Robert Schuman Centre

Fora of International Commercial Dispute Resolution for Private Parties

WALTER MATTLI

RSC No. 99/5

EUI WORKING PAPERS

EUROPEAN UNIVERSITY INSTITUTE

EUI Working Paper RSC No. 99/5

Mattli: *Fora of International Commercial Dispute Resolution for Private Parties*

The Robert Schuman Centre was set up by the High Council of the EUI in 1993 to carry out disciplinary and interdisciplinary research in the areas of European integration and public policy in Europe. While developing its own research projects, the Centre works in close relation with the four departments of the Institute and supports the specialized working groups organized by the researchers.

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

ROBERT SCHUMAN CENTRE

Fora of International Commercial Dispute Resolution for Private Parties

WALTER MATTLI

RSC Jean Monnet Fellow (1997-98)
and Columbia University

EUI Working Paper **RSC** No. 99/5

BADIA FIESOLANA, SAN DOMENICO (FI)

Printed in Italy in May 1999
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

ABSTRACT

Borrowing the rational institutionalist framework developed by Koremenos, Lipson, and Snidal, this study seeks to shed light on the striking institutional differences of various methods of international commercial dispute resolution for private parties. These methods include recourse to public courts or - much more frequently - to private international courts, such as the International Court of Arbitration of the International Chamber of Commerce or the London Court of International Arbitration, as well as recourse to so-called 'ad hoc' arbitration and Alternative Dispute Resolution (ADR) techniques, such as conciliation and mediation. The key institutional dimensions along which these methods of international dispute resolution vary are 1) procedural and adaptive flexibility and 2) centralization of provision of procedural safeguards and information collection. The study seeks to explain why different methods of international commercial dispute resolution are selected. It argues that these methods respond to varying institutional needs of different types of disputes and disputants. Such needs can be explained in terms of the following factors:

1) uncertainty about the preferences or behavior of contractual partners;
2) uncertainty about the present and future 'states of the world;' and
3) the number and asymmetry of the parties involved in a dispute.

1. INTRODUCTION

Two distinguished international arbitrators, Alan Redfern and Martin Hunter, recently observed that the study of the practice of international commercial arbitration is like peering into the dark.[1] Arbitration is a form of proceeding which is private between the parties; thus few awards are published and even fewer procedural decisions of arbitral tribunals see the light of day.[2] René David, a leading French expert of international arbitration, has similarly noted: "[S]ecrecy, which is one of the reasons why arbitration is resorted to by the parties, is easily extended...to everything concerning arbitration."[3] Information mainly comes from tapping the experience of the principal arbitral institutions or by looking at individual cases which come before the courts, either as a result of enforcement proceedings or because an arbitral award is challenged by the losing party.

Despite this difficulty, international arbitration is a topic that deserves much closer attention by scholars of international relations. After retreating from the international scene during the age of nation-state ideology in the 19th Century, international commercial arbitration has been staging a formidable comeback in the past twenty years. Today it calls to memory the flourishing era of arbitration practices and institutions of international trade fairs in medieval Europe. The number of arbitration fora has grown from a dozen or so in the 1970s to more than one hundred in the 1990s, and the caseload of major arbitral institutions has more than doubled during the same period.[4] Lawyers and judges agree that "there is [now] clear evidence of something of a world movement...towards international arbitration."[5] *The Economist* recently called

[1] I am grateful to Ken Abbott, Beth Yarbrough, Barbara Koremenos, Charles Lipson, Ronald Mitchell, Antonio Ortiz, and Duncan Snidal for excellent written comments on earlier drafts of this paper. I also thank Debbie Davenport, Miles Kahler, Robert Keohane, Lisa Martin and the participants of the Rational International Institutions Project (RIIP) and of the Program on International Politics, Economics, and Security (PIPES) at the University of Chicago for helpful suggestions. Special thanks to Dominique Hascher, General Counsel and Deputy Secretary General of the International Court of Arbitration of the International Chamber of Commerce in Paris, for inviting me to do an internship at the Court in the Spring of 1998, and to Anne-Marie Whitesell for welcoming me to her legal team at the Court. In addition, I have greatly benefitted from discussions on international commercial arbitration with Adrian Winstanley of the London Court of International Arbitration, Eva Müller of the Arbitration Institute of the Stockholm Chamber of Commerce, as well as Gerald Aksen, Alessandra Casella, Yves Dezalay, Bryant Garth, Thomas Heller, Christian Joerges, William Park, Martin Shapiro, Hans Smit, Francis Snyder, and Job Taylor.

[2] Redfern and Hunter 1991, xv.

[3] David 1985, 31.

[4] See Brown 1993.

[5] Kerr, Lord Justice of England, preface to Craig, Park, and Paulsson. 1990, xii.

arbitration "the Big Idea set to dominate legal-reform agendas into the next century."[6]

The growing importance of arbitration institutions is not the sole motivation to study these fora; there is a deeper analytical interest. International relations scholars have traditionally focused on inter-governmental international organization; little attention has been paid to *private* international institutional arrangements.[7] This omission has at times rendered a genuine assessment of the efficiency or effectiveness of public organizations difficult because it robs the analysis of the comparative institutional basis needed to evaluate issues of institutional performance. Thus, for example, a better understanding of the workings of international arbitration fora may help us to better assess the strengths and weaknesses of certain public judicial procedures and institutions.

This study offers an introduction into the arcane world of modern international commercial arbitration from a social science perspective, thus following the lead of recent work by Alessandra Casella, Claire Cutler, and Yves Dezalay and Bryant Garth. Casella has developed a general equilibrium model of the relationship between the expansion of international trade and the adoption of arbitration. Her model shows that the availability of arbitration influences the size and composition of markets; but arbitration and legal arbitral doctrines are themselves shaped by the exogenous growth of markets.[8] Cutler has offered a review of the historical evolution of private dispute settlement in international trade that contrasts with conventional historical narratives. She examines how economic and political elites have, at various times, manipulated the boundary between the economic and political spheres as a means of regulating commerce.[9] Building on the structural approach developed by the French sociologist Pierre Bourdieu, Dezalay and Garth have provided a comprehensive account of the evolution of modern international commercial arbitration practices and institutions. They have also explored how these international legal developments, in turn, have transformed domestic methods for handling disputes.[10]

The analysis in this study is not primarily concerned with issues of institutional evolution, and it is not confined to international commercial arbitration; it focuses more broadly on fora of international commercial dispute resolution for private parties. More specifically this study seeks to shed light on

[6] *The Economist*, 18-24 July 1992, 17 of survey on the legal profession. See also Wetter 1995.
[7] One exception is Lipson 1985.
[8] Casella 1996.
[9] Cutler 1995.
[10] Dezalay and Garth 1996.

the striking institutional differences of various methods of international commercial dispute resolution, using the rational institutional framework developed by Koremenos, Lipson, and Snidal.[11] These methods include recourse to public courts or - much more frequently - to private international courts, such as the International Court of Arbitration of the International Chamber of Commerce or the London Court of International Arbitration, as well as recourse to so-called 'ad hoc' arbitration and Alternative Dispute Resolution (ADR) techniques, such as conciliation and mediation. The key institutional dimensions along which these methods of international dispute resolution vary are 1) procedural and adaptive flexibility and 2) centralization of provision of procedural safeguards and information collection. For example, flexibility is typically much lower in public court proceedings than in arbitration or ADR; and centralization is present in the case of institutional arbitration but not in ad hoc arbitration or ADR.

The study seeks to explain why different methods of international commercial dispute resolution are selected. It argues that these methods respond to varying institutional needs of different types of disputes and disputants. Such needs can be explained in terms of the following factors: 1) uncertainty about the parties' preferences or behavior; 2) uncertainty about the present and future 'states of the world;' and 3) the number and asymmetry of the parties involved in a dispute.

The framework study by Koremenos, Lipson, and Snidal argues that international institutions can be understood either as the direct products of rational design or as indirect products of rational selection among institutions (where actors favor institutions that are more effective or appropriate). Most of the studies written for this project provide examples of the direct rational design. My study is an illustration of the indirect rational design type. It describes a 'market' of dispute resolution methods where different 'suppliers' offer different venues which the firms on the demand side select in terms of their design problem. This creates an accelerated evolutionary process (i.e., accelerated by rational anticipation of what will sell and what will work) and the final result will be very much the same as a direct rational design effort.[12]

The study elaborates several conjectures, linking institutional features of dispute resolution methods to the needs or demands of private parties. These conjectures can be summarized as follows:

---

[11] Koremenos, Lipson, and Snidal forthcoming.

[12] As illustrated below, the distinction between suppliers and demanders is useful analytically, but in practice it is often blurred since private dispute resolution methods are mostly provided by private organizations run and funded by firms.

First, centralization of fora to which private international parties resort to resolve their disputes increases with uncertainty about the parties' preferences or behavior (CENT|UNCERT). Such uncertainty may be low, for example, if the parties are locked in a mutually beneficial long-term commercial relationship; in this case, the parties' institutional demands for resolving disputes will be markedly lower than those of firms in a one-shot business encounter or of parties whose commercial relationship has come to an end. Centralization is also likely to increase with the parties' uncertainty about the present 'state of the world,' that is, with the parties' relative lack of information, for example, about the legal environment (the laws and integrity of judges) in which arbitration takes place and about the conditions for enforceability of arbitral awards (CENT|UNCERT(S)). More generally, traders with little experience in international exchange or traders from very different cultural and linguistic regions may rely more heavily on centralized support and expertise for resolving their disputes than veteran traders operating in a relatively homogenous region.

Second, institutional flexibility is valued where uncertainty about the future 'state of the world' is great (FLEX|UNCERT(S)). For example, firms operating at the forefront of new production and exchange methods are likely to prefer a flexible form of dispute resolution allowing them to tailor rules regarding procedure, evidence, and even the substance of the case to their evolving needs.[13]

Third, the larger the number of parties to a dispute, the higher the coordination and administrative demands on the dispute resolution form, and thus the greater the need for centralization (CENT|NUMB).

Finally, the greater the asymmetry of distribution of bargaining power among the parties, the less likely the dominant player will compromise over the terms of dispute resolution. Such a player may thus choose a relatively inflexible form of dispute resolution that fits his preferences.

The study is organized as follows. Section 2 offers a brief review and critique of themes in the institutional literature in international relations and economics that are relevant to this study. Section 3 presents the key institutional differences among the various methods of international commercial dispute resolution. It also introduces the principal international arbitral fora. Section 4 seeks to explain institutional differences within the framework offered by

[13] This example assumes that the parties have comparable bargaining power. Compare with fourth conjecture.

Koremenos, Lipson, and Snidal. Section 5 concludes with a discussion of ways of broadening the study.

2. PRIVATE DISPUTE RESOLUTION AND THE INSTITUTIONAL LITERATURE

Political scientists and economists have developed two theoretical schools, regime theory and New Institutional Economics (NIE), respectively, that seek to explain institutional arrangements. Unfortunately, however, the two schools have based their theories, in part, on assumptions that move the theories' reach away from the types of institutional arrangements discussed in this study.

'International regimes' are defined broadly as sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations.[14] In a world of rapidly growing interdependence, regimes are said to help states correct 'market failures' stemming from asymmetric information, moral hazard, risk, and uncertainty.[15] Regime theory has shed important light on the nature of interstate relations but it has overlooked the importance of non-state actors in international relations. In particular, it has failed to examine the extent to which international market players themselves are capable of remedying so-called 'market failures' through the creation of private institutional arrangements. This failure has deprived the theory of a comparative institutional perspective necessary to assess the desirability of intergovernmental regimes. Only a comparative institutional analysis that weighs the costs and benefits of both private and public institutional remedies of 'market failures' can provide a framework to address questions of efficiency and optimal institutional design.[16] This critique need not imply that regime theory is flawed; it suggests, however, that the theory could be strengthened by extending its focus beyond state behavior. For example, there is nothing that keeps the Chamber of Commerce from being viewed as a regime for its members, as will be shown below.

Institutional Economics, also called New Institutional Economics (NIE), is a rapidly growing field that has developed from the pioneering work of Oliver Williamson. It offers a rigorous conceptual framework for comparative institutional analysis.[17] NIE seeks to explain varying types of industrial organization, from straightforward market exchange to vertically integrated

[14] Krasner 1983, 2.
[15] Keohane 1984, 93.
[16] A related point is made in Demsetz 1969.
[17] Williamson 1975, 1985.

exchange, based on differences in transaction costs. The principal dimensions with respect to which transactions differ are asset specificity, uncertainty, and frequency. The first is the most important; it represents the degree to which durable investments are made to support particular transactions.

NIE postulates that transaction costs are economized by assigning transactions (which differ in their attributes) to governance structures (the adaptive capacities and associated costs of which differ) in a discriminating way. Governance structures are the organizational frameworks within which the integrity of a contractual relation is decided and maintained. In particular, the higher the asset specificity, the greater the institutional complexity to promote efficient exchange. Examples of governance structures include economic hostages, vertical integration, unitization, and multinationalism.[18]

Nevertheless, the Williamsonian framework is not without shortcomings. For example, none of Williamson's governance structures would be needed if courts were able to resolve disputes swiftly and at low cost. But Williamson argues that court ordering or legal centralism is inefficient. "Most studies of exchange assume that efficacious rules of law regarding contract disputes are in place and are applied by the courts in an informed, sophisticated, and low-cost way...The facts, however, disclose otherwise. Most disputes, including many that under current rules could be brought to a court, are resolved by avoidance, self-help, and the like...[And] because the efficacy of court ordering is problematic, contract execution falls heavily on [governance structures]."[19] This proposition is problematic. First, courts are institutions, too. A comparative institutional analysis that sets aside a large universe of institutions on the grounds of their alleged inefficiency risks being internally inconsistent. Within a Williamsonian framework, it is incomprehensible why inefficient institutions come into being or survive. Second, even if it established analytically (by way of *ad hoc* assumptions) that public courts and public law are inefficient, there remains the question of why NIE does not consider their next best substitutes, namely private courts and private law.

In short, NIE provides a sophisticated analytical framework for studying varying forms of governance. However, by overlooking the importance particularly of private courts and law, NIE may be accused of truncating the full range of variation on the dependent variable (governance forms) and thus suffering from selection bias. Williamson recognized that "a place for law

[18] Beth and Robert Yarbrough have recently added to this list various forms of trade liberalization. Their analysis is a good example of how NIE can enrich the study of international institutional arrangements. See Yarbrough and Yarbrough. 1992.
[19] Williamson 1985, 20 and 32.

[should] properly [be] provided in any comprehensive study of contract."[20] Beth and Robert Yarbrough have responded to this invitation and are presently extending the Williamsonian framework to incorporate law and public courts in a way that is consonant with the analysis offered in this study. Courts, they argue, are not generically inefficient; rather they are not very efficacious for certain types of transactions. One type is those transactions in which asset specificity makes the historical context of a relationship critical to solving disputes. A second type is those in which the confrontational nature of court proceedings risks damaging future relations (hence, courts' historical reluctance, until recently, to become involved in many family matters). In such cases, the Yarbroughs predict non-court means of dispute settlement.[21]

[20] Ibid., 168.

[21] Beth Yarbrough in a personal communication to me.

3. INSTITUTIONAL FEATURES OF INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION METHODS

The range of methods of international commercial dispute resolution is wide. It includes litigation in public courts, several arbitration options, and so-called Alternative Dispute Resolution techniques. This section offers a brief description of the various methods, highlighting their institutional characteristics.

Flexibility in Dispute Resolution

In the domestic context, parties who seek a binding method of resolving disputes through third-party intervention have the choice between a national public court and private arbitration. In the international context, such choice does not exist because there are no international public courts that handle international commercial disputes involving only private parties.[22] Therefore, the choice for international private parties is between recourse to a national court (i.e., litigation) and recourse to private international dispute resolution, such as international arbitration and ADR.[23]

Arbitration is a binding, non-judicial and private means of settling disputes based on an explicit agreement by the parties involved in a transaction. It entrusts the settlement of a question to one or more persons who derive their powers from the private agreement.[24] Arbitration becomes international when the parties to a dispute reside or conduct their main business in different countries. The term 'commercial' in international commercial arbitration is broadly conceived and covers activities such as sales of goods, distribution agreements, commercial representation of agency, leasing, consulting, banking, insurance, transportation, construction work, joint venture and other forms of industrial or business cooperation.[25]

A key feature of arbitration is its high degree of procedural flexibility. Arbitration provides the parties with full control over the arbitral process. The

[22] The only exception is the European Court of Justice which may deal with certain disputes between private parties under Community law. Redfern and Hunter 1991, 25; Burley and Mattli, 1993.

[23] The term 'jurisdiction clause' in an international contract is generally used to describe a forum selection that designates a public court to hear a case, while 'arbitration clause' makes reference to private international dispute resolution.

[24] Mustill and Boyd 1989, 38-50.

[25] This definition is suggested in the United Nations Commission for Trade Law (UNCITRAL) Model Law, Art. 1 (1), fn.

parties may decide the number of arbitrators comprising the arbitral tribunal, the appointment procedure of the arbitrators, the place of arbitration, the powers of the tribunal, and the applicable law in the dispute. In contrast, a trial before a national court must be conducted in accordance with the rules of that court. Further, public court proceedings are typically open to the public, and court decisions are published and readily available. Arbitral proceedings, however, are held in private; details about the cases, including the arbitral awards, are confidential. Privacy may help firms to hide a number of facts from competitors and the public in general, such as trade secrets and know-how not guaranteed by patents, or financial difficulties and other problems. Nevertheless, the parties may choose to publize arbitral decisions either to create precedents or to provide authoritative interpretations of standard contract terms.[26]

Flexibility characterizes not only arbitral procedures but also the actual institutions of arbitration, such as the International Court of Arbitration of the International Chamber of Commerce in Paris, the London Court of International Arbitration, and the Arbitration Institute of the Stockholm Chamber of Commerce. These fora can respond much more speedily to demands for new dispute resolution rules and services than public courts. The reason is evident: Private courts are demand-driven. The very same market actors who request new rules also control these courts. As noted by Casella, these fora are shaped from the 'bottom', that is, by the firms that voluntarily finance and share the 'club goods' they need.[27] Thus, the demanders are also the suppliers; they possess full information on how new business practices or changing market conditions affect their dispute resolution needs. They are capable of quickly responding to new needs by creating new services and by rewriting the charters of their courts. The frequent revisions of the rules of major arbitral institutions attest to the high degree of institutional flexibility of these fora.

Many of today's arbitration practices evoke Medieval Europe's private courts and the Law Merchant, a body of private commercial rules and principles that were distinct from the ordinary law of the land. The merchant courts sat in

[26] Cost is factor, unrelated to flexibility, that is frequently said to distinguish litigation from arbitration. Arbitration centers, for example, claim that litigation is much more expensive than arbitration. This need not necessarily be true, however. First, although litigants do not pay the salary of a judge, parties involved in arbitration must pay the fees and expenses of the arbitrators. Second, litigants are not charged for the use of the public facilities of the courts of law, but the parties in arbitration pay the administrative fees and expenses of an arbitral institution and these can be substantial, particularly when they are assessed by reference to the amount in dispute. In short, arbitration may or may not be less expensive than litigation, much depends on the specifics of the case and the attitude of the parties to a dispute. As a result, cost is not an institutional dimension that will be considered in the analytical part of the study.

[27] Casella 1996.

fairs, markets, seaport towns, and most other large centers of commercial activity. Merchant courts chose as judges merchants who possessed intimate knowledge of particular commercial practices and techniques. Mitchell, a historian of the Law Merchant, writes: "The summary nature of its jurisdiction...characterized the Lex Mercatoria. Its justice was prompt..[and] the time within which disputes [had to] be finally settled was narrowly limited."[28] Sea merchants, for example, demanded that disputes be settled "from tide to tide according to the ancient law marine and ancient customs of the sea...without mixing the law civil with the law maritime."[29] Another reason for using guild courts was that "[u]nder severest penalties, [they] forbade [guild] members to appeal, in cases where they alone were concerned, to any court save that of the guild."[30] Merchant courts relied on sanctions such as ostracism and boycott of all future trade in order to ensure that traders would be held to the resolution dictated by the arbiters.[31]

Besides arbitration and litigation, there are so-called Alternative Dispute Resolution (ADR) techniques. The most widely known forms of ADR are conciliation and mediation. Like arbitration, conciliation and mediation offer the parties great procedural flexibility. The parties pick conciliators or arbitrators of their choice and design procedures that best fit their cases. Typically, a mediator seeks to reduce the distance between the parties' positions, and make the parties understand each other's point of view in order that they may themselves achieve a compromise solution. A conciliator performs a different function. After consulting all sides and evaluating the evidence, the conciliator draws up the terms of a solution that is hopefully acceptable to all parties involved in the dispute. Conciliation and mediation differ in one important respect from arbitration: they do not result in a binding or enforceable award. A mediator cannot compel the parties to reach a settlement, and a conciliator has no power to impose his or her compromise solution on the parties.[32]

[28] Mitchell, W. 1904, 12-13.
[29] Ibid., 20.
[30] Ibid., 42,
[31] Benson 1989. See also Milgrom, North, and Weingast 1990; and Greif, Milgrom, and Weingast 1994.
[32] For this reason, ADR is sometimes combined with an adjudicatory process as a fall-back solution. For example, a contract may provide for a specific time-limit to start some form of mediation or negotiation after which arbitration becomes the only method available. Park fortcoming.

Centralization of Dispute Resolution Fora

International commercial arbitration can be conducted in two ways, as *institutional* arbitration or *ad hoc* arbitration. Institutional arbitration is done under the aegis of an arbitral institution, usually in accordance with the institution's own rules of arbitration.[33] The most established of these institutions are the International Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, and the Arbitration Institute of the Stockholm Chamber of Commerce.[34] Many more arbitral institutions have been set up in the past decade, notably in Asia, the Middle East, and North America.[35]

Ad hoc arbitration differs from institutional arbitration in that it does not rely on the supervision or formal administration of an arbitration center. In this sense it is the least institutionalist form of arbitration. In ad hoc arbitration, the parties are 'on their own;' they are not bound by time limits set by arbitral institutions and their proceedings are not monitored by any central body. The parties can leave the issuance of arbitration procedures to their arbitrators or develop their own rules and design their own arbitral management either in the initial contract or after a dispute has arisen. Alternatively, the parties may simply adopt or adapt the rules of one of the major arbitration centers, but, again, without entrusting the administration of the arbitration to such centers.[36] Another increasingly popular option is to use the arbitration rules of the United Nations Commission on International Trade Law of 1976 (UNCITRAL arbitration rules). Reference in the parties' contract to the UNICTRAL rules

---

[33] Institutional arbitration is also referred to in the literature as 'administered' or 'supervised' arbitration. On institutional arbitration, see Slate 1996; Hoellering 1994; Vigrass 1993; and Graving 1989.

[34] Another major institution is the American Arbitration Association (AAA). Its focus is primarily on domestic arbitration, and for this reason, it is omitted from the discussion below. The AAA handles yearly about 40,000 domestic arbitration cases and about 200 international arbitration cases.

[35] Due to limited space, this study focuses primarily on international commercial arbitration and does not consider the more specialized arbitration as offered, for example, by the Society of Maritime Arbitration (New York), the Grain and Feed Trade Association (London), and various stock and commodity exchanges. Nevertheless, I would argue that the framework used here does shed light on some key institutional features of commodity trade and maritime arbitration. See concluding section of this study. See also Mentschikoff 1961; Harris, Summerskill, and Cockerill 1993; Summerskill 1993; Covo 1993; and Johnson 1991, 1993.

[36] In ad hoc arbitration, parties may rely nevertheless on an 'appointing authority' (e.g., a court, an arbitral institution, or the chairman of a trade association) for the appointment of arbitrators.

will immediately incorporate a full-blown set of procedures designed specially for ad hoc arbitration.[37]

Ad hoc arbitration for international commercial dispute resolution is similar to ADR in that neither the mediator nor the conciliator is monitored by any central institution. Like the mediator and conciliator, the arbitrator in an ad hoc case depends entirely on the good will of the parties for a smooth process of dispute resolution. Ad hoc arbitration and ADR contrast sharply with institutional arbitration as offered, for example, by the International Court of Arbitration (ICA) of the International Chamber of Commerce, where the provision of procedural safeguards and information is highly centralized. They also differ from arbitration as conducted by the London Court of International Arbitration (LCIA), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). These three institutions are considered in order.[38] (Table 1 summarizes the key institutional dimensions along which the various methods of international commercial dispute resolution vary.)

Table 1: The Varying Institutional Dimensions of International Commercial Dispute Resolution Methods

		Institutional Litigation Arbitration [public courts]	Ad Hoc Arbitration [ICA, LCIA, SCC]	and ADR
Flexibility		low [typically]	high	high
Centralization	Centralized Information Gathering	n.a.	high to medium	none
	Centralized Monitoring and Other Safeguards	n.a.	high to medium	none

[37] On ad hoc arbitration, see Aksen 1991; and Arkin 1987.

[38] Most of the information about these fora comes from interviews I conducted during an internship at the International Court of Arbitration of the ICC and visits to the LCIA and the Stockholm Chamber of Commerce in March and April 1998.

Illustration of Institutional Arbitration: Three Private Fora

The International Chamber of Commerce and ICC Arbitration: The International Chamber of Commerce (ICC) is a business organization offering a wide range of services to firms engaged in international trade and investment, including commercial dispute resolution. Founded in 1919, it counts today as members over 7,000 enterprises and commercial organizations in 114 countries. The ICC's organizational structure includes a general secretariat in Paris, employing some 85 persons and a Secretary General. The supreme organ is the Council which meets twice a year. Members of the Council are appointed by the National Committees of the ICC. Each Committee may select one to three members according to its contribution to the ICC budget. The Council's President is elected for a two-year term. The ICC has established several commissions and special committees to address major issues relating to international commerce, such as intellectual property, competition law, taxation, transportation, telecommunications, the environment, and bribery. Annual conferences are supplemented every three years by an ICC Congress, attended on average by some 1,000 participants.[39]

A major organization within the ICC is the International Court of Arbitration (ICA), established in 1923.[40] The idea of such a court was conceived after World War I by businessmen wrestling with the practical difficulties of designing a dispute resolution process acceptable to merchants of different national backgrounds.[41] It is composed of a chair, eight vice-chairs, and 57 members selected by the ICC National Committees and national professional organizations. The members are professors, former judges, barristers and lawyers with expertise in international commercial law and arbitration. They represent a wide range of legal traditions, including civil law, common law, and Islamic law. The Court meets four times a month, once in plenary session and three times as *comité restraint*. The ICA is assisted by a secretariat located at the headquarters of the ICC in Paris. The secretariat has a staff of 38 persons, including six teams of lawyers from various countries. It assumes responsibility for the day-to-day administration of ICC cases and keeps

[39] Craig, Park, and Paulsson 1990, 25-27.

[40] Before 15 June 1989, the ICA's name was Court of Arbitration of the ICC.

[41] Craig, Park, and Paulsson 1990, xxi. The ICA is supplemented by four other ICC bodies dealing with the settlement of international commercial disputes. They are the Commission on International Arbitration, which advises on the development of ICC Rules of Conciliation and Arbitration; the International Maritime Arbitration Organization; the International Center for Technical Expertise; and the Standing Committee on Regulation of Contractual Relations, which gives parties the possibility of referring to a neutral outsider to adjust contracts whose performance is threatened by fundamentally changed circumstances. See Craig, Park, and Paulsson 1990, 27-28.

copies of all written communications and pleadings exchanged in the arbitration proceedings. It also provides assistance and information to parties, counsel and arbitrators. The provision of centralized information is a particularly valuable service because in an international arbitration case many different national systems of law may need to be consulted, depending upon where the arbitration takes place and what issues are involved. Questions of the capacity of the parties to agree to arbitration, the validity of the arbitration agreement, the 'arbitrability' of the subject-matter of the dispute and the recognition and enforcement of arbitral awards may all be determined by national arbitration laws.[42]

ICC arbitration is characterized not only by the high degree of centralized information gathering but also by the extensive monitoring offered by the Court. ICC arbitration proceeds in five steps:

1) The claimant submits a request for arbitration to the secretariat. The secretariat then transmits the request to the defendant who must respond within 30 days.
2) The Court appoints arbitrators and chooses the place of arbitration when the parties do not make their own selection.[43] In selecting the arbitrators, the Court relies in part on recommendations from the ICC National Committees. The Court also fixes the arbitrators' fees and estimates the overall arbitration costs based on the amount in dispute. After receiving one half of the advance on arbitration costs, the secretariat transmits the file to the arbitral tribunal. The fixing of fees by the Court is intended to prevent the parties from being placed in the uncomfortable position of having to negotiate issues of remuneration with those who will be responsible for deciding their case or otherwise to avoid challenges to an arbitrator's independence.
3) Within two months of receiving the file, the tribunal submits a document called the Terms of Reference to the Court. This procedure can be compared to a pre-hearing conference and be viewed as an opportunity for the arbitrators to get to know each other and become familiar with the specifics of the case. The Terms summarize the parties' respective claims, state the applicable law and the place of arbitration, and specify the procedural rules (rules regarding evidence and witness statement, etc.) The Court checks the Terms of Reference for conformity with ICC Rules.
4) As soon as the second half of the advance is paid, the arbitral tribunal proceeds with the case. Within six months (which the Court may extend), the tribunal submits a draft award to the Court.

[42] Redfern and Hunter 1991, xvi. See also Gentinetta 1973.
[43] ICC arbitral tribunals are composed of one or three arbitrators.

5) The Court scrutinizes the arbitral award. It may draw the arbitrators' attention to points of substance or may suggest modifications to the form of the award.[44] Once the Court is satisfied it approves the award; the secretariat then notifies the parties.

The growing popularity of ICC arbitration is best reflected in the docket of the ICA. The first three thousand requests for arbitration were filed between 1923 and 1977. The next three thousand were lodged between 1977 and 1987. 333 cases were filed in 1991 alone; the yearly number of cases kept growing steadily, reaching 450 in 1997.[45] About 54% of the 5,666 parties involved in ICC arbitration have come from Western Europe. The most frequently represented nationalities are, in order, France, the United States, West Germany, Italy, the UK, Switzerland, Yugoslavia, the Netherlands, Belgium, Egypt, Spain, Austria, Rumania, Sweden, and Greece. A recent development is the upsurge of ICC arbitration involving parties from Eastern Europe, Latin America, and South East Asia (7.9%, 11.5%, 9.5% respectively of all parties in 1996).[46]

The London Court of International Arbitration (LCIA): The LCIA is another long-established arbitration institution. It was inaugurated in 1892 as 'The London Chamber of Arbitration' on the initiative of the Corporation of the City of London and the London Chamber of Commerce and Industry. In 1903, the name of the tribunal was changed to the 'London Court of Arbitration'. A joint Committee, comprising representatives of the Corporation of the City of London and the London Chamber of Commerce, was formed to administer the activities of the Court. In 1975, the Institute of Arbitrators (later to become the Chartered Institute of Arbitrators) joined the other two administering bodies. In 1981, the name was changed to the London Court of International Arbitration, to reflect the nature of its work, which was moving steadily from domestic to international arbitration. In 1986, the LCIA was incorporated as a limited company under the control of a Board of Directors. It is composed of a President, who is also the Chairman of the Board of Directors, four Vice-Presidents and about 20 other members, all of whom are international arbitrators from major trading countries. The number of members drawn from the UK is restricted to no more than one quarter of the total. The Court is assisted by a small London-based secretariat of about five people.

[44] The ICA returns about 15-20 percent of the awards to the arbitrators for revision. See Dezalay and Garth 1996, 47-48; and Smit 1994, especially 68-72.

[45] Craig, Park, and Paulsson 1990; *The ICC International Court of Arbitration Bulletin*, various issues.

[46] *The ICC International Court of Arbitration Bulletin*, various issues.

The LCIA is somewhat less involved in arbitration proceedings than the ICA. Its main function is to select arbitrators or to confirm party-nominated arbitrators. Like the ICA, the LCIA has the right to reject party-nominated arbitrators if it judges that they are not independent or that they are otherwise unsuitable. The LCIA fixes the arbitrators' fees, ensures that the arbitrators comply with the procedural timetable and respect all other rules of LCIA arbitration. Unlike the ICA, the LCIA does not require arbitrators to draft terms of reference, nor does it scrutinize arbitral awards.

Despite recent efforts to further internationalize its services, notably through the creation of four so-called 'Users Councils' for Europe, North America, Asia-Pacific, and Africa, the LCIA remains an institution with a British bent.[47] This is reflected, for example, in the fact that all LCIA presidents until 1993 were British, and that 60% of Court-selected arbitrators and 65% of party-nominated arbitrators are nationals from the UK. The parties most frequently involved in LCIA arbitration come from the UK, the US, Australia, Canada, India, and Hong Kong.

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute): A frequently named third major international arbitration institution is the Arbitration Institute of the Stockholm Chamber of Commerce. It was established in 1917 as an independent entity within the Stockholm Chamber. The SCC Institute is composed of a Board of three members (and three deputies). The chairman of the Board has to be a judge with expertise in commercial and industrial matters. Of the two other members, one has to be a practising lawyer, the other "a person who enjoys the confidence of the business community."[48] The Board is assisted by a small secretariat.

Similar to the LCIA, the SCC Institute's main role is to act as an authority to appoint arbitral tribunals. Challenges against arbitrators are handled directly by the Board. The rules of the SCC Institute require that a tribunal deal with a case in an 'impartial, practical, and speedy fashion', give each party 'sufficient opportunity to present his case', and reach a decision 'no later than one year after the case has been referred to the arbitral tribunal'.[49]

---

[47] 'Users' Councils' have been set up to keep the international business community apprised of the arbitration services offered by the LCIA and to identify the changing needs of business to be able to respond quickly to these needs. Membership in 'Users' Councils' is by invitation; members include lawyers, arbitrators, and multinational industrial, commercial, and trading organizations.

[48] Stockholm Chamber of Commerce 1988, paragraph 2.

[49] Ibid., paragraphs 16 and 26.

The development of the SCC Institute into a major center of international commercial arbitration dates from the 1970s when Americans and Soviets agreed that trade contracts between the two countries should contain a clause providing for arbitration according to the rules of the SCC Institute. The caseload of the Institute grew to a yearly average of about 35 in the 1980s and 100 in the 1990s. In 1997, 82 international cases and 29 domestic cases were registered with the Secretariat. The most frequently represented nationalities in SCC international arbitation cases in recent years have been Russian, Ukranian, and American.

4. EXPLAINING FORUM SELECTION AND INSTITUTIONAL VARIETY

Actors engaged in international trade and investment face several types of uncertainty: 1) Uncertainty about the preferences and behavior of contractual partners; and 2) uncertainty about the present and future 'state of the world.' These types of uncertainty and their varying implications for the selection of particular institutional designs are discussed in turn. The last subsection also considers the issues of the number of parties involved in a dispute and the parties' relative bargaining power and draws their institutional implications.

Uncertainty about preferences and behavior

Uncertainty about preferences and behavior varies with the relative intimacy of a relationship between parties involved in international exchange. Intimacy or closeness of a relationship, in turn, depends on the parties' homogeneity, their frequency of interactions, and their distance from each other. Robert Cooper and Janet Landa, for example, have documented how traders belonging to ethnically homogeneous commercial groups, such as the East Indians in East Africa, the Syrians in West Africa, and the Chinese in Southeast Asia, experience considerably lower levels of behavioral uncertainty when dealing with each other than when dealing with outsiders.[50] One reason is that such trading groups serve as repository of trust which reduces the probability of breach on a contract between insiders.

Disputes may occasionally erupt even among insiders, but they are likely to be resolved more cooperatively than conflicts among strangers.[51] Marc Galanter, a leading exponent of the law and society movement, has argued that

[50] See, for example, Cooper and Landa 1984; and Landa 1981. See also Greif 1992; and Curtin 1984.

[51] For examples see Auerbach 1983; see also Ellickson 1991.

"in order to understand the distribution of [domestic] litigation, we must go beyond the characteristics of individual parties to consider the relations between them. Are the parties strangers or intimates? Is their relationship episodic or enduring? Is it single-stranded or multiplex?"[52] He finds that, generally, the more inclusive and enduring a relationship between a set of parties, the less likely disputes will be taken to official fora (public courts); instead, such parties will seek to resolve their differences in so-called 'embedded' fora, that is, fora that are part of the social setting within which a dispute arose.[53] A classic illustration of 'embedded' commercial interactions and dispute resolution is Stuart Macaulay's study of local business practices among firms in Wisconsin. Macaulay finds that uncertainty regarding contract performance is reduced by widely accepted local norms (e.g., 'commitments are to be honored in almost all situations - one does not welsh on a deal', and 'one ought to produce a good product and stand behind it') and by close personal relationships across the boundaries of local business organizations. He notes: "Salesmen often know purchasing agents well. The same two individuals occupying these roles may have dealt with each other...[during up to] 25 years. Each has something to give the other...[T]op executives may [also] know each other. They may sit together on government or trade committees. They may know each other socially and even belong to the same country club."[54] Disputes in this business community are frequently settled without reference to the contract or potential or actual legal sanctions. "If something comes up, you get the other man on the telephone and deal with the problem...One doesn't run to lawyers if [one] wants to stay in business."[55]

These examples help to shed light on the varying degrees of centralization of fora of international commercial dispute resolution, suggesting the following conjecture: *Centralization of fora to which private international parties resort to resolve their disputes increases with the uncertainty about the parties' preferences or behavior* (CENT|UNCERT).[56] Centralization implies a

[52] Galanter, Marc. 1993. Reading the Landscape of Disputes. *UCLA Law Review* 31:24.

[53] See also Galanter 1981. For examples of embedded fora, see Doo 1973; Note 1970; Bernstein 1992; and Maitland 1936.

[54] Macaulay 1963, 63.

[55] Ibid., 61.

[56] It should be noted that I am not primarily interested in knowing what dispute resolution clause the parties write into a contract but what method they ultimately use. The contractual provision may differ from the actual method used. For example, parties that write an ICC arbitration clause into their contract may decide to use ad hoc arbitration when a dispute erupts. Similarly, parties may choose some form of arbitration rather than complying with a jurisdiction clause. Some contracts have no provision for dispute resolution; in these cases the parties will choose the appropriate forms when disputes erupt, provided the parties have an interest in settling their disputes. See Coe 1997, 56, 161.

high degree of central provision of procedural safeguards and information. Such provision is characteristic of institutional arbitration; it is absent, however, in ad hoc arbitration or ADR (see Table 1).

Parties involved in an ongoing mutually beneficial relationship (possibly with dealings along many different fronts) are less likely to rely on highly institutionalized dispute resolution forms than parties with no anticipated future relationship, that is, parties that are not repeat players or do not belong to some close-knit trading community. There are two reasons. First, parties in a continuing relationship can more easily control each other because the expected future gains can serve as a hostage.[57] They are locked in a 'win-win' situation; thus each other's behavior is quite predictable, for the parties have little to gain (but potentially much to lose) from using dilatory tactics or adopting other forms of non-cooperation. They are anxious to maintain good relations and are therefore likely to be interested in reaching a quick and amicable settlement. Second, parties in a continuing relationship typically have good information about each other's past behavior, past problems, and past solutions. This knowledge may be usefully brought to bear to a new instance of conflict.

International arbitrators and lawyers I interviewed have confirmed the importance of the nature of a business relationship in determining how a dispute is likely to be resolved. Typically, parties in long-term relationships have a strong preference to settle disputes by ADR or ad hoc arbitration. This finding is also supported in several writings. Bertie Vigrass, former Registrar of the London Court of International Arbitration, summarizes the evidence as follows: "In the traditional fields of arbitration, such as maritime, construction, insurance, and commodity, it is usual for the majority of arbitrations to be "ad hoc" in nature. This is probably because there is an on-going relationship between parties, their legal representatives and arbitrators."[58] Four leading international arbitrators, Martin Hunter, Jan Paulsson, Nigel Rawding, and Alan Redfern, have similarly noted that "ADR provides an effective means of resolving disputes between parties who have an interest in maintaining an on-going business relationship. The parties approach the process in an spirit of negotiation and compromise, instead of adopting the adversarial positions associated with litigation."[59]

No long-term relationship, however, will last forever. Construction, licencing, distributorship, joint venture, and other long term contracts will

[57] On the role of hostages in economic exchange, see Williamson 1983; and Kronman 1985.
[58] Vigrass 1993, 469. See also Graving 1989, 368.
[59] Hunter, Paulsson, Rawding, and Redfern 1993, 73. See also Perlman and Nelson 1983, 232; Coe 1997, 44-49; Park forthcoming.

eventually expire, and relationships will come to an end. Logically, such changes will also affect the ways in which disputes that arise after a business relationship has ended will be resolved. James Myers, head of a major international construction group, describes the situation in the context of complex long-term construction contracts as follows:[60] At the onset, the contractor, the employer, and the engineer are all anxious to maintain a harmonious working relationship with each other. They realize that the ability of one party to perform over an extended period of time is based on the cooperation of the others. Disputes, when they arise, will be resolved swiftly, fairly, and in a friendly fashion. ADR and ad hoc arbitration are the preferred methods of dispute resolution in such settings. Parties may sometimes even refrain from presenting claims, lest the relationship be strained. Once the project is completed, however, the parties' attitudes are likely to change. A contractor who has no further business with the employer may now feel no compunction about demanding payment for additional costs accumulated during the course of the construction, and the employer will have no hesitation in dismissing such claims as baseless. Myers notes:

> "[P]roceedings which occur after the completion of an [international construction] contract...are resolved in a distinctly adversarial atmosphere in which large sums of money are sought, with little or no 'commercial downside' - meaning that the commercial relationship has normally expired and the parties have nothing to lose by refusing to accommodate each other for the sake of continuous harmonious commercial relations."[61]

It is apparent from this example that good will, the prerequisite for successful use of ADR or ad hoc arbitration, can no longer be taken for granted after a contractual relationship has ended. In such a situation, ADR and ad hoc arbitration are doomed to failure, but institutional arbitration is in its element. The following example, a typical institutional arbitration case, illustrates how procedural safeguards and monitoring provided by arbitral institutions help to overcome the difficulties posed by bad faith and adversarial tactics.[62]

In 1987, a large German company (the claimant) entered into an agreement with a firm in Colombia (the defendant), granting the firm the exclusive licence to manufacture and distribute certain pharmaceutical and biological products in Colombia for four years. In 1991 the company decided not to renew the licence agreement, and one year later, it initiated arbitration proceedings claiming that the defendant had breached certain of its surviving

[60] Myers 1991. See also Schwartz. 1995; Stipanowich 1996; and Vagts 1987.
[61] Myers 1991, 316.
[62] The example is based on a true ICC arbitration case; it captures many of the features typical of institutional arbitration. The names of the parties have been omitted.

obligations, such as reporting inventory and sales of the licenced products and refusing to pay substantial sums. The Colombian firm refused to respond to these claims.

In this case, the conflict erupts after one party decides to put an end to a business relationship. For the Colombian firm, the termination of the contract seems to have triggered a change in its view about the necessity of acting cooperatively. Defection from 'surviving obligations' may be seen as an attractive strategy because it brings immediate gains without imposing an obvious long-term cost. Such an uncooperative disposition typically also pervades the dispute resolution process in this type of cases. For example, the defendant could try to evade the contractual obligation to arbitrate the dispute, arguing that the matter falls under its national jurisdiction and can only be decided in a national court according to national law and procedural rules. This is precisely the strategy that the Colombian party took. It wanted the case to be tried in Colombian courts under Colombian law. If this fails, the defendant may seek to derail the arbitral proceedings by disagreeing on the choice of arbitrator(s), procedural rules, place and language of arbitration, and applicable law. It could also try to delay the proceedings by failing to appear on dates selected for hearings or by raising questions over procedural matters. If none of these dilatory tactics succeeds, the defendant still has the option of challenging the arbitral award before a national court, on the basis that the arbitral tribunal exceeded its jurisdiction, or that there was a substantial miscarriage of justice in the course of the proceedings. Finally, the party may choose simply not to honor the arbitral award.

Ad hoc arbitration demands little more than simple coordination on the arbitrators, procedural rules, applicable law, and place of arbitration. The institutional demands on cases like the German-Colombian one are much more complex. Extensive monitoring and strong institutional safeguards are necessary to deprive potential bad faith and other forms of 'defection' of their effects in such cases.

The ICA of the International Chamber of Commerce provides an example of an organization well equipped to handle such 'difficult' cases. Its rules and institutional apparatus effectively override obstacles that a non-cooperative disposition by one of the parties may pose. For instance, if one of the parties refuses to take part in the arbitral proceedings, the ICA is entitled to appoint the arbitrator(s) and constitute a tribunal. The notice and summons procedure is done by the ICC Secretariat and is supervised by the Court, assuring the

arbitrators that the defaulting party had notice of the arbitration.[63] If one party fails to sign the Terms of Reference, the ICA may approve them and the proceedings continue. After the Terms of Reference are approved, the opportunity for a party to engage in dilatory tactics by presenting additional claims and counterclaims is minimized because such claims can only be heard upon the agreement of all parties.[64]

The Court closely monitors the arbitral proceedings, ensuring that time limits and due process principles are respected.[65] It replaces arbitrators who do not fulfil their functions or are behind in their work. At the end of the process, it scrutinizes the award in relation to jurisdiction and applicable law. This monitoring and checking increases the quality of the arbitral award which, in turn, reduces the chance that the award will be challenged by the losing party in a national court. As noted by an experienced international arbitrator, "most final awards rendered under ICC auspices are carried out voluntarily by the parties, because [of their high] quality...[A] company that fails to carry out an [ICC award] is almost certain to lose subsequent[ly][66] and in addition runs the risk of jeopardizing its reputation in international circles."[67] Indeed, only about 6 percent of all ICC awards have been challenged by the losing party, and a minute 0.5 percent of awards rendered under the aegis of the ICC have been set aside by a national court.[68]

It is easy to see why ad hoc arbitration or ADR are ill-suited for situations represented by the German-Colombian case. If at any stage of the proceedings in ad hoc arbitration or ADR matters go unexpectedly awry and one of the parties starts acting in bad faith, there is no international supervisory institution to coerce compliance with procedural rules.[69] Furthermore, if the award

---

[63] Aksen 1991, 12.

[64] Ibid., 13.

[65] Due process principles include transparency of the arbitral process, the right of the parties to be called and heard , and equal treatment of the parties in the exchange of pleadings, in evidentiary matters, in resort to expertise proceedings, and in the holding of hearings.

[66] In other words, when the winning party applies to a national court for recognition and enforcement of the award.

[67] Aksen 1991, 22. See also David 1985, 45; and Hunter, Paulsson, Rawding, and Redfern 1993, 10.

[68] Craig, Park, and Paulsson 1990, 32-33; David 1985, 50.

[69] The type of problem that can arise in ad hoc arbitration is illustrated in a recent case (Intercarbon Bermuda v. Caltex Trading and Transport), in which one party refused to proceed with an arbitration pursuant to an arbitration clause that provided for no institution to set the arbitration in motion. The claimant was required to spend seven years in litigation before obtaining a federal court order compelling arbitration. Park 1995, 70. See also Coulson 1993; Aksen 1991, 8-9; Paulsson 1993, 438.

resulting from ad hoc arbitration is challenged in a national court, it will be considerably more difficult for the winning party to prove to the court that due process rules were respected and the tribunal was impartial and objective. Not surprisingly, national courts are much more comfortable confirming commercial awards that result from a monitored arbitration process than those produced by ad hoc proceedings.[70]

Uncertainty about the present 'state of the world'

Uncertainty about the present 'state of the world' is a variable that is useful in understanding the selection of different arbitration options. It refers to the extent to which actors involved in international exchange are knowledgeable about international commercial arbitration, and possess information about the legal environment (the laws and the integrity of local judges) in which arbitration takes place and about the conditions for enforceability of arbitral awards. Good information on legal environment and enforceability is a prerequisite of successful resolution of commercial disputes. The conjecture here is straightforward: *The greater the uncertainty about the present 'state of the world,' the greater the need for centralized information on international commercial arbitration and domestic arbitration laws and practices* (CENT|UNCERT(S)). Such information may be particularly important in cases involving traders with little experience in international exchange or traders from very different cultural and linguistic regions. Major arbitral institutions help to provide the necessary information and procedural guidelines to enable inexperienced parties to resolve their commercial disputes in an efficient and timely fashion.

'Legal environment' encompasses domestic legislation on arbitration and court interpretations of it. The law of the place of arbitration is of great importance because it may determine questions of the capacity of the parties to agree to arbitration, the validity of the arbitration agreement, the 'arbitrability' of the subject-matter of the dispute and the recognition and enforcement of arbitral awards. Thus, parties seeking to maximize procedural certainty may benefit from relying on centralized information on domestic arbitration laws and practices; such information will help them choose an arbitral situs where annulment of awards is not likely to be facilitated by a bribe to a local judge, where the range of non-arbitral legal questions is narrow and well-defined, where the integrity of the arbitration process is ensured and any judicial meddling with an arbitrator's substantive decision is minimized, and where arbitration decisions are enforceable - if necessary, through execution against

[70] David 1985, 11.

the assets of the losing party by proceedings in national courts of any state in which these assets are located.

Some countries have clear arbitration legislation but their courts may misapply the law, for example, by adopting over-elastic interpretations of 'violations of public policy' as grounds for setting aside awards. Other countries may have national laws containing mandatory provisions that override explicit contractual stipulations. Two examples serve to illustrate how arbitrary and fickle domestic legal decisions regarding international arbitration may be, thus underlining the importance of centralized information on developments in national arbitration laws and practices:[71]

The Indian Supreme Court held in May 1992 that if Indian law applied to an arbitration clause an application to set aside an award could be heard in India, even if the place of arbitration was outside India, and the Indian courts could enjoin the enforcement of the award anywhere. In other words, an acceptance of Indian law in a contract with an Indian party would ultimately lead to the Indian courts irrespective of the choice of a neutral venue.

The second example comes from Singapore. In a 1988 decision, the High Court affirmed restrictions on foreign arbitration parties imposed by local practice rules. This was followed by a new Singapore Legal Profession Act which stipulates that foreign lawyers can only appear in arbitration proceedings when the law applicable to a dispute is not Singaporean law. When Singaporean law does apply, foreign lawyers may only appear jointly with lawyers who are nationals from Singapore.

The second issue of central importance is the enforceability of arbitral awards. An award rendered in a given country may not automatically be enforceable in other countries where the losing party's assets may lie. Thus, a key function of major arbitral institutions is to collect and continuously update information on the conditions of enforceablility of awards in various parts of the world. For example, by 1997, over one hundred states had acceded to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards.[72] The majority of these states adopted the so-called reciprocity

[71] The examples are drawn from Hunter, Paulsson, Rawding, and Redfern 1993.

[72] See U.N. Doc E/Conf. 26/SR., 1-25. The standard work on the treaty is Berg 1981. Besides the New York Convention, there are at least two other international enforcement conventions, the 1975 Inter-American Arbitration Convention (also called the Panama Convention) and the 1961 European Convention on International Commercial Arbitration. In addition to these conventions, many bilateral commercial and investment treaties contain enforcement

reservation. That means that their courts will enforce an award under the New York Convention only if the award has been rendered within the territory of another state which has also adhered to the New York Convention.[73] A court in a signatory country may refuse recognition and enforcement of awards only on procedural grounds, including invalidity of the arbitral agreement, denial of an opportunity to be heard, arbitrator excess of jurisdiction, arbitral procedure contrary to the parties' agreement, and annulment of the award in the country where rendered.[74] However, the interpretation by national courts of these grounds for denying enforcement of arbitral awards may vary from country to country. Therefore, major arbitral institutions also keep information on the various national interpretations.

In sum, private firms and their lawyers often may not have sufficient information about present 'state of the world' to avoid expensive delays and other negative surprises. This is particularly true if the parties are inexperienced in international trade and investment or if they deal with firms from different and distant regions.[75] Uncertainty about legal environment and enforceability can be reduced, at least in part, by relying on information provided by major arbitral institutions, such as the International Court of Arbitration of the ICC or the London Court of International Arbitration. Such fora have the institutional capacity to monitor and record changes in domestic arbitration laws and practices around the world, especially if their membership has a broad geographic base.

Uncertainty about the future 'state of the world'

Uncertainty about the future 'state of the world' refers to the susceptibility of an issue-area to new developments or unanticipated shocks that may leave parties in unchartered legal territory. The conjecture is as follows: *The more uncertain the future 'state of the world,' the greater the desirability of a flexible dispute resolution method* (FLEX|UNCERT(S)), thus establishing a preference of arbitration and ADR over litigation in public courts.

---

provisions. For a brief historical account of the development of the various enforcement conventions, see Redfern and Hunter 1991, 60-64.

[73] Hunter, Paulsson, Rawding, and Redfern 1993, 19. Article III of the New York Convention provides that Convention states shall recognize foreign awards as "binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon," subject to no conditions more onerous than those imposed on domestic awards.

[74] Park 1995, 55-56.

[75] Aksen 1991, 14.

The flexibility offered in arbitration and ADR may be valued, for example, because it gives firms operating at the forefront of new production and exchange methods the possibility of appointing experts who have the necessary technical knowledge to evaluate complex new situations; an ordinary judge cannot be expected to have this specialized knowledge. Complex technical issues may arise in cases dealing with transfer of technology, industrial property, trademarks, technical know-how, and financial products. Brian Neill, Justice of the Court of Appeal of England and Wales, observes: "[C]ases arise from time to time which involve questions which lie at or near the frontiers of current scientific knowledge. Can they be tried satisfactorily in the ordinary courts? There must be doubt."[76]

Flexibility also permits the expert to disregard, to some extent, the technicalities of the law in favor of a solution which accords with new business practices. An arbitral tribunal, for example, may be given powers of so-called 'amiable composition' or, as it is sometimes put, the right to decide *ex aequo et bono* (meaning in equity and good conscience); that is, the tribunal may reach a decision without applying strict legal principles, provided the decision is fair. More generally, flexibility allows the parties to tailor the rules - regarding procedure, evidence, or even the substance of the case - to their specific needs. Thus parties can, for example, limit the extent of disclosure of documents, submit evidence in writing, or impose time limits on the length of speeches.[77]

When uncertainty about the future 'state of the world' is high, an agreement to submit a dispute to a public court may be risky for another and more specific reason. The typical jurisdiction clause in an international contract provides for the exclusive jurisdiction of a court in a country other than the residence of either party. This poses a potential problem, however, in that a neutral third-country court may have no nexus to the parties or the dispute and may therefore refuse to hear the case.[78] The reason for such refusal need not be only legalistic-technical; it can be quite practical: Judges are not compensated according to the number of cases decided and may thus find little incentive to

[76] Neill 1988, 235. For confirming evidence of the importance of this point, see recent survey results in Bühring-Uhle 1996, 136-137.

[77] Redfern and Hunter 1991, 24.

[78] Park 1995, 14. In the legal literature, this is referred to as the doctrine of *forum non conveniens*. The doctrine permits a court to dismiss an action, even if the court clearly has jurisdictional power to hear the case, when the relationship between the forum and the dispute is insufficient compared to another more convenient relationship. See Lowenfeld 1993, 263-80; Litman 1986; Steward 1986; and Silberman 1993.

take on foreign cases as directed by jurisdiction clauses, particularly if the docket is already congested with cases.[79]

The consequence of a failed jurisdiction clause in an international contract can be disastrous. Park explains: "In a domestic context, the failure to get into a court in Massachusetts usually implicates no more dramatic an alternative than a court in New York or Miami, rather than Boston. Variations in language, constitutional safeguards and basic notions of civil procedure will be slight. On the other hand, a failed jurisdiction clause in an international contract may mean xenophobic judges, a foreign tongue and markedly unfamiliar court procedures."[80] The reason is that if a court in a neutral third-country refuses to hear a case the parties may seek to rush the case to their national courts where graft and political influence may compromise procedural fairness.

A jurisdiction clause may be rendered ineffective not only by refusal but also by the absence of a multilateral convention to enforce court decisions. A court in one country may be willing to enforce foreign judicial decisions on the basis of discretion, courtesy, or reciprocity; but in the absence of an international treaty on enforcement of judicial decisions, a court is free to refuse such enforcement.[81]

Arbitration escapes many of these potential problems. The reasons are apparent: First, arbitrators are unlikely to decline to hear a case if the parties can provide the required deposit to cover costs. However, should an arbitrator decline an offer to decide a case, the parties could simply choose another name from the many lists of international arbitrators provided by arbitration centers. Second, as already mentioned, international treaties bind over one hundred countries to enforce foreign arbitral awards.

Number and asymmetry of actors

There are at least two reasons why an international commercial dispute may be litigated rather than arbitrated. The determining factors are number of parties and power asymmetry.

Numbers: The number of parties in an international commercial conflict can be two or more. For example, a complex international industrial operation may give rise to multiple contracts involving many parties. A main employer

[79] Ibid., 40-41.
[80] Ibid., 15.
[81] For an example, see Paulsson 1993, 441-442. See also Lowenfeld 1993, 368-456.

may have entered into a contract with a main contractor, who in turn contracts with various sub-contractors and suppliers. If, for example, the employer has complaints regarding the work done, he must arbitrate against the main contractor, who must then separately seek to recover from the subcontractor or supplier responsible for defective work by way of separate arbitration.[82] Such proceedings can be excruciatingly slow and forbiddingly expensive.[83] National courts have the advantage of being able to order parties to be joined in court proceedings when it is thought to be necessary or convenient. In court proceedings, complaints may be passed down the chain of contracts and subcontracts to the party or parties ultimately responsible. Arbitration tribunals do not have the same coercion power, because arbitration depends on consent.[84] Parties may overcome this weakness if they consent in advance to be joined in arbitral proceedings to a clearly defined series of related contracts. To the extent that multiparty arbitration takes place, it is mostly organized with the help of major arbitral institutions. This is not surprising, considering the considerable administrative support required to manage such cases. Nevertheless, a host of practical and legal difficulties render multiparty arbitration in many instances less appealing than public court proceedings.[85]

Asymmetry: As discussed above, in most international transactions, it is unlikely that a national court located in the country of either party will be acceptable to both sides. This is because most parties are instinctively unwilling to permit disputes to be determined in the other side's 'home' territory. Arbitration thus appears as a perfect compromise. Each party chooses an arbitrator who is familiar with the party's language, business practices, legal culture, and so on. This contributes to a feeling of confidence in the arbitral tribunal. However, a firm with substantial economic leverage may see no need to compromise. Park notes: "Multinationals with superior bargaining power might...be able to impose a jurisdiction clause that designates their home courts."[86] Such jurisdiction clauses typically operate in tandem with a choice-of-law clause providing that the contract will be interpreted according to the substantive rules of the dominant party's legal system.[87]

---

[82] Redfern and Hunter 1991, 24.

[83] For a striking example, see Kerr 1987.

[84] Hunter, Paulsson, Rawding, and Redfern 1993, 41-42.

[85] Coe 1997, 66-68; Park 95, 100-101; and Hunter, Paulsson, Rawding, and Redfern 1993, 43.

[86] Park forthcoming, 76.

[87] Park 1995, 14. Hunter, Paulsson, Rawding, and Redfern make a related argument with regard to ADR. They note: "ADR is unlikely to be effective if...there is a large discrepancy in the parties' wealth and resources and, consequently, their bargaining power." Hunter, Paulsson, Rawding, and Redfern 1993, 74.

5. CONCLUSION

This study has sought to explain the striking differences in the design of various institutional methods of international commercial dispute resolution for private parties within a self-consciously rationalist framework. It has identified a few key factors that account for the wide range of international dispute resolution methods, such as litigation in public courts, institutional arbitration, ad hoc arbitration, and ADR.

This study has only scratched the surface of a complex but exciting area of research for scholars of international relations and other social scientists. Several issues evoked in passing merit fuller analysis, notably the role that differences in bargaining power play in determining the method of dispute resolution. Other interesting questions that remain to be considered are: Why is the institutional form of arbitration popular with firms but relatively rare among states? How do commercial disputes typically get resolved in cases where one of the parties is a state agency?

An area of particular interest for the purpose of extending this study is specialized arbitration, for example, as conducted in maritime affairs or as offered by various stock and commodity exchanges. Such arbitration is typically conducted within commercial groups with strong national roots. For example, the British Coffee Trade Federation numbers over one hundred firms as members, including the leading roasters, merchants, brokers, and wharfingers in the UK. Notwithstanding its national base, the Federation is linked to a wide network of transnational commodity organizations such as the Committee of European Coffee Associations, the European Federation of Coffee Roasters Associations, and the Federation of Commodity Associations. This then raises yet another question for further research: How does this 'institutional embeddedness' shape the arbitral institutions and practices of national federations?

Walter Mattli
Columbia University
(wm62@columbia.edu)

REFERENCES

Arkin, Harry (1987) "International Ad Hoc Arbitration", *International Business Lawyer,* 15, 5-9.

Aksen, Gerald (1991) "Ad Hoc Versus Institutional Arbitration", *ICC International Court of Arbitration Bulletin,* 2, 12.

Auerbach, Jerold (1983) *Justice Without Law?,* New York, Oxford University Press.

Benson, Bruce (1989) "The Spontaneous Evolution of Commercial Law", *Southern Economic Journal,* 55, 644-61.

Berg, A. Van Den (1981) *The New York Convention of 1958,* Deventer, Kluwer Law and Taxation.

Bernstein, Lisa (1992) "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry", *Journal of Legal Studies,* 21, 138-43.

Brown, Laura Ferris (1993) "Arbitration Institutions in International Commercial Arbitration" in Laura Ferris Brown (ed.) *The International Arbitration Kit: A Compilation of Basic and Frequently Requested Documents* New York, The American Arbitration Association, 387-95.

Burley, Anne-Marie and Walter Mattli (1993) "Europe Before the Court: A Political Theory of Legal Integration", *International Organization,* 47, 41-76.

Casella, Alessandra (1996) "On Market Integration and the Development of Institutions: the case of International Commerical Arbitration", *European Economic Review,* 40, 155-86.

Coe, Jack (1997) *International Commercial Arbitration: American Principles and Practice in a Global Context,* Irvington-on-Hudson, New York: Transnational Publishers.

Cooper, Robert, and Janet Landa (1984) "Personal versus Impersonal Trade", *International Review of Law and Economics,* 4, 15-22.

Coulson, Robert (1993) "The Practical Advantages of Administered Arbitration", *National Institute for Dispute Resolution (NIDR) Forum,* Winter, 41-3.

Covo, Jacques (1993) "Commodities, Arbitrations and Equitable Consideration", *Arbitration International,* 9, 57-66.

Craig, Laurance, William Park, and Jan Paulsson (1990) *International Chamber of Commerce Arbitration,* New York, Oceana Publications.

Curtin, Philip (1984) *Cross-Cultural Trade in World History,* Cambridge, Cambridge University Press.

Cutler, Claire (1995) "Global Capitalism and Liberal Myths: Dispute Settlement in Private International Trade Relations", *Millenium,* 24, 377-97.

David, René (1985) *Arbitration in International Trade,* Boston, Kluwer Law and Taxation Publishers.

Demsetz, Harold (1969) "Information and Efficiency: Another Viewpoint", *Journal of Law and Economics,* 12, 1-22.

Dezalay, Yves, and Bryant Garth (1996) *Dealing in Virtue,* Chicago, University of Chicago Press, 47-8.

Doo, Leigh-Wai (1973) "Dispute Settlement in Chinese-American Communities", *American Journal of Comparative Law,* 21, 627-63.

Ellickson, Robert (1991) *Order Without Law,* Cambridge: Harvard University Press.

Galanter, Marc (1981) "Justice in Many Rooms", *Journal of Legal Pluralism and Unofficial Law,* 1, 6-17.

Gentinetta, Jörg (1973) *Die Lex Fori Internationaler Handesschiedsgerichte,* Bern, Verlag Stämpfli.

Graving, Richard (1989) "The International Commercial Arbitration Institutions: How Good a Job Are They Doing?", *The American University Journal of International Law and Policy,* 4, 319-72.

Greif, Avner, Paul Milgrom, and Barry Weingast (1994) "Coordination, Commitment, and Enforcement: The Case of the Merchant Guild", *Journal of Political Economy,* 102, 745-76.

Greif, Avner (1992) "Insitutions and International Trade", *American Economic Review,* 82, 128-33.

Harris, Bruce, Michael Summerskill, and Sara Cockerill (1993) "London Maritime Arbitration", *Arbitration International,* 9, 276-88.

Hoellering, Michael (1993-94) "The Institution's Role in Managing the Arbitration Process" *Arbitration and the Law* (Irvington-on-Hudson, New York: Transnational Juris Publications),151-61.

Hunter, Martin, Jan Paulsson, Nigel Rawding, and Alan Redfern (1993) *The Freshfields Guide to Arbitration and ADR.*, Boston, Kluwer Law and Taxation Publishers.

Jackson, Joseph (1991) "The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems", *Journal of International Arbitration,* 8, 31-99.

Johnson, Derek Kirby (1991) *Institutional Commodity Arbitration,* London, Lloyd's of London Press.

---------- (1993) "Commodity Trade Arbitration" in *Handbook of Arbitration Practice*, edited by Ronald Bernstein and Derek Wood, 257-285. London, Sweet&Maxwell.

Landa, Janet (1981) "A Theory of the Ethnically Homogeneous Middleman Group", *Journal of Legal Studies,* 10, 349-62.

Lipson, Charles (1985) *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries,* Berkeley, University of California Press.

Litman, Harry (1986) "Considerations of Choice of Law in the Doctrine of Forum Non Conveniens", *California Law Review,* 74, 565-601.

Lowenfeld, Andreas (1993) *International Litigation and Arbitration,* St. Paul, Minn., West Publishing.

Keohane, Robert (1984) *After Hegemony,* Princeton, Princeton University Press.

Kerr, Lord Justice (1987) Arbitration vs Litigation: The Macao Sardine Case. *Arbitration International* 3: 79-87.

Koremenos, Barbara and Charles Lipson, and Duncan Snidal (Forthcoming) *Rational International Institutions.*

Krasner, Stephen (1983) "Structural Causes and Regime Consequences: Regimes as Intervening Variables" in Stephen Krasner (ed.) *International Regimes*, Ithaca, Cornell University Press, 1-21.

Kronman, Anthony (1985) "Contract Law and the State of Nature", *Journal of Law, Economics, and Organization,* 1, 5-32.

Macaulay, Steward (1963) "Non-Contractual Relations in Business: A Preliminary Study", *American Sociological Review,* 28, 55-67.

Maitland, Frederic William (1936) "Trust and Corporation" in H.D. Hazelstine, G. Lapsley, P.H. Winfield (eds) *Selected Essays,* Cambridge, Cambridge University Press, 141-222.

Mentschikoff, Soia (1961) "Commercial Arbitration", *Columbia Law Review,* 61, 846-69.

Milgrom, Paul, Douglass North, and Barry Weingast (1990) "The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs", *Economics and Politics,* 2, 1-23.

Mitchell, W. (1904) *An Essay on the Early History of the Law Merchant,* Cambridge, Cambridge University Press.

Mustill, Michael and Stewart Boyd (1989) *Commercial Arbitration,* London, Butterworths.

Myers, James (1991) "Could Arbitration Be Made a More Effective Method of Resolution of Construction Disputes?", *International Business Lawyer,* 19, 313-19.

Neill, Brian (1988) "High Tech and Dispute Resolution I: The Challenge of Presenting Technical Evidence", *International Business Lawyer,* 16, 233-6.
Note (1970) "Rabbinical Courts: Modern Day Solomons", *Columbia Journal of Law and Social Problems,* 6, 49-75.

Park, William (1995) *International Forum Selection,* Boston, Kluwer Law International.

---------- (1997) "The Relative Reliability of Arbitration Agreements and Court Selection Clauses" in Jack Goldsmith (ed.) *International Dispute Resolution: The Regulation of Forum Selection*, Irvington-on-Hudson, New York: Transnational Publishers, 3-35.

---------- (forthcoming) "When and Why Arbitration Matters" in G.M. Beresford Hartwell (ed.) *The Commercial Way of Justice*.

Paulsson, Jan (1993) "The Role of Institutions in Arbitration" in Ronald Bernstein and Derek Wood (eds) *Handbook of Arbitration Practice*, London, Sweet&Maxwell, 427-57.

Perlman, Laurence and Steven Nelson (1983) "New Approaches to the Resolution of International Commercial Disputes", *The International Laywer*, 17, 215-55.

Redfern, Alan, and Martin Hunter (1991) *Law and Practice of International Commercial Arbitration*, London, Sweet and Maxwell.

Samuel, Adam (1991) "Arbitration in Western Europe - A Generation of Reform", *Arbitration International*, 7, 319-64.

Schwartz, Eric (1995) "Resolution of International Construction Disputes", *International Business Lawyer*, 23, 149-58.

Silberman, Linda (1993) "Developments in Jurisdiction and Forum Non Conveniens in International Litigation", *Texas International Law Journal* 28, 501-30.

Slate, William (1996) "International Arbitration: Do Institutions Make a Difference?", *Wake Forest Law Review*, 31, 41-64.

Smit, Robert (1994) "An Inside View of the ICC Court", *Arbitration International*, 10, 53-76.
Stipanowich, Thomas (1996) "Beyond Arbitration: Innovation and Evolution in the United States Contruction Industry", *Wake Forest Law Review*, 31, 65-182.

Steward, Margaret (1986) "Forum Non Conveniens: A Doctrine in Search of a Role", *California Law Review*, 74, 1257-324.

Stockholm Chamber of Commerce (1988) *Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.*

Summerskill, Michael (1993) "Maritime Arbitration" in Ronald Bernstein and Derek Wood (eds) *Handbook of Arbitration Practice*, London, Sweet&Maxwell, 347-96.

Vagts, Detlev (1987) "Dispute-Resolution Mechanisms in International Business" in *Academie de Droit International. Recueil Des Cours,* 207, 17-93.

Vigrass, B.W. (1993) "The Role of Institutions in Arbitration", in Ronald Bernstein and Derek Wood (eds) *Handbook of Arbitration Practice*, London, Sweet&Maxwell, 461-76.

Wetter, J. Gillis (1995) "The Internationalization of International Arbitration: Looking Ahead to the Next Ten Years", *Arbitration International,* 11, 117-35.

Williamson, Oliver (1975) *Markets and Hierarchies: Analysis and Antitrust Implications,* New York, Free Press.

---------- (1983) "Credible Commitments: Using Hostages to Support Exchange", *American Economic Review,* 73, 519-40.

---------- (1985) *The Economic Institutions of Capitalism,* New York, Free Press.

Yarbrough, Beth and Robert Yarbrough (1992) *Cooperation and Governance in International Trade,* Princeton, Princeton University Press.

EUI WORKING PAPERS

EUI Working Papers are published and distributed by the
European University Institute, Florence

Copies can be obtained free of charge
– depending on the availability of stocks – from:

The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

Please use order form overleaf

Publications of the European University Institute

To

The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI) – Italy
Telefax No: +39/55/4685 636
e-mail: publish@datacomm.iue.it
http://www.iue.it

From

Name .....
Address.....
.....
.....
.....
.....

❑ Please send me a complete list of EUI Working Papers
❑ Please send me a complete list of EUI book publications
❑ Please send me the EUI brochure Academic Year 1999/2000

Please send me the following EUI Working Paper(s):

No, Author .....
Title: .....
No, Author .....
Title: .....
No, Author .....
Title: .....
No, Author .....
Title: .....

Date .....

Signature .....

Working Papers of the Robert Schuman Centre

Published since 1998

RSC No. 98/1
Jonathan GOLUB
Global Competition and EU Environmental Policy. *Global Competition and EU Environmental Policy: An Overview*

RSC No. 98/2
Ian H. ROWLANDS
Global Competition and EU Environmental Policy. *EU Policy for Ozone Layer Protection*

RSC No. 98/3
Marc PALLEMAERTS
Global Competition and EU Environmental Policy. *Regulating Exports of Hazardous Chemicals: The EU's External Chemical Safety Policy*

RSC No. 98/4
André NOLLKAEMPER
Global Competition and EU Environmental Policy. *Improving Compliance with the International Law of Marine Environmental Protection: The Role of the European Union*

RSC No. 98/5
Thomas HELLER
Global Competition and EU Environmental Policy. *The Path to EU Climate Change Policy* *

RSC No. 98/6
David VOGEL
Global Competition and EU Environmental Policy. *EU Environmental Policy and the GATT/WTO* *

RSC No. 98/7
Andrea LENSCHOW
Global Competition and EU Environmental Policy. *The World Trade Dimension of "Greening" the EC's Common Agricultural Policy* *

RSC No. 98/8
Nick ROBINS
Global Competition and EU Environmental Policy. *Competitiveness, Environmental Sustainability and the Future of European Community Development Cooperation* *

RSC No. 98/9
Thomas RISSE (with Daniela ENGELMANN-MARTIN/Hans-Joachim KNOPF/Klaus ROSCHER)
To Euro or Not to Euro? The EMU and Identity Politics in the European Union

RSC No. 98/10
Véronique PUJAS/Martin RHODES
Party Finance and Political Scandal in Latin Europe

RSC No. 98/11
Renaud DEHOUSSE
European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?

RSC No. 98/12
Jonathan GOLUB
New Instruments for Environmental Policy in the EU. *New Instruments for Environmental Policy in the EU:An Overview* *

RSC No. 98/13
Stephen TINDALE/Chris HEWETT
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in the UK* *

RSC No. 98/14
Wolfram CREMER/Andreas FISAHN
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in Germany* *

RSC No. 98/15
Duncan LIEFFERINK
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in the Netherlands* *

RSC No. 98/16
Kurt DEKETELAERE
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in Belgium* *

*out of print

RSC No. 98/17
Susana AGULAR FERNÁNDEZ
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in Spain*

RSC No. 98/18
Alberto MAJOCCHI
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in Italy* *

RSC No. 98/19
Jan Willem BIEKART
New Instruments for Environmental Policy in the EU. *Negotiated Agreements in EU Environmental Policy* *

RSC No. 98/20
Eva EIDERSTRÖM
New Instruments for Environmental Policy in the EU. *Ecolabels in EU Environmental Policy* *

RSC No. 98/21
Karola TASCHNER
New Instruments for Environmental Policy in the EU. *Environmental Management Systems: The European Regulation* *

RSC No. 98/22
Jos DELBEKE/Hans BERGMAN
New Instruments for Environmental Policy in the EU. *Environmental Taxes and Charges in the EU* *

RSC No. 98/23
Carol HARLOW
European Administrative Law and the Global Challenge

RSC No. 98/24
Jørgen ELMESKOV
The Unemployment Problem in Europe: Lessons from Implementing the OECD Jobs Strategy *

RSC No. 98/25
Paul ORMEROD
A Business Cycle Model with Keynesian Micro-Foundations: The Policy Implications for Unemployment *

RSC No. 98/26
Richard CLAYTON/Jonas PONTUSSON
The New Politics of the Welfare State Revisited: Welfare Reforms, Public-Sector Restructuring and Inegalitarian Trends in Advanced Capitalist Societies *

RSC No. 98/27
Paul JOHNSON
The Measurement of Social Security Convergence: The Case of European Public Pension Systems since 1950 *

RSC No. 98/28
Claudio M. RADAELLI
Creating the International Tax Order: Transfer Pricing and the Search for Coordination in International Tax Policy

RSC No. 98/29
Wisla SURAZSKA
On Local Origins of Civil Society in Post-Communist Transition

RSC No. 98/30
Louis CHARPENTIER
The European Court of Justice and the Rhetoric of Affirmative Action

RSC No. 98/31
Arthur BENZ/Burkard EBERLEIN
Regions in European Governance: The Logic of Multi-Level Interaction

RSC No. 98/32
Ewa MORAWSKA
International Migration and Consolidation of Democracy in East Central Europe: A Problematic Relationship in a Historical Perspective

RSC No. 98/33
Martin MARCUSSEN
Central Bankers, the Ideational Life-Cycle and the Social Construction of EMU

RSC No. 98/34
Claudio M. RADAELLI
Policy Narratives in the European Union: The Case of Harmful Tax Competition

RSC No. 98/35
Antje WIENER
The Embedded *Acquis Communautaire* Transmission Belt and Prism of New Governance

RSC No. 98/36
Liesbet HOOGHE
Supranational Activists or Intergovernmental Agents? Explaining the Orientations of Senior Commission Officials Towards European Integration

RSC No. 98/37
Michael J. ARTIS/Wenda ZHANG
Core and Periphery in EMU: A Cluster Analysis

RSC No. 98/38
Beate KOHLER-KOCH
Territorial Politics in Europe -
A Zero-Sum Game?
La renaissance de la dimension territoriale en Europe : entre illusion et réalité

RSC No. 98/39
Michael KEATING
Territorial Politics in Europe -
A Zero-Sum Game?
The New Regionalism. Territorial Competition and Political Restructuring in Western Europe

RSC No. 98/40
Patrick LE GALÈS
Territorial Politics in Europe -
A Zero-Sum Game?
Urban Governance in Europe: How Does Globalisation Matter?

RSC No. 98/41
Liesbet HOOGHE
Territorial Politics in Europe -
A Zero-Sum Game?
EU Cohesion Policy and Competing Models of European Capitalism

RSC No. 98/42
Burkard EBERLEIN
Regulating Public Utilities in Europe: Mapping the Problem

RSC No. 98/43
Daniel VERDIER
Domestic Responses to Free Trade and Free Finance in OECD Countries

RSC No. 98/44
Amy VERDUN
The Role of the Delors Committee in the Creation of EMU:
An Epistemic Community?

RSC No. 98/45
Yves SUREL
The Role of Cognitive and Normative Frames in Policy-Making

RSC No. 98/46
Douglas WEBBER
The Hard Core: The Franco-German Relationship and Agricultural Crisis Politics in the European Union

RSC No. 98/47
Henri SNEESSENS/Raquel FONSECA/B. MAILLARD
Structural Adjustment and Unemployment Persistence (With an Application to France and Spain)

RSC No. 98/48
Liesbet HOOGHE
Images of Europe. Orientations to European Integration among Senior Commission Officials

RSC No. 98/49
Andre LIEBICH
Ethnic Minorities and Long-Term Implications of EU Enlargement

RSC No. 98/50
Emil J. KIRCHNER
Transnational Border Cooperation Between Germany and the Czech Republic: Implications for Decentralization and European Integration

RSC No. 98/51
Susan SENIOR NELLO
The Economic Accession Criteria for EU Enlargement: Lessons from the Czech Experience

RSC No. 98/52
Michael J. ARTIS/Wenda ZHANG
Membership of EMU: A Fuzzy Clustering Analysis of Alternative Criteria

RSC No. 98/53
Ewa MORAWSKA
The Malleable *Homo Sovieticus*: Transnational Entrepreneurs in Post-Communist East Europe

* * *

*out of print

RSC No. 99/1
Giorgia GIOVANNETTI
EMU and the Mediterranean Area

RSC No. 99/2
Carol HARLOW
Citizen Access to Political Power in the European Union

RSC No. 99/3
Francesca BIGNAMI
Accountability and Interest Group Participation in Comitology

RSC No. 99/4
Mette ZØLNER
Re-Imagining the Nation

RSC No. 99/5
Walter MATTLI
Fora of International Commercial Dispute Resolution for Private Parties