely develop procedural rules and good practices. Some scholars even suggest that the vast degree of arbitral autonomy is permitting arbitral institutions to establish an “arbitral order,” an autonomous transnational private ordering.<sup>59</sup>

---

56. *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 23 (2d. Cir. 1997) (citing *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d. Cir. 1988)).

57. *Bautista*, 396 F.3d at 1294 (“In deciding a motion to compel arbitration under the Convention Act, a court conducts ‘a very limited inquiry.’”) (citing *Francisco v. Stolt Achievement Mt.*, 293 F.3d 270, 273 (5th Cir. 2002)). *See also* *Lindo*, 652 F.3d at 1272 (“Following the Convention and precedent, this Court in *Bautista* recognized that it: [1] conducts only a ‘very limited inquiry’ in deciding a motion to compel arbitration under the Convention . . . .”) (citing *Bautista*, 396 F.3d at 1294); *Telenor Mobile Communications AS*, 584 F.3d at 405 (“[R]eview of arbitral awards under the New York Convention is very limited in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.” (internal citation omitted)).

58. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985) (“[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”); *id.* at 629 (“[W]e conclude that . . . respect for the capacities of foreign and transnational tribunals . . . require[s] that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.”). The Court’s confidence in the capabilities of arbitration echoed a sentiment the Second Circuit of the U.S. Court of Appeals expressed previously in *Wilko v. Swan*, 201 F.2d 439, 444 (2d Cir. 1953), *rev’d*, 346 U.S. 427 (1953) (“We think that the remedy a statute provides for violation of the statutory right it creates may be sought not only in any ‘court of competent jurisdiction’ but also in any other competent tribunal, such as arbitration.”). At that time, however, the Supreme Court did not (yet) accept the Second Circuit’s favorable reception of arbitration. *See Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989) (acknowledging the “advantages that prior agreements for arbitration may provide for the solution of commercial controversies.”).

59. *See, e.g.,* EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 35 (2010); STONE SWEET & GRISEL, *supra* note 7, at 65; Ralf Michaels, *Roles and Role Perceptions of International Arbitrators - Oxford Scholarship*, in *INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENTING THEORIES AND EVIDENCE* 48–73, 52 (Walter Mattli & Thomas Dietz eds., 2014) (“[T]hen . . . [the arbitrator] ceases to be of a national state and instead becomes integrated in a ‘global adjudication system’ . . . .”). The modern notion of a private legal regime, independent from national laws, takes inspiration from the ‘Law Merchant’ or *Lex Mercatoria* in the Middle Ages. *See, e.g.,* Leon E. Trakman, *The Twenty-First-Century Law Merchant*, 48 AM. BUS. L. J. 775, 780 (2011) (writing that the medieval merchants’ “autonomy resides in merchant laws crafted by merchant judges out of merchant practice, not domestic laws imposed on merchant practice. The inferred result is a merchant-determined regime of merchant rules and procedures, rooted in natural rights.”).

### C. *The Significance of Judicial Enforceability*

The inference of arbitral autonomy from legal analysis presupposes that having a right or jurisdiction entails an equal aggregate of independence from outside control and influence. That is, it reveals a conflation of legal power and actual control and influence.

The conflation of legal power and actual control is intuitive but misleading. An actor having legal power might coincide with it having control and influence, but not necessarily. Dictionaries describe “autonomy” as the freedom from external control or influence; independence; and as the condition of self-determination and self-government.<sup>60</sup> In this respect, the question of arbitral autonomy does not address whether arbitral institutions have gained adjudicatory jurisdiction. It asks whether institutional arbitration would be feasible if arbitration agreements and arbitral awards were unenforceable; whether arbitral institutions are capable of functioning or existing without judicial enforceability.

It is worth stressing that the dependency of institutional arbitration on judicial enforceability does not involve the extent to which these institutions require a court’s intervention in *individual* cases. Arbitral institutions often resolve disputes without courts getting involved. Disputants reportedly comply voluntarily with arbitral awards in 75 to 90% of arbitral proceedings and pursue enforcement or recognition in only a tenth of arbitral cases.<sup>61</sup> In this respect, many commentators correctly reduce the courts’ role to mere “judicial assistance,” something without which arbitration can manage “routinely.”<sup>62</sup> However, while arbitral institutions might be capable of functioning without judicial assistance *ex post*, the point at issue is whether they can function without that support *ex ante*. Put differently, the issue at hand involves the extent to which arbitral institutions rely on the *prospect* of judicial enforcement.

Thus, how dependent are arbitral institutions on judicial enforceability? ICA owes its popularity to being, on average, less time-consuming and less costly than litigation. Moreover, arbitration provides freedom. Parties can select the arbitrators themselves and tailor the procedure to their individual needs.<sup>63</sup> Additionally, with arbitrators being professionals in the relevant

60. See, e.g., NEW OXFORD AMERICAN DICTIONARY 110 (3d ed. 2010); MERRIAM-WEBSTER DICTIONARY 48 (2016 ed.).

61. See QUEEN MARY UNIVERSITY OF LONDON AND PRICEWATERHOUSE COOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES, QUEEN MARY UNIVERSITY OF LONDON 2, 6, 30 (2008), <https://perma.cc/STF7-6J96>. In 2012, compliance with interim measures was measured at 62%. See QUEEN MARY UNIVERSITY OF LONDON AND WHITE & CASE, CURRENT AND PREFERRED PRACTICES IN THE ARBITRAL PROCESS (INTERNATIONAL ARBITRATION SURVEY) 2 (2012), <https://perma.cc/ADR6-DT5T>.

62. See Paulsson, *Arbitration in Three Dimensions*, *supra* note 8, at 307 (“But the point is that this is a vision of arbitration which functions routinely without judicial assistance.”).

63. See, e.g., *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 929 (2d Cir. 1983) (“International merchants often prefer arbitration over litigation because it is faster, less expensive and more flexible.”).

field themselves, users of ICA praise arbitration's capacity to generate both neutral and expert decisions.<sup>64</sup> A majority of cross-border commercial agreements now contain arbitration clauses.<sup>65</sup> Do courts merely facilitate and support transnational arbitral institutions, or do they control the arbitral process to the degree that they preclude genuine arbitral autonomy?

Lone voices argue that arbitration is a "public legal creation" and the courts' enforcement of arbitration is critical to the sustainability of ICA.<sup>66</sup> The prevailing view is that courts merely "facilitate," or that ICA "can eventually operate outside the constraints of positive law or national legal systems."<sup>67</sup> A growing body of scholarship even suggests that the vast degree of arbitral autonomy is permitting arbitral institutions to establish an "arbitral order," an autonomous transnational private ordering.<sup>68</sup> To date, both sides of the debate, however, have failed to offer tangible evidence of how deep the reliance of arbitral institutions on judicial assistance runs. This lacuna asks for a method that can assess arbitral autonomy in terms of the power dynamics between public courts and private arbitration institutions. Institutional autonomy does not originate from *legal* power but *social* power. Hence, what is needed is a sociological study of inter-institutional relationships rather than a legal one.

## II. THE SOCIAL POWER OF COURTS

### A. *Of Power and Dependence*

The previous Part illustrates the need for an analytical framework to capture the degree to which arbitral institutions *depend* on judicial enforceability. Social Power Theory provides a viable analytical tool for assessing the degree of autonomy of arbitral institutions relative to states and their courts. Several seminal articles from the 1950s and 1960s by, amongst others, John French Jr., Bertram Raven, Richard Emerson, and Robert A. Dahl, help

---

64. See BORN, *supra* note 1, at 73–90 (providing an overview of these and other benefits of international commercial arbitration).

65. It has been estimated that roughly 90% of all cross-border contracts opt for arbitration. See Stone Sweet, *supra* note 5, at 627, 635; see also Drahozal, *supra* note 5, at 233.

66. For example, Reisman has called arbitral autonomy a "fantasy," arguing that international arbitration is a "public legal creation whose operation and effectiveness is linked inextricably to prescribed actions by national courts." See Reisman & Richardson, *supra* note 32, at 17. The role of courts in the arbitral process might be limited, but it is nonetheless "decisive" in upholding the system of ICA itself. See *id.* at 32.

67. See LEW ET AL., *supra* note 1, at 81; see also Armelle Mazé & Claude Ménard, *Private Ordering, Collective Action, and the Self-Enforcing Range of Contracts*, 29 EUR. J. L. ECON. 131, 138 (2010) ("The existence of a legal regime supporting private institutions might improve the functioning of the latter and reduce transaction costs . . . . [S]upervision by public institutions may extend the self-enforcing range of contracts." (emphasis omitted)).

68. See, e.g., EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 35 (2010); STONE SWEET & GRISEL, *supra* note 7, at 65; Leon E. Trakman, *The Twenty-First-Century Law Merchant*, 48 AM. BUS. L. J. 775, 779 (2011); Michaels, *supra* note 59, at 52 (noting that the arbitrator "ceases to be of a national state and instead becomes integrated in a 'global adjudication system'").

articulate a basic and operational definition of social power.<sup>69</sup> These authors developed the idea of social power as the capacity of one actor to affect or change the needs, objectives or behaviors of another actor.<sup>70</sup> It is about the ability to influence or outright control what others do. Here, actors can be persons, groups, or social institutions.<sup>71</sup>

Contrary to the conventional view of legal power, having social power is not a matter of being conferred an authoritative status or capacity.<sup>72</sup> Social power is not a property of actors; it is a social relation *between* actors.<sup>73</sup> Social power ebbs and flows in varying degrees subject to the shifting progression of the actors' relationship. Social power originates from the degree of dependence of one actor on the other.<sup>74</sup> Dependency is directly proportional to one actor's need for what the other actor has to offer, and inversely proportional to the availability of alternative sources for satisfying that need.<sup>75</sup> Seen through this lens, the state, through its courts, controls the "supply" of

69. See, e.g., James G. March, *An Introduction to the Theory and Measurement of Influence*, 49 AM. POL. SCI. REV. 431 (1955) [hereinafter March, *Introduction to the Theory and Measurement of Influence*]; John R.P. French Jr., *A Formal Theory of Social Power*, 63 PSYCHOL. REV. 181 (1956); James G. March, *Measurement Concepts in the Theory of Influence*, 19 J. POL. 202 (1957) [hereinafter March, *Measurement Concepts in the Theory of Influence*]; Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. BALT. MD 201 (1957); John R.P. French Jr. & Bertram Raven, *The Bases of Social Power*, in STUDIES IN SOCIAL POWER 150 (1959); Richard M. Emerson, *Power-Dependence Relations*, 27 AM. SOCI. REV. 31 (1962); see also John C. Harsanyi, *Measurement of Social Power, Opportunity Costs, and the Theory of Two-Person Bargaining Games*, 7 BEHAV. SCI. 67 (1962).

70. This definition takes inspiration from, but differs from, French, Jr. & Raven, *supra* note 69, at 150–51, who restrict their writing to psychological change, hence involving persons, while providing additional subjects of change in addition to goals, needs and behavior, such as opinions, attitudes, and values. See Dahl, *supra* note 69, at 202–03 ("My intuitive idea of power, then, is something like this: A has power over B to the extent that he can get B to do something that B would not otherwise do.").

71. See Emerson, *supra* note 69, at 32 ("[A]n actor can be either a person or a group . . . [A]ny relation . . . might be a person-person, group-person, or group-group relation."); French, Jr. & Raven, *supra* note 69, at 151 (illuminating that a "social agent" can be "either another person, a role, a norm, a group or a part of a group"); Dahl, *supra* note 69, at 203 ("Actors may be individuals, groups, roles, offices, governments, nation-states or other human aggregates.").

72. For a classic analysis of power in the legal meaning, see H. L. A. HART, *THE CONCEPT OF LAW* 5, 28 (3d ed. 2012) (discussing the power conferred on individuals to create legal rights and obligations, for example through contracts and wills). The distinction between legal and social power does not mean that we cannot use the language of social power to express the idea of legal authority in the 'Hartian' sense. An actor may have social power over another actor by virtue of the fact that the latter perceives the former as being a legitimate authority from an internal, normative point of view. See French, Jr. & Raven, *supra* note 69, at 151 (categorizing this type of social power as "Legitimate Power," which is based on the perception of one actor that the other "has a legitimate right to prescribe behavior for him"). Social power through a perception of legitimacy is not limited to an internal, *legal* point of view. See THOMAS HALE, *BETWEEN INTERESTS AND LAW: THE POLITICS OF TRANSNATIONAL COMMERCIAL DISPUTES* 52, 56 (2015) (arguing that authority of both public and private institutions may that govern transborder disputes stem from deference).

73. See Emerson, *supra* note 69, at 32 ("[P]ower is a property of the social relation; it is not an attribute of the actor."); French, Jr. & Raven, *supra* note 69, at 151 ("By the basis of power we mean the relationship between [a social agent] and [a person] which is the source of that power."); Dahl, *supra* note 69, at 203.

74. See Emerson, *supra* note 69, at 32 ("[P]ower resides implicitly in the other's dependency."); see also *id.* at 33 ("[T]he power of A over B is equal to, and based upon, the dependence of B upon A").

75. See Emerson, *supra* note 69, at 35 (speaking of "motivational investment" instead of "need"); see also French, Jr. & Raven, *supra* note 69, at 151 (noting "if the opposing forces induced by another person

enforceability.<sup>76</sup> The power of national courts over transnational arbitral institutions would subsequently correspond to the degree to which these institutions depend on the “goods” that courts supply.

Borrowing the terminology from Robert Dahl, we can distinguish the “base,” “means,” “amount,” and “scope” of the courts’ social power.<sup>77</sup> The “base” or source of the courts’ power is their constitutional prerogative to declare private agreements as well as arbitral awards enforceable by the state, allowing subsequent enforcement authorities to seize legitimately the assets of the party who remains defiant. The “means” of the courts’ social power are the tools that it has at its disposal to threaten or promise to declare said agreements and awards enforceable. These tools are the legal rules that courts promise to invoke to justify honoring or rejecting a claim to enforcement, that is, the domestic and international arbitration laws stipulating the conditions under which enforceability is available. The “scope” of the courts’ social power equals the range of responses that the exercise of that power would trigger with arbitral institutions. Lastly, the “amount” of the social power that courts have over arbitral institutions equals the probability that arbitral institutions will or would be compelled to comply with the legal rules on arbitration or instead refuse.

### B. *The Need for Transactional Security*

The degree of social power that courts have over arbitral institutions is not at the sole discretion of the courts. Social power is the fluctuating outcome of counteracting needs and dependencies.<sup>78</sup> Hence, when we ask whether courts have social power over arbitral institutions, we mean to inquire whether they have a “power advantage”<sup>79</sup> or a “positive power.”<sup>80</sup> A power advantage occurs when inequality of power in a relationship between actors arises.<sup>81</sup> Consequently, the actor with positive power can change the

or by P’s own needs are stronger, then P will locomote in an opposite direction (i.e., O does not have control over P),” where O is a social agent exerting social influence on person P)).

76. See French, Jr. & Raven, *supra* note 69, at 156 (“Since O mediates the reward, he controls the probability that P will receive it.”).

77. See Dahl, *supra* note 69, at 203 (“The base of an actor’s power consists of all the resources—opportunities, acts, objects, etc.—that he can exploit in order to affect the behavior of another . . . . The means or instruments of such exploitation . . . often . . . involve threats or promises to employ the base in some way and they may involve actual use of the base . . . . [T]he means is a mediating activity by A between A’s base and B’s response. The scope consists of B’s responses . . . . The amount of an actor’s power can be represented by a probability statement: e.g., ‘the chances are 9 out of 10 that if the President promises a judgeship to five key Senators, the Senate will not override his veto,’ etc.”).

78. See Emerson, *supra* note 69, at 32 (“Social relations commonly entail *ties* of mutual dependence . . . . [T]hese ties of mutual dependence imply that each party is in a position, to some degree, to grant or deny, facilitate or hinder, the other’s gratification.” (emphasis in original)).

79. See *id.* at 34.

80. See French, Jr. & Raven, *supra* note 69, at 153 (suggesting that regarding the resultant force of influence, a social agent has positive power over a person if its force of change is greater than the force of resistance, and negative power in the reverse situation).

81. See Emerson, *supra* note 69, at 34.



balance by decreasing its dependency on what that other actor supplies. We will call actions that alter the degree of power and dependence “balancing operations.”<sup>82</sup>

It follows that we can evaluate the autonomy of arbitral institutions by assessing their capacity to realize superior alternatives to the “goods” that courts supply, the enforceability by the state of enforcement of arbitration agreements and arbitral awards.<sup>83</sup>

For arbitral institutions to lessen their dependency on the courts, any effective alternative to or replacement of enforceability by the state would have to perform the same function at least as well. One of the main functions of the enforceability of private agreements is to mitigate the lack of transactional insecurity. Transactional insecurity is the uncertainty that plagues the contracting party who performs first.<sup>84</sup> It involves not knowing whether the other party will live up to her or his promise as well.<sup>85</sup> Legal scholars have referred to this as the “contracting problem.”<sup>86</sup> For a voluntary exchange to be mutually beneficial, contracting parties need to be sufficiently certain that the other party will honor the agreement.<sup>87</sup> The mere promise of the coercive force of “powerful central authority” strengthens transactional security<sup>88</sup> and fosters cooperation between private parties.<sup>89</sup>

82. *See id.* (describing “balancing operations” as “structural changes in power-dependence relations which tend to reduce power advantage”).

83. *See id.* at 35 (explaining the structure of the power-dependence relationship partly in terms of the capacity of the dependent actor to cultivate “alternative sources for gratification of [its] goals,” including the “cultivation of alternative social relations”).

84. *See* Avner Greif, *Contracting, Enforcement, and Efficiency: Economics Beyond the Law*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 239, 247–48 (1996), <https://perma.cc/HU43-M6S5> (“[E]xchange is always sequential—that is, some time elapses between the quid and the quo . . . .” (emphasis omitted)).

85. *See* Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J. L. ECON. & ORGAN. 5, 5–6, 10 (1985); *see also* Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 72 (2003); Emily Erikson & Joseph M. Parent, *Central Authority and Order*, 25 SOC. THEORY 245, 248 n.4 (2007) (“[A]t least one actor has to trust the other to take a specific action, at some personal risk to the actor bestowing trust.”); Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory The Public Dimension of Contract*, 76 L. CONTEMP. PROBS. 19, 30 (“Even where the parties are guided by their own social norms—as is often the case with relational contracts—contract law is nonetheless significant in providing the parties background reassurances, a safety net for a rainy day that can help catalyze trust in their routine interactions.”).

86. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 545 (2003) (identifying the problem of “ensuring both efficient ex post trade and efficient ex ante investment in the subject matter of the contract”).

87. Greif, *supra* note 84, at 241 (“A necessary condition for (voluntarily) exchanging goods is that the transaction be mutually beneficial. Individuals will perceive an exchange as mutually beneficial only if they expect the other party to the exchange to fulfill its part of the agreement.”).

88. *See* Kronman, *supra* note 85, at 28 (“[T]he existence of a centralized mechanism for the enforcement of promises does greatly increase the security of the parties and at a comparatively low cost (at least up to a point).”); *see also* Erikson & Parent, *supra* note 85, at 249 (“[T]hese [alternative systems of local control that contribute to the production of order in society] are improved by the presence of a powerful, but distant, third party, such as a centralized state.”); Emad H. Atiq, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L.J. 1070, 1078 (2014) (“Contracts are enforced against promisors who breach when doing so creates legal incentives for contractual reliance in a way that maximizes the surplus associated with contractual arrangements.”).

Regardless of the degree of personal trust between contracting parties, both can suppose that the other will either perform or pay damages, just because the state promises to compel her or him to do so. From an economic perspective, by reducing the risk of a non-compliant contracting partner, the state helps reduce the costs of contracting, making it more efficient.<sup>90</sup>

By advancing and expanding the FAA's public policy in favor of arbitration, courts make arbitration an attractive alternative to adjudication. The FAA, therefore, benefits any actor profiting from the success of commercial arbitration. Among these, we may count arbitrators as well as the private institutions that offer streamlined and organized arbitration proceedings. After all, the more arbitral agreements are protected by the state, the more arbitration becomes an attractive alternative form of dispute resolution, and the more parties will likely make use of these institutions' services. Beneficiaries of FAA's pro-arbitration policy also include arbitral institutions' clientele: the business or commercial disputants. In this respect, national courts, international arbitration institutions, and business actors participating in cross-border commerce relate to each other in what Emerson would call a 'power network:' "two or more *connected* power-dependence relations."<sup>91</sup> The question of arbitral autonomy can be rephrased as the capacity of arbitral institutions to provide the transactional security their clients need without relying on the courts.<sup>92</sup>

### C. *Securing a 'Market Entryway Function'*

Arbitral institutions can diminish the social power of courts and gain autonomy if they find a way to self-enforce arbitration and provide their clients with the transactional security that arbitration requires. Put differently, these institutions should be capable of performing their essential tasks even if judicial enforceability is absent. Anthony Kronman describes the circumstance wherein judicial enforcement of contracts is absent as a "state

---

89. Erikson & Parent, *supra* note 85, at 248 n.4 ("We define cooperation as a situation in which two agents engage in a joint venture for mutual gains, for which the actions of each are necessary, and where a necessary action by at least one of them is not under the immediate control of the other. We believe cooperation implies trust . . . ." (citation omitted)); *see also id.* at 246.

90. *See* Greif, *supra* note 84, at 248 ("Since the agent can act opportunistically, the principal would not initiate an exchange (even if it were efficient) in the absence of a contract enforcement institution.").

91. Emerson, *supra* note 69, at 36; *see also* HALE, *supra* note 72, at 49 (explaining the "variation in the institutions that provide the rule of law for transborder commerce" in part by considering the firm's or users' preferences and the fora offered by both "policy makers and purveyors of private dispute settlement").

92. For a comprehensive study of the needs and interests of traders involved in choosing their preferred dispute resolution forum, *see* HALE, *supra* note 72, at 9–11, 51–73 (calling the theory the "Market Power Theory").

of nature.”<sup>93</sup> Assuming that the state retains its monopoly on violence, there is no room for calling in the help of a mob or gang to induce forcefully a reluctant party to comply. What remains as substitutes for the power of the state are private or informal means of coercion that parties voluntarily accept *ex ante* and liquidate *ex post*.<sup>94</sup> What other incentives, beyond threatening with brute force, can private institutions or collaborative groups elicit?

From the 1990s onwards, empirical legal studies have gained greater insight into the effects of legal regulation, or the lack thereof, on collaboration *between* individuals, specifically within the context of groups and private institutions.<sup>95</sup> This body of scholarship includes works in law and economics,<sup>96</sup> social network theory,<sup>97</sup> theories of private institutions<sup>98</sup> and theories of private governance.<sup>99</sup> It shows that members of effectual groups have a strong incentive to cooperate and comply with a group’s rules of conduct when losing one’s membership is bad for business.<sup>100</sup> In commercial settings, group membership becomes essential for a merchant if the group provides *exclusive* access to virtually *all* traders and colleagues in the relevant market.<sup>101</sup>

93. Kronman, *supra* note 85, at 7 (“When two individuals (or groups) exchange promises and neither has the power to compel the other to perform, and there is also no third party powerful enough to enforce the agreement on their behalf, I shall speak of them as being in a state of nature vis-a-vis one another, even where both parties are able to protect whatever they presently possess from attack or expropriation by the other.”).

94. See David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 401–02 (1990). The state’s monopoly on the use of violence bars transactors from the *ex post* use of physical coercion. This leaves them with *ex ante* “coercion,” i.e. requiring the promisor to post a bond; see also Erikson & Parent, *supra* note 85, at 251 (“The monopoly of violence reduces the scope of actions available to local actors.”). In fact, the *absence* of the state’s threat may incentivize trust and cooperation between private parties. See Erikson & Parent, *supra* note 85, at 247.

95. See Eric Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 134 (1996) (“[A] law X not only influences some behavior Y directly by applying a sanction to it; it also modifies the dynamics of groups with an interest in that behavior. As such groups are the sources of non-legal sanctions, the law influences the behavior Y both through the direct application of its sanctions and through its effect on the groups whose non-legal sanctions influence that behavior.”).

96. See generally Schwartz & Scott, *supra* note 86; Posner, *supra* note 95.

97. See generally Erikson & Parent, *supra* note 85; Emily Erikson & Sampsa Samila, *Networks, Institutions, and Uncertainty: Information Exchange in Early-Modern Markets*, (Oct. 10, 2016) (unpublished manuscript), <https://perma.cc/3WMU-FB2A>; Emily Erikson, *Formalist and Relationalist Theory in Social Network Analysis*, 31 SOC. THEORY 219 (2013).

98. See generally Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97 (1991); AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE* (2006).

99. See generally EDWARD PETER STRINGHAM, *PRIVATE GOVERNANCE: CREATING ORDER IN ECONOMIC AND SOCIAL LIFE* (1st ed. 2015); Steven Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 115 (1992); ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (rev. ed. 1994).

100. See Bernstein, *supra* note 99, at 119.

101. See GREIF, *supra* note 98, at 439 (emphasizing the significance of guilds having “a monopoly over certain trade and crafts”); Mazé, *supra* note 67, at 137 (“[B]arriers to entry and exit are a necessary condition for coalitions to work, ensuring stable membership that supports the information network . . . .”); see also HALE, *supra* note 72, at 67 (describing a monopolist’s “decisive market power” as one of

We will call the capacity of a group to control entrance to its members' market the ability to perform a "Market Entryway Function." Phrased positively, if the members of the group largely intersect with the participants in the relevant market, being a member of the group might boost one's status or reputation within the market. This endorsement offers confidence in each other's reliability and trustworthiness.<sup>102</sup> Negatively, expulsion from the group or association essentially entails ostracism from that market.<sup>103</sup>

The capacity of performing the Market Entryway Function is critical for arbitral institutions to self-enforce arbitration agreements and arbitral awards effectively. The sanctions that the institutions promise to impose in case of non-compliance must have a deterring effect on individual behavior. Sanctions need to provide parties with an incentive to comply. Just like sanctions imposed by the state's public institutions, private or informal enforcement measures will need to pose a credible threat to deter non-compliance effectively. For this to be the case in private groups, a member must care, or care enough, about the potential adverse consequence of the sanction imposed by the group.

A group may subject non-compliant fellow members to criticism,<sup>104</sup> correction,<sup>105</sup> "finely tailored gossip,"<sup>106</sup> or "communal disapprobation."<sup>107</sup> These are naming-and-shaming sanctions.<sup>108</sup> A well-known example that speaks to the imagination originates from the diamond industry in the 1990s, where the bourse would hang a photo of the individual who did not comply within ten days with an arbitral award.<sup>109</sup> Other membership sanctions include fines<sup>110</sup> and penalties.<sup>111</sup> The most severe enforcement measures are a suspension of membership and expulsion from the relevant association.<sup>112</sup>

Membership sanctions in business groups are most effective if the suspension or expulsion of membership in effect entails the excommunication or ostracism from the relevant market. Members of groups with close social ties, such as families or groups organized around a common religious, ethnic

---

the conditions for effective private enforcement, albeit in relation to the private institution's "authority" rather than social power).

102. See Bernstein, *supra* note 99, at 120–21.

103. See Julius H. Barnes, *Arbitration in the United States*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION* 14, 16 (Daniel Bloomfield ed., 1927); see also Posner, *supra* note 95, at 139 (referencing the labor union context).

104. See, e.g., Posner, *supra* note 95, at 139.

105. See, e.g., Charny, *supra* note 94, at 388.

106. Erikson & Parent, *supra* note 85, at 252.

107. Charny, *supra* note 94, at 388.

108. See Posner, *supra* note 95, at 140 n.17 (noting "public denunciation of deviants" as a method of sanctioning).

109. See Bernstein, *supra* note 99, at 128.

110. See Bernstein, *supra* note 99, at 120.

111. See Charny, *supra* note 94, at 400.

112. See Charny, *supra* note 94, at 388, 400; Bernstein, *supra* note 99, at 120; Posner, *supra* note 95, at 139.

or cultural background, are expected to concern themselves with the quality of their interpersonal relationships.<sup>113</sup> That feature does not necessarily hold for merchant or business groups. Still, even for Holmes' legendary "bad man," who follows the rules strategically rather than faithfully,<sup>114</sup> informal sanctions may have significant consequences. A member who has his reputation tarnished by naming-and-shaming or membership sanctions risks missing future opportunities to trade with others in the relevant market or failing to procure credit.<sup>115</sup> That loss has market value.<sup>116</sup>

Groups or private institutions can provide transactional security if they are capable of both creating a situation in which a member's reputation has value and credibly threatening to take away that value. When members of a self-enforcing group transact, they effectively put up the value of their reputation as a bond or as collateral.<sup>117</sup> Scholars engaged in empirical legal studies refer to these as "reputation bonds."<sup>118</sup> Internal sanctions intend to liquidate those bonds. As Greif encapsulates, "posting bonds . . . can be used *ex ante* to increase the *ex post* cost of cheating."<sup>119</sup> The threat of those sanctions thus provides members the necessary level of transactional security.<sup>120</sup> Effective "reputation-based private-order institutions"<sup>121</sup> raise the benefits of cooperative behavior or increase the costs of non-cooperative con-

113. See Posner, *supra* note 95, at 162–63 ("Ethnic, community, and cultural relations provide a basis for continuing interaction and observation, a convenient method for distinguishing insiders from outsiders, and, in effect, a bond to guarantee performance."). Close-knit groups may deter members from non-compliance by appealing to their desire to avoid humiliation, feelings of guilt, or the desire to experience self-esteem or to foster pleasurable interpersonal relationships. See Bernstein, *supra* note 99, at 139 (calling such type of bonds "social" or "psychic" bonds); see also Charny, *supra* note 94, at 393–94 (mentioning the "sacrifice of psychic and social goods" such as "loss of opportunities for important or pleasurable associations with others, loss of self-esteem, feelings of guilt" and the risk of being "snubbed at the local club").

114. See Oliver Wendell Jr. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."); see also GREIF, *supra* note 98, at 430 (referring to "a moral-hazard problem in which there are only 'bad' agents who always maximize their material well-being").

115. See Greif, *supra* note 84, at 243.

116. See Bernstein, *supra* note 99, at 139 (explaining that social or psychic bonds may very well have a market value as much as reputational bonds have); see also Charny, *supra* note 94, at 393 ("If the promisor improperly breaches his commitments, he damages his reputation and thereby loses valuable opportunities for future trade.").

117. See Charny, *supra* note 94, at 392–93.

118. See, e.g., Bernstein, *supra* note 99, at 132.

119. GREIF, *supra* note 98, at 438; see also Posner, *supra* note 95, at 155 ("The importance of maintaining a good reputation and of avoiding ostracism deters improper behavior."). According to Bernstein's observations on the diamond industry, reputation bonds indeed are the primary enforcement mechanism and the main reason why parties tend to comply with arbitral awards. See Bernstein, *supra* note 99, at 138–39.

120. See Posner, *supra* note 95, at 167. See also, *id.* at 162–63 ("Ethnic, community, and cultural relations provide . . . a convenient method for . . . , in effect, a bond to guarantee performance.").

121. See GREIF, *supra* note 98, at Appendix C.

duct.<sup>122</sup> To put it differently, the value of one's reputational bond is higher than the gains from non-compliance.

The capacity of arbitral institutions to realize a monopoly in a given trade, industry, or business community enables these institutions to attain the capability of self-enforcing arbitration and thus to provide their clientele with transactional security independently from courts. That "Market Entryway Function" is crucial to effective self-enforcement of arbitration.<sup>123</sup> If a merchant organization only contains a segment of players in a given market, the threat of moral or non-legal sanctions loses credibility.<sup>124</sup> It presents what in game theory is called an "end-game" problem. Without continued dependency on the group, one might foresee a moment where she or he will no longer need to cooperate to secure future business dealings.<sup>125</sup> Membership will then become less critical for one's access to and participation in the market. If a private group or institution does not control access to the critical mass of a market, the value of reputational bonds will thus diminish, which in turn would raise the benefits of non-compliance.<sup>126</sup>

In sum, for transnational arbitral institutions to operate autonomously—that is, independently from judicial enforceability—they will need to be at least capable of controlling the market in which they operate. Without performing a Market Entryway Function, they are unlikely to enforce compli-

122. See North, *supra* note 98, at 98 ("Effective institutions raise the benefits of cooperative solutions or the costs of defection, to use game theoretic terms. In transaction cost terms, institutions reduce transaction and production costs per exchange so that the potential gains from trade are realizable."); see also Posner, *supra* note 95, at 137 ("The payoff from cooperation equals the actor's share of the cooperative surplus less the actor's cooperation cost. The payoff from defection equals the actor's share of the cooperative surplus less the expected cost associated with detection and sanction, which may involve anything from simply being denied one's share of the collective good (that is ostracism), to something worse, like humiliation or corporal punishment.").

123. Empirical legal studies have also discussed the need for a group to be relatively small and homogenous in order to reduce the transaction costs of circulating information about a noncompliant member. For discussions of this, see generally North, *supra* note 98, at 97, 99; Posner, *supra* note 95, at 140 & n.17, 166–67; GREIF, *supra* note 98, at 102. *Contra* Erikson and Samila, *supra* note 97, at 3 (questioning the generally assumed connection between the degree of information transfer and the closeness of the community in question). The question of information costs might be less relevant today than in the early 1900s. Given today's world of electronic communication, monitoring a party's credit-worthiness using modern information technology, or a party's commercial practices through mass media, is significantly less costly than information and monitoring a hundred years ago. See Bernstein, *supra* note 99, at 144–45 (explaining that the costs of developing "a reputation of trustworthiness and fair dealing" are lower in an "information-technology-based regime"). Bernstein points out, "computers used to monitor credit worthiness, or mass media used in advertising" make it possible to convey "information cheaply to a large group of transactors." Bernstein, *supra* note 99, at 140; see also Charny, *supra* note 94, at 419 ("[M]ass markets based on reputational bonds are feasible only with technology that conveys information cheaply to a large group of transactors, such as computers used to monitor creditworthiness or mass media used in advertising.").

124. See GREIF, *supra* note 98, at 106–07 (discussing the "Kantor," the organization facilitating the dealings of German merchants abroad, and stating that the Kantor's threat of sanctions was not credible because it "encompassed only the German merchants actually present in Bruges—rather than all the potential German traders who might want to trade during an embargo—its threat of sanctions was not credible").

125. See GREIF, *supra* note 98, at 429, 434–35.

126. See *id.* at 434–35.

ance with arbitration effectively. They would then rely on judicial enforceability to provide the transactional security their clients need and thus diminish their autonomy correspondingly.

#### D. *The Relativity of Social Power*

We should not assume that once one actor can be said to have social power over another, this power is absolute. There are three ways in which the courts' social power is inherently relative.

First, social power is relative to transaction costs for the courts of wielding, and the costs for arbitral institutions of rebuffing the means of power.<sup>127</sup> The strengths of the courts' power over arbitral institutions increase if the costs of exercising that power decrease or the costs of arbitral institutions withstanding the courts' influence increase.<sup>128</sup> If the costs of the courts' exercise of that power are relatively high, the *scope* or *amount* of power decreases, potentially making the exercise of that power even prohibitive. The same analysis applies to the costs of the arbitral institutions' denunciation of the courts' power. If these are too high, the strength of the courts' power will be insurmountable.<sup>129</sup> Hence, the costs and strength of power affect the power balance between courts and arbitral institutions significantly.

Second, in the real world, recognizing the externalities of exercising or refuting the social power requires a much more complex model. That model would account for not only the triangular relationship between courts, arbitral institutions and the prospective users of arbitration but also other stakeholders, each having an impact upon the network of relationships and responding to the conduct of other actors. For instance, courts have a particularly significant power-dependence relationship with Congress: the FAA and the New York Convention restrict the scope of reasons courts can invoke for deciding enforcement cases.<sup>130</sup> Courts also have distinct relationships with the enforcement agencies, which exercise some degree of discretion in determining if and how to execute courts' decisions.

Likewise, arbitral institutions have power-dependence relationships beyond those with their clients. Policy or procedural changes made by other arbitral institutions with whom they compete might also influence their behavior in the attempt to attract clientele. Arbitral institutions have a power-dependence relationship with national legislators as well: while arbi-

---

127. See Harsanyi, *supra* note 69, at 68 (describing the "costs of A's power over B" as "the opportunity costs to A of attempting to influence B's behavior, i.e., the opportunity costs of using his power over B"; and the "strength of A's power of B" as "the opportunity costs to B of refusing to do what A wants him to do, i.e., of refusing to yield to A's attempt to influence his behavior").

128. See Harsanyi, *supra* note 69, at 68 ("Other things being equal, A's power over B is greater the smaller the costs of A's power and the greater the strength of A's power.").

129. See *id.* at 69 ("Of course, a power concept which disregards the costs of power is most inaccurate when the costs of using a given power become very high or even prohibitive.").

130. Precedent of the courts' case law would also restrict to a certain degree the discretion of courts, signaling that an extended power network of ICA would also include the courts of the past.

tral institutions may desire favorable arbitration legislation, states often wish to draw arbitral institutions to develop local business. These relationships become manifest through these institutions' attempts to have legislatures enact favorable legislation for their business, as is explored below in Part III. While we should keep the possible extendedness of the power network of ICA in mind, this Article concentrates specifically on the interconnected relationships among U.S. courts, arbitral institutions, and prospective mercantile users of arbitration alone. Although an analysis of a more complex power network would account for additional limitations of social power, it would fail to articulate the intrinsic features of the inter-institutional power dynamics more generally and the interaction between the private, transnational arbitral institutions and the public, national courts.<sup>131</sup>

Third and finally, the social power that one actor has over another actor is not one-directional. As mentioned above, social power entails an inequality of counteracting powers that give one actor a power advantage or a positive power. Hence, even if the power advantage of one actor is significant, the relationship with the other actor may still display a degree of mutual dependency.<sup>132</sup> Indeed, in the context of ICA, both Congress and the courts have expressed a 'need' for arbitration. For example, the Senate Report to the FAACA noted that having to resort to international commercial arbitration will "serve the best interests of Americans doing business abroad."<sup>133</sup> Courts have underscored the advantage of ICA in helping American traders to avoid costly and time-consuming litigation,<sup>134</sup> as well as the risk and uncertainty of litigating in foreign and unfamiliar jurisdictions.<sup>135</sup> Under the New York

131. The ensuing findings may, in turn, provide a powerful analytical framework for further empirical research into other components of the social power network of ICA.

132. See Emerson, *supra* note 69, at 32 ("Social relations commonly entail *ties of mutual dependence* . . . . [T]hese ties of mutual dependence imply that each party is in a position, to some degree, to grant or deny, facilitate or hinder, the other's gratification.")

133. *Bergesen v. Joseph Muller Corp.*, 548 F. Supp. 650 (S.D.N.Y. 1982), *aff'd*, 710 F.2d 928 (2d Cir. 1983) (citing the House Report to the Convention Act).

134. See, e.g., *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1063 (2d Cir. 1993) (referencing Congress' appreciation for arbitration as "a means of reducing the costs and delays associated with litigation"); *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005) (citing the "twin goals" of arbitration, "settling disputes efficiently and avoiding long and expensive litigation" (quoting *Compagnie Noga D'Importation et D'Exportation, S.A. v. Russian Federation*, 361 F.3d 676, 683 (2d Cir. 2004))); *Telenor Mobile Communications AS v. Storm LLC*, 584 F.3d 396, 405 (2d Cir. 2009); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

135. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515–16 (1974) ("[A contractual provision specifying in advance the forum for litigating disputes and the law to be applied] obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved."); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248 (2d Cir. 1991) (explaining that the enforcement of arbitration under the Convention removes "the threats and uncertainty of time-consuming and expensive litigation"); *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 411–12 (N.Y. 1982) ("The desirability of arbitration is enhanced in the context of international trade, where the complexity of litigation is often compounded by lack of familiarity with foreign procedures and law. . . . Thus, resolving disputes



Convention, courts aspire to help remove barriers to cross-border trading<sup>136</sup> and provide “orderliness” and “predictability” in the resolution of commercial disputes.<sup>137</sup> In this respect, Chief Justice Burger for the U.S. Supreme Court in *M/S Bremen* noted that American business should be encouraged to extend their operations overseas and take advantage of the globalization of trade and commerce.<sup>138</sup> Courts also expressed the value of arbitration for society at large, as it eases the dockets of the courts<sup>139</sup> and attracts international business to U.S. soil.<sup>140</sup> Indeed, if Congress and the courts did not consider arbitration beneficial for society, there might have been little incentive to enforce arbitration, let alone, enforcing it as readily as courts do today. In this respect, arbitral institutions exercise some degree of social power over state institutions as well.

Hence, the question, to what extent arbitral institutions operate autonomously, asks whether the balance of power tilts towards arbitral institutions rather than the state’s courts. The answer thus entails a comparison of the extent to which one depends on the other. On the one hand, it is probably safe to assume that even if arbitral institutions provide a valuable service, state institutions would unlikely falter without institutional arbitration. As to the relationship between courts and arbitral institutions, the judicial system as a whole does not rely on arbitral institutions for its existence or even

---

through arbitration allows all parties to avoid unknown risks inherent in resorting to a foreign justice system.”).

136. David L. Threlkeld, 923 F.2d at 248 (“Enforcement of international arbitral agreements promotes the smooth flow of international transactions . . . . Stability in international trading was the engine behind the Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . .”).

137. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (“[S]ensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement”); see also *Scherk*, 417 U.S. at 516 (“A contractual provision specifying in advance the forum in which disputes shall be litigated . . . is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”).

138. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (“For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States . . . . The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”).

139. See, e.g., *Ultracashmere House Ltd. v. Meyer*, 664 F.2d 1176, 1179–80 (11th Cir. 1981) (“The purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation.”); *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (noting “the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation”); *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998) (“The purpose of the New York Convention, and of the United States’ accession to the convention, is to ‘encourage the recognition and enforcement of international arbitral awards,’ . . . to ‘relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation.’”).

140. For example, New York arbitration law is advertised as “well suited to international contracts and commerce,” expecting business actors to “choose New York City.” New York State Bar Association, *Choose New York Law for International Commercial Transactions* 2 (2014), <https://perma.cc/LX2X-QMX5> (last visited Jan. 31, 2018); see also *STONE SWEET AND GRISEL*, *supra* note 7, at 3 (“Making national law more hospitable to arbitration is essential to attracting this business.”).

its capacity to perform its essential tasks. The question of the autonomy of arbitral institutions, therefore, hinges on the question whether they are capable of existing or performing their essential tasks without relying on judicial enforceability. The following two Parts answer this question in the negative.

### III. A HISTORICAL INSTANCE OF ARBITRAL AUTONOMY

#### A. *Observing Social Power*

The fundamental components of social power that courts exercise over arbitral institutions provide a lens for examining the extent to which those institutions are autonomous. Assessing the degree of social power requires a research method that can measure the relevant behavioral indicators, that is, the causal effect of the state's exercise of power and the subsequent response of arbitral institutions. In short, the question of social power is not a legal but a factual one.<sup>141</sup> Asserting or refuting the social independence of arbitral institutions from courts is not identifiable via legal or philosophical analysis but via observation of institutional relationships.<sup>142</sup>

Carrying out such a study is not as straightforward as it might seem. Power-dependence relationships consist of the respective *capacities* to influence or control the behavior of the other. Hence, it exists as a "potential."<sup>143</sup> The prospective nature of social power does not mean that it is inoperative unless wielded. Social power is already in place when an actor *can* wield it.

Nonetheless, observations of an actor's capacity or a potential to exert influence are difficult if not near-impossible.<sup>144</sup> One method of empirical inquiry would be to survey arbitral participants for their perceptions of, or experiences with courts' power in the arbitral process. However, such a method would be ineffective. An introspective study would surely provide a sense of the prevailing beliefs in the field. It would fail to observe, however, the power dynamics between public and private institutions.<sup>145</sup> Most impor-

---

141. This claim takes inspiration from the analysis of social power and dependency by Emerson, *supra* note 69, at 32.

142. For the empirical nature of questions of social power and dependency, see *id.* ("Since the precise nature of this joint function [in fixing the dependence of one actor upon another] is an empirical question, our proposition can do no more than specify the directional relationships involved.")

143. *Id.* ("[T]he power . . . will not be, of necessity, observable in every interactive episode between A and B, yet we suggest that it exists nonetheless as a potential, to be explored, tested and occasionally employed by the participants."); French Jr. and Raven, *supra* note 69, at 152 ("[I]nfluence is kinetic power, just as power is potential influence.")

144. See Dahl, *supra* note 69, at 214 ("But the probability that we can actually make these observations . . . is so low as to be negligible.")

145. See March, *Introduction to the Theory and Measurement of Influence*, *supra* note 69, at 445 ("While the introspective nature of this approach provides, at least potentially, a major source of its attractiveness, it also results in a major disadvantage. One has a certain hesitancy in accepting an individual's self-evaluation of personal motivation in view of the distortions, conscious and unconscious, that may be ordinarily anticipated.")

tantly, such an inquiry would be intrinsically hypothetical,<sup>146</sup> in the form of the question: “What would happen if, tomorrow, courts stop supporting arbitration?”

The better method to ascertain courts’ social power over arbitral institutions is a historical documentary study. The true measure of social power is actual behavior. Hence, a study of social power requires some insight into the response of one actor to the actions of another. Specifically, as Emerson points out, a power-dependence relationship becomes “empirically manifest” when one actor refuses to supply the good on which the other actor relies.<sup>147</sup> Hence, the power of courts over transnational arbitral institutions becomes discernible when courts restrict or refuse the availability of states’ coercive force. In today’s world, where arbitration is easily enforceable in most courts in the world, the courts’ social power over institutional arbitration is not readily observable, therefore. Courts readily acceding to the arbitral institutions’ need for transactional security masks the distribution of social power between courts and arbitral institutions.<sup>148</sup> Even the belief that reputational concerns partly explain compliance with arbitration in certain sectors or industries<sup>149</sup> will be difficult to substantiate.

Bringing the social power of courts to light requires an actual—not hypothetical—environment of resistance, in which courts impose stringent requirements on enforceability or outright refuse to meet the needs of arbitral institutions. The state has the brute force to offer and to deny individuals judicial enforcement.<sup>150</sup> In those instances where courts do not enforce a promise, the state leaves parties to their own, private devices.<sup>151</sup>

Hence, to make social power observational, we need to find a “state of nature.” That is to say, what an observation requires is a state of affairs where arbitration is unenforceable—or rather: *when* arbitration *was* unenforceable. We may turn to an earlier time and examine through the study of contemporaneous writings about the relationships between courts and providers of cross-border commercial arbitration *before* the current universal en-

146. See March, *Measurement Concepts in the Theory of Influence*, *supra* note 69, at 222 (“[I]f one had complete control over nature, one could proceed in standard experimental form . . . and observing the outcome . . . [I]t ordinarily is not feasible to pose hypothetical questions to the political process.”).

147. See Emerson, *supra* note 69, at 32–33 (“[Power] will be empirically manifest only if A makes some demand, and only if this demand runs counter to B’s desires. . . . Any operational definition must refer to change in the conduct of B attributable to demands made by A.”).

148. See French Jr. and Raven, *supra* note 69, at 152 (“[A social actor’s] power is measured by his maximum possible influence, though he may often choose to exert less than his full power.”).

149. See, e.g., HALE, *supra* note 72, at 45 (“This high rate of compliance is likely only partially due to the shadow of public enforcement in courts, as market forces and reputational concerns will often promote compliance even in the absence of judicial enforceability, especially in the commodity trades or other areas of exchange in which markets are well organized and arbitration has a long history . . .”).

150. See GREIF, *supra* note 98, at 91 (“The simplest economic view of the state - as an entity that enforces contracts and property rights and provides public goods - poses the following problem: a state with sufficient coercive power to do these things also has the power to withhold protection or confiscate private wealth, undermining the foundations of the market economy.”).

151. See Kronman, *supra* note 85, at 11–12.

forceability. We can turn to the historical birth of the modern arbitral institutions and its connection to the origin of the modern-day international legal framework providing near-universal enforceability by states.<sup>152</sup> Such historical study will allow us to expand our available collection of observable data and examine the manifest power dynamics between the public and private institutions of cross-border commercial arbitration.<sup>153</sup>

### B. A Lack of Judicial Support

At the outset of the 20th century, ICA found itself in Kronman's "state of nature."<sup>154</sup> The United States was among the countries that offered minimal judicial enforcement.<sup>155</sup> It was not until 1920 that the New York state legislature enacted the New York Arbitration Act,<sup>156</sup> and not before 1925 that the U.S. Congress enacted the FAA.

At the outset of the 20th century, the United States provided remedies that insufficiently compelled parties to comply with *ex ante* or pre-dispute arbitration agreements and arbitral awards.<sup>157</sup> Although courts did not treat *ex ante* arbitration agreements as invalid or void,<sup>158</sup> they would not order parties to carry out arbitration agreements according to their terms under equity.<sup>159</sup> That is, they would not stay proceedings or allow peremptory

152. See generally Francis A. Allen, *History, Empirical Research, and Law Reform: A Short Comment on a Large Subject*, 9 J. LEGAL EDUC. 335, 337 (1957) ("[H]istory expands the range of basic data relevant to the understanding and solution of contemporary problems. This is true both with reference to the ordinary functions and functioning of institutions and with reference to the effects of various measures impinging on the operation of institutions and processes.").

153. This historical method of empirical legal research should not be confused with doctrinal historical legal studies seeking to interpret the content of positive law. See *id.* at 336.

154. See Kronman, *supra* note 85, at 7.

155. For example, the League of Nation's Sub-committee on Arbitration Clauses noted that, for French courts, invalidating an *ex ante* agreement and considering the enforceability of an arbitral award were discretionary matters for the court. Sub-committee on Arbitration Clauses, *Report on the Session Held in London, July 1922*, 3 LEAG. NATIONS OFF. J. 1410, 1412 (1922).

156. Other states, such as New Jersey, Oregon, Massachusetts and Illinois, followed New York's example and enacted similarly worded arbitration laws by 1925. See CLARENCE F. BIRDSEYE, *ARBITRATION AND BUSINESS ETHICS* 109 (1926). By 1937, thirteen states in total had similar arbitration laws. See AMERICAN ARBITRATION ASSOCIATION, *DECENNIAL REPORT OF THE AMERICAN ARBITRATION ASSOCIATION ON THE PROGRESS OF COMMERCIAL ARBITRATION: 1926-1936* 8, 16 (1936).

157. *Arbitration of Interstate Commercial Disputes: Joint Hearings before the Subcommittees of the House and Senate Judiciary Committees on S. 1005 and H.R. 646*, 68th Congress, January 9, 1924, 1 LEGIS. HIST. U.S. ARB. ACT PL 68-401 I, 38 (1925) (statement of Mr. Julius Henry Cohen). Neither arbitration agreements nor arbitral awards could really avoid conventional litigation. See also AMERICAN ARBITRATION ASSOCIATION, *supra* note 156, at 16 (noting that prior to the enactment of the New York state arbitration law in 1920, "there was no security against such litigation for the parties could generally find a way, if so inclined, to bring arbitration into litigation or to avoid arbitration altogether").

158. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 276, 284 (1926) (looking to Justice Cardozo's opinion in *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288 (N.Y. 1921)). See BIRDSEYE, *supra* note 156, at viii (observing that courts held "that an agreement to arbitrate a future dispute was against public policy and not enforceable.") and New York Chamber of Commerce, Committee on Arbitration, *Lord Coke's Dictum in Vynior's Case*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION* 6, 6 (Daniel Bloomfield ed., 1927).

159. See *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the H. and S. Judiciary Comm.*, 68th Cong. 16 (1924) (statement of Julius Henry Cohen).

pleas.<sup>160</sup> Conversely, courts would order specific performance of arbitration agreements *ex post*. These are arbitration agreements by which parties submit to arbitration a dispute that had already arisen.<sup>161</sup> The noncompliant party was further subject to liability for damages resulting from the breach of the arbitration agreement.<sup>162</sup> However, commentators at the time considered the remedy of damages less than compensatory, given that it usually resulted in covering merely nominal damages.<sup>163</sup>

The enforceability of arbitral awards was restricted as well for two reasons. First, because *ex ante* arbitration agreements were not enforceable, either party could retreat at any time before arbitrators would render the award.<sup>164</sup> Hence, if a party suspected that the arbitrator might decide in favor of the other party, it could walk away before the arbitral proceedings closed.<sup>165</sup> Second, the scope of enforceable awards was narrow. True, if no party revoked the agreement before the arbitrator issued an award, courts would allow an action to enforce and not revisit the matter.<sup>166</sup> Nor would courts require the winning party to prove the merits of the case.<sup>167</sup> However, even though courts would refrain from reviewing the award on matters of law and fact, they would refuse to enforce arbitral decisions that they deemed unsound or irrational.<sup>168</sup> Moreover, at least in New York, courts were reluctant

160. See MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 2:8 (3d ed. 2003); 68 Cong. Rec. 2758–62 (1925) (indefinitely postponing S. 1005).

161. See American Bar Association, Committee on Commerce, *The United States Arbitration Law and Its Application*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION* 211, 220 (Daniel Bloomfield ed., 1927) (noting “in many of our states and for a long time procedure has been provided by which a dispute, after it has arisen, might be submitted to arbitration”).

162. See *id.* at 218.

163. See Wesley A. Sturges, *Some Common Law Rules and Commercial Arbitration*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION* 156, 158 (Daniel Bloomfield ed., 1927). Because liquidated damages were not enforceable, and damages were difficult to prove when arbitral proceedings had not already commenced, the remedy of damages was inadequate. See Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 *YALE L.J.* 147, 153 (1921). Commentators therefore considered damages an inadequate remedy for rescinding an arbitration agreement, relative to the unavailable specific performance. See Cohen & Dayton, *supra* note 158, at 270, 278; see also Kronman, *supra* note 85, at 26 (“This [explains] why we grant a right of specific performance in cases where the idiosyncratic nature of the contract makes the risk of undercompensation especially great.”).

164. See BIRDSEYE, *supra* note 156, at viii; New York Chamber of Commerce, Committee on Arbitration, *supra* note 161, at 6; AMERICAN ARBITRATION ASSOCIATION, *supra* note 156, at 7.

165. See Sturges, *supra* note 163, at 157 (“Only if the parties have proceeded with the arbitration and an award has been rendered is this power of revocation terminated.”); see also *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the H. and S. Judiciary Comm.*, 68th Cong. 14 (1924) (statement of Mr. Julius Henry Cohen).

166. See Barnes, *supra* note 103, at 21. *But see* Sturges, *supra* note 163, at 158 (adding that this would however apply at least in cases where the award was a final money award).

167. See Cohen & Dayton, *supra* note 158, at 272.

168. See Sturges, *supra* note 163, at 158 (“Decisions of matters of law and fact, however, are generally denied review by the courts unless the arbitrator’s rulings in the given case are, in the opinion of the court appealed to, too unreasonable.”). For an argument that court proceedings over the enforcement of awards could still turn into an elaborate court case, since an award could be denied enforceability on grounds of fraud or misconduct of the arbitrators, see Cohen & Dayton, *supra* note 158, at 270–71. This does not mark a difference from the current arrangement under the New York Convention of 1958, however.

to enforce arbitral awards that aimed to settle the more intricate questions of fact or law.<sup>169</sup> As Justice Davis of the Supreme Court of New York explained in 1911, disputes posing such questions were considered “impossible of settlement without the aid of judges and courts.”<sup>170</sup>

Given the courts’ minimal support for commercial arbitration, and depending on the amount claimed, the gains of withdrawing from arbitration could easily exceed the costs of breaching an arbitration agreement. Without the threat of the state’s enforcement machinery, transactional security could have been low, turning uncooperative behavior advantageous.

### C. *Self-Enforcing Trade Associations*

Despite the lack of judicial enforceability in the United States, trade associations offered commercial arbitration successfully. The claims would sometimes reach millions of dollars.<sup>171</sup> Towards the end of the 19th century, trade associations had become a significant form of mercantile collaboration in the United States.<sup>172</sup> How, then, could trade associations successfully administer arbitration agreements without adequate judicial enforcement?

The answer is that trade associations managed to lessen their dependence on courts by securing an alternative to judicial enforceability. Trade associations at the time were market-specific groups.<sup>173</sup> These aimed to advance specific industries, businesses, commodities, or trades,<sup>174</sup> including stocks, produce and cotton exchanges, trade or banking associations, boards of trade or commerce, and local chambers of commerce.<sup>175</sup> The members of these groups were operating in the same market.<sup>176</sup> Their internal rules were therefore tailored to the particular practices and traditions of the respective

169. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 150 (1977).

170. NEW YORK CHAMBER OF COMMERCE, *COURT OF ARBITRATION, COMMERCIAL ARBITRATION* 19 (Charles L. Bernheimer et al. eds., 1911), Address of Honorable Vernom M. Davis, Justice of the Supreme Court of New York before the Chamber of Commerce, June 1, 1911; see also JULIUS KLEIN ET AL., *TRADE ASSOCIATION ACTIVITIES* 96 (1923) (“It is admitted that an honest arbitrator can resolve ordinary questions arising in his own line of business more surely than a judge or a jury can do so. . . . It is readily seen that he would be at a great disadvantage to decide correctly matters involving points of law.”); MARTIN DOMKE ET AL., *supra* note 160, at 4:1 (describing that arbitration administered by trade associations indeed tended to involve “issues of facts and basic usages and customs of the trade rather than an interpretation of complex legal principles”).

171. See BIRDSEYE, *supra* note 156, at 102 (“[T]ransactions . . . involving large sums, frequently reach[ed] as much as one hundred thousand dollars and, in one instance, several million dollars.”). But see FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 7 (1948) (“Of the thousands of trade associations in operation in 1927, only a comparatively small number of them knew about or used arbitration.”).

172. See William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L. REV. 193, 216–17 (1956).

173. See FRANCES KELLOR, *ARBITRATION IN THE NEW INDUSTRIAL SOCIETY* 32–33 (1934); KLEIN ET AL., *supra* note 170 at 1; Jones, *supra* note 172, at 216–17.

174. See KELLOR, *supra* note 173, at 33.

175. See H.H. Aldrich, *Commercial Arbitration by Boards of Trade*, in OFFICIAL REPORT OF THE FIFTH UNIVERSAL PEACE CONGRESS 274 (1893); BIRDSEYE, *supra* note 156, at 10.

176. See KLEIN, *supra* note 170, at 96; BIRDSEYE, *supra* note 156, at vii, 3.

trades.<sup>177</sup> The arbitration that these associations provided their members served primarily the interests of their respective members and of the market or industry in which they were involved.<sup>178</sup> Hence, trade associations appeared to exercise the Market Entryway Function and, by exerting control over the members' access to particular markets, were able to inflict sanctions (such as public criticism, fines, and suspension or termination of membership) at a cost lower than the value of reputation bonds.

These self-enforcing private institutions could thus provide the necessary transactional security that the state declined. Phrased in the language of social power, they successfully carried out a "balancing operation." By having control over access to the particular markets wherein their members were operating, trade associations were capable of allowing the value of reputation bonds to exceed the costs of sanctions such as public criticism, fines, and, most importantly, suspension or termination of one's membership.

Thus, the trade associations that provided commercial arbitration managed to function autonomously before the advent of legislative action towards judicial enforcement. Here, at least domestically, the assertion of arbitral autonomy in the social sense held true. Courts were, as a result, not in the position to exercise influence over how these associations administered the arbitration proceedings. Courts could not dissuade members of these trade groups from entering into *ex ante* arbitration agreements; awards did not need to meet the courts' standard of soundness or rationality, and arbitrators did not need to shun the more complicated questions of fact and law. The trade associations had found an alternative source of enforceability for costs lower than the costs of conforming to the common law arbitration rules.

A large number of trade or industrial organizations and commercial bodies provided *cross-border* commercial arbitration as well.<sup>179</sup> For example, before the introduction of legal support, the New York Chamber of Commerce occasionally offered arbitration between American and foreign merchants.<sup>180</sup> Its Committee on Arbitration aimed to protect the good

177. See BIRDSEYE, *supra* note 156, at 39 ("All these exchanges, trade associations and other similar organizations have more or less complete and comprehensive rules and regulations, which, in the main, refer to the conduct of their particular business, and govern the grades, grading, condition, terms, times and other intricate details of trading between members.")

178. Arbitration in this sense is to advance "the trade ethics and the guild or club spirit" so as to make "the trade machinery" work "more smoothly." BIRDSEYE, *supra* note 156, at viii.

179. In broader terms, a number of institutions were capable of administering arbitration procedures for the settlement of disputes involving *non-members*. See, e.g., E.R. Carhart, *The New York Produce Exchange*, 38 ANN. AM. ACAD. POL. SOC. SCI. 206, 220 (1911) ("Disciplinary action against non-members may result in their being denied representation on the floor of the exchange and members prohibited from trading for them. Many agreements to arbitrate are reached and many cases are settled out of court by threatened use of the complaint committee."); see also DOMKE, *supra* note 160, at 4:1 ("The business world . . . has resorted to an organized form of arbitration by creating arbitration facilities within many business organizations, chambers of commerce, exchanges and trade associations.")

180. CHAMBER OF COMMERCE OF THE STATE OF NEW YORK, COMMITTEE MINUTES, 1779–1792, at 129 (1913); see also Chamber of Commerce of the State of New York, *Brief History of Commercial Arbitra-*

standing of the American merchant and promise foreign traders a fair and unbiased resolution of disputes with their American counterparts.<sup>181</sup> According to the Chairman of the Committee on Arbitration, in 1921 a third of the 150 arbitration cases that the New York Chamber of Commerce administered between British and New York merchants involved arbitration clauses.<sup>182</sup>

However, arbitration offered by trade associations did not appear particularly apt for cross-border commercial disputes. Charles Bernheimer, then Chairman of the Committee on Arbitration of the New York Chamber of Commerce, articulated that providers of cross-border commercial arbitration had no means at their disposal to enforce these *ex ante* arbitration agreements without judicial enforceability.<sup>183</sup> In disputes between members and non-members, or “arbitration outside of markets,”<sup>184</sup> the threat of private or informal contract enforcement was limited. Trade associations could only prompt their respective members to comply.<sup>185</sup> Because non-members could not be suspended or expelled, the reputation bond has a much weaker impact on them than on members of the particular association. After all, outsiders had not yet had the opportunity to develop an established reputation. Whereas trade association members could compensate for the risk of dealing with an outsider by asking a higher price,<sup>186</sup> this is at the expense of burdening commercial transactions between parties in different sectors.

The limited reach of domestic trade associations hence tended to confine the benefit of commercial arbitration to their own members.<sup>187</sup> Without the capacity to exercise the Market Entryway Function across different markets, individual trade associations were not able to transfer their success in maintaining self-enforcing arbitration among its own members to cross-border disputes.

#### D. *The Pan-American Network*

By joining forces with each other, trade associations of different markets achieved what each of them alone could not manage: establishing a method

*tion in New York*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION* 23, 27 (Daniel Bloomfield ed., 1927).

181. See, e.g., BIRDSEYE, *supra* note 156, at 101, 103 (discussing the Committee on Arbitration of the Chamber of Commerce of the State of New York in 1918 and 1922).

182. See *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the H. and S. Judiciary Comm.* 68th Cong. 8, 27 (1924).

183. See *id.* at 32 (quoting statement of W. W. Nichols, President of the American Manufacturers' Export Association of New York).

184. Barnes, *supra* note 103, at 19 (describing “arbitration outside of markets” as arbitration between members of organized markets and non-members).

185. See KELLOR, *supra* note 173, at 36–37.

186. See Bernstein, *supra* note 99, at 145 (noting price would “compensate the promisee for the risk and imperfections of litigation,” which include “actual costs and uncertainty of the litigation,” as well as “reputational damage of being involved in a court suit at all”).

187. See Cohen & Dayton, *supra* note 158, at 280.



of ICA that could succeed without the support of judicial enforceability. Faced with the growing need for cross-border dispute resolution, early-day practitioners recognized that the lack of judicial enforceability was a severe roadblock in the development of international commercial arbitration. At the International Congress of Chambers of Commerce in Paris in 1914, M. Roberto Pozzi, representing the Cotton Federation of Milan, considered the legal recognition of the validity of the arbitration clause “one of the conditions essential to the realization” of ICA.<sup>188</sup>

In 1914, American businesspersons devised a method to create transactional security in cross-border arbitration that could be implemented worldwide without relying on judicial support. In that year, the Chamber of Commerce of the State of New York drafted a tentative plan for the “International Arbitration of Individual Commercial Disputes,”<sup>189</sup> or a “Plan for International Commercial Arbitration.”<sup>190</sup> The New York Chamber’s Committee of Arbitration together with Julius Henry Cohen, then a member of the New York Bar and American Bar Association, drafted the outline of the tentative plan.<sup>191</sup>

The Plan was based on the idea that business organizations in different countries would recognize and enforce within their own communities the arbitral awards of organizations elsewhere.<sup>192</sup> The proposed transnational network would consist of business organization selected from each “important commercial community,” which would enter into international agreements to “give full faith and credit to” and to “enforce to the full extent” arbitral awards rendered by their counterparts abroad.<sup>193</sup>

---

188. M. Roberto Pozzi, *Conciliation and Arbitration Between Merchants of Different Countries*, in 13 *COMMERCIAL ARBITRATION* 5, 7 (1921) (referencing the resolution adopted by the Chamber’s Paris Congress of 1922); see also A.J. Wolfe, *Conditions Essential to Success of Arbitration*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION* 57, 57 (Daniel Bloomfield ed., 1927). Likewise, in its first general meeting in April 1916 in Buenos Aires, the International or Inter-American High Commission urged that the government of the American nations enact legislation “whereby all commercial controversies of an international nature shall be settled by means of friendly arbitration.” *INTERNATIONAL HIGH COMMISSION, FIRST EDITION OF THE COMMITTEE REPORTS AND RESOLUTIONS* 28 (1916) (submitting conclusions to the International High Commission by its Fourth Committee, of which John H. Fahey was member).

189. *NEW YORK CHAMBER OF COMMERCE, INTERNATIONAL ARBITRATION OF INDIVIDUAL COMMERCIAL DISPUTES: TENTATIVE PLAN SUGGESTED BY THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK* (1914). Pozzi points out that the 1914 Plan reflected the Rules of Arbitration that the International Federation of Cotton Associations adopted in 1911, and the ones adopted in the international Publishers’ Congress in 1912. See Pozzi, *supra* note 188, at 14.

190. *NEW YORK CHAMBER OF COMMERCE*, *supra* note 189, at 1.

191. See *id.* at 6.

192. See *id.* at 5 (“There is now developing another and still greater conception—that of the arbitration of disputes between merchants living in different countries in such a way that a decision rendered in one country would be accepted and upheld in another.”). A modern version of this network may be found in the 1990s diamond industry, as studied comprehensively by Lisa Bernstein. See Bernstein, *supra* note 99, at 128, 143–44, 151.

193. *NEW YORK CHAMBER OF COMMERCE*, *supra* note 189, at 7 (proposing that commercial organizations enter into agreements “by which they will agree to enforce to the full extent of their influence the awards made by any other tribunal of a party to the agreement”). The Plan also called for a standard arbitration clause in international trade contracts, which would submit any dispute to the arbitral tribunal of selected chambers of commerce or other trade associations. See *id.* at 7 (art. I).

The network would rely on the capability of self-enforcing local trade groups to exercise private governance outside the law. If a party failed or refused to comply with an award rendered by a tribunal of one trade association, the tribunal would file a complaint with any other association of which that party was a member, “follow[ing] up such charges to the full extent of its power.”<sup>194</sup> This form of cooperation allowed the network between associations to circumvent the lack of judicial enforceability.<sup>195</sup>

In 1914, the Sixth International Congress of Chambers of Commerce in Paris adopted the Plan for a transnational network for cross-border commercial arbitration proposed by the New York Chamber of Commerce and Julius Cohen.<sup>196</sup> It had little effect in Europe due to the First World War, which broke out two months later.<sup>197</sup> In contrast, in the Americas the plan took hold. Like the United States, most Latin-American countries did not enforce commercial arbitration.<sup>198</sup> On April 10, 1916, the U.S. and Argentine Chambers of Commerce established the first inter-institutional network in line with the New York Chamber of Commerce 1914 Plan.<sup>199</sup> The Pan-American Networks built on what Julius Barnes called “the principle of binational supervision.”<sup>200</sup> The U.S. and Argentine chambers of commerce joined forces, inspired by the principles of party autonomy<sup>201</sup> and reciprocity between local mercantile communities.<sup>202</sup> Instead of relying on judicial en-

194. NEW YORK CHAMBER OF COMMERCE, *supra* note 189, at 8 (art. IV); *see also* Pozzi, *supra* note 188, at 15 (explaining that the non-compliant party “would be responsible to their own central organization which is officially bound to maintain it”).

195. NEW YORK CHAMBER OF COMMERCE, *supra* note 189, at 2.

196. *See* PAN AMERICAN FINANCIAL CONFERENCE, REPORT OF THE GENERAL COMMITTEE ON UNIFORMITY OF LAWS RELATING TO TRADE, COMMERCE, AND INTERNATIONAL COMMERCIAL COURT 4 (1915) (“[A]t the [International Congress of Chambers of Commerce], 1914, in Paris they had the satisfaction of having the subject prominently before the delegates and of having resolutions accepted . . .”). *See also* the introduction to procedural rules of the first instance of said Plan, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & BOLSA DE COMERCIO DE BUENOS AIRES, ARBITRATION FOR DISPUTES IN TRADE BETWEEN THE UNITED STATES AND THE ARGENTINE REPUBLIC 1 (1919) (referring to recent discussions at “international congresses of chambers of commerce” of “[f]riendly mediation on the part of men versed in the merchandise and the trade in question.”).

197. PAN AMERICAN FINANCIAL CONFERENCE, *supra* note 196, at 4 (“As the European war followed within two months [after the International Congress of Chambers of Commerce, 1914, in Paris] effect has not generally been given to these resolutions. It remained for representatives of the Buenos Aires Chamber of Commerce and the Chamber of Commerce of the United States of America, meeting in New York at the close of the Pan American Financial Conference, to take the first practical steps . . .”).

198. BORN, *supra* note 1, at 41–42, 60–61.

199. CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BOLSA DE COMERCIO DE BUENOS AIRES, *supra* note 196, at 2. Pozzi calls the Plan the “American experiment.” Pozzi, *supra* note 188, at 15.

200. Barnes, *supra* note 103, at 21.

201. *See* PAN AMERICAN UNION, FIFTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, SPECIAL HANDBOOK FOR THE USE OF THE DELEGATES 138 (1922) (“The salient feature of the arbitration agreement is that the plan rests entirely upon the voluntary assent of the persons engaged in the trade . . .”); CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BOLSA DE COMERCIO DE BUENOS AIRES, *supra* note 196, at 2 (“ . . . [T]he plan rests wholly upon the voluntary assent of the persons engaged in each particular transaction between the two countries. . .”).

202. *See* PAN AMERICAN FINANCIAL CONFERENCE, *supra* note 196, at 5 (Report of John H. Fahey, the President of the United States Chamber of Commerce, noting that arbitral awards were to be enforced

forcement, the transnational network would rely on localized private or informal contract enforcement mechanisms whenever “legal proceedings are not practical.”<sup>203</sup>

The private transnational cooperation between the United States and Argentina was the first step in a soon to be expanding transnational network of trade associations. By 1922, the United States Chamber of Commerce had already entered into seven other agreements with organizations “representative of the commercial interests” in their respective countries like the Chamber of Commerce of Buenos Aires.<sup>204</sup>

The Pan-American Networks verified that 1914 Plan met the criteria of arbitral autonomy in the sense of court-independence. The participating local trade associations collectively functioned as a group that met the requirements for adequate private or informal contract enforcement. A U.S. government report in 1915 appear to acknowledge the significance of the Market Entryway Function of participating associations: if influence on members was sufficiently robust and private sanctions effective, membership of the chambers would need to be comprehensive enough.<sup>205</sup>

Various contemporaneous reports confirm that the 1914 Plan assisted the Pan-American arbitration networks in operating effectively without the help of judicial enforcement. First, according to the Plan, awards would be “enforceable morally.”<sup>206</sup> The underlying premise held that each local organization that was a member of such a network would occupy the local “collective conscience of a group.”<sup>207</sup> In the Chamber’s conception, ICA would thus be founded upon a “universal sense of honor among business men,”<sup>208</sup> entailing a “universal base . . . of commercial honor, integrity and credit that is itself the base of all commerce.”<sup>209</sup> In 1915, the Inter-American High Commission suggested credence in the power of private or informal contract enforcement mechanisms, and the underlying reputation bond: “Agreements that involve the credit and standing of any group of business men are likely to be effective,” it reasoned.<sup>210</sup> Another report posits, “no business man can afford to undergo the derogation of business prestige

---

with “the sanction afforded by the influence of commercial organizations upon their members”); PAN AMERICAN UNION, *supra* note 201, at 142 (“Under the plan for arbitration enforcement of awards rests entirely upon the influence of the organizations which entered into it.”).

203. NEW YORK CHAMBER OF COMMERCE, *supra* note 189, at 8 (art. IV).

204. PAN AMERICAN UNION, *supra* note 201, at 136, 142 (including chambers of commerce or like organizations in the Latin American commercial centers of Panama, Rio de Janeiro, Asunción, Bogota, Caracas, Montevideo, and Guayaquil).

205. PAN AMERICAN FINANCIAL CONFERENCE, *supra* note 196, at 6 (“In many Latin-American countries commercial [sic] organizations already exist which are comprehensive enough in their membership to have influence sufficient for the enforcement of awards resulting from arbitration.”).

206. NEW YORK CHAMBER OF COMMERCE, *supra* note 189, at 2.

207. *Id.* at 1.

208. *Id.* at 1.

209. *Id.* at 3.

210. INTERNATIONAL HIGH COMMISSION, PRELIMINARY RESOLUTIONS 27 (1915).

which is incident to his being disciplined by the organization which represents the commercial interests of his community.”<sup>211</sup>

Second, the Plan relied on the aforementioned naming-and-shaming sanctions: the local organization of which the defaulter was a member would publicize the fact of non-compliance.<sup>212</sup> All participating chambers of commerce would publish a monthly bulletin listing the name of the noncompliant party, including the reasons that party may have expressed for refusing to honor the award.<sup>213</sup> The Plan explained that this enforcement technique originated from the conviction that “the man who will permit an award to go unobserved is not entitled to the credit of his fellow-men,” while giving “him full protection if he is justified.”<sup>214</sup>

The Pan-American Network provided at least one way in which the power-dependence relationship between courts and arbitration providers became manifest. In constructing an alternative to judicial enforceability, these associations could diminish their dependence on courts, both domestically and abroad. They executed a balancing operation that altered the power-dependence relationship. The national courts’ social power—or power advantage—diminished accordingly. It offered a relatively recent real-life example of arbitral autonomy.

With that said, later commentators reflected that without a central organizing arbitral institution, the Pan-American Network was incomplete and not strong enough to promote inter-American arbitration.<sup>215</sup> As the next Part will demonstrate, establishing this arbitral institution would indeed elevate ICA to the transnational organization of private dispute resolution it is today, but not without surrendering the independence of arbitration to the power of the state.

#### IV. THE MANIFESTATION OF PUBLIC GOVERNANCE

##### A. *The First Transnational Arbitral Institution*

The power-dependence relationship between courts and the Pan-American Network differed from the soon-to-be-established International Court of Arbitration. From the outset, national courts gained considerable influence over the first international arbitral institution.

Business representatives from the United States, France, England, Belgium, and Italy established the International Chamber of Commerce in

211. PAN AMERICAN FINANCIAL CONFERENCE, *supra* note 196, at 6.

212. See NEW YORK CHAMBER OF COMMERCE, *supra* note 189, at 8 (referring to art. IV).

213. See *id.*

214. *Id.* at 9 (explaining further in Notes to art. IV).

215. Marvin G. Goldman, *Arbitration in Inter-American Trade Relations: Regional Market Aspects Articles- Articulos*, 7 INTER-AM. L. REV. 67, 91 (1965) (referring to the network as “inadequate in promoting inter-American arbitration” and “incomplete without a coordinating regional arbitration body”).

1919 at the International Trade Conference in Atlantic City.<sup>216</sup> It immediately began developing the idea of an international arbitration court.<sup>217</sup> It established the ICC Court in 1923.<sup>218</sup> Today, it remains not only the oldest but also the world's foremost transnational arbitral institution.<sup>219</sup>

The ICC Court was originally built on the blueprint provided by the Pan-American Network. The ICC Court took inspiration from the 1914 Plan and the consequent 1916 Agreement between the Chambers of the United States and Buenos Aires.<sup>220</sup> The ICC represented a "common bond of union" between the members of the local associations admitted to the ICC.<sup>221</sup> The kernel of that vision was the idea of establishing "organized colleges of arbitrators for each trade" by way of "industrial and commercial associations of the world."<sup>222</sup>

However, Pozzi pointed out that "the absence of a fundamental organization on which [that project] might rest" was a "serious and perhaps insuperable difficulty" tainting the Pan-American Network.<sup>223</sup> That centralized character would help the ICC Court bring about a degree of systematization

216. NEW YORK CHAMBER OF COMMERCE, INTERNATIONAL TRADE CONFERENCE 460, 466–71 (1919). The ICC described itself as a non-political organization of financial, commercial and industrial interests worldwide, seeking to advance peace, progress and international commerce, among other things through working towards standardizing and harmonizing national laws. See INTERNATIONAL CHAMBER OF COMMERCE, No. 20 THE ORGANIZATION OF THE INTERNATIONAL CHAMBER OF COMMERCE, FEBRUARY 1922, 5 (1922); see also INTERNATIONAL CHAMBER OF COMMERCE, PROCEEDINGS, ORGANIZATION MEETING, PARIS, FRANCE, JUNE 23–30, 1920, at 6 (1920) [hereinafter INTERNATIONAL CHAMBER OF COMMERCE, PROCEEDINGS ORGANIZATION MEETING].

217. In May and June 1920, the Joint Committee on Permanent Organization drafted a constitution and a "program of subjects" of the Chamber. INTERNATIONAL CHAMBER OF COMMERCE, PROCEEDINGS ORGANIZATION MEETING, *supra* note 216, at 14; see also R.S. Fraser, *The International Court of Commercial Arbitration*, in REPORT OF THE THIRTY-FIRST CONFERENCE 184, 186 (1923) ("The Rules of the International Chamber, drafted by S. G. Archibald (Canadian Bar) and by Signor R. Pozzi (Italian Bar) . . ."). This Committee then submitted to the London Congress of the ICC a plan of "Conciliation and Arbitration between Traders of Different Countries," which the Congress adopted on July 1, 1921. The Committee further developed "Regulations on Conciliation and Arbitration," which the Council of the ICC approved officially on July 10, 1922. INTERNATIONAL CHAMBER OF COMMERCE, 13 COMMERCIAL ARBITRATION: FIRST CONGRESS, LONDON, JUNE 27 TO JULY 1, 1921, 3–4 (1921) [hereinafter INTERNATIONAL CHAMBER OF COMMERCE, FIRST CONGRESS]; see also INTERNATIONAL CHAMBER OF COMMERCE, RULES OF CONCILIATION (GOOD OFFICES) AND ARBITRATION 5–7 (1923) [hereinafter INTERNATIONAL CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION].

218. The Rules of Conciliation and Arbitration were drafted by the Drafting Committee in Paris on February 22–23, 1923, and in Rome on March 19, 1923. See *Appendix to Brochure No. 21, Explanatory Commentary of the Rules of Conciliation (Good Offices) and Arbitration*, in INTERNATIONAL CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION, *supra* note 218, at 1.

219. See STONE SWEET AND GRISEL, *supra* note 7, at 45–47 (presenting data illustrating the leading position of the ICC Court as global arbitration center in terms of caseload, the size of the amount disputes, and the geographical range in seats of arbitration combined); BORN, *supra* note 1, at 175–76.

220. Pozzi, *supra* note 188, at 14; PAN AMERICAN UNION, *supra* note 201, at 136.

221. Pozzi, *supra* note 188, at 8.

222. *Id.* at 8. The creation of the ICC was meant to enable the further promotion of the forms of international commercial arbitration established by the United States and Buenos Aires chambers of commerce and trade organizations in the cotton and publishing fields. INTERNATIONAL CHAMBER OF COMMERCE, PROCEEDINGS ORGANIZATION MEETING, *supra* note 216, at 98.

223. Pozzi, *supra* note 188, at 8.

and uniformity among the rules and practices of ICA.<sup>224</sup> The “centralizing effect” of the ICC Court was deemed key to the advancement of international commerce and trading.<sup>225</sup> It set out to offer a different kind of arbitration: arbitration for commercial disputes.<sup>226</sup> Rather than advancing a system of arbitral tribunals for every industry or trade, the ICC Court was designed to operate as a single institution that would offer arbitration worldwide.<sup>227</sup> In Pozzi’s view, the ICC Court was to function as a “Supreme Court of International Commerce.”<sup>228</sup> The first transnational arbitral institution for cross-border commercial dispute resolution was born.

### B. Dependence by Design

The ICC Court’s design as a centralized, private court offering dispute resolution above all markets and trades had a significant impact on its dependency on courts and the national legal rules they applied. Contrary to the transnational networks of local trade associations that came before it, the ICC Court was not set up to perform a Market Entryway Function. It was from the outset unable to provide its clients with transactional security on its own.

Initially, the ICC Court did attempt to employ informal contract enforcement mechanisms. The procedural rules for the Court took into account that a significant number of nations still did not offer judicial enforcement of arbitration, of which the United States was one.<sup>229</sup> The American delegation proposed that the Court provide three procedures for arbitration, designed to apply both “within and without the bounds of international law.”<sup>230</sup> Accordingly, the Court relied on local trade associations and chambers of com-

224. Ad hoc arbitration failed to guarantee a uniform interpretation of contractual clauses or the application of “definite principles.” See Fraser, *supra* note 217, at 187; see also Baron (Michael) Mustill, *The History of International Commercial Arbitration – A Sketch*, in LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 3, 10–11 (Lawrence W. Newman & Richard D. Hill eds., 3d ed. 2014) (“Private initiatives were attempted, but it was not until the rapid spread of global thinking, reflected and inspired by the founding of the League of Nations, that any real progress was made.”).

225. Mustill, *supra* note 225, at 11. But see Fraser, *supra* note 217, at 198 (arguing that an International Court of Arbitration would be “entirely superfluous” and “useless”).

226. See Yves Derains, *New Trends in the Practical Application of ICC Rules of Arbitration*, 3 NORTHWEST. J. INT’L L. BUS. 39, 48 (1981) (referring to this aspect of the ICC as “universality”).

227. Pozzi, *supra* note 188, at 18; see Fraser, *supra* note 217, at 187.

228. Pozzi, *supra* note 188, at 8.

229. INTERNATIONAL CHAMBER OF COMMERCE, 18 PROCEEDINGS OF THE FIRST CONGRESS (LONDON—JUNE 27—JULY 1, 1921) 98, 99, 101 (1921) [hereinafter INTERNATIONAL CHAMBER OF COMMERCE, PROCEEDINGS OF THE FIRST CONGRESS].

230. Pozzi, *supra* note 188, at 20; see also Owen D. Young, *International Commercial Arbitration*, in SELECTED ARTICLES ON COMMERCIAL ARBITRATION 269, 270 (Daniel Bloomfield ed., 1927) (“[S]ome system of arbitration outside the law must be provided. On the other hand . . . a code for arbitration within the law is . . . equally necessary.”). One procedure (Section A) was tailored to disputes where both parties originated from nations that offered public enforceability; one for when one party stems from such legal system (Section B); and one for parties neither of which could rely on enforcement by courts. INTERNATIONAL CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION, *supra* note 217, at 19; see also International Chamber of Commerce, *Proposed Plan for Conciliation and Arbitration between Traders of Different Countries*, in 13 COMMERCIAL ARBITRATION 23–29 (1921).

merce to enforce awards in disputes where one or both parties originated from legal systems that did not offer adequate enforcement. The chamber of commerce of which a noncompliant party was a member, were called upon to impose “such disciplinary measures as it may think fit and proper.”<sup>231</sup>

The Court itself intended initially to employ naming-and-shaming measures as well. It maintained the right to publish the name of the noncompliant party in the official publications of the International Chamber of Commerce and those of the National Committees.<sup>232</sup> However, in a report issued in 1927, the Secretary-General of the ICC Court observed how the Court never applied these procedural rules.<sup>233</sup> This lack of utility of informal enforcement within the ICC system might be explained by the fact that the Court’s intended reach encompassed a broad, heterogeneous clientele that would extend globally across all industries, trades, nations, and cultures. Hence, the ICC Court was not operating within a single market and not capable of performing the Market Entryway Function that individual trade organizations did. Either way, the idle sanctions resulted in the revised 1927 arbitration rules no longer offering procedures for arbitral disputes between parties hailing from non-enforcing states.<sup>234</sup>

In its first Congress, in 1921 in London, the ICC adopted a resolution that articulated the need for enforceability of arbitration by the state. The resolution recommended, among other things, that all countries declare the arbitration clause valid and make foreign arbitral awards enforceable without review of the merits, and that the procedure in legal arbitration across the participating nations be uniform.<sup>235</sup> It declared laws of states that restrict the enforceability of *ex ante* arbitration agreements as “an obstacle to the use of legal arbitration in matters in dispute between traders.”<sup>236</sup>

Several contemporaneous public statements corroborated the realization that the ICC Court would not be able to function without state support. According to Pozzi, judicial enforcement was “the most important phase” of the creation of the Court of Arbitration.<sup>237</sup> The founders of the Chamber, he

231. INTERNATIONAL CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION, *supra* note 217, at 38–39 (art. XX, XLI).

232. *Id.* at 39 (art. XX, XLI).

233. INTERNATIONAL CHAMBER OF COMMERCE, No. 50 ARBITRATION – REVISION OF THE RULES OF CONCILIATION AND ARBITRATION 3, 7 (1927).

234. The 1927 arbitration rules stipulated merely that the ICC Court would ask the “chamber of commerce or any other organization to which the recalcitrant members belongs to take suitable measures.” Sturges, *supra* note 163, at 16. Today, however, the ICC Rules of Arbitration do not stipulate any form of private enforcement beyond explicating that the parties who consented to ICC arbitration are to honor the award. INTERNATIONAL CHAMBER OF COMMERCE, ICC RULES OF ARBITRATION, <https://perma.cc/BE5Q-T837> (last visited Sept. 28, 2016) (art. 34.6); *see also* STONE SWEET & GRISEL, *supra* note 7, at 57 (noting that traces of the ICC’s considerations of non-legal arbitration remained in the Rules until the 1950s).

235. INTERNATIONAL CHAMBER OF COMMERCE, FIRST CONGRESS, *supra* note 217, at 22 (fourth recital and Resolutions 1, 3).

236. *Id.* at 16 (second recital).

237. *See* Pozzi, *supra* note 188, at 8.

explained, intended for the International Court of Commercial Arbitration to be “capable of obtaining legal recognition for its decisions.”<sup>238</sup> Others observed that, since the ICC aimed to establish a permanent arbitral tribunal, “awards would be enforceable in the country where execution is claimed.”<sup>239</sup> The ICC’s Commission on Commercial Arbitration cited the lacking legal validity of arbitration clauses and recognition of foreign arbitral awards as “an obstacle to the use of arbitration in matters in dispute between traders.”<sup>240</sup> Likewise, during the ICC’s First Congress in London in 1921, the Distribution Group, responsible for preparing the resolutions on ICA, considered the lacking legal recognition of the arbitration clause or “*clause compromissoire*” one of the “principal difficulties” standing in the way of advancing a “system of arbitration.”<sup>241</sup> As M. Edouard Huysmans of the Belgian National Committee of the ICC reported in 1921, appropriate legislative and judicial changes were “essential to the progress of ICA.”<sup>242</sup> These statements reinforce the thesis that without coordinated legislative action by the largest number of states possible, the initiators believed that the ICC Court would not succeed as a centralized, transnational dispute forum.

### C. *The Need for Courts: To Geneva and Beyond*

The ICC’s lobbying of the League of Nations substantiates the critical need for the backing of the brute force of states. These efforts led to a worldwide unification of domestic arbitration laws ultimately resulting in the present-day legislative framework provided under the New York Convention.

While most scholars tend to trace the origin of modern-day ICA to the enactment of the New York Convention, this Article travels farther back to the 1910s and 1920s to its antecedents under the League of Nations. Scholars and practitioners alike tend to treat the New York Convention as the primary legal instrument for regulating today’s ICA. However, to understand the nature of the relationship between national courts and transnational arbitral institutions, one needs to go further back in history. The New York Convention builds on the Geneva Protocol and the Geneva Convention

---

238. *Id.* at 19.

239. Fraser, *supra* note 217, at 187–88.

240. Commission on Commercial Arbitration, *Juridical Resolution*, in 13 COMMERCIAL ARBITRATION 22, 22 (1921); INTERNATIONAL CHAMBER OF COMMERCE, PROCEEDINGS OF THE FIRST CONGRESS, *supra* note 230, at 97 (proposing the “Distribution Group” at the ICC’s First Congress).

241. INTERNATIONAL CHAMBER OF COMMERCE, PROCEEDINGS OF THE FIRST CONGRESS, *supra* note 231, at 98 (citing as a secondary difficulty the fact that in certain jurisdictions “foreigners were not permitted to act as arbitrators in international matters”).

242. M. Edouard Huysmans, *Report Submitted by M. Edouard Huysmans on Behalf of the Belgian National Committee*, in 13 COM. ARB. 33, 36–37 (1921) (referring explicitly to the “recognition of the validity of the arbitration clause or agreement” and “[r]eduction to a minimum of the formalities demanded in every Country for the exequatur of a decision by foreign arbitration”). Purely legal sanctions “ensure the observance of the arbitrations clause and the execution of decisions arrived at by arbitration.” *Id.* at 37.



in the 1920s.<sup>243</sup> These early international efforts constituted the very first “stamp of official intergovernmental approval” of ICA.<sup>244</sup> They embodied the first coordinated efforts by states to work towards universal and uniform judicial enforcement of commercial arbitration.<sup>245</sup> The ICC has been the initiator and catalyst of this process.<sup>246</sup> In fact, the legislative cornerstone of today’s international legislative framework was borne out of the critical need of the ICC Court for transactional security in cross-border commercial arbitration.

The incremental international support of cross-border commercial arbitration took place in three milestone stages. The first stage was the enactment of the 1924 Protocol on Arbitration Clauses. Reporting to the League of Nations’ Economic Committee in 1922, the Sub-Committee on Arbitration Clauses explained that the Protocol’s primary focus was to ensure that states would enforce *ex ante* arbitration agreements. The Sub-Committee reasoned that it would be a “matter for regret when a man, who is breaking his contract, is assisted in doing so by the provisions of the law of his own country upon which he can rely.”<sup>247</sup> It was a matter of “the sanctity of contract.”<sup>248</sup>

On August 24, 1922, the League of Nations adopted the resolution to open the Protocol for signature.<sup>249</sup> Under the Protocol, “[e]ach of the Contracting States recognizes the validity of an agreement whether relating to

243. MUSTILL, *supra* note 225, at 11–12 (“[B]y the 1930s the framework of a regime was in place which would allow the cosmopolitan, and on the whole effective, system in force today to supplant the formalistic and parochial fragments which had survived from earlier centuries.”); *see also* BORN, *supra* note 1, at 65 (“[T]he Protocol laid the basis for the modern international arbitral process, requiring Contracting States to recognize, if only imperfectly, the enforceability of specified international arbitration agreements and arbitral awards . . .”).

244. Carel W.A. Schurman, Opening Speech for the United Nations Conference on International Commercial Arbitration (May 20, 1958), <https://perma.cc/97ZS-BVZQ> (last visited Sept. 28, 2016).

245. BORN, *supra* note 1, at 65 (“The Geneva Protocol played a critical—if often underappreciated—role in the development of the legal framework for international commercial arbitration.”).

246. These Geneva Instruments were the result of the private sector working together with the public sector. *See* LEAGUE OF NATIONS INTERNATIONAL ECONOMIC CONFERENCE, GENEVA, MAY 1927, GUIDE TO THE PREPARATORY DOCUMENTS OF THE CONFERENCE 5 (1927) (“It has been the policy of the Preparatory Committee to cast its net wide and to elicit the active collaboration both of individuals and of private and official organisations throughout the world . . . . The documents therefore . . . have been prepared, separately or in collaboration, by the Secretariat of the League [and] . . . the International Chamber of Commerce . . . .”); Huysmans, *supra* note 243, at 37 (“Without waiting for the general adoption of arbitration by the means of progress in legislature, it is considered that it would be to the advantage of the merchants to constitute ‘Arbitration Institutes’ to which they could submit their differences and that by a uniform set of regulations which would be, as it were, promulgated by the International Chamber of Commerce, it would be possible to carry out the scheme immediately.”); *see also* BORN, *supra* note 1, at 100 (“It was the combination and active collaboration of these two communities—public and private—that produced the contemporary legal framework for international commercial arbitration.”); *id.* at 63 (“International Chamber of Commerce [established in 1919] played a central role in efforts by the business community to strengthen the legal framework for international arbitration.”).

247. Sub-Committee on Arbitration Clauses, *supra* note 155, at 1412–13.

248. *Id.* at 1414.

249. Sir Eric Drummond, *Protocol on Arbitration Clauses Note*, 5 LEAGUE OF NATIONS OFFICIAL J. 235, 235 (1924).

existing or future differences between parties subject respectively to the jurisdiction of different Contracting States . . . .”<sup>250</sup> With the Protocol, the League of Nations had set the first multilateral steps to address the lack of judicial support for arbitration.<sup>251</sup> In its first three years, 15 states ratified the Geneva Protocol, which led to the full enforceability of arbitration agreements in these jurisdictions.<sup>252</sup> Although the United States did not ratify the Protocol, it did pass similar legislation with the FAA in 1925.

The second stage of multinational legislative change motivated by the ICC was the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. The judicial enforceability of *ex ante* arbitration agreements that the Geneva Protocol instigated proved insufficient for the mercantile community. Whereas the Protocol stipulated that signatory states would enforce domestic arbitral awards, no provision provided for the enforcement of *foreign* arbitral awards.<sup>253</sup> The Sub-Committee on Arbitration Clauses, reporting to the League of Nations’ Economic Committee in 1922, was aware that such a provision was left out in the Protocol. It advised that, due to the lack of consensus concerning the reciprocal enforcement of court decisions, the question of the enforcement of foreign arbitral awards would have to wait until a later date.<sup>254</sup>

That date came on September 26, 1927, when the League of Nations adopted the Geneva Convention.<sup>255</sup> Up until the Second World War, 21 nations ratified the Convention.<sup>256</sup> The Convention required states that were party to the Protocol to enforce arbitral awards rendered in one of the other

250. *Id.* at 236 (art. 1, ¶ 1). Equally significant, the Protocol limited this obligation “to contracts which are considered as commercial under its national law.” *Id.* (art. 1, ¶ 2).

251. In its preparatory report, the Sub-Committee on Arbitration cited a Convention between France and Belgium from 1889 as the single precedent for a multilateral instrument administered by the League of Nations, *see* Sub-Committee on Arbitration Clauses, *supra* note 155, at 1414.

252. The states that ratified the Protocol between 1924 and 1927 include: Albania (1924), Belgium (1924), Denmark (1925), Finland (1924), Germany (1924), Great Britain and Northern Ireland (1924) [and other British Territories in the following years], Greece (1926), Iraq (1926), Italy (1924), Monaco (1927), Netherlands (1925), New Zealand (1926), Norway (1927), Romania (1925), and Spain (1926). Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 678.

253. *See* Committee of Jurists, *Meeting of Legal Experts to Consider the Execution of Arbitral Awards*, 8 LEAGUE OF NATIONS OFFICIAL J. 582, 582 (1927).

254. *See* Sub-Committee on Arbitration Clauses, *supra* note 155, at 1414. In fact, the Sub-Committee hoped that private or informal enforcement could still render international commercial arbitration “salutary and effective.” *Id.* at 1413–14 (referring to “other sanctions besides the executive action of a law court by which a merchant or business man may be made to comply with an award”).

255. Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 (1929).

256. The states that ratified the Convention between 1927 and 1940 include: Austria (1930), Belgium (1929), Czechoslovakia (1931), Denmark (1929), Finland (1931), France (1931), Germany (1930), Greece (1932), India (1937), Italy (1930), Luxembourg (1930), Netherlands (1931) [and other Dutch Territories in the following years], New Zealand (1929), Portugal (1930), Romania (1931), Spain (1930), Sweden (1929), Switzerland (1930), Thailand (1931), and United Kingdom and Northern Ireland (1930) [and other British Territories in the following years]. Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 2096.

signatories' jurisdiction.<sup>257</sup> The Convention stipulated, "an arbitral award made in pursuance of an agreement whether relating to existing or future differences . . . shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon."<sup>258</sup> Moreover, judicial review of the merits was excluded.<sup>259</sup> That restriction meant that courts would no longer be permitted to condition the enforcement of arbitral awards on its assessment of the arbitrator's resolution of the dispute in question.

The third stage was the adoption by the United Nations of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958, the foundation of the present-day international legal framework for ICA.<sup>260</sup> The Geneva Convention had proven inadequate in lessening the needs of cross-border commercial arbitration.<sup>261</sup> Under the Geneva Convention the winning party was effectively compelled to attain a so-called "double exequatur," which led to additional legal proceedings in the country of arbitration.<sup>262</sup> Hence, the transaction costs of enforcing ICA were still too high to help arbitral institutions offer a viable alternative to adjudication.

In the wake of World War II, expanding international trade increased the need for further harmonization and liberalization of national arbitration rules.<sup>263</sup> In 1948, famed arbitration scholar Francis Kellor wrote, "[t]he unification of arbitration law and practice constitutes one of the major problems in the development of international commercial arbitration systems."<sup>264</sup> He added, "[a] general practice of arbitration can become a reality only in countries where arbitration law makes agreements to arbitrate future, as well as existing, disputes, legally valid, enforceable, and irrevocable."<sup>265</sup> The ICC echoed the need for further international action. It stated in its 22nd resolu-

257. See Economic Committee, *Work of the Economic Committee During Its Twenty-First Session*, 8 LEAGUE OF NATIONS OFFICIAL J. 569, 572 (1927).

258. Geneva Convention, art. 1 (Sept. 26, 1927).

259. Geneva Convention, art. 1(d) (Sept. 26, 1927); see BORN, *supra* note 1, at 66; PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1663 (1999).

260. In subsequent years, additional regional bilateral and multilateral agreements supplemented the New York Convention, notably the Inter-American Convention on International Commercial Arbitration in 1975. See Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42.

261. See *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 928 (2d Cir. 1983) ("But previous international agreements had not proved effective in securing enforcement of arbitral awards; nor had private arbitration through the American Arbitration Association, the International Chamber of Commerce, the London Court of Arbitration and the like been completely satisfactory because of problems in enforcing awards.").

262. See, e.g., *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 22 (2d Cir. 1997); *STONE SWEET & GRISEL*, *supra* note 7, at 62. Another flaw was the ambiguity as to scope. See *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 412 (N.Y. 1982).

263. See *Bergesen*, 710 F.2d at 929.

264. KELLOR, *supra* note 171, at 140.

265. *Id.* at 63–64.

tion during its 13th Congress in 1951 that, despite the adoption of the two Geneva instruments, “difficulties and uncertainties continue to exist . . . as to the enforceability of arbitral awards and this circumstance reduces the usefulness of international arbitration.”<sup>266</sup>

Hence, the ICC declared, the “full development of international commercial arbitration depends primarily on the standardization of arbitral practice throughout the world. The surest way to achieve this aim is to unify existing arbitration laws in different countries. . . .”<sup>267</sup> The New York Convention improved on both the Geneva Protocol and the Geneva Convention. Articles II and V(d) repeated the Geneva Protocol in a slightly modified form, while the rest of Article V and Article VI adopted the exceptions to the recognition and enforcement of foreign arbitral awards.<sup>268</sup> The New York Convention aimed to remove the remaining obstacles in the way of enforcing cross-border arbitration agreements and arbitral awards.<sup>269</sup> Over the years, the list of participating states grew from 24 in 1958 to 157 today.<sup>270</sup>

In a span of 35 years, the ICC succeeded in persuading states to join forces and lay the foundation of an ever-progressing privately governed global commercial dispute resolution. The theory of social power would predict that the critical dependency on transactional security in arbitration gave states the ability to influence the fate of the ICC Court. They could exercise this social power by adjusting the conditions under which their courts would enforce arbitration.

When it envisioned its Court of Arbitration, it hoped that the institution would be the first step towards “extra-territorial jurisdiction.”<sup>271</sup> Its goal was to realize “automatic enforceability of private arbitral awards based on a universal pre-legal principle of party autonomy.”<sup>272</sup> If fulfilled, this wish would have entailed “the unity of jurisdiction by creating a jurisdiction

266. INTERNATIONAL CHAMBER OF COMMERCE, No 161 RESOLUTIONS ADOPTED BY THE XIII<sup>TH</sup> CONGRESS OF THE INTERNATIONAL CHAMBER OF COMMERCE 75 (1951) [hereinafter INTERNATIONAL CHAMBER OF COMMERCE, RESOLUTIONS XIII<sup>TH</sup> CONGRESS].

267. INTERNATIONAL CHAMBER OF COMMERCE, RESOLUTIONS XIII<sup>TH</sup> CONGRESS, *supra* note 269, at 75.

268. See BORN, *supra* note 1, at 66 (“[T]he Geneva Protocol planted the seeds for a number of principles of profound future importance to the international arbitral process . . .”).

269. See *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 412 (N.Y. 1982) (“Generally, the UN Convention eased the difficulty in enforcing international arbitration agreements by minimizing uncertainties and shifting the burden of proof to the party opposing enforcement.”).

270. The 24 original signatory states include: Argentina, Belarus, Belgium, Bulgaria, Costa Rica, Ecuador, El Salvador, Finland, France, Germany, India, Israel, Jordan, Luxembourg, Monaco, Netherlands, Pakistan, Philippines, Poland, Russian Federation, Sri Lanka, Sweden, Switzerland, and Ukraine. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

271. Pozzi, *supra* note 188, at 20.

272. INTERNATIONAL CHAMBER OF COMMERCE, RESOLUTIONS XIII<sup>TH</sup> CONGRESS, *supra* note 269, at 15 (“At first sight commercial arbitration would seem to belong to the second category. The will of the parties is sovereign in any contract and if they sign an undertaking to settle their differences through, say, the Court of Arbitration of the I.C.C., the resulting award should be automatically enforceable by law in any country. Unfortunately, however, this is by no means the case universally.”).

parallel to that of the commercial courts.”<sup>273</sup> It would have bypassed the enforcing role of courts altogether and have thereby been capable of directly triggering the state’s enforcement apparatus. Such a powerful private court would entail a bold ‘balancing operation’ in its relationship with national courts. The New York Convention did not go as far. States retained the option, through their courts, to review both arbitration agreements and arbitral awards—albeit imposing minimal restrictions. Hence, courts maintained their social power over transnational arbitral institutions.

### CONCLUSION

This Article sheds new light on the power of public governance over the private institutions in cross-border commercial arbitration. Understanding the power dynamics underlying the legal rules on ICA contradicts the prevailing assumption among scholars and practitioners that arbitration institutions attained autonomy relative to national governments. As shown, assessing the degree of arbitral autonomy in terms of control and reliance exposes the critical dependency of arbitral institutions on the state, especially the courts. Transnational arbitral institutions are incapable of providing the transactional security that cross-border commercial arbitration requires without relying on judicial enforceability. In this sense, independence from judicial intervention *in* the arbitral process depends on judicial intervention *with* the arbitral process.

Consequently, as the fate of transnational institutional arbitration is in the hands of national courts, states ultimately control and are responsible for the condition and development of international commercial arbitration.

The power of public governance is not limitless, but two features of it show its resilience. First, the courts may lose social power by using it excessively. The legal environment in the U.S. in the 1910s demonstrates that when arbitration rules pose stringent restrictions on the enforcement of arbitration, private alternatives to judicial enforcement become more efficient. Severe legal intolerance of arbitration thus risks reducing the courts’ influence. Even so, given the minimal scope of judicial review today, likely there is room for the legislature or the courts to introduce additional conditions of enforceability without losing their power advantage.

Second, unlike legal power, social power is not a fixed attribute. It oscillates with the fluctuating power dynamics between actors. If arbitral institutions were to create effective means of private enforcement, they could reduce their dependency on judicial enforceability and thus lessen the influence of the state. Nonetheless, it may be challenging to devise alternatives means of enforcement that can compete with the state’s dominant and readily available enforcement machinery.

---

273. Huysmans, *supra* note 243, at 38.

Hence, until the day transnational arbitral institutions find ways to alter the power dynamics with national courts, they remain under the domination of the national arbitration rules that these courts invoke. The power of public governance elicits a reassessment of the scope of judicial oversight of arbitration. Given the critical influence of national courts on transnational arbitral institutions, judicial deference is not a matter of respecting contractual freedom and party autonomy alone. The courts' hands-off approach involves the outsourcing of the state's accountability of a private system of global dispute resolution that it enables and sustains. In *Mitsubishi*, Justice Blackmun suggested that the narrow scope of judicial review rests in part on the belief that transnational arbitral institutions will be competent, conscientious, and impartial. If courts remain reluctant to verify this presumptive trust by expanding the scope of judicial review, they should at least advance a legal justification beyond contract doctrines for the state's abstention.