The word contract carries different weight in different contexts. Bankers and politicians, diplomats and economists, lawyers and judges all have complex understandings of what a contract is and what it means for them. In the recent sovereign debt negotiations with the Euro group and the International Monetary Fund (IMF), the newly elected radical left government of Alexis Tsipras asked their European peers to substitute for the previous “program” of structural reforms a new “contract” – a “social contract” – between the Greek government and its creditors (Quatremer 2015). The Greek leaders also inscribed their negotiation in a longer temporality than their European counterparts: arguing for a partial cancellation of the debt that Greece owed to Germany, Tsipras (2015) reminded his fellow Europeans that Germany had itself failed to compensate Greece for the costs of reconstruction after World War II (WWII) – including money directly borrowed by Germany from Greece during the war. This proposal was not at all what the European leaders expected to hear: for them, the only “contracts” in play were those of Greece’s debt and related agreements with the European Union (EU) and other International Financial Institutions (IFIs) entered into as part of a stabilization program.

The episode pitted two understandings of the “contract,” as well as two different temporalities, against one another: the first rests on the concept of the “general will,” which Tsipras identified (following Rousseau at some distance) with the suffrage of the Greek people, and which allowed the Greek government to frame its claims in the context of a larger history that touched the core of its people’s identity. The
other is the juridical legitimacy of the agreed-upon legal “covenant” signed by the contracting partners a few years earlier, according to the maxim *pacta sunt servanda*.

This episode in 2015 was not an isolated incident. Over previous years, the Greek sovereign debt crisis had already become the locus where international actors tested competing conceptions of contracts, and the solidity of the boundaries defining the legitimate way to make and un-make contracts. Already in 2010 and 2011, when the EU group’s efforts to restructure the Greek debt forced private banks, bondholders and government officials to join them and the IMF at the table, the evaluation of Greece’s ability to honor its debt contracts was the focus of many controversies. At the time, the legitimacy and credibility of the pronouncements of the rating agencies was the object of many criticisms: the financial health of the Eurozone rested on the (private) judgment of rating agencies on the budget and social policies adopted by the sovereign Republic of Greece. Whether they displayed rating inertias, as in the case of Moody’s, or whether they proceeded too clearly to downgrade Greece’s rating, apparently causing an acceleration in the crisis, the rating agencies were criticized for their role.

The Greek sovereign debt crisis and the fragmented, unstable scene in which it played out illustrates in other words what Teubner (1996) calls “a global Bukovina”: a metaphor he draws from the tiny northeastern province of today’s Romania, which before 1914 was governed by an incredible amalgamation of allegiances and legal orders – parochial and imperial, political and communitarian, linguistic and religious. An important casualty of the crisis is that the very notion of a “contract,” with its strong legal underpinning in private law, has been blurred to the point that it now encompasses ambiguous and contested principles and expectations by which third-parties outside the contracted exchange claim a stake at the table of negotiation. Professional lawyers, IMF economists and socio-legal scholars would probably tell us that we should not generalize from the Greek crisis, as a debt bond between thousands of private investors and a sovereign state belongs to a rather special class of transactions. Yet, this Greek bond is still formatted, talked about and regulated as, indeed, a contract.

The same problems that have plagued sovereign bond contracts have also affected more traditional private law contracts as well. Take the nearest equivalent to the Greek crash in a “pure” private setup, namely
the collapse of Lehman Brothers. The dead body of the bank with its billions of financial contracts piled up in its broken balance sheets immediately became the object of competing claims by many jurisdictions and authorities, some public and others private, many of them American though not all; some of them may have even come from sunny, pastoral Bukovina. Financial lawyers told the story of contracts being cut into pieces, dispatched, repackaged and then sold again into successive generations of, yes, contracts. Still today we are not so sure that the forensic experts have actually found whose solitary, individual commitment and wealth rested in these unholy remains.

In this volume we start from this point: across the world economy and over time the notion of what a contract is has proved inherently unstable and contested. The contract now implies very different understandings, expectations and social sanctions than in previous eras, not just for the parties that enter into them, but for the social order that supports and confirms market exchanges. How contracts have been framed, the understanding they have supported and the social efficacy that have come with them have always been contingent upon core political and philosophical understandings that can often be assimilated with the classic construction of sovereignty: for John Locke and Adam Smith, but also for Thomas Hobbes and Jean-Jacques Rousseau, the sovereign is the one that protects the physical integrity and the property rights of citizens (or subjects), as well as their contracts (Rousseau [1762]1971). Thus, in a context in which the very notion of sovereignty has been also debated, challenged and reframed to fit with the demands of the global economy, it comes as no surprise that the notion of the contract is open to many debates.

The ambition of this book is to trace the development over the last hundred years of the meaning of the contract and how it relates to the broader legal and social constructs in which international markets are embedded. In doing so, we want to extend the discussion on law and global governance to past historical periods: typically, this broad research current never ventures beyond the 1980–90 threshold that typically marks the beginning of our present-day global era. In

1 The ahistorical bias of law and globalization scholarship is in fact quite surprising, if we remember the substantial benefits drawn in other research fields from the comparison of the present Global Era with the first Global Era, that extended roughly from 1870 to 1914. Economists, for instance, have learned important lessons on growth and productivity gains by comparing these two periods, as well as on the effects of market integration, trade diversification and capital market expansion.
particular, we focus on the interwar decades that saw not only a high level of tension and overall instability, but also a considerable amount of institutional innovation and legal experimentation. The relative decline of Britain, the semi-isolation of the United States and, not least, the extraordinary experience of the League of Nations contributed to a context uniquely rich in ideological programs, policy proposals and legal experiments. Our intuition therefore is that this short and unstable period may shed more light on our theoretical debate than the more settled and more distant experience of the pre-1914 decades. Our aim however is not so much to “rediscover” or “revisit” a period that would have remained unduly ignored – which it is not –, nor is it to open up a subfield of historical inquiry and simply point out where issues of international governance arose.

For our analysis, we use a historical and micro-level (contractual) perspective to explore the shifting legal premises, assumptions and expectations that shaped how agents envisaged financial and commercial transactions across borders, then and now. We are primarily interested in an exploration of how lawyers, politicians, diplomats and investors fought with the evidence of a decline in the previous British governance and how this led them to imagine and experiment with new ways to envisage international contracting.² Avowedly, an underlying hypothesis at this point is that early on, perhaps on the very day when the League of Nations opened its offices and meeting rooms, early features emerged of what we now dub a “global Bukovina”: experts, professions, lobbies, epistemic communities and chambers of commerce immediately laid siege to the new organization and tried to control both its agenda and its discourse – still, before World War I (WWI), Bukovina was just a distant and backward province of the old Austro-Hungarian Empire.

In order to delineate and identify analytically this complex object, we develop the concept of contractual knowledge. We envisage it as an analytical interface between, on one hand, a legal discourse that is typically formalistic and anchored in the worldview of international policy-makers, hence in their practice of power, and, on the other hand, the assumptions and expectations of agents that contract on international markets or advise and shape how contracting should happen. Our

² We shall also look backwards at the pre-1914 era, though our main aim as we center on the interwar years is to shed new light on the genealogy – economic and legal – of both the classic post-1945 multilateral decades and the current Global Era.
endeavor is to demonstrate that this perspective in general, and this concept in particular, offer a novel understanding of the governance of markets and how the legal point of view informs this governance. Contractual knowledge in other words can be understood as a range of knowledge practices associated with the negotiation and renegotiation of obligations whose origin is contractual, as opposed to rooted in the unilateral dimension of the transfer of resources, actual or symbolic, – such as the obligations stemming from the unilateral will of an absolute monarch (Bernardini 2007). In our definition of contractual knowledge, we thus find: (1) the legal boilerplates (Gulati and Scott 2013) and new legal provisions that have been increasingly standardized in new trade contracts, financial contracts, etc.; (2) the pricing techniques that are part of what Annelise Riles (2011) calls “collateral knowledge,”3 which are typically used to finalize contractual exchanges, as well as all the forms of calculation or “calculative devices” (Callon and Muniesa 2005) used by international arbitration experts to determine the amount of awards in case of dispute; (3) the knowledge produced by and about the authoritative institutions in charge of legalizing market transactions, from the moment negotiations open to the moment when disputes erupt and contracting parties seek litigation or arbitration (such as public or professional regulatory agencies, or arbitration tribunals); (4) the historical narratives, philosophical justifications and political ideologies that contracting parties deploy to justify the making and un-making of contracts (here, think again about Adam Smith and the long lineage of classic political economy).

Contractual knowledge is thus a composite mix of legal and paralegal expertise, which goes beyond the sterile, scholastic opposition between “the law in the book” and “the law in action”: it sums up in a pragmatic perspective the assumptions and understandings that partners share in order to make contracting possible and, in particular, in order to anticipate how the future state of the world may affect them and how they may protect themselves against possible risk. Like neoinstitutional economists, we see contracts as bundles of rights that fix prices and quantities of exchanged goods (North 1990), as well as the rules that contracting partners are supposed to respect during and after the exchange. Examples reach from a “spot” exchange for a barrel of crude oil or a sandwich, to a long-term debt or a micro-credit

3 For instance, the knowledge that goes into the pricing of collaterals exchanged on the side of market transactions.
contract, or again to the acquisition of complex industrial equipment with a large package of long-term, after-sale services. Typically, many contracts include so-called contingent clauses that state in advance what course of action the parties should follow if commitments are broken or if a given external event occurs; alternately, they may decide ex ante whether they would go to court or ask an arbiter to decide a dispute; and at this point, significant precedents may have been issued and stored by a regulatory authority to be used as a default rule, either coercively or not. The notion of contractual knowledge thus unpacks and makes explicit the institutional and cognitive assumptions that give epistemic credence to the economists’ core concept of rational expectations. What brings together our perspective and that of economists is that we assume, in our case explicitly, that participants to market exchanges share common assumptions regarding what contracts imply and how, more generally, the market works: what makes them possible ex ante (thanks to measuring and pricing devices), but also the social rules and sanctions that frame the unfolding of commitments over time, and how far their reach may extend.4

This concept of contractual knowledge is not an entirely new idea, as Emile Durkheim already emphasized in Division of Labor the importance of the “non-contractual elements of the contract,” – for example, those tacit as well as explicit norms about the social rules and sanctions against non-compliance –, but surprisingly, the study of contractual knowledge has seldom been undertaken by social scientists.5 Against the notion that contracts only belong to the realm of private and individualistic action, we thus insist that contracts make sense only within a habitat, whose constitution is part of the social and, in particular, the legal construction of society. From that specific habitat, contractual knowledge inevitably extends to, and is invested by political or constitutional meta-rules that inform more generally our view of how society is, or should be governed. In today’s thoroughly integrated economy, the relationship between contracts and sovereign authorities takes utterly different forms whether they unfold at the domestic

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4 We certainly do not assume that social agents always follow principles of forward-looking, means-end, instrumental rationality; in fact we are agnostic on this point, which means that the question does not affect the present discussion. Rather, we oppose the view of contracts as simple, bilateral bonds that conjoin and seal the two parties’ preferences in a social vacuum.

5 By paying attention to the plurivocality of contractual forms of knowledge, we will thus move beyond the purely functionalist view of contracts – and more generally, of law –, which has been adopted by social scientists since at least the times of Max Weber (1978[1922]).
level, where a strong hierarchy of norms and courts rules over social exchange, or at the international level, where they take very specific and often intriguing forms (Arendt 1951; Latour 2004). Critically, the absence of a minimal degree of constitutionalization of the international legal order most often means that there is no superior text or epistemic authority that can establish basic rights, standards of fairness and shared principles of due process (Koskenniemi 1997, 2007). At best a process of constitutionalization can be observed within given subfields (Keohane, Moravcsik and Slaughter 2000; Slaughter 2000), where a body of meta-norms may gradually emerge and be accepted by most actors (Stone Sweet 1994, 1999, 2009); but in our view at least, there is no clear sign that this process will lead to a consistent, structured and binding international legal order (Teubner and Beckers 2013).

To trace the origins and evolution of contractual knowledge in global markets, we have actually chosen to focus on contractual obligations that bind together sovereign entities – states, mostly represented by their diplomatic corps and finance ministries, as well as international organizations, mostly IFIs – and private interest representatives – big banks, but also multinational law firms. We focus empirically on trans-border contractual bonds, with a specific emphasis on contractual agreements involving large exchanges of assets, as in sovereign debt markets. Hence, our focus is on contracts envisaged from a rather standard economic perspective, with due regard given to the usual problems of opportunism, uncertainty and information, but we also consider the organizational practices developed within the international institutions that were put in charge of accompanying the opening of markets, codifying legal interpretations and adjudicating disputes in case of contractual breaches. Here, our book focuses on a wide range of institutions and actors; to cite just a few: the interwar Reparations Commission and different cartels, various economic offices of the League of Nations, the International Chamber of Commerce (ICC), the International

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6 Still, we do not need to go back to Roman times when tracing the notion of the contract: suffice to say, as Bruno Bernardini (2007:12) reminds us, that the two notions of contract and obligation – or *obligatio* in Roman law – are intrinsically linked, and they were first applied in order to ascribe some legal framework to trans-border exchanges, so as to create “reciprocal” and “conditional” but still “legally binding” terms for the exchange. The first definition of a contract and the “contractual obligation” it generates – or *sullagma* in Greek – comes from Labeo, a Roman jurist from the time of Augustus. For Labeo, a contract is characterized by the special type of obligation it institutes: a “reciprocal obligation” (Bernardini 2007:68), rather than a unilateral one for instance.
In the next section of our introduction, we describe the various narratives available about the evolution of global market governance during the last century. We underline how two narratives map onto the evolution of global governance: the evolution in the power distribution in the system of states, and the creation of an ecosystem of legal institutions and actors in charge of promoting and interpreting international private law. The transition from the First Global Era (roughly, from 1870 to 1914) to the interwar period and then the post-WWII order is often portrayed by world-system and hegemonic theorists as the demise of the British-led imperial form of governance and the emergence of a multilateral project, which was both implemented and replaced by American hegemony after 1945. The legal ambiguity and instability that marked the interwar period would then reflect the decline of an earlier order of international contracting, which, from a legal perspective, was not international, but in fact English: Britain ruled (most of) the world, and English law and English court ruled (most of) the international markets, to an extent unmatched today by American power and law. Yet, scholars of international private law have also stressed the extraordinary proliferation of transnational institutions in charge of standardizing and codifying contractual knowledge as well as litigating contractual disputes based on such evolving bodies of doctrine in this period. These developments have marked the language, hopes and forms of cooperation found among transnational networks of international law specialists and practitioners. They may actually explain why the interwar period saw the emergence of an early form of legal deconstruction, or legal fragmentation (Kennedy 2006; Mallard 2014), and why in some cases the expectations and experimentations formed around contracts have stabilized and why in other cases they have drifted apart or converged.

We thus propose an analytical framework that we believe can help social scientists, anthropologists and historians capture the various factors responsible for the evolution of contractual knowledge in different periods (the Victorian era, the interwar period, the postwar era and the post-Bretton Woods era). Finally the last section of this introduction discuss how our book chapters draw from this analytical framework, and how they confirm, challenge or bring nuance to our two master narratives. The intersections and possible zones of conflict between the two
master narratives are thus studied case by case, through smaller-scale descriptions of historical processes associated with contractual innovation and debates about specific forms of global governance. We address a variety of practices associated with evolving forms of contractual knowledge: (1) the evolution of writing practices in the realm of sovereign debt contracts; (2) tools and resources like the mobilization of social capital or the standardization and codification of interpretive rules by which international organizations consolidate their power over the interpretation of contracts; and (3) the market structures in the transnational field of contractual knowledge that emerged over the last century. Each contribution thus describes some aspect of the complex and often contingent evolution of micro-level practices associated with the production of contractual knowledge: how cross-border contracts were written; how domestic or international arbitration courts interpreted their meaning; how informal and tacit rules of knowledge accreditation evolved during the last hundred years. At the same time, we move from the micro-level to the more institutional and structural level, by describing the market structure of various fields in which contractual knowledge is being produced.

Our collection of case studies not only provides socio-legal scholars, institutional economists and historians with tools to understand how, over the last hundred years, legal actors and institutional entrepreneurs have shaped emerging fields of contractual exchange, hence international markets; It also provides them with an analysis of the power struggles between broad political ideologies and legal philosophies, read within the evolution of the construction and formal interpretation of contracts, but also connected to the informal values, interpretive schemes and repertoires of collective action that have been mobilized in the transnational legal fields that structure the international economy (Abbott 1988; Dezalay and Garth 1996). This focus on explicit and tacit contractual knowledge allows us to observe how public and private authorities and jurisdictions, as professional elites, have shaped global markets as they have attempted to gain jurisdiction over the making of international contracts. It provides a rich object for our analytical framework that adopts a broad definition of the law as a historically specific object of conflicts, both symbolic and material, which creates representations, supports expectations, coordinates strategies and distributes opportunities and resources that affect the outcomes of contractual exchange for a wide range of actors.
CONTRACTUAL KNOWLEDGE IN HISTORICAL PERSPECTIVE

The global governance of markets from the British to the American centuries: an externalist approach

The classical narrative that is most often used to present the history of the governance of international markets typically starts by paying respects to “hard power” before identifying shifts and cycles in the power relations between states and empires, from which it derives the history of the geo-economy of market structures (Bordo, Taylor and Williamson 2003). Hence, this narrative usually starts with a reference to the Champagne fairs and medieval Venetian trade, before moving to Genoa and Amsterdam, then to Britain and later the United States. In this narrative, intermediary periods, when no superior power ruled the world, are marked by protracted political conflicts, epistemic opacity in law and thus economic disorganization. Since Kindleberger’s theory of hegemonic stability, the classic and perhaps only example of such an anomic era is the interwar period, when the United States (US) withdrew from the League of Nations and Britain’s relative decline was too advanced to reestablish its pre-1914 supremacy (Kindleberger 1986). Along similar lines, “world-system” theorists (Braudel 1992; Arrighi 2010; Wallerstein 2011) thus argue that the law matters little per se; it may only reflect or formalize the balance of hard factors that structure the world society, namely military and economic power (O’Brien 2002).

Law, in this view, only distributes the rewards of globalization in a way that favors the hegemon and helps it consolidate its power through economic globalization (O’Rourke and Williamson 2000; Byers 2003; Krisch 2003).

We certainly agree that the First Global Era is a paradigmatic case to illustrate this functional/strategic use of the law of international markets by the hegemon. The question is what kind of law we are talking about. Historians, whether of the legal profession or not, typically Point to the core norms of nationality, sovereignty and territoriality, which structured in a most powerful way what was then understood as international law (Kennedy 1996; Grewe 2000; Koskenniemi 2001; Mazower 2012). Yet there is little to be found under this title that actually governed commercial or financial transactions, not to mention foreign direct investments: classic textbooks from this period reflect a very limited interest in this trivial matter (Fiore 1875). Neither was it a great attraction during the pre-1914 meeting of the
Institut de Droit International or the International Law Association - the two main bodies that structured the emerging epistemic community of international lawyers (Koskenniemi 2001). While there was already before 1914 some notion that intellectual property rights had per se an international dimension (Pataille and Huguet 1855; Briggs 1906), there was no notion whatsoever that banking or antitrust regulation could be the object of a specific international legal regime (Freyer 2006). Similarly, nobody imagined that extraterritorial courts could help resolve private contractual disputes, or that firms might go forum-shopping when trying to optimize their international fiscal strategy. Even the principle that national regulators may coordinate through mutual recognition, as is the case on a daily basis in the EU, was unheard of. What has too often been underestimated is the extent to which the legal solution to the governance of the pre-1914 global market was found outside the realm of international law. Before WWI, and still to a large extent during the 1920s, a ready substitute for an inexistent global or international law of markets was solidly established with all the necessary judicial machinery: the English law and English courts.

This moment of national hegemony was quite exceptional, and three main factors contributed to this oft-neglected, rare moment associated with Britain’s imperial dominance. The first one is the British Empire’s own economic *raison d’être*, which was to ease the way for trade and investment. The institutional, political and military structure of imperial control thus eschewed the need for an international or multilateral legal machinery; what started to emerge within the Empire (though after rather than before WWI) was at best an embryonic, weakly composed federal structure (Anghie 2007). The Dominions, in particular, were not commercially closed to third countries, and therefore this infrastructure served non-British interests as well.

Second is the structure of English and European imports from the rest of the world, namely commodities. Here again things were managed and regulated on English terms. The dominant role in structuring the large London-based markets was taken by so-called trade associations, which organized exchanges on a private basis, typically via standardized contracts and quality standards. They settled contractual disputes by way of arbitration and self-enforcement, that is, via the threat of market exclusion (Ellison 1886; Barker 1917; Bernstein 1992). This infrastructure was light, efficient, and entirely rule-based. It was also both local (English) and global at the same time:
these private market rules extended easily across the world, though ultimately they were anchored in English law and confirmed by English courts. Hence, the significant corollary that foreign judgments never surfaced in the deliberations of, for example, the London Corn Trade Association and its smaller sisters: although foreign trading houses operated through these London exchanges they never called upon their Belgian, French or German home courts when they ran into legal difficulties.7

The third factor that contributed to the Englishness of global governance was finance. At the beginning of the nineteenth century, Great Britain became a major exporter of capital, a feature that is most often associated with the development of a sovereign debt market. In essence, this market was very much governed along the same principles as commodity exchanges: private market rules, privately based dispute resolution (organized by issuing banks and the Bondholder association), and self-enforcement: a return to the primary market was closed as long as defaults had not been settled in an orderly way (Flandreau and Flores 2012; Flandreau 2013). A less visible though as important investment line was trade finance, both vis-à-vis European and non-European markets (Spalding 1926). At this point the goods and products that were sold served as collateral for English banks, shipping companies, insurers and trading houses, with the collateral being enforceable, of course, in English courts.

The very problématique of market governance during the First Global Era was thus founded on legal, political and microeconomic premises considerably more at odds than is usually expected in our current era. On this count, there is little symmetry in the ways the First and Second Global Eras were ordered and governed. Critically, English law was local and global at the same time; in other words, it was imperial in so far as international merchants and bankers were invited to trade out of London and under English law, as interpreted by English courts. Yet, once they had reached a certain size, they had little choice. Contrary to today, they could not go forum-shopping and trade off the relative benefits of a large set of exchanges or arbitration facilities.

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7 Before 1914, global governance was thus de facto legal, though unwillingly so – English judges had never intended their precedents to apply across the world, as a coordination device for global markets. From this development derives both the remarkably low operational costs of this global rule, as well as the absence in the collective perceptions and discourses of the very problem that was so elegantly solved.
The three reasons we have identified for this exceptionally hegemonic nineteenth century form of governance are well within the analytical framework developed by world-system or hegemony theorists: hard factors like trade, finance and military power. Naturally, these hard factors also play a role in explaining why attempts to challenge such hegemony emerged in the interwar period, why the British tried to oppose them, and why they failed. Indeed, in the interwar period, we find abundant evidence of Britain’s often-antagonistic reaction to emerging forms of multilateral legal coordination. For instance, in 1919, at the same time when the League foundation was being discussed at Versailles, a group of high-level English lawyers and judges concluded their report on questions of international judicial cooperation by stating

> England has hitherto been a creditor country and, through the trade organizations of powerful importing associations, whose arbitrations are alike obligatory and respected, and also through their ability to require security for export transactions, British merchants have hitherto been comparatively rarely concerned with the question of defending legal proceedings abroad or of enforcing abroad British judgments against foreigners. Until it is apparent that this state of things has materially altered, we think that there will be but slight ground for seeking to amend the system by negotiations.

>(Committee on the Enforcement of Judgments and Awards 1919)

In other words, Britain had no need for any cumbersome international machinery in order to support its global trade: all the guarantees needed were provided by its (prewar) net financial position vis-à-vis the rest of the world, plus its market power over both the import and the export sides of trade. As long as hard factors like the military balance of power and the financial balance of payments were favorable to Britain, they could stay the course. This state goes a long way in explaining why Britain also opted out of The Hague Conference on International private law from 1893 till 1926. More generally, from the 1860s onwards, France was the place where the most systematic effort at collecting and translating foreign codes and statutes was developed (see, for example, the *Annuaire de Législation Étrangère*). Anybody who looked at that time for a ready translation of the Swedish, Hungarian

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8 If the economic hegemon of the day had had an interest in a more integrated international legal order, these conferences would have probably taken place in London forty years earlier, and the accords would have been written in English (rather than in French).
on Spanish commercial law would have found it much more easily in Paris than in London (Sgard 2006). This effort reflects the fact that when French merchants and manufacturers did not trade through the London markets, they ultimately had to rely, in case of dispute, upon the long and costly machinery of judicial cooperation and rules of Conflicts of Law, which required in turn a thorough knowledge of the partner country's domestic legal institutions. France, in other words, just like Germany, Italy or Belgium could not grandly ignore foreign courts and foreign judgments: their second-rank position in the international economic and legal hierarchy clearly put them at a disadvantage.

The League of Nations emerged at a time when this English-based legal order was still dominant, though also under increasing pressure. What soon came out of the bureaus, meeting rooms, and conference halls in Geneva, though in a confused and piecemeal manner, was a sense that the governance of the international economy had to be founded on a new or larger institutional foundation. Economic historians or hegemony theorists typically focus, at this point, on broad, macro issues like exchange rates or German reparations, though those years have also seen a renewed legal perspective on how the international economy should be governed. The theme that we gradually see emerging is that of a move from a *de facto* international rule that (primarily) derived from the *de jure* English legal order, to a prospective *de jure* rule that would be specifically international – that is, written in international law. Unintended and silent rules were to be partially, and then more systematically substituted with voluntary rules, which would thus have to be imagined, tested, debated, bargained over, adopted and interpreted. We should not underestimate the conceptual and political step that this evolution implied. Even the very notion that there was something specifically legal and *international* (rather than just British) in the governance of global markets had to be acknowledged. In many ways, these changes reflected the relative decline of Britain and the economic ascendancy of Germany and the United States, though in Geneva neither had a strong voice. In practice, this tension would be primarily played out between Britain and France: while the former typically kept the upper hand in this forum, the later tried to imagine and defend more or less consistent rules of coordination and dispute resolution to further the project of a multilateral governance (Henig 2000; Clavin 2013; Tooze 2014).
Can we sum up the last hundred years of innovation as simply a gradual transition from a British and imperial governance, to the (failed) French-centered multipolar world of the 1920s, to the more successful US-based world of the post-WWII era? Have the changes we witnessed been purely due to a shift in the identity of the sovereign power in charge of writing and interpreting the global rules of international trade and finance? Or has there been a qualitative change in the epistemic nature of legal obligations?

World-system theorists, hegemony theorists, and to a lesser extent, Bourdieuan theorists (Dezalay and Garth 2002; Cohen and Vauchez 2007), who stand on the “externalist” side of the debate: for them, the transition in the geographical and social locus of power is one between different hegemons, which does not affect in a significant manner the quality of law and contractual knowledge. In fact, many sociologists see the meaning of a contractual obligation as being extremely malleable (Bourdieu 1987), subject to very different interpretations depending upon who has the authority to interpret it. According to this externalist view of law, to some extent one can avoid entering into the complexities of the contracts themselves – the processes of arbitration and standardization of norms and valuation techniques.

On the other side of the debate are theorists who believe that the hermeneutic or epistemic character of the law itself needs also to be taken into account (Halliday and Carruthers 2007; Mallard 2014). The assumption here is that the multilateral model of regulation, in its interwar manifestation, or in its post-1945 embodiment, introduced a qualitative innovation in the legal construction of the world order that cannot be simply subsumed in the mere horizontal translation of the locus of power, from London to Washington and New York via Paris and Geneva. In this view, the transition to the Second Global Era and its non-hierarchical, deformed and fragmented set of transnational legal orders cannot be completely understood according to the classic hegemonic paradigm. The United States remains the most powerful nation, with the richest and most dynamic economy. But today’s global governance cannot be reduced to the attempts by the US government to impose its domestic rules and courts on international investors and manufacturers, across the world, as Britain could do to a large extent. But then, which factors can account for this qualitative change in the way global governance operates?
A hundred years of legal experimentation by jurists and law practitioners: an internalist approach

There is a second entry that can help us account for the qualitative change that has characterized the shift from a hegemonic system of global governance based on the British judicial system to the later, multilateral and indeed international mode of legal regulation of markets: this narrative places emphasis on the role of jurists, lawyers, law professionals and professional experts in charge of inventing new contractual forms and creating new doctrines for their interpretation in international settings (Kennedy 1994, 2013; Koskenniemi 2001). This internalist account sees the creation and growth of an international law of markets over the last century as the result of a process of legal experimentation driven by law professionals.

In the juridical profession in Europe and the United States, the view that global trade should be regulated by some kind of international (private) law was a new belief that was not fully espoused before the 1920s, and even up until the 1970s. During the First Global era, when empires and Great Powers led the growth of global markets before WWII, most international law scholars did not recognize the need for new international legal instruments to accompany that expansion. The profession’s faith in the capacity of “international law” to pacify relations between countries was never as high as at the turn of the twentieth century (Koskenniemi 2001), yet what was then known as “international law” was essentially international public law: it was about the relationships between sovereign (Western, Christian) states and their capacity to avoid conflict and to coordinate their governmental institutions (for instance, their respective legal orders), in ways that would make life easier for industrialists and bankers.

The key implication of international law being essentially public before 1914 is that international private law, addressing the rights of private individuals and firms as they cross borders, has remained thoroughly underdeveloped.9 More precisely, it was not recognized as a self-standing body of law, or as a valuable concept for understanding the actual or optimal governance of the global economy. In practice, those individual rights only had an internal or domestic extension – such as nationality, marital status, property and inheritance, contracts and judgments. Unless they traded out of London and under English

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9 On the (non) construction of the private/public opposition in international law, see, for example, Horwitz (1982), Joel (1988) and Mills (2006).
contract law, the rights on which citizens and merchants acted and transacted beyond borders were thus defined by their own country of origin (or domicile) and by the country where they traded; that is, how countries recognized the individual rights of nonnationals and the rights that they gave them (Fiore 1875; Westlake 1880; Benton 2002). The domestic law of each country then took care of how it would recognize domestically, that is in front of its own courts, the rights of foreign nationals. Rules of “Conflict of Law” stated very precisely how each country would recognize and enforce, within its own legal and judicial order, a divorce or a bankruptcy judgment rendered by a foreign court. International legal rules governing global private exchanges may have been nonexistent, but domestic rules existed in a dual regime: move under English law or accept the costs, uncertainty and delays entailed by the process of judicial cooperation.

In fact, the new brand of international public lawyers of the late nineteenth century, together with the politicians that shaped the discourse in the interwar period, never seem to have perceived a contradiction between the observation that they lived in an economically integrated world and their defense of political and legal governance that was thoroughly local, that is, national and state-controlled. For them, entrepreneurs, bankers, emigrants or tourists were steeped in national law, national identity, and national rules of economic and social interactions. In fact, they were not supposed to go global: they remained under the more or less benign protection, sponsorship and supervision of their sovereign. In other words, there was no such thing as an international commercial law, or an international law of markets.

As previously said, international public law remained the dominant language for any political discussion on how to build a peaceful, liberal and progressive order; though, at the same time, the League emerged as the key forum where new market rules and contractual forms could be imagined and discussed – a hybrid of public

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10 Should it accept or ignore them entirely, without discussion? Should it ask that a domestic judge first revise and then confirm this alien judgment? Or, again, should any of these rules be conditioned by a principle of reciprocity? And so on.

11 In the early-modern period, before 1789, and hence in an age that was not yet global in the present sense of the word, the classic literature on the Law of Nations from Grotius till Vattel had actually formalized and legitimized the possibility of recognizing individual rights beyond the jurisdiction of the sovereign, hence under the banner of natural rights (Bernardini 2007). But the international public lawyers of the late nineteenth century built their discourse and doctrine very much against this view, which they saw as romantic and, in our vocabulary, as pre-Westphalian. In other words, by the mid nineteenth century, these pre-global, transnational rights of merchants, traveling scholars and other adventurers had become totally passé.
and private norms and regulation involving a wide range of actors claiming legitimacy over contracting practices on behalf of specific types of expertise. Even though the League was to be the glorified servant of international public law, as soon as its office in Geneva opened, problems of a mostly micro-level nature inundated its officials and experts (Zimmern 1936; Clavin and Wessels 2005; Petersson 2013; Alessandro 2013): problems of refugees and international plagues, and closer to our field, intellectual property, cross-border bankruptcies, letters of exchange, the recognition of foreign firms and banks, competition policy, double taxation, commercial arbitration, etc. Quite significantly, the job of drafting these new texts and testing this new language of international trade was not taken over by the grand public international lawyers who staffed the new Legal Department of the League. In fact, the job was done by the economists and bankers from the Economic and Financial Section, which soon started to discuss and bargain with new international actors, like the International Chamber of Commerce, the Reparations Committees, the large American investment banks, and the US rating agencies. Said differently, we can at this point observe the very first steps towards the formation and autonomization of international policy fields, where diverging interests, private or public, parochial or transnational, compete to establish the agenda, frame the discussion and shape the eventual legal texts. The fact that this experimentation did not deliver much in terms of actual market governance is not the main point: they nonetheless opened a dynamic that is still driving the evolution of global markets.

If the first experiments with an international law of markets emerged from discussion between professional bankers, private lobbyists and apprentice lawyers, working in a new and shallow transnational environment, it should not come as a surprise that their emerging contractual knowledge lacked institutional and political backing. This shortfall is the classical lament about the interwar period, voiced by international law scholars like Hans Morgenthau (1960: 277), who criticize the League of Nations for the indeterminate, vague and polysemic language

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12 In the whole book, and unless warranted, we use the generic term “Economic and Financial Section” in order to describe: (i) the Economic and Financial Section of the League, which was part of its permanent Secretariat and (ii) the Economic and Financial Committees, which were made of outside experts who were typically on short-term leave from their government or from the private sector (typically banks). Semantic confusion is also compounded by the fact that, until 1923, this structure was formally provisional.
that its most political texts used to couch the institutional basis for the enforcement of decisions. Without strong and clear institutional organization, the legal experiments in the regulation of international trade and finance could be easily dismissed, as exemplified by the outright repudiation of Germany’s reparation debt in 1933. Interwar European trade and finance thus suffered from a lack of “legalization” – to borrow a concept used by many recent analysts of international regimes after Abbott and Snidal (2000: 444–5) – which resulted not only from the fact that codification preceded the establishment of institutions endowed with the legitimacy to judge specific cases and to enforce specific decisions. The weak legalization of trade and finance during the interwar years also hinged on the fact that rules were most often partial and incomplete, with no clear authority to interpret them and “plug the holes” in the legal governance of markets and insure execution. Surely, the League, and its Permanent Court of Justice, tried to fight these sources of ambiguity and lead the way toward a process of legalization, but the collapse of international markets and the decline of the League after 1933 put a halt to the effort of rationalization, codification and universalization of international private law.

This diagnosis of the interwar period was shared by lawyers and institution-builders responsible for the creation of the United Nations and Bretton Woods architecture: for them, the interwar period had not suffered from too much international law – as some German thinkers maintained, nostalgic of the Great Power game, like Carl Schmitt (2003[1950]) –, but from too little legalization of the international governance of markets (Abdelal 2010). Historians of international law and international jurists have also come to share the view that, from 1945 and at least up to the 1970s, we have seen a gradual legalization of international trade and finance, which was largely driven by the mobilization of law professionals of various countries throughout the second half of the twentieth century (Kennedy 1996; Mazower 2010, 2012). Law professionals have invested in the hallways of EU institutions, and international organizations such as the IMF and the World Trade Organization, in a manner much beyond the scale of that witnessed at the League. The result of their experimentation with contractual law has led to an increasingly legalized environment for global market exchanges (Abbott and Snidal 2000). For example, they have empowered the IMF with the new responsibility to legalize the regulation of foreign exchange rates, in order to create a predictable environment for international trade.
In a sense, the postwar generation shared Max Weber’s (1978[1922]) view that trade and exchange need to be backed up by a strongly legalized set of norms and instruments (out of which contracts were only one example), as merchants and traders involved in cross-border transactions needed to clarify an unstable environment and increase predictability about the future consequences of their course of action. The success or failure of their endeavor could not depend upon the unpredictable political choices of such and such country to devalue their currency so as to boost artificially the exports of such and such nation. Global trade needed fixed and agreed upon rules, enforced by powerful international institutions. Like other legal instruments – for example, legislation, jurisprudence, academic theorizing, etc. – contracts and institutions were meant to clarify any ambiguities and inconsistencies in the world’s legal system (Bourdieu 1987).

One may thus envisage the growth of an international law of markets after WWII as the outcome of a process of legal experimentation driven by law professionals whose forbears staffed the League of Nations, before moving to the various branches of the Bretton Woods and United Nations architecture (Pauly 1996; Mazower 2010). Of course, we could follow the world-system or hegemony theorists and say that without the geopolitical backing and economic power of the United States, these new U.S.-based international organizations would not have had the authority to diffuse and enforce rules worldwide. Still, the United States decided to ground its authority on a set of international and multilateral institutions rather than on its domestic judicial system and its domestic market infrastructures. This point cannot be completely accounted for with an “externalist” approach to global governance. Studying the ideas, legal imaginaries, hopes and expectations of the lawyers and politicians responsible for making these choices can provide us with a useful complement to explain both the shift in locus of power and the specific organizational choices made after WWII.

And what about now? How did these postwar experiments affect the global world we live in today? Where do the lawyers and international private law specialists now see themselves and their efforts of consolidation? Paradoxically, since at least the two oil crises of the 1970s, the common diagnosis is that the present legal system of global governance of markets suffers from too much legalization, or rather, from a too-chaotic process of norm accumulation. International law practitioners rather believe today that we have arrived at a new kind of epistemic
uncertainty that results less from the “thinness” of the international legal order, as after 1919, than from the very exponential growth of bilateral treaties, regional agreements, ad hoc courts and arbitration decisions, which characterized the world economy. Hence, the dilemmas are rather those of excess “thickness,” leading to obscurity.

The web of bilateral agreements, industry-based soft-laws, and international and domestic court decisions, is often perceived as producing an elusive global governance of markets, characterized altogether by fluidity, incompleteness and complexity (Shaffer and Pollack 2010). Instead of providing governments, firms and investors with ready solutions to their problem of information, knowledge, mutual commitment or dispute-resolution, the road to the best legal contractual solution typically appears long, winding and dangerous, especially for those who are ill advised or underequipped to navigate the complexity (Drezner 2009). Whereas the role of the IMF seemed clearly bound and legally defined in the immediate postwar period (as it was to serve mostly as a controller of exchange rate system), the multiplicity of superimposed and competing norm-makers, regulatory sites, dispute settlement fora which have mushroomed since the end of the Bretton Woods consensus (brought by the end of fixed exchange rates) has now stripped global governance from whatever architecture the founders of the post-WWII institutions wished to erect and have thus landed us in a legal geography quite close indeed to Teubner’s global Bukovina.

According to this view, the new legal universe is primarily characterized by the fluid, overlapping, often indeterminate relations between legal and judicial orders (Nicolaidis and Shaffer 2005), which not only affects the sustainability of global trade and investments, but also contributes indirectly to the rise of global inequalities (Ruggie 2004). Think about the partial, self-standing “transnational legal orders” (Halliday and Shaffer 2015), which shape and regulate transactions in a great number of branches through industrial standards, consumer protection norms, and banking regulation: contractual knowledge in these cases is typically in the hands of discrete networks of depoliticized experts, who may or may not nominally belong to national government agencies, and who may interpret contractual obligations very differently. Commercial and investment arbitration presents similar features: this essentially decentralized institution for dispute resolution, which now extends almost to the whole universe of private international contracting (as well as to disputes between private investors and administrative authorities) leaves the parties with a very large capacity
to choose between national laws, fora, and arbitrators, whose interpretive lenses on contractual provisions may widely vary.

The process of EU integration, especially its last twenty years, has accentuated the impression that deterritorialized networks of economic experts and law professional have claimed a legitimacy that once was the prerogative of a nation-state and that no clear hierarchy of norms and authorities has emerged out of this fight between national and supranational regulators. In the 1970s and 1980s, the situation was clearer: the bureaucrats in Brussels were charged with the establishment of standards, norms, codes and rules, which eventually backed-up in the post-1985 single market, a major addition to the founding European treaties (the Common Market Treaty of 1957 in particular); meanwhile, the European Court of Justice ensured the consistency of the whole legal edifice and gradually extended its reach over the national legal orders (Vauchez 2013). But with the creation of the Euro, Brussels now intervenes in highly political budgetary matters that are supposed to escape its reach, and it is no longer clear what agency national political leaders have. This widespread perception of a messy structure of governance, associated with the grey figure of the Brussels technocrat, has apparently contributed to the new appetite of voters for either far left (in Greece) or far right (in France) parties, which articulate anti-Brussels sentiments and a neotraditional construction of national sovereignty.

Against the view that global or regional institutions are solely responsible for the opaque state of affairs in finance and international trade, we also see domestic judicial institutions adding to the complexity: in particular, the United States shows its new appetite for a regulation of the world economy that would be more thoroughly anchored onto the American legal, judicial and regulatory orders, rather than on international or multilateral bodies. This trend is evidenced in the recent civil and criminal cases brought to US courts against foreign banks – European banks in general, and Swiss banks in particular – that have violated US tax laws and political embargoes set by the US government – as in the case of BNP-Paribas, which was recently ordered to pay a landmark $8.9 billion to settle a US criminal case for breaching US embargoes against Sudan and Iran.13 Here, what is at

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13 A similar case is presented by recent sovereign debt restructurings, whose legitimacy was the object of recent US court decisions that ruled in favor of the “vulture” funds (as in the case of Argentina).
stake is the geographical validity – universal or relative – that national governments can claim for their laws over the contractual obligations of two foreign trading partners. The extra-territorial claims made by domestic courts in the United States offer another example of how the quality of the law that is used for the regulation of international markets matters. As we see, domestic courts are thus turned into instruments of a hegemonic struggle to impose one’s interpretive authority across borders.

Since the interwar period, the body of international private law that one needs to master to navigate the high waters of international trade or global finance has arguably grown more opaque as it has become more diverse and fragmented – linking knowledge of complex financial instruments to the latest legal innovations and new forms of justifying the ascription of political authority to freshly erected governance bodies – and that such “opacity” (Mallard 2014) is new and surprising: no one could have predicted that the mobilization of law professionals who favored the creation and institutionalization of an international law of markets would have resulted in such a fragmented legal space at the international level. This state of affairs is indeed entirely at odds with both the relatively lean imperial governance of the British age and the thin and fragile legal construction that was painfully assembled after 1919.

To restate the same argument in the language of sociologists of science, the knowledge devices or inscription-producing instruments (Latour 1987) used by international legal practitioners and financial experts to rule over contractual exchanges have lost their ability to present the international environment in a transparent and predictable way, despite their best efforts to domesticate the environment of global exchanges. Two main processes account for this failure: the multiplication of implicit and explicit interpretations of what contracts mean; and the fragmented character of the institutional space in which contracting parties can bring their cases to be heard, which encourages forum-shopping strategies on their part (Busch 2007). If there was ever a time when the predictions drawn from the knowledge of international court judgments, codices of international law, and academic treatises could produce the impression of self-evidence, it is now a widely held conclusion that contractual instruments no longer have the property of “being not only ready-to-hand but transparent” according to “the tendency [of instruments] to disappear and become a means when we are using it” (Knorr Cetina
1997:10). And to that extent, we cannot reduce contracts to yet another set of “technologies of calculability” (Callon 1998), which, like the transparent equipment described by sociologists of science when they conducted ethnographies of laboratory life (Latour and Woolgar 1979), or the algorithms that have proliferated in financial trade rooms (Lepinay 2011), would generate predictability and calculability in the globalized world of finance. To take a stand on contractual practices today, one must reflect upon the historical conditions of the production of contractual instruments, their potential conflicts with contractual obligations formed by similar parties in overlapping groups, and the ways in which some degree of harmonization between dissimilar tools — rather than the simple implementation of univocal principles — can be achieved.

This epistemic opacity and the subsequent need for a reflexive use of legal instruments not only raise important concerns for the efficiency of the present system of global governance (as it proves that the international regulation contracts do not always work to render the environment more predictable), but also, and more importantly, for its legitimacy. For good reason international lawyers who have crafted this master narrative of increasing legal confusion have discussed the normative consequences of such “fragmentation” of international legal rules (International Law Commission 2006; Benvenisti and Downs 2007: 596), and the resulting opaque knowledge of the law it produces. Powerful states gain an advantage from legal confusion and actively “reduce the clari ty of legal obligation by introducing overlapping sets of legal rules and jurisdictions governing an issue” (Alter and Meunier 2009: 16). This state of affairs favors the rich over disenfranchised populations (Drezner 2009), as the first have the ability to choose which jurisdiction is likely to provide the more accommodating ruling with

14 What Karin Knorr Cetina (1997:10) wrote about the status of instruments in high energy physics, for example, that “the equation of instruments with technical objects is now highly problematic, [especially] in light of today's technologies, which are simultaneously things-to-be-used and things-in-a-process-of-transformation, [which] undergo continual processes of development and stabilization,” is equally true for the legal texts, contractual devices, and arbitral institutions that are granted the authority to rule over global markets.

15 In general, with the notable exception of Annelise Riles (2011), and Pénét and Mallard (2014), scholars in the social studies of finance pay little attention to law, contracts and other legal tools as instruments of market governance.

16 It is in that sense that we can say about international legal environment, as Clifford Geertz (1973) said about culture more generally, that, with a richer and more complex understanding of the plurivocality of legal language comes the realization that the positivist dream of achieving a transparent correspondence between norms and facts, law-in-the-books and law-in-practice, predicted behavior and actual outcomes, can never be achieved.
respect to their contractual obligations. Even when included in networks of global exchanges, aggrieved parties, especially when they come from the peripheries, often have no recourse to appeal ill founded or unjust decisions.

In this book, we keep normative discussions to a minimum and instead, question the historical validity of the processes that led to this paradoxical legalization of the international environment in which contractual obligations are read. Thus far, our two narratives have emphasized first the role of hard factors (like military and economic power), which have affected the identity of the hegemon and indirectly the kind of law that has been privileged to rule over international market exchanges; and second, the role of the beliefs, expectations and legal imaginaries that law professionals brought with them when they sought to create a rationalized system of international governance of market exchanges. With the relative exception of the immediate post-war era (corresponding to the Bretton Woods consensus), these trends resulted in a fragmented and opaque system of governance. Indeed, the present fragmentation might be due to the fact that the United States never succeeded in concentrating as much legal authority as the British had, and that international law practitioners could thus experiment and develop a uniquely large scope of contractual innovations, dispute-settlement fora or interpretative authorities. If there is some truth to this view, we present reasons why we also need to bring other actors into the play, and we explain in the next sub-section how an analysis that pays attention to both external and internal factors, analyzed at different levels, might look.

Research questions and analytical framework
In order to explain the evolution of contractual knowledge (from preparing templates and model contracts, to designing monitoring mechanisms for specific contracts, or litigating disputes in the case of denounced contractual breaches, and establishing jurisdiction for international organizations) in global markets, we have asked our contributors to consider the following questions:

- How did new contractual rules over cross-border exchanges change over time? Can we observe any standardization of contractual knowledge over time? Or at least a convergence around some expected range of legitimate actions with respect to the writing, interpretation
and execution of contracts and implicit contractual rules? Did private contracting rules make it into states’ public regulations and thus extend their reach to all kinds of contracting partners (private and public)? Can we see a common “episteme” emerging in each period that characterizes contractual innovation in both international private law and in public law matters?

- Who were the key actors driving the evolution of contractual knowledge: government officials, multilateral policy wonks, apolitical experts, multi-card lobbyists, private law firms, civic associations, bankers, or a new brand of business lawyers? During the last hundred years, can we observe some long-lasting structured sets of informal patterns incorporated within the *habitus* (Bourdieu 1987) of lawyers, experts and bankers who claimed jurisdiction over contractual knowledge? Have we seen some type of autonomization of the fields of high finance and private international law, which could lead us to conclude that elites in these fields have been able to reproduce their power, routines, and expectations, without suffering from external shocks?

- Historically, if contractual knowledge was initially dominated by English (private) law and international (public) law, then how did we move from there to here? Are there examples of legal or contractual practices that had emerged in the private markets of the Victorian era then moving to successor markets, even though they were founded on different bases? How did the world drift, gradually or not, willingly or unperceptively, to the present situation where international contractual knowledge has become a tangible reality even though it is far from being a well settled, well delineated transnational legal field? How can “hard” factors such as the distribution of military force and economic wealth account for the open-ended, indeterminate, and sometimes chaotic dimension of legal innovation, in this context?

Answering these questions has led our contributors to mix in their analysis some factors external to the contracts themselves with a fine-grained analysis of the evolution of key contractual clauses. Many of our chapter contributors focus on these external elements: either mechanisms outside of the legal field (changes in the military and economic power of nations, or changes in the philosophies of global governance), or mechanisms that belong to domestic legal fields (the varying quantities and types of social capital accumulated by legal and political elites,
or the strength gained by legal organizations from processes of standardization and boundary-policing), so as to explain how they have affected the transition of contractual provisions from texts to practices. Other chapters pay attention to the “internal” characteristics of contracts: the valuation mechanisms adopted to fix prices, the standardized definition of the commodities, the arbitration clauses included in order to litigate disputes about noncompliance, etc. For instance, various contributors trace the evolution of historical understandings of “conditionality clauses” in sovereign debt contracts (Flores Zendejas), collective action clauses (Weidemaier, Gulati, and Gelpert), pari passu clauses (Nelson), and arbitration clauses (Sgard). Their study suggests that the construction and discourse of international law, and their relationship to issues of governance, seem to have a life cycle somewhat different from the cycles of hegemonic succession and long-run economic expansion, which means that the processes of commensuration and standardization of contracts that facilitate the exchange of goods on global markets need to be described in detail, as in, for instance, the more internalist accounts of the evolution of contractual law reform do (Gulati and Scott 2013).

In Figure 1.1, we provide a comprehensive representation of the different mechanisms that various theories (hegemonic, world-system, Bourdieuan, ecological and neoinstitutionalist) can illuminate. Here, we look for ways each theory can complement the others by focusing on specific factors driving change: for instance, focusing on world-historical military and economic events by hegemonic and world-systems theories, or on elite struggles in domestic fields by Bourdieuan authors.

This approach to creating a comprehensive view of the processes (both internal and external) that have affected the making and unmaking of contractual knowledge over the last century allows us to place our contributors’ works in an integrated framework, which not all the authors might agree with, but, which at least, can serve as a basis of discussion for further research. Indeed, while our presentation does not assume strong relations of causality between each factor, but rather some form of “elective affinity” à la Weber – hence, the presence of double arrows in Figure 1.1 – it allows us to render the complexity of the interrelations between these mechanisms in a way that avoids two pitfalls: that of adhering to a master narrative that is too linear and univocal to characterize all aspects of contractual changes over the last hundred years; and that of emphasizing only contingencies, unintended
### Figure 1.1 A Dynamic Approach of Recursive Cycles of Contractual Lawmaking

*This figure is adapted from Mallard (2014:38). In this figure, we not only indicate abstract mechanisms, but we also try to list some of the historical predictions that are drawn from the book chapters regarding how each factor affected the interpretation of contracts in two historically specific periods (the interwar period, and the immediate post-WWII period). Our purpose here is illustrative rather than exhaustive.*

### Time 1: From the Victorian era to the interwar period

- Geopolitical and military changes
  - Hegemonic and world-system theories
- Decline of Britain and rise of France and the US
- Broad normative changes in people’s perception of the “social contract” between nations and citizens
  - Normative approaches to global governance
- Convergence between the imperial and post-national contracts

#### Mechanisms external to the field of law

- Change in how contractual provisions are written
  - Internalist histories of contracts
- Introduction of CACs, conditionality clauses, etc.

#### Mechanisms internal to the field of law

- Struggles between legal/political elites in domestic fields of power
  - Bourdieuan theories
- Old class of Victorian bankers in decline and new class of state technocrats rising
- Standardization of the interpretive procedures adopted by organizations in charge of interpreting contracts (courts, arbitration, expert committees) and reinforcement of their external boundaries with competitors in the field
  - Neo-institutionalist approaches
- Standardization in the Paris-based ICC, or LoN Economic Committees, or Rome institute on codification, etc.
- Stabilization (or not) of the meta-organizational model of regulation
  - Ecological approaches
- Oligopolistic model of CRAs after Great Depression

#### Internal changes to the contracts themselves

- Decline of France and Britain and rise of the US, Soviets and newly independent nations
- Rejection of the imperial contract and acceptance of multilateralism

### Time 2: From the interwar period to the post-WWII era

- New class of Paris-based arbitrators supported by US social capital
- Rise of new institutions which fragmented some fields (UNCITRAL, etc.) and consolidated others (WTO Appellate Body, etc.)
- Maintenance of oligopolistic model of CRAs: functional complementarity found between competitive organizations (codification), etc.

#### Mechanisms external to the field of law

- Introduction of pari passu clauses, changes in conditionality clauses, etc.

#### Mechanisms internal to the field of law

- Change in how contractual provisions are written
- Internalist histories of contracts

#### Internal changes to the contracts themselves

**Legal Experimentations in Writing, Interpreting and Standardizing Contractual Obligations**

To help us better understand the specific historical processes that have shaped the contemporary world of contracting practices, our chapter contributors start from the assumption that innovations, experimentation and developments in contractual matters have a historical
trajectory of their own, one that cannot be subsumed to the recognized macrocycles of international history, even though the latter may yield large influence. Thus, all contributors depart from a description of contracting practices to examine moments of bifurcation and of convergence with the master narratives we have sketched out in this introduction. In their respective chapters, they test the idea that dilemmas and strategies, which have surfaced in the last thirty years may originate in trends that are part of century-long processes, and which have affected various sub-fields differently, depending upon the specific issue at stake: the writing of sovereign debt contracts; the practice of arbitration in commercial disputes and the institutionalization of organizational practices; the structuration of fields around principles like competition, oligopoly or market dominance by one actor.

Writing sovereign debt contracts: textualist approaches
Our first three chapters go back in time to examine the form and content of legal clauses written in sovereign debt contracts over a hundred-year period. As far as the study of law is concerned, their perspective is largely internalist: they compare the writing of specific provisions and clauses found in sovereign debt contracts over the long term. In particular, they focus on contractual provisions that have protected contracting parties against the risk of contractual breach, whether the parties were private companies and individuals or public entities and even states, as in the cases under consideration.

We open our collective inquiry into contractual provisions by looking at the evolving meaning and technicalities associated with “conditionality clauses” in the sovereign debt market. The challenge of ensuring minimum guarantees that a sovereign state’s future policies will not de facto make any debt service impossible is now often addressed via so-called conditionality arrangements: with these contractual provisions, creditors typically ask that governments commit themselves to “sound” economic policies, accept a degree of direct oversight from international financial institutions (IFIs) or other observers – thus breaking the exclusivity of the bilateral relationship between debtor and creditor – , and agree to rules that regulate how they interact and bargain with their creditors in case of default. Conditionality has thus worked as a collateral, although not a material one.

The presence of conditionality clauses in sovereign debt contracts, Juan Flores Zendejas shows, predated 1919: in fact, these clauses have
roots in market-based practices from the nineteenth century, in particular, in debt contracts undersigned by major private banks (like the Rothschild) which underwrote loans contracted by national governments before 1914. These market-based practices gradually substituted themselves to the only previous option – threat of invasion against a defaulting debtor Prince.

If conditionality clauses find their origins in the nineteenth century, they obtained their first endorsement by a wide range of international investors, creditor states, and IFIs in the interwar period. Indeed, in the early 1920s, it was the Economic and Financial Section of the League that pushed for the inclusion of conditionality arrangements in multilateral stabilization programs. This experiment started with Austria in 1922 and was then extended in a number of Central and Eastern European countries. Contrary to post-WWII practices, League conditionality could also apply when the debt was issued, that is, when the country reached the primary market. By contrast, the IMF could only intervene when an already-issued debt had run into trouble and refinancing had become impossible.

The League’s affinity for broad conditionality clauses is not surprising if placed in parallel with the development of what we could call “public law conditionality clauses,” by which the Great Powers regulated the treatment of ethnic minorities by Central and Eastern European countries. Indeed, the leaders of the Versailles conference, which settled the 1919 peace between the Allies and Germany, imposed strong safeguards on these new states: in exchange for inter-state recognition, new states in Central Europe had to abide by Minority Treaties, which set up oversight committees in charge of monitoring adherence to minority protection rules and hearing the direct complaints of ethnic minorities. Direct, supranational oversight was thus not limited to the nascent international private law ruling over the issuance of sovereign debt, but also characterized essential developments in public international law at the time. It fitted perfectly with the imperial understanding of contracts, whereby new nations were to remain under the close control of the Great Powers, from which they derived recognition of their (limited) claim to statehood. As the French President, George Clemenceau, expressed to Poland at the signature of the Minority Treaties,

It has for long been the established procedure of the public law of Europe that when a State is created, or when large accessions of territory are made to an established State, the joint and formal recognition of the
Great Powers should be accompanied by the requirement that such States should, in the form of a binding International convention undertake to comply with certain principles of Government. In this regard I must recall for your consideration the fact that it is to the endeavors and sacrifices of the Powers in whose name I am addressing you that the Polish nation owes the recovery of its independence. It is by their decision that Polish sovereignty is being restored over the territories in question, and that the inhabitants of these territories are being incorporated into the Polish nation… There rests, therefore, upon these Powers an obligation, which they cannot evade, to secure in the most permanent and solemn form guarantees for certain essential rights which will afford to the inhabitants the necessary protection, whatever changes may take place in the internal constitution of the Polish State.

(cited in Krasner 1999:92)

Placed in the broader context of the imperial relations that shaped public and private law in the newly created states of the interwar period, it comes as no surprise that the nation-states which broke free from imperial bonds after the 1950s rejected the concept of conditionality clauses as used in the interwar period. After WWII, conditionality clauses continued to spread to more cases, thanks to the IMF’s advocacy and intermediacy, but narrowed in scope. Indeed, whereas before WWII all new states (with good or bad credit history) could a priori be subject to such third party interventions and oversight (as they obtained recognition of their statehood from the unilateral will of the imperial powers rather than from their own self-determination), after WWII only those states which had failed to reimburse their debts could have such limitations imposed on their sovereignty. From a routine practice in line with the imperial mentality of the League experts and Great Powers, conditionality became accepted only as an exception, reserved for those states that had already failed. The post-WWII evolution of conditionality clauses thus shows the changes conditionality clauses underwent to become acceptable, and in fact, quite widespread in the postwar era: through a process of narrowing and specification, the global diffusion of such contractual knowledge was harmonized with the expansion of state sovereignty as a hegemonic norm of international society, and the growing rejection of the imperial “contract” between the European Great Powers and new states.17

17 Once that articulation between political and private law understandings of the notion of “contract” becomes clear, we can immediately see why the reference to a new “social contract” in relation to sovereign debt negotiations – for instance, between Greece and the Euro-Zone...
World theorists may challenge the notion that imperial relations of power between superpowers and peripheries have so radically changed since the Victorian age. But they won’t challenge the idea that at least, imperial ideologies have retreated from the public sphere: now, contractual obligations between the global North and South are no longer explicitly associated with the justification of Victorian imperial contracts – for example the notion that it was the White Man’s burden to administer “non-civilized” populations. Broad changes in our philosophies of global governance – based on the rejection of imperialism – gradually came to be reflected in the letter of contractual provisions found in sovereign debt contracts: to survive, these provisions needed to conform to the new accepted forms of global governance. It seems that after WWII and the decolonization wars it became impossible to go back to the times of imperialism, when Britain and the other four or five European Great Powers could administer populations in contractually “leased territories” (Koskenniemi 2001:139),18 and organize, rule and litigate disputes concerning the circulation of goods and capital across borders.

The following two chapters explore two other typical examples of new contractual clauses in sovereign debt contracts which emerged after WWI: the inclusion of contingent clauses by which lawyers tried to solve collective action problems between the many creditors of a bankrupt sovereign – for example collective action clauses (CACs) –, and clauses that prevented one creditor from being favored at the expense of others in anticipation of a default – for example pari passu clauses. In both cases, we can safely assume that lawyers wrote these clauses after stumbling on the same practical questions which are well-known to Weberian neo-institutionalist sociologists and economists: if commitment devices and monitoring clauses fail, and contracts have

institutions, or between Argentina and a domestic US court, or between South Korea and the IMF – is invariably filled with references to such notions as the “people’s rights,” or expressed as a criticism of new forms of “imperialism” and calls for new democratic forms of association at the transnational level (Badie 1999).

18 Victorian legal scholars had also purposefully tried to distance their military operations in the Middle East and Africa from the old understanding of international law as Christian law produced by the Pope and the Christian princes of the sixteenth century. Even in the Berlin Act of 1884, by which the European powers organized the administration of the Congo River basin, and which led to one of the most deadly exploitations of human life in history, international lawyers inscribed the principle that African “consent” should be sought in contractual form by European great powers so that land-appropriation procedures would be different from those of the Spanish international law scholars of the sixteenth century, who only invoked the names of God and the Pope to expropriate foreign resources (Schmitt 2003[1950]).
to be renegotiated, then the parties must choose between three main roads. First, they could rebargain on a multilateral basis between the debtor and its creditors. Second, they could look for a third party to smooth the road to a settlement. Third, and as a last resort, they could go to court and litigate. In the interwar period, it was commonly accepted that all of these actions were preferable to more dire consequences: for instance, war against a debtor state that refused to service its debt (Finnemore 2003; Mallard 2011), or imprisonment of a private debtor.

As our contributors discuss, these various contractual clauses were included through a slow process of experimentation followed by an extremely rapid and widespread adoption of the new clauses after a crisis, as if all market actors then decided to follow the same “convention,” for example an arbitrary decision made by market actors to follow the same market rule in times of uncertainty, according to the definition used by Stephen Nelson. For instance, contemporary private investors as well as the IMF now see the new CACs written in sovereign debt contracts as a key innovation that helps debtors and creditors engage in “orderly debt restructuring,” should future defaults occur, as CACs can mitigate the risk of negotiation being held up by minority investors. But that perceived “newness” of CACs is in fact a historical reconstruction. As Mark Weidemaier, Mitu Gulati and Anna Gelpern show, CACs have a long history going back to the interwar period when they were considered by experts and government officials at the League, but ultimately discarded, largely because the environment in which bonds were issued was too thinly legalized for them to work. When sovereign states defaulted, there was little recourse to the courts for either private or public bondholders, so what the contract said mattered little in shaping how debt restructuring was done. Indeed, the inclusion of new innovative provisions in contracts is a futile effort if no judge or arbitrator exists with the authority to read a judgment and deliver an award. Contractual provisions in themselves do not have a binding effect – they depend upon the legal environment in which the contracts will be mobilized, interpreted and discussed.

In fact, the case of the “pari passu” clauses, which New York-based vulture funds used to claim compensation from Argentina in a New York court, shows that the letter of contracts usually does not change to reflect evolving legal practice; rather, the uncoupling between law-in-the-books and law-in-practice often continues because the contractual provisions serve a performative function – closer to a “fiction”
than to a “convention,” if it is possible to separate the two. Stephen Nelson takes the specific example of _pari passu_ clauses to discuss this concept of legal fiction. On paper, just like in the case of CACs, _pari passu_ clauses sound right and fair, and their spread after WWII illustrated the ideals of the new era: an era in which all (creditor) states would be treated equally. In practice, no one knew what that meant, but what mattered is that they gave the impression that the problems of equity and fairness had been dealt with by contract lawyers. These clauses articulate in contractual terms the commonsense notion that in the case of restructuring, no bondholder should be privileged over others and no one should be left completely on the side. In principle, they seem to prevent corruption or malpractice, formally making it illegal for a state to reimburse a few happy bondholders before announcing a massive default (e.g. friends and families of Finance Ministers, banks controlled by the party in power, protectors/patrions in the administration of a Great Power with more influence, etc.). This articulation with common sense can explain how _pari passu_ clauses became a fad among private lawyers little bothered by their practical implementation: they first appeared in sovereign debt contracts at the end of the nineteenth century and only became widespread from the 1940s to the 1970s, in parallel to the institutionalization of international arbitration.

Now that the legal environment is richer with institutions and actors in charge of interpreting and executing contractual clauses, can we say that CACs and _pari passu_ clauses provide an effective recipe for “orderly debt restructuring”? More broadly, can we now deduce contractual practices from reading contractual provisions? To us, it seems that CACs do not fare much better now than in the interwar period, in a legal environment that has become opaque and fragmented. As Weidemaier, Gulati and Gelpern show, in the case of Argentina’s and Greece’s defaults at the beginning and end of the 2000s, the diffusion of CACs to New York-based contracts and European sovereign debt contracts has neither solved the practical problem of finding a supra-majority among creditors who will accept a “hair-cut” – as in the case of Greece –; nor that of dealing with the minority of discontents who may wish to sue the debtor country, even after an agreement is found – as in the case of Argentina, sued by “vulture funds” in New York courts for failing to treat fairly the bondholders left out of the agreement. If CAC promoters claim that CACs, at least on paper, help states avoid defaults by facilitating renegotiation among creditors, in practice, whether
the international environment is unified or fragmented, the letter of contractual clauses does not drive the practice of contract renegotiation. Knowing this, we may infer that the extremely rapid diffusion of CACs after the Argentine sovereign debt crisis of 2003 – in New York-based contracts but also in European law contracts – is just a fad initiated by private law firms and lazy policymakers who would rather reassure themselves by engaging in mimetic behavior (in as far as they themselves would acknowledge the decoupling between law-in-the-books and law-in-action) that costs them little than address collectively the root problems at the heart of these banking practices.

Analytically, these chapters help us understand the need to move on from the naïve view that contractual provisions are prescriptive and descriptive – for example that they define how market behaviors should be organized and how they are organized –, to the neo-institutionalist notion (Meyer et al. 1997) that although contractual provisions may be prescriptive, they are not descriptive – as the structure of the legal environment has deep implications for how contractual provisions will be read and acted upon –, and ultimately to the view that contractual provisions are “performative” (Callon 1998) rather than prescriptive or descriptive. What interests those bankers and contract lawyers who include new contract terms – like *pari passu* – or terms that they know will not be enforced – like CACs –, is the immediate effect that they have ex ante: their performance as the contract is signed. They give the appearance that through the writing of these contractual terms, experts have recognized and solved a problem. What Annelise Riles (2010) has written about “collateral knowledge” – that collateral terms in debt contracts serve the role of a legal fiction which enables the transacting parties to act as if the ambiguity about what will happen in the ( unknowable) future has been mapped out so that the deal can be completed –, is thus also true about the contractual knowledge found in these types of contract clauses. Rather than descriptive or prescriptive, they are “performative” in the sense that they provide market-actors with a script that enables them to act as if everything is in their control, even in the case of default – or, in the case of CACs, it enables politicians and government experts to act as if they had identified the best solution for the problem. This performative effect is present ex ante, not ex post: when states default, then, it is common that all parties reassess their interests and choose their behavior based on many other parameters than the terms of the contract.
This performative effect is context-dependent: Nelson illustrates how its effectiveness can be threatened by forum-shopping strategies specific to the fragmented mode of legal governance in which we live today. Indeed, taking the example of *pari passu* clauses, this legal fiction was for most market actors only a vague and unbinding promise to treat all creditors equally in case of default. But after the vulture funds, created by business lawyers whose market niche is the identification of loopholes in debt contracts, began to sue defaulting debtor states (like Argentina) in New York courts, the inclusion of *pari passu* clauses in debt contracts may no longer have the same performative effect. Investors might be scared that court-oriented US-based funds and New York courts will impose their interpretation of *pari passu* clauses, in violation of an implicit practical norm: that *pari passu* clauses do not open any legal action. Here, the threat of litigation in the United States has been directly responsible for a widespread feeling that the financial world no longer works according to the implicit norms held dear by a cosmopolitan elite of bankers, and that the rules of the game can be unilaterally changed by US judicial institutions, thanks to the judicial resources offered by the relocalization of the world’s financial activities from London to New York. Such a shift in the location of the world’s financial power generates opacity, as no one knows how US judicial authorities will reinterpret century-old contractual rules, some of which have been held dormant for much of that time, and would have remained so if not for the strategies of US law firms (as in the example of US lawyers who threatened to sue Swiss banks suspected of keeping dormant accounts from Holocaust victims as recounted by Ariel Colonomos and Grégoire Mallard). Here, it is the translation of American raw financial power into legal interpretive power that is responsible for the emergence of uncertainties and predictive discomfort, although the important time lag between the moment the United States substituted itself economically for Britain, and the moment New York courts started operating hegemonomically in the same way British courts used to operate before WWI is striking. This time lag adds nuance to hegemonic or world systems theories regarding this shift in power.

Thus, while these three chapters show the importance of studying the specific terms found in contractual instruments – if only to emphasize their performative effects over their descriptive or prescriptive effects –, they also point to the necessity of including at the center of our analysis the sociological and geopolitical processes which affect
the legal environment in which the interpretation of such clauses takes place.

**Consolidating international organizations: mobilization of social capital and standardization processes in organizations**

Now that we see both the interest and the limits of a mostly *internalist* study of contractual knowledge, which centers on the terms of contractual provisions, we turn our attention to changes found in the transnational environment of institutions which turn contracts into a set of organized practices. In addition to the broad historical factors associated with a changing balance of military and economic power, our contributors emphasize the role that three mechanisms have played in affecting how contractual knowledge is turned into practice: (1) struggles between political and legal elites, which are determined in large part by the unequal distribution and circulation of social capital (as predicted by Bourdieuan theories); (2) processes by which new legal organizations have gained power (through consolidation, codification or standardization of interpretive routines and/or the active defense of hard-gained institutional niches in the broader ecology of the field of international private law); (3) processes that lead to the stabilization or destabilization of relations between organizations at the level of the field itself (relations of competition, functional differentiation, market specialization, “ententes,” etc.); see Figure 1.1.

To see how these processes operate in the broad field of contractual knowledge, we have chosen to focus first on one striking success story of the last hundred years: the establishment of private arbitration as an autonomous field of knowledge and practice. Today, the relevance of arbitration is widely recognized. Any specialist of international private law will likely recommend that when contracts and renegotiation of terms fail, either because of a lack of supra-majority among bondholders, or because the situation of the debtor is too dire, the next route is typically recourse to a third party: either an official court or a private arbitration tribunal, especially if the contract includes a clause that reflects the parties’ preference for arbitration. Two of our chapters

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19 In order for us to better understand the economic interests, political projects and transnational values of these producers of new legal discourses, we thus need to abandon any a priori definition of what the law is: we can’t exclude expert ruling from the legal realm just because it does not fit with a preestablished definition of international law conceived as public law. The law is not just an abridged, graphic description of the real world of interstate agreements and treaties (positive law).
explain how mechanisms of elite struggle, organizational standardization, niche-conquest and boundary-policing influenced tremendously in the establishment of this practice, which was not self-evident in 1919 when private actors more likely turned to courts to litigate a contractual dispute.

Today this approach to arbitration is widely practiced because, in most countries, courts are now bound to enforce both the ex ante commitment to arbitrate (as written into the contract) and the award that is eventually handed out. This outcome, however, cannot be assumed from the introduction of arbitration clauses in many contracts in the 1920s. What we said in the previous section still holds true: compromissory clauses, just like CACs or pari passu clauses are neither prescriptive nor descriptive of the reality of financial and political relations in situations of contractual failure. In fact, in order to understand why contracts included the possibility for market actors to avoid the courts and seek arbitration after WWI, one has to look at the broader historical analysis of the conception of judiciary sovereignty. Indeed, as Jérôme Sgard shows, the acceptance of contractual arbitration clauses by states resulted from the inability to deal speedily with the surge of WWI commercial disputes in European tribunals. Before WWI, proud states like the French Third Republic had refused to break down the unitary state judiciary and admit the possibility that private actors could provide equivalent forms of justice. While England adopted statutes along these lines in the 1880s, broader changes in the way the state administered justice were needed before such contractual provisions were recognized as legal in French and American contexts.

Macro-historical processes are helpful not only to explain why arbitration clauses were finally legalized, but also to account for how arbitration clauses were implemented after their inclusion in trade and financial contracts became a routine practice. After the United States and France legalized arbitration, three cities, and three institutional regimes of arbitration, competed for monopoly over the practice of arbitration: London, where the old imperial contractual regime still operated; New York, where a new national power emerged that laid claim to world dominance on issues of trade and finance; and Paris, whose originality was to operate on an extraterritorial and completely

20 Technically, an “arbitration clause” formalizes the decision to submit a dispute to arbiters, once it is identified that it cannot be solved bilaterally; in a “compromissory clause” it is agreed upon ex ante that the qualification of the dispute is not possible.
international basis. In the interwar period, it was unclear which model would become the “conventional” one. Each arbitration organization thus started working slowly, as in the case of Paris-based International Commercial Chamber (ICC): new institutions established facilities, published rules of procedure, formalized how they selected or identified possible arbiters, etc. But they produced very few arbitration cases. Thus, the standardization of contractual knowledge through the establishment of institutional routines proved to take longer than originally planned, as many competing options were identified and tested before one dominant form stabilized.

Sgard explains how the model favored by the Arbitration court established in 1923 by the ICC, which established the legitimacy of a largely extraterritorial model of arbitration, eventually won over the alternative ways of arbitrating cross-border disputes defended in London and New York. To understand how arbitration knowledge was institutionalized in practice, Sgard insists on the specificities of work routines in each organizational culture (London, Paris and New York). Left with little to do in the interwar period in actual matters of arbitration, European law professors and technicians working at the ICC invested their energy in codification, rationalization and textbook production, which gave a very academic tone to the ICC (Gaillard 2008). This work of rationalization led to a quasi-absolute autonomy of the ICC from external political interests – at the cost of its lack of relevance for political or financial interests in the interwar period. The lawyers and law professors working at the ICC emphasized consistency in their principles of arbitration, to the point that when asked to litigate important oil nationalization cases in the 1970s, they were positioned to translate their academic prestige into economic gain and professional credibility: their theories based on codified (although limited) cases created the legal environment that made it possible to translate open-ended arbitration clauses into specific decisions that looked fair.

The emergence of the ICC as the dominant platform for international commercial arbitration should thus be seen as an indication that transnational contracting practices do not always conform to hegemonic theories, which predict that economic and military power always translates into legal and cultural power. Here, it was the most unlikely organization that eventually imposed itself on the market of arbitration – indicating that the field of arbitration started operating with more autonomy than often assumed, and that the professionals in
the shadows (from technicians in the ICC performing simple tasks to the arbitrators) successfully imposed themselves in jurisdictional conflicts over their Anglo-American competitors who had market dominance in the fields of trade and finance. The story of how arbitration moved from contractual clauses into institutionalized practice thus points to the importance of processes of autonomization and organizational boundary-policing.

The question of “autonomization” of expert knowledge and issuespecific fields has been quite central within the sociology of professions and the sociology of expertise (Bourdieu 1987; Abbott 1988; Dezalay and Garth 2002). Bourdieuan scholars add to the neo-institutionalist stories of organizational standardization and focus on the accumulation of “social capital” by early promoters of an organizational form, which, they claim, is a key element in the process by which one organizational model becomes professionalized and gains its autonomy from politics. Along these lines, to understand the delayed success of the ICC in the field of international private law, Yves Dezalay and Bryant Garth emphasize the circulation of social capital between the top elite European arbitrators working for the ICC and the American elites who represented big multinational companies and New York-based think tanks and supported the efforts of Parisian law professors. During the interwar period, even though as Sgard points out, elite European professors had little to do as the multipolar system of private arbitration that the ICC aimed to create had not yet asserted its authority over the imperial governance of international trade by British courts, the diverse actors working at the ICC were actively supported by their New York backers. Thus, post-WWII, when European law professors close to the ICC were asked to intervene in the commercial disputes that pitted European and American public and private interests against the Arab nationalized oil companies after the wave of independence wars in the 1960s, they benefited from the high social capital associated with positions of power in their academic field, and the rejection of the British-based model of arbitration, whose imperial roots disqualified it in the eyes of the Arab nations.

Two main processes were thus central to the success of the ICC and the autonomization of the field of arbitration: (1) the mobilization of social capital by ICC practitioners to secure the legitimacy of their one organizational model – the ICC – and then, of its market dominance; (2) the codification and standardization of arbitration
principles and modes of evaluation, which turned the knowledge produced in a complex environment and fragmented field into the internal routines and modes of operation of one organization – the ICC. Thanks to these two processes, the ICC and its practitioners achieved in a remarkably small duration of time an extraordinary degree of professionalization and autonomization from market pressures and state politics, and gained legitimacy for the field of arbitration in the face of the state courts, although the latter operate under the authority of a pyramidal system of epistemic authority. These two processes combined also gave the impression that the world of arbitration had moved from the imperial model of governance to a multipolar model characterized by its networked form of horizontal governance organized around transnational peer panels and expert committees. We could also add a third factor that impacts the meta-organizational level of international arbitration: the high degree of market differentiation between the various organizations (ICC, ICSID, etc.), which are in charge of arbitrating various types of contracts (Pauwelyn 2015).

In many ways, this path toward autonomization and depoliticization contrasts with the development of another kind of “arbitration” over the last century: that of sovereign war-based debts – for example those debts that take the form of reparations – which, as illustrated by Germany’s reaction to Tsipras’ demand to reopen the German reparations file, are still heavily disputed. Here, the story of the reparations committees in the interwar period runs parallel to the story of international arbitration in the ICC, in large part because many of the same players (US bankers and philanthropists, French officials and law professors, etc.) played both games at the same time (in addition, in fact, to playing a third game centered on the regulation of trade through cartels, as Marco Bertilorenzi and Giuseppe Telesca show). The utmost failure in the field of war debt arbitration was surprising, as in the early days of the interwar period there were high hopes that the Reparations Commission set up to arbitrate the claims of each European nation regarding the public debts stemming from WWI would institute a truly international model of global governance based on expert committees, standardized evaluation techniques and peer consensus which could work in relative isolation from partisan politics, and that it would successfully settle claims by Germany, France and others on the amounts of war debts each owed. As Ariel Colonomos and Grégoire Mallard show, the Reparations Commission was in fact a fantastic laboratory where
European law professors and economists experimented with new forms of contractual knowledge. These experts, law professors, bankers and diplomats treated the amount of German reparations and the scheduling of payments as (artificial) adjustment variables that they could manipulate and restructure to avoid all-out currency wars in a context when states threatened to default on their sovereign debt if Germany failed to pay. The Reparations Commission thus anticipated some of the functions and instruments later adopted by the Bretton Woods institutions: in fact, by calculating (and recalculating) the level of reparations that Germany owed its neighbors thanks to standardized macroeconomic instruments (like standardized national accounts for each European country), and by bringing the Americans into the governance of Europe’s financial and economic policies (when they were otherwise absent from many of the League Committees), the Reparations Commission sought to institute what looked like an international model of arbitration for public financial (implicit) contracts, which sought to strike a balance between the objectives of reconstruction and macroeconomic stabilization.

In this case, the attempt to institute such a multilateral model of expert governance largely failed. Members of the Reparations Commission may have benefited from the social capital of US bankers and philanthropists, but they lacked a powerful organization that – in a Latourian (1987) twist – could have swallowed the outside world and imposed its interpretive routines and arbitration procedures on sovereign debt defaults: when the French government decided to invade Germany in retaliation for a default in 1924, the Reparations Commission could only lament the decision. Unlike arbitrators involved in private dealings, the experts in the Reparations Commission failed to internalize the meaning of key instruments and concepts – like the legal notion of “collective responsibility,” – which became victims of political reinterpretations expressed in the unruly and highly charged political environment of the time by nationalist parties. For Colonomos and Mallard, the massive failure of that specific form of inter-state arbitration left an important legacy, as it left the field with no strong multilateral organization in charge of arbitrating inter-state disputes in similar matters. So it is no surprise that when further disputes erupted about the failure of states and private actors to properly compensate victims – as in the case of the Holocaust era assets scandal –, lawyers (especially US lawyers) threatened to turn to domestic courts to
extract new awards for the victims they claimed to represent. Although the cause was grounded on solid moral claims, the fragmentation and politicization of the field of international justice that this episode represented was disquieting. In the absence of a multilateral forum with a standardized procedure, it was New York courts that were asked to decide on an extraterritorial matter – a trend which not only signals the substitution of New York for London as the center of transnational regulation in matters of trade and finance, but also the reproduction of a quasi-imperial understanding of legal regulation on the part of the new hegemon.

These analyses show the necessity for us to separate analytically not only the textual realm of private law contracts and public law contracts (sometimes as implicit contracts, such as those recognized by warring states after the end of a conflict) from the way they are interpreted by the domestic legal fields in which they circulate, but also from the larger set of world historical events which inevitably impact the fields of law in many countries. Separating these different levels of analysis (as represented in Figure 1.1) is essential if we want to produce adequate chronologies of change in regulative fields associated with contractual practice.

This is the task undertaken by Bertilorenzi and Telesca, who ground their Bourdieuan approach to the sociology of elite struggles in financial and industrial fields in a prosopographic methodology: by focusing on the careers of emblematic bankers and industrialists in two successive generations spanning WWI, they explain the resistance to change in the already-autonomous Victorian field of financial regulation in the late 1920s. Their detailed description of the career patterns of elite bankers associated with the reformist nebula close to the ICC, the League’s Economic Committee and the French legal field represented in the Reparations Commission, allows us to understand why epochal changes like WWI did not immediately affect formal and informal regulative rules in the highly cosmopolitan field of finance and finance regulation, as these world historical changes were filtered through social organization and struggles between politico-legal elites in Europe’s domestic fields of power. As our authors show, it was only with Credit-Anstalt’s collapse in 1931 that bankers understood that they could no longer save banks and price junk bonds through informal late-night meetings in the secluded world of London clubs, or in more formal arrangements passed by cartels: new forms of regulation and
valuation techniques were badly needed, involving public authorities.\footnote{Until then, throughout the 1920s, bankers from the Victorian era mobilized their social capital so as to force their informal rules into an organizational form which effectively worked to avoid the twin perils of inflation and uncontrolled speculation: the cartel was conceived of as an informal price-setting mechanism that was preferable to state controls of prices. In so doing, the elite of High Finance of the Victorian age succeeded in maintaining its monopoly over banking and trade regulation for a good decade after WWI, until the Great Depression really hit Europe.} This time lag had important consequences: although WWI represented an epochal change for the industry and banking sector, many financiers who had been socialized in the old ways of arranging cross-border trade survived the war, and they believed that informal arrangements (through tacit contracts and honor codes) could just as well regulate the reconstruction of the European economies in the interwar era. As a result, ten years were lost in the reform of financial regulation, and it took until WWII to completely get rid of the Victorian idea that private “ententes” could work more effectively than public forms of state regulation.

**Structuring fields: market dominance, differentiation and competition in complex institutional ecologies**

Previous chapters show that early conditions in the process of field emergence are extremely important for the course of institutionalization and that the process of “autonomization” of contractual practices is neither incremental, nor continuous, but that it is dependent upon larger socio-political mechanisms (like the circulation of social capital, the standardization of organizational routines and the ecology of organizations competing to shape interpretive norms in the outside environment, etc.). The last three chapters focus on this last, ecological or meta-organizational dimension of the evolution of contractual practices.

Rather than situating themselves at the level of a single organization (like the ICC, the Reparations Commission, the League’s Economic Committee, etc.), these chapters focus on the effects produced by the frictions and tensions between various organizations that populate the same field. In their chapter, Gregory Shaffer and Michael Waibel pay specific attention to such ecological factors in the (nongradual) process of legalization of a private and public law of markets. In particular, they pay a great deal of attention to the imbalances created when international organizations that initially pursued complementary
mandates (like the IMF and the World Trade Organization (WTO)) later moved away from their initial sphere of activity. They show how the decoupling between the statutory objectives of one organization and the practical implementation of these goals by that organization can create imbalances not only for the organization in question, but also for other organizations that populate the same field. Their chapter presents the evolution of regulation at the meta-organizational level as an incomplete process full of uncertainties and contingent setbacks, illustrated by their comparison of how finance on the one hand and trade on the other hand evolved.

The two organizations upon which they focus are the main pillars of the post-WWII economic international order: the IMF, in charge of macro-economic stabilization through currency convertibility controls, and the WTO, which sought to accomplish similar goals through the opening of trade. These functionally differentiated regimes that were designed to evolve together unexpectedly diverged in the 1970s. On the one hand, the rules of the trade regime hardened over time, in the sense that processes of autonomization and judicialization took place especially after the creation of the bi-leveled Dispute Resolution Mechanism of the WTO in the 1990s. This innovation at the level of one organization (the WTO) contributed greatly to the autonomization of international trade law, a subpart of international public law that, before 1914, was both little developed and had limited professional standing among lawyers. The autonomization of trade law translated into the routinization of adjudication rules over commercial disputes and contractual obligations, based on the delegation of interpretation to independent legal experts and quasi-judicial arbiters, whose personal allegiance typically is to the dispute-resolution process per se, or to their own professional community (Alter 2008), rather than to state parties.

On the other hand, the rules of the financial and monetary regime that had been developed by the IMF from the late 1940s onwards weakened rapidly with the gradual collapse of the Bretton Woods system in the 1970s. Since the return to (mostly) floating exchange rates and (generally) free capital movements, we have observed in many respects a process of delegalization of financial regulation, as a consequence of

22 This comparative focus allows Shaffer and Waibel to take issue with the teleological view of the evolution of transnational legal regimes in terms of legalization and judicialization (Abbott and Snidal 2000).
a renationalization and fragmentation of these policies. Indeed, just like during the nineteenth century, exchange rates and other instruments affecting the financial wealth of a country are now considered at least nominally as a preserve of sovereign governments – or, in Europe, of the EU institutions. As the IMF lost its jurisdiction over foreign exchange management, it moved in practice toward a twin mandate: first as a macro-economic policy advisor (under the title of “enhanced surveillance”); and second as a crisis manager. Yet, both arms of the IMF remain remarkable today for their very low level of legalization: in practice, since the 1970s, the IMF works exclusively on the basis of internal bylaws, which are at best contingent rules, or indicative signals that may suggest to third parties how it would react in certain conditions. The self-evident drawback is that its intervention in times of crisis tends to be exclusively justified on the basis of informal judgments about the trustworthiness of the debtor, or alternately, the need to control a supposed systemic risk. In this sense, the international legal framework established by the IMF has now been largely unable to produce regularity and predictability: the interpretation of what conditionality clauses – whose reformulation in specific debt contracts is described by Flores Zendejas – mean in practice (as interpreted by the IMF) has clearly moved out of the quasi-legal, contractual envelope into which the League had tried to write it. The impression of informality, the multiplication of ad hoc judgments about the relative ability of such and such nation to reimburse its debt, which are expressed by IMF officials who are not exempt of national prejudices, have increasingly shadowed the IMF’s treatment of countries who seek funds outside private markets.

These trends have been prejudicial to the larger goal of regulating financial practices. As Shaffer and Waibel argue, these dual processes of judicialization in trade and delegalization in money and finance have threatened the complementarity between the two international organizations that was originally designed in Bretton Woods, thus adding another source of complexity to the current evolution of contractual knowledge.

The degree of fragmentation which has plagued IFIs since the 1970s has no equivalent in the private regulation of financial defaults: as Bruce Carruthers shows, since the Great Depression most states have delegated to three Credit Rating Agencies (CRAs) the task of valuing all kinds of bonds (including sovereign bonds) so as to avoid market failures due to credit crunches and financial panics. As in the field of
private arbitration, the hegemonic reliance on the CRAs’ ratings was a product of the interwar period. This practice made sense during the Great Depression, when markets were unable to compute fair prices, as the situation was one of complete uncertainty. And since the Great Depression – at least until the last Greek sovereign debt crisis –, this oligopoly has proved remarkably consistent: states and regional organizations (like the European Central Bank recently) have incorporated into their regulative frameworks an index based on the credits produced by these three CRAs – Moody’s, Standard and Poor and Fitch –, so as to predict when and how they should avoid exposing themselves to systemic risk. The private production of ratings and their direct incorporation into banking regulations (regarding the limits that public regulators asked banks to respect in terms of risk) continued without addressing many of its challenges (like the fact that it often proved suboptimal, if not to say completely corrupt, as CRAs are essentially asked to rate their clients, who pay for their services), mostly because it fits with the private sector’s strategy to avoid public oversight (Pénet 2014). This trend, although it has posed problems of regulative disempowerment for central banks (Pénet and Mallard 2014), shows that at the meta-organizational level, the three main units have been able to sustain a high level of complementarity, which may be the exception rather than the norm when compared to other regulative fields.

But how was the sustainability of the meta-organizational model achieved for such a long time? Bruce Carruthers shows that the CRAs never limited themselves to their predictive role (e.g. anticipating the risk of default), but that they were constantly associated in diverse activities that bolstered their market centrality: such as in the work of public regulators and contract lawyers. For instance, since the 1970s, when the new markets for derivatives and futures boomed as a result of the uncertainty over the dollar convertibility price, an international association of bankers lobbied to have CRAs’ ratings incorporated into the pricing methods commonly used by banks and legal departments to evaluate the worth of collaterals in the exchange of over-the-counter (OTC) derivatives. Industry representatives produced model contracts, which addressed problems of legal uncertainty due to the cross-border type of exchange23 by asking trading partners to post some value as

23 Here again, because of the global nature of these new markets – which concern big international banks that trade options on the future convertibility prices between currencies –, they are characterized by a high level of uncertainty: often, one firm located in country W will bet
collateral, whose price was dependent upon the CRA’s grades. The jurisdiction over the computation of that price, which is essential to the “collateral knowledge” analyzed by Annelise Riles, has since then been retained by three CRAs that already controlled the predictions upon which public authorities based their regulation of banking practices. 24 This chapter thus highlights the resistance to change when organizations are in a situation of oligopoly. It confirms that a field of practice in which a few dominant organizations agree not to seek complete monopoly but rather, to look for new jurisdictional prerogatives for the field itself – for example for themselves – can prevent change from happening despite systemic shocks (like the 2008 crisis for which CRAs have been blamed).

This story of the standardization of valuing techniques and codification of rules at the meta-organizational level is complemented by the last chapter of our book, in which Susan Block-Lieb and Terence Halliday narrate the little-known history of ex ante codification of contractual law. As they show, the codifying practices of international contract law have moved in the long twentieth century within a complex and changing ecology of international organizations, states and expert groups. Each of these groups mobilized different kinds of resources to claim jurisdictional authority over new terrains of legal work within a more or less globalized market economy. Here again, the League created the first organization (UNIDROIT) largely made up of European professors. After having remained largely dormant until the 1960s, it was awakened by the creation of alternative and competing international organizations, which pushed for contractual law reform as a result of decolonization and the rise of new oil powers – UNCTAD and UNCITRAL (Rajagopal 2003). This competition for jurisdictional hegemony (Abbott 1988) paradoxically resulted in some measure of “autonomization” of the field: UNIDROIT de facto became unsubordinated after WWII, as jurisdictional fights resulted in market segmentation among the main players. Thus, interestingly, the institutions that

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24 As Annelise Riles (2010) showed, the payment of a collateral is often included in contracts, especially one that involves cross-border exchange of values, as such payment mitigates the risk that the contract will not be honored in the future: the payment of a collateral is a way to agree ex ante on the price of the penalty for contractual breach, and to avoid going to court or to an arbiter in case of contractual violation.
were themselves in charge of creating some coherence in the international system (those which claimed authority over either unification or harmonization) have been increasingly competing with one another – but they were able, in a manner that is a bit different from the oligopolistic model followed by CRAs in the market of financial valuation, to agree to a seemingly long-lasting settlement based on market differentiation.

CONCLUSION

This book presents a complex picture of the evolution of the legal landscape of international governance over the long twentieth century; and in so doing it also highlights multiple processes of institutionalization and autonomization of this field that have remained remarkably unnoticed. The chapters of this book look at the many instabilities and incoherences that have existed after 1920 within and across multiple overlapping regimes-in-formation, and the failed attempts at substituting new forms of governance to Britain's weakened global rule over trade and finance. We concentrate on the innovations, experiments or attempted reforms formulated by a wide range of experts, statesmen, industrial cartels and globalized trade unions. Thus, our focus is on the strategies, perceptions and the values of individual agents (not just diplomats and statesmen) as they establish contracts, or help others to contract, across borders, in a world that has been and remains confused and unstable. We examine how social capital has circulated within and between networks of industrialists, policy experts, bankers, international public lawyers and private lobbyists, who all have had an interest in shaping the letter of the law and the boundaries of the legal field. Understanding how the law was envisaged, practiced and fought for in a wide range of international milieus, and explaining how these legal practices evolve over time, is a key ambition of all of the contributors to this volume.

Out of a split landscape, marked by the initial contrast between international public law and English private or commercial law, and their gradual convergence in the interwar period, the overall picture that emerges is one of a gradual process of autonomization and fragmentation, which in many ways complements the vision that international law scholars have of the evolution of this field of practice over the last century. But as we find, master-narratives that put emphasis on
post-1970s fragmentation over the postwar consolidation are too simplistic: they miss, for instance, that in some areas the first signals of fragmentation appeared in fact very soon, during the first years of the League, while in other areas, fragmentation only dates from the early 2000s. Detailed analyses which describe and explain the successful or failed attempts to create order out of this meta-organizational mess add nuance to this vision of a fragmented and opaque world: the evolution of contractual knowledge is sometimes managed and stabilized by the creation of oligopolistic cartels (in the case of contractual valuation techniques), or market differentiation among organizations (in the cases of international arbitration and codification).

On this count, the British and American centuries seem more different than similar, though nothing supports at this point the effect of opposite political designs. What appears significant is the move from the interwar period toward a more fractured political scene, where one nation, even one as strong as the United States, can no longer single-handedly write the law of global markets; even the global liberal West could not maintain dominance once newly-independent nations entered the multilateral organization it had created. The result, after a century of legal experimentation in global markets, is a mass of treaties, bargains, extraterritorial fora, private bodies and transnational normmakers who invest resources, social capital and ingenuity in building up new institutions and new jurisdictions. At last, observing how the legal environment of contractual and institutional practices that facilitated such opening of markets evolved allows us to describe and speculate about the nature of the evolving ontology that is called international private law or, preferably, what we call here the law of international markets – as it also extends to public law matters as well. Beyond these sketches of an early move toward the deformalization of international law, which has been accentuated since 1980, lies a more substantive discussion about legal history that still has traction today: about the exact definition, consistency and impact of the international law of markets that was invented after WWI in a context still dominated by the colonial or imperial mindset, and which still haunts our political reflections about the present-day system of global governance.

References


