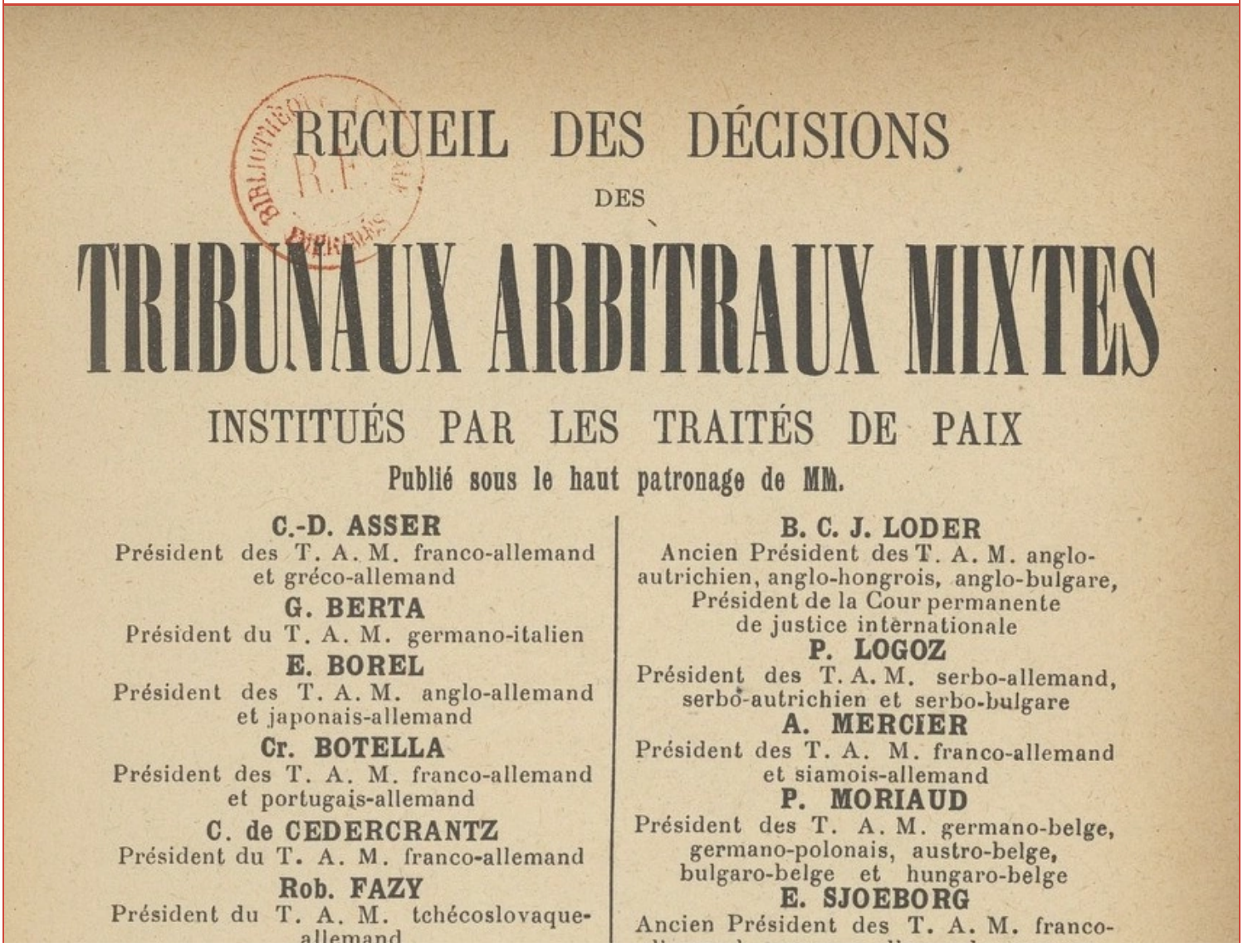
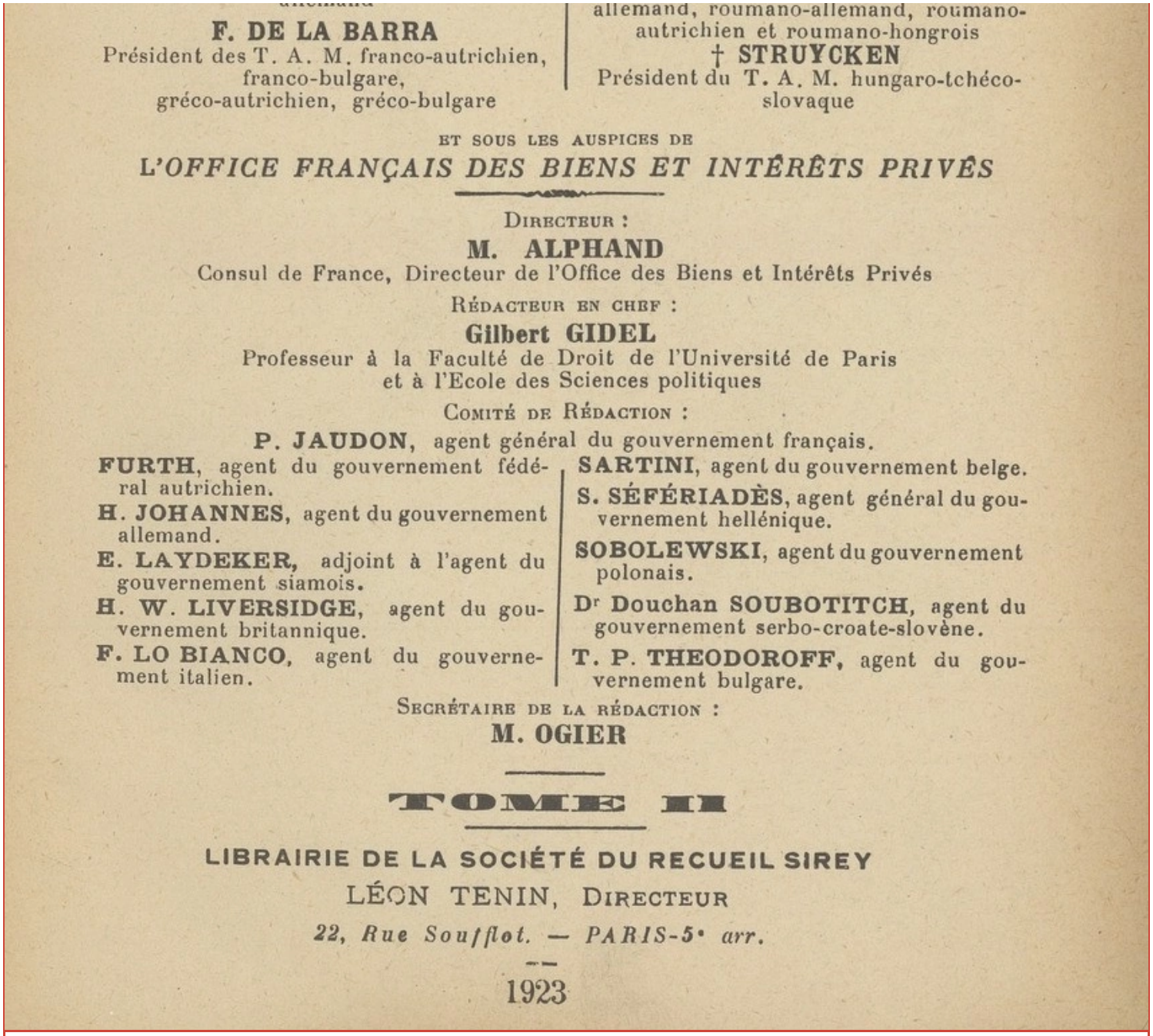
COLONIAL-ERA MIXED COURTS AND POST-WORLD WAR I MIXED ARBITRAL TRIBUNALS AS SPACES OF TRANSNATIONAL AND INTERNATIONAL LEGAL INNOVATION AND EMULATION, BY MICHEL ERPELDING

12 JAN 2024





allemand

F. DE LA BARRA
Président des T. A. M. franco-autrichien, franco-bulgare, gréco-autrichien, gréco-bulgare

allemand, roumano-allemand, roumano-autrichien et roumano-hongrois
† **STRUYCKEN**
Président du T. A. M. hungaro-tchéco-slovaque

ET SOUS LES AUSPICES DE

L'OFFICE FRANÇAIS DES BIENS ET INTÉRÊTS PRIVÉS

DIRECTEUR :
M. ALPHAND
Consul de France, Directeur de l'Office des Biens et Intérêts Privés

RÉDACTEUR EN CHEF :
Gilbert GIDEL
Professeur à la Faculté de Droit de l'Université de Paris et à l'Ecole des Sciences politiques

COMITÉ DE RÉDACTION :

P. JAUDON, agent général du gouvernement français.

FURTH, agent du gouvernement fédéral autrichien.
H. JOHANNES, agent du gouvernement allemand.
E. LAYDEKER, adjoint à l'agent du gouvernement siamois.
H. W. LIVERSIDGE, agent du gouvernement britannique.
F. LO BIANCO, agent du gouvernement italien.
SARTINI, agent du gouvernement belge.
S. SÉFÉRIADÈS, agent général du gouvernement hellénique.
SOBOLEWSKI, agent du gouvernement polonais.
Dr Douchan SOUBOTITCH, agent du gouvernement serbo-croate-slovène.
T. P. THEODOROFF, agent du gouvernement bulgare.

SECRÉTAIRE DE LA RÉDACTION :
M. OGIER

TOME II

LIBRAIRIE DE LA SOCIÉTÉ DU RECUEIL SIREY
LÉON TENIN, DIRECTEUR
22, Rue Soufflot. — PARIS-5e arr.

1923

Introduction: Between the National and the International

The numerous legal transfers and instances of cross-jurisdictional dialogue that occurred during the Interwar period did not only take place within or between national institutions of newly-created states or former imperial heartlands. They also took place in and around a particular category of judicial institutions that openly defied the sovereignty of nation-states. Some central features of these institutions were their international composition, their jurisdiction over cases involving parties or interests of different nationalities, and their reliance on substantive and procedural rules that combined domestic and international features. These features led contemporaries to label them as 'mixed' – a term which should be understood here as largely synonymous to the present-day characterisation of certain judicial institutions as 'hybrid'. Always controversial, these institutions

emerged in two fairly atypical contexts and were largely discredited by the end of the Interwar period.

Stamp of the Mixed Court of Appeals of Alexandria, 1876. Source: French Diplomatic Archives, AMAE 353/PO/2/189.

The first of these contexts was a particular form of colonial domination imposed upon certain non-Western polities, notably in North Africa, the Middle East, and East Asia. Falling short of outright annexation, it took the form of protectorates, internationalised cities or zones, the 'A' mandates of the League of Nations (i.e. the former Ottoman provinces of Iraq, Lebanon, Syria, and Palestine, which were not granted immediate independence, but put under an internationally supervised French or British administration), and nominally sovereign states placed under international financial administration. While preserving the local polity as a legal entity that was distinct under international law, it, nevertheless, resulted in the total or partial delegation of sovereign powers by that polity to one or several Western states. This included, most notably, the power to adjudicate disputes, which was left to so-called 'mixed courts'. While these courts formally belonged to the host polity and its legal order, their benches were partly or entirely composed of foreigners, the law that they applied was based on foreign laws or international treaties, and their main objective was to provide foreigners with guarantees not systematically granted to nationals by the local judiciary. Although many of these mixed courts were created already during the last quarter of the 19th century, they achieved special prominence during the Interwar period.

Stamp of the German–Yugoslav Mixed Arbitral Tribunal, 1939. Source: French National Archives, AJ/22/169.

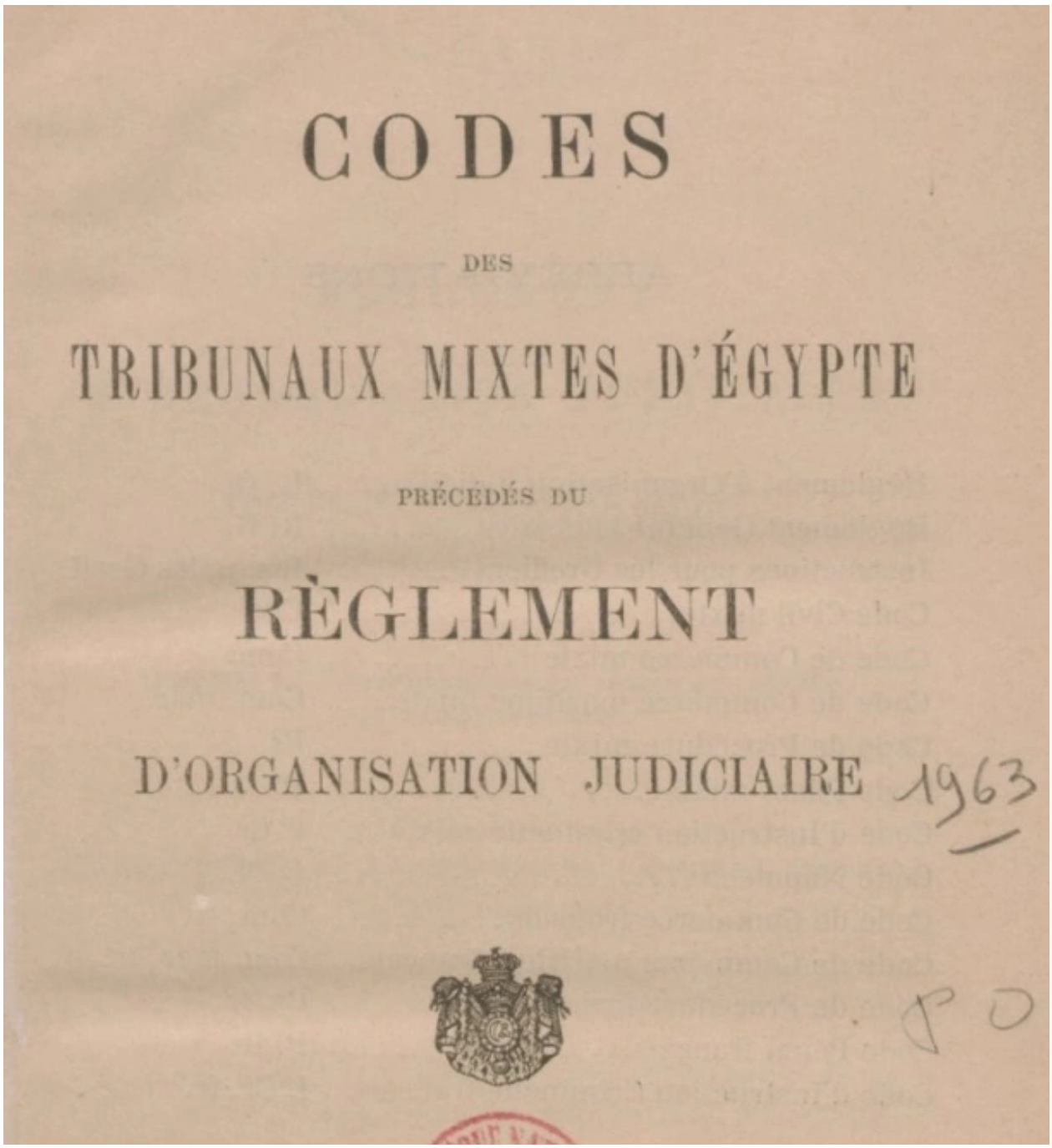
The second context that gave rise to 'mixed' judicial institutions was that of the 1919–23 peace treaties, which resulted in the creation of 39 'Mixed Arbitral Tribunals' ('MATs') between individual Allied and Associated and former Central Powers (i.e. Germany, Austria, Hungary, Bulgaria, and Turkey, as successor states to the Ottoman Empire). All were located in Europe, meeting in Paris, London, the Hague, Rome, Geneva, and Istanbul. Each included three members: a neutral president and one arbitrator (often styled as 'judge') from each of the two former belligerent states. Their purpose was two-fold: on the one hand, they handled private disputes between nationals of states that had formerly been at war with each other; on the other hand, they allowed nationals of Allied and Associated Powers to file compensation or other claims against former Central Powers. Their decisions were directly enforceable on the territories of the two relevant states.

During the Interwar period, comparisons between the recently created MATs and the mixed courts established in certain colonial contexts were not uncommon – especially with the Mixed Courts of Egypt (1876-1949), which were by far the most well-known and reputed of these courts, with their case law cited on par with that of major Western domestic courts and international courts in the legal literature of the time. Commentators would often note how both institutions defied categorisations as fully international or domestic institutions. However, they also underlined their fundamental

asymmetry, noting that both found their *raison d'être* in a feeling of mistrust vis-à-vis certain polities, namely non-Western polities in the case of the mixed courts and the former Central Powers in the case of the MATs. While this asymmetry would ultimately cause the demise of both the MATs and the mixed courts, these institutions, nevertheless, played a pioneering role in transnational and international legal innovation and emulation in the Interwar period.

Substantive Innovation: Mixed Courts and Arbitral Tribunals as Vectors of Transnational Legal Harmonization

Both mixed courts and the MATs were created with the view of fostering transnational legal innovation. However, the extent of their objectives differed.


CODES

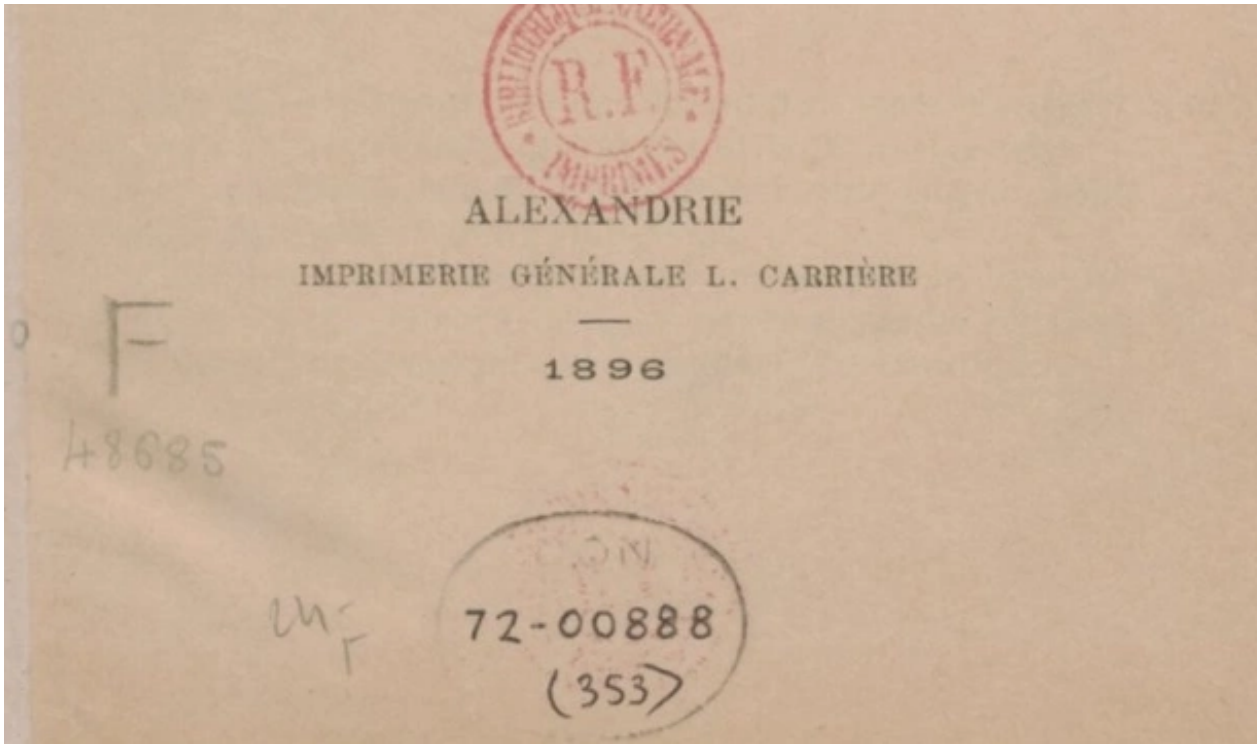
DES

TRIBUNAUX MIXTES D'ÉGYPTE

PRÉCÉDÉS DU

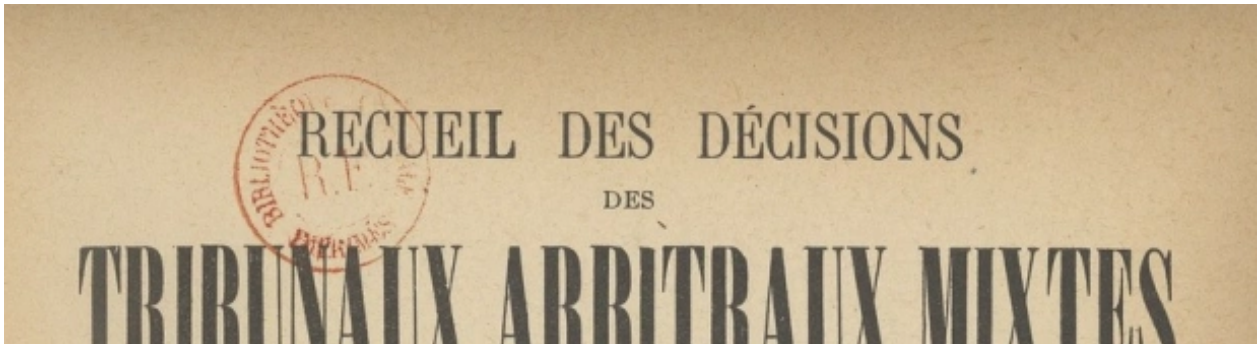
RÈGLEMENT

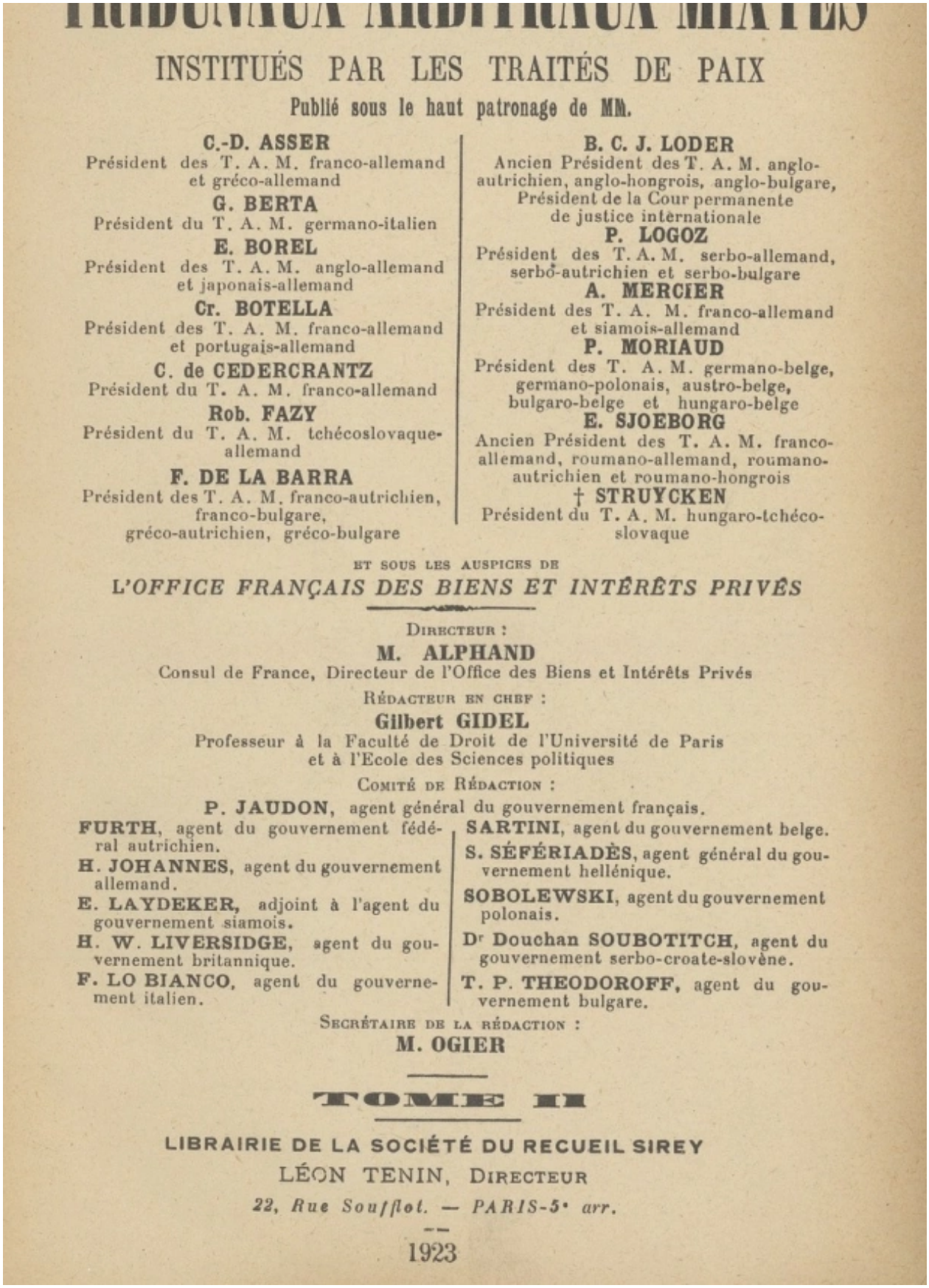
D'ORGANISATION JUDICIAIRE 1963



1896 Edition of the Mixed Codes of Egypt and the Judicial Charter of the Mixed Courts of Egypt. Source: gallica.bnf.fr / Bibliothèque nationale de France

In the case of the mixed courts created within certain colonial settings, this objective was clearly characterised as partaking in a Western long-term 'mission' to 'civilise' non-Western peoples and polities. The introduction of mixed courts would therefore often go hand-in-hand with that of (mostly French-inspired) 'mixed codes' providing foreigners with easily accessible, familiar, and often favourable rules. Despite their creation as part of a fundamentally discriminatory and racist project, some of these codes proved to be enduring legal transplants. The Mixed Codes of Egypt were particularly influential in this regard. Drafted in the summer of 1872 on behalf of the Egyptian Government by Jacques-Hippolyte (or 'Pol') Manoury (1824-99), an Alexandria-based French lawyer who was also the counsel of the Suez Canal Company, they combined elements of the Napoleonic Codes, other European codes, and local usage. They would not only serve as models for Egypt's own first National Codes in 1882. Together with the often creative case law of the Mixed Courts (which handed down roughly 50,000 judgments per year in the Interwar period), they would also partly inspire 'Abd el-Razzaq al-Sanhuri (1895-1971), the author of the 1948 Egyptian Civil Code, which would later serve as a model for most other codes in the region.





TRIBUNAUX ARBITRAUX MIXTES

INSTITUÉS PAR LES TRAITÉS DE PAIX

Publié sous le haut patronage de MM.

C.-D. ASSER
Président des T. A. M. franco-allemand et gréco-allemand

G. BERTA
Président du T. A. M. germano-italien

E. BOREL
Président des T. A. M. anglo-allemand et japonais-allemand

Cr. BOTELLA
Président des T. A. M. franco-allemand et portugais-allemand

C. de CEDERCRANTZ
Président du T. A. M. franco-allemand

Rob. FAZY
Président du T. A. M. tchécoslovaque-allemand

F. DE LA BARRA
Président des T. A. M. franco-autrichien, franco-bulgare, gréco-autrichien, gréco-bulgare

B. C. J. LODER
Ancien Président des T. A. M. anglo-autrichien, anglo-hongrois, anglo-bulgare, Président de la Cour permanente de justice internationale

P. LOGOZ
Président des T. A. M. serbo-allemand, serbo-autrichien et serbo-bulgare

A. MERCIER
Président des T. A. M. franco-allemand et siamois-allemand

P. MORIAUD
Président des T. A. M. germano-belge, germano-polonais, austro-belge, bulgaro-belge et hungaro-belge

E. SJOEBORG
Ancien Président des T. A. M. franco-allemand, roumano-allemand, roumano-autrichien et roumano-hongrois

† STRUYCKEN
Président du T. A. M. hungaro-tchéco-slovaque

ET SOUS LES AUSPICES DE

L'OFFICE FRANÇAIS DES BIENS ET INTÉRÊTS PRIVÉS

DIRECTEUR :

M. ALPHAND
Consul de France, Directeur de l'Office des Biens et Intérêts Privés

RÉDACTEUR EN CHEF :

Gilbert GIDEL
Professeur à la Faculté de Droit de l'Université de Paris et à l'Ecole des Sciences politiques

COMITÉ DE RÉDACTION :

P. JAUDON, agent général du gouvernement français.

FURTH, agent du gouvernement fédéral autrichien.
H. JOHANNES, agent du gouvernement allemand.
E. LAYDEKER, adjoint à l'agent du gouvernement siamois.
H. W. LIVERSIDGE, agent du gouvernement britannique.
F. LO BIANCO, agent du gouvernement italien.
SARTINI, agent du gouvernement belge.
S. SÉFÉRIADÈS, agent général du gouvernement hellénique.
SOBOLEWSKI, agent du gouvernement polonais.
Dr Douchan SOUBOTITCH, agent du gouvernement serbo-croate-slovène.
T. P. THEODOROFF, agent du gouvernement bulgare.

SECRÉTAIRE DE LA RÉDACTION :

M. OGIER

TOME II

LIBRAIRIE DE LA SOCIÉTÉ DU RECUEIL SIREY

LÉON TENIN, DIRECTEUR

22, Rue Soufflot. — PARIS-5e arr.

1923

Volume 2 of the 10-volume semi-official collection of decisions of the MATs. Source: gallica.bnf.fr / Bibliothèque nationale de France

With their mission limited to the implementation of certain provisions of the post-World War I peace

treaties, the MATs' contribution to substantive law was necessarily envisaged as a more limited one. Nevertheless, some of their supporters, such as the French legal scholar Jean-Paulin Niboyet (1886-1952), hoped that their case law would ultimately result in a Europe-wide harmonisation of private international law rules. Based on the number of cases handled by the MATs – some 100,000 between 1920 and 1939 – and the use of pilot case-type decisions, this aim was not entirely unrealistic. Between 1921 and 1930, the French Government even published a semi-official collection of decisions, the *Recueil des décisions des Tribunaux arbitraux mixtes institués par les Traités de Paix*, thus ensuring a broad dissemination of the MATs' most important case law. Nevertheless, without a centralised appeals mechanism and given major differences in legal traditions (including, but not only, between the Paris-based and the London-based MATs), the objective of harmonising national rules via their uniform interpretation by 'mixed' institutions would remain elusive. As a matter of fact, not even in the field of public international law would the case law of the MATs prove consistent enough to be enduring, as opposed to that of the less judicialised 'mixed commissions' created during the 19th and early 20th century to compensate foreigners for property losses incurred as result of wars or revolutions.

Procedural Innovation: Mixed Courts and Arbitral Tribunals and the Emergence of Individuals as Holders of Treaty-based Rights

Authors of the Interwar period readily acknowledged what was arguably the Mixed Arbitral Tribunals' most innovative characteristic, namely the fact that they granted direct standing to private persons, both natural and legal, against sovereign states. Before the MATs, only the short-lived Central American Court of Justice (1907-1918) had done so, hearing a total of 10 cases. With this context in mind, the MATs' examination of tens of thousands of cases – mostly compensation cases brought by Allied nationals and companies against former Central Powers for damages suffered as a result of 'extraordinary war measures' against their 'property, rights or interests' under Article 297 (e) Versailles Treaty and similar provisions in the other peace treaties – was a truly extraordinary development. To be true, there were major limitations to this innovation. Notably, the standing of individuals before the MATs was limited by the power of the representatives of their governments – the so-called 'State Agents', who played a central role at each stage of the procedure – to conclude settlements on their behalf and thus end the proceedings. Another major flaw was the fundamental asymmetry of the standing granted to individuals before the MATs: with the exception of the six MATs established with Turkey following the Turkish War of Independence as part of the 1923 Lausanne Peace Treaty, they could only examine claims by Allied nationals. However, despite of all these shortcomings, the possibility granted to individuals, companies, and other legal persons to sue sovereign states before the MATs created a whole new form of international litigation, which would sometimes result in mass claims that would attract international media attention, such as the 1924 case of the Belgian deportees before the German-Belgian MAT.

Source gallica.bnf.fr / Bibliothèque nationale de France

Max Illch (1872-1958), counsel for Germany, during the Belgian deportees case before the German–Belgian MAT at the Hôtel de Matignon in Paris, 7 January 1924. Press photography by Meurisse news agency. Source: gallica.bnf.fr/ Bibliothèque nationale de France.

While they were certainly presented during the Interwar period as the first major attempt to provide private persons with an international forum dedicated to the enforcement of their treaty-based rights, the MATs were not entirely unprecedented or unparalleled in that regard. As a matter of fact, several mixed courts established within colonial settings had already provided, or were providing, foreigners with similar procedural avenues. The first to do so had been the Mixed Courts of Egypt, whose treaty-based '*Règlement d'organisation judiciaire*' (or Judicial Charter) had granted foreigners the right to sue the Egyptian Government before them. This model was later imitated by other mixed courts, notably those established within the International Zone of Tangier (1925-56) and the French Mandate for Syria and Lebanon (1923-46). In a display of judicial activism, the mixed courts established in Egypt and in the Tangier Zone even held that their jurisdiction over such suits gave them the power to set aside national laws that they deemed contrary to the treaty-based economic rights of foreigners. This could have major political consequences. When the Mixed Courts of Egypt first decided to do so in the 1876 *Cesare Carpi v Daira Sania* case, their decision triggered a tug-of-war with the Egyptian Government that contributed to the demise of the country's leader, Khedive Isma'il, in 1879. Similarly, when the Mixed Court of Tangier decided in 1939 to set aside a local law prohibiting private radio broadcasting, invoking the regime of economic freedom granted to

foreigners under the regime of the Tangier Zone, one of the first consequences of this decision was the creation of a Francoist Spanish radio station. Decisions such as these contributed to the unpopularity of mixed courts not only with local governments. Since they would usually only benefit foreign claimants, they also became a major target for decolonisation movements in the Interwar period. Deemed incompatible with national sovereignty, they were increasingly presented as an anomaly, especially after the conclusion of the 1937 Montreux Convention in which the Egyptian Government had secured the end of this form of activism, as well as the closing of the local Mixed Court of Egypt by 1949.

Emulation: Mixed Courts and Arbitral Tribunals as Training Grounds for Transnational Lawyers

Despite their hugely controversial nature, both the mixed courts established in colonial settings and the MATs provided a major training ground for transnational and international lawyers in the Interwar period.

Both types of institutions required lawyers who were not only highly trained lawyers, displaying in particular a keen interest in questions of private and public international law, but also familiar with foreign legal systems, and fluent in European languages – especially French, which was the main working language before both mixed courts and the MATs (with the exception of those based in London and Rome). These exacting requirements explain the existence of personal continuities between these institutions, notably between the MATs and the Mixed Courts of Egypt, but also between the latter and the Mixed Court of Tangier.

Meeting of the General Assembly of the Mixed Bar of Egypt, ca. 1926. Source: **Les juridictions mixtes d'Égypte 1876-1926: Livre d'or édité sous le patronage du Conseil de l'ordre des avocats à l'occasion du cinquantenaire des tribunaux de la réforme** *(Alexandria, Journaux des tribunaux mixtes 1926).*

This common experience would also result in the emergence of a common ethos. This was not only true with regard to single institutions – the most prominent example in this regard were certainly the Mixed Courts of Egypt, which commemorated their 50th anniversary in 1926 with a lavish publication illustrating this ethos. In the 1930s, several transnational lawyers involved with the MATs – notably the German, French, and Belgian Government Agents, supported by litigators linked to the International Chamber of Commerce in Paris – even attempted to make these institutions permanent. As a model for their suggestion of permanent transnational courts with jurisdiction over both commercial disputes and what would now be called investor-state disputes, they mostly invoked the non-discriminatory MATs with Turkey, but also alluded to the Mixed Courts of Egypt. However, this latter association would prove to be counterproductive, ultimately causing the French Government to withdraw its support for the project after the advent of the social reformist Popular Front in 1936.

Conclusion: From Mixed to Supranational Adjudication

Despite the state of disrepute into which they had fallen by the end of the Interwar period, the mixed courts and the MATs nevertheless had an impact on international adjudication after World War II. This impact was different from that imagined by the lawyers who in the 1930s had promoted the establishment of permanent MATs with the aim of protecting the interests of transnational commercial actors. That aim would be largely assumed by the even more exclusive and largely opaque means of international commercial arbitration and, following decolonisation, by investor-state arbitration. The hidden heritage of the mixed courts and the MATs is to be found elsewhere, namely within the two supranational courts established in Europe in the 1950s: the European Court of Justice ('ECJ') in Luxembourg and the European Court of Human Rights ('ECtHR') in Strasbourg. While this might sound counter-intuitive at first sight, the continuities between these supranational institutions and the mixed institutions of the Interwar period were real. The capacity of individuals to sue sovereign states as a guarantee for their treaty-based rights was an especially striking common feature of both mixed and supranational adjudication and acknowledged as such by some contemporary actors, such as the German negotiator of the ECSC Treaty, Carl Friedrich Ophüls, and the first President of the ECtHR, René Cassin. Moreover, there were personal continuities between both types of institutions, with several architects of the ECJ and the ECtHR having previously had first-hand experience of the MATs, the Mixed Courts of Egypt, and/or the Mixed Court of Tangier.

Posted by Dr Michel Erpelding, Research Scientist, Faculty of Law, Economics, and Finance, University of Luxembourg; Principal Investigator, research project 'Forgotten Memories of

Supranational Adjudication' (supported by the Luxembourg National Research Fund, C21/SC/15845902/FoMeSA).

This piece belongs to Season 2 of the "Cross-jurisdictional dialogues in the Interwar period" series dedicated to less-known legal transfers which have had a palpable impact on the advancement of the law. The Interwar period was a time of disillusionment with well-established paradigms and legislative models, but also a time of hope in which comparative dialogue and exchange of ideas between jurisdictions thrived. The series is edited by Prof Yseult Marique (Essex University) and Dr Radosveta Vassileva (Middlesex University). To access the other pieces from this series, either select the 'Interwar Dialogue' category or click on the #Series_Interwar_Dialogue tag on the BACL Blog.

Suggested citation: M Erpelding, 'Colonial-Era Mixed Courts and Post-World War I Mixed Arbitral Tribunals as Spaces of Transnational and International Legal Innovation and Emulation', BACL Blog, available at https://british-association-comparative-law.org/2024/01/12/colonial-era-mixed-courts-and-post-world-war-i-mixed-arbitral-tribunals-as-spaces-of-transnational-and-international-legal-innovation-and-emulation-by-michel-erpelding/

Select Bibliography

- R. Blühdorn, 'Le fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes créés par les traités de Paris' (1932) 41 RdC 141.
- J. Y. Brinton, *The Mixed Courts of Egypt* (revised edn, New Haven/London, Yale University Press 1968).
- C. Carabiber, *Les juridictions internationales de droit privé* (Neuchâtel, La Baconnière 1947).
- M. Erpelding, 'Mixed Courts of the Colonial Era', in H. Ruiz Fabri (Ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford, Oxford University Press 2020).
- M. Erpelding, 'Mixed Courts of Egypt', in H. Ruiz Fabri (Ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford, Oxford University Press 2020).
- M. Erpelding and F. Rherrousse, 'Mixed Court of Tangier', in H. Ruiz Fabri (Ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford, Oxford University Press 2019).
- B. Hess and M. Requejo Isidro, 'International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of 1919-1922', in M. Erpelding, B. Hess and H. Ruiz Fabri (eds.), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Baden-Baden, Nomos 2019) 246–48.
- T. Heyligers, 'L'organisation des tribunaux mixtes d'Égypte' (1927) 17 RdC 1–107.
- M. S.W. Hoyle, *Mixed Courts of Egypt* (London/Dordrecht/Boston, Graham & Trotman 1991).

- *Les juridictions mixtes d'Égypte 1876-1926: Livre d'or édité sous le patronage du Conseil de l'ordre des avocats à l'occasion du cinquantenaire des tribunaux de la réforme* (Alexandria, Journaux des tribunaux mixtes 1926).
- S. Messina, 'Les Tribunaux mixtes et les rapports interjuridictionnels en Égypte' (1932) 41 RdC 367–499.
- H. Ruiz Fabri and M. Erpelding (eds.), *The Mixed Arbitral Tribunals, 1919-1939: An Experiment in the International Adjudication of Private Rights* (Baden-Baden, Nomos 2019).
- F. Tamburini, 'Il "tribunale misto" di Tangeri (1925-1952): Balance of power, diritto e mentalità coloniale' (2007) 4 Jura Gentium 55.
- W. Theus, 'International Commercial Courts : a new frontier in international commercial dispute resolution ?', in European Yearbook of International Economic Law (Berlin/Heidelberg, Springer 2022) 1–34.
- J. Zollmann, 'Mixed Arbitral Tribunals: Post-First World War Peace Treaties', in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford, Oxford University Press 2022).

Categories:

HISTORY INTERWAR DIALOGUE TRANSPLANTS

Published by radosvetavassileva
legal scholar **View all posts by radosvetavassileva**

Tags: **#Series_Interwar_Dialogue**

PREVIOUS

Launch of Healthcare, Quality Concerns, and Competition Law (Hart 2023) on 8 March 2024

Recent Posts

Colonial-Era Mixed Courts and Post-World War I Mixed Arbitral Tribunals as Spaces of Transnational and International Legal Innovation and Emulation, by Michel Erpelding

Launch of Healthcare, Quality Concerns, and Competition Law (Hart 2023) on 8 March 2024

Kriszta Kovács (ed), The Jurisprudence of Particularism: National Identity Claims in Central Europe (Bloomsbury Publishing 2023), ISBN: 9781509960125, reviewed by Radosveta Vassileva

Thomas Kadner Graziano, Comparative Contract Law: Exercises in Comparative Methodology (3rd edn, Edward Elgar Publishing 2023), reviewed by Sirko Harder

The Right to Same Sex Marriage: The Judicial Committee of the Privy Council, Constitutional Interpretation and Comparative Law, by Derek O'Brien

Categories

Select Category

COMPARATIVE ADMINISTRATIVE LAW COMPARATIVE CONSTITUTIONAL LAW

COMPARATIVE CONTRACTS COMPARISON IN EUROPE

COVID-19 - COMPARATIVE PERSPECTIVES EVENTS AND NEWS

HUMAN RIGHTS & COMPARISONS JUDGES AND COMPARISON

RESEARCH METHODS AND PERSPECTIVES TORTS

#Book_Discussions #event #fake_news #freedom_expression_online #hate_speech #Newsletter #Series_Interwar_Dialogue

Subscribe to Blog via Email

Enter your email address to subscribe to this blog and receive notifications of new posts by email.

Email Address

Subscribe

Join 3,539 other subscribers

Tweets from @BritAssoCompLaw

Nothing to see here - yet

When they Tweet, their Tweets will show up here.

View on Twitter

Search

Search