International Arbitration Culture and Global Governance

Joshua Karton, Queen's University
Chapter 4

International Arbitration Culture and Global Governance

Joshua Karton*

1) Introduction

Academics increasingly characterize international commercial arbitration (ICA)1 as a form of global governance or (on a less grand scale) describe ICA’s international-law-generating and global regulatory aspects.2 Relatedly, they have also produced an abundance of commentary

* Assistant Professor, Queen’s University Faculty of Law. I am grateful to Walter Mattli and Thomas Dietz for their generous invitation to join this project and also for insightful comments on earlier drafts.

1 Like the other chapters in this book, this chapter deals only with “general” international commercial arbitration. That is, it considers only arbitrations of disputes arising from cross-border contractual relationships between commercial entities (including state entities engaged in commerce). It does not deal with arbitration of employment or consumer disputes. Most importantly, it does not discuss arbitrations arising out of international investment treaties. Since investment treaty arbitration regulates the conduct of states in the exercise of sovereign functions, it constitutes a very different kind of global governance from that of international commercial arbitration. See, eg, Anthea Roberts, “Divergence between Investment and Commercial Arbitration,” Proceedings of the Annual Meeting (American Society of International Law) 106 (March 2012): pp. 297-300. Accordingly, investment treaty arbitration will not be discussed here, except to the extent that a given investment arbitration award or scholarly publication discusses matters of arbitral practice common to both investment and commercial arbitrations. It should be noted, however, that shared cultural norms are also an important factor shaping global governance in international investment arbitration. Indeed, the argument for the importance of culture is even stronger there, since the community of frequently-appointed investment arbitrators is smaller and more homogeneous than the community of commercial arbitrators. See, eg, Moshe Hirsch, “The Sociology of International Investment Law,” in The Foundations of International Investment Law: Bringing Theory into Practice, edited by Zachary Douglas, Joost Pauwelyn, and Jorge Viñuales (Oxford: Oxford University Press, forthcoming 2014), ch. 4; Stephan Schill, “W(h)ither Fragmentation? On the literature and sociology of international investment law,” European Journal of International Law 22, no. 3 (2011), pp. 875-908; Jeswald Salacuse, “The Emerging Global Regime for Investment,” Harvard International Law Journal 51, no. 2 (2010): pp. 427-473.

on the new *lex mercatoria* and the transnationalization of commercial law through arbitration.³

By contrast, users of ICA (parties and their counsel) tend to characterize it as a procedural alternative to litigation in national courts. They perhaps share the perspective of the US Supreme Court, which has described the difference between litigation and arbitration as purely “procedural”,⁴ and arbitration agreements as simply “a specialized kind of forum-selection clause.”⁵ Surveys confirm that parties’ specific reasons for choosing arbitration are generally procedural—most importantly, the global enforceability of arbitral awards and the neutrality of the forum, but also such matters as the ability to choose one’s arbitrator, the speed and cost of the proceedings, confidentiality, and the flexibility of evidentiary rules.⁶

---


⁵ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”)

the ordinary case, where disputes are governed by the substantive law of a state, most people would expect an arbitral tribunal to decide issues of substantive law in roughly the same way as a court from the country whose law governs the dispute.

If ICA is just an adjunct to court litigation of commercial disputes—more neutral, more widely enforceable, perhaps faster and cheaper, but essentially the same adjudicative exercise in a different venue—then ICA could constitute a form of “global governance” only in a rather impoverished sense. According to such a conception, ICA could amount at most to an atomized form of governance derivative of the authority of national laws and courts, a mere adapter plug that connects disparate national legal regimes with globalized businesses.

Although only a small minority of cross-border commercial disputes are resolved by arbitration, ICA undoubtedly constitutes a form of “transnational governance.” The standard definition of transnational law (a key aspect of transnational governance), given by Jessup in 1956, is so broad as to encompass any form of legal regulation, by any private or public entity, of any activity that crosses national boundaries: “all law which regulates actions or events that transcend national frontiers… [including] [b]oth public and private international law… [and] other rules which do not wholly fit into such categories.”

However, for ICA to constitute global governance, as opposed to merely disconnected resolutions of individual cross-border disputes according to national laws, there are at least two prerequisites. First, legal rules must be formulated at the global level and apply regardless of the nationality and public or private status of the parties. Since we still live under an essentially Westphalian world order, this means that states must at minimum acquiesce to some degree of autonomy for arbitral adjudication. Second, there must be a

---

For a summary of different theories of international arbitration as governance, see Chapter One of this book.


As Friedman put it with respect to the promulgation of codified instruments like the INCOTERMs, “All this is supposed to constitute . . . autonomous norm creation within the international economy. . . . But in the end all such customs and practices have to be validated somehow by national courts applying what they consider
functional consistency in arbitral decision-making; a consistent adjudicative approach, such that “like cases are treated alike,” is a hallmark of the rule of law. In the radically decentralized ICA system, where there is no central administrative body, no appellate hierarchy, and no common sets of procedural or substantive rules, consistency appears to be a tall order. Can there be global governance without a global governor?

The existing literature addresses ICA’s character as a form of governance and explains many of its features, but does little to explain how or why ICA has emerged or may emerge as global governance. The literature arising from within the international arbitration community remains largely doctrinal, while the more critical literature that has developed in political science and sociological circles has focused on ICA’s position within the international economic system (and has concentrated largely on investment rather than commercial arbitration).12 Neither literature provides systemic explanations for the outcomes reached in ICA beyond general claims that (for example) ICA decision-making tends to favor multinational corporations at the expense of developing states.13

A more fine-grained tool for analyzing and predicting outcomes in ICA is needed. However, it is difficult to come by. Broad confidentiality rules deprive the researcher of access to the data normally used to assess adjudicative systems: the decisions of the adjudicators. Very few ICA awards are published,14 and there is no way of knowing whether the few extracts that are publicly available are representative of the whole body of awards. Moreover, not all of the published award extracts contain any analysis of substantive law matters, and these are difficult to compare due to variations in governing laws, facts, and membership of the

13 See, eg, several of the contributions to Michael Waibel et al., eds., The Backlash Against Investment Arbitration (Alphen aan den Rijn: Alphen, 2010).
14 As opposed to investment arbitration awards, most of which are nominally confidential but have been published, with the consent of the parties or otherwise. See Joshua Karton, “A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards” Arbitration International 28, no. 3 (2012): pp.447-486, 455-56.
tribunals. Thus, the traditional methods of legal scholarship are largely useless for explaining ICA as governance.

Several interdisciplinary perspectives have something to contribute, including the various approaches presented in this book, but I argue that the key to understanding ICA’s emergence as global governance is a legal culture specific to the international arbitration community. Of course, while all sociological studies concern the effects of social norms, not all sociological theories emphasize the importance of shared cultures—that is, community dynamics. For example, two recent sociologically-inflected treatments of ICA focus, respectively, on the structure of ICA institutions and on networks of individual practitioners. However, I believe that a sociology of the whole ICA community—the field’s culture—presents the best opportunities to explain its role in global governance.

The legal culture described in this chapter satisfies both of the prerequisites for ICA to become a form of global governance. A shared culture instills into international arbitration practitioners a normative commitment to establishing international arbitration as a global system of governance for cross-border commercial relationships. Arbitrators and arbitral institutions have formulated rules and established practices that are specific to globalized commerce. These rules are a long way from a complete legal system and are not self-enforcing, but the ICA community (along with the global business community it supports) has also been successful in convincing states to collaborate in the development of globalized procedural and substantive rules and practices. The same culture also provides the decisional stability necessary for arbitration to come into its own as a form of legal governance promoting the rule of law.

The notion of a culture shared by the legal professionals of a given jurisdiction is uncontroversial. After all, no legal system can be characterized solely on the basis of its rules—the rules need interpreting, and there will always be situations where no specific rule exists or where more than one rule might plausibly apply. Legal culture fills those gaps because it inculcates a collective, reflexive response that often obviates the need for argument. In ICA, it is much harder to conceive of a shared legal culture because practitioners do not share a common nationality, language, or training, or even access to a common corpus of governing laws or precedents.

However, despite their differences, international arbitration practitioners actually have more in common than the body of legal practitioners within any one jurisdiction. As Cotterrell points out, “the distance between the work environment, career pattern and outlook of the high prestige corporation lawyer and the sole practitioner in a large American urban center is so great as to make it difficult to see any significant bonds of common experience and interest between them.” By contrast, most international arbitration practitioners have similar professional and educational backgrounds, including cosmopolitan and multicultural upbringings, graduate degrees from a fairly small number of elite universities, work experience at multinational business law firms, and close ties with practitioner, commercial, and academic communities.

The personal characteristics, values, perspectives, experiences, and modes of reasoning that ICA practitioners tend to have in common constitute a culture. That culture, and the specific social norms that compose it, can be described, and its effects on ICA-as-governance can be assessed. A shared culture not only drives the emergence of ICA as a system of governance, but also makes it possible for ICA to achieve a measure of rule-of-law legitimacy. Although it is still a young field, ICA has reached a point in its development where its basic legal concepts are largely settled. Despite the existence of increasing numbers of international arbitrators and arbitral institutions, there is “a growing convergence in procedures and mutual goals.” The fact that counsel, arbitrators, and even arbitral institutions compete with each other means that beneficial innovations are quickly copied, so that the field progresses en masse. Even without stare decisis (and even without most decisions being reported), ideas and trends disseminate when arbitrators work together and when they meet in conferences and social settings.

Within the small, notoriously close-knit international arbitration community, a distinct and cohesive legal culture has emerged. This paper looks at the role culture has played in driving the emergence of ICA as a form of global governance and in shaping the form that governance takes.

Part II evaluates “culture” as the basis for a theory of ICA-as-governance, then explains how a common culture can emerge within a heterogeneous, transnational community. Part III

---

17 Cf Ralf Michaels, “Roles and Role Perceptions of International Arbitrators,” Chapter Three of this book (“Differences within this group are significantly less pronounced than differences between the group and its environment.”).


19 The characteristics shared by leading international arbitration practitioners will be discussed in more detail in section 2(b), below.

describes the aspects of international arbitration culture that are most relevant to ICA’s development as a form of global governance. In particular, it argues that arbitrators are driven to establish ICA as an autonomous, global system of governance by a shared dedication to internationalism for its own sake and also by a belief that internationalism serves the interests of commercial parties.

To generate a cultural account of ICA as a form of global governance, I draw on a variety of previously-published written sources and original interview data. Written sources included anything that might express or describe standard practices in ICA or international arbitrators’ values, interest, goals, or decision-making processes. These are primarily writings by arbitrators, such as academic publications, conference presentations, and lectures, as well as published arbitral awards. Academic writings are at best anecdotal evidence of one author’s experiences, and only a tiny, non-representative sample of arbitral awards are published. Accordingly, such sources cannot be used to make statistically valid generalizations about particular doctrines or outcomes. However, they do serve as useful sources of information about norms in ICA.

Written sources of data on ICA culture were supplemented with a series of interviews I conducted in 2012 with twenty international commercial arbitrators.21 Most of the interviewees were selected based on lists of leading and up-and-coming arbitration practitioners published by Chambers and Partners22 and by Who’s Who Legal;23 additional interviewees were identified via snowball sampling.24 It was important that the interviewees feel they could speak freely, so all interviews are presented in an anonymized fashion. Where appropriate, interviewees are described in a general way so that the reader can put the interviewee’s comments in context. No details of the interviewees’ lives and careers have been changed, but information about them may have been omitted to protect their anonymity.

The interviews were conducted in person wherever possible, and otherwise by telephone. All of the interviews were recorded and transcribed for analysis. They were “semi-structured,” meaning that there was not a single set of scripted questions that was posed to every

21 The interviews were conducted during the preparation of a recently-published book, Joshua Karton, The Culture of International Arbitration and the Evolution of Contract Law (Oxford: Oxford University Press, 2013). That book focuses on international arbitral decision-making on matters of substantive law, and proposes that a distinct culture of international arbitration is shaping the evolution of contract law principles. However, the same research also supports the broader analysis presented in this chapter, which considers all aspects of arbitral decision-making in order to describe ICA’s emergence as a form of global governance.


24 That is, interviewees were asked to suggest other arbitrators who might be amenable to being interviewed and be able to share useful insights.
interviewee; instead, a series of general topic areas, outlined in advance, was proposed for
discussion, and interviewees were encouraged to speak freely on those topics or on related
topics that came to mind. The semi-structured approach strikes a balance between informal
and closed interview techniques. It increases the comprehensiveness of the data gathered and
makes data collection more systematic, without closing off interesting areas of discussion or
requiring interviewees to fit their responses into predetermined categories.\footnote{25}

All twenty interviewees are active as arbitrators, but some work primarily as counsel or as
academics. They come from or currently practice in thirteen different countries\footnote{26} and were
trained in a variety of legal systems; nearly every major region of the globe is represented.\footnote{27}
They range in age from their early forties to their early eighties. Some have a primarily
academic background, while others spent their entire professional lives in law firms. Some
worked for several years in arbitral institutions, as government officials, or as national court
judges. All of them work mostly or exclusively in international arbitration, but some are
generalists and some specialize in particular types of disputes. Approximately two thirds
appear on lists of highly in-demand arbitrators, while others sit as an arbitrator less frequently
or began to receive appointments as an arbitrator only within the last few years. Only three
are women, but this was not for lack of effort to secure the participation of female
interviewees; women were more likely than men to decline requests for an interview.

Twenty interviews is a small sample, and the interviewees are not representative of all
international arbitrators in a statistical sense. However, they were chosen to represent as wide
as possible a range of backgrounds; interviewing arbitrators with varying characteristics
presented the best opportunities to uncover similarities and differences between their
adjudicative philosophies and to identify relationships (if any) between the personal
characteristics of arbitrators and their decision-making. Except on a few well-defined issues
characterized by clear differences in national legal traditions,\footnote{28} interviewees’ responses were
highly consistent with each other, regardless of variations in gender, national background,


\footnote{26} Some interviewees requested that their home states not be named because they come from states that have
produced only a few international arbitrators.

\footnote{27} There were no interviewees who grew up or received their legal training in Eastern Europe, Sub-Saharan
Africa, or South Asia; however, several interviewees have extensive experience with disputes relating to
those regions.

\footnote{28} The clearest example is the appropriateness of arbitrators actively encouraging settlements between the
parties, an issue that caused some angst among interviewees. Most but not all of the interviewees who
indicated that it is their practice to take an active role in helping the parties to settle were trained in
jurisdictions that have a strong tradition of national court judges encouraging settlements, such as Germany,
Switzerland, and various East Asian states.
professional experience, and the like. This gives me some confidence that a larger sample would not have yielded substantially different findings.

Of course, not everything said by arbitrator—in publications, awards, or interviews—should be taken entirely at face value. In addition to being statistically unrepresentative, the arbitral pronouncements cited in this chapter may simply be self-serving. After all, arbitrators work in a competitive marketplace where they must compete with other arbitrators for appointments, and all of them benefit when the field as a whole expands. Indeed, much ICA scholarship has been criticized—with some justification—as amounting to little more than marketing.

The fact that such sources of information may not accurately depict widespread arbitral practice does not mean that they are useless. Writings by arbitrators and interview data are important to the extent that they indicate the values with which ICA markets itself and, correspondingly, the features of ICA and characteristics of arbitrators that arbitrators themselves consider to be important. Such statements may not be statistically valid (or even accurate with respect to the individual arbitrators who wrote or said them) but they are theoretically useful. For sociological purposes, it makes little difference whether (for example) ICA actually does serve the interests of international commerce better than national court litigation. What matters is that international arbitrators passionately believe this to be the case, and that they see serving commercial interests as an important goal.

2) Legal Culture and Transnational Communities

Scholarly attention to ICA has thus far been dominated by traditional, doctrinal analysis that focuses on codified rules and published decisions. However, “pure legal analysis” is a

29 On the role of competitive market forces in shaping ICA and in shaping international arbitrators’ self-image, see Karton, The Culture of International Arbitration, pp. 56-75.

30 See, eg, Catherine Rogers, “Transparency in International Commercial Arbitration,” University of Kansas Law Review 54 (2006): pp. 1324-1325 (observing that ICA has only “recently . . . attracted some skeptics, who are calling for . . . reforms”. However, these critics remain few in number and “their proposals have demonstrated an appreciable sense of reserve.”).

31 This phenomenon may be due to the fact that so much international arbitration scholarship is published by writers who work primarily as practitioners. The purely theoretical literature on ICA (as opposed to investment treaty arbitration) is tiny and largely focused on jurisdictional matters. See, eg, Emmanuel Gaillard, Legal Theory of International Arbitration (Leiden: Martinus Nijhoff, 2010); Hong-lin Yu, “Explore the Void—An Evaluation of Arbitration Theories,” International Arbitration Law Review 7, no. 6 (2004): pp. 180-190 (Part 1) and 8, no. 1 (2005): pp. 14-22 (Part 2). A small but increasing number of quantitative, empirical studies have been conducted. Some of these also focus on published awards, and so are either limited to investment arbitration (where most awards are publicly available) or of very limited value because of the lack of a statistically representative sample of the total body of arbitral awards.
highly problematic concept; in any legal system, an understanding of the rules alone is insufficient to explain the outcomes reached in adjudication. The entire field of socio-legal studies is premised on this notion. As Legrand writes:

... the notion of “French law” cannot be reduced to that of “binding law in France.” French law is much more than a compendium of rules and precepts. Accordingly, to assert that the study of French law consists in the study of French legislative texts and judicial decisions is plainly inadequate.

Comparativists similarly agree that “one must take account not only of legislative rules, judicial decisions, the ‘law in the books’,” and also of general conditions of business, customs, and practices, but in fact of everything whatever which helps to mold human conduct in the situation under consideration.” In this section, I justify my focus on culture as the key component of the “everything whatever” that helps to explain international arbitral decision-making, then assess the prospects for such a culture arising in a heterogeneous, transnational community like that of ICA practitioners.

a) **Culture as the Basis for an Account of International Arbitration as a Form of Governance**

While the existing literature discusses the interaction of multiple legal cultures in ICA, it largely deals with conflicts created by differing cultural assumptions, and fails to account for

Quantitative studies relating to international commercial arbitration mostly take the form of surveys on such easily-counted matters as the relative popularity of different seats of arbitration, arbitral institutions, and governing laws. See, eg, the surveys conducted by Queen Mary, University of London, with a variety of research partners. But see Thomas Schultz and Robert Kovacs, “The Rise of a Third Generation of Arbitrators?—Fifteen Years after Dezalay and Garth,” *Arbitration International* 28, no. 2 (2012): pp. 161-171. Only in the last few years has a socio-legal literature on international arbitration begun to emerge. In addition to other chapters in this book, see also Karton, *The Culture of International Arbitration*; Hirsch, “Investment Arbitration”; Schill, “W(h)ither Fragmentation”; D’Silva, “Dealing in Power.” For a recent example of analysis that is not explicitly sociological but sympathetic to the socio-legal perspective, see Luke Nottage, “In/formation and Glocalization of International Commercial Arbitration and Investment Treaty Arbitration in Asia”, paper presented at the international conference on “Dispute Resolution: Alternatives to Formalization – Formalization of Alternatives”, Goethe University Frankfurt, 19-21 July 2013 (forthcoming 2014; manuscript on file with author).

32 Also called “law and society” or “sociology of law.”
35 Most of the studies of culture in ICA that have been published focus on the divergent effects of the multiplicity of national legal cultures in which arbitrators and counsel were trained; they consider such matters as the propriety of *ex parte* communications, the proper scope document production, treatment of witnesses, and the promotion of settlements by arbitrators. See, eg, Kun Fan, “Glocalization of Arbitration:
the convergent effects of cultural factors on the outcomes reached in arbitrations. This is not surprising; lawyers—who, after all, make their living by working with legal rules—often resist explanations for adjudicative outcomes that discount the applicable rules (and, for that matter, cultural explanations for the creation of rules). For most lawyers, “culture” makes for an unsatisfying account of observed behavior. It is simultaneously broad enough to be vague and narrow enough to be reductionist.36

Culture is also not the sole or even necessarily the prime determinant of behavior; a variety of other constraints act upon arbitrators, from legal rules to economic self-interest, to personal political or moral beliefs. Yet culture is a powerful, inescapable force shaping all aspects of human conduct, including adjudication. An explanation of arbitral justice that does not at least acknowledge cultural realities cannot hope to be complete. Despite the analytical baggage the term “culture” carries, it is the only word that adequately encompasses the various social factors that affect adjudication: standard practices, interests, values, goals, and attitudes.

Culture exists wherever members of a community share a set of norms that produce reflexive behavior conditioned by tradition or community approbation. Culture forms a feedback loop with behavior; it both shapes and is shaped by the conduct of the community’s members. In other words, culture consists of a complex of norms that condition behavior both by shaping the thinking of individual members of the community and by creating a community consensus or peer pressure that discourages deviation from those norms. The key aspect of culture that differentiates it from other factors that shape behavior is that it is reflexive. It operates prior to—and therefore frequently obviates—deliberate decision-making. Cultural factors “make it unnecessary to think out afresh our reactions to situations. The situations

become standardized. Their meaning and the appropriate way to act in relation to them become taken for granted.”

For analytical purposes, cultures are often broken down into their constituent social norms. The literature indicates that social norms have the same effects on specific behaviors as culture does on behavior generally; they both condition and are conditioned by the interactions between members of the community. To put it differently, social norms and cultures are micro-level and macro-level equivalents. In the legal context, Cooter identifies three effects of social norms on law: expression, internalization, and deterrence. Norms express the customs and values of a given community, inculcate those customs and values into members of the community, and deter violations of the norms through the imposition of social sanctions.

Using norms (on the micro level) or culture (on the macro level) to explain observed behavior is a necessarily uncertain proposition. Culture is “indeterminate”—it amalgamates a “variety of activities and attributes into one common bundle” and thereby may confuse different factors affecting behavior or disguise the differences between them. Culture is also “impressionistic”—it lacks “sufficient analytical precision . . . to allow it to indicate a significant explanatory variable in empirical research.” For these reasons, it is impossible to identify direct causal relationships between specific social norms and corresponding behaviors; specific behaviors cannot be ascribed wholly to the effects of culture generally, let alone to any one norm. Similarly, it is impossible to separate entirely the effects of culture from other factors, such as the threat of punishment or economic self-interest. Nevertheless, so long as the researcher is careful not to indulge in false determinism, “the malleability surrounding the notion of ‘culture’ does not prevent the ascription of determinative efficacy and the articulation of various characteristics which can prove of direct relevance.”

A distinct culture is not, of course, the only thing that distinguishes international arbitral decision-making, nor is a sociologically-influenced analytical method the only means by which to consider arbitral awards within their broader context. Two other fields, psychology and economics, have proven particularly useful in understanding the decision-making of national court judges, although scholars of international law have been slower to adopt interdisciplinary methods.

42 Legrand, “Fragments,” pp. 28–9, calling the indeterminacy of culture “a handicap only for the positivist.”
Psychological studies of judging—that is, studies of judges’ moral and political preferences—abound in the literature on domestic litigation. Similarly, many studies have been carried out that apply economic models to construct what might be called materialistic accounts of judicial decision-making. No similar studies have been conducted on ICA, but in any event, for this research, the sociological approach was preferable to both economic and psychological methods. The psychological makeup and political predilections of both judges and arbitrators undoubtedly affect the way they make decisions, including their application of substantive law. However, international commercial arbitrations rarely involve the kinds of politically-charged issues where differences in adjudicators’ political orientations are likely to play a large enough role to shift outcomes. Such factors are therefore unlikely to create divergences between the ways that judges and arbitrators make decisions on the kinds of disputes that are referred to ICA.

In addition, as Tamanaha notes in his meta-study of psychological studies of judicial decision-making, the personal idiosyncrasies of judges are likely to be overshadowed by the “significant, predictable, social determinants that govern the course of judicial decision-


The “social determinants” to which Tamanaha refers include such factors as shared professional formation, mind-set, practices, and values—the kind of social norms that will be discussed below. Sociological studies are thus more likely than psychological studies to produce the kind of insights that will inform predictions about the outcomes achieved in ICA as a whole.

Economic analysis, while important, also has limitations when applied to ICA. Market competition between arbitrators and between arbitral fora is one of the core structural differences between arbitration and litigation. Indeed, some commentators have argued that the global convergence in arbitral rules and practices is best explained by economic factors. For example, Ginsburg writes that convergence is simply a case of network effects in action; like Facebook or LinkedIn, the more members a legal network possesses, the more valuable it is to each individual member. Accordingly, practices will tend toward convergence and newcomers will have an incentive to align themselves with existing norms. However, pure economic analysis often fails to account for the influence of social norms, which constrain behavior in ways that are difficult to model in terms of economic value. For this reason, sociologists who explore economic behavior often criticize economists for ignoring the social dimension of human actions.

While economic analyses often disregard the impact of social forces, the reverse is less true—sociological analyses often account for the impact of economic forces. We usually associate the word “culture” with religious, philosophical, or historical influences, but a culture may also develop out of economic forces or business practices. Ogus argues that many of the characteristics of national legal cultures are explicable according to the economic value of networks. As an example of legal culture developing from routine business practices, Trakman cites the informal practice of making deals over the phone, rather than

49 Sociologists often cite market forces as underappreciated contributors to culture. See, eg, Erhard Blankenburg, “Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany,” American Journal of Comparative Law 46 (1998): pp. 1-41.
relying on written contracts negotiated with the assistance of lawyers.51 Thus, when commercial lawyers speak of “trade usages,” “industry custom,” or “commercial practice,” they are referring to business culture.

More broadly, accounts of arbitral decision-making that emphasize arbitrators’ rational self-interest (whether such accounts are based on economic models in the strict sense or on rational choice theories more generally) are unlikely to yield a complete picture. To be sure, several features of arbitral decision-making can be explained by arbitrators’ economic self-interest. For example, as will be discussed below, arbitrators tend to defer to party autonomy on matters of procedure and choice of law; when called upon to choose the procedure or the applicable law, they are likely to select processes and laws that minimize costs and delays for the parties. Both tendencies are explicable on the basis that arbitrators want to please commercial parties and their counsel because arbitrators want to receive repeat appointments. Such analysis is accurate as far as it goes, but is incomplete in two important ways.

First, even those aspects of arbitral decision-making that can be explained on the basis of economic self-interest are in some cases better explained on the basis of culture. The mere fact that a social norm has its roots in self-interested behavior does not make it any less of a norm. Over time, economic incentives yield patterns of behavior, which eventually gain normative force. If obedience to a norm is reflexive rather than the result of a deliberate choice, or is genuinely (even if inaccurately) described as a moral imperative, then the behavior is at least as much culturally-determined as it is self-interested.

This phenomenon is exemplified by arbitrators’ attitudes toward party autonomy. Arbitrators acknowledge that party autonomy represents a constraint on their power (for example, to determine the procedure of the arbitration), but they regularly defer to the parties.52 One interviewee described her standard practice as “a deferential approach. Fundamentally, it’s the parties’ process.” Another interviewee, a French practitioner and academic, said: “You are an arbitrator because you have been appointed as an arbitrator and it’s the parties’ arbitration. It’s for them, so you are at their service.” An American attorney put it this way: “When I sit as an arbitrator, I think of providing a service that the parties have contracted with me to provide. I do think of myself as having a real obligation to be flexible and responsive to their needs and desires—the mode of dispute resolution that they expect when they do arbitration.”

One could account for such sentiments on the basis that the parties choose the arbitrators and pay their fees, so arbitrators have a financial incentive to defer to them. In addition, many

52 One interviewee said: “You are much more constrained by party autonomy than by the rules of procedure.”
arbitral rules of procedure—binding upon arbitrators in individual cases—enshrine broad party autonomy. Nevertheless, although the arbitrators I interviewed regularly (even eagerly) acknowledged that arbitration is a “business,” they explained their deference to party autonomy in language that makes clear that they see party autonomy as something of inherent normative value, not simply as a rule or a prudent practice. They spoke of their “duty,” their “proper role,” and their “moral obligation” to the parties; they characterized cases where arbitrators imposed their procedural preferences on the parties as “horror stories” where the tribunal was “riding roughshod”; they proudly gave examples of cases where they acquiesced to an agreement between the parties for procedures that the arbitrators thought were slower or more expensive than necessary.

The second reason that rational choice (ie, economic) models are necessarily incomplete is that many features of ICA governance are inconsistent with arbitrators’ rational self-interest. If nothing else, the choice to act as an arbitrator is itself arguably irrational, since leading practitioners can earn far more money as counsel than as arbitrators. And yet, many younger arbitration counsel aspire to “graduate” to acting as an arbitrator, and the majority of the most famous arbitrators rarely if ever act as counsel. Clearly, the symbolic capital they earn as arbitrators, including personal satisfaction and the esteem of their peers, is more important to them than the financial capital they earn in fees.

Another example of arbitrator conduct that is at odds with their economic self-interest has to do with their application of transnational commercial law. For example, as will be discussed below, arbitrators promote transnational law, whether in the form of codified instruments like the UNIDROIT Principles of International Commercial Contracts or in the form of “general

53 For example, the 2013 ICC Rules of Arbitration provide that the parties may agree to join additional parties to their arbitration (Article 7), consolidate two or more arbitrations (Article 10), fix the number of arbitrators and the manner of their appointment (Article 12), replace an arbitrator (Article 15), determine the place of arbitration and the location of any hearings and meetings (Article 18), choose any rules of procedure in areas where the ICC Rules are silent (Article 19), determine the language of the arbitration (Article 20), choose the law governing the merits of the dispute, including granting the tribunal amiable composition powers (Article 21), determine the means by which case management conferences are to be conducted (Article 24), decide whether there will be an oral hearing (Article 25), exclude or admit any third parties into the hearings (Article 26), limit the power of the tribunal to grant conservatory and interim measures (Article 28), opt out of the emergency arbitrator provisions in the ICC Rules (Article 29), settle the dispute and have the settlement recorded by the tribunal in the form of an award (Article 32), set the allocation of costs of the arbitration (Article 37), and modify the time limits provided in the Rules (Article 38).

54 One interviewee gave the example of adjournments that violate the agreed hearing schedule: “They will often change their timetables by agreement. For example, let’s say they wanted to go off and mediate, and they say ‘May we have an adjournment of the timetable for the next four weeks?’ without specifying why. You know why. A court would be much more reluctant to suddenly allow the established timetable to be ignored. But as an arbitrator, that is never a problem.” Note that when arbitrators are being paid for their services in a lump sum, as is often the case, such delays directly harm their economic interests.
principles of international law” or “lex mercatoria.” Businesses tend to be suspicious of general principles and rarely call for their application because businesses prize predictability, while general principles are notoriously malleable.\footnote{See below, notes 97-99 and accompanying text.} The continued interest in transnational commercial law, and the many scholarly writings on the subject that prominent arbitrators continue to produce, go largely against arbitrators’ self-interest and are best explained by their cultural affinity for transnational law.

A third example relates to the principle of neutrality and the risk of bias. ICA promotes itself as a neutral forum and cannot be seen as a legitimate system of dispute resolution if arbitrators are not neutral. And yet, if self-interest were the dominant norm, individual arbitrators would be \textit{less} neutral than national court judges. Arbitrators are both more beholden to parties (because they depend on the parties for appointments) and more likely to have previously expressed opinions on factual or legal issues related to a dispute they are adjudicating (because they tend to publish in academic and trade journals). In addition, arbitrators and counsel frequently swap roles and interact freely in professional and social venues in ways that would be shocking if judges and litigators were involved. Most obviously, many arbitrators are appointed unilaterally by a single party. As Paulsson puts it, “A certain perception of reality and a distaste for hypocrisy cause some practitioners to conclude that one should simply expect that a party-appointed arbitrator will not behave as impartially as one appointed jointly or by a neutral authority.”\footnote{Jan Paulsson “Ethics, Elitism, Eligibility,” \textit{Journal of International Arbitration} 14, no. 4 (1997): pp. 13-22, 13-14.} If arbitrators were to act solely or primarily in their self-interest, they would systematically favor the parties that appoint them.

There is no objective evidence that such favoritism occurs in more than a handful of cases, and there is anecdotal evidence that most awards are unanimous.\footnote{See Brekoulakis, “Systemic Bias.” Brekoulakis concludes that, while there is little evidence that the individual biases of arbitrators have any broad reaching impacts, decision-making in ICA in general is driven by systemic biases common to the entire ICA system. Although Brekoulakis focuses on institutions rather than social groups, the systemic biases he identifies are generally consistent with the cultural norms identified in this chapter.} Several interviewees said that they had never encountered a truly partial co-arbitrator, or that they had encountered one only once or twice in a hundred arbitrations. Interviewees noted that overtly partial arbitrators will lose future appointments because they will have little influence on other members of the tribunal; neutrality could therefore be seen as a function of a rational choice. However, biased arbitrators would only lose influence in tribunal deliberations if the arbitration community values neutrality. There are some arbitrations (such as in some domestic arbitrations under the rules of the American Arbitration Association) where the party-appointed arbitrators are
expected to be partisan and only the chair is to be neutral; such arrangements are considered anathema in ICA.

Like all social norms, neutrality is enforced by social sanctions meted out by other members of the community. A clear example was given by a senior arbitrator, who related two occasions where he publicly shamed co-arbitrators in investment arbitration tribunals for acting in a non-neutral manner. (He noted that such occurrences are rare, and are more common in investment than commercial arbitrations.)

I was chairing an important investor-state panel. The party appointed by the state asked a question which was suggestive against the argument of . . . the counsel for the investor. He was a very distinguished arbitrator, but I objected to the question before any lawyer spoke. I said “I will not allow the witness to answer that question.” My colleague looked at me. There was a pregnant pause, and he said “I guess you’re right, Mr. Chairman. I won’t insist on an answer.” There is another case I remember . . . again the arbitrator appointed by the state showed . . . displeasure, if you wish, at a statement which was being made during the oral argument by counsel for the investor. It was obvious. I turned—and I said it loud enough for the parties to hear—I said, “So and so, please be careful with your reactions during the hearing.” And [the reply came] . . . “I guess you’re right. I apologize, Chairman.”

In sum, a cultural account of ICA governance will highlight many of the same factors as a purely economic analysis, but will also provide insights that cannot be expressed in economic models. Culture is not the only way to explain ICA’s emergence as a form of global governance, or to describe the features of that governance, but, given the limited data currently available to ICA researchers, a cultural analysis has more explanatory power than any other single theoretical model.

Only one previous large-scale cultural analysis of ICA has been conducted: Dezalay and Garth’s Dealing in Virtue. This 1996 study is well known in arbitration circles and has justly been described as “enormously successful.” However, Dealing in Virtue has both methodological and substantive limitations.

Methodologically, Dezalay and Garth relied primarily on interviews with arbitration practitioners. Their analysis generally omits arbitral awards, court decisions, and publications by arbitrators, except where they provide detailed narratives of a few historically important arbitrations. While such materials cannot necessarily be relied upon as robust in the statistical sense, they are rich sources of information about ICA. Dezalay and Garth’s methodological


choice to focus on interview data is consistent with their attention to personalities and relationships, as opposed to outcomes. Substantively, Dezalay and Garth focused their investigation on the kinds of people who become successful arbitrators, rather than on the decisions made by arbitrators. This was due partly to their lack of personal experience with ICA, but largely to the fact that their study is heavily influenced by the theory of social fields advanced by the French sociologist Pierre Bourdieu (who was Dezalay’s mentor).

Social fields theory explains the interactions of members of community in terms of competition for symbolic capital. It was developed to explain the internal dynamics of a community, and is not as well suited to explaining the external products of those interactions, such as the outcomes reached in arbitrations. Accordingly, while social fields theory was appropriate for Dezalay and Garth’s purposes, it has limited utility for describing ICA’s function as global governance. A broader perspective on the norms prevailing in ICA is needed, one that sheds maximum light on the core function of international arbitrators: adjudication of disputes. This chapter therefore does not adopt Bourdieu’s theory in toto, although it does employ some of his vocabulary, especially his notion of “symbolic capital” as defining the characteristics that members of a group find to be important.

b) Emergence of a Legal Culture Specific To International Commercial Arbitration

While disagreements persist as to the particular characteristics of a given state’s legal culture, the concept of a culture shared by the legal professionals within a jurisdiction is uncontroversial. However, it is altogether more tenuous to claim that a legal culture now exists in ICA, a field that is only a few decades old, and in which practitioners do not share a common nationality, language, or training.

There are at least two good reasons to object to the notion of an ICA culture. First, arbitrators are too heterogeneous to constitute a unified community, and second, arbitrators’ actions are not reflexively conditioned by a common tradition. This section confronts these two objections and addresses the prospects for the generation of a common legal culture in a heterogeneous and young transnational community.

---


Although definitions of culture vary, they all agree that a culture is a characteristic of an identifiable group.\(^{62}\) Yet international arbitrators speak a variety of languages, come from different national cultures and adhere to diverse religions and ethical traditions. They were trained in different legal systems or may have no legal training whatsoever.\(^{63}\) They are practicing lawyers, academics, former judges, and (though less frequently than in the past) diplomats, politicians, or industry experts such as accountants or engineers. While the most prominent arbitrators tend to be specialists in arbitration law who have built their careers around ICA, others may act as arbitrator only once or twice.\(^{64}\)

What, then, are the characteristics that ICA practitioners share—the commonalities that forge ICA as a community? ICA practitioners, especially arbitrators, tend to have elite educational (if no longer socioeconomic) credentials. They developed their careers in large, corporate, usually Anglo-American firms or major universities, and travel in both business and academic circles. They tend to share cosmopolitan, multinational backgrounds and speak multiple languages. They work repeatedly with each other and on disputes within a relatively narrow band of commercial subjects.

These commonalities will only increase as the field continues to grow; culture is a harmonizing (or at least homogenizing) force. Partly by self-selection, partly by internalization of community norms, and partly out of a desire for esteem from other members of the community, those seeking to break into the upper echelons of international arbitral practice will emulate the résumés, practices, and perspectives of the current elite, thus reinforcing existing values and standards. These trends are reinforced by the fact that “admission” into the ranks of sitting arbitrators is controlled largely by other arbitrators and senior arbitration counsel. Counsel select party-appointed arbitrators or negotiate with each other to agree on appointments, and party-appointed arbitrators or the directing bodies of arbitral institutions (themselves composed of experienced arbitrators) make a large number of appointments.\(^{65}\) In all of these scenarios, personal experience with a potential appointee is an

---

\(^{62}\) For a summary of different definitions of culture as the term is used in socio-legal research, see Cotterrell, *Sociology of Law*, p. 23–4.


\(^{65}\) When I asked one interviewee, who has been closely involved with the governance of more than one arbitral institution, to comment on the fact that the people making appointments on behalf of institutions almost invariably are themselves active arbitrators, he replied: “Yes, but who better? You’ve got to know who you
important factor, creating incentives for ambitious younger practitioners to model their careers on those of successful members of the previous generation.\textsuperscript{66}

In addition, the notion that so varied a group might possess a common culture is consistent with the growing importance and autonomy of transnational legal practice and private governance regimes.\textsuperscript{67} Commerce is always embedded in a mixture of public and private governance mechanisms. However, in international commerce, private governance mechanisms are relatively more important.\textsuperscript{68} The globalization of commerce has boosted cross-border economic activity and its importance relative to domestic transacting; “as governance mechanisms become increasingly decoupled from state legal systems they are at the same time internationalized and privatized.”\textsuperscript{69}

It is only natural that internationalized legal regimes would lead to an internationalized legal practice. Modern commercial law practice has become sufficiently complex that specialization is necessary to attract clients,\textsuperscript{70} and law firms increasingly market their international arbitration groups as specialist practices.\textsuperscript{71} This trend has been abetted by the decoupling of legal practice from citizenship requirements, such as the elimination of educational and citizenship requirements as a bar to transborder mobility within the EU.\textsuperscript{72} In a modern commercial practice, a lawyer of one nationality might work in a second country on

---


\textsuperscript{67} Teubner, “Breaking,” p. 6 (arguing that ICA fulfills the criteria to constitute an epistemic community, including shared normative beliefs, shared notions of validity, and a common policy enterprise).


a transaction governed by a third country’s law, and the dispute is referred to arbitration in a fourth country. In such situations, practitioners effectively operate in a geographic limbo. When actors are placed outside existing systems of governance and interact repeatedly with each other, it is not surprising that regimes specific to the new field of interaction might develop. As Friedman argues, transnational law “is as much a product of its times and its social context as national or local law.” This process has been called “auto-constitutionalization”—the phenomenon of private governance regimes that operate outside the state developing their own sets of norms. In other words, where economic globalization has given rise to the establishment of a transnational corpus of specialist legal practitioners who work primarily with each other and outside the governance of any one state, autonomous professional norms will coalesce—into a culture of ICA.

A second reason to doubt that ICA possesses a culture is that the field is too new for ICA practitioners’ shared values and standard practices to have become reflexively conditioned by a common tradition. Culture shapes the identity of a community through repeated interactions “over the longue durée.” In other words, culture is a function not only of the existence of shared norms, but also of time passing, so that the norms become internalized—acted upon instinctively and not by conscious choice.

ICA in its modern incarnation has existed for scarcely three generations; it is still an emerging field. In the 1990s, Dezalay and Garth described two generations of arbitrators. The first, whom they called the “grand old men,” were characterized by a charismatic form of authority. The second, whom Dezalay and Garth labeled “technocrats,” were specialists in the law of international arbitration. Schultz and Kovacs recently argued that a third generation of international arbitrators, characterized by their case management abilities, whom they dub the “managers,” is now ascendant. In addition, many of the practices and norms now

---

76 Legrand, “Fragments,” p. 27.
widespread among international arbitrators result from conscious choices among competing options; they therefore stand in stark contrast to cultural norms, which are by definition reflexive. As Hirsch points out, social norms are obeyed because members of the community have internalized the norm, not because they have calculated that such behavior would be profitable.\(^79\)

It may therefore be argued that various social norms observable in the ICA community do not constitute a culture, and that therefore other interdisciplinary models of arbitrator behavior must have greater explanatory power. Regardless of its merits, this argument misses the point. The important question is not whether something that can properly be labeled “a culture” already exists, but whether social norms specific to the community are affecting arbitral decision-making. If they are, then regardless of any other relevant factors, understanding those norms is crucial to generating a complete understanding of whether and in what ways ICA constitutes a system of governance. The next section describes some of the social norms already prevailing in ICA and their consequences for the governance that ICA provides.

3) International Arbitration Culture and Global Governance

This section argues that a cultural analysis shows that ICA is evolving into a form of global governance—as opposed to an atomized form of governance derived from national orders—in part because the ICA community is normatively committed to governance at the global level. This commitment is can be understood in terms of a legal culture of international arbitration. That culture is composed of several norms that relate both to the institutional structure of the ICA system and to the values shared by members of the community.\(^80\) This section describes two of these norms that have the clearest effects on governance. First, members of the ICA community share a dedication to internationalism, to an ideal of global justice. The internationalism norm drives the ICA community to pursue global governance for its own sake. Second, members of the community see ICA as existing to serve the needs of international commerce. Since arbitrators see the interests of international commerce as being served by internationally harmonized rules and processes, the ICA community is committed to global governance for the sake of international commercial interests.

a) Arbitrators’ Normative Commitment to Global Governance for its Own Sake

“Internationalism” is defined here as a point of view that reflects a dedication to subordinating national perspectives and distinctions in favor of transnational or global ideals.


\(^80\) See Karton, The Culture of International Arbitration, chs. 3 and 4.
In practical terms, arbitral internationalism manifests itself in a desire among arbitrators to establish an international space autonomous from national legal systems and traditions. Arbitral internationalism is related to the desire to detach arbitration from interference by national courts, but it is rooted less in an instinct toward autonomy than in economic, social, and intellectual globalization. Members of the ICA community tend to see global solutions as superior simply because they are global.

Arbitrators’ internationalism can be seen in their dedication to “delocalizing” ICA and in their promotion of uniform international rules and practices. Arbitrators also embody internationalism in their persons; the value that members of the community place on international *bona fides* can be seen in the cosmopolitan backgrounds and attitudes valorized in the community.

i)   *Internationalism and Delocalization*

Arbitrators tend to share the goal of creating a coherent, unified global dispute resolution forum that is more than a hodgepodge of national laws, practices, and cultures.  

*ICA practitioners and national courts and legislatures now agree that international commerce requires “harmonized solutions . . . acceptable for parties from around the world.”*  

The purpose of ICA is therefore to “provide a universal procedure for the settlement of international disputes detached, to the extent possible, from the particularities of national law.” Lew argues that “international arbitration is, and should be recognized to be, an autonomous process for the determination of all types of international business disputes. . . . It has its own space independent of all national jurisdictions.”

If ICA is to be an autonomous forum existing on a global plane, it must be supported by the national systems of enforcement that make arbitration possible—this is a reality of our

---


83 Craig et al., *ICC Arbitration*, p. 295, referring to the motivation for some of the 1998 amendments to the ICC Rules.

Westphalian world order. However, arbitrators have worked to progressively detach ICA from the reach of national laws and courts, a process often called “delocalization.”

At one time, delocalization “gave rise to passionate arguments,” especially in developing countries, which suspected that ICA was simply another means by which multinational corporations based in developed countries could exploit natural resources without fear of legal sanction. Although these tensions and concerns persist, they have diminished significantly. Many aspects of delocalization are no longer controversial; for example, parties everywhere are now free to choose a different substantive law than that of the seat of arbitration, or to hold hearings in a different place than the seat. Over roughly the last thirty years, many states have amended their arbitration-related legislation, and have done so almost uniformly in the direction of lesser state control of arbitration; a similar trend can be seen in the case law.

Despite such developments, arbitrators recognize that, given the necessity of national courts as ICA’s enforcement mechanism, total delocalization is as impossible as it is undesirable. In *Coppée Levalin NV v. Ken-Ren Fertilisers and Chemicals*, the House of Lords considered an application for security for costs in an arbitration administered by the International Chamber

---

85 The term delocalization was coined to refer to the notion that a dispute need not be governed by the substantive law of the seat of the arbitration. Kaufmann-Kohler has described this as “physical delocalization,” which she points out “has already been achieved.” Gabrielle Kaufmann-Kohler, “Globalization of Arbitration Procedure,” *Vanderbilt Journal of Transnational Law* 36 (2003): pp. 1313-1333, 1318. However, since at least the 1980s, “delocalization” has referred more broadly to the detaching of any aspect of the arbitral proceedings from national laws. Otto Sandrock, “To Continue Nationalizing or to De-Nationalize? That is Now the Question in International Arbitration,” *American Review of International Arbitration* 12 (2001): pp. 301-334, 302–3.


87 Cutler explains their persistence on the basis that international arbitration is one component of a “new constitutionalism” that maintains a separation between politics and economics, and thus shields from democratic institutions questions of “who gets what” in international commercial disputes. This democratic deficit unsurprisingly leads to dissent, especially in developing states. Claire Cutler, “International Commercial Arbitration, Transnational Governance, and the New Constitutionalism,” Chapter Six of this book.

88 At least in commercial arbitrations. In investment treaty arbitrations, allegations of systemic bias in favor of investors or against developing countries continue to generate controversy.


of Commerce (ICC). Lord Mustill recognized the conflict between the necessity of court involvement and arbitrators’ internationalist desires:

*On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of . . . a municipal court. On the other side there is the plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.*

This theme—a recognition of the necessity of national court involvement but a yearning for truly delocalized arbitration—has run through the international arbitration literature for decades. Lew refers to a-national arbitration as “the dream,” while Smit calls it “the epitome” of international arbitration. The “utopian” and “mystical” cast of much of this literature shows that it is motivated by more than just the “economic interests that participants in international law have in proclaiming their own autonomy.”

Indeed, as Kennedy puts it, delocalization is “the whole point” of constructing an international arbitral order: “If an international commercial transaction can be legally constructed in a regime detached from local legal cultures, in a place without public policy, the risks from prejudiced national public policy, intercultural misunderstandings, national

---


Lew argues that the debate goes back at least to the 1950s, when Frédéric Eisemann, then Secretary-General of the ICC International Court of Arbitration, lobbied for the establishment of denationalized international arbitration awards that would not be subject to annulment in any jurisdiction. Lew, “Dream,” p. 179.


elite rent seeking, or biased judiciaries can be diminished."96 A London-based interviewee expressed this perspective in the following terms:

*Arbitration is in an area of its own, and the reason is simple: the parties have expressly excluded the courts of each other’s countries, or any third country, by their agreement to arbitrate. . . . The parties are saying, in effect, “You, judge, mind your own business. Please respect what we’re doing. If either of us needs your help to get evidence, help us. If either party needs interim relief, and the court thinks it’s right, help that party. And when one party seeks enforcement, help that party. But don’t interfere; don’t second guess the arbitrators.” That’s what the parties want.

ii) *Internationalism and Transnational Commercial Law*

For many arbitrators, the establishment of arbitration as autonomous from both national courts and national laws calls for the establishment of a purely international commercial law. This notion encompasses codified international law instruments like the UN Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles). However, the desire for a substantive law that is both transnational and global is most manifest in autonomous free-floating “general principles of international law,” also called *lex mercatoria* or “transnational commercial law.”

Many arbitrators argue that the application of transnational commercial law is generally desired by parties engaged in international commerce. As one interviewee put it: “we see in arbitration as it develops that parties are having more confidence in the internationally-minded arbitrator than they do in the nationally-minded judge.” To the extent that this is true, arbitral internationalism is a manifestation of respect for party autonomy and a desire to serve the interests of cross-border commerce.

But, to a large extent, it is not true. Businesses tend to be suspicious of general principles and rarely draft contracts that choose them as the governing law. They prize predictability, while general principles are incomplete and uncertain, and often suspected to be mere fig leaves for the arbitrator’s own preferences. In the vast majority of arbitrations where the contract contains a choice of law provision—97.7 per cent, according to one study—the parties nominate the law of some state.97 If arbitrators simply acquiesced to the preferences of the

---


97 Dasser, “Mouse,” p. 140. In most of the remaining 2.3 per cent of cases, the parties chose a codified international instrument, such as the UNIDROIT Principles, so the percentage of cases in which the parties chose “general principles” or *lex mercatoria* is even smaller. See also Dietz, “Efficient Enforcement,” pp. 168-170.
parties, then the *lex mercatoria* would have remained merely an academic curiosity.\(^98\) Arbitrators’ continued interest in transnational commercial law is best explained by their preference for international rules over national ones, regardless of the parties’ wishes.\(^99\)

Interviewees acknowledged that commercial parties are generally suspicious of transnational law, but were adamant that transnational law maintains an important role, especially where a state law governing the contract contains gaps or is alleged to be outdated or parochial. In such circumstances, many arbitrators will at least propose to the parties that the national rule ought to be replaced with an international one. For example, one interviewee said: “I look at the applicable law and I try to find support in some international rules. Where there is a gap in the applicable law, you look at these international rules to find the right solution.”

To give a concrete example, several interviewees decried the inadequacy of state laws regarding interest rates. Most (but not all) states permit the granting of prejudgment interest on damages awarded. However, state laws often award interest at a rigid statutory rate that does not take into account the actual cost of money or variations in currencies. Interviewees were blunt about the inappropriateness of such rules for modern, globalized commerce. A Swiss arbitrator recalled a case governed by Swiss law in which damages were calculated in a foreign currency: “Does it make sense to apply the Swiss statutory interest of five percent a year to a currency . . . where the interest rate is 80 percent per year because the currency devalues so quickly that the interest rate is practically a hedge against devaluation? It has nothing to do with Swiss statutory law.” One tribunal held bluntly that, “In international arbitration, arbitrators have the broadest powers to determine interest on the basis of the most appropriate rate, without resorting to any [choice of law] rule.”\(^100\)

It appears, then, that parties’ concern with transnational law is not its transnational character but its indeterminacy. Accordingly, most arbitrators today are reluctant to apply *lex*

---

\(^98\) This is another reason to discount economic self-interest as the primary determinant of arbitrator behavior.

\(^99\) On the disconnect between arbitrators’ image of the universality of the *lex mercatoria* and the small number of cases in which it is actually applied, see Piero Bernardini, “International Arbitration and A-National Rules of Law,” *ICC Bulletin* 15, no. 1 (2004):p. 58, 63.

\(^100\) ICC Case No. 11849 of 2003, *Yearbook of Commercial Arbitration XXXI* (2006): p. 148. The contract was governed by the CISG, which provides for awards of interest but gives no guidance on how to set the rate. The parties each argued for the application of their own states’ laws to determine the interest rate. However, the tribunal rejected both arguments and awarded interest at the rate it considered to be appropriate based on the facts of the case. On the setting of interest rates in international arbitration, see the various articles in a Special Issue on Compensation and Damages in International Investment Arbitration, *Transnational Dispute Management* 4, no. 6 (2009). Although they may be more sensitive to these issues than national courts are, arbitral tribunals have nevertheless been criticized for not going far enough in calculating interest according to actual economic realities. See John Gotanda and TJ Senechal, “Interest as Damages,” *Columbia Journal of Transnational Law* 47 (2009): pp. 491-536.
mercatoria or general principles of international law under those names. However, they do frequently promote codified international commercial law instruments. When asked about the circumstances in which he might apply lex mercatoria, a French interviewee said: “I think it does not exist, . . . and it’s a good thing that it does not exist. The UNIDROIT Principles exist. They are written, they are predictable, so why not use them?”

Tribunals even apply codified transnational law instruments such as the CISG and the UNIDROIT Principles in circumstances where national courts most likely would not apply them, such as before they went into effect 101 and when neither party submitted that they apply. 102 Even when a national law does apply, arbitrators will frequently refer to international contract law instruments as evidence of an international consensus on a point of law, 103 or as expressions of applicable trade usages, 104 or to “arrive at an internationally acceptable and economically sensible interpretation of the domestic law.” 105 Witz explains that the greater use of international instruments in ICA occurs “because international


102 See, eg, ICC Case No. 11849 of 2003, Yearbook of Commercial Arbitration XXXI (2006): p. 148, para. 9. Even if the CISG is applicable in litigation, courts are unlikely to determine sua sponte that it applies; one of the parties must argue for the CISG’s application. In arbitration, on the other hand, some tribunals determine on their own initiative whether the CISG or one of the other international contract law instruments applies. See, eg, ICC Case No. 8128 of 1995, Journal de droit international [1996]: p. 1024. Schlechtriem also describes a case in which the contract contained an express choice of Russian law. The parties argued for conflicting interpretations of Russian domestic law but the tribunal found that the CISG applied as the Russian law pertaining to international sales contracts. Peter Schlechtriem, “Requirements of Application and Sphere of Applicability of the CISG,” Victoria University Wellington Law Review 36 (2005): pp. 781-794, 794.

103 See, eg, an award reported in Michael Bonell, “Die UNIDROIT-Prinzipien der internationalen Handelsverträge: Eine neue Lex Mercatoria?,” Zeitschrift für Rechtsvergleichung [1996]: p. 152, 157: “General legal rules and principles enjoying wide international consensus . . . are primarily reflected by the UNIDROIT Principles.”

104 See, eg, ICC Case No. 5713 of 1989, Yearbook of Commercial Arbitration XV (1990): p. 70, where the tribunal declared there to be “no better source” than the CISG from which “to determine the prevailing trade usages.” The tribunal applied the CISG on this basis, even though neither party came from a state that had ratified to the CISG.

arbitrators are more accustomed and more favorably inclined to the application of international standards than are national judges.”

Indeed, the development of a transnational commercial law is an explicit project for some arbitrators. Arbitrators frequently refer to general principles or lex mercatoria where the parties have expressed no intention to apply them, or even where the parties have expressly chosen to be governed by national laws. As one tribunal noted, general principles: “apply uniformly and are independent of the peculiarities of different national laws.” But even where tribunals have not deliberately attempted to develop autonomous transnational commercial law, transnational legal rules may nevertheless be generated as a by-product of the heterogeneity of the ICA community and the internationalist ethos shared by many arbitrators:

*I’m not sure it’s a conscious thing. . . . It’s due in part to the fact. . . . in international arbitration that you have actors from different backgrounds—legal, cultural. So you may have counsel from different backgrounds, you may have arbitrators on the panel who are trained in different laws, and somehow everybody wants to get to some common denominator. When you deliberate within a tribunal, you would like to get to consensus.*

Arbitral internationalism can be seen most clearly in the evolution and status of what is most often called “international arbitral practice”—the standard practices of ICA practitioners reconceived as legal norms. The particularities of those standard practices are beyond the scope of this discussion; what is striking is the extent to which ICA practitioners have developed a set of procedures that are global in character and not derived from any one national approach. They are often described as a hybrid of common law and civil law approaches, but many practices are specific to arbitration, such as the use of “Redfern Schedules” for document discovery.

---


107 See, eg, ICC Case No. 9466 of 1999, *Yearbook of Commercial Arbitration* XXVII (2002): p. 170, para. 3, where the tribunal reasoned that: “the silence of the parties as to the law that should be applied to their contractual relationship may be construed as a significant indication of their will that their relationship be simply governed by the terms of the contract and/or . . . by the general principles of international commercial contracts.” Alternatively, tribunals may avoid the controversies surrounding general principles and lex mercatoria but still serve internationalist values by applying the laws of the parties’ home states concurrently. See, eg, ICC Case No. 7319 of 1992, *Yearbook of Commercial Arbitration* XXIV (1999): p. 141, para. 13.


109 Redfern Schedules (named after Alan Redfern, an independent arbitrator who helped establish Freshfields’ international arbitration practice group) are documents that set out, in a table format, such matters as
Interviewees were unanimous in their denunciation of parties that want to have their arbitration governed by national procedural rules. Several told anecdotes of cases where they tried, with greater or lesser success, to convince the parties to adopt international procedural standards, which they equated with modernity and global acceptability. One interviewee made this broad declaration:

*I always try to apply international standards rather than any particular national standard. I understand sometimes the parties from different jurisdictions might have different positions. . . . But my practice, when I act as chairperson particularly, is to try to introduce the modern standards of international arbitration.*

This internationalist approach is also being codified within ICA and in national laws. Documents like the IBA’s Rules on the Taking of Evidence in International Commercial Arbitration and Guidelines on Conflicts of Interest in international Arbitration, which are in common use in ICA, were designed as crystallizations of existing practice, much in the manner that the American Law Institute’s Restatements are intended to crystallize existing common law. Similarly, industry groups\(^{110}\) and private law firms\(^{111}\) have published their own compendia of best practices in international arbitration procedure.

Arbitral institutions and national legislators frequently look to international arbitral practice for guidance when updating rules and statutes. For example, the recently proposed amendments to the Dutch Arbitration Act have been described as necessary modernizations reflecting changes in international arbitral practice,\(^{112}\) as have several provisions of the 2011 revisions to the French Code of Civil Procedure relating to arbitration.\(^{113}\) However, the most prominent example is the UNCITRAL Model Law itself, which is often praised for codifying international arbitral practice on such basic matters as competence-competence and party autonomy in the choice of the governing law. States that have adopted the UNCITRAL


Model Law often do so on the basis that the Model Law “reflects worldwide consensus on key aspects of international arbitration practice.”\footnote{114}

Commentators reinforce these trends by evaluating institutional rules of procedure and national laws according to the extent to which they conform to international arbitral practice. For example Luttrell and Moens praise the most recent revisions to ACICA Rules for reflecting “international best practice,”\footnote{115} while O’Reilly criticizes the English Arbitration Act 1996 for failing to “design its provisions for wide international use . . . The time has come to review the legislation with a renewed and vigorous international outlook.”\footnote{116}

\textbf{iii) Internationalism and Arbitrators’ Cosmopolitanism}

The phenomenon of globalization does not reside only in institutions.\footnote{117} It is increasingly a mental and cultural phenomenon, a “\textit{zeitgeist}.”\footnote{118} As Arthurs argues, even if institutions like the WTO were to dissolve and transnational trade and immigrant flows were to disappear, “We would still be deeply implicated in a global system driven not only by trade and economics, but also by transnational social, cultural, intellectual and ideological forces . . . a globalization of the mind.”\footnote{119} ICA practitioners tend to share a perspective increasingly detached from the national legal systems and traditions in which they were trained, a preference for transnational sources of law over national ones, and a sensitivity to the issues that arise when dealing across multiple cultures and legal traditions. As one interviewee, a Swiss arbitrator who has practiced in three different countries, put it:

\begin{quote}
There’s an international dimension that . . . is absolutely key, it seems to me. There are different nationalities. You have to understand both sides . . . You just don’t handle an Italian party, a Russian party, a Polish party, a Thai party the same way.
\end{quote}

\footnote{117}{International arbitral institutions are often themselves exemplars of globalization. For example, Grigera Naón sees the ICC as exemplifying the multicultural character of international commercial arbitration. Noting the multinational makeup of the ICC Court of Arbitration and of its secretariat, he concludes: “All of this emphasizes the multicultural traits of the ICC arbitration system and guarantees the evenhanded administration of ICC arbitrations, free from cultural or other bias.” Grigera Naón, “Role,” p. 139.}
There are things you have to be aware of; otherwise, they are shocked by your behavior.

For this reason, nearly all successful international arbitration practitioners—whether arbitrators or counsel—share a kind of global cosmopolitanism that marks modern elites in a number of sectors. Rogers lists the following characteristics shared by leading arbitrators: “linguistic ability . . . multi-national educations . . . and multi-faceted, multi-cultural legal training.”120 Such attributes reinforce arbitrators’ image of neutrality and legitimize them to their international clientele. As Garth puts it, potential arbitrators: “must demonstrate . . . an attitude that might be termed ‘cosmopolitan.’ . . . The ‘legal nationalist’ has a very difficult time making it into the international arbitration world.”121 Cremades, a prominent Spanish arbitrator, argues that professionalism in arbitration is largely defined by the arbitrator’s ability to avoid legal nativism and think internationally.122

Just as parties are likely to seek out arbitrators with cosmopolitan backgrounds, lawyers with cosmopolitan backgrounds are more likely to be interested in practicing international arbitration law. One arbitrator, now based in a major business capital, described leaving her home country (where she not only grew up but also studied and practiced) in part to “get away from its parochial mentality” and “to find an international aspect to the practice of law.” As Dezalay and Garth note, many of the key solicitors who developed international arbitration in England “were . . . drawn to ICC-style arbitration because of their own cosmopolitan, hybrid backgrounds—for example, they were born or educated abroad, including especially German immigrants; or they had foreign, typically French, spouses.”123 Such self-selection is self-reinforcing. Young cosmopolitan lawyers are likely to join a field populated by lawyers with similar characteristics, thus strengthening the effects of cultural norms.

These observations were supported by the interviewees’ backgrounds. While the arbitrators interviewed do not constitute a representative sample of all arbitrators, or even of highly active arbitrators, their example is illustrative of trends in ICA. All twenty interviewees speak English fluently and work regularly in English; ten speak at least three languages and eleven

122 Bernardo Cremades, “Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration,” in Conflicting Legal Cultures in International Arbitration, edited by Stefan Frommel and Barry Rider (London: Kluwer 1999), p. 165 (“The truly international arbitrator is one whose . . . professionalism leads his decision to be independent from the “bag and baggage” of the system or national systems from which he originates.”).
123 Dezalay and Garth, Dealing in Virtue, p. 136.
are sufficiently proficient in at least two languages to conduct arbitrations entirely in them. Of the eight interviewees who are native English speakers, five are sufficiently proficient in another language to converse in it and to read legal documents in it. Ten of the interviewees studied law in at least two countries and eight have formal training in both common law and civil law systems. Eight practiced or taught at universities in at least two different countries.

The interviewees who speak more than one language or were trained in more than one legal system invariably pointed to their multinational backgrounds as a reason for their effectiveness as arbitrators and their success in garnering appointments. A London-based arbitrator who speaks English, French, and Russian, and was trained in both civil law and common law, said that these are significant assets:

*It’s absolutely essential in this field to have, if not languages, certainly the cultural awareness at the very, very least. . . . In the big firms nowadays I don’t think they even consider you if you have only one language . . . That certainly wasn’t the case in my day. I think also that my civil law-common law background was invaluable.*

An Australian arbitrator, who has significant experience with Asian legal systems and also studied in continental Europe, made a similar point about cultural awareness:

*It is desirable to have experience in more than one legal system. But beyond that, it’s desirable to have a broader, cross-cultural sensitivity and experience. It’s not simply the fact that laws differ from place to place. The significance of the contract, and the approach to the law and the role of law differ from place to place. One has to understand that they come from a different system and you have to make allowances and be fair.*

The theme of cross-cultural sensitivity was raised by every interviewee. For example, interviewees said that they might alter the way they manage an arbitration depending on the nationality of the parties and their counsel. When asked whether it is appropriate to encourage the parties to settle, a Swiss arbitrator said that the appropriate course of action depends in part on the parties’ backgrounds:

*I’m not among those who say that’s out of the question; an arbitrator shouldn’t do it. But you do have to be careful. You really have to choose where it will be well received and where it will not, and that may depend on the cultural background and the legal background of counsel and the parties. If I proposed it to Swiss and German parties,*

---

124 Counting Mandarin and Cantonese as different languages. They are often lumped together in arbitrators’ CVs, but proficiency in one does not permit even basic understanding of the other, so they are counted separately for present purposes.
they will find it very natural, but if I have English and Australian counsel they will think it’s totally outrageous.

Several interviewees articulated their role as including helping parties from different traditions and counsel from different legal systems to understand each other. Said one interviewee: “It’s part of my job . . . not necessarily to make the parties converse, because often they are no longer able to do that, but certainly to make sure that they have a conduit.” Several interviewees gave examples of situations in which they acted as “cultural translators” (in the words of one interviewee), either between the parties or between one party and the other members of the tribunal.

All of these characteristics—cultural sensitivity, training in multiple systems, facility with multiple languages—constitute forms of symbolic capital in the ICA community. Symbolic capital constitutes the recognition, institutionalized or not, that successful members of a community receive from the rest of the group.\(^\text{125}\) The forms of symbolic capital which members of the field try to accumulate are closely related to shared cultural norms. Leaders in the field have become leaders because of their stores of symbolic capital, while those seeking entrance to the field must conform to accepted norms and practices, thus reinforcing prevailing orthodoxies. In ICA, such global cosmopolitan \textit{bona fides} are important sources of symbolic capital. Their prevalence among members of the community is evidence of ICA’s normative commitment to internationalism for its own sake.

\textbf{b) Arbitrators’ Commitment to Global Governance Because it Serves the Needs of Business}

Arbitrators are private contractors. They provide a service (resolution of disputes) and are compensated for that service by their clients (the disputing parties). As Gélinas puts it: “International arbitration exists to serve the needs of international business.”\(^\text{126}\) Lord Mustill takes the argument a step further: “Commercial arbitration exists for one purpose only: to serve the commercial man. If it fails in this, it is unworthy of serious study.”\(^\text{127}\) The same principle applies to individual arbitrators: “The idea that . . . the arbitrator is bound to respect the parties’ will in exercising his or her role and, more generally, in discharging his or her

\(^{125}\) Bourdieu and Wacquant, “Epilogue,” p. 72.


\(^{127}\) Mustill, “New Lex Mercatoria,” p. 86. See also Fortier, “Back to the Future,” p. 121(characterizing Mustill’s statement as “the essential creed of the commercial arbitrator”).
duties, has prevailed for a long time. That the arbitrator is the servant of the parties is . . . a widespread view.”

ICA is characterized by two social norms that relate to the service of business: an ideal of client service and an orientation toward the interests of the international commercial system.

At its heart, arbitration is a service industry. As one interviewee put it: “I do think of myself as somebody who is providing paid service to the parties. When I’m sitting as an arbitrator, the parties are entitled to the service they are paying you for.” The relationship between arbitrators and disputing parties (and their counsel) is one characterized by collegiality, informality, and an identification by the arbitrators with the mutual interests of the parties before them. Arbitrators work to ensure that the parties see the arbitration process as serving their needs: “Unlike judges, arbitrators must inevitably treat the parties and their lawyers as having something of the aura of a clientele, whose goodwill, understanding and respect for the tribunal’s authority must be cultivated and preserved.”

The clearest way in which arbitrators act as service providers is by actively managing disputes so as to serve the interests of the parties, especially with respect to minimizing costs and delays. A survey conducted by Schultz and Kovacs indicated that the current generation of arbitration counsel particularly prizes “case management abilities” when selecting arbitrators. My interviews support this survey data. Interviewees were unanimous in their belief that arbitrators should actively manage the proceedings so as to serve the collective interests of the parties. They rejected the notion that an arbitrator should act purely as an umpire in the manner of a common law judge. One observed: “I’m a great believer in getting my hands right in the mud, right up to here [gestures at her elbow], and I think the parties appreciate the fact that you care about their dispute and that you show that you care by getting down to the nitty gritty with them, rather than just sitting there.” More generally, as one interviewee related: “You need a decent office, you need an organization. Robert Briner used to say that ‘arbitration is mostly logistics,’ and he’s absolutely right. It’s getting

---

129 But see Michaels, “Roles,” p. 62 (arguing that “Contemporary arbitration procedures are frequently so adversary in nature that the common interests of the parties, which could define a service, are difficult to identify.”).
organized, having a system.”132 Such abilities are particularly important for sole and presiding arbitrators.

In particular, interviewees emphasized the importance of tailoring the procedure of each arbitration to the needs of the parties and the particularities of the case, which usually involves acceding to the parties’ agreement on matters of procedure unless the agreed processes are manifestly inappropriate.133 Interviewees invariably stated that their practice is to hold a procedural conference as early in the proceedings as possible, not only to determine how the arbitration will go forward, but also to establish a good working relationship. They noted that it is helpful to have not just counsel but also party representatives at this meeting:

> It is useful to have a very good first session where you discuss procedure. You have counsel there, and you also have party representatives. . . . They may not be used to this process [and] it’s important that they get a good impression . . . of the way the tribunal handles matters. That is what I mean by management skills: practically and technically, how do you draft a calendar; what comes first, what comes next; what do you do if there is an issue that disrupts the calendar—these kinds of things.134

The emphasis currently placed on case management can be traced in part to a backlash to the arguably more legalistic style of arbitration employed by the technocratic “second generation” of arbitrators identified by Dezalay and Garth.135 Commercial parties (and many arbitration lawyers) frequently complain that arbitration has become too technical and rule-bound, too slow and expensive—in short, too much like litigation.136 The modern-day

---

132 This interviewee proudly pointed out the low, wheeled cabinets that cluttered his office and the color-coded filing system he had developed for his own use: “I have a nifty system for these kinds of things. A lot of others have probably similar systems.”

133 One interviewee pointed out that most disagreements on procedure between the tribunal and the parties should be resolved in the parties’ favor: “After all . . . in case management, you are guiding the parties in a direction in which they are not unhappy to go. In arbitration essentially, you start off with what the parties agreed to as the procedure and you build on that. You don’t normally tear up what they’ve written. . . . If the practitioners are experienced, they will tell you why it was agreed in this way, and you will pipe down, settle down and say, ‘That’s fine. If that’s what you want, that’s what you’ll get.’”

134 Another interviewee gave an example of the benefit of bringing party representatives to the procedural conference. When counsel ask for an extension due to a schedule conflict, “the arbitrators peer over at the party on the other side, the in-house lawyer, and say, ‘Is that the schedule you want or do you want this over sooner?’ Often, you get a different response.”

135 See above, notes 131-132 and accompanying text.

valorization of case management skills is an example of the field adapting to ensure that it continues to serve the needs of commercial parties.

Arbitrators’ dedication to their “clientele” goes beyond such matters as deferring to the parties’ agreement in matters of procedure or taking steps to minimize costs and delays. The entire field is oriented toward the interests and perspectives of businesses engaged in cross-border commerce. ICA practitioners tend to see arbitration as part of the international commercial system, rather than sitting separate from it, as national courts do.

In a much-quoted passage, Justice White of the US Supreme Court wrote that arbitrators should not be held to standards of “judicial decorum” because arbitrators’ effectiveness depends on them being “men of affairs, not apart from the marketplace.”

Arbitrators have come to see themselves as actors not just in an international legal system, but in international commerce as well. One interviewee contrasted the arbitral and judicial roles on the basis that arbitrators play a constructive role in improving commercial relationships:

> What you want when you are an arbitrator is somehow to be constructive, as opposed to a judge, which I think can be quite a destructive way of acting, in the sense that you keep breaking relationships. As an arbitrator . . . in certain cases there is scope for a role to allow business to carry on, or just generally to be part of the wheels of business.

As Lew puts it, arbitration has “survived the test of time . . . because it has served the users well. It has met the needs of those business entities which have considered national courts to be unsuited to their needs.”

Many arbitrators believe passionately in the essential role of arbitration within international commerce and, in particular, in arbitration’s superiority over litigation for the resolution of international commercial disputes. Arguments for arbitration’s indispensability often take the form of lists of the general deficiencies of litigation in national courts, such as its purported slowness and expense in comparison with arbitration. However,

---


arbitrators are most likely to cite the “inability” of litigation to respond to the “specific needs” of international commerce.\(^{139}\)

Arbitral awards often highlight various ways in which national laws are inadequate to the task of regulating modern international commerce. For example, in ICC Case No. 9427 of 1998, the dispute concerned an on-demand guarantee. The governing law, that of a Baltic state, had no provisions dealing specifically with on-demand guarantees. Instead of applying broader contract law principles, as a national court would have done, the tribunal applied “such legal principles relating to on-demand guarantees which are generally applied in international banking practice.”\(^{140}\) Thus, faced with an apparent gap in the applicable national law, the tribunal applied general principles specific to the particular industry, notwithstanding that neither party had asked the tribunal to do so. It did not, as a national court would likely have done, reason by analogy to other provisions of the governing law.

Aside from the perceived inadequacies of national laws, in pursuing global governance the ICA community is also responding to commercial parties’ interest in predictable, non-discretionary rules.\(^{141}\) With respect to cross-border commerce, certainty and predictability can best be accomplished by a unification or harmonization of the law; otherwise, when disputes arise, parties may face an unpredictable choice of law process, and be surprised to find themselves subject to unfamiliar foreign laws.\(^{142}\) Since the movement to unify national

---


commercial laws has achieved at best partial success, harmonization of commercial law on a
global scale may be best achieved by the organic development of global commercial law
outside of state law-making processes. It is this intuition that has driven the development of
non-state codifications like the UNIDROIT Principles.

Arbitrators also distinguish themselves from national court judges by touting what they see as
their superior commercial expertise. Interviewees were unanimous in expressing their view
that commercial experience and a commercial perspective are essential for effective
arbitration. One interviewee, a partner at a Swiss law firm, expressed this idea:

You have to have good analytical skills, so that in a short time you get to know what
the case is about, you’re able to discern the interests of the parties that lie behind
their positions and that means you have to have a certain commercial experience, and
I think that the best arbitrators are those that have a long career behind them as
advisors to parties to commercial transactions.143

A London-based barrister, with extensive experience in both arbitration and litigation, put the
point in these terms:

Parties want you to understand that they’ve got a big commercial dispute which is a
real burden for them and they’re trying to cope with it as best they can. It’s costing
them a lot of money, it’s taking up huge amounts of management time, and you need
to be sympathetic to the commercial background that both parties will be
experiencing in fighting a major case. Judges in my experience are often quite
oblivious to all this commercial background.144

To some extent, such denigration of judges’ expertise may motivated by arbitrators’ interest
in promoting ICA over national court litigation. After all, in many jurisdictions, complex
commercial cases are heard only by judges sitting on a “commercial court” or named to a
“commercial list,” who presumably have significant relevant experience. However, as noted
above, reactions that begin as economic self-interest (or continue to coincide with self-
interest) often become internalized as social norms. Almost universally, commentators on
ICA—including but not limited to my interviewees—aver that a commercial mentality exists

143 A similar point was made by a Canadian interviewee, who observed that facility with numbers is an
important but underrated skill.
144 This claim—that national court judges often make for poor arbitrators—was made by many interviewees, all
without any prompting. One said, “The fact that someone has been a very distinguished judge, by no means
qualifies that person as a good international arbitrator. I’ve seen this many times.” In general, the retired
judges who have had the most success in gaining appointments are those with significant experience as
counsel in international arbitrations prior to their elevation to the bench. (Lord Mustill might be the
paradigmatic example.)
alongside a legal mentality in the minds of arbitrators. One interviewee said simply: “I like to think my approach would be fact-based and commercial in nature. In other words, if at all possible, to focus on the basic business aspects of the case.” Hermann declares more broadly: “It is fundamental to arbitration that it should solve disputes according to commercial practice and common sense, arriving at a result considered fair in a particular business community.”

Collins contrasts what he sees as the “commercial reasoning” employed by arbitrators with the “private law reasoning” employed by courts:

*Private law reasoning is relatively closed to the competing normative considerations governing contractual behavior outside the discrete communications system provided by the formal contract itself. As a result, it cannot translate expectations grounded in business relations . . . into its default standards for regulation. Commercial arbitration appears to be favored precisely because it can provide . . . reasoning which marries adjudicated outcomes with business expectations more closely.*

This mind-set is exemplified by an interviewee who declared that there are really only two rules of contractual interpretation: “Common sense is one. Commercial sense is the other.”

The primary practical manifestation of this purported commercial mentality is the primacy given in arbitral awards to arguments based on trade usages and commercial reasonableness. As Schmitthoff notes: “The interaction between international commercial usage and international arbitration is very close.” Arbitrators thus oblige what they see as the preference of businesses to be judged according to the standards of their industries, and not according to a priori rules of general contract law imposed upon them by the legal system.

In an apparent exception to their usual deference to party autonomy, arbitral tribunals sometimes apply trade usages when the parties have not raised them, and may find that a trade usage governs even absent evidence that the parties were aware of it. For example, in

---

148 Under the major international contract law instruments, parties are deemed to be aware of relevant trade usages and must take active steps to inform themselves. With respect to the CISG, see Martin Schmidt-Kessel, “Article 9,” in Schlechtriem & Schwenzer *Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG)*, edited by Ingeborg Schwenzer, 3rd English ed., (Oxford: OUP, 2010), p. 191. (Under CISG art 9(2), if it can be shown that a relevant usage is “objectively known,” then a “lack of due care” is imputed to a party that claims ignorance of the usage.) With respect to general principles, the online CENTRAL compilation of *lex mercatoria* rules, Principle I.2.2, adopts a similar position: http://www.trans-lex.org/output.php?docid
ICC Case No. 7661 of 1995, the tribunal reasoned that it was “unlikely that a seller would accept a lower price to account for an event, known or unknown, that may never happen.” Consequently, the tribunal found that the contract did not include a guarantee against certain unforeseen financial contingencies. In ICC Case No. 9443 of 1998, the tribunal considered a contractual obligation that, on its plain language, was perpetually renewable unless both parties expressly repudiated it. The tribunal interpreted the term differently, on the ground that “such an obligation is irreconcilable with general principles of international commerce. It is unimaginable that two corporations will be obliged to cooperate eternally without one or the other being able to put a stop to the cooperation.”

There are even cases where arbitral tribunals disregarded express contractual or statutory terms in light of trade usages. Such instances are explicable on the basis that the norm in favor of trade usages is consistent with party autonomy; tribunals appear to assume that, regardless of their express agreement, parties also intend to be bound by applicable usages. For example, ICC Case No. 3820 of 1981 involved a sale of food products in installments. Payment was to be by documentary credit, which provided that the seller could draw down the credit, “provided goods have been received by opener.” The buyer refused to take delivery of the goods, then argued that, under the governing law, this meant that it had not received the goods; therefore, the preconditions for payment had not been met. The Dutch sole arbitrator wrote that documentary credits must be interpreted: “not . . . in accordance with specific national laws . . . but in accordance with the practices that apply on this subject in international trade.” He held that, contrary to its express terms, the letter of credit must be read to include situations where “the opener could have received the goods if he had wanted to.”

---

149 ICC Case No. 7661 of 1995, *Yearbook of Commercial Arbitration XXII* (1997): p. 149, para 17. While this can be seen as simply an application of common sense, and not a specific trade usage, it remains that such arguments are made from the point of view of practice rather than law. Another example of interpretation of a party’s intent based on commercial reasonableness is consolidated ICC Cases Nos. 6515 and 6516 of 1994, *Yearbook of Commercial Arbitration XXIVa* (1999): p. 80, para. 15.


Institutional rules of arbitration and national arbitration laws reflect arbitrators’ desire to ensure that applicable trade usages are enforced. In a 2000 survey of arbitral institutions, Drahozal found that thirty-two of the forty-four largest commercial arbitration institutions expressly require arbitrators to take trade usages into account, regardless of the applicable law.\(^{152}\) As for national arbitration laws, prior to 1985, references to trade usages were rare, but since then, the situation has changed dramatically.\(^{153}\) Most statutes enacted or amended after that date contain provisions requiring arbitrators to take trade usages into account.\(^{154}\) These changes are part of a broader phenomenon in which states compete to attract arbitration business to their jurisdictions, largely by limiting the circumstances in which state courts and state laws may intrude into the arbitration.\(^{155}\) The trend toward greater emphasis on trade usages is likely to continue because businesses are served by processes that judge their behavior according to the standards specific to their industries.

The \textit{lex mercatoria} is also partly a manifestation of arbitrators’ preference for trade usages, and of their belief that the parties also prefer to be governed by trade usages. A common characterization of the \textit{lex mercatoria} is as the set of trade usages specifically “adapted to the conditions of international commerce.”\(^{156}\) Tribunals have invoked this notion when they apply \textit{lex mercatoria} without the express authorization (and sometimes over the objections)


\(^{154}\) English translations of these statutes are collected in Jan Paulsson, ed., \textit{International Handbook on Commercial Arbitration} (The Hague: Kluwer, 2010). This trend is traceable in part to the enactment since 1985 of approximately seventy statutes based on the UNCITRAL Model Law on International Commercial Arbitration, which includes a provision to this effect, art. 28(4).


of the parties. For example, in ICC Case No. 8873 of 1997, the contract contained an express term that it was governed entirely by Spanish law to the exclusion of all other laws.\textsuperscript{157} Nevertheless, the tribunal found that it also had to consider \textit{lex mercatoria}, which is not a “law,” but rather applies to all international commercial disputes because it embodies international trade usages.\textsuperscript{158} Indeed, proponents of \textit{lex mercatoria} argue that the universalized, formalized language of \textit{lex mercatoria} gives a patina of law to what are essentially trade usages, thus enhancing their legitimacy as a basis for arbitral decision making.\textsuperscript{159}

\section*{4) Conclusion}

It is not a teleological inevitability that ICA should come to constitute a form of global governance. It could amount to no more than what domestic commercial arbitration is in many jurisdictions: a more informal and flexible adjunct to court litigation. However, ICA is in fact evolving into a genuine system of global governance—one that (unlike national courts) is limited in the ambit of its subject-matter jurisdiction but (also unlike national courts) global in its reach. Despite the variety of laws that apply to international arbitrations and the variety of backgrounds possessed by international arbitrators, a common legal culture knits together the members of this distinct international community. This shared culture makes it possible for ICA to emerge as a kind of global governance and at the same time propels that emergence.

In domestic legal communities, culture provides a shared frame of reference on the applicable laws and rules and also fills the inevitable gaps in those laws and rules. The same is true in the transnational sphere. Arbitrators’ normative commitment to an ideal of global justice guides them to seek internationally harmonized rules of both procedure and substance. The field’s orientation toward serving the needs of international business shapes those rules. As would be expected based on the cultural analysis presented above, the governance provided by international arbitration emphasizes legal and cultural neutrality, flexible and efficient

\begin{itemize}
  \item \textsuperscript{157} ICC Case No. 8873 of 1997, \textit{Journal de droit international}\textsuperscript{[1998]} : p. 1017 (“\textit{Ce Contrat sera entièrement régi par le droit espagnol, à l’exclusion de tout autre droit.”})
  \item \textsuperscript{158} ICC Case No. 8873, “\textit{On devra prendre en considération également, dans le contexte de la loi nationale choisie par les parties, les usages de commerce international.”} Another example is ICC Case No. 8365 of 1996, where the respondent contested the applicability of \textit{lex mercatoria} on the ground that it is not a complete system of law and can only serve to fill gaps in and help interpret the applicable national law. Nevertheless, in the absence of a choice of law by the parties, the tribunal decided to apply “the terms of the contract and trade usages.” It also referred to “international arbitral precedent,” which it characterized as: “largely applying . . . general principles of law, trade usages and international customary law, or \textit{lex mercatoria.”} ICC Case No. 8365 of 1996, \textit{Journal de droit international}\textsuperscript{[1997]} : p. 1078, 1079 (author’s translation).
  \item \textsuperscript{159} Cf Flood, “Megalawyering,” p. 170.
\end{itemize}
procedures, deference to party autonomy, and substantive rules founded in standards of commercial reasonableness.