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The Myth of Transnational Public Policy in International Arbitration†

This Article traces the concept of transnational public policy as developed in the context of international arbitration at the intersection between legal theory and practice. The emergence of such a transnational public policy, it is claimed, would enable arbitrators to safeguard and ultimately to define the public interests that need to be protected in a globalized economy, irrespective of national laws. A historical contextualization of efforts to empower merchants and their practices in Germany and the United States in the nineteenth and early twentieth centuries highlights their reliance on the mythical lex mercatoria that shaped English commercial law. Further contextualization is offered by the postwar invocation of "general principles of law recognized by civilized nations," to keep at bay the application of supposedly less civilized, parochial legal orders, and by the consequent emergence of the "new" lex mercatoria as conceptualized especially in France. These developments paved the way, on the theory side, for later conceptualizations of self-constitutionalizing law beyond the state, especially by Gunther Teubner, and, on the practice side, for the notion of transnational public policy developed by arbitrators, especially by Emmanuel Gaillard, culminating in jurisprudential claims of an

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autonomous arbitral legal order with a regulatory dimension. In all these constructions, the recourse to comparative law has been a crucial element. Against this rough intellectual history, the Article offers a critique of today's construction of transnational public policy by probing into its constitutional dimension and the respective roles of private and public interests. This allows, in particular, to draw on parallels to historic U.S. constitutional debates on the allocation of regulatory powers in federalism.

Introduction

Who is in charge of safeguarding public policies? And who defines them? While the answers to these questions may seem rather obvious to a constitutional lawyer,[1] they are far less clear in the conflict-of-laws context—and even less so if one adds international arbitration to the equation. In the past few decades, courts in most countries have gradually accepted arbitrators being entrusted with the disputes that touch upon fundamental public interests, at least insofar as these disputes concern economic regulation, such as competition laws, securities regulations, exchange controls, or embargos.[2] Practitioners have happily embraced the U.S. Supreme Court's gloss of this liberalization as justified, *inter alia*, by the "respect for the capacities of . . . transnational tribunals,"[3] and have felt encouraged to keep on pushing the boundaries even further in favor of the autonomy of the arbitral process—and with some considerable success. Arbitral tribunals, so the argument goes, would themselves develop safeguards for the protection of "fundamental values of the international community [through] rules making up truly international public policy and reflecting the broad, even if not unanimous, consensus among states to condemn certain practices."[4] Such a transnational public policy, emerging from comparative law, would be the logical and necessary corollary to the evolving *lex mercatoria*. This claim echoes (though not always consciously) those in legal theory about the process of "self-constitutionalization" of truly *trans*-national law.[5] Transnational

1. *But see* Maksymillian Del Mar, *Imaginaries of Authority: Toward an Archaeology of Disagreement*, *in* Authority in Transnational Legal Theory 222 (Roger Cotterrell & Maksymillian Del Mar eds., 2016) (discussing the debate among constitutionalists over the viability of constitutional pluralism).

2. Starting with the seminal SCOTUS decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985).

3. *Id.* at 628.

4. Emmanuel Gaillard, Aspects philosophiques du droit de l'arbitrage international 177 (Martinus Nijhoff ed., 2008).

5. *See* Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* Global Law Without a State 1 (Martinus Nijhoff ed., 1997); Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Mich. J. Int'l L. 999, 1015–16 (2004).

public policy thus becomes a concept for legitimizing a far-reaching autonomy of the arbitral system, in terms of self-regulation *and* regulation. Some go as far as claiming that "arbitrators are becoming—if with some hand-wriggling and reluctance—default lawmakers for traders."[6] In the absence of proper international regulatory powers and institutional structure, international arbitrators would be entitled—or even required—to set the rules for international economic transaction, thereby ultimately defining public interests at the global level. In these times, where party autonomy supposedly "represents, as it were, a human right in a globalized world,"[7] is it too far-fetched to consider commercial arbitrators, whose jurisdiction is the product of party autonomy, as akin to global regulators?

This Article does not set out to discuss the conceptual nature of transnational law or the *lex mercatoria*.[8] Nor does it intend exhaustively to discuss the vast literature on the subject.[9] More modestly, it takes a selective and in-depth look at one specific attempt at legitimizing regulatory powers beyond the state,[10] notably the concept of transnational public policy as cultivated in the context of international commercial arbitration.[11] Transnational public policy, synthesized

6. Alec Stone Sweet, *The New* Lex Mercatoria *and Transnational Governance*, 13 J. Eur. Pub. Pol'y 627, 641 (2006).

7. Jürgen Basedow, *Law of Open Societies: Private Ordering and Public Regulation of International Relations*, 360 Recueil des Cours de l'Académie de Droit Int'l 9, 202 (2012).

8. *See, e.g.*, Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 Eur. L.J. 400 (2002) [hereinafter Zumbansen, *Piercing the Legal Veil*]; Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 Law & Contemp. Prob. 125 (2013) [hereinafter Zumbansen, *Transational Private Regulatory Governance*]; Peer Zumbansen, *The Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy*, *in* Negotiating State and Non-state Law: The Challenge of Global and Local Legal Pluralism 83, 108 (Michael A. Helfand ed., 2015) [hereinafter Zumbansen, *The Constitutional Itch*]; Ralf Michaels, *The True* Lex Mercatoria*: Law Beyond the State*, 14 Ind. J. Glob. L. Stud. 447 (2007) [hereinafter Michaels, *The True* Lex Mercatoria]; Ralf Michaels, *The Mirage of Non-state Governance*, Utah L. Rev. 38, 38–45 (2010); Rodger Cotterrell, *What Is Transnational Law?*, 37 Law & Soc. Inquiry 500 (2012); Gregory Shaffer, *Transnational Legal Process and State Change*, 37 Law & Soc. Inquiry 229 (2012); Terence C. Halliday & Gregory Shaffer, Transnational Legal Orders (2015); Maya Steinitz, *Transnational Legal Process Theories*, *in* Oxford Handbook of International Adjudication 340 (Cesare P.R. Romano et al. eds., 2013); Peer Zumbansen, Oxford Handbook of Transnational Law (2021).

9. For a recent publication covering much of that ground, see Leon Trakman, *Aligning State Sovereignty with Transnational Public Policy*, 93 Tul. L. Rev. 207 (2018).

10. *See* Del Mar, *supra* note 1 (albeit with mostly different angles).

11. Arbitrators as ultimate adjudicators in regulatory matters is an even more acute claim and issue in international investment arbitration; this, however, is too vast a topic to include in this paper, which is thus limited to commercial arbitration. For an analysis of the notion of transnational public policy in national courts, which is also not covered here, see David C. Burger, *Transnational Public Policy as a Factor in Choice of Law Analysis*, 5 N.Y.U. J. Int'l & Comp. L. 367 (1984); Adeline S.L. Chong, *Transnational Public Policy in Civil and Commercial Matters* 128 Law Q. Rev. 88 (2012).

through comparative law, is the key element in this construction. This concept claims not only sociological relevance, as a consequence of global merchant practice, but also—through numerous sophisticated circularities and repetitions—a central normative role, which calls for a deeper analysis.

Part I frames the origins of the idea of private agreement being capable of creating law, including the general rules that can override private agreement and other laws, and how it has developed over time. It traces the desire to free merchants from the shackles of national laws, based on the invocation of a community spirit, *Volksgeist*, or *esprit corporatif*, as a force animating the emergence of "civilized" norms among merchants for overcoming parochialism. Part II extends this reasoning by focusing on the theoretical work of Gunther Teubner on the self-constitutionalizing dimension of the law merchant. This theoretical perspective is then contrasted with the promotion of transnational public policy as a self-sufficient limitation of private party autonomy as developed by arbitration practitioners, in particular by Emmanuel Gaillard. Part III reverts to the constitutional dimension of this construction of transnational public policy by probing into the respective roles of "public" and "private" interests. This allows for the framing of the underlying constitutionalizing claim by contrasting it with the analogous challenges to legitimacy in the U.S. federal system. The conclusion is that the concept of transnational public policy has no roots in any kind of genuine *Volksgeist*; it is not linked back to the interests of those affected by international private transactions. The recourse to some synthetization of "civilized" regulatory solutions through comparative law cannot provide this grounding. And without such grounding, the concept cannot deliver on its normative claim.

I. General Principles for Leaving State Law Behind

This first Part examines the roots of the notion of transnational public policy, as reflected in the calls after World War II for transcending "parochial" regulation in national laws through arbitration (Part I.A). The proposition that private transactions could constitute a source of law beyond the state is contextualized by exploring the conceptual influence of (the rhetoric on) the mythical *lex mercatoria* (Part I.B), notably on the codification of commercial law in Germany in the nineteenth century (Part I.B.1) and later in the United States and at the global level (Part I.B.2), as well as on the rise of the use of "civilized" general principles of law in intersection between private and public international law (Part I.B.3), and, of course, the making of the "new" *lex mercatoria* in the 1960s (Part I.B.4). This contextualization prepares the terrain for a better understanding of the theoretical and practical

justifications of transnational public policy and its relation to the procedural instrument of arbitration.

A. The Merchant's Dream of Autonomy

A useful starting point for tracing the notion of transnational public policy is—rather than the Middle Ages[12]—the 1953 Report and Preliminary Draft by the International Chamber of Commerce (ICC) for what later became, with significant modifications, the UN Convention on Recognition and Enforcement of Foreign Arbitral Award of 1958 (the New York Convention).[13] In this report, the ICC Secretary General Frédéric Eisemann captured the discontent of the business community with the inefficiency of the instruments (both national and international) regulating the effects of arbitral awards rendered abroad. He proposed a new approach:

> In actual fact, the idea of an international award, i.e. an award completely independent of national laws, corresponds precisely to an economic requirement. . . . [T]he fact that an award settling a dispute arising in connection with this agreement will produce effects in different countries makes it essential that it should be enforced in all these countries in the same way. The development of international trade depends on this.[14]

The proposal of such "international" or even "denationalized"[15] arbitral awards aimed to eliminate the relevance of the law of the seat of arbitration and do away with the burdensome requirement of double exequatur, which undermined most of arbitration's efficiency.[16] In support of the ICC's claim, Eisemann ventured into formulating a broader proposition:

12. For a discussion of the "foundation myth" of the medieval *lex mercatoria*, see Charles Donaghue, *Medieval and Early* Lex Mercatoria*: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT'L L. 21 (2004); Nikitas E. Hatzimihail, *Genealogies of* Lex Mercatoria, *in* STUDIES IN MEMORIAM OF PROFESSOR ANTHONY M. ANTAPASIS 311 (2013); Ralf C. Michaels, *Legal Medievalism in* Lex Mercatoria *Scholarship*, 90 TEX. L. REV. 259 (2012). *But see* Trakman, *supra* note 9, at 233.

13. Int'l Chamber Commerce (ICC), Enforcement of International Arbitral Awards: Report and Preliminary Draft Convention Adopted by the Committee on International Commercial Arbitration at Its Meeting of 13 March 1953, ICC Brochure No. 174 (1953), *reprinted in Preliminary Draft Convention*, U.N. Doc. E/C.2/373 (1955), https://daccess-ods.un.org/tmp/1257805.67526817.html).

14. *Id.* at 7–8.

15. For the expression "denationalized," see the comments of the government of Luxemburg in Econ. & Soc. Council, Comments Received from Governments Regarding the Draft Convention on the Enforcement of International Arbitral Awards, at 5, U.N. Doc. E/AC.42/1 (Jan. 21, 1955).

16. *See, e.g.*, Jan Kleinheisterkamp, *Recognition and Enforcement of Foreign Arbitral Awards*, *in* MAX PLANCK ENCYCLOPAEDIA OF EUROPEAN PRIVATE LAW 1420, 1421–23 (Jürgen Basedow et al. eds., 2012).

> Legal circles have until recently shown a marked opposition to recognizing autonomy of the will as a valid source of private international law which, being ideally the science of conflict of laws, presupposes that all legal relationships are subject to some national law. But at the same time, it would be hard to imagine the sense of frontier and of sovereignty disappearing, economically to start with and later politically, without the simultaneous establishment of international forms of procedure along similar lines. . . . Only by giving full value to the autonomy of the will can [the development of international trade] be achieved.[17]

This proposition of the autonomy of the will as a source of law through the means of arbitration reflected a particular spirit of the time. In line with other epochal projects of economic integration designed to eradicate war, such as the Bretton Woods System, the General Agreement on Tariffs and Trade (GATT), and the European Communities, the wish to overcome "frontier and sovereignty" expressed a spirit of cosmopolitanism that sought to fight the evil of nationalism that had so long haunted the world in previous decades. This vision of the primacy of private autonomy in a denationalized, or *trans*-national, system of rules of commerce was, however, clearly rejected by the (national) delegates negotiating the New York Convention, who insisted that the new convention would "maintain generally recognized principles of justice and respect the sovereign rights of States."[18]

B. Back and Forth to the Lex Mercatoria

The underlying "dream" of a truly transnational legal order,[19] however, has since proliferated. The modern merchants' dream of

17. *Id.*

18. Econ. & Soc. Council, Report of the Committee on the Enforcement of International Arbitral Awards, ¶ 14, U.N. Doc. E/2704, E/AC.42/4/Rev 1 (Mar. 28, 1955). It is interesting to note that of the seven comments received from national governments, only those from Luxemburg and Yugoslavia formulated objections against the notion of "denationalized" awards, whereas the other countries mostly greeted the ICC draft as being "in accordance with natural justice and [national] law." Luxemburg sharply commented that:

> Such an anarchical state of affairs in the law hardly seems consistent with the traditional concept of the autonomy of the will, and it remains to be seen whether this interesting and extremely bold idea can be effectively and suitably translated into juridical reality. There is reason to doubt that this can be accomplished. It is comparable to the "statelessness" of individuals, which is of advantage at times, but nevertheless produces an abnormal, and at first analysis, undesirable situation. . . . It is unthinkable that the will of the parties should create a *novum*, with provisions down to the last detail. Some reference to the positive laws of a specified State or to a body of international law (which in any case does not now exist) is indispensable.

Econ. & Soc. Council, *supra* note 15, at 6.

19. Julian Lew, *Achieving the Dream: Autonomous Arbitration*, 22 Arb. Int'l 179 (2006). For an incisive, entertaining analysis of this issue, see also Ralf Michaels, *Dreaming Law Without a State: Scholarship on Autonomous International Arbitration as Utopian Literature*, 1 London Rev. Int'l L. 35 (2013).

autonomy beyond borders drew much inspiration from the mystic representations of the medieval *lex mercatoria* which had influenced much of Romantic legal scholarship in the nineteenth century. It was the idea of a law stemming from the medieval practices and usages of traders, as first applied in the merchants' own *piepowder* courts of fairs and boroughs, maritime and staple courts, and later was "ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law," as Lord Chief Justice Cockburn wrote in 1875.[20]

1. Cosmopolitan Law Merchant and Nationalist *Volksgeist*

The naturalist idea of a *lex mercatoria* as the immanent law of merchant society, expounded through the wisdom of lay courts of merchants, is intriguingly linked to the German nineteenth-century mystical notion of the *Volksgeist*, the spirit of the people.[21] Romanists, such as Savigny, acknowledged that laws and rights, although based on deeper jurisprudential institutions (*Rechtsinstituten*) common to all societies sharing a Christian and Roman background, were in their differing iterations shaped by this *Volksgeist* rather than by coincidence or human arbitrariness.[22] Germanists, issuing from the German Romantic movement and who rejected traditional, formalist legal and political structures, held that proper law could only grow out of the *Volksgeist* and thus through the accreditation of customary practices.[23] The Germanists believed that the integration of this "immanent law," or *ius naturale*, which resulted from the *Natur der Sache* or *naturalis ratio*, had to be institutionalized, not as promoted by Savigny through legislative institutions and jurisprudence,[24] but through the case law of laymen courts. After the failed German Revolution of 1848, the only branch of law in which this vision of a new legal system could ultimately be implemented was commercial law, a field largely ignored by traditionalist Romanist lawyers and public authorities.

20. Goodwin v. Robarts (1875) 10 LR Exch. 337, 346 (Eng.). *See also* Peter Vanheath v. Turner (1621) Winch 24, 24–25 (Eng.) ("[T]he custome of merchants is part of the common law of this kingdome, of which the Judges ought to take notice: and if any doubt arise to them about there custome, they may send for the merchants to know there custome, as they may send for the civillians to know there law."). For the classic account, see EWAN MCKENDRICK, GOODE ON COMMERCIAL LAW 1–8 (4th ed. 2010).

21. For two pieces uniquely influential in the development of the following, see James Q. Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 159–66 (1987); Stephen E. Sachs, *From St. Yves to Cyberspace: The Modern Distortion of the Medieval "Law Merchant,"* 21 AM. U. INT'L L. REV. 685, 800–03 (2006).

22. 1 CARL F. VON SAVIGNY, DAS SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 9–18 (1840).

23. *See* Whitman, *supra* note 21, at 159.

24. *See* SAVIGNY, *supra* note 22, at 18 (concluding that this natural process of deriving the law from the spirit of the people becomes more difficult with the loss of homogeneity of a stratified society and ultimately impossible unless based on own "organs" as institutionalized (i.e., democratic?) lawmaking and jurisprudence).

Indeed, the Romantic Germanists' inspirations can be traced back to the English practices under Lord Mansfield of drawing on lay jurors in hearing commercial cases.[25] The main drafter of the first German commercial code of 1861, Levin Goldschmidt, invoked the idea of a common heritage, and the resulting universality, of commercial law, as cultivated and cherished by the English.[26] Referring to the historical development of the practice of international commercial law, from the Roman *ius gentium* to the global influence of medieval Italian trading practices on commercial rules up to the eighteenth century and the proliferation and absorption of other foreign trading rules and practices, he argued that "the reasons for this commonality can partially be found in the international, cosmopolitan nature of trade itself."[27] Eager to break with the formal and reactionary straightjackets of the *anciens régimes* in politically fragmented Germany, Romantics such as Goldschmidt were clearly fascinated by a certain mysticism of English commercial law,

> which of all laws of the world is probably most completely product of usages and custom, *the least constricted by legislative regulations* . . . [as it] relies still today primarily on the commercial practice of the civilized world, a true *ius gentium*. This *lex mercatoria* (law merchant, customs of the merchants) originally stood opposed to the common autochthonous customary law (common law) as extraneous to the law, but is now part of the same. It is determined not only by local processes but also by older and newer foreign laws and legal treatises . . . . From these sources, the English judge develops the applicable law—yet not blindly, but after a free appreciation as the "lawful organ of the national legal consciousness"; and the decisions of respected English judges then constitute evidence of this customary law, a significant, albeit not generally binding, authority. The regular inclusion of merchant jurors assures the living flow of the development of commercial law.[28]

25. For this practice, see JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 93–99 (1992); CECIL H.S. FIFOOT, LORD MANSFIELD 114 (1936).

26. I/1 LEVIN GOLDSCHMIDT, HANDBUCH DES HANDELSRECHTS 210 (Erlangen, Ferndinand Enke 1864) (noting that "[t]his universal character of commercial law is most sharply emphasised in English jurisprudence." *Id.* at 210 n.2).

27. *Id.* at 210–11 (distinguishing this "general" (*allgemeine*) universal commercial law from "common" (*gemeine*) territorial commercial law, the latter being the actual applicable one and which can be interpreted only with caution in the light of, and supplemented by, the former: "[t]he coincidence of even many national laws does not allow deducing the very same solution for a question not resolved by the own law.").

28. *Id.* at 77 (emphasis added). For the influence of Johann Georg Büsch, one of the first Germans to travel to England and study its political institutions, see Whitman, *supra* note 21, at 162–63.

With this inspiration, and eager also to overcome the then-dominating formalistic conception of the law and the arbitrariness of court practices,[29] Goldschmidt insisted that the special nature of commercial matters, especially in international cases, should guide the judge, since commercial practice is essentially based on good faith and fair dealing.[30] This conception then required the integration of merchants into the commercial courts in order to ensure proper knowledge of general and local usages: "Like the jurors of the medieval jurisdictions [being] the judicial organs of the national [consciousness], the commercial courts drawing on merchant lay judges are the proper judicial organs of the commercial consciousness."[31] Like Eisemann in 1953,[32] Goldschmidt also felt the need, in 1857, to make a broader jurisprudential claim in support of his project relating to the autonomy of the collective will of merchants:

> [T]he true significance of customary law in these present times of eager law-making and of excess of legislation becomes apparent where it is necessary to confront the unyielding will of the legislature with the *changed* convictions of the people. Custom without derogatory powers is meaningless. . . . *Total liberalization of custom is one of the cardinal questions for the envisaged new phase of commercial law*.[33]

Unlike Eisemann's vision, Goldschmidt's proved more realistic and, indeed, fruitful. Crucially, it was not about denationalizing commercial law.[34] It was about ensuring that commercial disputes would be decided predominantly according to, and thus anchored in, the merchants' own practices. The underlying objective was deeply political, and literally revolutionary,[35] yet it was not about questioning the state's sovereign powers as such. It was about making law more democratic. The means for achieving this was the systematic use of open-ended terms in the legislation, such as "reasonableness,"

29. GOLDSCHMIDT, *supra* note 26, at 219.

30. *Id.* at 220; curiously, an English lawyer today would be reluctant to accept this proposition: *cf.* Waldorf v. Miles, 2 A.C. 128, 2 WLR 174 (1992). *But see* MCKENDRICK, *supra* note 20, at 4 n.5 (qualifying the absence of the requirement of good faith as a prerequisite for the exercise of legal—as opposed to equitable—remedies as "curiously lacking in present law").

31. GOLDSCHMIDT, *supra* note 26, at 242–43.

32. *See* ICC, *supra* note 13.

33. Levin Goldschmidt, *Vorwort zur Kritik des Entwurfs eines Handelsgesetzbuchs*, 4 KRITISCHE ZEITSCHRIFT FÜR DIE GESAMTE RECHTSWISSENSCHAFT 289 (Heidelberg, Mohr 1857), *quoted in* Whitman, *supra* note 21, at 165 n.64 (emphasis added).

34. *See* Goldschmidt, *supra* note 33, at 293 n.7 ("From today's perspective of legal theory, the postulate is entirely true that a common law [as opposed to general law] exists only within a state organisation, be it a central state or a federation, but not in a merely international association, such as the German *Bund*. Beseler's postulate that 'what is necessary is the unity of the people, not of the State' leads to a people without State, i.e. to the state of nature.").

35. *See* Whitman, *supra* note 21, at 165 ("[I]ntroduce into law what the [1848] revolution had failed to introduce: the 'will of the people.'").

"adequacy," and "legitimate interests." All these terms were ultimately proxies for the merchants' consciousness of good faith and fair dealing. This set-up would then ensure that merchant lay judges, sitting with a professional judge in a commercial court, could flexibly integrate commercial customs and usages beyond their merely subsidiary application in the silence of commercial and general civil legislation. Indeed, Goldschmidt managed to include these cornerstones of his vision in the first common German commercial code of 1861 (prior to the unification of the German Reich under Prussian rule in 1870), which then became the basis for modern German commercial law, which still relies today on merchant lay judges to allow for the continuous reception of commercial practice.[36]

2. Realism and the Merchant Spirit in Uniform Commercial Codes

The German Romantic integration of the *Volksgeist* into commercial law, by invoking the spirit of the mythical, medieval *lex mercatoria* and the representations of its incorporation into English law, had a crucial influence on Karl Llewellyn, the drafter of the American Uniform Commercial Code (UCC), as shown by James Whitman[37]: "Llewellyn believed that the German merchants had preserved intact the medieval independence that had perished in America and Britain" and that "[i]f Americans could remodel their commercial law on German lines, they would rejoin the great tradition of the *lex mercatoria*."[38] Llewellyn hoped to create, in line with Goldschmidt, "a code in which the generative impulse for an ever-evolving law merchant remained with the merchants themselves, assembled in juries."[39] The UCC's deference to custom, the law merchant, good faith, and reasonableness, was conceived by Llewellyn, like Goldschmidt, as "indications to a court that should refer its decisions to lay specialists with a feel for commercial law."[40] His proposal to include a mechanism of drawing on merchant jurors "to revive the practices of Lord Mansfield" was, however, ultimately rejected.[41] The (accepted) open-textured terminology was thus left without a mechanism for linking it back to the

36. *See* Gerichtsverfassungsgesetz [GVG] [Judicature Act], §§ 105, 109(1), *translation at* www.gesetze-im-internet.de/englisch_gvg/index.html; similarly in France, see Code de l'organisation judiciaire [COJ] [Code of Judicial Organization] arts. L, 411-1, 412-1, 412-3, 413-3.

37. Whitman, *supra* note 21, at 166.

38. *Id.* at 170 & n.93.

39. *Id.* at 172.

40. *Id.* at 174.

41. *Id.* at 172, 174. *But see* Zipporah B. Wiseman, *The Limits of a Vision: Karl Llewellyn and the Merchant Rules*, 100 Harv. L. Rev. 465, 527–28 (1987). *See also* Otto Kahn-Freund, *The Use and Misuse of Comparative Law*, 37 Mod. L. Rev. 1, 19 (1974) (relating to the intrinsic difficulty of transplanting the commercial court model of Germany and France to a common law jurisdiction).

"immanent law" that resulted from commerce's *Natur der Sache*,[42] the German notion that had also influenced other legal realists prior to Llewellyn.[43]

Although Llewellyn's efforts to keep the *lex mercatoria* alive failed in the United States,[44] his ideal ultimately materialized much later in the post-modern and ambitious iteration of the "new *lex mercatoria*": the UNIDROIT Principles of International Commercial Contracts (hereinafter the Principles), first published in 1994, with further editions in 2004, 2010, and 2016. As it happens, Llewellyn had attended a session of the drafting committee of the 1935 draft of an international sales law,[45] directed by Ernst Rabel, another German who influenced Llewellyn[46] and whose works provided the basis for the later elaboration of these Principles.[47] The Principles were originally conceived as a general part of a "Uniform International Commercial Code."[48] The U.S. approaches to unifying commercial contract law, especially the UCC, as well as the restatement technique, had such a great influence on this project that Alan Farnsworth, the reporter of the Restatement (Second) of Contracts and one of the most influential drafters of the project, asserted the "American provenance of the UNIDROIT Principles."[49] Moreover, the Principles provide the basis for much of what Goldschmidt and Llewellyn had in mind: they closely follow the technique of subjecting many of the prescribed solutions to

42. Whitman, *supra* note 21, at 158, 174. *See also* Gerald J. Posteman, *Implicit Law*, 13 Law & Phil. 361 (1999) (describing Lon Fuller's similar but non-romantic concept of "implicit law").

43. Whitman, *supra* note 21, at 166 ("Like scholars in many fields, leading American lawyers—among them Holmes and Pound—had been drawn to German thought after 1870, and indeed to the *Natur der Sache* tradition in particular; Llewellyn was only the last of a distinguished line."). For an analysis of the influence of the German *Natur der Sache* on American jurisprudence, see Jacco Bomhoff, Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse (2013).

44. *See, e.g.*, Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 Nw. L. Rev. 906, 912 (1978) (asserting that § 1-103 UCC, which refers to custom and the law merchant as subsidiary sources, had as its purpose, not to guarantee the continued existence of the law merchant, but to require the application of equitable principles in commercial cases).

45. Ernst Rabel, *A Draft on an International Law of Sales*, 5 Chi. L. Rev. 543 (1938).

46. David S. Clark, *The Influence of Ernst Rabel on American Law*, *in* Der Einfluss deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland 107, 123–26 (Marcus Lutter et al. eds., 1993).

47. *See* Bernard Grossfeld & Peter Winship, *The Law Professor Refugee*, 18 Syracuse J. Int'l L. & Comm. 3, 11 (1992). Rabel was the mastermind behind the 1935 draft Uniform Act on Sales, the predecessor of the Uniform Law on International Sales of 1964, which eventually led to the UN Convention on the International Sale of Goods (CISG) in 1980, which was in large parts based on the ongoing UNIDROIT works on the Principles, which were first published in 1994.

48. Int'l Inst. for the Unification of Private Law (UNIDROIT), Report on the Research Undertaken by the Secretariat with a View of Examining the Expediency of Drafting Uniform Rules on the Non-Performance of Contracts, Study L–Doc. 4, at 1 (Mar. 1973).

49. E. Allan Farnsworth, *The American Provenance of the UNIDROIT Principles*, 72 Tulane L. Rev. 1985 (1998).

"legitimate interests" or "adequacy" for specific situations and, more often, simply to what is "reasonable." At the same time, the Principles are designed primarily to apply in international arbitration, i.e., the only procedural context so far in which they can actually constitute proper law governing a contract.[50] Boldly, and unsurprisingly, their drafters implicitly claim to have embodied the new *lex mercatoria*: "[These Principles] may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like."[51] The question then is: do they, if applied by international arbitrators, also provide what Eisemann had in mind, namely a truly denationalized system that allows for the primacy of the autonomy of the will without having to bother with the application of national laws? As a matter of fact, they do not; quite the contrary, as will be seen later.[52]

3. Overcoming Parochialism Through "Civilized" Principles

The longing for primacy of private autonomy in a denationalized or *trans*-national system of rules of commerce, and the deeper wish to overcome frontiers and sovereignty for the sake of effectively enforcing commercial promises, as formulated by Eisemann, was a significant driving force in the postwar period. It led to the crafting of a new *lex mercatoria* that was certainly more radical than Goldschmidt and Llewellyn—and maybe even Eisemann—would have imagined or approved of. A few months before Eisemann's proposal, an award had been rendered in one of the first oil arbitrations, the Abu Dhabi dispute of 1951. In this case, the umpire, Lord Asquith of Bishopstone, Lord of Appeal in Ordinary at the British House of Lords, was faced with having to choose the law that would be applicable to the interpretation of the territorial scope of an oil concession contract.[53] While conceding that the proper law of the contract would normally be the law of Abu Dhabi, Lord Asquith concluded laconically that "no such law can reasonably exist," since "[t]he Sheik administers a purely discretionary justice with the assistance of the Koran; and it would be very fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial contracts."[54] Since the parties had agreed that "they intend to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner," he held that

50. *See infra* text accompanying note 150.

51. Int'l Inst. for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts: Official Texts of the Black Letter Rules in English, French, German, Italian and Spanish, pmbl. ¶ 3 (1994).

52. *See infra* note 152.

53. Petrol. Dev. (Trucial Coast) Ltd. v. Sheik of Abu Dhabi, 18 I.L.R. 144 (1951), *reprinted in* 1 Int'l Comp. L.Q. 247 (1952).

54. *Id.* at 250–51.

the parties could not have wished any municipal law to govern their agreement. He then found that "[t]he terms of that clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilized nations—a sort of 'modern law of nature.'"[55] This logic is troubling, given the absence of any attempt to inquire into the content of Islamic principles on commercial transactions.[56] Less surprising for the time, and not less troubling, is that the arbitrator was entirely oblivious to the public law dimension of the concession contract and purely focused on the commercial dimension. Almost absurd, then, is the seamless assumption that this "modern law of nature" is coextensive with those rules of English law "that are so firmly grounded in reason as to form part of this broad body of jurisprudence." It is this "homeward trend" to English law that then allowed Lord Asquith to hold that this "modern law of nature" is more sophisticated than the "primitive" Islamic law for purposes of "modern commercial instruments."[57]

As odd and poor as this methodology may have been, it was nevertheless a significant stepping stone to the construction of a new *lex mercatoria*. Lord Asquith happily—and "with deep indebtedness"—adopted the solution tendered by counsel for the claimant,[58] notably Sir Hersh Lauterpacht, who in 1925 had obtained his doctorate in laws from the London School of Economics (LSE) for his thesis on "Private Law Sources and Analogies of International Law" (published in 1927). The solution in the *Abu Dhabi* award was also approved by Lauterpacht's pupil master, Ph.D. supervisor, and friend, Lord McNair, who taught both international law and a course on "General Principles of Common Law" at the LSE during Lauterpacht's time there. Shortly after retiring as president of the International Court of Justice (ICJ) in 1957, McNair further developed a comparative solution in his highly influential article, "The General Principles of Law Recognised by Civilised Nations."[59] Building on Lauterpacht's

55. *Id.*

56. For a slightly more serious attempt in the Privy Council, albeit leading to the same conclusion, i.e., the fallback on English cases as persuasive authority, see Saif Bin Sultan Hussain Al Quaiti v. HH Sultan Awad Din Sultan Sir Saleh Bin Ghalilb, [1962] UKPC 7 ("Assisted by counsel on each side who have held office in the Sultanate as Judges and were agreed that the only principle of law which can be derived from the Sharia in deciding the issues arising in this case is that the decision arrived at must be just and reasonable in all the circumstances and in accordance with natural justice, equity and morality.").

57. *See* Amr Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neolibealism*, 41 HARV. INT'L L.J. 419, 444 n.93 (2000) ("leaves the reader with a logical puzzle combined with a sense of cultural indignation").

58. *Petrol. Dev. (Trucial Coast) Ltd.*, *supra* note 53, at 261 ("I have . . . gone into general principles at the express invitation of the parties: to whose legal representatives I would wish to express my deep indebtedness.").

59. Ian McNair, *The General Principles of Law Recognised by Civilised Nations*, 33 BRIT. Y.B. INT'L L. 1, 12–13 (1957) (approving the *Abu Dhabi* award).

Ph.D. thesis,[60] McNair's article formulated the theoretical underpinnings of the arguments that would later dominate in the Libyan oil-nationalization cases in the 1970s as well as in the nascent international investment law.[61] McNair basically formulated the public-international-law narrative equivalent of Eisemann's proposal:

> Professor Jessup has recently shown in his Storr Lectures, published under the title of *Transnational Law*, that the complexity of the modern world . . . compel the abandonment of any such facile dichotomy of law into national law and public international law. Tribunals must be left free to develop the system of law which seems to them appropriate to the class of disputes with which they are called upon to deal, and they are doing so rapidly. . . . [I]t is submitted that an entirely adequate basis for the choice by tribunals of an appropriate system can be found in the intention of the parties, manifested either by express provision in their contract and the nature of the transaction envisaged by it. . . . My submission is that in contracts of this type the parties, if they specify no particular legal system, intend that their contracts should be governed by the general principles of law recognized by civilized nations.[62]

From the very beginning, the impulse to turn to comparative law in the development of general principles of law has accompanied the efforts to theorize transnational concepts. The clear motivation behind McNair's theory was to provide a justification for discarding the application of the (mandatory and often public) national law of the country when that country is in dispute with a company (typically from a "civilized" country), in order to avoid a mere questioning of its degree of civilization or parochialism.[63] It offered a more "civilized" alternative

60. In the foreword to Lauterpacht's Ph.D. thesis, McNair wrote:

> The result of this investigation is to vindicate the practice of resort to rules and conceptions of private law for the purpose of the development of international law, and to give to it the dignity of a scientific basis. The modern detractors of this practice are apt to treat it as being at best an ingenious and empirical expedient for filling up a gap or getting out of an impasse; I venture to think that the author makes good his claim to establish it on grounds of intrinsic merit and reasonableness.

Ian McNair, *Foreword* to Hersh Lauterpacht, Private Law Sources and Analogies on International Law, at v (London, Longmans, Green & Co. 1926).

61. For the current use of transnational public policy in investment arbitration, see Jean-Michel Marcoux, *Transnational Public Policy as an International Practice in Investment Arbitration*, 10 J. Int'l Dispute Settlement 496 (2019).

62. McNair, *supra* note 59, at 5, 10.

63. *See especially* Ruler of Qatar v. Int'l Marine Oil Co., Arbitral Award, 20 I.L.R. 534, 541 (June 1, 1953) (deciding whether an agreement, which was contrary to Islamic law, was governed by Islamic law or "the principles of natural justice and equity"; for this case it sufficed the arbitrator to find that the parties could not have wanted Islamic law to apply, without further elaborating what the then applicable principles would entail other than a summary finding that the agreement is not invalid).

that derives its legitimacy from the (expressed or implied) parties' common intention to respect the agreement in good faith[64] and that "is not public international law but shares with public international law a common source of recruitment and inspiration."[65]

The idea of a nascent transnational "commercial law of nations," which would be part of a *ius* [*commune omnium*] *gentium*[66] and absolved from the parochialism of municipal law, clearly fascinated the lawyers of the common law world. This was, however, only true with regard to the (supposed) "no man's land" of state contracts in the realm of public international law.[67] In the private commercial context, however, the idea of an independent *lex mercatoria*—already absorbed into the common law in the seventeenth century under the influence of Lord Mansfield—has found little support in the common law world.[68] For example, it wasn't until 1996 that England formally recognized that parties could empower arbitrators to decide disputes without recurring to any law, but merely *ex aequo et bono*.[69] Things were different in the civil law world and especially in France, where René David was still claiming in the 1950s that arbitrators would decide nine out of ten cases *ex aequo et bono* as *amiable compositeurs*.[70] The quest for a true modern law merchant in traditional commercial law was, indeed, more fully embraced in the civil law world of international arbitration; it found a home in the École de Dijon of Berthold Goldman, whose

64. This was handily expressed in the agreements under scrutiny in the *Qatar* and the *Abu Dhabi* awards, and respect for the agreement in good faith was confirmed by experts to be the only principle deriving from the Sharia concerning international commercial contracts. *See supra* notes 55, 56, and 63.

65. McNair, *supra* note 59, at 6.

66. In the sense of universal modern law of nature, rather than public international law, cf. Francis A. Mann, *Reflections on a Commercial Law of Nations*, 33 BRIT. Y.B. INT'L L. 20, 40 (1957).

67. For a slightly less influential attempt to provide for a more substantive basis for the solution propagated by McNair, see Mann, *supra* note 66. For the rejection of the notion of denationalized law in commercial contracts by English courts, see Francis A. Mann, *Lex Facit Arbitrum*, *in* INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed., 1967).

68. For a scathing analysis from a common law perspective, see Michael Mustill, *The New* Lex Mercatoria*: The First Twenty-Five Years*, *in* LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 149, 181–83 (Maarten Bos & Ian Brownly eds., 1987).

69. This resulted, prior to the reform of 1996, from the broad statutory powers of courts to review for errors of law: *see, e.g.*, Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekgringeen, [1962] 2 LRPC 257 (citing Czarnikow v. Roth, Schmidt & Co. [1922] 2 KB 478, 488 (Scrutton, L.J.)).

70. *Cf.* René David, *Arbitrage et droit comparé*, 11 REVUE INTERNATIONALE DE DROIT COMPARÉ 5, 15 (1959) [hereinafter David, *Arbitrage et droit compare*]; René David, *Le dépassement du droit et les systèmes de droit contemporains*, 8 ARCHIVES DE PHILOSOPHIE DU DROIT 3, 8 (1963). For the rejection of the idea (and practice) of arbitrators being freed from the obligation to follow the law, see Ernst J. Cohn, *Commercial Arbitration and the Rules of Law: A Comparative Study*, 4 U. TORONTO L.J. 1 (1941); Mann, *supra* note 67.

disciples—especially Philippe Fouchard and Emmanuel Gaillard—became most influential in the world of international arbitration.

4. The Modern *Lex Mercatoria*

Berthold Goldman also cited Lord Asquith's award—without any hint of criticism—in his seminal article of 1964, "Frontières du droit et *lex mercatoria*," in which he laid out the jurisprudential basis for the new, modern *lex mercatoria*.[71] Like René David in 1958,[72] Goldman also pointed to an increasing international use of standardized contractual documents, connected to a "dense and large network of documents." Individual contracts would be increasingly governed, not by some national or *inter*-national law, but simply by the standard documentation itself, drafted by private entities such as the London Corn Trade Association, the ICC, or the International Air Transport Association (IATA).[73] Goldman thus affirmed the need for a "uniform method of interpretation" that went beyond the individual interests of the contracting parties—which required an acceptance that "in fact, the operations of international commerce that take place in such a framework, largely escape the national laws."[74] These standardized documentations are merely contractual in nature. However, their interpretation and the filling of lacunae therein would require uncovering and specifying the underlying general principles, "if one refuses to dwell exclusively, for this purpose, on a state-based legal system of which the parties intended to detach themselves."[75] And this task, as Goldman argued, virtually always falls upon arbitral tribunals, which cannot limit themselves to the specific provisions in the contract or underlying models or (privately) codified usages:

> A background of general rules is frequently indispensable to arbitrators, even if they do not always invoke them explicitly. Indeed, experience shows that they frequently do not seek them in some national law or international treaty, but in a "customary" law of international commerce—*lex mercatoria*—of which it would be futile to specify whether they state it or create it, since both approaches are intimately linked.[76]

71. *See* Berthold Goldman, *Frontieres du droit et* lex mercatoria, 9 Archives de Philosophie du Droit 177 (1964).

72. David, *Arbitrage et droit comparé*, *supra* note 70, at 13–14 ("[Arbitration] is, whether we admit it or not, the instrument for the creation of a corporative law, which for this purpose completes the function of model contracts and forms that substitute themselves, in turn, to the non-mandatory rules of law [*droit supplétif*]. . . . Arbitration offers to overcome the lack [of legal certainty resulting from spurious national rules of conflicts of laws and jurisdiction], so long until it might generate, one day, a truly international commercial law.").

73. Goldman, *supra* note 71, at 179–80.

74. *Id.* at 181.

75. *Id.* at 183.

76. *Id.*

Goldman affirmed the thus-elaborated rules of the *lex mercatoria* would qualify as genuine rules of law. As for the specificity requirement, he countered with the lack of precision of national law rules; as for their publicity, he admitted that "these rules or principles are less known than the constant solutions of the state jurisdiction," yet he considered this to be irrelevant, "because the solutions of arbitrators are not really ignored by the professional circles concerned by them"; and, as regards their truly binding force, he argued that parties to international contracts would be conscious of "a common rule of international commerce, very simply expressed by the adage *pacta sunt servanda*."[77] This a priori circular argument expresses the same spirit as Eisemann's transnational postulate of the autonomy of the will as a source of law.[78] Yet Goldman's point becomes clearer in his invocation of the same kind of *Volksgeist* that already drove Goldschmidt and Llewellyn to their Romantic projects inspired by the *lex mercatoria* of merchant adjudicators. Goldman relies not only on the *écoles historiques du droit*, but also on the *école sociologique*, for which rules are a matter of social fact. Accordingly, he concludes that, so long as "the 'operators' of international commerce do not consider [private authorities] as less qualified to define the rules . . . the qualification as 'legal' . . . will be satisfied irrespectively of whether the rule is the produce of a professional or a public authority."[79]

II. Lawmaking Authority in a Transnational System

Part I traced multiple voices expressing the desire to free merchants from the shackles of national laws, for which they all invoked a community spirit, *Volksgeist*, or *esprit corporatif* as a force animating the emergence of "civilized" norms that would make it possible to overcome parochialism. This Part further elaborates this reasoning by focusing on the theoretical work of Gunther Teubner on the self-constitutionalizing dimension of the law merchant (Part II.A). This theoretical perspective is then contrasted with the promotion of transnational public policy as a self-sufficient limitation of private party autonomy as developed by arbitration practitioners (Part II.B), in particular by Emmanuel Gaillard (Part II.C).

A. *The* Lex Mercatoria *as an Autopoietic System*

This neo-Romantic conception of a modern *lex mercatoria* has appealed equally to arbitration practitioners and legal theorists. Legal

77. *Id.* at 189.

78. For a more radical expression of the same principle in the form of the *contrat sans loi*, which at least as questionable in terms of logic, arguing for a *contrat sans loi*, see Clive Schmitthoff, *Das neue Recht des Welthandels*, 2 Rabels Zeitschrift 47, 69 (1964) ("If national law permits the parties to a contract to choose the law applicable to their contract, then it is only logical that they must also permit to make the contractual conditions so complete that there is no longer room for the application of any national law.").

79. Goldman, *supra* note 71, at 190.

sociologists, in particular Gunther Teubner, have been fascinated by, and explored, the idea of the emergence of legal norms outside the state and its institutions. Teubner was little impressed by the theoretic reasoning of Goldman and his followers, and rejected his idea that the *lex mercatoria* could be customary law or a *droit corporatif*, or based on some notion of a *contrat sans loi*.[80] Instead, he conceptualized the *lex mercatoria* from the perspective of systems theory as autopoietic, i.e., self-generating and self-referential. In other words, while Goldman's justification of the juridical quality of the *lex mercatoria* is supposedly circular, if seen in a two-dimensional plane, Teubner's logic is actually spiral or helical, by adding time as a third dimension.[81] The sociological observation is that members of the merchant community (or rather their transactional lawyers) accept *pacta sunt servanda* as a basic norm of cooperation, and then ensure compliance with the derivative rules generated by the equally accepted procedural mechanism of arbitration. The resulting rules derived from the basic norm of cooperation must themselves be considered binding and hence as law. Further, for Teubner, the crucial element is ultimately the contractual dispute resolution mechanism of arbitration. He is clearly intrigued by the practical operation of the doctrines of severability and competence-competence that govern modern arbitration, i.e., the recognition of arbitrators' powers to decide on the validity of the contract which includes the arbitration agreement and, hence, the power to decide on their own jurisdiction.[82] On this basis, Teubner identifies:

> [S]hort-circuit arbitration as a self-regulatory contract which goes far beyond one particular commercial transaction and establishes a whole private legal order with the claim to global validity. . . . Here, the vicious circle of self-validation is transformed into the virtuous circles of two legal practices: contracting and arbitration. . . . In the circular relationship between the two institutional poles of contract and arbitration, a "reflexive mechanism," . . . we find the core of

80. *See* Teubner, *supra* note 5, at 6, 13 ("These advocates of the *lex mercatoria* have developed theoretical arguments the poverty of which is only matches by the conceptual narrowness of their counterparts.").

81. *Id.* at 12 ("These contract temporalize the paradox and transform the circularity of contractual self-validation into an iterative process of legal acts, into a sequence of the recursive mutual constitution of legal acts and legal structures. . . . [The contract] refers to a pre-existing standardization of rules and it refers to the future of conflict regulation and, thus, renders the contract into one element in an ongoing self-production process in which the network of elements creates the very elements of the system.").

82. *Id.* ("The self-referential contract . . . externalizes the fatal self-validation of contract by referring conditions of validity and future conflicts to external 'non-contractual' institutions which are nevertheless contractual since they are a sheer internal production of the contract itself. . . . [Arbitration] has to judge the validity of the contracts, although its own validity is based on the very contract the validity of which it is supposed to be judging.").

> the emerging global legal discourse that uses the specialised binary code, legal/illegal, and processes the symbol of a non-national, even of a non-international, *global* validity.[83]

Teubner finally seems to have pinpointed what Robert Wai later termed the "transnational liftoff"[84]:

> [O]ur concept of global legal pluralism works on the basis of two assumptions which are more radical than an implied delegation of state power.[85] . . . The global context, in which no pre-existing legal order can be said to be the source of validity of global contracts, compels us to *define contract itself as a source of law*, as a source on equal footing with judge-made law and with legislation. In our case contracting is even the primary source of law and the basis for its own rudimentary quasi-adjudication and quasi-legislation.[86]

Ultimately not that different to Goldman,[87] Teubner affirms with respect to legitimacy:

> Rules of recognition [as postulated by H.L.A. Hart] need not necessarily be produced hetero-referentially by an independent "public" legal order and then be applied to "private" contractual arrangements. What we face is a "self-legitimating" situation, comparable only to authentic revolutions in which the violence of the first distinction is law-creating.[88]

In later writings,[89] Teubner still insists that the autopoietic *lex mercatoria* produces not only highly specialized primary rules on the rights and obligations of the parties, but also—as a self-contained system—the generalized secondary rules on rule making, law recognition, and legal sanction. Yet he acknowledges that such reflexive norm building still leaves open the issue of legitimacy, particularly pressing in light of the bold claim of private law making. Teubner rejects the idea that the *lex mercatoria* could emanate from a *spiritus mercatorum*, as a *droit corporatif* of the merchant class, for want empirical evidence of

83. *Id.* at 11–12. *See also* Zumbansen, *Piercing the Legal Veil*, *supra* note 8, at 426 ("Arbitration law and private legislation (general terms of business) together form a system of decisions in which the hierarchicalisation known from the contract is beginning to be repeated.").

84. Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002).

85. *See supra* note 78.

86. Teubner, *supra* note 5, at 13–14 (emphasis added). *See also* Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149, 162–65 (1997) (referring to the emergence of an "official" legal order owing to the institutionalized system of arbitration).

87. *But see supra* note 80.

88. Teubner, *supra* note 5, at 14.

89. Fischer-Lescano & Teubner, *supra* note 5, at 1015–16.

any such body that could discipline its members. This rejection, however, forces him to postulate a process of self-constitutionalization based on a broader polity,[90] "substantive legitimation through inner constitutional principles,"[91] which brings him back, and closer, to the broader *Volksgeist*. Essentially, this self-constitutionalization is about going beyond the system's endogenous (private) interests by integrating the exogenous (public) interests.[92]

B. The Practitioners' Transnational Public Policy

One might still wonder how Teubner's process of self-constitutionalization would actually work. Practitioners have embraced the pairing of the dispositive dimension of the *lex mercatoria*—which organizes rights and obligations between private parties—with the prescriptive dimension of a transnational public policy. This notion was famously coined by Pierre Lalive in 1986.[93] Building on the work of Jean Paulin Niboyet (1929) and Henry Rolin (1960), who had already postulated a "truly" international public policy in the *ius gentium*,[94] Lalive expanded on the understanding that international arbitration is a parallel system of international justice. The international arbitrator is not an organ of a state and hence would not be bound by any national conflict-of-laws rules. What would bind the arbitrators are "*principles* of private international law, which recognize both the autonomy of the will of the parties and the freedom, for the international arbitrator, to disregard on occasions the 'conflictual method' [of choice of law] in order to choose the 'direct way' and apply, for example, general principles of law or the *lex mercatoria*."[95] Accordingly, as stated by Yves Derains on the basis of Goldman's writings, "all laws have the same value [for the arbitrator] and none has a privileged position, a fact which has a variety of important consequences, for instance, with regard to public policy as an exception [to the application of otherwise applicable law]. The arbitrator does not have to assure

90. *Id.*

91. Gunther Teubner, *A Constitutional Moment? The Logics of "Hitting the Bottom," in* THE FINANCIAL CRISIS IN CONSTITUTIONAL PERSPECTIVE: THE DARK SIDE OF FUNCTIONAL DIFFERENTIATION 9, 41 (Poul Kjaer, Gunther Teubner & Alberto Febbrajo eds., 2011).

92. *See also* Renate Maynz, *The Conditions of Effective Public Policy: A New Challenge for Policy Analysis*, 11 POL'Y & POL. 123 (1983); *cf.* Julia Black, *Constitutionalising Self-Regulation*, 59 MICH. L. REV. 24, 30 (1996).

93. Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 258 (Peter Sanders ed., 1986).

94. Jean-Paulin Niboyet, *Ordre public*, *in* 10 REPERTOIRE DE DROIT INTERNATIONAL 92, 160–62, 164 (Albert G. de Lapradelle et al. eds., 1929); Jean-Paulin Niboyet, *Le rôle de la justice internationale en droit international privé: Conflit des lois*, 40 RECUEIL DES COURS 152 (1932); Henry Rolin, *Vers un ordre public réellement international*, *in* HOMMAGE D'UNE GÉNÉRATION DE JURISTES AU PROFESSEUR BASDEVANT 441 (Charles Chaumon ed., 1960) (cautioning that Niboyet undoubtedly goes too far, *id.* at 444).

95. Lalive, *supra* note 93, at 270 (emphasis added).

the respect for conceptions that are merely national."[96] Yet Lalive and Derains both acknowledge that the arbitrator is legally and morally bound to take into consideration the international public policy of one or several states, typically manifested in internationally or overriding mandatory laws, "in order to meet the expectation of the parties and, more precisely, their 'legitimate' expectations: the parties cannot legitimately expect the arbitrator to establish or sanction a violation of public policy, let alone because he owes a duty to render an enforceable award."[97] Lalive points out that national courts' allegiance to their own constitutional system is clearly established, and that they have "not hesitated to recognize and give effect to a wider notion, more international or perhaps supranational, of public policy, based on vital interests not only of the national community to which the judge belongs but also a broader, regional or universal international community."[98] Lalive then asks: "[I]f such is the situation for the judge of a state, should not the international arbitrator also, and so to speak a fortiori, take into account *transnational* public policy and enforce it?"[99] Unsurprisingly, the answer is affirmative:

> [T]he international arbitrator could have greater difficulty than a judge when defining . . . the content of the international public policy of a state. But he would seem to be in a *better position* than a state judge when called to ascertain and understand the specific needs of the *international* community (at least that of businessmen), and it is precisely one of the reasons why the parties, *ex hypothesi*, have resorted to international arbitration.[100]

Lalive identifies—although not systematically—the issues that affect the validity of the underlying contract, whose enforcement would give rise to slavery, corruption or collusive fraud, drugs or arms trafficking, aiding in kidnapping, murder, or "generally the subversions or evasion of imperative laws of a sovereign state (such as through the employment of mercenaries) or violations of human rights, etc."[101]

For Lalive and those who have followed his lead, this transnational public policy is just the flipside of the *lex mercatoria*, an equivalent to *ius cogens* in the *ius gentium*, and thus subject to the same

96. Yves Derains, *L'ordre public et le droit applicable au fond du litige dans l'arbitrage international*, 3 REVUE DE L'ARBITRAGE 375, 380 (1986) (citing Berthold Goldman, *Les conflits de lois dans l'arbitrage international de droit privé*, 2 RECUEIL DES COURS 347, 443 (1963)).

97. Lalive, *supra* note 93, at 272.

98. *Id.* at 285.

99. *Id.*

100. *Id.*

101. *Id.* at 293. For a similar list, see GAILLARD, *supra* note 4, at 177, 183–88, 119–23 (insisting that it is not about "lists" but a "method").

methodological challenges of unveiling or defining general principles of law. Its exact content must be determined, like the dispositive rules of the *lex mercatoria*, on the basis of comparative studies that make it possible to unveil the core of regulatory principles common to most (so as to avoid saying "civilized") nations, i.e., the mandatory principles that cannot be derogated from by the parties. Lalive concludes that "there does exist a general tendency of states (notwithstanding their legal 'particularism' or even narrow interests or selfishness as expressed by traditional 'international public policy') to become more conscious of their increased *international solidarity*."[102] He admits that arbitrators will more readily find such transnational public policy based on considerations of "social ethics" rather than political considerations,[103] and highlights how the *bonos mores* appear to be an essential part of transnational public policy in arbitral awards.[104] This also brings his construct back to the *Volksgeist* logic when he affirms that much of public policy is about a "*feeling* of law and justice" in a given community and thus a feeling of transnational public policy in an international community.[105]

C. *Transnational Public Policy and the Autonomy of the Arbitral Order*

While Lalive claims not to engage with fundamental "theoretical and practical, legal and political" controversies such as the definition of the law, the role of the state, or the "creative powers" of arbitrators, one of the most prominent "*arbitralistes*" and a spiritual grandson of Goldman, Emmanuel Gaillard does exactly this. In his Hague lecture on the "Aspects philosophiques du droit de l'arbitrage international" of 2007,[106] Gaillard makes transnational public policy one of the cornerstones of his theory of a truly autonomous arbitration.

This theory is based on Eisemann's postulate, which was rephrased and given full normative force (for France only) in 2007 by the French Cour de Cassation in the *Putrabali* case: "[A]rbitral awards, which are not attached to any legal order, are decisions of international justice."[107] This gloss of the *ius gentium* had already been used by French jurists in the early nineteenth century[108] and is the extension of the common French affirmation that "l'arbitre

102. Lalive, *supra* note 93, at 288.
103. *Id.* at 286.
104. *Id.* at 289–93.
105. *Id.* at 309.
106. *See* GAILLARD, *supra* note 4.
107. *See* Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., June 29, 2007 (PT Putrabali Adyamulia v. Rena Holding), *reprinted in* 32 Y.B. COM. ARB. 299 (2007).
108. *See* Cour de Paris, Dec. 16, 1809, *Lamme*, *cited in* 2 ANTOINE PILLET, 2 DROIT INTERNATIONAL PRIVÉ 541 (1924).

est le juge naturel du commerce international,"[109] which some have traced to Domat in the seventeenth century.[110] And indeed, Gaillard has hailed this transnationalization, which he credits to Goldman,[111] as arbitration's great "contribution to the general theory of law."[112] In 2015, the Cour de Cassation acknowledged Gaillard—through its *Conseiller* Dominique Hascher—by purporting to recognize the existence of an *ordre arbitral international*.[113]

A key challenge to Gaillard's theory comes from the impact of national overriding mandatory laws. These laws are enacted by states for the sake of implementing particularly important national policies. These underlying policies are found—typically ex post by judges having to interpret mandatory laws later—to be so strong as not to allow parties to agree on deviating outcomes that could undermine these policies. And it does not matter whether such deviation is achieved by contractual stipulation or by choosing a foreign law that is based on more favorable (or simply lax) policy considerations. These overriding mandatory laws claim a necessary *application immédiate* that shortcuts the choice of law process.[114] Ever since the U.S. Supreme Court decision in *Mitsubishi* in 1985, relating to antitrust matters,[115] courts have accepted that even essential public policies may be implicated in a private dispute, and that this would not render such a dispute incapable of being settled by arbitration:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. . . . [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of

109. *See, e.g.*, Philippe Fouchard, *L'arbitrage international en France après le décret du 12 mai 1981*, 109 JOURNAL DU DROIT INTERNATIONAL [CLUNET] 374 (1982).

110. THOMAS CLAY, L'ARBITRE 271 (2000) ("No one contests this reality which had been envisaged by Domat.") (citing 1 JEAN DOMAT, LES LOIX CIVILES DANS LEUR ORDRE NATUREL; LE DROIT PUBLIC, ET LEGUM DELECTUS (2d ed. 1702)).

111. Emmanuel Gaillard, *"Note" on Sté Hilmarton Ltd c / Sté Omnium de traitement et de valorisation (OTV)*, 121 CLUNET 702, 709 (1994) (referring to Berthold Goldman, *Une bataille judiciaire autour de la lex mercatoria*", 1983 REVUE DE L'ARBITRAGE 379, 391 ("[A]n international award . . . is not integrated into the legal order of the country of its geographical localisation.")).

112. Emmanuel Gaillard, *La jurisprudence de la Cour de cassation en matière d'arbitrage international*, 4 REVUE DE L'ARBITRAGE 700 (2007).

113. Cour de cassation [Cass.] [supreme court for judicial matters], Paris, civ., July 8, 2015, No. 13-25.846, ECLI:FR:CCASS:2015:C100797 (French Republic v. Ryanair).

114. Phaedon Francescakis, *Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois*, 1966 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1.

115. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985).

> disputes require that we enforce the parties' agreement [to arbitrate].[116]

This opened a new dimension for the jurisdictional powers of international arbitrators, who were invited by the Supreme Court—with a gloss similar to that of the French references to the *ius gentium*—"to take a central place in the international legal order."[117] Cosmopolitan liberalization originally remained, however, under the nationalist sword of Damocles as formulated in the controversial footnote 19 in *Mitsubishi* as the "second-look doctrine":

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy. . . . Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. . . . While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.[118]

Despite this modest affirmation of national sovereignty,[119] courts—especially in the United States and France—have subsequently dismantled the idea of substantive review of arbitral awards in cases where national overriding mandatory rules claimed to apply, and have adopted a minimalist approach to the public policy review.[120]

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116. *Id.* at 628–29.
117. *Id.* at 638.
118. *Id.* at 637–38 n.19.
119. *But see* Thomas E. Carbonneau, *Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of* Mitsubishi, 19 VANDERBILT J. TRANSNAT'L L. 265, 285 (1986) ("The defined standard . . . operates as a ploy, a meaningless token by which to give a semblance of protection of national interests here no such safeguards actually exist.").
120. *See, e.g.*, Baxter Int'l Inc. v. Abbot Laboratories, 315 F.3d 829, 832 (7th Cir. 2004) ("*Mitsubishi* did not contemplate that, once arbitration was over, the federal courts would throw the result in the waste basket and litigate the antitrust issues anew. That would just be another way of saying that antitrust matters are not arbitrable."). For a sharp critique, see Richard Buxbaum, *Public Law, Ordre Public and Arbitration: A Procedural Scenario and a Suggestion*, *in* RESOLVING INTERNATIONAL CONFLICTS: LIBER AMICORUM TIBOR VÁRADY 84, 90–100 (Peter Hay ed., 2009). In France, see Cour d'appel [CA] [regional appellate court] Paris, Nov. 18, 2004 (SA Thalès Air Defense v. GIE Euromissile), *reprinted in* 2015 REVUE DE L'ARBITRAGE 751 (with note by Luca Radicati di Brozolo, *L'illicéité qui crève les yeux: critère de contrôle des sentences au regard de l'ordre public international (à propos de l'arrêt Thalès de la Cour d'appel de Paris)*, 2015 REVUE DE L'ARBITRAGE 529); Cour de cassation [Cass.] [supreme court for judicial

But Gaillard goes much further. Again borrowing from Lalive,[121] he rejects that arbitrators, who do not owe allegiance to any state, would be bound to apply the internationally mandatory rules of any state.[122] These rules intend to give effect to some national public policies which would be of no relevance to the autonomous transnational arbitral legal order.[123] Accordingly, Gaillard affirms:

> arbitrators are empowered to disregard the law chosen by the parties in situations where they find that it contravenes the fundamental values of the international community, [the protection of which] is ensured by rules making up truly international public policy and reflecting the broad, even if not unanimous, consensus among states to condemn certain practices.[124]

In contrast to Goldman and Teubner, Gaillard tries to avoid circularity by deriving the autonomy of the transnational arbitral legal order from the sum of national rules that recognize arbitration as a legal tool at the parties' disposal.[125] Just like public international law derives from the intentions of states, he argues that the community of states has equally created a truly autonomous arbitral order "by accepting to entrust, for those parties who have wanted it, the power to judge the disputes of international commerce to arbitrators and to recognize the product of the arbitral process, the award, without controlling its substance."[126] And referring implicitly to the French *Putrabali* case law (only), he affirms that "the status as 'international judge' that certain jurisdictions among the most progressive ones in the matter do recognize constitutes the best illustration of the fact that the arbitrator can today be considered the organ of an own legal order."[127] This

matters] 1e civ., June 4, 2008 (SNF v. Cytec), *reprinted in* 2008 REVUE DE L'ARBITRAGE 473 (limiting court review to "blatant, specific and concrete" violations of public policy only). *See also* Catherine Kessedjian, *Transnational Public Policy*, *in* INTERNATIONAL ARBITRATION—BACK TO BASICS? 863 (Albert J. van den Berg ed., 2007) (arguing that this judicial demise is one of the main reasons why arbitrators must embrace transnational public policy).

121. *See supra* note 93.

122. *See* GAILLARD, *supra* note 4, at 183.

123. *See similarly* GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 156 (2012) ("In contrast to the 'special connection' and 'application immédiate' of more recent IPL [international private law; *sic*], this is not a question of the policies of one or other regimes that would have to be considered as a priority, but an orientation towards a global public interest.").

124. GAILLARD, *supra* note 4, at 177.

125. *See* Cass., 1e civ., July 8, 2015, No. 13-25.846, ECLI:FR:CCASS:2015:C100797 (French Republic v. Ryanair) (referring to the arbitration provisions of the French Code of Civil Procedure and the New York Convention and noting that "the Court of Appeal has violated the above-mentioned texts which constitute the international arbitral order." *Id.* at ¶ 6).

126. GAILLARD, *supra* note 4, at 91–92.

127. *Id.* at 92 (arguing that "[t]he fact that the States have preserved the monopoly of the coercive enforcement of arbitral awards does not diminish the autonomy of the jurisdictional activity of the arbitrator and of the legal order into which it belongs, since the States in reality merely put the public force to the service of the enforcement of the product of the arbitral activity which they wanted to make the privileged method of dispute resolution of international commerce.").

emerging arbitral legal order is then a truly *trans*-national rather than *a*-national one; instead of resulting in Eisemann's, Goldman's, and Teubner's "law *without* a state," it synthesizes a law that simply leaves the state behind—as "law *beyond* the state."[128]

III. Transnational Public Policy and Legitimacy

After having contextualized the theoretical and practical constructions of transnational public policy, this Part reverts to its constitutional dimension by probing the respective roles of public and private interests. It reveals a systemic prioritization of party autonomy over national regulatory concerns (Part III.A), as well as the concept's disconnection from the interests and the influence of those affected by the supposed arbitral powers, thus raising questions of legitimacy (Part III.B). The problems of the underlying constitutionalizing claim are further elaborated by contrasting them with the analogous problems in the U.S. federal system (Part III.C). In view of the significant issues of legitimacy, the question is finally whether the concept of transnational public policy can possibly fulfill a more modest practical role (Part III.D).

A. Incorporating Public Interests for the Sake of Private Interests?

Under Gaillard's "transnational positivist" conception of arbitration,[129] the sovereignty of states is supposedly not called into question. Gaillard is not interested in the theoretical nature of the *lex mercatoria*; he correctly points out that today its application is simply ensured by arbitration laws that allow parties to have their contract governed by non-state law.[130] His essential—and maybe existential—question of an autonomous arbitral legal order is "only vaguely related to the debate over the *lex mercatoria* which has agitated legal doctrine in the 1970s and 1980s."[131] His "transnational positivist" theory of the arbitral legal order, which allows the synthetization of transnational substantive rules, is actually more akin to the understanding of the creation of a *supra*national legal order (such as the European Union): states transfer sovereign rights of adjudication (arbitral jurisdiction) and regulation (transnational rules) and voluntarily abstain from exercising these rights (stay of court proceedings and minimalist review) within the scope of the conferred powers, i.e., within the domain of international commercial transactions as chosen by the

128. Michaels, *The True* Lex Mercatoria, *supra* note 8, at 447.

129. Emmanuel Gaillard, *Souveraineté et autonomie: Réflexions sur les représentations de l'arbitrage international*, 3 Clunet 1163, 1172–73 (2007).

130. *Id.* at 1170. *See, e.g.*, Arbitration Act 1996, c. 23, § 46(1)(b) (Eng.) (introducing a profound change to the English law of arbitration: "The arbitral tribunal shall decide the dispute . . . (b) if the parties so agree, in accordance with such *other* considerations [than *law*] as are agreed by them or determined by the tribunal" (emphasis added)).

131. Gaillard, *supra* note 129, at 1170.

parties. For Gaillard, it is not about any "transnational lift-off" of the *lex mercatoria*, or its "constitutional" or "self-constitutionalizing" moment through the integration of a transnational protection of public interests. Arguably, it is not the autonomy of the merchants that is crucial for him, but that of the arbitrators. This autonomy would free arbitrators from having to worry about internationally mandatory rules of states and even, to some degree, the law chosen by the parties, as transnational public policy would constitute the ultimate boundary of the party's choice of law. Arbitral transnational public policy would not only become constitutive of the *lex mercatoria* but also of party autonomy. The arbitrator would, indeed, become the "default judge" (*juge naturel*) of international commerce and would have to accept "becoming—if with some hand-wriggling and reluctance—default law-maker for traders" in a globalized world without any (other) state-empowered global regulator.[132]

In this light, one might be tempted to argue that Gaillard is not actually interested in public interests at all.[133] The recognition of a "transnational public policy" in the context of an "autonomous arbitral legal order" would necessarily entail a significant increase in powers for international arbitrators. From a practical perspective, it would also entail new opportunities for counsels—sometimes before putting their arbitrator hats back on—to come up with and plead arguments in a much more open, flexible, and (legally) less complex, almost *ius*-naturalist framework. Conflict-of-laws issues and national legislation and regulation—further restricted by the case law of state courts—could be relativized much more easily. In this context, the coherence within a self-contained and institutionalized system or even rule of law is much less relevant.[134] What is key here is the ever-new possibility of convincing ever-changing arbitrators of a specific state of

132. *See* Stone Sweet, *supra* note 6, at 627, 641. *See also* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 105–06 (2012) ("Despite their lack of allegiance to a State, international arbitrators exercise sovereign law-making authority in their rulings. . . . Despite the private, contractual character of their authority to rule, international arbitrators occupy a unique position in the transborder process that allows them to articulate viable international commercial law principles."). *See generally* HANS-PETER BERGER, THE CREEPING CODIFICATION OF THE *LEX MERCATORIA* 67 (2010) (providing an erudite discussion of international arbiter's "genuine law-making function"); Kessedjian, *supra* note 120, at 862–63 ("Consequently, arbitrators have more and more powers. The development of the law is now left in their hands. The regulation of society is left in their hands. The regulation of transnational activities is also left in their hands.").

133. Maybe with the exception of the "strong public policy in favor of international arbitration" that U.S. courts have been eager to affirm for the sake of "achieving [the dream of?] the orderliness and predictability essential to any international business transaction." Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974) (reiterated in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 639 (1985) (which spoke of an "*international* policy favoring commercial arbitration" (emphasis added)) (the "dream" reference is to Lew, *supra* note 19).

134. *See also* Zumbansen, *Transnational Private Regulatory Governance*, *supra* note 8, at 136.

development of that transnational public policy that suits the needs of the respective client, without having to fear much restraining convergence.[135] In the absence of arbitral precedent, each tribunal has to redefine, again and again, the substance of any transnational public policy de novo, especially because most arbitral awards are not publicly accessible (and those which are rarely give much insight into the real meaning of the purported transnational public policy in question).[136] Critics might thus paraphrase Teubner,[137] in the sense that the vagueness of the contours of transnational public policy is matched only by the degree of its champions' insistence that it exists.[138]

Gaillard's argument is that the comparative law method would actually provide arbitrators with a sophisticated tool to develop precise benchmarks for what is acceptable under notions of transnational public policy. This has been criticized as illusionary, since it would be impossible to find a true common core, based on unanimity, where a line could be drawn for private autonomy on the basis of public policy consideration.[139] And, indeed, this process of determining the exact contours and scope of policies is, by definition, political in nature, at least as soon as one leaves the comfort zone of obvious "I-know-it-when-I-see-it" violations of fundamental rights (such as contracts relating to the slave trade[140] or terrorist activities).[141] A classic example is competition law, which is a pillar of the "economic constitution" of free markets. The Swiss Federal Court has consistently affirmed, owing to the heterogeneity of national legislation, that "there can no longer be any doubt: the provisions of competition law, whichever they are, are not part of the essential and largely recognized values which, according to the predominant conceptions in Switzerland, should

135. *See also* Mustill, *supra* note 68, at 157 (referring to a "micro *lex mercatoria*"); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse*, 23 Arb. Int'l 357, 365 (2007). *See also* W. Michael Reisman, *Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration*, *in* International Arbitration—Back to Basics?, *supra* note 120, at 849, 855–56.

136. *See also* Mustill, *supra* note 68, at 156.

137. *See supra* note 80.

138. *See* Celia Wasserstein Fassberg, Lex Mercatoria*: Hoist With Its Own Petard?*, 5 Chi. J. Int'l L. 67, 68 (2004) ("For a long time, the existence of *lex mercatoria*, rather like the existence of God, seemed largely dependent on the will to believe.").

139. Pierre Mayer, *La règle morale dans l'arbitrage international*, *in* Etudes offertes à Pierre Bellet 379, 395 (1991).

140. *Cf.* Mayer, *supra* note 139, at 396 (arguing that in the nineteenth century, a comparative elaboration of general principles of law would have revealed that the slave trade *is* part of the *lex mercatoria*).

141. *See also* Pascal Holander, [Int'l Bar Ass'n], *Report on the Public Policy Exception in the New York Convention*, 10 Disp. Resol. Int'l 35, 48 (2016) (concluding as the rapporteur: "Substantive public policy appears, in contrast, to be less prone to universal or 'transcendental' values or rules, other than the prohibition on giving effect to 'illegal' contracts (i.e. entered into for the purpose of carrying out an illegal—criminal—activity), rendering the drawing up of a catalogue of its manifestations a daunting task.").

constitute the foundation of any legal order"[142] (referring until 2006 to legal orders of "civilized nations").[143]

Gaillard counters that finding general principles of law under customary international law rules—as codified in Article 38(I)(c) of the ICJ Statute—does not require unanimity; rather, the principle of majority should suffice.[144] Instead of giving effect to national, potentially idiosyncratic, public policies that claim international application, the arbitrator will be more predictable—and hence more respectful of parties' legitimate expectations—by measuring this legitimacy with the yardstick of a "largely followed legislative movement" identified on the basis of comparative law.[145] Yet the dangers of comparing "political" laws, i.e., those constituting public or regulatory law, have been decried since Montesquieu and forcefully reiterated by Kahn-Freund, highlighting in particular the respective balance of influences from partial economic interests, which vary greatly from one country to another.[146] Moreover, and accordingly, the proper selection of representative jurisdictions is one of the greatest challenges of comparative law, particularly because of the potential for bias and even manipulation.[147] The degree of flexibility that this approach offers to both counsel and arbitrators raises the suspicion that Gaillard's method at best enshrines a logic of the lowest common denominator.[148] And this would, in turn, mean privileging the version of a transnational public

142. *See, e.g.*, Tribunal fédéral [TF], Mar. 8, 2006, 4P.278/2005 (Tensacciai v. Terra Armata), *reprinted in* 2006 REVUE DE L'ARBITRAGE 763, 766–67.

143. *Id.* at 764 ("Speaking of values common to civilized states is maybe not politically correct, as it implies the division of the world in two sides.").

144. GAILLARD, *supra* note 4, at 77–80, 183. *See also* Ole Lando, *The* Lex Mercatoria *in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1984) (interestingly avoiding the reference to "civilization as a yard-stick," the author notes that "rules of law which are common to all *or most* of the States engaged in international trade. . . .") (emphasis added).

145. GAILLARD, *supra* note 4, at 90. *See also* Emmanuel Gaillard, *General Principles of Law: More Predictable After All?*, 6 N.Y.U. L.J. 6 (2001); Mustill had already criticized this approach as "macro *lex mercatoria*." Mustill, *supra* note 68, at 156. *But see* Kessedjian, *supra* note 120, at 866 ("Second, transnational public policy is not to be found in national law. Whether some States have developed the same norms as those found in transnational public policy adds some credibility to them but is not consubstantial to them. Hence, the number of States that have gone in the same direction does not matter.").

146. 1 CHARLES MONTESQUIEU, DE L'ESPRIT DES LOIS 10 (Geneva, Barrillot & Fils., 1748) ("[Les lois politiques et civiles] doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un très-grand hasard si celles d'une nation peuvent convenir à une autre."); Kahn-Freund, *supra* note 41, at 12, 27 ("[I]ts use requires a knowledge not only of the foreign law, but also of its social, and above all political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law."). For a caveat, see also GOLDSCHMIDT, *supra* note 26.

147. Günther Frankenberg, *Critical Comparison: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 423 (1985) (speaking of "strategic comparison").

148. *See, e.g.*, Tribunal fédéral [TF], Mar. 8, 2006, 4P.278/2005 (Tensacciai v. Terra Armata), *reprinted in* 2006 REVUE DE L'ARBITRAGE 763, 766–67 (the aforementioned example of competition law not being part of international public policy in Switzerland).

policy that is the least invasive for party autonomy. In other words, Gaillard's comparative law method primarily ensures that the private interests of the parties are, in the case of doubt, given priority over the public interests, at least so long as the latter have not reached a sufficient degree of global convergence. Party autonomy would then prevail systemically over national regulatory concerns.

B. The Constitutional Dimension of Transnational Public Policy

Transnational public policy is thus arguably the real frontier of the transnational debate. The "war of faith" over the *lex mercatoria*[149] might have been the decisive starting point for the construction of a cosmopolitan transnational legal understanding and the enhancement of private autonomy, away from the grip of the nation-state. However, it is no longer of practical or even much theoretical relevance—at least not in the world of arbitration. The Romantic understanding of the *lex mercatoria* is, indeed, practically compatible with most national arbitration laws, which permit the parties to empower arbitrators to decide on the basis of more or less anything—or nothing, since arbitrators asked to decide *ex aequo et bono* in practical terms only have to give any reasoning (and not even that in some jurisdictions).[150] In any case, parties to complex international commercial transactions will, these days, not likely choose such an uncertain basis for the determination of their precise rights and obligations, and resulting liabilities.[151]

The *lex mercatoria*, be it in its Romantic conception or in a new positivist manifestation in the UNIDROIT Principles, does not challenge state sovereignty.[152] Transnational public policy does. On the surface, the practical point of this theory seems to be to free arbitrators from the complexities and difficulties of conflict of laws, i.e., of sorting out which jurisdiction has the most legitimate claim to regulating certain international economic transactions.[153] What this implies, however, is that this theory seems to plant the flag of arbitration on the vast white areas of the map of global regulation. It implicitly claims the constitutionalization of a utopian jurisdiction beyond states that

149. Teubner, *supra* note 5, at 5. *See also* Zumbansen, *Piercing the Legal Veil*, *supra* note 8, at 427 ("Against this background, the occasional criticism of the debate out *lex mercatoria* as being too passionate cannot be sustained. In fact, it cannot be passionate enough.").

150. *See, e.g.*, Arbitration Act 1996, c. 23, § 46(1)(b) (Eng.).

151. *See* Mustill, *supra* note 68, at 156.

152. The UNIDROIT Principles unconditionally bow in Article 1.4 to the supremacy of the "mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law." Notably absent is the reference to transnational origin.

153. On this problem, see generally Hannah Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflicts*, 57 Am. J. Comp. L. 631 (2009). As it relates specifically to arbitration, see Jan Kleinheisterkamp, *Overriding Mandatory Laws in International Arbitration*, 67 Int'l & Comp. L.Q. 903, 910–16 (2018).

supplements and, where clashing, supersedes national laws. In the same vein, Alec Stone Sweet and Florian Grisel postulate:

> This hierarchical feature of transnational public policy can produce constitutional effects . . . transnational public policy embodies a set of higher-law norms analogous to constitutional law in the domestic sphere. . . . In the decade that followed [van den Berg's affirmation in 1981 that the basis of public policy under the New York Convention could only be national[154]], the arbitral order consolidated its own notions of "transnational public policy," in the form of a body of preemptory norms that trump the application of any other applicable law.[155]

In this autopoietic self-constitutionalizing conceptualization, however, transnational public policy raises the same issues of accountability and legitimacy as any polycentric regulatory system beyond the state.[156] The potential clash with, and the claim of primacy over, policy decisions taken in national institutional contexts is a serious one. The factual observance of certain rules may be of sociological relevance; this does not, however, answer the question of legal legitimacy of their claim to constitute binding and even superior law.[157]

There are, at least in the context of arbitration, no transnational mechanisms or institutions that have the legitimacy to structure the public decision-making process determining public policies;[158] moreover, the elements of publicity and participation of all those affected by the economic transactions are absent.[159] It remains rather undisputed that international arbitration is dominated by a small group of initiated

154. ALBERT J. VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM INTERPRETATION 360–61 (1981) (rejecting Goldman's concept of an *ordre public réellement international* as irrelevant to Article V(2)(b) of the New York Convention).

155. *See* ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 146, 148 (2017).

156. *See generally* Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REGULATION & GOVERNANCE 137 (2009); Neil Walker, *Taking Constitutionalism Beyond the State*, 56 POL. STUD. 519 (2006). For an EU law perspective, see MADELEINE DE COCK BUNING & LINDA SENDEN, PRIVATE REGULATION AND ENFORCEMENT IN THE EU (2020). *But see* Zumbansen, *The Constitutional Itch*, *supra* note 8, at 108 (questioning the quest for legitimacy).

157. *Cf.* Michaels, *The True* Lex Mercatoria, *supra* note 8, at 455.

158. *But see* Kessedjian, *supra* note 120, at 864–65 ("[W]e would argue that the arbitrators' legitimacy [like that of judges] is one 'by default,' one which exists de facto for lack of a better system. Currently, the parliamentarian democratic system is widely criticized for a number of reasons, one of which is the lack of trust citizens have in politicians. In addition, the contractualization of activities essentially via self-regulation and the lack of true societal regulation via preventive norms have rendered the role of the judge or the arbitrator an essential one for the regulation of society.").

159. For a discussion of such requirements generally, see NIKO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 263–76 (2010) (on democratic accountability).

lawyers.[160] An "arbitral legal order" may claim to capture a certain *esprit corporatif* or even a merchant spirit (if one were to include the merchants' legal counsel).[161] Still, that would only represent the interests of those whose transactions are subject to regulation, not the interests of all those concerned and protected by such regulation. Even when merchants are viewed as the legitimate beneficiaries of functioning markets, they represent only a (minor) part of the collective interests in the markets that existing (national) regulation aims to protect. Those who are involuntarily exposed to the effects and fallouts of transactions in a poorly regulated globalized economy do not get to participate in the making of such transnational public policies. Even Teubner recognizes "the risk that 'corrupt' [transnational] constitutional norms may develop from an excessively close coupling of sub-constitutions to partial interests."[162] The crux of the conception of an autonomous arbitral legal order is, indeed, its close coupling with the partial interest of the arbitral community, and its uncoupling from the interests of those protected by national market regulation. The very constitution of such an arbitral legal order through transnational public policy is bound to fail: it cannot be bound back to a real "people" and its intentions or *animus*, i.e., to the *Volksgeist*. Transnational public policy cannot sufficiently tap into a real source that allows for the integration of the comprehensive public interest of all stakeholders affected by the transnational commerce it seeks to regulate.[163]

C. Transcendence and Realism

The tension between the cosmopolitan and the local, the aspiration and the rootedness, the national and its transcendence, has been the source of many historic struggles. These struggles arguably all focus on the same central point but from different angles and on different facets, often approaching circular reasonings and movements, and thus leading to a kind of dance of beliefs.[164] From a realist

160. For the seminal sociological study of the field, see Bryant Garth & Yves Dezalay, Dealing in Virtue 33–61 (1996). For a more critical view, see Tom Ginsburg, *The Culture of Arbitration*, 36 Vand. J. Transnat'l L. 1335, 1342 (2003) ("capture . . . of the 'market' for arbitration business").

161. *But see* Trakman, *supra* note 9, at 233–39 (referring to "public policy originating in mercantile practices," and, noting that, "In its modernized incarnation, transnational public policy is perceived as informing and being informed by mercantile customs, operating pluralistically, and functioning distinctively in discrete industries." *Id.* at 237).

162. Teubner, *supra* note 123, at 54 (who seems to think of an *ordre public transnational* as a potential solution to this corruption, rather than its source).

163. *See generally* Diane Stone, Making Global Policy 68–69 (2019) (offering a political science perspective on the issue).

164. Contrast Goldschmidt's codification efforts aimed at overcoming the reactionary influence of Roman law through connecting to the (cosmopolitan) spirit of the *lex mercatoria* through the merchants' (local) notions of reasonableness with Savigny's belief that the *Volksgeist* needs to be rooted in a historic method that merges the structure of Roman law with the essence of the (local) practices of Germanic law

perspective, as propagated by Llewellyn,[165] what becomes clear is that the rhetoric of the "national" and the "transnational," of the "civilized" and the "parochial," is ultimately one of constitution: the allocation of regulatory power—and thus actual power. Who sets the ground rules that regulate the behavior of individuals? Who determines the boundaries of private autonomy?

The above analysis of the concept of transnational public policy identifies three "constitutional" issues that are crucial to addressing these questions. First, there is the legitimacy of recurring to higher order general principles to override national policy choices. Second, there is the systemic prioritization of *pacta sunt servanda* over public regulatory interests. And, third, there are the critical limitations on the delegation of authority from the state to some higher authority. These three issues have also been crucial in the different, and yet, for the current purposes, highly interesting, context of U.S. constitutional law. Drawing an analogy to U.S. constitutional law may, at first sight, seem odd, because the U.S. Supreme Court provides the centralizing element that is critically lacking in the decentralized system of arbitration. Yet it is the restrictions on the centralizing powers recognized by the U.S. Supreme Court that allow making a deeper point on transnational public policy. As highlighted in the following with reference to seminal cases such as *Erie* (Part III.C.1), *Lochner* (Part III.C.2), and *Ogden* (Part III.C.3), even in a fully constitutionalized federal system such as the United States, in the absence of specific federal regulatory powers, federal adjudicators must pay deference to the regulatory choices taken at the lower (state) level to protect public interests and cannot invoke transcendent general principles to override those choices. Arguing *a maiore ad minus*, this should then hold truer in the relationship between the constituted regulatory powers of national states and the un-constituted transnational dispute resolution system of arbitration.

1. *Erie*: The Legitimacy of "General Commercial Law"

Joseph Story, the godfather of U.S. conflict-of-laws and uniform commercial law, famously opened the door for federal judges in "questions of general commercial law" to decide upon "general principles of commercial law" without being bound by the case law of the state courts whose law was applicable, doing so most notably in the 1842

into the *usus modernus pandectorum* of the uncodified, cosmopolitan *ius civile*. *See supra* text accompanying notes 21–30. For the historic tension between national regulatory efforts and the cosmopolitan nature of Roman law in Spain and Portugal, see Jan Kleinheisterkamp, *Development of Comparative Law in Latin America*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 253, 255–57 (Mathias W. Reimann & Reinhard Zimmermann eds., 2d ed. 2006).

165. Karl N. Llewllyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L.J. 1222 (1931).

case, *Swift v. Tyson*. Story, who also admired Mansfield and hoped for general principles of law to emerge universally,[166] concluded that "the true interpretation and effect [of contracts and other instruments of a commercial nature] are to be sought not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."[167]

Fifty years later, Supreme Court Justice Stephen J. Field forcefully addressed this point (in a dissenting opinion) in a way that also resonates with the current context[168]:

> I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this Court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. . . . But notwithstanding . . . the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the states—independence in their legislative and independence in their judicial departments. . . . Any interference with either, except as thus permitted [by the Constitution], is an invasion of the authority of the state, and to that extent a denial of its independence.[169]

166. *See* Story's eulogy of Mansfield, as cited in WILLIAM W. STORY, LIFE AND LETTER OF JOSEPH STORY 600 (1851) ("England and America, and the civilized world, lie under the deepest obligation to him. Wherever commerce shall extend its social influence, wherever justice shall be administered by enlightened and liberal rules, wherever contracts shall be expounded upon the eternal principles of right and wrong, wherever moral delicacy and juridical refinement shall be infused into the municipal code . . . the name of Mansfield will be held in reverence . . . ."). As for his universalist aspiration, *see* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 645 (1834) ("[M]any approximations have been already made towards a general system of international jurisprudence, which shall elevate the policy, subserve the interest, and promote the common convenience of all nations . . . *et omnes gentes et omni tempore una lex et sempiternal et immortalis continebit*."). *See also* A. MILLS, THE CONFLUENCE OF PRIVATE AND PUBLIC INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW 128 (2009).

167. Swift v. Tyson, 41 U.S. (16 Pet. 1) 1, 2 (1842).

168. Justice Field's dislike for transcendental principles arguably echoes that of his older brother, David D. Field II, the drafter of the New York Civil Procedure Code and a founding member of the Institut de Droit International. *See* N.Y. CODE CIV. PROC. (1850) (the "Field Code"). David D. Field II, after returning from long travels in Europe, became the most ardent proponent of codifying the common law in the United States based on his belief that the common law as applied in the U.S. had become too vague and unpredictable and thus eroded legal certainty; *see* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 327–28 (1988).

169. Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893).

The rejection of a "general law" as "a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute" was then spearheaded by Oliver Holmes, one of the first U.S. scholars to be influenced by German legal thought on the *Natur der Sache*.[170] Curiously, it is also Holmes's seminal definition of the law that Gaillard relies upon when re-joining Goldman's circular, sociological logic by affirming that transnational public policy would be law because it is what arbitrators in fact do.[171] In 1917, Holmes famously insisted in *Southern Pacific Railroad v. Jensen* that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified."[172]

Twenty years later, Holmes's criticism was widely embraced by the majority of the U.S. Supreme Court, under Justice Brandeis, in *Erie* (1938):

> The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are, and that, in the federal courts, "the parties are entitled to an independent judgment on matters of general law": "but law in the sense in which courts speak of it today does not exist without some definite authority behind it. . . . The authority and only authority is the State, and, if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."[173]

The *Erie* decision itself has, of course, been problematic and problematized.[174] Specifically in the context of the tension between "conflictualism" and "transnationalism," this decision has been branded by Friedrich Juenger as having "helped balkanize American law and prompted innumerable choice-of-law problems."[175] As controversial as *Erie* may be, its importance lies in reiterating the fundamental

170. *See supra* note 43.

171. *See* GAILLARD, *supra* note 4, at 24–25, relying in part on Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

172. S. Pac. R.R. v. Jensen, 244 U.S. 205, 218, 222 (1917) (Holmes, J., dissenting).

173. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

174. For a contemporary critique, see Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 267–96 (1946).

175. Friedrich K. Juenger, *The* Lex Mercatoria *and Private International Law*, 60 LA. L. REV. 1133, 1144 (2000). For a contextualization of Juenger's position, see Hatzimihail, *supra* note 12, at 338–46.

constitutional problem of the allocation of fundamental regulatory powers concerning private autonomy: who gets to decide the limits of private autonomy? In *Erie*, it is the allocation between the state level and the federal level and thus the limitation of the latter. In the context of transnational public policy, it is between the national and the transnational level. In *Erie*, the tension of regulatory powers is between two fully constituted levels in a federation, whereas in the context of transnational public policy the tension is between a fully constituted sovereign entity and an un-constituted utopian (from Greek οὐ τόπος: no place) or *eutopian* (εὖ τόπος: good place[176]) "international justice"—an "autonomous arbitral legal order."[177] And even in the fully constituted context of the former, the respect for the regulatory powers of the state concerned barred the recourse to some general law that transcends the parochialism of local regulation. It is difficult to conceive of a different outcome in the allegedly self-constituted context of the latter.

2. *Lochner*: The Legitimacy of Prioritizing the Creature of Contract

Gaillard's positivist conception, based on comparative law, supposedly avoids relying on some brooding omnipresence of a "general law."[178] His attempt to derive legitimacy from comparative law, however, as mentioned above,[179] slides into the trap of the lowest common regulatory denominator that would systemically set the default in favor of freedom of contract and against regulatory intervention. This suggests drawing another parallel to U.S. constitutional law, namely the *Lochner* era, when the U.S. Supreme Court systematically struck down any statutes considered to infringe on the freedom of contract.[180] It was again Holmes who in his dissent in *Lochner* (1905), formulated the fiercest criticism against the systemic bias in favor of freedom of contract, which has been termed the most influential dissenting opinion in the Court's history[181]—the substance of which was again embraced by the U.S. Supreme Court only thirty years later[182]:

> It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as

176. See "Hexastichon Anemolii Poete Laureati," in the front matter of Thomas More's *Utopia* (1516), concluding "Eutopia merito sum vocanda nominee." *See also* Michaels, *supra* note 19, at 39.

177. *See supra* text accompanying notes 107–24.

178. For this "positivist transnationalism," see *supra* text accompanying notes 126–29.

179. *See supra* text accompanying note 147.

180. For a transnational contextualization of *Lochner*, albeit from a quite different angle, see Peer Zumbansen, Lochner *Disembedded: The Anxieties of Law in a Global Context*, 20 Ind. J. Glob. L. Stud. 29, 65–67 (2013).

181. John P. Stevens, Five Chiefs: A Supreme Court Memoire 25 (2011).

182. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

> tyrannical, as this, and which, equally with this, interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[183]

It may be pushing the parallel too far to suggest that the concept of transnational public policy would essentially aim to enact the economic liberalism of the nineteenth century, as defended by Herbert Spencer in his 1851 economic treatise.[184] Holmes's core point for the current discussion, however, is that freedom of contract as a fundamental value cannot be seen in the isolation of individualism and thus cannot enjoy a systemically higher rank than public interests.[185] Moreover, it is not for judges to formulate what they deem to be the more appropriate policy solution, from a higher and supposedly more civilized perspective, in disregard of the democratically legitimated state lawmakers.[186] If this logic of deference to regulatory powers holds true in the constitutional context of federalism, it is difficult to see how it could not hold true a fortiori in the private context of international commercial arbitration.

3. *Ogden*: The Limits of Delegation of Sovereignty

Gaillard's positivist transnational construction with an almost supra-national dimension—the produce of states agreeing to limit the

183. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

184. Or even to embrace Spencer's mingling of his economic concepts with Darwin's *On the Origin of Species*, which led Spencer to coin the expression of "the survival of the fittest" (later adopted by Darwin) and laying the basis for ideas about social Darwinism. *See* 1 HERBERT SPENCER, PRINCIPLES OF BIOLOGY 444, 445 (London, William & Norgate 1864).

185. See thirty years later Nebbia v. New York, 291 U.S. 502, 523 (1934) ("Neither property rights nor contract rights are absolute. . . . Equally fundamental with the private right is that of the public to regulate it in the common interest."); *West Coast Hotel Co.*, 300 U.S. at 391 ("The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.").

186. *Nebbia*, 291 U.S. at 502 ("With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."); *West Coast Hotel Co*., 300 U.S. at 399 ("Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.").

exercise of their sovereignty by delegating powers to the arbitral legal order[187]—invites yet a third comparison with historic U.S. constitutional law. *Ogden v. Saunders* of 1827 is an early precursor to both *Erie* and *Lochner*. The central issue was whether, in the absence of a federal bankruptcy act, New York bankruptcy law could continue to apply and allow the discharge of debts contracted in New York despite the Contracts Clause in the U.S. Constitution, which prohibited states from enacting legislation that would impair "the obligations of contract."[188] Chief Justice Marshall, unsurprisingly seconded by Story, dissented in this case with a *ius*-naturalist understanding that reads like a blueprint for Eisemann's transnational postulate: "individuals do not derive from government their right to contract, but bring that right with them into society; . . . obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties."[189] Writing for the majority, however, Justice Washington firmly rejected the argument that the Constitution referred to contractual obligations that would be created by the "universal law of all civilized nations." Considering the differences in state bankruptcy laws at the time, Washington argued that Marshall's and Story's understanding would translate not only into an excess of *pacta sunt servanda* but also into an excess of federal powers:

> [T]he sphere of state legislation upon subjects connected with the contracts of individuals would be abridged *beyond what it can for a moment be believed the sovereign states of this Union would have consented to*, for it will be found upon examination that there are few laws which concern the general police of a state or the government of its citizens in their intercourse with each other or with strangers which may not in some way or other affect the contracts which they have entered into or may thereafter form.[190]

187. *See supra* text accompanying note 125.

188. U.S. Const. art. 1, § 10, cl. 1.

189. Ogden v. Saunder, 25 U.S. (12 Wheat.) 213, 346 (1827).

190. *Ogden*, 25 U.S. at 258–59. *See also id*. at 282 (*per* Johnson, J., concurring) (already rejecting the essence of later social Darwinism: "The state construes them, the state applies them, the state controls them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted. I say the social exercise of these rights because in a state of nature, they are asserted over a fellow creature, but in a state of society over a fellow citizen."); *id.* at 317 (*per* Trimbel, J., concurring) ("[T]the obligation of a contract is something not wholly depending upon the will of the parties."); *id.* at 318 ("The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract."); *id.* at 319–20 ("Admitting it, then, to be true that in general men derive the right of private property and of contracting engagements from the principles of natural universal law; admitting that these rights are in the general not derived from or created by society, but are brought into it, and that no express declaratory municipal law be necessary for their creation or recognition, yet, it is equally true that these rights and the obligations resulting from them are subject to be regulated, modified, and, sometimes, absolutely restrained by the positive enactions of municipal law."). On social Darwinism, see *supra* note 184.

This point addresses the same problem as that underlying Gaillard's supranational logic: would the ratification of the New York Convention, the magna carta of modern international arbitration, imply that states have consented to accepting limitations on their sovereign right to regulate their markets? Can the New York Convention's tolerance for a minimalist approach (for the review of arbitral awards by national courts especially in the United States and in France[191]) be understood as a collective delegation of the protection of (national) public interests to arbitrators based on a few general transnational principles? If based on such national judicial deference to arbitrators, the doctrine of transnational public policy arguably undermines the very notion of public policy.[192] From a constitutional perspective, it is difficult to understand how a country could allow its courts to relinquish control over fundamental public policies that are otherwise accepted—and required—to override party autonomy. Countries cannot accept the degradation of their overriding mandatory rules to merely "semi-mandatory" rules just because of the parties' contractual stipulation of arbitration.[193] Conversely, an attempt to justify the legitimacy of such an erosion by invoking an emergent functional equivalent of transnational public policy surely does not correspond to what the states had in mind when ratifying the New York Convention. In 1958, prior to *Mitsubishi*, most matters affecting public interests were simply not capable of settlement by arbitration at all.[194] Eisemann's conception of a-national arbitration was clearly rejected;[195] and Article V(2)(b) of the New York Convention expressly reserves that the content of public policy is to be defined by the individual state in which recognition is being sought. If some national courts adopt a more arbitration-friendly policy under Article VII(1) of the New York Convention, they need to ensure the compatibility of such a policy with their national constitutions.[196] In any case, such

191. *See supra* text accompanying note 120.

192. Buxbaum, *supra* note 120, at 83.

193. For the concept of "lois d'application semi-nécessaire," see Luca Radicati di Brozolo, *Mondialisation, juridiction, arbitrage: vers des règles d'application seminécessaires?*, 1 Revue Critique de Droit International Privé 1 (2013); Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 Colum. J. Eur. L. 383, 407 (2003).

194. For a pre-*Mitsubishi* overview, see van den Berg, *supra* note 154, at 368–75. For an early incisive discussion of *Mitsubishi*, see Carbonneau, *supra* note 119, at 265–98.

195. *See supra* note 18. *See also* van den Berg, *supra* note 154, at 361–62.

196. Or supranational constitutional principles as shown in the Opinion of Advocate General M. Wathelet in *Genentech v. Hoechst & Sanofi-Aventis*. *See* Case C-567/14, Genentech v. Hoechst & Sanofi-Aventis, ECLI:EU:C:2016:526, ¶¶ 55–72, esp. 58 (Mar. 17, 2016) ("In my opinion, limitations on the scope of the review of international arbitral awards such as those under French law . . . are contrary to the principle of effectiveness of EU law.") (while endorsing in footnote 33 the French "recognition" of an international arbitral order).

isolated judicial policy choices can hardly constitute the basis for the emergence of a new global regulatory regime. The analogy to *Ogden* and its off-springs in the U.S. Supreme Court highlights that any delegation of powers to a higher—federal, *supra*national, or *trans*national—structure must itself comply with the respect for the fundamental values and safeguards of the delegating entity at the bottom, i.e., the state.[197] And that is exactly the shortcoming of the concept of transnational public policy.

D. Salvaging the Concept?

If dreaming up a truly autonomous arbitral legal order with its own transnational public policy is too utopian, the question remains whether there is in fact anything that can be salvaged from the notion of transnational public policy. Admittedly, many prominent arbitrators who embrace the notion have been cautious in constraining its application only to very rare exceptions, where the mandatory laws that would have to be applied are too repugnant to be acceptable[198]: a back door to sneak out of an impasse of conflict of laws rather than a glorious gate towards some post-Westphalian transnational *eutopia*. This seems to echo the logic of last resort as hinted at by Holmes in his dissent in *Lochner*[199] and laid out more clearly by the also dissenting Justice Harlan[200]: a set of fundamental principles that exceptionally allow "palpably excessive" state regulation to be disapplied. Indeed, such an ultimate safeguard makes sense in, and is even essential to, a constitutionalized system with fundamental rights. The existential problem remains that arbitrators cannot derive the mandate necessary for such supervisory power from a private agreement.[201] Crucially, they do not have their own comprehensive and binding catalogue of fundamental rights that encompass

197. For the ultra vires problem in the European context, see Matthias Goldmann, *Constitutional Pluralism as Mutually Assured Discretion*, 23 Maastricht J. Eur. & Comp. L. 119 (2016).

198. *See, e.g.*, Pierre Mayer, *Les lois de police étrangères*, 108 Clunet 277, 307 (1981); Peter Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit 540–41 (2d ed. 1989). For a less cautious approach, see Jan Paulsson, The Idea of Arbitration 209–30 (2013) (at least if read in conjunction with Paulsson, *supra*, at 231–55. *See also infra* note 201).

199. *See supra* text accompanying note 183.

200. Lochner v. New York, 198 U.S. 45, 68 (1905) (Harlan, J., dissenting).

201. *But see* Paulsson, *supra* note 198, at 231–55 (arguing that arbitrators, beyond the concept of transnational public policy, may also refuse to apply otherwise applicable regulations if they consider them endogenously "unlawful," i.e., unconstitutional within the legal system from which they emanate—irrespective of what the judiciary of that legal system considers in this respect: "In other words, the international arbitrator remains fundamentally outside the legal order whose law he applies; his duty to respect the interconnections of its body of rules has no relation to the duty of a judge; he derives it—and all the more inflexibly—from his arbitral mandate." (citing, and affirming the summary of his position by, Pierre Mayer, *L'arbitre international et la hiérarchie des normes*, 2011 Revue de l'Arbitrage 361, 370–71)).

all interests at stake. Merely abstract references to the "rule of law" fall short of having any normative value[202] and are circular, since the problem is *which* law applies.[203] Purely subjective determinations of what would be "repugnant," depending on what the arbitrator had for breakfast or on the size of her foot,[204] on an "I-know-it-when-I-see-it" basis, are hardly acceptable. Attempts to objectivize such calls, purporting to draw from higher level principles, runs back into the already discussed methodological insufficiencies, inherent in the very notion of public policy.[205]

One could still imagine a practical role for transnational public policy if a significant degree of modesty could be brought back to the understanding of the arbitrator's mandate, and when ambitions of arbitral autonomy are put to rest. A useful parallel here is arbitral competence-competence, the key ingredient in the autopoietic logic[206]: arbitrators are entitled to determine their own jurisdiction, yet "not for the purpose of reaching any conclusion which will be binding upon the parties—because that they cannot do—but for the [merely practical] purpose of satisfying themselves as a *preliminary* matter whether they ought to go on with the arbitration or not."[207] In other words, competence-competence is primarily a navigation tool for the arbitrators themselves, whose decisions on jurisdiction remain fully

202. For a critical analysis of the rhetoric of promoting rule of law in so-called legal globalization, see Mauro Bussani, *Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric Through Comparative Law*, 67 Am. J. Comp. L. 701 (2019).

203. Equally irrelevant is the reference to state courts abstention to control arbitral awards. *See, e.g.*, Derains, *supra* note 96, at 376–77 (referring to the case law addressed above in text accompanying note 120); Kessedjian, *supra* note 120. *See also* W. Michael Reisman, Systems of Control in International Adjudication & Arbitration 135 (1992) ("As long as an effective control system operates, unauthorized applications of the *lex mercatoria* can be corrected at a later stage. . . . But the development of the *lex mercatoria* coincides with the breakdown of the international control system."). *See also* Buxbaum, *supra* note 120.

204. Paulsson, *supra* note 198, at 200 ("The Chancellor's Foot is the common law's vivid metaphor for judicial dissimulation of secret preferences under the raiment of high-sounding principle.") (referencing in part the original quote of John Selden in 1689, reprinted in Table Talk of John Selden 43 (Frederick Pollock ed., 1927)). For a trivialization of legal realism as "understanding justice as being what the judge had for breakfast," see Ronald Dworkin, Law's Empire 36 (1986). On a reflection on extra-legal factors, see Thomas Schultz, *Arbitral Decision-Making: Legal Realism and Law & Economics*, 6 J. Int'l Dispute Res. 231, 233 (2015).

205. *See also* Reisman, *supra* note 135, at 855 (raising concerns from the public international law perspective and noting that "without this discipline [of customary international law analysis], the invocation of 'transnational public policy' becomes an easy way for those claiming to have an insight into the heart and the soul of international law to effect their own preferences without having to prove that they have become customary international law").

206. Which is crucial for Teubner's finding of transnational lift-off. *See* Teubner, *supra* note 5; for a discussion, see *supra* note 82.

207. Christopher Brown Ltd. v. Genossenschaft Osterreichischer [1954] 1 QB 8, 12–13 (Eng.) (emphasis added). For the approval of this passage and its accord with current English, French, and U.S. law, see Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affs., Gov't Pak. [2010] UKSC 46 (*per* Lord Mance).

reviewable by courts.[208] Transnational public policy could not be anything more than that: a functional tool of comparative law for arbitrators who are uncertain of where in the world their award will be enforced. It would be a tool for gauging how state courts might, in the future, receive the arbitral decision in light of their national public policies. And even then, arbitrators would have to be careful to avoid falling not only for the lures of a fictive normativity but also for the practical lures of a false shortcut by recurring to some kind of approximation.[209] Admittedly, some care is needed in the formulation of narrower, more realistic choice-of-law rules for arbitrators when it comes to public policy issues[210]—and finding the solution to this complex subject will have to remain for another day.[211] Yet the difficulties of navigating conflicts of laws cannot be avoided by supposedly transcending the reality of national laws.

Conclusion

This historic and conceptual survey of the notion of transnational public policy raises significant questions as to whether it could be the apex of some transnational autonomous arbitral legal order that self-constitutes and limits private and party autonomy. The analogy with U.S. constitutional law shows that, even if one were to grant transnational public policy a status vaguely equivalent to constituted federal law, it is by no means clear how it could claim any primacy over national regulation.[212] More importantly, it is difficult to discern a reason and legitimation for granting transnational public policy such equivalence in the first place. The fact that leading arbitrators and scholars keep invoking the concept may say something about the field of arbitration

208. *Id*. But for the possible attempts of arbitrators to shield their self-affirmed jurisdiction by issuing antisuit injunctions, see, e.g., Toby Landau, *Arbitral Life-Lines: The Protection of Jurisdiction by Arbitrators*, *in* International Arbitration—Back to Basics?, *supra* note 120, at 282.

209. For the U.S. context, see Monrad G. Paulsen & Michael I. Sovern, *Public Policy in the Conflict of Laws*, 56 Colum. L. Rev. 969, 1016 (1956) ("The principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws.").

210. *See, e.g.*, Kleinheisterkamp, *supra* note 153, at 925–28 (suggesting a practical solution rather than a conceptual conflict of laws solution).

211. For a sensible starting point, see Restatement (Second) of Conflict of Laws § 187(2)(b) (Am. L. Inst. 1971). For its unfortunate rejection in the context of arbitration, see *Northrop Corp. v. Triad International Marketing SA*, 811 F.2d 1265, 1270 (9th Cir. 1987); similarly, see Int'l Chamber Commerce, Draft Recommendation on the Law Applicable to International Contracts art. 9, alternative 1 (1980), *discussed in* Ole Lando, *Conflict-of-Laws Rules for Arbitrators*, *in* Festschrift für Konrad Zweigert 145, 176 (Herbert Bernstein et al. eds., 1981).

212. And this is without entering into the issue of separation of powers that also underlies the U.S. constitutional debate. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937).

in sociological terms[213] but not about the normative value of this construction. To follow the lead of Lord Denning[214]: there is a fundamental difference between judges and arbitrators riding the unruly horse of public policy. As competent as they may be as riders, arbitrators simply do not have their own horses to ride. They can only ride the horses temporarily entrusted to them (according to their conflict-of-laws analysis) and that they must do responsibly to the owners.

What seems to be the fundamental flaw of transnational public policy is what brings us back to the notion of *Volksgeist*. Self-constitutionalization is only possible for the group itself, not for others. The sphere of the international disputes that go to arbitration is a subsystem resulting from the many transnational recombinations of the markets affected by underlying transactions. These markets may themselves be transnational in economic terms, yet they are constituted by national, supra-national and sometimes international regulation that—from a *demos*-centric and territorialist perspective of nation states—create opportunities for and enhance economic transactions and market activity.[215] Regulatory efforts may often be suboptimal, and yet they are the best framework that our societies have been able to constitute in the desperate effort to optimize the balance between *all* private and public interests. In particular, the legitimacy of these regulatory efforts consists (at least in theory) in the fact that they themselves are regulated by higher principles: the fundamental constitutional rights of all those within the jurisdiction of the regulator. The (probably equally utopian) attempt to ensure the harmonious coexistence of all societal forces through regulation is only possible through a holistic view of all those interests at stake.[216] Only then can regulation claim the legitimacy of being linked back to—and respectful

213. *See* Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L 1, 1–17 (2015). *See also* GARTH & DEZALAY, *supra* note 160.

214. Lord Denning replied to the ad nauseam cited trope of Burrough in *Richardson v. Mellish* [1824] 2 Bing 229, 252 ("Public policy . . . is a very unruly horse, and once you get astride it, you never know where it will carry you."), and in *Enderby Town Football Club Ltd. v. Football Association Ltd.* [1971] Ch 591, 606–07 ("I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice. . . . It can hold a rule to be invalid even though it is contained in a contract.").

215. For an incisive analysis of the role of "transnational" soft law, see, e.g., CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL MARKET: RULE MAKING IN THE 21ST CENTURY (2d ed. 2015).

216. For one of the many constitutional expressions of the need for such holistic understanding of fundamental rights in the United States, see Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."). For the German perspective, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 27, 2015, 1 BvR 471/10 & 1 BvR 1180/10, 138 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 138, 296 ("Solving the normative tension between the constitutional values . . . is the responsibility of the democratic legislator, who in the [political] process of forming a public opinion has to seek a compromise acceptable for all."). For a critical analysis of the constitutional traditions of "balancing" in a comparative perspective, see BOMHOFF, *supra* note 43.

of—the ever-evolving *Volksgeist*. Arbitrators cannot possibly accomplish that, at least because they do not have the mandate to do so.

If, after proper conflict-of-laws analysis, arbitrators come to the conclusion that certain mandatory regulations of the market affected by the underlying transaction are applicable in any given case, they will then have to do their job: resolve the dispute according to the applicable laws. They should resist the urge to resort to the metaphysical or the transnational to escape the perceived absurdity of national regulation. As with any perceived absurdity, it is there for a reason. The essence of freedom of contract is to allow parties to allocate risk between them, not to externalize costs or change or escape fight or flee regulatory frameworks that enable and condition their market participation and constitute that market in the first place. Hedging against the risks of that market—be they transactional, economic, or regulatory—is the parties' own responsibility when deciding to enter into international transactions and calculating their risks and prices. Parties can use substantive and procedural party autonomy, i.e., choice of law and choice of arbitration, to engage in "regulatory arbitrage"—but they must do so at their own risk, which they take for the purpose of optimizing their profit margins.[217] The more daring parties are in defying the legal framework that seeks to regulate their transaction, the greater the risk that their contractual construct will not be upheld, either by the courts or by arbitral tribunals. Arbitration cannot, by externalizing the costs of undermining national policies, be an insurance against that regulatory risk, which the parties themselves have to assume and take responsibility for.[218]

The utopian dream of arbitrators properly balancing private and public interest at the global level, and of their duty and freedom to thwart national regulations for the sake of a higher order public policy is, after all, utopian: it has no place. More importantly, transnational public policy is "udemonian" (οὐ δῆμος)[219]: it has no *demos*, no ordinary citizens of a constituted state, whose *Volksgeist* could carry it and bestow legitimacy on it. Given the risk of conjuring demons and confusion both in practice and academia about the status and autonomy of arbitrators, it seems safer to archive the dream of a transnational public policy rather than attempt to achieve it.[220]

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217. *See* Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 47 Cornell Int'l L.J. 63, 65 (2014).

218. *See also* Reisman, *supra* note 203, at 137–38 (albeit not considering the application of overriding mandatory laws different from the chosen law).

219. Rather than, by virtue of comparative law, "eudemonia-n" (εὐδαιμονία) (i.e., dispensing felicity as the good composed of all goods); *see* 6 The Works of Plato 129 (George Burges ed., London, H.G. Bohn 1854) (providing a superior, Platonic definition of same under the definitional section relating to "felicity").

220. Michaels, *supra* note 19, at 59 (referring to Lew, *supra* note 19) ("[T]he main problem with Lew's 'Achieving the dream' is not in the dream; it is in achieving it."). *See also* Reisman, *supra* note 203, at 855 ("As a public international lawyer who believes that international law is a real and important system of law, I object to a concept whose notorious imprecision and subjectivity gives international law a bad name. The parties to an international commercial arbitration and the system of international law itself deserve better.").