# THE AUTONOMY OF INTERNATIONAL ARBITRATION REVISITED

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***Abstract***

*This Editorial seeks to describe how international arbitral practice, and its various claims to autonomy, have been shaped by competing visions, whose influence varies depending on changing environments, in ways that ultimately determine the field's development and driving preoccupations. The concept of autonomy is omnipresent in arbitration scholarship and touted as central to the field's existence. Common accounts tend however to only emphasise the degree to which international arbitration evolves freely from State control. In so doing, they pass over the specific and evolving visions that support claims to autonomy from national legal systems, as well as how such claims serve to re-embed arbitral practice in alternative non-State normativities. Two such competing visions will be identified: the first, more prevalent in an earlier period, presented autonomy as the reflection of a distinct sociological reality (that specific to commercial actors engaged in cross-border trade); the second, more popular today, largely understands autonomy as a function of self-sustaining legal principles that are not specific to international arbitration, but the expression of globally extensive and universally valid ideas of justice.*

## I. Introduction

We frequently hear about the 'autonomy' of international arbitration, to either describe the current state of the law with regards to arbitral practice, trace the course of its past evolution, or express a certain aspiration about its future development. It is a term that has long been used in this field, and dominated discussions about its development and basic legitimacy. It does

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not tend to be seen as just another legal doctrine or general principle, among the many available in the toolbox of the arbitration lawyer. Authors have identified it as "*existential*," both for the very possibility of arbitration,[1] and for its international character.[2] Its importance is therefore seemingly constitutional. In other words, it is believed that, if there is such a thing as international arbitration, it cannot but be autonomous.

What, however, does autonomy actually mean? In the sense in which the term is most often used, it mainly applies to the relationship between international arbitration and States. Specifically, to qualify the extent to which international arbitral practice evolves beyond the control of domestic legal systems, and in particular of national courts and national laws. This makes autonomy a matter of degree,[3] in both the descriptive and normative uses of the term. Arbitration can be described as more or less autonomous, depending on whether arbitral awards are subject to a stricter or laxer standard of judicial review, the extent to which arbitrators are empowered to adjudicate the dispute beyond the reach of national regulations, courts at the seat able to interfere with the conduct of the arbitral proceedings, etc. Similarly, the evolution of the law of international arbitration, both generally and in relation to its key components (the arbitration agreement, the arbitral procedure, the arbitral award), can be described as tending towards more or less autonomy. And consequently, to describe arbitral practice as wholly autonomous would mean that it has attained a complete emancipation from State control – a state-of-affairs that all will agree has not materialised, nor is it ever likely to.[4]

Nevertheless, autonomy does not only serve a descriptive purpose, it is also a normatively loaded concept. Indeed, it has been taken up as a defining

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1 George A. Bermann, *The Self-Styled 'Autonomy' of International Arbitration*, 36(2) ARB. INT'L 221 (2020).

2 Philippe Fouchard, *L'autonomie de l'arbitrage commercial international*, 1965 REVUE DE L'ARBITRAGE 99, 100 (1965).

3 Jean-Baptiste Racine, *Réflexions sur l'autonomie de l'arbitrage commercial international*, 2005(2) REVUE DE L'ARBITRAGE 305, 307 (2005).

4 *Id.*

*commitment* of the international arbitration community, which has thus traditionally pushed for ever greater degrees of arbitral freedom from State control. Total autonomy is, thus, seen as a "*dream*" or a "*utopia*," towards which this field should be constantly advancing.[5] The commitment is so central to international arbitration that its current era of development can be described as "*the age of autonomy*,"[6] or even claimed that the history of this area of law is that of its gradual progress towards greater autonomy.[7] As put by Julian Lew in a famous article: "*The ideal and expectation is for international arbitration to be […] free from the controls of parochial national laws, and without the interference or review of national courts. Arbitration agreements and awards should be recognised and given effect, with little or no complication or review, by national courts*."[8] All of this suggests that autonomy is absolutely central to international arbitration, perhaps this field's *key idea*.

Our aim in this Editorial is to sketch a somewhat more complicated picture. The history of international arbitration is not simply that of its autonomisation. With this, we are not simply wishing to emphasise that the resistance on the part of States sometimes results in a pause or even a retreat in the drive towards ever greater autonomy. Important as these national resistances may be, they are not the focus of this Editorial. We will also not engage with the criticisms of international arbitration's quest for emancipation from State control, which have been already effectively done from analytical[9] and political[10] perspectives. Our concern is instead with autonomy as a framing device, which pushes us to consider the concrete legal configuration of international arbitration solely in terms of a conflict

5 Ralf Michaels, *Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature*, 1(1) LONDON REV. INT'L L. 35 (2013).

6 MIKAËL SCHINAZI, THE THREE AGES OF INTERNATIONAL COMMERCIAL ARBITRATION (2021).

7 *Supra* note 3, at 307.

8 Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22(2) ARB. INT'L 179 (2006).

9 Guilherme Vasconcelos Vilaça, *Why a Theory of International Arbitration and Transnational Legality?*, 29(2) CAN. J. L. & JURISPRUDENCE 495 (2016).

10 ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW ch. 4 (2005).

between State control and arbitral emancipation. It is certainly true that this remains a useful way to understand certain aspects of international arbitral practice, particularly at certain periods in time. Nevertheless, the explanatory and normative potential of the framework of autonomy is less than commonly assumed.

So, what exactly is the problem with autonomy, at least as it is commonly understood? We will focus on two issues. The first is that it is often taken for granted that the case for autonomy, or the 'dream' of autonomous arbitration, is both invariable and self-propelling. To put it otherwise, that autonomy has a fixed meaning over time, and that it is inherently a good thing (even if, when concretely implemented, it needs to be balanced with the kind of interests that States are responsible for preserving, which explains why autonomy can never be complete). In reality, as we will see below, neither thing is completely accurate. There have been important shifts in the way the case for autonomy has been articulated over time. Each of these has imagined the autonomy of arbitration in particular way, and provided a different justification for it. Autonomy does not derive its strength from its intrinsic qualities, but from the broader visions within which it is inserted, concerning arbitration's basic legitimacy and relationship to law.

The second issue relates to the fact that this notion is used, in international arbitration, to refer solely to its relationship with State law. Autonomy does not normally feature in an absolute sense, to describe or push for international arbitration's isolation from any sort of external interference. The law of this area is only described as autonomous from only one particular interference, that of national legal systems. Such a tendency disregards the fact that it also has possible relationships with other legalities or normativities, which can be structured more or less hierarchically, and with regards to which international arbitration can also be characterised as

more or less autonomous.[11] If we take these other relationships into account, the picture already becomes considerably more complicated, as international arbitration comes to potentially enjoy not just one but several 'autonomies.' Or, as we will see below when we examine the different visions that have emerged over time of the basic legitimacy and distinctiveness of international arbitration, the various configurations that they have produced can be only be said to be autonomous in some partial or incomplete sense.

Thus, we do not wish here to go against the idea of State-related autonomy, but both behind it (on what basic visions is it based?) and beyond it (how is arbitration positioned with regards to other non-State normativities?). In what follows, we will seek to identify what these differing visions are, and how they come into conflict with one another, focusing mainly on two of them. The Editorial will focus on each of these successively. We will begin by presenting what we consider to be the traditional case for the autonomy of international arbitration. It emerged during its early period of development during the 50s, 60s and 70s, where the ability and competence of arbitrators to adjudicate disputes free from State control was gradually asserted against territorialist or State-centred views of the law. Even though this period was marked by high-stakes and politically-charged disputes over oil contracts in newly-independent ex-colonies, the case for autonomy was decidedly built on a certain de-politicised model of cross-border commercial relations (to which State contracts were assimilated). This view presented itself as sociological: it placed a great emphasis on an observation of the social distinctiveness of such relations, by characterising them as spatially, functionally and practically distinct from those typically covered by State law. From such social differentiation followed a claim to legal differentiation, i.e. that they be carved out from the normally competent State, and subject to the specialised system of dispute resolution and

[11] *See, however*, ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION 30 (2017), which considers in depth the arbitral order's external interactions.

substantive regulation that emerged from international commercial relations. This move supported important doctrines such as the *lex mercatoria*, the so-called theory of 'delocalisation', and a stronger, more qualitative conception of autonomy – one that sees it as the property of self-standing legal orders.

This early period was never, however, completely dominated by a focus on the sociology of commercial relations. Oppetit has offered a different account, by describing how celebrated arbitrators were able, during international arbitration's "*heroic*" era of early of development, to pacify through law what to others may have seemed like irresolvable political conflicts.[12] Even if equally de-politicising, the emphasis was on the capacity of international arbitration to deliver justice and serve the goals of the rule of law. Thus, arbitral autonomy followed from its ability to perform these functions better than national courts, rather than any claim to sociological differentiation. More contemporary practice has seen this alternative vision of arbitration's legitimacy grow in importance. The context since the late 80s and early 90s has been favourable to such a shift. Since then, the autonomy of international arbitration is largely taken for granted – the State's control has become largely exceptional, as enshrined in international treaties and national regulations. The key concern is no longer that of justifying international arbitration's detachment from domestic legal systems, but for arguing in favour of its ability to adequately perform the significant power it has acquired in the governance of cross-border relations[13] (particularly with the rise of investor-State dispute settlement, which, even if less statistically important than its commercial counterpart, has come to dominate discussions). In this new scenario, we observe a fundamental shift in the way international arbitration is understood and justified. As argued earlier by Oppetit, the focus is no longer on the necessary correspondence between law and social practices, but rather on the integration of abstract standards and principles of global law, whose

12 BRUNO OPPETIT, THEORIE DE L'ARBITRAGE 10-11 (1998).

13 *Supra* note 1, at 230-231.

validity and authority largely transcend this particular domain (such as due process, transparency, or the protection of legitimate expectations). These norms are not simply incorporated in order to compensate for some of the perceived deficiencies or excesses of the field, when left too unchecked by State control. Their incorporation signals a more profound transformation in international arbitration's self-identity – from the natural forum for adjudicating the specialised norms of cross-border merchants, to an expression of the rule of law and aspiring form of superior justice.

## II. The autonomy of international arbitration as social differentiation

As already stated, the traditional case for the autonomy of international arbitration, both in its positive (self-governance) and negative dimensions (freedom from external control by States), was a sociological one. It was anchored in a certain understanding of cross-border commercial relations, as constitutive of a separate social field. Such relations were assumed to be internally cohesive (they shared similar practices, needs and values), but also externally distinctive (i.e. they constrasted with other social domains). Whether this sociological claim is convincing or not is not our focus here.[14] The point is that, on this basis, autonomy was understood and promoted as the legal reflection of social differentiation. Because those particular relations are distinct, so goes the argument, the norms to which they are subject should also be distinct, and therefore free from the grip of domestic legal systems. In brief, law should be coupled to actual social arrangements. Through his theory of the *lex mercatoria*, Berthold Goldman can be credited for most famously articulating the case for the autonomy of international arbitration in this way.[15]

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[14] The most powerful critique is Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society, in* GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997).

[15] *See* the landmark piece, Berthold Goldman, *Frontières du droit et "lex mercatoria*," 9 ARCHIVES DE PHILOSOPHIE DU DROIT 177 (1964) [*hereinafter* "Goldman Lex Mercatoria"]. The title given to Goldman's Festchrift, The Law of International Economic Relations, captures

The argument for social differentiation has been emphasised in three main ways, each of which has served to support autonomy in a particular manner. The first is practical: it is said that the practices that commercial actors, when engaging in cross-border transactions, spontaneously engage in are distinctive, and in any case contrast with those found in a purely national context. In some cases, such patterned behaviour is said to constitute a form of custom, usually referred to as international trade usages,[16] which structure the relations of actors engaged in particular sectors. Further evidence is the elaboration and international dissemination of model contracts, usually produced by professional associations, which again serve to shape and interpret the rights and obligations of cross-border exchanges. And of course, arbitration itself, including the creation of arbitration institutions, is presented as a practice that distinguishes cross-border economic relations – as international arbitral tribunals are said to be uniquely placed to discover and implement the customary practices of cross-border commerce.[17] Thus, the traditional case for autonomy was built, first of all, on the claim that cross-border commercial relations have developed distinctive normative patterns. From this follows the proposition that that State law ought to respect the consistency and distinctiveness of these practices, notably by allowing arbitrators to resort to non-national standards to adjudicate disputes, granting greater self-governance through arbitral institutions, and preserving awards from being excessively scrutinised for their compliance with national norms.

The second dimension to social differentiation is functional, since it relates to the functions that law is said to have to perform. It was said that international commercial relations have particular needs, such as predictability, flexibility, or confidentiality, which orient and distinguish the practices that emerge within this field. Importantly, it was suggested that

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well this aspect of his work: BERTHOLD GOLDMAN, LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES. ETUDES OFFERTES À BERTHOLD GOLDMAN (1982).

16 *Supra* note 11, at 140; JOSHUA KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION ch. 4 (2013).

17 Goldman Lex Mercatoria, *supra* note 16, at 183.

domestic legal systems do not take those needs into account, or are somehow unable to do so. This would perhaps derive from the different social constituency that informs and is targeted by national legal orders. The invocation of the needs of international commerce[18] thus commonly has served to justify that the regulation of such relations, and jurisdiction over them, be carved out of national legal systems – in order to, for instance, argue for the desirability of allowing arbitrators freedom in selecting or constructing the applicable law, support the emergence of a specialised body of law (the *lex mercatoria*), interpret contracts according to notions of commercial reasonableness rather than national principles,[19] or minimise the review of an award by national courts. It has also been used as the basis for the emergence of an arbitral case law as a distinct source of law, as famously in the ICC Dow Chemical award of 1982, per which: "*The decisions of […] tribunals progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successfully elaborated should respond*".[20]

The third and final dimension of social differentiation is spatial. International commercial relations have been said to occupy a distinct space, in a way that again sets them apart from the relations that are at the basis of national regulations. Thus, international arbitration "*exists in its own space*".[21] Such a space is one that lies beyond national territories, and sits across State borders. Even if there has been a lot of talk of autonomous arbitration being "*delocalised*",[22] the more precise term would be *re-localised*, as international arbitration is imagined as taking place in a transnational

18 Philippe Leboulanger, *La notion d'"intérêts" du commerce international*, 2005(2) REVUE DE L'ARBITRAGE 487 (2005).

19 Joshua Karton, *The Arbitral Role in Contractual Interpretation*, 6(1) J. INT'L DISP. SETT. 4 (2015).

20 *ICC Case No. 4131 (1982), in* COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 146 (Sigvard Jarvin & Yves Derains eds., 1994).

21 *Supra* note 8, at 181.

22 Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32(1) INT'L & COMP. L. QUART. 53 (1983).

space rather than a national one. From the strictly State-centred perspective that historically has informed conflict of laws methodology, such a distinct space simply cannot exist: cross-border relations can only be located in a national territory, even if they may present connections to multiple jurisdictions.[23] The very possibility of international arbitration as an autonomous legal field is predicated on the opposite view – that cross-border relations do occupy a separate social space from that of purely national ones, one that is characterised by specific needs (most importantly, to mediate across of national differences) and the emergence of cross-cultural practices. Accordingly, the significance of the choice of a certain country as the seat of the arbitration will be downplayed, in relation to the applicability of that country's law[24] – arbitration is ultimately grounded in a space that is not that of any particular national jurisdiction. It will also be pointed out that national legal systems are radically misaligned with cross-border realities: such realities are characterised by the difficulty, non-existent in a purely domestic setting, of finding a neutral and mutually-agreeable legal basis on which to ground the relation and adjudicate possible disputes. Similarly, the authority of national legal systems will also commonly be undermined by being described as "*parochial*" in outlook, i.e. approaching commercial dealings only from their own, purely domestic perspective, without consideration of the unique needs and perspectives of parties to international transactions.[25] These observations have again fuelled calls for a more autonomous arbitral practice, for instance by by arguing that arbitrators should be encouraged to elaborate procedural standards that transcend local particularities, and that awards should be liberated from any excessive dependence on the law of the country of the seat.

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23 Horatia Muir Watt, *Private International Law's Shadow Contribution to the Question of Informal Transnational Authority*, 25(1) INDIANA J. GLOBAL LEGAL ST. 37 (2018).

24 *See, e.g.,* the famous award Sapphire v. NIOC, reproduced and commented in Jean-Flavien Lalive, *Contracts between a State or a State Agency and a Foreign Company. Theory and Practice: Choice of Law in a New Arbitration Case*, 18 INT'L & COMP. L. QUART. 987 (1964).

25 The concept of parochiality appears in the more famous pro-arbitration decisions of the US Supreme Court, *see, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974).

In sum, the case for the autonomy of international arbitration is traditionally based on claims about the social reality and distinctiveness of international commerce.[26] To legally maintain and enhance autonomy follows from the need to recognise such realities, whereas to undermine would amount to imposing upon this field the product of different social configurations. Underlying the principle of autonomy, therefore, one finds, not only a certain (and very debatable) understanding of international commerce as socially cohesive, but also an ideal of alignment between law and society. In this sense, and from the perspective of legal theory, the case for autonomy is inevitably pluralistic in outlook – it views law as generated by concretely situated social institutions.[27] The normative question of whether the content of this law is good or bad is explicitly sidelined in favour of its correspondence to actual social arrangements.[28]

This prompts a concluding thought about the nature of autonomy. We explained earlier that it is common to see autonomy in quantitative terms – international arbitration can be more or less autonomous, depending on whether it is subject to a tighter or laxer control by national legal systems. The traditional case for autonomy that we have described, however, rests on a qualitative understanding of this concept. From this perspective, the term serves to describe the very existence and basis for international arbitration as a legal field, rather than the degree of manoeuvre it is afforded. There are two sides to such a qualitative understanding. On the one hand, to describe international arbitration as autonomous implies that arbitral practice cannot be reduced to the ad hoc resolution of contractual disputes – a 'contractual' or 'transactional' view that was more common view in its initial period of development.[29] Rather than the ephemeral creation of two parties agreeing to subject their disputes to this form of

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26 There are, of course, exceptions. Authors sometimes refer to a more utilitarian calculus. *See, e.g.,* Thomas Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16(2) AM. REV. INT'L ARB. 213, 258 (2007) (discussing the promotion of arbitration as a trade-off between effective dispute resolution and the integrity of substantive legal guarantees).

27 JAN PAULSSON, THE IDEA OF ARBITRATION 45 (2014).

28 *Supra* note 16.

29 *Supra* note 11, at 26.

alternative dispute resolution, international arbitration should be seen, if understood as autonomous, as a principled or rules-based practice, and therefore one that is bound by and inserted within a broader and coherent system of law. On the other hand, however, autonomy implies a second and more decisive quality. It is the idea that such a system of law is one that is specific to international commercial relations, as adjudicated through arbitration, and possesses a self-standing character. In other words, its existence and validity is its own rather than derivative; it does not depend on the position of other legal orders, such as those of individual States or even of public international law.[30] Such a view of autonomy is, again, not simply of theoretical interest – it may justify a quantitatively more autonomous approach to resolving practical issues. For instance, an arbitral tribunal may choose to not apply the laws of any particular State, or disregard an anti-arbitration injunction issued by the courts of the seat of arbitration, by arguing that an international arbitral tribunal's competence does not derive from State law, but rather from the arbitration agreement and principles specific to arbitral practice.[31] Conversely, of course, to refuse arbitration any self-standing character may lead to a more stringent form of review, as where a court considers only the extent to which arbitral autonomy may compromise the effectiveness and validity of the territorially or otherwise competent legal system.[32]

## III. The integration of international arbitration within global law

As various authors such as Ralf Michaels have pointed out, the drive towards autonomy has tended to develop more strongly in its negative dimension. [33] By this is meant that it has been effective with regards to liberating international arbitration from the hold of national legal systems,

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30 EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 39 (2010).

31 Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Arbitration No. 10623/AER/ACS, *Award*, 7 December 2001, pt. II.

32 This type of argument is prevalent in EU law, *see, e.g.,* Case C-284/16, Slowakische Republik v. Achmea BV, ECLI:EU:C:2017:699.

33 *Supra* note 5, at 59-61.

both in terms of governing laws and competent courts, but much less so in facilitating the positive emergence of a clear substitute regime, made up of transnational rules and principles. While the general concept of the *lex mercatoria* remains intuitively powerful to describe the reality of international arbitral practice operating, both procedurally and substantively, under original norms that cannot be traced to any particular national legal order, it is much less clear where those norms can be found, how they may be legitimately elaborated, or what is their actual foundation. One of the most often heard critiques of the *lex mercatoria* or similar concepts is precisely their inability to produce anything other than vague propositions such as *pacta sunt servanda*, which are of little help in actually solving concrete disputes.[34]

It is not the author's intention here to rehash this traditional debate. What we wish to focus on here is the argumentative strategies that have been used to fill in the void left by State law, due to the liberating effect of arbitral autonomy. Our argument is that these strategies have gradually evolved in a very different direction from the ones that, as described in the previous section, had driven the original case for autonomy. In fact, they are actually diametrically opposed in two important respects. First, contemporary arbitral practice is characterised, not by its emphasis on carving out a separate domain for itself, but by its eagerness to re-embed itself, not back into State law, but within a broader, global legal structure, one that largely transcends the particular social enclave of transnational commercial relations.[35] The drive is therefore towards the integration of international arbitration, rather than its differentiation. And second, modern-day international arbitration tends to no longer be interested in grounding legal standards in concrete social practices, but searches instead for legitimacy and practical orientation in the abstract domain of universal values and

[34] Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-Five Years, in* LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 149 (Maarten Bos & Ian Brownlie eds., 1987); Paul Lagarde, *Approche critique de la lex mercatoria, in* LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES. ETUDES OFFERTES À BERTHOLD GOLDMAN 125 (1982).

[35] *Supra* note 11, at 31.

reason. In other words, its outlook has become idealistic, rather than sociological. Whilst it is true that scholars sometimes still speak in the theoretical language of legal pluralism, and describe the law of international arbitration as emanating from a certain "*community*" that is separate from States,[36] that community is no longer that of economic operators, but that of the lawyers themselves (the so-called "*arbitration community*"),[37] who engage in effective international arbitral practice, as arbitrators and arbitration lawyers and scholars, through their use of deliberative reason.[38] Autonomy is thus liberated from society as much as from States, and based instead on self-sustaining legal principles.[39]

Such a tendency can be seen, first of all, in the use of comparative law.[40] This has been promoted in international arbitral practice, notably by the late Emmanuel Gaillard, as part of a renewal of the *lex mercatoria*.[41] Per this updated version of the theory, arbitrators should reach out, when confronted with substantive or procedural issues, not for a list of nebulous standards emanating from concrete commercial practice, but for 'general principles' that enjoy broad support across nations. Identifying these principles is largely the work of comparative law – by comparing relevant legal systems or instruments, it is argued, it is possible to identify a strong consensus around a certain principle, or at least a general convergence or a certain trend in that direction. Thus, it has been said that comparative analysis can serve to identify basic jurisdictional principles of international arbitration (such as competence-competence),[42] approaches to evidentiary issues that bridge the civil law/common law divide (as for instance with

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36 Stavros Brekoulakis, *International Arbitration Scholarship and the Concept of Arbitration Law*, 36(4) FORDHAM INT'L L. J. 745 (2013).

37 *Id.*

38 *Supra* note 27, at 45.

39 KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA (1999).

40 Joanna Jemielniak, *Comparative Analysis as an Autonomization Strategy in International Commercial Arbitration*, 31(4) INT'L J. SEMIOT. L. 155 (2018).

41 Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?* 17(1) ARB. INT'L 51 (2001). More recently, 1 Emmanuel Gaillard, *Comparative Law in International Arbitration, in* IUS COMPARATUM 1 (2020).

42 *See, e.g., supra* note 31, at ¶¶ 129-134.

discovery procedure),[43] or even substantive standards of contract law (such as good faith).[44]

It is certainly possible to doubt the actual viability of this method to actually identify any such consensus and therefore circumvent national law. What matters here, however, is that this renewed approach implies that the ultimate validity of the norms that can be elaborated in this way no longer rests on their correspondence with the concrete practices and needs of merchants engaged in cross-border economic activities. The existence of a transnational consensus or convergence is ultimately evidence of the universal (and therefore acontextual) acceptability of the norm in question, as a form of 'better law' or 'best practices'.[45] The fact that such norms tend to be described as "*principles*" is revealing, for the word is here used, not to describe broadly applicable standards or normative propositions that can be extracted from a variety of legal settings, but to signal that their validity is ultimately grounded in reason – a "*modern law of nature*".[46] Even if trade usages and general principles are often lumped together under a single reference, the two concepts actually point in very different directions.[47]

This logic is even more explicit in the tendency to resort to such universal norms directly, without the mediation of comparative analysis. This tendency was already decisive in the early development of international investment law in the middle of the century,[48] but more contemporary practice has seen it accelerate and spread across the entire field of international arbitration. The applicability of a certain standard will be presented as self-evident and inescapable, as a matter of general rationality or uncontroversial basic values. Arbitrators will thus resort to broad

43 *See, e.g.,* Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure,* 36(4) VANDERBILT L. REV. 1313 (2003).

44 *See, e.g.*, *ICC Case No. 3896 (1982), in* JOURNAL DU DROIT INTERNATIONAL 58, 79 (1984).

45 *Supra* note 11, at 126.

46 Andrea Leiter, *Protecting Concessionary Rights: General Principles and the Making of International Investment Law*, 35 LEIDEN J. INT'L L. 55 (2022).

47 *Supra* note 11, at 140.

48 *Supra* note 46.

principles such as party autonomy, proportionality or full reparation, without needing to ground them in any system of positive law or transnational convergence. This is particularly evident in the emergent notion of a "*transnational*" or "*truly international*" public policy, which empowers arbitrators to enforce certain core norms against the agreement of the parties, while preventing courts from applying purely national conceptions of public policy in their review of arbitral awards. Here are included principles such as the prevention of terrorism or corruption – as already proclaimed in Lagergren's famous 1963 ICC award, where he refused jurisdiction in a bribery affair, for reasons not grounded in any particular national law: "*corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations*."[49] In this way, international arbitration "*integrates fundamental values and superior interests*" that are said to generate a strong consensus among nations.[50] We find here no reference at all to the particular needs of commerce – on the contrary, it is implied that these may well be overridden on behalf of a form of "*higher justice*."[51] Nor is there a sense of spatial limitation – transnational public policy is always relevant, without the need for any form of territorial connection to a particular polity,[52] since it is restricted to "*matters triggering global ignominy*."[53] It is only in this current context that we can speak, with precision, of the 'delocalisation' of international arbitration.

In any case, the clearest example of this idealistic tendency is found, not in the substantive norms applied by arbitrators and possibly monitored by national courts, but in the development of arbitral procedure and institutional organisation. Some authors have for some time identified a tendency towards the '*judicialisation*' of international arbitration, by which it is meant that it has gradually integrated principles and values considered to

49 *ICC Award No. 1110 (1963)*, 10 ARB. INT'L 282 (1994).

50 Pierre Lalive, *Ordre public transnational (ou réellement international) et arbitrage international*, 1986(3) REVUE DE L'ARBITRAGE 329 (1986).

51 *Id.* at 365.

52 *Id.* at 365-366.

53 Andrea Bjorklund, *Enforcement, in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 204 (Thomas Schultz & Federico Ortino eds., 2020).

be essential to courts or court-like bodies.[54] This means that, rather than evolving as an alternative mode of dispute resolution, international arbitration is seen more and more as a form of parallel justice, subject to the same basic expectations as national judges, or indeed any system that can aspire to qualify as properly legal.[55] Thus, it is increasingly viewed as unacceptable for arbitrators to be subject to laxer rule of law standards, such as due process, transparency, adequate reasoning or independence and impartiality, than those applicable in a court setting.[56] The recent work of Jan Paulsson is representative of this trend, as he places great emphasis on the "*common values*" shared by courts and arbitral tribunals alike[57] (but this precise view was already present in the work of earlier authors such as Oppetit, who saw the two as operating under common principles of "*natural justice*").[58] Also representative is the growing interest in arbitration from scholars of constitutional law,[59] who have tended to approach it through constitutional theories of adjudication.[60] Thus, the rule of law tends to be touted as the most defining feature of international arbitration, which is now often promoted as an expression[61] of that principle.[62] This is particularly evident in the context of international investment disputes,

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54 *Supra* note 11, at 11.

55 Thomas Schultz, The Concept of Law in Transnational Arbitral Legal Orders and its Consequences, 2(1) J. INT'L DISP. SETT. 59 (2011). The author develops further this argument in his book, THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION (2014).

56 Sundaresh Menon, *Arbitration's Blade: International Arbitration and the Rule of Law*, 38(1) J. INT'L ARB. 1 (2021).

57 *Supra* note 27, at 265.

58 *Supra* note 12, at 29.

59 VÍCTOR FERRERES COMELLA, THE CONSTITUTION OF ARBITRATION (2021).

60 *See, e.g.,* Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4(1) L. & ETHICS HUM. RIGHTS 47, 48 (2010); Víctor Ferreres Comella, *Arbitration, Democracy and the Rule of Law: Some Reflections on Owen Fiss' Theory*, YALE SELA PAPERS (2014); Paolo Esposito & Jacopo Martire, *Arbitrating in a World of Communicative Reason*, 28(2) ARB. INT'L 325 (2012).

61 INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY, ICCA CONGRESS SERIES NO. 19 (Andrea Menacker eds., 2017); David W. Rivkin, *The Impact of International Arbitration on the Rule of Law*, 29(3) ARB. INT'L 327 (2013).

62 But also its guarantor, in the context of international investment law. *See, e.g.*, VELIMIR ZIVKOVIC, FAIR AND EQUITABLE TREATMENT AND THE RULE OF LAW (2023).

where arbitration is regularly promoted in these terms.[63] But it is also apparent in the purely commercial domain, where scholarship regularly compares one form of justice to another in terms of how well they meet the requirements of the rule of law.[64]

All of this betrays a significant remoteness from any concrete social practices that could be said to be characteristic of international commerce, and a shift in the opposite direction, towards abstract ideals and values, in particular a universal principle of "*fair process*,"[65] from which operational norms are claimed to be deduced.[66] Where previous practice asserted the autonomy of international arbitration by emphasising the non-delegated and self-standing nature of its authority, more contemporary scholarship tends instead to position arbitration as an agent of a broader legal structure. That structure is not, however, that of national legal orders, as in the past. What we are witnessing is, instead, a turn to what a variety of scholars refer to as "*global law*." As Neil Walker explains in his book,[67] this notion seeks to capture, not so much the proliferation of legal sources or law-giving institutions at a global or international level (even if this is certainly also of some relevance), but rather the transformation undergone by discursive legal practices, in their increasing tendency, even at a very local level, to express and implement a commitment to legal norms of a globally extensive reach, however precarious or indeterminate these may appear to be. Such spatially un-constrained commitments are exactly what we observe in

63 RIVKIN, supra note 61.

64 PAULSSON, supra note 27, at ch. 9.

65 OPPETIT, *supra* note 12, at 25.

66 BREKOULAKIS, *supra* note 36, at 782 (procedural "norms in arbitration practice have not developed accidentally. They have developed by reference to the fundamental legal principle of fair process. The principle of fair process requires that each arbitration party must be treated equally and must be given the opportunity to present each case, as well as that the arbitration will be conducted in a manner that avoids unnecessary delays. The principle of fair process and the ensuing sub-principles apply in arbitration not because they are stipulated in all arbitration laws and arbitration rules. Rather, the fact that these principles universally feature in arbitration laws and rules is evidence of their wide institutional support").

67 NEIL WALKER, INTIMATIONS OF GLOBAL LAW (2015).

arbitral practice, with its novel focus on self-sustaining rule of law-type values, rather than the particular patterns of behaviour that one may hope to observe in commercial trade across borders.

## IV. Conclusion

This Editorial has sought to describe how international arbitral practice, and its various claims to autonomy, have been shaped by competing visions, whose influence varies depending on changing environments, in ways that ultimately determine the field's development and driving preoccupations. Our overview has shown the explanatory and normative limits of the traditional accounts of autonomy, which tend to only emphasise the degree to which international arbitration evolves freely from State control. As we have argued, these accounts tend to pass over the specific and evolving visions that support claims to autonomy from national legal systems, whilst failing to consider how such claims serve to re-embed arbitral practice in alternative normativities that are are not arbitration-specific. We have thus sought to identify how, in contrast to its early development, where it was presented as the reflection of a distinct social reality (that of the social differentiation and internal cohesion of international commercial actors), autonomy today is largely represented as a function of self-sustaining legal principles, which structure and define the field of international arbitration. For the most part, however, those principles are not specific to international arbitration, but the expression of globally extensive and universally valid ideas of justice.

What does this turn to global law mean, for the very notion of autonomy? What are the implications of the claim to arbitral autonomy been transformed into an argument about this technology of dispute resolution being a form of superior or more perfect justice than that dispensed by national courts? We will sketch out two concluding thoughts. The first is that the autonomy of international arbitration vis-à-vis States becomes somewhat more precarious. If it is based on its claim to deliver justice more competently than national courts, as a more perfect expression of the rule

of law, then autonomy will always be conditional on this being the case, and therefore open to erosion whenever arbitral tribunals do not live up to these high expectations. The second thought relates to international arbitration's changing positioning vis-à-vis other non-State legal orders. The traditional case for autonomy was inherently defensive – it sought to resist any intrusiveness on the part of State law, by clearly delineating the perimeter of what properly belonged within the arbitral domain. By contrast, the global turn means that this dividing line is now much more porous. This may nevertheless allow for a different, more offensive case for autonomy. Indeed, even though the norms deployed by arbitrators are no longer claimed as specific to international arbitration, this does not mean that arbitral practice is reduced to a passive receptacle for the interpretations developed elsewhere. Arbitrators can now engage in a more open and two-way dialogue with other areas of legal practice, including those found in national settings, as long as they share in the same basic commitments.[68] They can therefore now hope to influence global legal practice through their own interpretations of shared standards.[69] Integration of global norms thus goes both ways – it certainly serves to embed international arbitration within broader legal structures, but it is also the gateway for international arbitration's own global projection and ambition.

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68 "Global law also refers to the emergence or to the prospect of the emergence of a trans-systemic and often explicitly inter-systemically engaged common sense and practice of recognition and development of jurisdictionally unrestricted common ground on particular rules, case precedents, doctrines or principles, or even with regard to background legal orientations." *Id.* at 19-20.

69 *See, e.g.,* the jurisprudence of international arbitral tribunals in relation to the calculation of compensation, which has largely evolved by reference to standards that are presented as universal: Toni Marzal, *Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS*, 22 J. WORLD INV. & TRADE 249 (2021); in a way that has had considerable influence across international legal practice: Christian J. Tams & Eleni Methymaki, *The world court's influence on contemporary investment law, in* INTERNATIONAL INVESTMENT LAW: AN ANALYSIS OF THE MAJOR DECISIONS 37 (Hélène Ruiz Fabri & Edoardo Stoppioni eds., 2022).