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The self-styled ‘autonomy’ of international arbitration

George A. Bermann*

ABSTRACT

Among international legal regimes, international arbitration has traditionally claimed for itself a remarkable degree of autonomy from other international regimes, an autonomy that enables it to enjoy a remarkable measure of self-determination. Its assertions of autonomy take a number of different forms and exhibit considerable resilience. Autonomy does allow international arbitration to develop in accordance with norms that are specific to it, but it also poses challenges that need, even for international arbitration’s own well-being, to be acknowledged and addressed.

1. INTRODUCTION

International arbitration has distinguished itself by, among many other things, its powerful insistence on autonomy from other legal regimes, be they national or international.¹ Its assertion of autonomy is largely undisguised, the notion being advanced with considerable satisfaction. This article has two aims. One is to trace the origins and the scope of the autonomy that international arbitration claims for itself. The other is to identify autonomy’s costs, even as measured by reference to international arbitration’s own purposes.

It is important, in embarking on this inquiry, to take a stab at what the autonomy upon which international arbitration insists actually means. The very use of the term ‘autonomy’ begs the question of ‘autonomy from what?’ Autonomy is best viewed as freedom and independence from norms by which adjacent legal orders are governed. The standard definition of autonomy is indeed nothing more and nothing less than ‘self-government’,² which implies in turn a right to recognition, an ability to function,

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1 Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 259 (‘Arbitration is a form of self-governance, fostering adherence to common values.’).

2 Merriam Webster defines autonomy as ‘the quality or state of being self-governing’ <<https://www.merriam-webster.com/dictionary/autonomy>> accessed 13 March 2020. The *Cambridge Dictionary* defines it as ‘the right of a group of people to govern itself or to organize its own activities’ <<https://dictionary.cambridge.org/us/dictionary/english/autonomy>> accessed 13 March 2020.

and a capacity to develop with substantial freedom and independence from whatever regime of which it would otherwise be part.

2. ARBITRAL AUTONOMY: ORIGINS AND SCOPE

International arbitration's dependence on what it styles as autonomy is pervasive. As the sections that immediately follow show, assertions of autonomy go both to international arbitration's *raison d'être* and its functionality.

2.1 Existential autonomy

International arbitration's attachment to what it styles as autonomy derives from its core function, namely, the definitive adjudication of disputes. In performing this function, international arbitration asserts authority that is traditionally viewed as the province of national courts. It is a historical fact that, for a long period, national courts treated agreements to resolve such disputes definitively and authoritatively through private adjudication as contrary to public policy and wholly unenforceable.³ In denying effect to such agreements, courts typically characterized their purpose as impermissibly 'ousting' (or purporting to 'oust') those courts of their jurisdiction under law.⁴

In thinking about autonomy, it may actually be useful to analogize international arbitration to a separatist political movement.⁵ Like a separatist political movement, international arbitration stakes out territory. It also asserts self-determination, as defined above: freedom and independence from many of the norms and practices by which the legal order from which it separated itself is governed, thereby enabling it to enjoy recognition, to function, and to develop with substantial freedom and independence from whatever regime of which it would otherwise be a part.⁶ In these respects, international arbitration's autonomy is essentially existential.

In fact, the term autonomy figures literally in two of the most fundamental premises upon which international arbitration demands recognition and claims legitimacy. The first of these premises is what goes in international arbitration circles by the name of 'party autonomy'.⁷ The second premise is somewhat more obscure. It posits

3 See, eg *United States Asphalt Refining Co v Trinidad Lake Petroleum Co, Ltd* (1915) 222 Fed 1006, 1011 (SDNY). See generally Raymond J Heilman, 'Arbitration Agreements and the Conflict of Laws' (1929) 38 Yale LJ 617.

4 See Kristen M Blankley and Maureen A Weston, *Understanding Alternative Dispute Resolution* (Carolina Academic Press 2017) 176–77 ('If one party to an arbitration agreement asked for specific performance of the arbitration agreement (i.e. to order the parties to arbitrate), the Court would reject party requests on the basis that the parties were attempting to 'oust' the courts of supervision or jurisdiction over legal disputes.').

5 Separatism has been defined as: '[a] theory or doctrine which supports a state of separation between organizations, institutions, or other societal groups or between different political jurisdictions.' <<https://www.yourdictionary.com/separatism>> accessed 13 March 2020.

6 See discussion on the positive and negative liberties within the framework of the autonomy thesis in Hiro N Aragaki, 'Does Rigorously Enforcing Arbitration Agreements Promote Autonomy' (2016) 91 Ind LJ 1143, where the author makes a distinction between negative liberty manifesting in the form of freedom from norms of the legal order and positive liberty manifesting as the ability to enjoy recognition and self-determine by having preferences over one's preferences.

7 See generally Camilla Andersen and David Mavunduse, 'Party Autonomy in International Commercial Arbitration' (2019) 25 Int'l Trade L & Reg 92.

that an arbitration agreement (typically a contractual arbitration clause) enjoys 'autonomy' *vis-à-vis* the contract in which it is found.

2.1.1 Party autonomy

Except in those few instances in which the arbitration of disputes is mandated by law, arbitration finds its origins in party consent. Arbitration after all is fundamentally a creature of contract⁸ and finds in consensualism not only its origins but also its legitimacy.⁹ Like any separatist movement, international arbitration must lay claim to legitimacy, and it is party autonomy that largely performs this legitimating function.

If international arbitration finds in party autonomy both its origins and its legitimacy, it also finds in it the source of its attractiveness as compared to litigation in national court.¹⁰ Virtually all the virtues associated with international arbitration entail autonomy from what may be regarded as the 'norm'. The most obvious example is the freedom of parties to select their own judges rather than appear before judges whom the state assigns to them, and to do so in consideration of their self-interest.

Party autonomy also manifests itself in the parties' ability to tailor their dispute resolution mechanism to what they view as their distinctive needs.¹¹ This is a freedom that parties before national courts likewise do not enjoy. The Supreme Court has posited time and again that in arbitration the parties are the architects of their own means of dispute resolution. As the Court reads it, the Federal Arbitration Act (FAA) is committed to nothing more, but also nothing less, than the assurance that arbitrations will be conducted according to the procedures the parties themselves designed.¹²

8 See, eg *Fils et Cables D'Acier de Lens v Midland Metals Corp* 584 F Supp 240, 243 (SDNY 1984); see also Stephen J Ware, 'Default Rules from Mandatory Rules: Privatizing Law Through Arbitration' (1999) 83 *Minn L Rev* 703 (professor Ware notes that a search on 10 July 1998 for the phrase 'arbitration is a creature of contract' in the Westlaw ALLCASES database yielded 177 cases); Thomas E Carbonneau, 'The Exercise of Contract Freedom in the Making of Arbitration Agreements' (2003) 36 *Vand J Transnat'l L* 1189, 1193 ('Freedom of Contract, . . . , is at the very core of how the law regulates arbitration.').; *Gates v Arizona Brewing Co* (1937) 54 *Ariz* 266, 269 ('Arbitration is a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the place of the tribunals provided by the ordinary process of law.').; see Blankley and Weston (n 4) 177.

9 Arbitral autonomy allows parties to select, *inter alia*, their preferred arbitral administrative institutions, applicable law, and determine powers of the arbitral tribunal. See Moonchul Chang, *The Autonomy of International Commercial and Maritime Arbitration: International, Canadian and Far Eastern perspectives* (Korea University Press 1989) 10.

10 See generally Maurice Kenton and Peter Hirst, 'Advantages of International Commercial Arbitration' (30 July 2015) <<https://www.mondaq.com/uk/International-Law/416416/Advantages-Of-International-Commercial-Arbitration>>.

11 Gary B Born, 'Keynote Address: Arbitration and the Freedom to Associate' (2009) 38 *Ga J Int'l & Comp L* 7, 16; Blankley and Weston (n 4) 179 ('The arbitration agreement may be an extensive document outlining all the different procedural choices the parties have made – such as the location of the arbitration, the arbitration rules, the method of arbitrator selection, the amount of discovery, time limits for the hearing, applicable governing law, whether the resulting award must be written, and so on.').

12 See *Volt Information Sciences, Inc v Board of Trustees, Leland Stanford Junior University* (1989) 489 US 468 (purpose of the FAA is to effectuate the parties' intent as to their dispute resolution mechanism); *Doctor's Associates Inc v Casarotto* (1996) 517 US 681 (FAA preempts a Montana statute requiring arbitration clauses be printed in the front page of the container contract in underlined capital letters on grounds

Parties do not, of course, design an arbitration model from scratch. In all likelihood, they will incorporate in their arbitration agreement one or another set of existing rules of arbitral procedure,¹³ but it is they who choose the rules. In selecting an arbitral situs, parties impliedly subject themselves to whatever rules of arbitral procedure the arbitration law of the seat prescribes¹⁴—though increasingly these are default rules only, thus leaving party autonomy on matters of arbitral procedure largely intact. But, again, it is the parties who ordinarily select the seat and thereby its arbitration law. A tribunal that deviates from what the parties have prescribed in these respects does so at its risk, or rather at risk to its award. To the extent that the rules of procedure and the arbitration law to which the parties are deemed to have subjected themselves are silent, procedural determinations will then be made by the arbitral tribunal itself.¹⁵ But that tribunal too, it must be remembered, is composed of persons whom the parties themselves have selected for that purpose. In sum, party autonomy signifies autonomy from standard civil procedure and its rules of the game more generally.¹⁶

Through party autonomy parties may achieve still other advantages often associated, rightly or wrongly, with arbitration, including the promise of economies in time and cost, fewer formalities than those entailed in litigation, and a measurably higher degree of confidentiality and neutrality than is available in national court. Up to now, thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹⁷ arbitral awards have also enjoyed a far greater degree of international mobility than national court judgments have enjoyed, although that particular advantage is in the process of disappearing.

2.1.2 *Autonomy of the arbitration agreement*

The second way in which international arbitration literally employs the language of autonomy in aid of its existence is through the so-called autonomy of the arbitration clause from the contract of which it is a part. Of course an arbitration agreement

that the FAA required party autonomy by 'ensur[ing] that private agreements to arbitrate are enforced according to their terms'. See also Alan Scott Rau, 'Hall Street Associates v. Mattel, Inc.: Fear of Freedom' (2006) 17 *Am Rev Int'l Arb* 469, 579 ('arbitration has no virtues other than what the parties themselves happen to find in it'. This has been recognized by the Supreme Court in terms of the overriding goal of the FAA being to 'rigorously enforce agreements to arbitrate.')

13 For example, UNCITRAL Arbitration Rules (2013).

14 For example, The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, as revised in 2006 [hereinafter, the 'UNCITRAL Model Law'].

15 See generally William W. Park, 'Duty and Discretion in International Arbitration' (1999) 93 *Am J Int'l L* 805.

16 However, several studies conclude that International arbitration is not time or cost-effective. See Edward Brunet and others, *Arbitration Law in America: A Critical Assessment* (CUP 2006) 19; Christian Buhning-Uhle, 'A Survey on Arbitration and Settlement in International Business Disputes' in Christopher R Drahozal and Richard W Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International 2005) 25 (Objectives such as speed and cost 'seem to have only marginal relevance for the choice of arbitration in international commerce. This may be due either to the perception that, in international arbitration, these advantages do not materialize, or that these qualities are not among the real priorities of the participants.')

17 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 3 (1958).

forms part of the contract in which it is found. But international arbitration knowingly adopts the fiction that an arbitration clause and the contract in which it is found are separate legal instruments.¹⁸ The purpose of the fiction is to enable a tribunal to declare a contract null and void, if it so finds, without in so doing nullifying and voiding its authority to make that very determination.¹⁹ Put differently, separability, as the notion is known in US law, allows arbitral authority to survive the demise of the contract on which that authority is based.²⁰ Significantly, the French-language counterpart to separability is the 'autonomy of the arbitration clause' (*l'autonomie de la clause compromissoire*).²¹

Between party autonomy and the autonomy of the arbitration clause from the main contract, the notion of autonomy—for all its abstractness—performs mighty heavy lifting, largely freeing parties from the ground rules of civil litigation, while at the same time detaching the fate of an arbitration agreement from the fate of the contract in which it is found. Remove these assertions of autonomy, and international arbitration would not come close to being the robust adjudicatory mechanism that it is today.

2.2 Functional autonomy

The autonomy of international arbitration also has an important functional dimension in at least four respects. The first manifests itself in the entitlement of arbitral tribunals to determine their own jurisdiction. The second is reflected in a distancing of national courts as actors in the arbitral process. The third takes the form of emancipation from the procedural and substantive law of the arbitral seat. The fourth is international arbitration's basic freedom from regulation in the public interest.

2.2.1 Kompetenz-Kompetenz

At least as fundamental to the workings of international arbitration as the principle of separability is the notion, subscribed to practically universally, that arbitral tribunals have the authority to determine their own jurisdiction.²² Should a party appearing before an arbitral tribunal contest arbitral jurisdiction, the tribunal enjoys the privilege of deciding the challenge; it need not suspend proceedings pending a judicial determination of the matter. This principle, commonly referred to in its German wording as *Kompetenz-Kompetenz* (but also as Competence-Competence and *Compétence-Compétence* in its English and French versions, respectively), signifies quite literally competence to determine one's own competence.²³

18 The UNCITRAL Model Law, art 16(1) ('... [A]n arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.').

19 *Highlands Wellmont Health v John Deere Health* (2003) 350 F 3d 568, 574–78 (6th Cir); See generally Brunet and others (n 16) 41, 42.

20 *Prima Paint Corp v Flood and Conklin Mfg Co* (1967) 388 US 395.

21 Jean-Pierre Ancel, 'L'actualité de l'autonomie de la clause compromissoire' (1994) 11 *Travaux du Comité français de droit international privé* 75.

22 See generally Adam Samuel, 'The US Supreme Court Does *Kompetenz-Kompetenz*' 35 *Arb Int'l* 263.

23 UNCITRAL Model Law provides in art 16(1) the now-classic articulation of the *Kompetenz-Kompetenz* principle: 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.' See generally William W Park, 'Jurisdiction to

The autonomy thus practised by arbitral tribunals must not, of course, be exaggerated. Many legal systems make it possible, *Kompetenz-Kompetenz* notwithstanding, for a party resisting arbitration to seek and receive a judicial ruling at the outset, albeit only on selected threshold issues,²⁴ and, in most systems, subject to a highly relaxed standard of judgment.²⁵ Moreover, though a tribunal enjoys the freedom to determine its own jurisdiction, it does not ordinarily have the last word on the matter, courts conducting post-award review commonly address jurisdictional challenges on a *de novo* basis.²⁶

Even so, the very privilege of arbitral tribunals to make their own jurisdictional determinations, if only at the outset, contributes handsomely to the speed and efficiency of arbitral adjudication. It is in many ways the embodiment of autonomy.

2.2.2 Averting judicial interference

Kompetenz-Kompetenz notwithstanding, international arbitration's relationship with national courts is a complicated one. Realistically, international arbitration cannot possibly assert a perfect autonomy from national courts. Like it or not, international arbitration is profoundly dependent for its efficacy on the involvement of courts at several stages in the arbitration life cycle. The judicial role in enforcing agreements to arbitrate is positively essential to the accomplishment of international arbitration's purposes.²⁷ Unless courts are prepared to decline jurisdiction over a given dispute due to the parties' prior agreement to arbitrate and, if necessary, to compel arbitration, an arbitral agreement may come to naught. If an arbitration is launched, judicial intervention may be needed for the appointment of members of an arbitral tribunal should that become necessary.²⁸ A court may be asked to afford provisional relief in

Determine Jurisdiction' in 13 ICCA Congress Series 55 (Permanent Court of Arbitration, The Hague, 2007), reprinted in William W Park, *Arbitration of International Business Disputes* (2nd edn, OUP 2012) 231; Stefan Kröll, 'Party Autonomy in Relation to Competence-Competence' in F Ferrari (ed), *Limits to Party Autonomy in International Commercial Arbitration* (2016) 165.

- 24 George A Bermann, 'The Gateway Problem in International Commercial Arbitration' (2012) 37 *Yale J Int'l L* 1, 50.
- 25 See Emmanuel Gaillard and Yas Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators' in Emmanuel Gaillard and Domenico di Pietro (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice* (Cameron May 2008) 257, 264–65 ('The Court established the correct approach to the review of the arbitration agreement by the courts to be the prima facie finding that there exists an arbitration agreement that is not null and void, inoperative or incapable of being performed. The key rationale for the Court's holding that the courts' review of the arbitration agreement should be limited to a prima facie standard is the principle of competence-competence.').
- 26 For example, see *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57, where an Award on Jurisdiction was challenged before the Singapore Courts and the Court of Appeal in Singapore held that the 'court should consider the matter afresh' (para 41); see also Charles H Brower II, 'International Decision, S.D. Myers, Inc. v. Canada, and Attorney General of Canada v. S.D. Myers, Inc.' (2004) 98 *Am J Int'l L* 339, 339–44 ('When conducting annulment proceedings, U.S. courts frequently subject arbitral tribunals' rulings to *de novo* review, but apply an independent presumption that the tribunals have acted within their jurisdiction.').
- 27 See generally, George A Bermann, 'The Role of National Courts at the Threshold of Arbitration' (2017) 28 *Am Rev Int'l Arb* 291.
- 28 See the UNCITRAL Model Law, art 11(4) ('Where, under an appointment procedure agreed upon by the parties,
(a) a party fails to act as required under such procedure, or

aid of an arbitral proceeding²⁹ or to order the production of evidence for use in that proceeding,³⁰ though the tribunal may override the relief and refuse to admit the evidence into the record.

Courts also have a post-award role to play, most notably courts of the seat which may, albeit only on limited grounds, annul an award, rendering it a nullity at least in that jurisdiction. Nor is an arbitral award, once rendered, self-enforcing. If unpaid, an award may only be enforced in the courts of a jurisdiction where the award debtor has assets. In many jurisdictions, enforcement is a judicial function by which an award is reduced to judgment and proceed to execution, or otherwise win judicial approval, before it can be executed.

But neither the authority of courts to annul awards or deny them enforcement of awards should be viewed as inimical to the arbitral process. All participants in international arbitration know that it is ultimately in arbitration's best interest for awards that are sufficiently unworthy to end up being annulled or denied enforcement, functions that only courts can perform. They appreciate that exposure to some degree of judicial monitoring is the price that states exact for allowing civil disputes to go to arbitration rather than court in the first place and for entitling arbitral awards to enforcement as if they were judgments of a national court.³¹

That said, there persist suspicions that national courts may disrupt or undermine the arbitral process—suspicions in response to which international arbitration community has asserted still another species of autonomy, autonomy from judicial interference. The UNCITRAL Model Law on International Commercial Arbitration, while expressly allowing courts to intervene in the discrete ways just mentioned, literally prohibits courts from intervening in any other way. 'In matters governed by this Law, no court shall intervene except where so provided in this Law.'³² Thus, while the international arbitration regime welcomes those judicial interventions that are deemed supportive of the arbitral process, it rejects incursions that, in its view, are not.

2.2.3 *Autonomy from the law of the seat*

When parties designate an arbitral seat, they necessarily subject themselves to the arbitration law of that jurisdiction, such as it is. Parties do not have autonomy from the

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment'.

29 See the UNCITRAL Model Law, art 9 ('Arbitration Agreement and interim measures by the Court - It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.').

30 See the UNCITRAL Model Law, art 27 ('Court assistance in taking evidence - The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.').

31 See George A Bermann, 'What Does It Mean to Be "Pro-arbitration"?' (2018) 34(3) *Arb Int'l* 341, 351.

32 The UNCITRAL Model Law, art 5.

arbitration law of the seat, once they have selected it, although they are apt to favour as seat a jurisdiction that, through its liberal provisions and preference for default over mandatory rules, especially privileges party autonomy.³³

But most arbitration laws in fact have little to say on the multitude of non-merits matters that international arbitrators are called upon to decide on a daily basis over the course of an arbitral proceeding. These are matters on which national courts can ordinarily turn to forum law, a luxury that arbitral tribunals do not have. Arbitral tribunals do not even exist until they are constituted in the wake of a dispute. The range of non-merits issues that arise in the course of an arbitral proceeding is staggering. What rules of privilege are to be applied in a hearing? By whose law is the tribunal to determine the arbitrability (or non-arbitrability) of a claim? By what criteria does the tribunal decide whether the claim before it is *res judicata*? What rate of interest on an award shall be applied? Under what circumstances, if any, may a tribunal issue an anti-suit injunction, barring a party from introducing or maintaining litigation that stands to interfere with an ongoing arbitration? If the parties have selected an applicable law, may a tribunal—without exceeding its authority—give effect to the mandatory norms of a jurisdiction other than the one whose law was chosen? If the parties did not select an applicable law, what body of law governs the merits of a dispute?

At one point in the distant past, it was thought that arbitral tribunals, in making non-merits determinations such as these, should operate as if they were courts of the seat of arbitration, borrowing whatever legal principles and practices the local courts follow in the cases that come before them.³⁴ It should at this point come as no surprise that over time tribunals have asserted the freedom to make determination of this kind independently, untethered from local law and practice. After all, part of arbitration's appeal to begin with was an escape from the strictures imposed by and on national courts.

A sure sign of this autonomy is the growing prominence in the practice of international arbitration of what have come to be known as 'international standards',³⁵ norms that derive directly from nobody of state law, but that are recognized and developed over time by international arbitral institutions, professional associations, and arbitral tribunals themselves as most suitable for the resolution of international disputes. Suffice it to say that ascertainment of international standards is in and of itself an exercise in arbitral autonomy. Prominent among the sources of international standards is past

33 See Chang (n 9) 118–20 ('According to the traditional view, international arbitration is subject to the mandatory procedural law of the arbitral forum where the award is rendered; it is referred to as *lex arbitri*. . . . Parties are still allowed a good deal of room in establishing procedural rules, although the measure of freedom in applying that procedure is determined by the *lex arbitri*'). However, note the contradictory position taken by proponents of the concept of delocalized law. See Chang, *ibid* 120–21. See also Pierre Lalive, 'Les règles de conflit de lois appliquées au fond du litige par l'arbitre international séjournant en Suisse' (1976) 3 *Revue de l'arbitrage* 155 ('international commercial arbitration may be entirely detached or separated from the national laws of the parties: it shall only be governed by rules of arbitration chosen by the parties or referred to by the parties in their agreement').

34 See discussion on the *Monolocal Approach* in Emmanuel Gaillard, *Legal Theory of International Arbitration* (Brill Nijhoff 2010) 115–18.

35 See George A Bermann, "'International Standards' as a Choice of Law Option in International Commercial Arbitration' (2016) 27 *Am Rev Int'l Arb* 423, 432–34.

arbitral practice, 'soft law' norms produced by arbitral associations themselves (exemplified by the International Bar Association's arbitration section), and the presumed good judgment of arbitrators.³⁶ Significantly, all of these sources lie in the hands of the international arbitration profession itself, products themselves of arbitral autonomy.

2.2.4 *Autonomy from regulation*

The functional autonomy enjoyed by international arbitration has a fourth and often underappreciated dimension, namely, autonomy from professional regulation in the public interest.³⁷ It is difficult to identify any class of service providers, performing services as consequential as the adjudication of legal disputes, that go as unregulated as international arbitrators do.³⁸ In most jurisdictions, an arbitrator need not be a member of the bar, and even for those who are, sitting as arbitrator does not constitute the practice of law. It has been said, with little exaggeration, that international arbitrators operate in a professional ethical 'vacuum'.³⁹ The constraints on the practice of international arbitration, such as they are, emanate largely from self-regulation, which is in itself among the purest signs of autonomy.

All told, autonomy lies at international arbitration's very foundation, not least its existence and functionality. It also yields a large and wide variety of second-level assertions of autonomy, some healthier than others, and so warranting a close look. The resonance of autonomy with international arbitration is a good deal more than semantic.

3. AUTONOMY CONCERNS

By most accounts within international arbitration circles, autonomy in its various guises has served international arbitration interests well. International arbitration's prosperity cannot be dissociated from the various forms of freedom it enjoys. But the fact that a regime is largely self-governing, and functions well, does not necessarily shield it from criticism and challenge. To that extent assertions of autonomy can be deceptive.

International arbitration is indeed coming under criticism and challenge from which its own guiding principles neither aid nor protect it. This is largely due to the fact that the criticism and challenges levelled at international arbitration derive largely from norms that the international arbitration regime has not, at least historically, internalized. In fact, the more autonomous a regime, the greater the risk that it will distance itself from the norms by which it is judged from the outside.

Certain of the challenges that international arbitration is facing of late, and has only relatively recently begun to acknowledge, are both highly normative and highly

36 See Blankley and Weston (n 4) 212; Gabrielle Kaufmann-Kohler, 'International Arbitration: Codification and Normativity' (2010) 1 *J Int'l Disp Settle* t 1.

37 See Blankley and Weston, *ibid* 220 ('Most of the regulation takes place in the private sector, as opposed to positive law:').

38 This is not a new concern. See J Noble Braden, 'Sound Rules and Administration in Arbitration' (1934) 83 *U Pa L Rev* 189.

39 Catherine A Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' (2002) 23 *Mich J Int'l L* 341, 341. See also Catherine A Rogers, *Ethics in International Arbitration* (OUP 2014) 17–19.

politically salient. For example, it has become abundantly clear that international arbitration no longer enjoys immunity from critiques based upon lack of transparency and diversity.⁴⁰ Nor does the fact that international arbitrators largely operate in a professional ethical vacuum any longer pass unnoticed.⁴¹ Meanwhile, the legitimacy of consumer arbitration, typically predicated on contracts of adhesion, is predictably coming increasingly under attack.⁴²

No arena of international arbitral practice has come in for greater challenge than investor–state arbitration. Largely based on a multitude of treaties between and among states, investor–state arbitration enables foreign investors to mount large monetary claims against host states for alleged failures to comply with a range of obligations set out in those treaties, among them the largely indeterminate standard of ‘fair and equitable treatment’. According to a growing critique, investor–state arbitration endows *ad hoc* arbitral tribunals, composed of a relatively small number of individual ‘repeat-player’ arbitrators, with outsized authority and insufficient accountability, while at the same time exerting a powerfully chilling effect on states’ right to regulate in the public interest.⁴³

International arbitration’s autonomy currently faces a very particular challenge emanating from the European Union (EU). The European Court of Justice recently ordered the German Supreme Court to annul an award rendered in favour of Dutch investors against Slovakia under the Netherlands–Slovakia bilateral investment treaty largely on the ground that the tribunal that rendered the award had occasion to rule on issues of EU law, without the possibility of making preliminary references to the Court of Justice on the interpretation and validity of EU law. The Court saw a tribunal’s ability to do so as a threat to the integrity and consistency of EU law, as well as the Union’s ability to regulate the internal European market without outside interference.⁴⁴ Significantly, the Court of Justice justified the result as necessary to ensure, quite literally, the ‘autonomy’ of EU law⁴⁵—a move deplored in turn by the international arbitration community as an assault on its own autonomy.⁴⁶ The remarkable

40 Blankley and Weston (n 4) 181. See also Catherine A Rogers, ‘Transparency in International Commercial Arbitration’ (2006) 54 U Kan L Rev 1301.

41 Blankley and Weston, *ibid* 182 (‘Although no qualifications exist regarding who can legally serve as an arbitrator, in practice much of the work is dominated by small group of people. These individuals are often white men, lawyers or former judges.’).

42 See Blankley and Weston, *ibid* 182–83. There has been pending in the US Congress for years proposed legislation to render pre-dispute arbitration agreements unenforceable in consumer and other categories of disputes. The latest bill is HR 1423, Forced Arbitration Injustice Repeal Act, 116th Congress (2019–20).

43 Paulsson (n 1) 177 (‘Arbitration is under recurrent attacks by those who fear that it may undercut the authority of regulation and regulators.’). These concerns are currently before Working Group III of UNCITRAL. See UNCITRAL Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session, A/CN.9/970, 6–8 (New York, 1–5 April 2019) <<https://undocs.org/en/A/CN.9/970>>; see also Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS), UNCITRAL Report of Working Group III (Investor-State Dispute Settlement Reform), Thirty-Sixth Session (Vienna, 29 October–2 November 2018) <<https://undocs.org/en/A/CN.9/WG.III/WP.149>> accessed 13 March 2020.

44 CJEU, Case C-284/16 *Slovak Republic v Achmea BV* (2018) ECLI:EU:C:2018:158 [hereinafter *Achmea*].

45 See *Achmea*, *ibid*, paras 31–37 and 57–59.

46 See Csongor Istvan Nagy, ‘Intra-EU Bilateral Investment Treaties and EU Law after Achmea: “Know Well What Leads You Forward and What Holds You Back”’ (2018) 19 German LJ 981, 1016; See also

and unprecedented result is a confrontation between two international regimes, each asserting an autonomy of its own devise seen as threatened by the autonomy asserted by the other.⁴⁷

The critiques enumerated here are public and accordingly highly visible, but other critiques play out within the interstices of international arbitration itself, largely under the cloak of autonomy. Three concrete examples should suffice.

Respondent in a patent infringement case asserts by way of defence the patent's invalidity, at the same time that a challenge to the patent's validity is pending before the Patent Office. Faced with that scenario, a national court would seriously entertain the possibility of suspending proceedings and awaiting the Patent Office's determination. This is a move that an arbitral tribunal, imbued with a sense of autonomy, is unlikely to make, thereby distancing itself from norms of deference to specialized agencies. To make that move would, it is said, be an abdication of arbitral responsibility.

Claimant initiates litigation in court for breach of contract under a contract that expressly precludes the award of consequential damages.⁴⁸ Were the court, in the absence of any legal justification, to award consequential damages, its judgment would stand a good chance of reversal on appeal. But if the claimant had brought its claim in arbitration and won consequential damages, the award would likely withstand judicial challenge, the court hesitating to 'second-guess' the arbitrators and thereby interfere with the tribunal's freedom of judgment.

Finally, courts in a number of US states treat contract clauses whereby consumers waive any right to bring class action litigation as unconscionable and unenforceable, and federal law allows them to do so. However, the US Supreme Court has held that states cannot similarly treat as unconscionable and unenforceable a consumer's waiver of class arbitration, on the theory that the FAA dictates respect for the parties' exercise of party autonomy in including the class arbitration waiver in their contract.⁴⁹ In contrast, states remain free to treat waivers of class action litigation in court as unconscionable and unenforceable. The disparate treatment of class arbitration and class action waivers is telling.

Each of these examples demonstrates how readily autonomy lends itself to exceptionalism from generally prevailing legal and social norms. The question necessarily arises how best to meet the challenges to which assertions of autonomy subject themselves. Two means come especially to mind.

The first is fairly obvious. It consists of deploying the very autonomy that is at issue to address directly, through self-policing, the specific critiques of which the regime finds itself the target, and to anticipate the critiques that lie ahead. There is ample evidence to suggest that international arbitration is heading down this path,

Vivek Kapoor, 'Slovak Republic v Achmea: When Politics Came Out to Play' (*Kluwer Arbitration Blog*, 1 July 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/07/01/slovak-republic-v-achmea-politics-came-play/>>.

47 George A Bermann, 'European Union Law as a Jurisdictional and Substantive Challenge to Investor-State Arbitration' (2017) 5 *Eur Int'l Arb Rev* 51.

48 *Parsons and Whittemore Overseas Co, Inc v Societe Generale de l'industrie du papier (Rakta)* (1974) 508 F 2d 969; *Fertilizer Corp of India (India) v IDI Management Inc (US)* (1981) 517 F Supp 948 (SD Ohio).

49 *AT&T Mobility v Concepcion* (2011) 563 US 333. See generally Blankley and Weston (n 4) 181. See also Rogers (n 40).

though some challenges are more amenable to this strategy than others. For example, international law firms and arbitral institutions have made the so-called 'diversity pledges' that are already demonstrably affecting arbitration demographics.⁵⁰ Similarly, arbitral institutions have recently limited the arbitrator's discretion and moved to more objective—transparent—standards as to what information should be disclosed or disqualified.⁵¹ Other challenges are less amenable to this strategy. The effort that is underway in the United Nations Commission on International Trade Law to reform investor–state investment dispute settlement, with a view to protecting states' right to regulate and enhancing the regime's legitimacy more generally, is necessarily slow-going.⁵²

A second, less defensive, strategy consists of harnessing international arbitration's resources to advance what may be widely viewed as progressive norms and values. An admittedly rare, but nevertheless striking, example is the so-called Bangladesh Accord, entered into in the wake of the 2013 Bangladeshi garment factory collapse that claimed the lives of over 1100 garment workers. Under the accord entered into with the relevant labour unions, over 200 international clothing brands have committed to inspecting and remediating working conditions in the Bangladeshi factories from which they source and assumed corporate social responsibility for failures in this regard.⁵³ Last year, the Permanent Court of Arbitration in The Hague announced the settlement of two cases against multinational fashion brands under the Accord in the amount of over US\$2.3 million.⁵⁴ This example shows how international arbitration can deploy its autonomy to counter the critiques that may be levelled at it.

4. CONCLUSION

Autonomy has become a veritable leitmotif of international arbitration. The regime has, in diverse and far-reaching ways, claimed for itself a remarkable degree of self-determination, in the sense of freedom from certain norms and disciplines otherwise prevailing in law and society. For reasons that remain to be explored, it has enjoyed substantial success in maintaining that freedom, enabling it not only to survive but also to develop very largely as it sees fit, often in exceptionalist mode.

But the regime is also experiencing strains and stresses that implicate its long-term legitimacy. To meet the associated challenges, the solution does not reside in abandoning self-determination, but rather in deploying it, both self-protectively and affirmatively, to safeguard a legitimacy that it may have for too long taken for granted.

50 For example, see the Equal Representation in Arbitration Pledge <<http://www.arbitrationpledge.com/about-the-pledge>> accessed 15 July 2019.

51 Rogers (n 40).

52 See UNCITRAL Report of Working Group III, Thirty-Seventh Session and Thirty-Sixth Session (n 43).

53 Accord on Fire and Building Safety in Bangladesh signed on 15 May 2013 <<https://bangladeshaccord.org/>>. See Jaakko Salminen, 'The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?' (2018) 66 *Am J Comp L* 411.

54 See PCA's Press Release dated 17 July 2018 <<https://pca-cpa.org/wp-content/uploads/sites/6/2018/07/20180717-Press-Release-No.-2-ENG.pdf>>. The unions were represented on a pro bono basis by the law firm of Covington & Burling.