Standard Contracts as Gateways to Global Markets

The experience of the London Corn Trade Association (1878-1914)

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Apologies !

1. Introduction: Standard contracts and Adhesion clauses

The standard economic view of contracts assumes that they formalize immediately and transparently "the will of the parties", which in turn is driven by individual optimization and bargaining. In linguistic terms, the signified (the economic bargain) and the signifier (the legally-sanctioned, written contract) are supposed to be always aligned. If for instance an external shock affects the market, like a technological change, the parties would come back to the bargaining table and adjust both sides of their contract without delays or uncertainty.

Black Holes and more generally the experience of Boilerplate or Standard Contracts tell us that the language and the writing of the law is not as flexible and transparent as assumed. A gap may appear between the optimal bargain and the actual contract, or between what the economist observes (or pretend to observe) and what the lawyer reads (or pretend to have written). The law therefore has a formal, linguistic life of its own, even if economic theory records it only negatively: other things equal, delays and discrepancies in the legal transcription of contracts push the market away from equilibrium and impose specific costs on the parties, like litigation costs. The whole problem was well summarized by an old English Circuit Judge, already in the 1920s:

« *With commercial contracts the difficulty (…) is commonly due to two different causes: first, that the traditional form of contract is often old standing, and is ill-adapted to more modern occasions; and, second, is often used in novel circumstances that properly require adaptation or amendment, and these are but ineptly achieved. (…) Even if the difficulty or obscurity of the [traditional forms of commercial contracts] be signally emphasized by some expensive litigation, it is not thereupon abandoned or amended. It remains in use for the provision of further litigation, and to repeat the enrichment of commercial lawyers*. » (MacKinnon 1926, pp. 13-16)

Or read for instance the following comment on insurance policies, also from the 1920s:

"*Lloyd's Marine Policy is an example of the survival of a traditional document with words and phrases which have, in some cases, almost lost their meaning with the passing of time. Yet no one thinks of altering this revered but somewhat incoherent form.(…) some expressions have acquired a technical meaning, and having been the subject of legal interpretation, could only be altered with great care and some risk. Some are, indeed, so lost on the mist of antiquity that their present meaning is subject for conjecture.*" (Dowling, 1929, p. 25).

The discussion on Black Holes tends however to focus on a sub-field concerned with Standard Contracts between sophisticated parties (K). Examples extend from sovereign debt contracts

and the Pari Passu clause, to a large array of contract forms adopted within industrial branches or, quite often, on organized financial or commodity exchanges [ref]. A number of authors have indeed underlined the rigidity observed in the writing of specific standard clauses and the adverse consequences this has on the parties themselves as well as on the market as a whole.

The literature then tends to identify on the one hand Boilerplates clauses with an inertial or path-dependent character that, for most observers, do not respond to any clear rationale. They are anomalies, or indeed Black Holes, both from an economic and a legal perspective. The Pari Passu is here the example of choice, the challenge being to account for their resilience in contractual language: why don't merchants and bankers adopt more efficient clauses? Why are their lawyers unable or unwilling to help them at this point? And for which reasons are judges not as helpful as we could expect?

Yet it is also well accepted that Standard clauses can work as a coordination tool between market participants and contribute as such to market efficiency. They typically reduce transaction costs and legal risks, ease the aggregation of supply and demand, and contribute more generally to market liquidity and to exact pricing [ref]. In fact, these Standard contracts may "establish markets": whether merchants rely on them or not, the conditions of trading are so contrasted that market segmentation emerges. Typically, a standardized and more liquid market tier will differentiate from a less liquid one where bespoke contracting will dominate. The crux of the matter is that these "Market Establishing Standard Contracts" have de facto a dual quality: they are altogether about voluntary transactions between individual parties and about coordination rules between all market participants. Quite often this difference is not entirely clear ex ante, when reading a given contract: a prima facie voluntary clause may have become utterly resistant to change, so that it covers up a large and deep Black Hole.

There is however a wholly different class of "Market-Establishing Standard Contracts" that explicitly differentiates between these two dimensions. They first present Voluntary clauses that deal with the specifics of each transaction, like the volume and the price of wheat that is exchanged. Then come a typically longer list of clauses on which the individual traders have clearly no direct say and which provide a series of guideposts and contingent clauses that should structure and secure the execution of each transaction. Hence, these are Adhesion clauses.

Standard Contracts that *explicitly conjoin Voluntary and Adhesion clauses* offer a promising entry into the discussion on standardization in general and Black Holes in particular, for one very simple reason: they offer an easy empirical entry into the key questions being discussed here. Who writes and amends them? How are disputes over the interpretation of clauses resolved? And who brings the contract forms to the printer's office, round the corner?

The global commodity markets between the 1870s and World War I offer remarkable examples of dual Standard Contracts coordinated thousands of exporters, intermediaries and buyers from tens of jurisdictions across the world. These contracts were typically drafted, amended and printed to merchants by fully incorporated, non-profit, London-based private associations. The London Corn Trade Association (LCTA) is one of the most representative of these associations, together with the London Cotton Association. Many authors who later discussed Standard contracts in international trade actually started with a reference to the LCTA and its classic two-pages Contract forms (London Corn Trade Association 1896 & 1913, Schwob 1928, Schmitthoff 1968).

As most of its sister associations the LCTA did in fact three main things: it drafted and amended tens of Standard contracts that could be handled and transferred easily, including by banks; it also produced or adopted quality standards for all sorts of grains; and it arbitrated the many disputes that arose between exporters and importers about the actual quality of individual shipments. Coming after the Voluntary clauses, the Adhesion clauses thus included the commitment to arbitrate disputes at the Association, but also a set of ad hoc rules of civil procedure, with an appellate procedure included.

These Standard Corn Contracts also worked under English law and were confirmed by English Courts, even though they were very often adopted for transactions between third countries. In this thoroughly Westphalian age, governing the global market through Standard Contracts proved a most efficient strategy to alleviate the many dilemmas that arose from Conflicts of Laws. But the LCTA also formally articulated its Sale Contracts to other privately drafted Standard Contracts, respectively for maritime insurance, shipping and trade finance. They all thus worked as a cluster, or as a chain of contracts that structured the successive operations of international trade and reduced considerably transaction costs and legal uncertainty.

Critically, from the 1870s onwards, the short-term commercial bills that financed international commodity trade, including corn trade, were typically endorsed, or “accepted”, by large, high-reputation Merchant banks that gave their guarantee of ultimate payment (against a commission). These accepted commercial bills could then be discounted with great ease and in great volumes, so that they formed the very basis of the London money market, by far the most liquid in the world. As things stood in those days, a tangible part of these bills were then bought or re-discounted by the Bank of England, as a counterparty to its own issuance of Pound Sterling. A mere agricultural produce had thus been transformed into a global commodity fit for trade, but in turn the underlying commercial contracts were transformed into a highly liquid financial asset at the core of the dominant financial place of those time.

One last nice thing with the London Corn Trade Association is that it left thousands of pages of carefully written, though largely un-explored minutes.[1] They tell us in great details how it regulated the global corn market, week after week, for decades. We can thus read how changes in contractual clauses were discussed and decided, but we also find, pasted into the minute books, many letters that present the reactions, the proposals and also the complaints of private merchants and foreign market organizations, in Continental Europe or in distant exporting countries.

This contribution analyses how the LCTA governed the global corn market trough "Market Establishing Standard Contracts" that explicitly conjoined Voluntary and Adhesion Clauses. In particular the later offered two key benefits that set these contracts very far away from the private, bilateral conception inherited from Classical legal thought. They first included a set of rules that safeguarded the execution of private transactions, in particular rules of procedure for arbitration; and on this basis, these Contracts encapsulated a series of arrangements with foreign market authorities and with service providers in London. As a result, the LCTA Standard Contracts could be used as largely self-regulated, transnational legal vehicles that allowed private merchants to trade safely across jurisdictions while keeping the benefit of a set of vertically integrated service contracts.

The next Section of this paper discuss in more detail the literature on Standard Contracts, market governance and private ordering so as to identify exactly where the discussion on the Corn trade fits. Section 3 then presents the internal structure of the LCTA and its decision-making procedures, specifically with regard to Standard Contract forms. Section 4 is about the ways through which the Association interacted with its constuency and the limits of its self-perception as "the voice of the trade". The following sections 5 and 6 are about the construction and the politics of its Standards Contracts, vis-à-vis foreign market authorities, primarily in exporting countries, and vis-à-vis related profession (shipping, insurance and finance). Section 7 turns back to the LCTA contract as such and to the efforts of this Association to protect the integrity and binding power of its own private legal order. Section 8 will be a conclusion.

2. Contract Standardization and the Construction of Transnational Markets

The discussion on standard contracts has a long history that goes back to the heydays of the Realist revolution when they were seen as an illustration of the broader evolution towards a less individualistic and less competitive economic model (Pound 1909, Isaacs 1917). During the

[1] The LCTA archives are now kept at the London Metropolitan Archives ; the archives related to the Corn Exchanges, especially those of the Baltic Exchange, are still at the Guildhall.

interwar years these themes would often come with a strong corporatist accent, in authoritarian and fascist regimes but also in the US, where vertical trade associations developed on a large scale from the 1920s till the New Deal years. They typically defended "fair rules of competition", collective agreements with labor, arbitration and contract standardization – all this preferably with some kind of government endorsement (Jaffe 1937, Himmelberg 1976, Brand 1988). Quite soon after the failure of the National Recovery Administration (1934-1935), which is often seen as the epitome of American corporatism, a distinctly liberal critic of contract standardization emerged: in practice, it was argued, big business controls the Trade organizations, hence the drafting of standard contracts, the market and the profits. Down this line, we find a long series of contributions, starting with Kessler (1943) and Kronstein (1943), and including Rakoff (1983), Korobin (2003) and Ben-Shahar and White (2007) that focuses on asymmetric relations between the parties: big firms versus small ones, or business versus consumers.

The alternate route is to look at contract standardization between sophisticated parties, which relation is considered as *prima facie* more equal. The will of the parties, hence economic optimizing, may then soon come back into the discussion: if power relationships are muted, market forces should work better and contracts should be more efficient while preserving the benefits of standardization. A long series of argument have thus explored why indeed markets may function better with standardization. Most of them deal with economies of learning and network externalities (Kahan and Klausner 1997) and very often underline the link between contract standardization and the perceived risks of legal uncertainty when clauses are changed (Ben-Shahar and Pottow 2006); from here a concern may soon emerge for market liquidity and exact pricing (Allen and Gale 1994, Choi and Gulati 2004). However, competitive pressure on contract drafting may not always prove effective so that Black Holes may appear and remain entrenched. Sub-optimal standard clauses that should be shelved or amended keep being written into the contracts and keep causing harm, both to the parties and possibly to the economy as a whole (Boardman 2007). The Pari Passu clause has become here the reference of choice (Choi and Gulati 2004, Gulati and Scott 2013).

The return to legal individualism may thus give the sense that here lies an enigma: how can one account for the dynamics of a market structure where both the rules and the actual transactions would derive directly from the same source – the will of the parties? If a standard contract is instrumental in coordinating supply and demand, the merchants who amend a clause will in fact drop out of the market and lose all the benefits of high liquidity and exact pricing. In other words, rather than collecting the profits of innovation and "carrying the market", the prime mover may soon become a second-tier merchant, perhaps even a pariah.

General Equilibrium theory raises its own version of the problem as it tries to account for the collective binding force of markets while remaining anchored in fully individualistic premises. While the mathematical model is logically consistent and powerful, dynamically it rests on a two-way indeterminacy, or indeed a Black Hole. On the one hand, a market can clear and post prices only if agents are already busy at work, calculating and bargaining. But on the other one, in order to bargain and contract with reasonable efficiency, the very same agents need an already-functioning market that provides them with prices reflecting aggregate supply and demand; a shared currency and some units of measures for the volumes and weights of grains may also be welcome.

In economic theory the answer to this logical indeterminacy is both well known and perfectly ad hoc: it is the Walrassian auctioneer, or a third-party, or a market authority. In other words, a structure of governance that enunciates, formalizes, amends and enforces collective rules. How this structure emerges and how it acts in practice are questions that just don't have a generic answer. *Prima facie*, we don't know. This is where we often meet the concept of private ordering that, somewhat paradoxically, re-emerges more or less where previous generations used to speak the language of corporatism. During the Interwar years, the governance of international commodity markets was customarily described as corporatist, while today we would rather see it as a nice example of a private order.

There is indeed a large overlap in the literature on market governance and on private ordering, one that allows to identify different broad generic cases, especially as regard the relationship to state authority and state law. A common, though often exotic case is the privately-governed, self-sustained market. We find here illegal markets or the example of the Maghribi Traders (Greif, KK) whose theoretical attraction derives in particular from its entirely non-State character; Clay (1997) propose a broadly similar case and Ellickson (1994) is another obvious classic in this line. The New York diamonds market as studied by Bernstein (1992) and Richman (2004) is close, although it is partly governed by formal organizations and banks de facto recognize its rules and decisions, while being themselves subjected to public regulations. The Tokyo Tuna market (Feldman 2006) takes us one step further: its daily operations are de facto in private (corporatist) hands, although it was established by the government and kept being nominally under government oversight. In other words, in this later case we enter the broad range of cases where private ordering comes with a measure of public confirmation and delegated authority, henceforth with the expectation that some mutual adjustment and monitoring may also be at stake. Think about the large body of research on financial regulation for instance.

A difficulty arises however from the literature on markets and private ordering because of the tendency to associate this later model of governance with reputation-based enforcement, a

population of repeat-players merchants and the implied preference for a low level of legal formalization (Richman 2004, 2012). Sanctions being based on social exclusion, as opposed to trials in public courts, norms would remain rather implicit, yet well-known from insiders. The alternate route at this point is probably to shift from the formal/informal discussion to a perspective that insists rather on the plural character of legal orders and the many ways in which they may mutually adjust or compete one against the other. Insisting on the degree of uncertainty and fluidity in legal relations may then help accounting for the varieties of strategies that actors can adopt, hence on their ingenuity and on their capacity to experiment. This approach is often particularly relevant when considering the international or transnational context (Teubner 2010, Berman 2012).

This is where the experience of the London Corn Trade Association comes in. On the one hand, it issued and continuously amended tens of Standard Contracts that visibly conjoined Voluntary and Adhesion clauses: merchants could not miss the difference. In particular, the latter type of clauses included rules of civil procedure for arbitration that were both unbundled and standardized (Dodge 2011). This formal structure of governance thus allowed the Association to avoid contractual Black Holes at least with regard to the Voluntary Clauses, so that it resolved in practice the old problems left over by the enigmatic Walrassian auctioneer. At that point, the Association's Standard Contracts worked indeed "as Statute" and included a legitimate, in-house interpreter of legislative character (Choi and Gulati 2007, Teubner 2010).

On the other hand, the Adhesion Clauses in the Standard Contracts of the LCTA illustrate a more diverse and ultimately richer model of interaction between largely self-regulated legal orders than what the literature generally observes. The LCTA first coordinated thousands of parties from tens of countries and jurisdiction across the world (sovereign and colonial). This worked i.a. through settled relations with private market authorities in the said countries or in its seaports. If only because its own contracts were subjected to English law, this implies that the Association had de facto a doctrine of Conflict of laws. But the LCTA Contracts also formalized the vertical integration of the Sale contract per se with (English law) Standard Contracts for maritime transport, insurance and trade finance. This coordination derived from formal, on-going, largely documented negotiations with other trade association.

This suggests that the LCTA worked not only as a rather consistent and well-governed norm-making private order, one that was strong enough to avoid internal Black Holes. It also coordinated privately with other trade-based legal orders so that the global corn trade was in fact governed by as a cluster of Standard Contracts: the LTCA articulated them together so as to deliver legal predictability and market efficiency to its own constituency. Hence, at this point, we clearly remain outside the Coasean firm, although the Adhesion clauses that the Trade

Association had negotiated clearly constrained the contractual discretion of market agents. They could always opt out, but the costs in terms of pricing, safety and liquidity would very high.

Borrowing from Ronald Gilson's famous phrase, the LCTA was a "Transaction Cost Engineer", though it did not work at the micro-level, by mediating between private parties and helping them reaching a valuable deal (Gilson 1984, Bernstein 1995). Indeed, the Voluntary clauses are not being used at this point, only Adhesion clauses are. But in turn, Adhesion clauses did not only coordinate sellers and buyers within a single market. They were used as practical tools to build and secure legal pathways through jurisdictions and markets that helped considerably merchants when transferring commodities and payments. Said differently, the LCTA Market Establishing Contracts offered legal fast-tracks, or gateways to international transactions across a long succession of jurisdictions and transactions. And with the large-scale adhesion of merchants from across the world, these international routes became indeed the only way to access the global market and its many benefits – legal safety, exact pricing, and liquidity.

What had first looked like an obscure and busy, hands-on, weekly *bricolage* by a few market insiders in London had become in fact a privately-run contractual highway. The remarkable thing indeed is that this work of legal engineering was entirely based in private contractual language and by and large enforced by the Association itself, with limited *direct* support from public (British) authorities. Market power was enough, but it worked only because it had been formalized and leveraged by the Association itself: it both established the market and extracted from its very success a unique capacity to own impose its own rules on merchants.

Black Holes however have not disappeared entirely from this re-engineered global market. The point is that Black Holes did not form in the interstices of Voluntary Clauses: the various Committees and the Arbitration procedure of the Association would have take care of them. As we will see, Black Holes emerged from coordination failures located in the Adhesion clauses of the Standard Contracts, primarily those that formalized the various plug-ins that the Association had negotiated with its institutional partners in London and abroad. This is where conflicts between vested interest and problems of collective action had to be addressed and where settlements became crystallized.

3. The London Corn Trade Association

The governance of the Association.

The LTCA was founded in 1878, at the time when the international grain trade was taking off as a truly global market, this being the consequence altogether of the rapid growth of demand in

Europe, the entry into the market of new producing regions like South Russia or Argentina, and a steep fall in transport costs (railways in exporting countries, steamer ships) (Broomhall and Hubback 1930, O'Rourke 1997). Beyond the representation of the profession' interests, the primary mandate of the new association was to issue Standard contracts (Chattaway 1907, Barker 1920, Barty-King 1978). From there followed dispute resolution and the production and grain standards. On the other hand, the Association did not manage the London corn exchanges so that being a member of the Association was not a precondition for trading in London (Fuchs 1890, Rees 1972).

It was however only after the mid-1880s, when the LCTA had been incorporated as a Limited Company, that its Contract forms became widely accepted, including by Continental merchant houses. In 1904 for instance the Amsterdam grain trade organization asked if it could sell directly from its offices the LCTA's contracts. But the London Association also issued Contract forms using metric units of measure, which were translated and printed in German, so that Hamburg and Bremen merchants could more easily use them. Still, arbitration had to take place at the LCTA, in London, on the basis of the English version of these contracts. [2] The major foreign houses also became members of the Association and regularly contributed to its deliberations, either via their own representative in London, like Dreyfus Frères, or by way of correspondence with "The Elders of the Corn Trade in Berlin », or the Hamburg Börse. A large part of it is actually pasted into the Minute books of the Association, together with the often careful answer they received. Of course, asymmetric power relations are often visible, if only in the different ways the English answered to the Germans and the Russians. Raw attempts at arm-twisting institutional partners can be observed regularly though the overall rule was to keep discussing and to reach some kind of settlement when tensions arose. The very mandate of the Association was actually to make trade easier.

The Association remained governed ultimately by a limited number of London merchant houses: the membership lists of its main governing committees reveal a strong pattern of cooptation within a rather close circle of 20-25 merchants. A well-informed German observer thus underlined both its success and its decidedly "oligopolistic" character (Fuchs, 1890). The formal structure of governance of the Association hinged first on an annual General Assembly that elected an Executive Committee of 20, then 25 members, which met about every two weeks: it interacted with other large institutions in the United Kingdom and abroad, adopted and amended contracts and decided, for instance, on the exclusion of delinquent traders who had not respected an arbitration award The Chairman of the Association and the Executive Committee

[2] Exec. Committee, Minutes, 13 december 1904 and 8 may 1906.

was elected every year and was re-eligible once, at which point he proposed his own successor. Beyond, the work of the Association was organized along two main lines of Committees.

The authority of Committees

First were some 8 to 10 Geographic committees, like the Black Sea & Danube Committee or the East Indian one. Their six to eight members had directly their fingers on the proverbial "pulse of the market": they received information on how the growing season progressed in the various producing regions; they were in direct relation with the like of the Odessa Bourse or the Bolsa de Comercio de Rosario, Argentina; and they had an on-going correspondence with merchants who complained over the amount of dirt in a given shipment, who reported on a new machine for mixing grains that had been adopted in Antwerp or suggested that the Committee starts making a standard for Manchurian peas.

The main job of these Committees was actually to prepare Grain Standards or to receive and adopt Standards sent from abroad (Hubback 1911). By 1914, in the Argentine case, there were four Standard Contracts and more than 20 Quality Standards of grains; and for the main types of grain, six or eight successive Standards could be adopted each year, as the season progressed. On the other hand, when the volume of trade in a given grain was too small, the Committees used to keep individual samples, taken from single shipments. Members and arbiters could then come and consult them in the Association's rooms, when needed. Hence, the counterpart to the certification work that produced the globally traded commodities was the keeping of a huge "library", or material database of grains, most probably the largest in the world. [quote numbers].

Arbitration on the quality of grain shipments was not the job of Geographic Committees, although their members ended up doing a lot of it, just because of their superior market knowledge. First instance arbitration was most common and was often organized directly in the port: thousands of them took place each year, which left little traces in the archives of the Association, probably because they often looked more like settlements than judgments (Fuchs 1890, Chattaway 1907, Barker 1920). The rule was that each party chose an arbiter and the two of them, if they could not agree, would select a third one who, in practice, made the decision; hence he was an Umpire. Arbiters were shippers, grain merchants, brokers or millers – but not lawyers.[3] Dispute were indeed about points of facts, rarely about points of law. An appeal could be lodged with the Arbitration Appeal Committee, where all the big names of the Association,

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[3] In The Association's Counsel was once asked whether in law the choice of the arbiters raised problems of qualification. After conceding that the question was "*of some nicety*", he provide a self-fulfilling answer: "*as if he devotes his time to the affairs of the Corn Trade and professes to be engaged in that trade, as a Merchant, Miller, Factor or Broker, and is also a member of Association, he considered that he comes with the strick letter of the Rule »*. (Exec Comm, Minutes, 27 january 1903).

including former Chairmen, used to sit. After a substantial sum of KK£ had been paid, an Appeal Court of five members was formed, which could overturn the initial decision by a majority of four.[4]. The parties could then proceed to an official English court, but again this was a very rare occurrence.

There is however a palpable sense that these Appellate Courts were perceived less as an alternate or broader source of expertise, than as a representative of the whole trade, who talked with all its incorporated social authority – i.a. in order to deter the parties to move their case to a court. [1906 reform]. In 1909 for instance, a German merchant who had challenged an appellate award was interviewed by the whole Executive Committee, at a rare special meeting, after which a former Chairman of the Association sternly concluded that « *the conduct of Mrs Jungheim Hopkins being in the opinion of the Committee derogatory to their conduct as men of business and otherwise injurious to the interests of the Association [he should be] expelled from the Association*. »[5]

After the Grains Standards and arbitration, the drafting and revision of Contract forms was the third main activity of the London Association, one on which it also invested of lot of time and legitimacy. 48 contract forms had already been adopted by 1896 and more than 60 on the eve of World War I. Things started typically with the Executive Committee inviting publicly contributions in the profession's news publications. Individual traders, including members of the Association' committees, Continental merchants or foreign market authorities used to send proposals for amending specific clauses in specific Contract form. The geographic Committees were the first to consider the contributions and report on them, although they were not the stronger voice: the main discussions and the final decisions took place at the Executive Committee, seconded by a so-called "Sub-Committee" which worked as a kind of clearing house. One member of the Executive Committee used to coordinate the whole work and, as an exception to the rule, he would receive a lump-sum remuneration when the whole process was completed. The amendments were then published in the profession's newspapers, in London and abroad.[6] Paper slips would also be pasted into the contract forms, unless a wholly new form was printed.

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[4] The Association insisted however that the awards were his own and not those of Appellate Courts. Jurisdiction derived from having signed an LTCA contract form : the Association did not accept to arbitrate other disputes (Exec. Comm., Minutes, 30 july 1907)

[5] Exec. Comm., Minutes, 21 january 1909.

[6] *The Argus*, from Melbourne, thus informed its readers on 12 february 1912 (page 8), that "*The London Corn trade Association have given notice that from March 1 maritime insurance policies tenderable under contracts must cover risks of strikes, riots, and civil commotions, which the Lloyd's standard policies exclude. It is understood that underwriters will accept these risks at a minimum premium of 1 per cent*."

Enforcement, in turn, rested on the threat of exclusion and on the enormous market power that the LCTA and the London exchanges could leverage: the LCTA contract forms were the key that gave easy and cheap access to shipping and insurance services as to trade finance. The very purpose of these contract forms was indeed, from the onset, to make this articulation more effective. Bespoke contracts could certainly be drafted and signed in London and the parties could also deal through Hamburg, Antwerp or Le Havre, but these were second tier markets. On the other hand, and already said, issues of reputation did not play a big role in this large, widely open market. This was indeed a thoroughly rule-based order, albeit a private one and not an exceptionally complex one for that matter. Still market power had to be formalized in explicit rules in order for its sanction to be exercised by a settled authority.

4. 'The voice of the trade'

Rhetorically the London Corn Trade Association saw itself, and it clearly wanted to be seen as the expression of the interests and demands of "the trade". This was most clear when the Association entered a revision cycle and invited contributions. But even outside the revision cycles, the minutes of the various committees attest to its keen attention to receive the demands and grievances of individual merchants, or organization, and to offer answer.

In its own perception it seems that the true check on the discretion of the Association did not derive so much from broad membership and from rules of representation, but rather from these on-going exchanges with merchants and, ultimately, on their continuing willingness to use its contract forms. From a discursive standpoint at least, "the market" or "the trade" are much more powerful references than the members of the Association, not to speak of their Annual Assembly. Remarkably, this principle could also justify a relatively open policy vis-à-vis foreigners, especially Continental merchants, "the trade" being de facto perceived as global and not just English. This was the message conveyed by the Chairman at the 1907 General Assembly to his (sometimes insular) constituency:

« … in view of the revision of contracts in the Autumn, I think it only wise to point out to UK friends that if we are going to be too rigidly insular, and there is not little give and take in regard to contract conditions, I am afraid that (…) a larger share of the grain trade will go to Continent (…) I have held very strongly that we ought not to be merely an Association for making money. We must,

of course, protect the interests of the Members, but we ought to make the basis of our Association the benefit of the trade as a whole ».[7]

Contrary to what a Common law approach to rule-making may have suggested, being the voice of the trade, rather than its shepherd, did not come with a strong reliance on precedents as a source for adjusting bottom-up Standard Contracts. The primary reason, again, was that disputes were typically about the quality of grains and very rarely about points of law. When a legal question arose in the writing of a Contract, and unless there was a matter of urgency, the Executive Committee would record it and postpone amendments to the next revision cycle.

The Association refused more generally to give interpretations of its contracts. The Minutes of the Executive Committee for December 1904 thus reports for instance that "*A letter was read from Mr Jacques Meyer of Düsseldorf asking the meaning of certain clauses in our contract forms. The Secretary was instructed to reply it is not within the province of the Committee to reply to such questions; suggesting that he should apply to somebody in the trade for the information he required*."[8] As remarkable as the refusal to comment is, here, the explicit assumption that "the trade" knows the rules and can be safely relied upon to provide the needed information.

The implicit assumption was that the conditions and the practicalities of international trade were best perceived by traders, who would then help the Association formalizing and easing them. The Association was thus an interpreter, preferably one without any explicit project or any formal imagination. In a classic "à la Lord Mansfield" way, the LCTA thus presented itself as a voice that made the immanent rules of the market understandable to lay people, to foreigners, or to traders caught inadvertently in a dispute. A judicial authority then enforced these rules by way of arbitration, while interpretation rested in a legislative process. Beyond, this position never went as far as implying that some kind of informal rules or customs applied in parallel with those of the Association: there is no suggestion of a duality or substitutability between two parallel legal discourses.

There is actually no documented occasion when the Association launched a Standard contract or amended a given clause and did not "carry the market"; but the disruptive potential of changes in Boilerplate clauses was well perceived. After a change had been introduced in the insurance clause, for example, the Chairman admitted publicly at the 1906 General Assembly that there had been « *a little misapprehension* » among merchants, which was however undue as there was no « *arbitrary introduction of fresh matters in the policies; it is imply the collection into one*

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[7] General Annual Meeting, Report, 2 may 1906.
[8] Exec. Comm. , 13 december 1904. The same position is expressed in almost similar terms in Exec. Comm. 3 january, 7 march 1905, 12 march 1907 ; Argentine, American and Australian Committee, 19 december 1912

concrete clause, of all conditions that have hitherto been scattered over the entire policies »[9]. In another example a merchant sent to the Association a copy of a Bill of Lading (ie a maritime transport contract) "*which included an unusual deviation clause* ». The UK Chamber of Shipping was immediately contacted and it soon answered that it had made an inquiry and that the ship owner would immediately correct the said clause.[10]

An even more significant illustration of the practical and discursive priority given for a market-based, bottom-up validation arose from the suggestion raised in 1909 at the Executive Committee that as many clauses as possible should be unified across all the Association's Contracts. This proposal, which could have been seen as a reasonable step in a process of standardization and simplification implied that the legislative authority of the Association would become more centralized. But it was eventually rejected and never discussed again, the Chairman having concluded that « *to build up new forms was very dangerous and not desirable* ».[11]

This conclusion resulted however from an extended discussion that brought to light the very limits of the Association's implicit pretense of being the benevolent interpreter of immanent market rules. The actual issue in the present discussion was the wording of a clause stipulating that the quality of Argentine grains in individual shipments should be appraised following the so-called *faq rule*, or: "*Fair average quality of the seasons shipments at time and place of shipment ».* Literally, once a grain standard has been adopted, it is the benchmark for appraising specific deliveries from the same place and for the time being, first of all by arbiters. Yet, in an attempt to unify clauses across Standard Contracts, the revision committee had suggested that the Argentine contracts adopt the "*about faq rule*", which implied more flexibility, therefore less constraints on exporters and shippers. This triggered strong reactions, mostly by London-based buyers and millers, who anticipated an adverse distributive impact on them.[12]

Rigidity, hence Black Holes in the drafting of the LCTA Standard Contracts, might thus derive from conflicts of interests between different stakeholders, which were crystallized at a point in time in the wording of a given clauses. Re-opening such discussions may indeed prove "*dangerous and not desirable* » for the Association. This pattern would explain, in turn, why the London Association kept printing so many Contracts. At least this was suggested at a British-Russian conference held in February 1910, when the Head of the Russian delegation underlined that « *in commerce our idea should be the unification of processes in buying and selling. We*

[9] General Annual Meeting, Report, 29 may 1906.
[10] Exec. Comm. Minutes, 15 january and 19 february 1907.
[11] Exec. Com., Minutes, 9 february 1909. See also, the East Indian Committee, rejecting that changes in contracts could be introduced « *merely for the sake of a visionary uniformity* »[date to be added].
[12] Exec. Com., Minutes, january to march 1909.

experience considerable difficulty in dealing with England, where you have some 16 different contracts, but on the Continent you only have some three or four. I think our idea should be to strive to have one contract for a country ».[13]

5. The politics of a transnational contract form

Qualities of grains.

The dispute over the *faq rule* illustrates indeed a pattern of conflicts and bargains that underlies a great part the politics that under lied global contract drafting. Deciding how the quality of individual shipments would be assessed and dispute resolved proved one of the hardest bones of contention within "the trade". Three methods were in use, which all raised their own problems. The oldest and simplest one was to buy on the basis of a representative sample of an already-shipped and already-arrived grain: the buyer bought the grain he had in his own hands. Risks of disputes were limited but trade operations took longer and were difficult to finance.

Then came the *faq* option which asked that the buyer contracts on the basis of a Standard of quality which, as said, was made up regularly by the LCTA Geographic Committees or by a local market authority – the Bolsa of Buenos Aires or the Grain Exchange of Montreal. The possibility of substantial discrepancies was thus quite large – the Buyer bought grains he would not see before several weeks, so there was a lot of arbitration. Two further problems keep coming up in the minutes as in the letters the Committees received from traders and from foreign market institutions. First, the exporter only knew how much he would earn by the end of the transaction cycle. Then, the exporting countries resented the power of the London Association to certify their own production. In particular, the Russians exporters and the St Petersburg government would fight for years in order to impose their home-made grain Standards as the only reference in the Contracts. But the LCTA only thanks them for the standard samples it regularly received by boat and rejected entirely taking them in consideration. Eventually, and under growing pressure, it convened a Europe-wide conference in order to build a large coalition of grain importers: nobody indeed was ready to enter contracts based on Russian made Standards. [quote]

The third option was to rely on official certificates delivered by quasi-public regulators like the Montreal or the Chicago Board of Trade, or the Chamber of Commerce of Cape Town or Perth. While this option worked often well and became generalized over time, it also asked for a much

[13] LCTA, Conference between Russian Delegates and British Delegates. 15-17 february 1910.

higher degree of mutual recognition between institutions - call it trust. This was at the core of another enduring show of force with the Americans, with the Europeans rejecting the various, regional certification agencies which they considered as utterly biased towards the interests of the local grain growers and the exporters. This conflict was settled only after the Roosevelt Administration imposed national grain certificates, enforced by officials from the Departure of Agriculture (Hoffman and Hill 1976, Pirrong 1995). But at that time, the London Association, and the whole European profession that it had again coordinated, just had to accept the American conditions, across the board. *> American Rye Terms ?*

***Conflicts of laws and usances*.**

Together with problem of grain certification, Standard contracts also formalized a lot of minute settlements of a more legal character that aimed generally at mitigating the tensions and discontinuities between the rules and customs applied respectively in London and in the exporting countries or seaports. In other words, these were about problems of conflict of laws in a broad acceptation that extends to both official and customary laws.

At least till the end of the nineteenth century, international merchants and shippers had to know in details the so-called *usances* that were applied in the ports were they traded. These customs used to belong to the old Law Merchant that regulated trade across late medieval and early modern Europe. Since the seventeenth century, handbooks for merchants used to summarize plenty of such customary rules: which units of measures for weights and volumes apply in Alexandria, Cadix or Bergen? Can Exchange letters be drawn from these ports on Amsterdam or Copenhagen, and in which currency? Who carries the responsibility if goods are badly handled when loaded on the boats, or when kept in the docks? Along a similar line, late nineteenth grain traders also had questions about local norm systems: which contractual documents mark the actual transfer of ownership on goods in Bombay or Montreal? How many days does it take to load a given volume of grain respectively on a sailing ship or a steamer in Rosario or Perth? And if a strike breaks out and the ship has to wait several weeks, does the *force majeure* clause apply?[14]

Drafting Standard Contracts implied therefore a complex process of discovery that started typically with taking stock of the experience accumulated by the London merchants who knew well the respective exporting country and its *usances*. In practice, the larger or the best-established merchants in London market would be directly co-opted into the drafting

[14] Sonndorfer (1882) is a fine example of a world-wide collection of *usances* regarding units of accounts (weight and volume), standard brokering premium or rules for appraising the quality of grain shipments. See also Lefèvre (1882). Spalding (1925) offers similar information regarding Exchange Letters in different countries and continents, but see also *Universal Commerce* (1818) for a very similar though much earlier publication.

Commission. Afterwards, and just as in the case of contract revisions, the London Association de facto entered informal and asymmetric negotiations with local market authorities – Exchanges, Chambers of Commerce, etc.

This negotiation unfold through a mix of bargaining, open pressure and mutual adjustment, that lead eventually to a partial substitution of the *usances* by explicit or implied rules, that were written in the Standard contracts [REF]. The point, for sure, was not to impose as far as possible the rules followed for instance in the Port of London. The Association largely recognized the local trading customs and it conceded often when a Chamber of Commerce argued that it has long been accepted practice to take option B rather A, on this or that problem.[15] We thus find clauses in many Contract forms stating "Vessel to discharge afloat according to the custom of the Port".[16] But on other occasions the London association could be quite blunt, as for instance when strikes became quite common across countries after 1905: from Russia to Argentina, it successfully imposed a "Strike Clause" that put most of the costs on the Exporters or the Shippers. In particular, the principle similar to *force majeure*, that would have implied a de jure suspension of the problem, was entirely rejected.[17]

6. Coordination between Markets and Standard Contracts.

The Contract-based legal order that the London Corn Trade Association has established did not only settle the relation between global market and local systems of norms and *usances*, with the London courts offering their distant and benevolent protection. A key feature of the LCTA Sale Contract was also to articulate together a series of English-law contracts which had all been subjected to a similar process of standardization by private, London-based professional organizations (Tongeman 1947). The Bill of Lading (maritime transport contract), the Maritime Insurance policy, and the Invoice, worked therefore as a cluster or a package of Standard contracts that made easier the integration of all the successive steps and operations of international transactions (Thorpe 1924).

This package of contracts supported in practice the early adoption by the LCTA of the so-called *Cost, Insurance and Freight* model of contracting: all costs incurred until the grain was delivered to the buyer were entirely taken by the Seller and included in the price initially agreed (Schwob

[15] See a deliberation of the on the inclusion of a customary rule within the Baltic Oat Contract (Executive Committee, Minutes of 1st november 1904).

[16] La Plata Parcels, 1896, n° 17.

[17] In June 1906, for instance the Executive Committee received for answer a telegram from the Port of Nikolaieff, South Russia, saying « *The Committee of the Exchange recognises 'force majeure' as applying to loading not being completed in time* ». After what « *The Secretary was instructed to thank them for their communication, notifying them that 'force majeure' is not recognised by the Association* » (Exec. Committee, Minutes, 12 june 1906).

1928, Thayer 1940, Rothstein 1983). A CIF contract, like most LCTA contract forms, thus articulates three key contracts which structure and safeguard the transfer of the grains and the reverse payment flow

Bills of Lading are the usual contract form for maritime freight services. They typically present three aspects: they are a transport contract, they are proof that the ship's captain has received the goods (hence that they have been loaded on the ship), and they formalize the transfer of property on the goods to the Buyer (yet they do not transfer the property to the ship captain) (Tongeman, 1947). Bills of Lading, whose legal history goes back to the Middle Ages, have traditionally presented large variations across countries, ports, types of ship, goods, etc. A lot of *usances* norms typically ended up into Bills of Lading. During the later decades of the nineteenth century the expansion of transport by railways (down to the quays) and steamer ships exercised considerable pressure on this family of contracts, or « *a kind of Darwinian process of development* », as the Chairman noted at the 1902 General Assembly.[18] The LCTA which made formal references to these Bills in all its Standard Contracts, was thus in almost continuous discussion with the UK Chamber of Shipping, so as to secure this articulation, which thus presented a clear legal character.[19] These negotiations only converged however on a series of regional Bills of Lading, says for Australia, the Danube Berth, etc. For the North Atlantic trade no Standard Contract at all was adopted, so that each Shipper kept using his own contract forms.

The resistance of Bills of Lading to standardization thus became a factor in the continuing large number of Contract forms that the LCTA printed. Coordination between Standard Contracts was undoubtedly a powerful legal innovation, but it also implied that the whole structure could be weighed down by the difficulties encountered by each profession when standardizing its own constituent contract forms. This can be indeed the source of contractual Black Holes.

Insurance policies are also well-known contracts that accept large variations in their degree of standardization vs. bespoke approach. The Lloyd's had of course been the key London institution where they were drafted and negotiated. The main interlocutor of the LCTA here was however the Institute of Underwriters (Hewer, 1984) with which it was also in regular discussion (Thorpe 1924, Copeman, 1947). Negotiations could go on for months so as to settle minute details in the Association's contracts which, in turn, might have large potential distributive effects between the different parties in the grain trade. In 1901 for instance, the two organizations had lengthy discussions on the implication of the adoption of elevators in order to

[18] Annual General Assembly, Report of the Chairman, 13 may 1902.

[19] A Sub Committee in charge of coordinating the revision of Contracts noted for instance in 1902 that: « *it is very advisable that the Bills of Lading to be issued shall be in conformity with the Contracts forms issued by this Association and in harmony with the established custom of the Trade* ». (Exec. Comm., Minutes, 11 march 1902).

on-load and down-load grain in bulk. In 1906, an ad hoc Committee on 'Rules for Policies of Insurance' within the LCTA drafted a standard Average Clause (i.e. about the evaluation and sharing of losses after a sea accident). This clause was then sent to the Institute of Underwriters and the Lloyd's for discussion and, later, for inclusion into the policies they wrote for grain merchants; in turn, due reference would be made in the LCTA Standard Contracts to these fitted Insurance Policies.[20]

Trade finance, lastly, was of course strategic: very few merchants had the working capital needed to finance the huge contracts typically in practice in international commodity trade. It was also mentioned above that the demands of the banking community had been a significant factor in the creation, in the late 1870s, of a trade organization primarily in charge of writing Standard Sale Contracts. That being said, the banks do not show up often in the LTCA' minutes.[21] One reason might be that trade finance had long been settled practice. Moreover, it did not experience substantial technical shocks during the decades under review, contrary to the adjustment that the shipping and insurance industries had to make to the transition from sailing ships to steamers, or from cargo ships to bulk carriers.

The relation between the commodity trade and the London banking system remained however of major importance for both. At that time, the London money market rested on a huge pool of foreign trade bills that de facto reflected the position of London as the largest trading hub in the world (Dowling 1929, Truptil 1936). In turn, this predominance was based on industrial strength (although the US and Germany were then rapidly catching up), and on the strong complementarity, which is at the core of the present contribution, between large exchanges, insurers, shippers, banks and the financial markets. The nexus between trade and the finance was in practice an operation called "acceptance" whereby large, high-reputation merchant banks endorsed, hence they gave their guarantee to three- to six-months Exchange Bills drawn on first quality importers (Spalding 1924 & 1925, Warburg 1914). These merchant bankers had a superior knowledge of the reputation and current position of all market operators. But they could also rely, in case of default, on a general "letter of hypothecation" on the goods being traded as well as on the contractual 'Documents' that formalized the whole transaction and which the LCTA had de facto assembled - the Bill of Lading, the Insurance police and the Invoice (Thorpe 1924). In other words, the on-going, minute work done over the years by the various Committees of the Association ended up in a contractual package that backed up the issuance of a large pool of widely-traded, short-term financial assets.

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[20] Exec. Comm., Minutes, 20 and 27 March 1906.

[21] See however a detailed discussion on the difficulties of obtaining credit in London banks on the basis american contractual documents. Exec. Comm., Minutes, 17 mars 1908.

Here is the key point however: once an Exchange Bill had been "accepted" by a large merchant house, it could be, and typically was soon discounted (resold) on the London Money market. In practice, accepted foreign trade bills were the asset of choice of the large deposit banks when they had excess short term liquidity on their hands. In particular, Bills representing commodity imports were seen as particularly secure because the goods traded were present on British soil. Last but not least, accepted trade bills were unconditionally re-discounted by the Bank of England: market liquidity was thus guaranteed because these Bills could end up as a counterpart to money issuing.

7. A private, transnational legal order

We have now explored how a mere agriculture produce was eventually transformed into the near equivalent of gold. After the grains had been become a certified commodity fit for global trade, a succession of Standard contracts allowed it to be sold and transported across the world with great ease and legal safety. As a commentator said, "the fungibility of the produce leads to that of the contract" (Dauphin-Meunier, 1940). But in turn, the financial risk carried by individual merchants was absorbed as well, so that the short-term financial debt they issued became also highly fungible, the commodity being here a perfect collateral. Eventually the fungibility of the financial contracts thus lead to that of money, in the form of the most liquid and most widely demanded currency of these times: a currency that was "as good as gold", it was then said.

Two procedures of certification (grain and debt), at least four Standard contracts, and as many markets were thus closely articulated through express negotiation and mutual adjustment, with very little statutory or State intervention – at least before we reach the door of the Bank of England. If not as an architect, the London Corn Association emerged here as the coordinator or the assembler of a contractual platform that governed this succession of transactions and markets and ultimately backed up a core financial market. The market authorities in exporting countries, the Shipping Chamber, the Institute of Underwriters or the Banks were not captured into a unilateral, exclusive relationship with the LCTA: they had a lot of business with other 'trades'. They all entered voluntarily a structured, horizontal negotiation with the Association that led eventually to the adoption of clauses to be inserted into the Corn Contract forms.

This construction is strongly related to the huge investment made by the Association in its own rules of procedure: how to write and amend Standard Contracts, how to arbitrate disputes about their execution and how to transform grains into a fungible commodity. Remarkably, the

Association defended jealously its exclusive prerogatives on these three counts: it considered the awards of its Appellate Arbitration Committee as final and it clearly discouraged going the Court; it refused to share with outsiders the final writing of clauses; and it steadily declined to say on the basis of which shipments a given Standard of grain had been assembled. This was well (and grandly) expressed in an answer to the government of South Africa that had criticized the refusal by the Association to adopt the grain standards it had sent from Cape Town: « *Letters from Sellers were also read saying they failed to see how the Association can refuse to adopt the Official Standard. The Secretary was direct to inform them the Association has not only the right to criticize an official Standard, but the power to decline to adopt one, which right it has before now exercised, with the result that the Standard objected to has been amended.* »[22]

Let's underline this point: a key aspect of the success of the Association was in the balance it reached between its core prerogatives and its willingness to engage a large range of potential interlocutors, either individual or collective. Its minutes rarely reflect uncertainty regarding what could be discussed and possibly bargained over, and what was beyond limits. The London Association was thus strongly pro-active in structuring its relations with other norm setters or market regulators, while preserving with great attention the consistency of its own private legal order. Standard Contracts encapsulated a rule of mutual recognition and a series of bilateral settlements with third parties, but they also formed the basis of a self-contained, vertically integrated set of rules which integrity and binding power the Association wanted most clearly to protect.

This pattern extends in particular to the relation with the official English legal order. As already said, the Sale Contracts of the LCTA were all subjected to English law. By way of a legal fiction, foreign merchants were supposed to be domiciled at the Consulate of their country of origin, in London, whereas Scotts were nominally hosted in the offices of the Association. This also implied that disputes over the contracts and arbitration awards could be subjected to trial in an official English court only, following the Set Aside rule of the 1889 Arbitration Statute. Yet we observe very few such cases, as the courts most often deferred to the Corn Association just as to the other, well-established London Trade Association (Cranston, 200KK) [LJ]. Rather than a powerful hierarchic relation, we observe again a rule marked by mutual recognition and adjustment. Both sides knew well what the other was doing and expecting and who was the last resort authority and they also shared a common understanding of how they should interact. The Institute of Underwriters for example had its own, quite different relations to State institutions,

[22] Argentine, American & Australian Committee, Minutes, 20 october 1910. See also Black Sea & Danube Committee, 29 april 1902, a response to « *a letter from Mr Louis Dreyfus counter signed by the other Black Sea Shippers (...) complaining about our Azoff barely standards* ».

primarily because of the much greater weight of court precedents and statutes in the insurance business.

Still, the LCTA did not see the frontiers of its private legal order as immune from conflicts and threats. The principals of the Association were fully aware that its continuing effectiveness rested on stable legal relations with third parties, especially the English courts. The Association thus had its own Counsel, whose opinion was asked each time a legal problem arose and then rarely ignored. But the Association also had substantial financial reserves that were regularly justified by potential legal threats. The main legal risk the LCTA thought it was exposed to were about disputes with other professions, like primarily shippers or insurers. This risk, plus the possibility that statutory reform may affect how trade was conducted, was seen as the main threat on the continuing success of the Association. As was said at an Annual Assembly, « *we never know when we may be called upon to fight a heavy law case* ».[23]

The priority to self-regulation and normative consistency was even stronger when dealing with foreign jurisdictions: the Association never interacted with foreign courts and more generally with the official legal order of foreign countries. In the thousands of pages of archives that were consulted, no question was ever raised for instance about the interpretation of a given point of the Italian contract law or the Danish law on arbitration. And on the rare occasions when such issue landed in the Association meeting rooms, they were deliberately left aside. In 1920 for instance, the Executive Committee received "*A communication from Msr Strauss and Co Ltd asking if the Association would hear an Appeal from a Rotterdam Arbitration on a London form. The Secretary was instructed to reply that it was hoped that the occasion would not arrive, and that the Committee was not in a position to say whether such an Appeal could or could not be heard*". Similarly, when a merchant asked if an Belgian arbitration award could be appealed at the LCTA, he was answered that « *The [Executive] Committee does not feel competent to express an opinion as to the question in your letter which involve a legal point* ».[24] [25]

This resistance extended even more clearly to any concern for international law. In the early 1900s, the London Corn Trade Association was just not interested in contributing to the discussions, in London, on the opportunity of joining The Hague Conference on International Private Law. The LTCA also rejected entirely the so-called 1921 Hague Rules on Bills of Lading that aimed at unifying the terms of such contracts at the international level. Similarly, its voice would not be heard when the League of Nations discussed and adopted a Protocol (1923), then a

[23] Exec. Comm., 1906 Annual Report, 29 may.
[24] Exec. Comm., Minutes, 28 september 1909.
[25] Exec. Comm., Minutes, 19 october 1920.

Convention (1928) on International Commercial Arbitration, or again when the United Nations adopted the 1958 Convention on International Awards.

8. Conclusion

Institutional Conservatism & Black Holes.

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