

THE THREE AGES OF INTERNATIONAL COMMERCIAL ARBITRATION

*Reviewed by Joshua Karton**

As Mikaël Schinazi points out on the very first page of his ambitious new book, it is remarkable—given the contemporary importance of international commercial arbitration—how little attention has been paid to its modern history. Several treatments of the medieval *lex mercatoria* exist (albeit of dubious historical accuracy), several more of arbitration in antiquity, and a good handful of the historical development investor-state dispute settlement. However, almost no history has been written to explain how international commercial arbitration came to be practiced as it is today.

The Three Ages of International Commercial Arbitration seeks to fill that gap, and largely succeeds. It admirably combines intensely intellectual flights of fancy with shoe-leather archival research that must have been painstaking to conduct. (Schinazi received unprecedented access to the archives of the International Chamber of Commerce, and took full advantage of that opportunity.) The result is an evocatively written, deeply researched, and richly argued treat for the thoughtful arbitration lawyer. Anyone who is interested in international arbitration scholarship for reasons beyond winning their next case should read this book.

Schinazi is primarily a practitioner; this book was developed from his doctoral thesis, which I believe to be the last thesis supervised to completion by Emmanuel Gaillard (to whom it is

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dedicated).¹ It is very much in the tradition of Gaillard's characteristic combination of grand theory *à la française* with granular understanding of the rules and practicalities of arbitration work. *The Three Ages of International Commercial Arbitration* is academic history, but it is history written by a lawyer and for lawyers.

Schinazi divides the history of international commercial arbitration into three eras, or ages. As its title suggests, this division is the central conceit and organizing principle of the book. It positions itself within the historicizing tradition that gave us such labels as “the Age of Enlightenment” and “The Long Nineteenth Century”.² Like the scholars who developed those concepts, *The Three Ages of International Commercial Arbitration* focuses on intellectual traditions over social currents, and cultural trends over economic ones. It is more a history of the arbitration community than a history of arbitration itself.

The heuristic tying the book together is the notion of oscillation between “renewal” and “anxiety”. Schinazi does not argue for a Hegelian dialectic, in which anxiety and renewal succeed each other, leading to a new synthesis. Instead, he posits that anxiety and renewal represent poles of an inherent and likely unresolvable tension in the field. Tellingly, he associates renewal with the “mercatoocracy”—the cosmopolitan global community of businesspeople and the lawyers who work with them—and anxiety with national courts and especially legislatures.

¹ Disclosure: Schinazi consulted me for methodological advice while he was a PhD student, and I served as an external examiner of his thesis. The published book differs in many respects from the thesis version of Schinazi's research, differences that are at least in some small part attributable to my comments on the thesis.

² The latter of which Schinazi specifically cites as an inspiration for his approach. Mikaël Schinazi, *The Three Ages of International Commercial Arbitration* (Cambridge: Cambridge UP, 2022) at 13.

In Schinazi's account, renewal or anxiety alternately predominate, as legislatures, courts, and practitioners react to perceived excesses of the previous era. Periods of renewal include the years when the ICC was established and the heady days leading up to the entry into force of the New York Convention, while periods of anxiety are associated with judicial restrictions on arbitral jurisdiction and party autonomy. Schinazi thus firmly seats himself within the camp of his mentor, Gaillard, in associating internationalism and arbitral autonomy with progress and national courts and laws with reaction.

The first era Schinazi describes is the "Age of Aspirations", which he dates from the 1780s to 1920s. Many would consider an account of this period to be a "pre-history" of international arbitration, but Schinazi shows convincingly how many of the core features of modern international commercial arbitration date from this era, such as the binding character of awards, decision according to legal rules, and a requirement for arbitrators to give sufficient reasons. It was characterized by two disparate communities that came together only in the next age: merchants in trade associations and diplomats and statesmen seeking to settle political disputes through non-violent means. What made it an age of *aspirations* was, in effect, a lack of a coherent community and the institutions such a community develops. The two separate threads of commodity trade arbitrations and state-to-state diplomatic dispute resolution did not find their way to each other until after World War I. Moreover, the ambivalence of courts in various jurisdictions to enforcing arbitration agreements hindered arbitration's development as an effective dispute resolution method. Schinazi devotes a chapter to the frequent shifts in attitudes toward arbitration in France from the French Revolution to the early 20th century, which sets up his theme of "renewal vs anxiety" and also foreshadows the modern debates on what it means for a jurisdiction to be "pro-arbitration".

In Schinazi's second age, the Age of Institutionalization, the aspirations of the previous era were achieved. Interestingly, the dreams of the age of aspiration were realized only through a decidedly un-romantic development, what Schinazi calls the "technocratisation of the economy".³ If there is a victory, it belongs to the technical experts, to the bureaucrats of the arbitration world. Nevertheless, Schinazi tries his hardest to inject some romance into his comprehensive exposition of the mercantile conferences and directors' meetings that led to the establishment and flowering of the great arbitral institutions, especially the International Chamber of Commerce and its Court of International Arbitration.

The chapters dealing with the Age of Institutionalization will be of the greatest interest to the most readers, since they build on extensive research in the archives of the ICC, and present substantial historical data never previously published. There is a great deal of detail, not all of it scintillating, but Schinazi nevertheless picks out the thread of a compelling narrative of institution-building, of regularization, and consequently of the flourishing of international arbitration. One can imagine Schinazi sitting at his desk, torn between displaying the fruits of his meticulous research and telling a pleasurable story; in the end he was able to do both.

This part of the book is stuffed with fascinating and often amusing anecdotes. For example, the ICC Court of Arbitration was considering the fees claimed by an American arbitrator, which were alleged to be disproportionately high. In a 1929 letter to the Executive Committee of the ICC Court of Arbitration, the secretary of the Manchester Chamber of Commerce (which had administered the arbitration) argued that the case should not be taken as exemplary of the kinds of fees charged by UK arbitrators: "This particular case ... is really not a fair example. [The arbitrator] was an American professional man, and everybody knows that they have ideas about fees which are the

³ Schinazi, *supra* note 2 at 89.

envy of European professional men, and the despair of European business men who are obliged to employ them.”⁴ *Plus ça change....*

The third age Schinazi identifies, the Age of Autonomy, dates from the late 1950s, and was sparked by the promulgation of the *New York Convention*. By “autonomy”, Schinazi means three separate but related concepts: the emergence of a distinct class of arbitration professionals (and their autonomy from national legal practice and national legal communities), the autonomy of the field as a whole from both national civil procedure and international law, and the legal autonomy of arbitration norms increasingly detached from national laws (yet still enforced by national courts).

In his account of the Age of Autonomy, Schinazi largely shifts from social history to intellectual history, charting the development and influence of the “French School”, the philosophical vanguard of legal and professional autonomy for the international arbitration field. Readers who are not familiar with the theoretical literature on international arbitration will find this part to be of interest, especially the way that doctrines espoused by the French School theorists continue to shape arbitration practice even as they are disclaimed by many, especially those from the common law tradition.

This shift is part of a broader kind of disjunction between Schinazi’s histories of the three ages. Part I, on the Age of Aspirations, is mostly focused on states and is a standard kind of dates-and-places history; Part II, The Age of Institutionalization, focuses on arbitral institutions (but really on the ICC) and takes a social history perspective; Part III, the Age of Aspirations, focuses on scholarly trends and communities, and employs intellectual history techniques. This lack of parallelism makes it harder for Schinazi—and the

⁴ Schinazi, *supra* note 2 at 170.

reader—to follow a thread through his entire historical recounting. More generally, there is a bit of shoehorning of the (messy) history to match the (tidy) schema, and the labels Schinazi assigns to the three ages seem to have been chosen as much for poetic effect as for descriptive accuracy.

The book is also rather Eurocentric, something that Schinazi is frank about admitting.⁵ He points out—as is undeniably true—that Europe, and France in particular, have played a key role in the development and ongoing practice and theorization of international arbitration. However, this is not a true defence against charges of Eurocentrism; any account of international arbitration’s history must of necessity dwell on Europe, but it need not dwell there *exclusively*.⁶ Relatedly, due to his focus on international commercial arbitration as recognized by the ICC and similar institutions, Schinazi has little to say about domestic commercial arbitration, in France or elsewhere.

Finally, the book is more effective at looking backward than forward. In his brief concluding chapter, Schinazi posits that the field may now have entered (or may soon enter) a new Age of Disruption, in which “the tension between the mercatocracy and the state will be exacerbated by unfamiliar circumstances that could threaten the integrity of the arbitration system as a whole”.⁷ By this, Schinazi refers primarily to nationalist political movements like those that led to Brexit and the Trump presidency, and that collectively threaten the cosmopolitan mercantile harmony on which the international arbitration system depends. However, he could as easily have been discussing the Covid Pandemic and other such shocks to globalization. The idea is tantalizing, and I would have appreciated more than the single page offhand musings Schinazi offers as to what this Age of Disruption might actually look like.

⁵ *Ibid* at 25.

⁶ Schinazi has more recently been working on a postcolonial history of international arbitration.

⁷ Schinazi, *supra* note 2 at 279.

Few would have been better placed than Schinazi to predict, based on the metanarrative he identifies in describing the Three Ages to prognosticate about the mooted Age of Disruption.

Ultimately, though, the dearth of informed crystal ball gazing should not be seen as diminishing the richness of Schinazi's historical explorations. This is an absorbing book that rewards close reading, and deserves to be in every international arbitration practitioner's library.