

**Faculty of Law**

Master's thesis

**POSSIBILITY OF AN AUTONOMOUS  
INTERNATIONAL COMMERCIAL  
ARBITRATION**

Degree:	Master of International and Comparative Law
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*For my mother, Hatice, who once told me that knowledge is power.  
And for my brother, Engin, who was always here to support me.*

## University of Lapland, Faculty of Law

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### Summary:

International commercial arbitration (ICA) is an alternative dispute resolution used by businesses dealing with cross-border exchanges. The State has no interests in regulating this field of law. Indeed, ICA is an adjudication system for cross-border exchanges and does not benefit directly one State in particular. The level of the State is not suitable either. Slow, costly, adversarial, non-expert, and unpredictable, State courts are not made for cross-border businesses. This lack of suitability from both sides brings the idea of a possible autonomous ICA system in which arbitration would proceed alongside State courts without any relation between these two. So, is it possible to have an ICA freed from the State?

In order to answer this research question, this thesis analyzed the theoretical foundations of ICA in order to situate autonomous theory and its features. Once its theoretical definition has been given, two practical problems to the realization of the idea were analyzed: public policy and enforcement issues. Solutions exist with the transnational public policy of Pierre Lalive and the idea of a self-enforced system. However, these solutions are solving problems but they rely on the State in a residual way. This does not constitute a huge obstacle because the practice illustrates how small role the State could have and how much autonomous ICA would benefit from this role. Indeed, this small role of the State would render the system legitimate and strong. Finally, the question is not about the presence or the absence of the State but rather the level and quality of its presence. State positivism must acknowledge a paradigm shift towards legal pluralism and autonomy of ICA. However, the current situation compels the prospective autonomous theory to rely on the State as a last resort.

Keywords: International commercial arbitration, Autonomous theory, Arbitral legal order, Enforcement, Public Policy

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## Abbreviations

ADR	Alternative Dispute Resolution
Geneva Convention	1927 Convention on the Execution of Foreign Arbitral Awards
Geneva Protocol	1923 Geneva Protocol on Arbitration Clauses
IBA	International Bar Association
ICA	International Commercial Arbitration
IL	International Law
IR	International Relations
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

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# 1 Introduction

## 1.1 Topical issue

*DO YOU dream? When do you dream? What do you dream about? Do you dream about international arbitration? Is there a dream for international arbitration? Is the concept of delocalised arbitration, or arbitration not controlled by national law, a dream or nightmare? Is autonomous arbitration a reality, or is 'every arbitration necessarily ... a national arbitration, that is to say, subject to a specific system of national law'?<sup>1</sup>*

This is how an article in favour of autonomous arbitration looks like. It seems a bit too lyrical for a tough topic like international commercial arbitration (hereinafter 'ICA'). However, scholars of ICA dream of an autonomous arbitration and some express it in the same terms in order to combat this dream. The dream is clear: the creation of an autonomous international commercial arbitration system which would not have to rely on the State to work properly. Hence, this dreamed system would keep its own virtue in terms of time, cost, speed, efficiency, and neutrality and would be able to be self-enforced and would not need any State support. It is the dream of private ordering, the adjudication counterpart of *lex mercatoria*.

This dream is also the one which appeared with neoliberalism and its extreme version of "laissez-faire": deregulation and privatization. This idea is one which pushes the State to give away its role in economy and commerce while it focuses on security and financial stability. This dream is also the counterpart of the competition state.<sup>2</sup> The concept of welfare state is ending and the notion of competition appears as fashionable. In order to achieve this transformation, the State must let private companies to do their best self-regulation.

This dream appears also as a product of globalization. Companies are globalizing so quickly and widely that States are not appearing as the correct scale to deal with. It seems like the State is overwhelmed by the complexity of ICA matters. The scale of the State does not correspond to the reality of the multinational corporations which are making commerce in one state and arbitrating their disputes in another one. As a former French Prime Minister said, "*L'État ne peut pas tout*"<sup>3</sup> and that's why this dream occurs.

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<sup>1</sup> Julian D.M. Lew (2006).

<sup>2</sup> Cutler, A.C. (2003)

<sup>3</sup> BUSINESS INSIDER. "The State cannot do everything" (author's translation). This sentence created a small-scale scandal in France. Indeed, France is a powerful and centralized country where it was thought that the State had no limits.

## 1.1 Definition of the terms

The concept of international commercial arbitration will be defined in this section in order to understand what is going to be dealt through the whole thesis. How could ICA be distinguished from national arbitration law and from other types of dispute resolution?

### 1.1.1 International

The international feature of arbitration refers to its difference from national or domestic arbitration, it “transcends national boundaries”.<sup>4</sup> This feature is controversial and here is a summary of the debate. Scholars thought that all arbitrations were domestic arbitrations because it happens in a specific country and it must follow substantive law of the seat of arbitration. However, the opponents to this traditional view supported the idea of a different arbitration which was less connected to the *lex fori* and having different features from national arbitration. Redfern and Hunter consider in their book that ICA is not related as much to its seat. Indeed, the place (‘seat’ meaning a real connection to the country) of arbitration is chosen mainly because of its neutrality. This choice is made in order for the place of arbitration not to take so much importance in arbitration proceedings and not to become a ‘seat’<sup>5</sup>. This debate concerning the existence of international arbitration has been solved by the adoption of the term of ‘international commercial arbitration’ by international instruments. International instruments are not the sole to use it. Indeed, a lot of countries have special laws for international commercial arbitration. However, there still remain scholars who would think that international arbitration refers only to state-to-state or investment arbitrations.<sup>6</sup>

Once used by international instruments, this designation came with criteria establishing the internationality of the arbitration. To this regard, article 1(3) of Model Law can be reviewed<sup>7</sup>. In this article, there are three criteria for discovering an international arbitration: internationality

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<sup>4</sup> Blackaby, N., Partasides, C., Redfern, A., & Hunter, M. (2015). p. 8

<sup>5</sup> *Ibidem*.

<sup>6</sup> Rubino-Sammartano, M. (2001). p. 46

<sup>7</sup> “(3) *An arbitration is international if:*

*(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*

*(b) one of the following places is situated outside the State in which the parties have their places of business:*

1. *(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;*

2. *(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*

*(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”*

arising out from the parties, from the dispute or from the choice of the parties.<sup>8</sup> These elements are encompassing a lot of cases in order to consider proceedings which goes beyond the control of a sole country. The perfect example is a dispute between two parties from the same country performing a contract in another country. If the nationality of the disputants was the sole criterion, this would be missed even though this case is truly international.

### 1.1.2 Commercial

The term *commercial* is an important part of the definition because of the lack of national consensus on arbitrable matters. Indeed, a lot of subject matters can be arbitrated in the world but it differs from state to state. Some States are quite conservative and would allow solely commercial matters to be arbitrable. For example, Article 1 of the 1923 Geneva Protocol states the scope of the Protocol being commercial matters but also arbitrable matters in the concerned State. At the same time, it recognizes a possible reservation made by States to limit the application of this Protocol to only commercial matters. Commercial matters are the ones which are naturally included in international instruments while the other ones can be limited by State Parties by making a reservation that will limit the application of the concerned Convention. Article 1(3) of the New York Convention allows also for such a reservation. However, this procedure does not refer to any kind of definition of commercial matters that could be arbitrated. This lack of definition in the term ‘commercial’ is showed in the Model Law established by UNIDROIT. There, it is obvious that the “Model Law does not provide a strict definition of the term ‘commercial’<sup>9</sup>”. Though, a non-exhaustive list of commercial matters is included but it does not in any way give a closed concept of the term ‘commercial’. For this reason, international instruments are not useful in order to know whether it will be international commercial arbitration or not: national laws are the ones that are responsible to determine what embodies commercial matters that can be brought to arbitration.

### 1.1.3 Arbitration

Concerning the definition of arbitration, it is presented as a simple concept by Redfern and Hunter: “parties who are in dispute agree to submit their disagreement to a person whose expertise or judgment they trust”.<sup>10</sup> This type of adjudication started very freely and has gotten some characteristic features as the final and binding award, the need of an agreement to

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<sup>8</sup> Blackaby, N., Partasides, C., Redfern, A., & Hunter, M. (2015). p. 12.

<sup>9</sup> United Nations. (2012).

<sup>10</sup> Blackaby, N., Partasides, C., Redfern, A., & Hunter, M. (2015). p. 1



arbitrate, some optional arbitration rules that can be used, and the creation of institutions of arbitration which help parties in their arbitration process. Obligatory international instruments do not state the rules concerning the arbitration itself, it just organizes recognition and enforcement procedure. The rest is dependent to parties because of party autonomy and some elements includes a special role of the State.

## 1.2 Short history of arbitration

Since the 20<sup>th</sup> century, globalization and technologic improvements had an effect of increasing substantially international commerce. With international arbitration, the need of a suitable arbitration process which would be truly international appeared. Indeed, the recognition on a global scale was also important and pushed the idea of an autonomous arbitration system. At that time, international arbitration was still very national and binding arbitration agreements for the future were not available.<sup>11</sup>

As a response to these problems, the international community, in the League of Nations, established the 1923 Geneva Protocol on Arbitration Clauses. It held the possibility of having an arbitration agreement for existing and future disputes. It also brought the possibility to have an arbitration in a country where “none of the party is subject”.<sup>12</sup> Moreover, its second point dealt with the procedure that must be decided by the will of the parties and by the law of the seat of arbitration. However, this Geneva Protocol was not considered as sufficient and the Geneva Convention was adopted later in 1927.

This 1927 Geneva Convention for the execution of foreign arbitral awards laid down the principle of enforcement of foreign arbitral awards and brought a clear framework of conditions of recognition and enforcement of foreign arbitral awards by drafting cumulative conditions in order to obtain execution. Though, its problem was the extensive power given to State courts for not recognizing arbitral awards. These problems were acknowledged and new negotiations already started before the Second World War. The other problem was the sole recognition of awards that complied with the law of the seat of arbitration. The idea of an international award which would not be linked to any national law was launched during the negotiations in 1953 for the future New York Convention.<sup>13</sup> However, this idea of linking the international award

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<sup>11</sup> UNCTAD (2003).

<sup>12</sup> Geneva Protocol on Arbitration Clauses (1923).

<sup>13</sup> Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953, reprinted in: The ICC International Court of Arbitration Bulletin Vol. 9/No.1 – May 1998 (U.N. DOC E/ C.2/373).

only to the International Chamber of Commerce (hereinafter ‘ICC) and not to any national court was demanding and maybe too much of a development for international community at that time. This proposition will be the topic of the thesis in the following section and it will be studied whether this kind of proposition is theoretically and practically possible.

Finally, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter ‘New York Convention’ and ‘NY Convention) was adopted in 1958. The concept of double exequatur was eliminated and replaced by the concept of *prima facie* enforcement. Before, there was a need of a recognition of enforceability by national courts from the seat of arbitration in order to get enforcement by the third country. This change is quite interesting regarding the autonomous principle because it decreases the grip of the State of the place of arbitration in the arbitration proceedings and gives more autonomy.

In 1961, the European Convention on International Commercial Arbitration was adopted and it was the first time the term of “international commercial arbitration” was used in an international instrument. Otherwise, it “failed to meet its objectives”.<sup>14</sup> Afterward, arbitration rules were adopted in different areas around the world as the Uniform Law of the European Council (1966) and also UNCITRAL Rules (1985) with the latter suiting more to arbitration between civil and common law countries. The latter was so unanimously recognized that it was used for arbitration between the U.S. and the USSR. UNIDROIT adopted its Model Law which helps developing countries to equip themselves with a suitable legislation for international commercial arbitration in 1985.

### 1.3 Problem

The main question of the thesis will be:

**Is it possible to think and implement an autonomous  
international commercial arbitration?**

This question is very general and the thesis cannot answer to this question with all its practical consequences. For that reasons, the theoretical part will be quite important during the whole thesis but concerning the practicalities, there is going to be a special focus. Indeed, the thesis will only look at two main elements of arbitration proceedings which are public policy and enforcement issues. These are the most problematic areas where the State is supposedly needed.

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<sup>14</sup> Redfern, A., & Hunter, M. (2009). p. 70

## 1.4 Roadmap

In order to answer the question of the previous section, this thesis will be divided in four chapters. The first chapter is dedicated to an historical analysis of commercial law and arbitration from ancient times to nowadays. This historical study will allow to see how the relationship between adjudication and the State had worked in the past and the neutrality promised in the previous section will be tried in that chapter because of the highly political assessment of history in commercial law.

The second chapter is theoretical. The different theories explaining the nature of arbitration will be studied and among them, the most important for this thesis: the autonomous theory of arbitration. The latter is going to be studied in detail in order to see the possible advantages and criticisms of this theory to have a theoretical background for the next chapters.

The third chapter will mainly focus on two detailed theoretical problems in the theory: public policy and enforcement. These two elements of ICA will be studied *de lege lata* and *de lege feranda* in the perspective of an autonomous arbitration. This chapter will bring empirical research to demonstrate that these problems are not practical problems.

Last but not least, the fourth chapter will be mainly general and will discuss the autonomous theory as an utopia. The autonomous theory will also be assessed through its possibility and its desirability nowadays.

## 2 Historical insight

Understanding law implies to understand its history. The history is an undeniable tool to demonstrate the importance of the debate of an autonomous ICA. The history, even controversial at some points, shows the interest of talking and debating about the possibility of an ICA freed from the State interference.

When starting the history of commercial law, it must be known that its “earlier content [...] remains shrouded in mystery”.<sup>15</sup> More than mystery, history of commercial law is also obstructed by ideological disputes in the scholarship. The summary of history that will be made is going to be objective and try not to fall in the trap of the controversy between proponents of *lex mercatoria* and its opponents which accuse the latter side of having idealized the obfuscated history.

The only point on which historians of law do not differ is the general first proof of existence of commercial law: Code of Hammurabi. Concerning the Antiquity and the Medieval Period, the battle is still going on behalf of *lex mercatoria* while the Modern Period remains less disputed. These three periods are going to be assessed in order to demonstrate the place given to arbitration.

### 2.1 Antiquity

Commercial law was not something well developed at the time of Antiquity. At the same time, it cannot be said that commerce existed in a very developed way. Indeed, “95 per cent of the necessities of a household were satisfied by the labour of its members and dependents only 5 per cent by purchases in the market.”<sup>16</sup> These figures show how commerce was a minor element in Ancient Greek society. So, commerce was not something as important as it is nowadays.<sup>17</sup> For this summary of commercial litigation in Ancient Greece, most of what will be say can be found in Francois Morel’s book.<sup>18</sup> The choice of this book as a basis of the history of commercial law in antiquity is due to its lack of bias in the debate over *lex mercatoria*.

Concerning Greeks, he speculates on the presence of special commercial courts by giving evidence taken from that time’s writings. He distinguishes ‘*nautodices*’ which were judges

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<sup>15</sup> Goode, R. M., Kronke, H., & McKendrick, E. (2015). p. 11

<sup>16</sup> Hourwich, I. (1915).

<sup>17</sup> According to the statistics of the WTO, the amount of “merchandise exports of WTO members totaled US\$ 16.2 trillion in 2015”. World Trade Organization (2016).

<sup>18</sup> Morel, F. (1897).

chosen among merchants and which were authorized to investigate the case themselves. The latter is generally forbidden in Athenian Courts. Moreover, these Courts handled by ‘*nautodices*’ do not allow any appeal, so their decision is irrevocable.<sup>19</sup> The author recognizes some arbitrators as well in the name of ‘*epagogue*’ which were required to settle disputes during the journey on a ship, its decision being final. These ‘*epagogue*’ had to judge *ex aequo et bono*.<sup>20</sup>

Concerning Romans, the author is clear about the absence of such a division between commercial and civil matters. His argument is about closeness of the society and the uselessness of such a division when civil law can cover all commercial matters at stake. Romans would have been surprised to challenge their unity of law. Reforms in Roman Empire were not even clear, he insists, as the effort of jurists to change the interpretation of a text shows it. There was no division of commercial and civil matters but rather a “commercialisation progressive du droit civil”.<sup>21</sup> *Jus gentium* was enough, no commercial law nor commercial courts were needed.

## 2.2 Medieval period

In High Middle Ages, trade was growing and expanding through Europe. Fairs became quickly important in Medieval Europe as trade grew. The ones in Champagne and Flanders were so important that they could last more than a month. Medieval period has been characterized by a severe lack of governmental sovereignty. Feudalism was reigning in everyday life and State power was only another layer of power between the Church, the Municipality and sometimes Guilds. Due to that lack of a centralized powerful authority, commercial law managed to evolve in an original way throughout Europe. Two visions of the Medieval Period will be studied, the realist one and the romantic one.<sup>22</sup>

The romantic view of Medieval period points out the uniformity of the customs and rules created in Medieval Europe. Lord Mansfield is considered as one of the main scholars having this view. He believed in the private order created at that time without the need of a legislator. Harold Berman supports him by featuring commercial law at that time through these characteristics: objectivity, universality, reciprocity of rights, participatory adjudication,

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<sup>19</sup> *Ibidem*. p. 8

<sup>20</sup> *Ibid*. p. 10

<sup>21</sup> *Ibid*. p. 16. “*progressive commercialisation of civil law*” (author’s translation)

<sup>22</sup> Elcin, M. (2012). p. 11

integration, and growth.<sup>23</sup> The proponents of the romantic view oppose the fragmentation of civil law between the Church, the Municipality, and the King to the unification of law merchant in Europe. The argument in favour of a European unification of law merchant is the existence and functioning of fairs. These types of events happened in all Western Europe and gathered merchants from all Europe.

For example, the bills of exchanges were created so that merchants coming from far do not have to carry money with them. The perfect example of autonomy of law merchant can be seen through the institution of '*mercanzia*'. François Morel insists in this unofficial existence of '*mercanzia*' which is a dispute settlement institution created by the agglomeration of all guilds. These guilds were powerful elements of Medieval Europe and their gathering allowed the creation of a powerful private tribunal. This private justice acquired a general jurisdiction over commercial matters. Thus, this tribunal accepted affiliates and non-affiliates. The judgment was made with a closer look to facts than law. As it was specially shaped for merchants, the justice was quick and nobody risked anything by being judged by them because it was not a waiver of their right to go before ordinary judges. With the available choice, '*mercanzia*' attracted many cases. However, its right to judge was dependent on the express consent and its rights to enforcement were rather limited. This problem ended when Florentine Law recognized '*mercanzia*' as an official tribunal. This recognition meant an efficient process of litigation and the possibility to enforce its decisions. This institution was "privée, contractuelle et corporative"<sup>24</sup> and it became public, binding and official.<sup>25</sup>

This type of evolution of commercial law is exactly what can justify the existence of a *lex mercatoria*. François Morel states that this process happened around all Italy.<sup>26</sup> This type of process shows the importance of private ordering in a society where the State is missing. This lack of State power gave the opportunity for private guilds to take political power by creating judicial institutions that became public because of their efficiency. The capture by the State is a result of the empowerment of the State. Moreover, these private ordered arbitration systems justify the existence of a merchant law created by their own without the need of a State. However, it must not be forgotten that, in that case, the municipal power gave the recognition and it really put forth the popularity of the institution by bringing enforcement powers.

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<sup>23</sup> Goode, R. M., Kronke, H.C., & McKendrick, E. (2015) p.14-15 quoting Berman, H. J. (2003).

<sup>24</sup> Morel, F. (1897). p. 52. "*private, contractual and guild-based*" (author's translation)

<sup>25</sup> *Ibidem*. p. 80

<sup>26</sup> *Ibid*. p. 53

Ironically, apologists of *lex mercatoria* stay at this point of the analysis and does not evoke other places of Europe where the situation was not quite the same. Indeed, as said above, the historical insight must be objective and other sides of Medieval Europe seems to disprove the idea of a European global merchant law.

Realists of Medieval Period are not refusing to see the real development of some private ordered institutions. On the contrary, their role is to bring uncertainty in the history of commercial law without breaking all the foundations. Certainly, critics of the romantic view can be fierce as Emily Kadens' article shows it and her use of this expression: "tale of the law merchant".<sup>27</sup> However, the content of her criticism is not completely non-constructive. She is telling that this story is "flawed in various respects"<sup>28</sup> but does recognize the importance that customs had. However, she is not giving the same importance to the customs as the romantics gave, there is no law merchant unified in Europe for her and for realists in general. She is willing to rehabilitate the role of the State that romantics and transnationalists have broken by considering that the regulation of the State was "forced and unwanted".<sup>29</sup> Kadens proves that custom was a problem for merchants because of its uncertainty and "*its ability to evolve*".<sup>30</sup> She demonstrates that merchants wanted certainty to trade properly. The autonomy of commercial law and institutions in Northern Italy is not denied as the balanced presentation of history is given in Goode, Kronke and McKendrick's book.<sup>31</sup>

Concerning the existence of *lex mercatoria* as a set of substantive rules, realists do not agree. In Medieval period, substantive rules are considered as "*immutable, invariable and unattainable on earth*"<sup>32</sup> and so nobody would be able to change them for merchants. For this reason, they tend to accept only a special set of procedural rules made for merchants.

Moreover, realists refuse to recognize the existence of a unified set of customs throughout Europe. Kadens<sup>33</sup> proves, through historical facts, that even merchants were requiring a regulation from the Municipality or from the King. She refuses to fall on the simple dichotomy "*between good custom and bad regulation*"<sup>34</sup> and recognizes that some State regulations were also made to improve merchants' life along with the self-interest of the State.

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<sup>27</sup> Kadens, E. (2008).

<sup>28</sup> *Ibidem*.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid*.

<sup>31</sup> Goode, R. M., Kronke, H., & McKendrick, E. (2015). Section 1.19

<sup>32</sup> Elçin, M. (2012). p.12

<sup>33</sup> Kadens, E. (2008).

<sup>34</sup> *Ibid*.

Realists emphasize the relativity of what happened in Northern Italy. This kind of empowerment of merchants was not the norm and Francois Morel shows it with the example of Germany. In Germany, the development has been completely different. He opposes the Italian view where the advantages were taken while in Germany, merchants got their advantages granted by the Emperor. Firstly, merchants were introduced in urban courts, they passed from advisor to real judges in commercial cases by changing the procedure for themselves – making it quicker and more efficient. Though when urban courts got attached to the new discovery of roman law by making the procedure more complex, the commercial side of urban courts split and it became another institution with the jurisdiction over commercial matters.<sup>35</sup>

Even though the existence of *lex mercatoria* in Medieval period has been a point in the debate between realists and romantics, it is sure that they mostly agree on one point: commercial law and institutions improved and expanded themselves during Medieval Period. However, from the point of view of an autonomous theory, Medieval Period did not have a fully harmonized European *lex mercatoria* but it existed some autonomous initiatives made by Guilds to regulate disputes among merchants. However, the historical context was completely different because the State was not dominant and no State positivism was present to stop these initiatives. On the contrary, this autonomous creation was needed because no dominant social institutions were present.

### 2.3 Modern history

Modern history is less controversial for history of law. Modern history is famous for the rising of the State power and capture of private endeavours by the State. Mercanzia are an example of this capture because the City of Florence made it official and public while it started as a private enterprise. However, this capture did not equate to compliance by everyone. It cannot be compared to nowadays where legislation is assimilated to major compliance. Acts of the State were not strictly followed.<sup>36</sup> Emily Kadens takes the example of the prohibition of compound interest in 1673 in France. Despite this enactment, “[the King] was not powerful enough to ensure it was accepted and followed, not even by royal courts.”<sup>37</sup>

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<sup>35</sup> Morel, F. (1897) p. 99

<sup>36</sup> Kadens, E. (2008).

<sup>37</sup> *Ibid.*



For Romantics, the rising of States explains the fragmentation of law merchant because every State created their own commercial law and it gave birth to differences between countries. Realists deny this fact by saying that this ideal did not exist before. Moreover, romantics which are quite keen to see this regulation as a fragmentation of *lex mercatoria* seem to forget one of the goal of these new regulations: “garantir la sécurité des échanges”.<sup>38</sup> Security is the first element that merchants actually wanted in order to trade properly.

In France, the State increases its domination on the country and one of its symptoms in commercial law is the creation of Commercial Courts in 1563. Judges were merchants and the procedure was shaped as quicker than civil courts, the objective of improving merchants’ life could clearly be seen. However, this capture of power is slow and guilds are maintained until the French Revolution. When the Revolution happened, Le Chapelier Act suppressed all guilds of merchants. The only remedy for merchants is the State now. For the substantive law, Louis XIV made decrees of codifications and Napoleon arranged it to create the Commercial Code. Then, in 1807, in France, the capture of commercial law by the State is achieved.

To conclude, Modern Period is going against what the Medieval Period built. It is the period of the rising of State power and of the capture of commercial law by the State. From that moment, Commercial Law is associated with the State and customs are forgotten because a period of legal formalism and positivism starts until the contemporary trend of fast-paced globalization comes to shatter everything again.

Concerning the impact on the autonomy of arbitration, it can be said that Modern Period is the one that inspired State dominance over arbitration proceedings. Medieval Period, on the contrary, inspired new theories on arbitration which are thinking ICA as autonomous. Generally speaking, it can be seen that history of commercial law is bringing a needed insight to the question of autonomy. Medieval period is presented as much chaotic but also open to autonomous initiatives while the Modern Period was the beginning of a general paradigm dominating current legal theory: state positivism.

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<sup>38</sup> Thaller, E.-E., & Percerou, J. (1936). p.38 “guarantee security of exchanges” (author’s translation).

### 3 Foundations of ICA and the autonomous theory

The debate on the foundations of ICA can be divided in two: the first one amounts to the classical division which is looking at the origin of the power of the arbitrators while the contemporary division is mostly about jurisdictions controlling the arbitration proceedings. Indeed, the first debate is similar to the one about party autonomy in national contract law while the second is typical of ICA. Most of the scholars are mostly dealing with much technical issues because foundations of ICA are a legal theory issue and does not attract most of the practical-minded scholars. However, these theoretical debates are full of consequences. The first debate about foundations appeared in the early 1970s while the new one appears in this millennium. Indeed, the classical division deals with the question of whether the contract or the State is at the foundations of the ICA while the modern division disputes the link of international arbitration with States.

#### 3.1 Classical division and its implications for the autonomy

Concerning the classical division, it is the first element that continues to be debated in the middle of the second half of the 21<sup>st</sup> century. The idea was to question the underlying power of the arbitral tribunal. As emphasized by Katherine Lynch, “these differences of opinion over the theoretical basis for arbitration and the nature and legitimacy of the arbitral process, are important because the way in which ICA is characterized affects the manner in which the extent and scope of applicable rules in arbitration are determined”.<sup>39</sup> This debate comprises proponents of contractual theory, jurisdictional theory, and the ones that are thinking of a hybrid theory.

##### 3.1.1 Contractual theory

Also called the theory of party autonomy, this theory emphasizes the role of the parties and their agreement. It supports that arbitration is based only on parties’ agreement rather than the will of the State. As the wish of the parties is supposed to prevail, procedural and substantive laws are the choice of the parties and no necessary link with the seat of arbitration is expected. Fouchard, Gaillard, and Goldman’s book presents this theory as “not disputed: an arbitrator's power to resolve a dispute is founded upon the common intention of the parties to that dispute”.<sup>40</sup> However, this statement is clearly ideological because at the time of the publication of the book, the question was a matter of debate.

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<sup>39</sup> Lynch, K. (2003) p.65

<sup>40</sup> Fouchard, P., Gaillard, E., Goldman, B., Savage, J., & Fouchard, P. (1999). p.29

This theory emphasizes the only will of the parties which, in their point of view, is sufficient to constitute arbitration. The State is not considered relevant in the process. Frances Kellor talks about arbitration as being “wholly voluntary in character. [...] No law requires the parties to make such a contract, nor does it give one party power to impose it on another.”<sup>41</sup> This emphasis is going to be the basis of the autonomous theory of arbitration that will be seen in the next section.

The contractual theory of arbitration is sometimes criticized because of its over-emphasis on parties’ agreement. This focus is considered as too important and thus preventing parties to see the reality of the arbitration and its context. This is what Lynch articulates when she considers that contractual theory “ignores the context of national legal systems within which international commercial arbitration is embedded”.<sup>42</sup> Moreover, she stands for a “minimum form of control” of parties’ agreement<sup>43</sup> in order to check, at least, the jurisdiction of the arbitral tribunal and fairness of the proceedings. This criticism of the contractual theory is mostly found among the proponents of the jurisdictional theory.

### 3.1.2 Jurisdictional theory

The jurisdictional theory is the state positivist view of arbitration and it emphasizes “the complete authority and supervisory powers of the state to regulate any ICAs within its territorial jurisdiction”.<sup>44</sup> The most famous proponent of jurisdictional theory is Francis Mann. This theory can be considered as the most intuitive to lawyers which are generally educated within the domestic level and tend to link everything to the power of the State.

Mann can be quoted as follow: “Every arbitration is a national arbitration, that is to say, subject to a specific system of national law”.<sup>45</sup> Mann demonstrates, in his article, that the State has jurisdiction over all the activities happening in its territory and for that reason, the State must explain arbitration.<sup>46</sup> Thus, arbitration is happening because the State allowed it. The concerned State is indeed the seat of arbitration and no others can claim such rights according to Mann.

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<sup>41</sup> Yu, H. (2008) *quoting* Kellor, F., Sturges, W. A., & American Arbitration Association. (1941). *Arbitration in action: A code for civil, commercial and industrial arbitrations*. New York: Harper & Bros.

<sup>42</sup> Lynch, K. (2003) p.67

<sup>43</sup> *Ibidem*. p.68

<sup>44</sup> *Ibid*. p.68

<sup>45</sup> Mann, F. A. (1976).

<sup>46</sup> *Ibidem*. “Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law”

Roy Goode presents different advantages of the jurisdictional theory in his article.<sup>47</sup> He considers that there is no contract without law, that this theory respects also the autonomy of the parties. Moreover, he insists on the certainty this theory gives to the process because then, the seat of the arbitration get a comprehensive power over the proceedings and can shape it as it wants. It must be said that Goode is so against the possible contractual theory that he would like to see Article VII of the NY Convention amended.<sup>48</sup>

To finish with, it can be said that Lynch does not find this theory enough suitable to explain the nature of arbitration because she finds that it gives “insufficient weight to the importance of the parties’ agreement”.<sup>49</sup>

### 3.1.3 Hybrid theory

The hybrid version is a compromise between contractual and jurisdictional theory. This compromise can be expressed as a harmonized mixture of the two previous theories. Lynch finds this theory suitable because she says that it “presents a more realistic conception of modern ICA and underscores the necessity of ensuring effective control and governance of the system by national legal system”.<sup>50</sup> Developed by Sauser Hall, Hong-Lin Yu<sup>51</sup> uses this quote in her article:

*“a mixed juridical institution, sui generis, which has its origin in the [parties’] agreement and draws its jurisdictional effects from the civil law.”<sup>52</sup>*

This theory of compromise has been adopted by Redfern and Hunter who wrote a handbook on international arbitration<sup>53</sup> where is it clearly said that “International commercial arbitration is a hybrid”.<sup>54</sup> However, this theory has been criticized for its lack of strength because it does not really solve the problem of the nature of the arbitration. On the contrary, by acknowledging both theories, the hybrid theory of arbitration seal the problem without any further debate.

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<sup>47</sup> Goode, R. (2001).

<sup>48</sup> *Ibidem*. “A strong case can be made for amending Article VII of the Convention by restricting its scope to treaties entered into by the enforcing state - removing that part of Article VII which enables a party to invoke the more favourable provisions of the law of enforcement”

<sup>49</sup> Lynch, K. (2003) p.69

<sup>50</sup> *Ibidem* p.71

<sup>51</sup> Yu, H. (2008).

<sup>52</sup> Sauser-Hall, G. (1957). L'arbitrage en Droit International Privé, 44(I) ANN. INST. DR. INTERN. 469 (1952) & 47(II) ANN. INST. DR. INTERN. 394

<sup>53</sup> Redfern, A., & Hunter, M. (2009).

<sup>54</sup> Redfern, A., & Hunter, M. (2009). p.30

## 3.2 Modern division and its implications for the autonomy

Once the first debate has been solved, or that a compromise has been found, it is time to see whether this modern division is still ongoing. This debate is still new and has been mostly dominated by the epistemic community of arbitrators even though some new critics appear. In the context of fast-paced globalization and rather difficulty of States to follow the growth in cross-border exchanges, the debate over which states arbitration must be anchored to is a striking question. In this regard, scholars have replied in different manners but three main answers appear: some are linking arbitration proceedings to the only seat of arbitration while the others are anchoring it to the plurality of states. Finally, the last theory anchors arbitration to none of the States but consider ICA as an autonomous legal order.

### 3.2.1 Seat-based International Commercial Arbitration

The first answer concerning the special link that ICA have with states is the one that considers international arbitration having its foundation on the sole seat of the arbitration. Scholars analysed it objectively but also criticized this vision of the foundations of ICA and it would be useful to see whether this vision can endure criticisms. Finally, despite being an outdated vision, it will be seen that some scholars are still adopting it and that this representation sees new development.

#### 3.2.1.1 Differing representations

##### 3.2.1.1.1 Francis Mann's national ICA view

Francis Mann's vision of the foundations of international arbitration can be summarized with its own words as follow:

*In the legal sense no international commercial arbitration exists. Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law.<sup>55</sup>*

This famously quoted part of his article *Lex Facit Arbitrum* summarizes efficiently his point of view. For him, the concept of ICA does not exist because he believes in automatic attachment of cross-border arbitration to the legal order of the seat of arbitration. This point of view is emphasized in his article where he denounces the autonomist point of view of his colleagues

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<sup>55</sup> Mann, F.A. (1976)

(Berthold Goldman, C.N. Fragistas). He does not think such a dream possible and consider it even as a “*problem of the supremacy of the law in the field of arbitration*”.<sup>56</sup> This point of view is indeed influenced with state positivism.

For Mann, the State has the jurisdiction over “every activity occurring on (its) territory”<sup>57</sup> and he concludes that it is not possible for an arbitration not to be regulated by the State. He insists on the supremacy of State law over its territory. Moreover, his positivism is showed by this specific phrasing: “every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law”.<sup>58</sup> It is reminiscent of positivism and the impossibility of having a law coming from another order than municipal legal order. This positivism is statist because Mann cannot imagine a right conferred from another institution than the State.

Mann considers the place of arbitration as a seat governing all the aspects of arbitration. As analysed by Paulsson, this representation offers the advantage of bringing predictability and consistency.<sup>59</sup> This analysis is relevant because it brings one clear foundation to ICA: the seat of the arbitration. Mann’s theory is simple and does not require knowing more than the law of the seat of arbitration. If the award is set aside, the analysis of the case would be finished because as the seat is the foundation, setting aside the award would be the end of the case and it would mean that there is no award anymore. It will be shown later how inaccurate this view can be.

Jan Paulsson presents this theory carefully before criticizing it in his book named *The Idea of Arbitration*. For example, Jan Paulsson gives a clear name to this representation or movement, it is the “territorialist view”.<sup>60</sup> It is an accurate name because of the specific importance this representation gives to the territory of arbitration. It relates all arbitrations to the territory where they have their seat. Paulsson denounces the inaccuracy of the territorialist view.

Finally, this view of anchoring arbitration proceedings to the sole State which happens to be the seat of arbitration is closely connected to the jurisdictional theory. Both are State positivist views. However, the focus is on different aspects. In this modern debate, Mann is considered as the one who attaches ICA to the sole legal order of the seat of the arbitration. However, in the classical debate, it has been considered that Mann justified all arbitration proceedings by

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<sup>56</sup> *Ibidem*.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid*.

<sup>59</sup> Paulsson, J. (2013). p.34

<sup>60</sup> *Ibidem*. p.29

the State. The modern debate is mostly taking the international point of view and that is the reason why Emmanuel Gaillard will insist on the fact that Mann anchored arbitration in the only seat of arbitration.

#### 3.2.1.1.2 Emmanuel Gaillard's monolocal view

Emmanuel Gaillard, in *Legal Theory of International Arbitration*, analyses the different representations of the foundations of international arbitration in order to present his own theory. Even though he does not support the monolocal view<sup>61</sup>, he analyses its philosophical postulates and its implications.

Gaillard considers that this monolocal view is assimilating the judge to an arbitrator.<sup>62</sup> Indeed, it is the exact content of Mann's thinking.<sup>63</sup> However, this view denies arbitration as an alternative dispute resolution. It brings the arbitrator and the judge at the same level and the peculiarities of the arbitrators are then faded and there is no alternative then. What could be the incentives for businesses to participate in arbitration if arbitrators are assimilated to judges?

In the monolocal representation of international arbitration, Gaillard sees two points of view: objectivist and subjectivist<sup>64</sup>. The objectivist view corresponds to the assimilation of the arbitration to the judge and the reasoning pushes the arbitrator to apply only national laws. In the subjectivist view, parties are considered to have agreed on a seat of arbitration which means that the arbitration will be ruled by national laws. Mann considers then the choice of the place of arbitration as a choice of law for the arbitration. Gaillard recognizes the "highly speculative exercise"<sup>65</sup> that constitutes such a subjectivist view.

Gaillard continues his analysis with stating philosophical postulates of this representation. He recognizes a pursuit for order and state positivism in this monolocal view.

The quest for order refers to what Paulsson said about predictability and efficiency in the previous part, Gaillard argues the same by saying this vision implicitly considers that this solution is preferable to nothing. This pursuit "readily favor[ing] injustice over chaos"<sup>66</sup>, it is better for the proponents of order to prefer injustice caused by the monolocal view. This

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<sup>61</sup> Gaillard names Mann's point of view monolocal. Gaillard, E. (2012) p.25

<sup>62</sup> *Ibidem*. p.15

<sup>63</sup> "There is a pronounced similarity between the national judge and the arbitrator in that both of them are subject to the local sovereign." Mann, F.A. (1976)

<sup>64</sup> Gaillard, E. (2012) p.15

<sup>65</sup> *Ibidem*. p.20

<sup>66</sup> *Ibid.* p.24.

monolocal view is simple and efficient because of its assimilation of the arbitrator to the judge. With this monolocal view, international arbitration is assimilated to national arbitration and there is no complexity due to its cross-border features. So, this theory brings simplicity on a complex field of law. Indeed, as this theory does not dominate contemporary scholars, ICA is considered as a very challenging matter with intertwined legal orders that lawyers must understand. That is the reason why Gaillard says that this theory is implicitly looking for an order in this field even though it over-simplifies and brings injustice.

The other philosophical postulate that Gaillard finds is state positivism. It is clear in Mann's article that he trusts the power of the State and its exclusive dominion over all the affairs happening in its territory. This belief in the rationality of the State and its capacity to deal with everything is statism. However, this statism is supplemented by positivism because Mann cannot imagine anything justified by any other things than contemporary laws. Gaillard refers to Kelsen and Hart as theoretical basis of this jurisdictional theory. This state positivism can be summarized as follow: "every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law".<sup>67</sup>

### *3.2.1.2 Criticisms*

This view has been more and more criticized and its influence decreased since the publication of Mann's article in 1976. There are two types of criticisms against this theory: the simplification argument and the argument of inadequacy with reality.

This monolocal or territorialist thesis is not an accurate depiction of reality, it oversimplifies the complex world and ICA. Everything is changing so fast and commerce is so quick, diverse and internationalized that it is difficult to know how to categorize everything. Chaos can be sometimes the word to consider for fast-paced globalization. It is the same for arbitration, all the cases are not simple and with digitalization, it happens that there are no seats due to the proceedings happening online. Moreover, using national law is not always adequate regarding the complexity of the issues. For these reasons, the monolocal thesis is inaccurate and does not face the real world.

This thesis is based on a classical assumption of international law. It does not consider anything apart from power of the States. The best evidence of this is when Mann talks about a treaty, he

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<sup>67</sup> Mann, F.A. (1976)



sums it up by saying that the State accepted it and that is the reason why it constitutes a national element as well.<sup>68</sup> Mann misses completely the evolution of transnational law and private ordering because of his state positivist bias. It precludes him from capturing the reality and proposing a more suitable theory. That is exactly what Claire A. Cutler tells in her book.<sup>69</sup>

The second criticism is about the inadequacy with the facts. The first example is the NY Convention which eliminates the concept of double exequatur. Since the Convention, parties are not required to receive authorization to recognize and enforce the award once it has been rendered in the seat. It means that the seat of arbitration retains the right to set aside the award but if not, it does not have the power to authorize enforcement in another country. This meant that before, the jurisdiction of the place of arbitration had to give an exequatur of enforceability of the award and it meant a formal control by the judge of the award before enforceability. This element is an evidence that the place of arbitration does not retain all the power that Mann says it should. Since the NY Convention, the place of arbitration does not control all the awards made in its territory. This detachment from the place of arbitration is more important in some countries as Belgium, Sweden, and Switzerland where it is possible for parties to waive their right of judicial review of their award if none of them are nationals of the seat.<sup>70</sup> Moreover, the last element which shows the inaccuracy is a new practice used mostly by France and United States: recognition and enforcement of set aside awards.<sup>71</sup> This shows how ICA cannot be only anchored in the seat of arbitration because other countries can do whatever they want.

There is only a minority of scholars which are standing for this thesis because of its clear problems. Paulsson tells clearly that: "It simply does not fit the realities of an international society no longer constrained within national units - a world, moreover, in which national legal systems understand this new flux"<sup>72</sup>. The monolocal thesis seems extinguished. However, it seems like there are still some authors who are standing for this thesis and it constitutes a new development in this theory.

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<sup>68</sup> "The Geneva Convention of 1961 applies only by reason of the fact that the State controlling the arbitration has become a Party to it." Mann, F.A. (1976).

<sup>69</sup> "Conventional theories of international relations and international law are incapable of capturing these developments." Cutler, C. A. (2003). p.2

<sup>70</sup> In France, Article 1522 of the Code of Civil Procedure. In Belgium, Article 1717(4) of the Belgian Judicial Code. In Switzerland, Article 192(1) of the Swiss Private International Act. In Sweden, Article 51 of the Swedish Arbitration Act. See Strik, Daniella. (2012).

<sup>71</sup> Gaillard, E. (2012) p. 136

<sup>72</sup> Paulsson, J. (2010).

### 3.2.1.3 *New development*

In this part, there are two authors who are going to be evoked: Won L. Kidane and Sundaresh Menon.

Concerning Sundaresh Menon, he stands for the territorialist approach that he considers as a “safeguard (of) the international character of arbitration. It prevents vaguely defined domestic normative values of the enforcement court from intruding into the realm of international arbitration.”<sup>73</sup> Menon is standing, in this speech, against the above-mentioned enforcement of set aside awards and proposes the territorialist approach as a solution. For him, it increases “transaction costs if parties had to take into account the laws and judicial system of not just the seat, but all the places where enforcement may possibly be sought subsequently when deciding whether to include an arbitration agreement”.<sup>74</sup> His arguments are strong and his view is seductive. However, it brings the same problem of simplification because for Menon, “*when the award is set aside in the seat, the game would by and large be over.*”<sup>75</sup>

Concerning Won L. Kidane, he is also a critique of international arbitration and a proponent of the territorialist view. He is supporting David Caron who says that “international arbitration – be it investment or arbitration – is not a system, it is a framework”.<sup>76</sup> Kidane considers that supranational autonomous arbitration has been an ‘illusion’ created by European big cases.<sup>77</sup> He is supporting state decisions in big cases like *Salini* case. His perspective is mostly neo-colonial; he is for example supporting the Court of the seat in *Salini* case<sup>78</sup> which has been ignored. In this case where Gaillard participated, Kidane says that the only evidence that Gaillard uses through this case is the one that “paints the political picture of well-known and well-connected arbitrators ignoring the courts of developing countries under the pretext of denial of justice to the private party”. Kidane’s territorialist approach can be discovered when he states that Gaillard did not consider the seat because of the arbitrator’s agreement “detached from the laws that gave that agreement the force of law in the first place.”<sup>79</sup> This criticism is

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<sup>73</sup> Menon, S. (2015).

<sup>74</sup> *Ibidem.*

<sup>75</sup> *Ibid.*

<sup>76</sup> Kidane, Won L. (2017) p.87-88

<sup>77</sup> *Ibidem.* p.88

<sup>78</sup> *Salini Costruttori S.p.A. v. The Federal Democratic Republic of Ethiopia*, Addis Ababa Water & Sewerage Authority, ICC Arbitration No. 10623/AER/ACS. This case is an investment case but it does not matter for that purpose.

<sup>79</sup> Kidane, Won L. (2017) p.72

clearly territorialist and it shows that this approach is not dead. It is still favored by some scholars which are offering new perspectives on ICA and its day-to-day practice.

### 3.2.2 Westphalian International Commercial arbitration

The second representation that scholars have is the one linking ICA to a multiplicity of States and that its foundation is based in each State equally. This is a renewed territorialist approach because it does recognize the possibility of a foundation based on more than one State while still relying on State positivism. Jan Paulsson and Emmanuel Gaillard have talked about this new plurilocal thesis. Moreover, this theory is considered as the one representing the most accurately reality. However, this vision attracts still criticisms.

#### 3.2.2.1 Differing representations

##### 3.2.2.1.1 Jan Paulsson's multiple view

Paulsson talks about a 'pluralistic thesis'<sup>80</sup> and takes the example of Hilmarton case<sup>81</sup> as an evidence of the end of the monolocal representation and the existence of a pluralistic foundation. In this case, it is clearly said by French judges that:

*“an award rendered ‘en matière internationale’ is not ‘integrated into the legal order of the state where it was issued with the result that its enforcement is a matter for the plenary authority of the forum before which it happens to be brought.’”<sup>82</sup>*

In this case, the Court of Cassation in France accepted to enforce an ICA award even though set aside in Switzerland. Paulsson presents this case as an evidence of the outdated feature of the monolocal view. This case shows that ICA is not only founded upon one country. Moreover, the focus of this pluralistic thesis goes towards the country where the recognition and enforcement is sought.

This thesis is not even presented as a thesis but merely as “a simple observation of fact”<sup>83</sup> as Paulsson says. It is considered as a realistic and objective capture of the reality of ICA. It means that ICA is not belonging to its seat and that the fate of the award can change depending on the country of recognition and enforcement. Paulsson anchors the ICA to a multiplicity of States.

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<sup>80</sup> Paulsson, J. (2013) p.35

<sup>81</sup> Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV), 92-15.137. Court of Cassation of France, March 23, 1994.

<sup>82</sup> Paulsson, J. (2013) p.36

<sup>83</sup> *Ibidem.* p.37

This thesis is based on an implied criticism of the monolocal view because it does not rely on a legal fiction to state that parties have intended to use the law of the place of arbitration just because they chose it as a place of arbitration. As showed in *Hilmarton* case, French judges recognize the lack of connection between the place of arbitration and the case. This is the first criticism which can be found in this case. Other courts in the world are not so liberal as French courts but it constitutes an evolution that the place of arbitration is not seen as the only one which deals with whole arbitration proceedings.

The second criticism of the monolocal approach in the pluralistic approach is the one that refers to complexity. This pluralistic approach does not avoid difficulties of ICA and, on the contrary, tends to face these complex matters of cross-border disputes and its different interpretations in different jurisdictions. Indeed, the enforcement stage of arbitration can be made in a different state when the place of arbitration does not constitute the place where the assets of the losing party are. In that case, the State where enforcement is sought is not bound in any ways by the decision of another State – indeed, these are sovereign states. This is a realistic understanding of international law because States do not owe anything to other States.

#### 3.2.2.1.2 Emmanuel Gaillard's plurilocal view

As for the monolocal representation, Emmanuel Gaillard analysed philosophical postulates of the plurilocal/Westphalian representation. This thesis is still relying on State positivism as said above and is based on a Westphalian model.

However, before entering into philosophical postulates presented by Gaillard, it would be useful to copy the definition that Gaillard gave of this plurilocal approach:

*It considers that the source of juridicity of an award does not derive from a single legal order – that of the seat – but rather from all legal orders that are willing, under certain conditions, to recognize the effectiveness of the award.*<sup>84</sup>

Here again, it is possible to see the focus on the ending of the process. Unlike the monolocal approach focusing mainly on arbitration proceedings, this thesis focuses on the award and its fate.<sup>85</sup> In this thesis, it is possible to call an arbitration international contrary to the monolocal approach which considered ICA as inexistent. This thesis recognizes that more than one State are involved in ICA proceedings and the international aspect is then easily recognized.

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<sup>84</sup> Gaillard, E. (2012) p.24

<sup>85</sup> *Ibidem.* p.25

Concerning philosophical postulates, Gaillard starts with the postulate of State positivism. Here again, as in the monolocal approach, this approach relies on State positivism and is built on this basis. The State and its positive law shall affect ICA even though it concerns not only one country but more than one. This is, again, a clear belief in the power of State to regulate ICA. However, Gaillard recognizes that this postulate is weak. Gaillard explains that arbitration which would be sanctioned at the end by the State is problematic for the positivist view which considers that nothing happens without the State consent<sup>86</sup>.

The other philosophical postulate presented by Gaillard for this plurilocal thesis is the Westphalian model. It refers to Westphalian Treaties which shaped the concept of equal and sovereign States in Europe.<sup>87</sup> Brought in the context of ICA, it means that each State can carry out its own judicial review when required to enforce an award or before.<sup>88</sup> This is a very scattered theory which does not give a clear vision of the foundations of the ICA but rather one which allows States to do their own job without considering the others.

### *3.2.2.2 Current picture of the ICA system*

This thesis is represented by scholars as the real picture of the ICA system. Unlike the territorialist approach which was an inaccurate depiction of reality, this one is illustrated as realistic. Paulsson says that “this is not a theory, but a simple observation of fact”.<sup>89</sup> Theory and practice is going to be used to illustrate this assumption.

Firstly, the NY Convention of 1958 demonstrates the accuracy of the theory. The only Convention that exists in ICA is about recognition and enforcement and it shows how important this topic is perceived. As said above as a criticism, the NY Convention does not allow double exequatur but permits an autonomous review of national courts. Moreover, the NY Convention does not anchor arbitration proceedings to the seat of arbitration. On the contrary, the fact that the only international binding instrument that exist in ICA deals with recognition and enforcement shows how accurate are the proponents of the plurilocal thesis.

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<sup>86</sup> *Ibid.* p.27

<sup>87</sup> Peace of Westphalia (1648)

<sup>88</sup> Gaillard, E. (2012) p.28

<sup>89</sup> Paulsson, J. (2013) p.37

Secondly, the interpretation of the NY Convention is more and more resembling to the possible consequences of the plurilocal thesis. Here again, Article V will be evoked and especially Article V(1) which states the following:

*“Recognition and enforcement of the award **may** be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that<sup>90</sup>*

This article could be understood as an mandatory list of elements which are prohibiting recognition and enforcement in the country where it is sought. It was the classical understanding of this article, but in France and United States.<sup>91</sup> Some judges started to interpret it as a possibility of a refusal and not a mandatory refusal and they started to accept recognition and enforcement even though the arbitral award was set aside in the seat of the arbitration. It probably started with *SEEE v. Yugoslavia*<sup>92</sup> as Gaillard wrote.<sup>93</sup> In this case, an award was recognized and enforced even though “the award had been considered non-existent in the State in which it had been rendered”.<sup>94</sup> This case was an international investment arbitration case but in this matter, it does not make a big difference between these two. One of the most famous case about enforcement of set aside awards is *Putrabali* case.<sup>95</sup> This recognition and enforcement of set aside awards is mostly done by France which has a very liberal stance in ICA.<sup>96</sup>

However, this trend of national courts shows how much the theory is applied. To paraphrase Paulsson, it becomes true that this pluralistic theory is not a theory or a thesis anymore but mostly a capture of facts. However, it does not allow the pluralistic thesis of being free from criticisms, on the contrary.

### 3.2.2.3 Criticisms

Critics of the pluralistic thesis are also quite heavy and that is understandable because they amount to criticizing the current functioning of the ICA system. It is possible to refer to different

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<sup>90</sup> Article V(1) of the New York Convention (1958) (emphasis added).

<sup>91</sup> The question of the fate of an award set aside at the seat in other legal systems has given rise to a substantial case law in two countries: France and the USA.” Gaillard, E. (2012) p. 136

<sup>92</sup> *Société Européenne d’Études et d’Entreprises (SEEE) v. Socialist Federal Republic of Yugoslavia*. Supreme Court of the Netherlands, October 26, 1973. Reported in *Nederlandse Jurisprudentie*, 1974, no. 361.

<sup>93</sup> Gaillard, E. (2012) p.137

<sup>94</sup> *Ibidem*. p. 137

<sup>95</sup> *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices*, 05-18.053. Court of Cassation of France, June 29, 2007.

<sup>96</sup> Cuniberti, G. (2007).

criticisms: legal nature of non-enforced awards, lack of a global theory which would comprise all aspects of arbitration, and complexity of handling the consequences of this theory.

Firstly, Gaillard criticizes this theory based on the number of awards not enforced by Courts. Indeed, the plurilocal view is State positivist and it would mean that these above-mentioned awards would lack legal nature even though they do not. A PWC study has concluded that some interviewers identified 90% of cases where there was voluntary compliance in their experience of ICA.<sup>97</sup> So, these awards are not theoretically based because they do not benefit of the sanction of the State where recognition and enforcement is sought. For this reason, this theory is flawed.

Secondly, the criticism that can appear is the one relating to the lack of comprehensiveness of the theory. By this, it is meant that the theory is not sufficiently general and does not comprise all the steps before recognition and enforcement. For example, the arbitration agreement, the constitution of the arbitral tribunal, and the proceedings of the tribunal. All these steps are not dealt with and it seems odds to give a foundation to a system by putting it at the end of the process especially if this type of foundation is rarely used by parties.

Thirdly, Gaillard thinks about the consequences on the arbitrators that this type of theory can produce. If all States are entitled to prevail when recognition and enforcement is sought, the arbitrator should care about the public policy of each of these States. However, Gaillard says that this would be wholly impracticable because “the most restrictive rule [would then] prevail[s]”<sup>98</sup> and would lead to ‘*in defavorem arbitrandum*’. Gaillard reassures sceptics by saying that arbitrators are not acting as such and that the possible place of enforcement cannot be planned beforehand. This criticism refers also to the quest of order seen as a philosophical postulate in the previous thesis. In this theory, there is no order, it is the actual international anarchy that dominates because each State is sovereign to react in their own way. That is actually what Sundaresh Menon, chief justice of the Supreme Court of Singapore, said in his famous speech<sup>99</sup> when he affirms that “the territorial approach, if widely accepted, would tend to discourage forum shopping”. He meant that the Westphalian approach is giving room for

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<sup>97</sup> PricewaterhouseCoopers LLP., & School of International Arbitration (Queen Mary, University of London). (2008).

<sup>98</sup> Gaillard, E. (2012) p.35

<sup>99</sup> Menon, S. (2015).

parties to do forum shopping as States are free to decide whatever they wish concerning the award.

Last but not least, the criticism of State positivism can still be made. This position relies on State even though, as said above, the level of State is outdated and does not reply to the challenges posed by cross-border disputes. It is the criticism mostly made by transnationalists whose theory will be studied in the following subsection.

### 3.2.3 Autonomous International Commercial Arbitration

As divided in Gaillard's book, the third view considers ICA as autonomous and not linked to any other legal orders. This is a complete paradigm shift from the classical state positivist view. Here, the State is not considered as a relevant level and all arbitration proceedings must be considered as happening in a transnational level. This view differs regarding authors but its basis remains the same. Above and beyond all theoretical representations, it is interesting to see whether this theory have a recognition on the ground. Finally, the autonomous theory being a controversial theory, criticisms must be analyzed and their impact must be demonstrated.

#### 3.2.3.1 *Differing representations*

##### 3.2.3.1.1 Emmanuel Gaillard's arbitral legal order

Gaillard's theory bases the "source of the juridicity of international arbitration"<sup>100</sup> in an autonomous legal order. ICA is defined by itself because it constitutes its own legal order. Unlike to what Kelsen would say, there is no norm which would explain the existence of the ICA other than its own norm. Due to that lack of superior norm to explain ICA, Gaillard imagines ICA as an autonomous legal order. As stated in his article earlier<sup>101</sup>, Gaillard reiterates his division of arbitral legal order theory in two: jusnaturalist and transnationalist trends.

Hence, Gaillard proposes two ways of explaining and justifying the theory of arbitral legal order but rather focuses on the transnational trend. In it, he considers that arbitral legal order is "a system rising above each national legal system taken in isolation [that] can be brought about by

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<sup>100</sup> Gaillard, E. (2012) p.37

<sup>101</sup> Gaillard, E. (2010)



the convergence of all laws”.<sup>102</sup> This is the latter that the author follows with his explanation of “transnational rules method”.<sup>103</sup> This method helps to find transnational and autonomous principles which are going to be the basis of the arbitral legal order. To find them, Gaillard tells us “to ascertain the prevailing trend within national laws which obviously does not mean that the rule in question has received unanimous recognition”.<sup>104</sup> It is a method which recognizes rules which are the most adopted by the States and excludes the ones which are unique to some States. Gaillard says that this method “is dynamic as it takes into account the evolution of national laws”.<sup>105</sup> This method will help to secure arbitral legal order with an autonomous number of rules. For example, this rule can be considered for public policy issues. The arbitrator is not forced to consider specific parochial requirements of each State’s public policy, but he only must consider the main rules which are arising out of the international community. Professor Loquin talks about “legal Darwinism” because then, States with parochial laws are going to be ousted. Professor Loquin’s remark is clearly illustrated<sup>106</sup> in Gaillard’s method.

#### 3.2.3.1.2 Jan Paulsson’s autonomous legal order

Paulsson does not agree with Gaillard. Even though they are evoked in the same section, it cannot be said that Paulsson and Gaillard are theoretically compatible. Paulsson does not like the “Parisian theory”<sup>107</sup> of his colleague and insists on its “dreamy and self-contradictory premise of an ‘autonomous’ order recognized by the state orders from which it purports to be free”.<sup>108</sup> He does not believe in Gaillard’s theory of arbitral legal order and even affirms that “the zeal of those who make extravagant claims may do more harm than the resistance of non-believers and scoffers”. In this affirmation, Paulsson and Gaillard are clearly seen as both transnationalists but it does not give birth to similar theories.

Paulsson’s theory is much more in-depth. It is not a simple refusal of the State interference but rather an understanding of the private ordering and its importance. For Paulsson, private orderings are legal orders. He does not confront the State and private orderings but rather thinks of a ‘fluid legal order’ in which private legal orders are going to perform in the same time as national legal orders. He does not see the legal world as a confrontation but mostly a

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<sup>102</sup> Gaillard, E. (2012) p.46

<sup>103</sup> *Ibidem.* p.48

<sup>104</sup> *Ibid.* p.48

<sup>105</sup> *Ibid.* p.50

<sup>106</sup> *Ibid.* p.47 quoting Loquin, E. (2000).

<sup>107</sup> Paulsson, J. (2010)

<sup>108</sup> *Ibidem.*

coexistence. For that reason, he does not exclude the need of national courts even though its “vision of arbitration [...] functions routinely without judicial assistance”.<sup>109</sup> This vision is quite complex and philosophical because it does not bring a clear answer as Gaillard did, not a sharp separation between State and arbitration but rather a fluid coexistence.

To support this argument, Paulsson uses the contrary of State positivism and Kelsenian view, he uses Santi Romano and his vision on pluralism of legal orders. Through his theory, Paulsson tries to answer to these following questions: what is a legal order? Is it possible to constitute a legal order out of the state? For Romano, a legal order is not only the legal order of the State, it is much more than that and that is why Paulsson says that “non-state arrangements may lay serious claim to qualify as legal orders”.<sup>110</sup> To support this view, he shows that “they are impersonal; they intend to govern important aspects of social life, and to do so exclusively; and their potential to endure seems more than equal to that of a number of troubled states.”<sup>111</sup> So, by showing the possibility of private arrangements to constitute a legal order, Paulsson prepares the ground to say that “arbitration is an obvious potential vehicle for social arrangements constituting legal orders outside the conventional statist model”.<sup>112</sup> He also argues that the state is sometimes not suitable for some matters and that private orderings “may fill the vacuum when public institutions fail”. In his book, he is talking about the problems of jurisdictional institutions in several states and the denial of justice that it can bring. In that case, it is clear for Paulsson that private orderings are much more virtuous.

For Paulsson, private orderings are sometimes necessary because of the problems inherent to State courts.

*“They are members of the United Nations; they enjoy official diplomatic relations; their borders are formally acknowledged. But on the ground, on the national level of these putative entities, there is nothing that could decently be called law, and in some cases, this has been so for generations: no constitutional legislature, no law enforcement, no judiciary – nothing but a bleak mockery of each of these basic institutions of polity.”*

Regarding the problems of the State, he supports the acknowledgment of non-state legal orders in order to bring the possibility of justice. Moreover, his stance is not against State interests because he is for a fluid coexistence. This paradigm shift is essential in his point of view, “we

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<sup>109</sup> Paulsson, J. (2013) p.46

<sup>110</sup> *Ibidem.* p.50

<sup>111</sup> *Ibid.* p.50

<sup>112</sup> *Ibid.* p.47

will lose our way unless we update our mental maps”.<sup>113</sup> Paulsson’s view is quite radical and calls for an important paradigm shift when compared to other visions.

### *3.2.3.2 Level of recognition*

This theory seems completely utopian as said by some<sup>114</sup>, but it will be seen that its basics are somehow embodied in ICA system. For that purpose, the New York Convention and the UNCITRAL Model Law will be studied. After that, an overview of the reforms in national level will be made with the focus on the improvements regarding the autonomous theory of arbitration. Afterward, the liberal stance of French courts will be emphasized in another part. Even though there are some kinds of recognition, it must be acknowledged that there is no international instrument and national laws which are fully recognizing the autonomous theory of arbitration as the foundation of arbitration.

#### *3.2.3.2.1 New York Convention*

Concerning the New York Convention of 1958, it cannot be said that it approves the autonomous theory of arbitration. On the contrary, the NY Convention is based on the need of the State to recognize and enforce foreign arbitral awards as its title indicates it. However, it is possible to find two articles which are going in the right direction.

Among them, Article V and its interpretation. Article V regulates different conditions leading to a refusal of recognition and enforcement of foreign arbitral awards. Article V recognizes arbitrability, incapacity, fairness, equal opportunities to present the case, lack of jurisdiction, and set aside awards as reasons for refusal of recognition and enforcement when such arguments are brought by one party. Otherwise, the court of recognition and enforcement can, in its own initiative, bring the reasons of arbitrability and public policy to refuse recognition and enforcement to the award. At first sight, it should not be considered as one going in the right direction towards the autonomous theory because it recognizes an important role for the court of the State where recognition and enforcement is sought. However, this article has been interpreted quite in a liberal way by States and the specific drafting has been used to emphasize the autonomous character of arbitration. Indeed, some States have considered that the award which has been set aside in the seat of arbitration was not a definitive reason to refuse

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<sup>113</sup> *Ibid.* p.49

<sup>114</sup> Kidane, Won L. (2017); Michaels, R. (2013).

recognition and enforcement. This understanding was used in several cases especially in France.

*Hilmarton*<sup>115</sup> case of 1994 is striking in this matter because it is the first time when the Court of Cassation enforces an arbitral award which has been set aside in its seat. The reasoning is quite striking because Article V seemingly appeared as precluding recognition and enforcement of arbitral awards when set aside in the place of arbitration while Article VII was considered as the exception. Indeed, Article VII does not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon”. This article has been considered as the best choice principle. It means that if French law does not recognize the setting aside of the award, it would not constitute a bar to the recognition and enforcement of the award. French courts are not considered barred by any decision of setting aside from the place of the arbitration. The French Court in *Hilmarton* states that “la société OTV était fondée à se prévaloir des règles françaises relatives à la reconnaissance et à l'exécution des sentences rendues à l'étranger en matière d'arbitrage international”.<sup>116</sup> French Courts are the courts which are recognizing and enforcing the most set aside awards and the reasons will be seen later in this subsection.

#### 3.2.3.2.2 UNCITRAL Model law

Concerning UNCITRAL Model Law in ICA, it must be said that a Model Law is a soft law instrument made in order to encourage States to adopt similar regulations on a specific topic. In this case, the Model Law promotes States to take specific regulations in ICA in order to suit the specific needs of cross-border arbitration. Thus, UNCITRAL’s goal is to achieve certainty and predictability of ICA around the world. Indeed, if all the States had the same legislation over ICA, there would be no problems concerning arbitration proceedings. The Model Law is also pro-autonomous theory of arbitration because its rules are shaping a quite-autonomous arbitration model that will be seen below.

The first article which indicates an implicit recognition of the autonomous theory of arbitration is Article 5 of the Model Law. This Article 5, called *Extent of Court Intervention*<sup>117</sup>, is important

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<sup>115</sup> Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV), 92-15.137. Court of Cassation of France, March 23, 1994.

<sup>116</sup> *Ibidem*. “OTV firm was founded to invoke French rules regarding the recognition and enforcement of foreign awards made abroad in the field of international arbitration” (author’s translation).

<sup>117</sup> Article 5 of the UNCITRAL Model Law: “In matter governed by this Law, no court shall intervene except where so provided in this law”

because it brings a clear line between the possible field in which the Court can arbitrate and the rest. It limits clearly the interference of the Court and brings a possibility of the autonomy of arbitration proceedings in certain areas. As said above, it is not a full acknowledgment of the autonomous theory of arbitration but rather a starting point.

The other article which implicitly recognizes the autonomous theory of arbitration is Article 35 of the Model Law, where the arbitral award is completely delinked from the seat of arbitration. Several articles are respecting the multilocal approach but tending to the autonomous arbitration. Indeed, parties, under the UNCITRAL Model Law, have the choice of their procedural law<sup>118</sup>, place of arbitration<sup>119</sup>, substantive law<sup>120</sup>, arbitrators and its numbers<sup>121</sup>. Moreover, the arbitral tribunal retains the power to decide on its own jurisdiction<sup>122</sup> and to give interim measures<sup>123</sup>.

These powers are an acknowledgment of the multilocal approach analysed above, but as Paulsson says, the multilocal approach can be considered as the current picture. As the Model Law is moving away from the monolocal approach and acknowledging the multilocal, it means that the current picture of ICA is closer to the autonomous theory of arbitration. Indeed, there is an implicit starting-point of recognition of autonomy of ICA. Moreover, the Model Law has been implemented by an increasing number of countries as it will be seen below.

### 3.2.3.2.3 Reforms and evolution in national level

Concerning reforms and evolutions in national level recognizing the autonomous theory of arbitration, there will be two analyses. The first one is going to be a general evolution towards the autonomy where no specific country will be analysed in detail. In the second part, France and its liberal stance towards arbitration is going to be the focus.

#### 3.2.3.2.3.1 General evolution towards the autonomy

The UNCITRAL Model Law has achieved its goal by inducing States to adopt the Model Law in their legislation and achieve harmonization throughout the world. Until now, 75 States<sup>124</sup> have UNCITRAL-based legislation in ICA while other countries were only influenced by it.<sup>125</sup>

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<sup>118</sup> Article 19 of the Model Law. Determination of rules of procedure

<sup>119</sup> Article 20. Place of arbitration

<sup>120</sup> Article 28. Rules applicable to substance of dispute

<sup>121</sup> Article 10. Number of arbitrators

<sup>122</sup> Article 16. Competence of arbitral tribunal to rule on its jurisdiction

<sup>123</sup> Article 17. Power of arbitral tribunal to order interim measures

<sup>124</sup> UNCITRAL. (website)

<sup>125</sup> English Arbitration Act 1996 will be evoked later in this part.

In this part, the assessment of the general evolution towards the autonomy is going to be far from exhaustive and for that reason, the focus will be on two elements: the possibility of a waiver of right of judicial review in the seat of arbitration, and the English Arbitration Act 1996 and its importance in the general evolution.

The acknowledgment of the autonomous theory of arbitration is starting to appear slowly and implicitly through domestic laws on international commercial arbitration. The most striking element showing this recognition is the possible waiver of right to judicial review. This possibility exists in several countries as: Switzerland<sup>126</sup>, Tunisia<sup>127</sup>, Peru<sup>128</sup>, Belgium<sup>129</sup> and others. This type of waiver is generally construed as follows.

*Where none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may, by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph 2.<sup>130</sup>*

Generally, this disposition includes only arbitration cases where no nationals are involved. This type of legislation is a clear sign of the autonomous character of arbitration. In that case, all international awards, if the parties wish, can be delinked from the place of arbitration and be ‘floating’. If we consider that most of the awards are complied voluntarily<sup>131</sup>, it is a legislation allowing the autonomy of the arbitration proceedings especially if no court assistance is used during the proceedings. Thus, this type of disposition is increasing in domestic ICA laws.

The other clear evolution towards the autonomous theory of arbitration is the English Arbitration Act of 1996. The content of the Act in itself is not revolutionary but its context is. Chukwumerije sums up the context in the following sentence: “English courts were historically suspicious of the arbitral process. This resulted in extensive judicial intrusion in the process”.<sup>132</sup> So, the content is clear, the English system has never been until 1996 a pro-arbitration State and did even have some difficulties to acknowledge the severability of the arbitration clause. However, in 1996, the English Arbitration Act is passed in order to “liberalize English

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<sup>126</sup> Article 192 of Private International Law Act.

<sup>127</sup> Article 78(6) of the Tunisian Arbitration Code of 1993.

<sup>128</sup> Article 126 of Peru’s General Law on Arbitration of 1996.

<sup>129</sup> article 1717(4) Belgian Judicial Code

<sup>130</sup> Article 192 of PILA.

<sup>131</sup> 90% of ICC awards are complied voluntarily in some answers given to the PWC study. PricewaterhouseCoopers LLP., & School of International Arbitration (Queen Mary, University of London). (2008).

<sup>132</sup> Chukwumerije, O. (1999).

arbitration law by bringing it in line with modern trends in arbitration as embodied in the UNCITRAL Model Law”.<sup>133</sup> Even though the whole Model Law is not enacted, it is clear for scholars that there is a strong influence.

Section 1(c) covers the general principles of the Arbitration Act and it includes one of the matters covered by the UNCITRAL Model Law in its Article 5: limit to the interference of the court. Astonishingly, one of the general principles is the one limiting the court’s interference to the ones expressly provided in the Act.<sup>134</sup> This is a huge change from the past because English courts used to have a general jurisdiction over ICA and they used it often. This disposition is included in order to “ensure that the court’s powers were only of a nature as to, and only exercised in such a way as to, support arbitration, not interfere with it”.<sup>135</sup> This can be considered as a small step regarding the evolution seen in Switzerland but it is still important because of the strong importance of the jurisdictional theory in England.

Section 69(1) gives the possibility to exclude appeal on points of law and it is also quite an important step towards the autonomous theory of arbitration for England. Even if the appeal is not excluded by the will of parties, the appeal is quite limited. Moreover, jurisdictional challenges to the Court are limited by time limits and an exhaustive list of possible challenges.<sup>136</sup>

So, the overall goal of the English Arbitration Act is to differentiate litigation and arbitration so that the advantages of arbitration can still be sustained. Concerning recognition of the autonomous theory of arbitration, arbitration gets more freedom even though it must be stated explicitly by parties. However, this freedom must be tasty for the proponents of the autonomous theory of arbitration because the British case is coming from far.

#### 3.2.3.2.3.2 Liberal stance of French courts

In France, transnationalists seem to have won the combat as the case law of the Court of Cassation shows it. However, this shift is not supported by national legislation but rather by reaction of the Courts.

One of the first cases showing the liberal stance of French Courts is the *Hilmarton* case evoked above. In this case, a contract of advice and coordination is at stake, this contract is made in

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<sup>133</sup> *Ibidem*.

<sup>134</sup> Section 1(c) of the English Arbitration Act 1996: “in matters governed by this Part the court should not intervene except as provided by this Part.”

<sup>135</sup> Chukwumerije, O. (1999) *quoting*: Landau, T. T. (1997).

<sup>136</sup> Section 67 and 68 offers the possibility of challenges for jurisdiction and serious irregularity.

order to obtain a contract of works in Algeria. The arbitration happened in Geneva and has been set aside there. The case which will be analysed here is the enforcement request made by the private party before French Courts that went finally before the Court of Cassation. The decision of the Court considered that Article VII of the NY Convention allowed the Court of Appeal to decide that the set aside award can be recognized because of the more permissive features of French law. This case is the first which recognizes international and autonomous character of arbitration. The Court held that: “la sentence rendue en Suisse était une sentence internationale qui n’était pas intégrée dans l’ordre juridique de cet État”.<sup>137</sup> It is a clear and explicit acknowledgment of the autonomous character of arbitration. However, scholars of the territorial approach considered that decision was “out of its way”.<sup>138</sup>

This decision could have been considered a mistake or a sudden imprudence of the Court of Cassation if it would not have been validated by further cases which went in the same direction. Among them, there have been *Chromalloy*<sup>139</sup> and *Putrabali* cases<sup>140</sup>. The tone of the Court is the same and it even goes further with the *Putrabali* case where the award is considered as “rattachée à aucun ordre juridique étatique”.<sup>141</sup> The same wording is used in *Chromalloy* case and it seems like the French Courts established a stable case law concerning ICA: it is an autonomous arbitration which does not have to follow the decision of the place of arbitration. Moreover, concerning the possible critics saying that French courts consider it autonomous only when it concerns foreign arbitral tribunals, *Götaverken* case in 1980 must be noticed. In this case, the Court of Appeal of Paris “decline[d] jurisdiction to set aside an ICC award rendered in Paris on the ground that [...] neither the parties nor the contracts, had any connection with France, and they had not designated French law”.<sup>142</sup> Moreover, France recognizes the possibility for non-nationals to waive their right of judicial review in the country when choosing France as their place of arbitration.<sup>143</sup>

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<sup>137</sup> *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV)*, 92-15.137. Court of Cassation of France, March 23, 1994. “the award rendered in Switzerland is an international award which is not integrated into the legal system of that State” (Gaillard’s translation in Gaillard, E. (2012). p.61)

<sup>138</sup> Goode, R. (2001).

<sup>139</sup> *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV)*, 92-15.137. Court of Cassation of France, March 23, 1994.

<sup>140</sup> *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices*, 05-18.053. Court of Cassation of France, June 29, 2007.

<sup>141</sup> *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices*, 05-18.053. Court of Cassation of France, June 29, 2007. (*Putrabali*). “which is not anchored in any national legal order” (Gaillard’s translation in Gaillard, E. (2012). p.63)

<sup>142</sup> Goode, R. (2001).

<sup>143</sup> Article 1522 of the Code of Civil Procedure.



### 3.2.3.3 Criticisms

The autonomous theory of ICA has received the most severe criticisms from the scholarship. These criticisms were so comprehensive that it was not even considered as a serious and clear theory by some.

#### 3.2.3.3.1 Lack of rationality

The criticisms concerning the lack of rationality has been made mostly by Ralf Michaels in its article named “Dreaming law without a state: scholarship on autonomous international arbitration as utopian literature”. In this article, Ralf Michaels mainly criticizes arguments used in order to support the thesis of an autonomous arbitration. He considers that “the literature on law without a state is replete with dreams, visions and faith”<sup>144</sup> and it supposedly “masks a poverty of theoretical foundations.”<sup>145</sup>

This analysis of the literature supporting the autonomous theory of arbitration is relevant because the author is looking for arguments. He supports that at the exact moment where he is looking for explanations, he is faced by references to faith, utopia and dream. The first paragraph of the article of Julian D.M. Lew<sup>146</sup> is characteristic of this scholarship who bases all its theory on faith and dreams rather than on rational arguments. Lew’s article is not his only argument, he also takes the example of Gaillard who also relies on that faith as the following quote show: “these are mental representations, visions of international arbitration that, as such, are a matter of belief – if not of faith – and not of scientific truth”.<sup>147</sup> This lack of rationality could question the feasibility of this theory in practice. Moreover, relying on dreams or faith is not a scientific approach to the theory and it undermines all the rest of the scholarship and even the purpose of this thesis work.

For these reasons, Michaels’ analysis of the scholarship is quite striking because he is criticizing one of the fundamental element of the theory: its legitimacy. However, Michaels is not only a sectarian critic of the autonomous theory of arbitration because he agrees that state positivism has the same features. State positivism is not a rational theory over the obligatory character of national norms but rather a belief on the obligatory character and the effect that a norm passed

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<sup>144</sup> Michaels, R. (2013).

<sup>145</sup> *Ibidem*.

<sup>146</sup> Julian D.M. Lew (2006).

<sup>147</sup> Gaillard, E. (2012) p.152

through a parliament will have effects on the society. Michaels' assessment is quite realistic and that's why his criticisms turn into a useful insight. He recognizes the following.

*“When a paradigm shift is needed, it is necessary to try to think outside the current paradigm, and that means to move, deliberately or not, to that which is not (yet)”<sup>148</sup>*

However, the fact that state positivism is based on faiths and dreams does not make it a reason for the autonomous theory of arbitration to be also based on such elements. It can be argued that this paradigm shift needs also a clear and rational explanation.

The fact that the scholarship sustains all its theory on faith and dreams is considered as “both a weakness and a strength at the same time”<sup>149</sup> by the author. The weakness is the lack of rationality in the process of presentation of the autonomous theory of arbitration because it does not give any tools for anyone to consider implementing such theory. However, Michaels sees a strength in this strategy because it allows the scholarship “to occupy the space of imagination, and to claim it for their own projects.”<sup>150</sup>

#### 3.2.3.3.2 Lack of realism

ICA is considered as the most important dispute resolution mechanism of international commerce and its importance is such that Gaillard and Paulsson have thought about making this dispute resolution detached from the State. However, this statement, classical in ICA, is not depicting the reality. At least, this is what Christopher Drahozal and Thomas Dietz show. This criticism will relativize ICA and its importance and also push the argument that the autonomous theory is useless because the argument is the tiny importance of ICA in reality.

Contrary to the general assumption dominating the ICA scholarship, ICA is not the general dispute resolution mechanism. Indeed, “*data on the use of arbitration clauses in international contracts, however, provides a more nuanced picture*”<sup>151</sup>, different than what the scholarship is implicitly saying. If the figures are to be sought, it appears that 0,2% of US exporting firms were involved in ICA in 2009.<sup>152</sup> Other figures appear in the articles of Drahozal where it is specified that “only 1% or 2% of clauses giving rise to ICC arbitrations from 2000 and 2003 provided for transnational law”.<sup>153</sup> Drahozal takes the example of Eisenberg and Miller

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<sup>148</sup> Michaels, R. (2013).

<sup>149</sup> *Ibidem*.

<sup>150</sup> *Ibid*.

<sup>151</sup> Drahozal, C. R. (2016).

<sup>152</sup> Dietz, T. (2014) p. 174

<sup>153</sup> Drahozal, C. R. (2011).

findings<sup>154</sup> where there are some contracts in which arbitration clauses are not so attractive. Thus, assets sale purchase contracts are comprising only 30,4% of arbitration clauses. It is not much. However, Drahozal tends to limit the effects of this study by saying that it is a not a big scale study.<sup>155</sup> It can still be said that the gathering of different studies shows that ICA is not the fundamental element of dispute resolution mechanism of international commerce.<sup>156</sup> These figures bring an actual criticism: by overestimating the amount that ICA constitutes in international trade, these scholars have probably overestimated its problems. The non-significance of ICA would make their theories off-ground debates. However, this criticism cannot be so overreaching because of the actual and clear amounts at stake in ICA. Even though there is a small amount of parties which are choosing ICA as a dispute resolution mechanism, when they choose, they are most probably multinational corporations, the ones that ICA scholars have considered when drafting their theory.

The other criticism on the lack of realism of the autonomous theory of arbitration is the one concerning the natural behaviours of the parties. Dietz shows that typically, it is thought that the choice-of-law clauses are taken to “maximize their joint welfare”.<sup>157</sup> Dietz, on the contrary, proves that, generally, the party with the most bargaining power imposes its own State law or even State Court. “From a rational choice point of view, it is clear that parties do not choose the law that is most efficient for both parties, but the law that best suits their own interests”.<sup>158</sup> That is the exact problem that can be found in the scholarship: the belief on the rational behaviour of parties without considering differences of bargaining power which brings a different rationality to the drafting of the contract. As Michaels said, the utopia that transnationalists are trying to build is quickly broken by empirical studies of other scholars. It is one of the reason why Michaels said that utopia thinking was a weakness for the proponents of the autonomous theory of arbitration.

Dietz ends his chapters by agreeing that “arbitration works better than litigation in State courts. But, on the other hand, ICA seems far away from offering economic agents engaged in global commerce a viable universal legal infrastructure”.<sup>159</sup> Dietz’s criticism constitutes a very

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<sup>154</sup> *Ibidem.* (2016).

<sup>155</sup> *Ibid.* (2016) “First, the findings are limited to contracts with at least one securities laws—and hence with an obligation to make disclosures required by those laws. **As a result, the Eisenberg and Miller findings provide little information about the use of arbitration clauses in other parts of the world.** Second, the findings are limited to ‘material contracts’, the only contracts required to be disclosed by SEC rules.” (emphasis added)

<sup>156</sup> Dietz, T. (2014).

<sup>157</sup> *Ibidem.* p.177

<sup>158</sup> *Ibid.* p.181

<sup>159</sup> Dietz, T. (2014) p. 186-187

constructive one and he is arguing for a better business-oriented infrastructure which will take into consideration the reality of the drafting and bargaining process.

#### 3.2.3.3.3 Lack of democratic control

Here, we will talk about Claire A. Cutler and her analysis of private power in her famous book “*Private Power and Global Authority*” where she criticizes the autonomous theory of arbitration through the general label of private power. One of the grounds on which she criticizes it is the lack of democratic control when transnational law is involved.

Cutler’s analysis is global and does not concern ICA in particular but her criticism still embodies the functioning of ICA and its autonomous theory. One of the main assumptions of Cutler is that private actors retain power and they are challenging Westphalian organization of the world order, but it is not recognized in classical theories of international relations and international law.<sup>160</sup> She recognizes three trends of the actual governance: juridification, pluralism and privatization.<sup>161</sup> These trends constitute the transnationalisation of international commercial relations and there are two problems that appear with governance. Indeed, “conventional theories of international relations (hereinafter ‘IR’) and international law (hereinafter ‘IL’) are incapable of capturing these developments”<sup>162</sup> and these norms are “not subject to democratic methods of scrutiny and review.”<sup>163</sup>

It is time to consider the main criticism of Cutler regarding the ‘transnational legal order’<sup>164</sup>, as she calls it. The lack of democratic control is the main problem of new transnational norms freed from the State. She does not try to stop this evolution but acknowledge only the limits. Moreover, this lack of democratic control cannot be widespread because it is not a problem according to the mainstream ideology. Indeed, these private entities are considered as “part of the realm of ‘apolitical’ and neutral, private economic activity”.<sup>165</sup> Cutler means that IR and IL theories have operated an “art of separation”<sup>166</sup> in which private activities are not considered as political subjects. This separation is the one separating economic activities and political

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<sup>160</sup> Cutler, C. A. (2003) p.2 “These trends are in turn linked to deeper transformations in local and global political economies and are challenging conventional understandings of world order.”

<sup>161</sup> *Ibidem*.

<sup>162</sup> *Ibid*.

<sup>163</sup> *Ibid* p.5

<sup>164</sup> *Ibid* p.2

<sup>165</sup> *Ibid*.

<sup>166</sup> *Ibid*. p. 57 quoting Walzer, M. (1984).

activities – it rendered economic activities harmless, normal, neutral, consensual, and efficient.<sup>167</sup>

This art of separation is harmful for the development of transnational law because it avoids the confrontation between transnational norms and a democratic scrutiny and review. For Cutler, this problem is real and it ruins the legitimacy of the ‘transnational legal order’ because it is important for her to keep the scrutiny over the laws even though they are transnational. She thinks that “corporations and private business associations are increasingly functioning authoritatively, but this is rendered invisible by an ideology that defines the private sphere in apolitical terms”.<sup>168</sup> For this very reason, she wants to submit private laws to democratic scrutiny. However, she recognizes that the acknowledgement of political relevance of transnational law would threaten the role of the State.<sup>169</sup> If nothing is done in this regard, the problem is the legitimacy of transnational norms because of the inadequacy between theory and practice.<sup>170</sup> Bringing the Cutlerian criticism of transnational norms to the autonomous theory, it appears that Cutler would like to see an external control to arbitration system.

The real criticism of Cutler is based on four liberal myths presented in the first chapter<sup>171</sup>. She wishes IR and IL scholars to combat assumptions that private order is natural, neutral, consensual and efficient. Cutler does not oppose efficiency of private orderings but rather the natural, neutral and consensual features. These assumptions were not challenged by the scholarship and that is the reason why Cutler states that “the corporation is undertheorized, while the state is overtheorized.”<sup>172</sup>

Cutler’s criticism seems important because she does not challenge the reality of transnational law but rather its current functioning. It must be more appealing for proponents of autonomous theory of arbitration to take into consideration Cutlerian remarks because they tend not to destroy the theory but rather to improve it.

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<sup>167</sup> *Ibid.* p.54

<sup>168</sup> *Ibid.* p.242

<sup>169</sup> *Ibid.* p.256.

<sup>170</sup> *Ibid.* p.241: “A legitimacy crisis exists when there is a disjunction or asymmetry between theory and practice that becomes so great that it strains the foundations of the order.”

<sup>171</sup> *Ibid.* p.54

<sup>172</sup> *Ibid.* p. 255.

#### 3.2.3.3.4 Lack of seriousness

In this last type of criticism, it is possible to point out challenges which are undermining the complete endeavour of the scholarship by saying that the autonomous theory of arbitration is no more than a pure marketing for the authors who are generally arbitrators. This criticism is quite heavy and questions the real intention of the authors. These kind of criticisms and insights have been mostly elucidated by Christopher Drahozal, Ralf Michaels, and Catherine Rogers. Rogers considers that the scholarship is composed essentially of the “work of the top international arbitration specialists, who use these publications as a form of elite advertising, but incidental beneficiaries are other users of the system. These products render the mysterious inner workings of the arbitration system more transparent”.<sup>173</sup> Even though she does not clearly attack autonomous theory of arbitration, she clearly states the value of the scholarship of ICA: advertising arbitrators.

Drahozal brings a clear insight to this process. Referring to Dezalay and Garth’s work<sup>174</sup>, he considers that “scholarly publications on the new law merchant constitute signaling behavior by prospective international arbitrators”.<sup>175</sup> Considering the importance of confidentiality in ICA, he understands the need for advertising to the possible future parties and the only way is to do it through publications. Referring to his own statistics<sup>176</sup>, he tries also to understand the reason why the majority of writings which are defined as advertisements are standing for a transnational and autonomous theory of arbitration. The main reason put forth by Drahozal is to show “legal internationalism”<sup>177</sup> and flexibility towards other systems of law. Indeed, “even if parties do not want to have their dispute resolved according to principles of transnational law [as the evidence discussed above suggests], they may still prefer an arbitrator with a transnational outlook and expertise as to a number of legal systems”.<sup>178</sup> Though Drahozal does not present it as a criticism, the depiction of scholarship as advertisement for authors appear as a heavy critic of the whole purpose of the autonomous theory of arbitration. The seriousness of the autonomous theory is at stake with this kind of criticism.

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<sup>173</sup> Rogers, C. (2006). p.22

<sup>174</sup> Dezalay, Y., Garth, B. G. (1996).

<sup>175</sup> Drahozal, C. A. (2011).

<sup>176</sup> See 3.b.2. Lack of realism

<sup>177</sup> Drahozal, C. A. (2011) *quoting*: Bond, S. R. (1991).

<sup>178</sup> *Ibidem*.

### 3.2.3.3.5 Other critics

The first criticism that can be considered very general but having some consequences on the autonomous theory is David Caron's criticism, mostly specialized in International Investment Arbitration but that has some assumptions on ICA and arbitration in general. Caron's words have been brought by Kidane in the context of ICA. Kidane paraphrases Caron in the following sentence.

*“International arbitration – be it investment or commercial – is not a system; it is a framework”<sup>179</sup>*

This assumption is a heavy challenge to the very idea of arbitration. Indeed, Kidane completes it by saying that international arbitration is “a gap filler – nothing else – but market forces of its own have supplied and grown theories and promotional justifications that have become true because of repetition”.<sup>180</sup> It narrows the understanding of international arbitration and makes the research meaningless because, then, ICA does not exist in itself, it is just here to fill the gaps.

The other criticism which can be brought is Catherine Rogers' criticism that has been already evoked in the context of advertisement. Rogers wrote a book about the “Ethics in International Arbitration” in which she considers the epistemic community that arbitrators constitute and the lack of ethical rules in the community<sup>181</sup> – she speaks about an ethical no-man's land.<sup>182</sup> Rogers is not an opponent to the autonomous theory of arbitration but rather one thinking about the consequences of this idea and its possible challenges and criticisms. This is the kind of critics that proponents of the autonomous theory of arbitration must take into account in order to improve their theory.

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<sup>179</sup> Kidane, Won L. (2017) p.87 referring to: Caron, D. D. (2009).

<sup>180</sup> *Ibidem.* p.116

<sup>181</sup> *Ibid.* p.84 quoting: Rogers, C. A. (2011). “International arbitration operates largely on assumptions of its ability and need to self-regulate. Its processes exist largely independent of national legal systems, unregimented by national procedural rules.”

<sup>182</sup> Kidane, Won L. (2017) p.83

## 4 Practical problems

The theoretical background of the discussion on an autonomous ICA has been made in the previous chapter. Now, it is time to look at the possible practical achievement of the autonomy of international arbitration. In order to be efficient, this chapter will mainly focus on two problematic elements towards autonomy: public policy and enforcement.

Indeed, if the whole arbitration proceeding must be looked at, it can be seen that autonomy already applies for a number of elements. Among them, there is the freedom of choice of law, either for procedural or substantive law. It is clear in the different arbitration rules.<sup>183</sup> Other elements of achievement of the autonomy of ICA are the freedom to choose the place, and also the possible waiver of right of judicial review in the place of arbitration.<sup>184</sup> Thus, ICA is already delocalized but not fully autonomous mainly because of two elements which are intertwined: problems of public policy and enforcement.

Enforcement and public policy are the main elements which are precluding ICA to be fully autonomous. In fact, these elements are anchoring or trying to anchor the whole procedure to the mercy of national courts. That is the reason why only these two elements are going to be studied below.

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<sup>183</sup> *see* UNCITRAL Arbitration Rules, Article 35. ICC Arbitration Rules, Article 21.

<sup>184</sup> *Supra* note 73.



## 4.1 Public policy

The definition of public policy is not a clear one. However, its function is clear, it is to “reject foreign laws or acts that contradict the state’s basic principles of law”.<sup>185</sup> Moreover, it also acts as a positive element. Thus, the notion of public policy carries both a negative and positive function in international arbitration context<sup>186</sup>.

In municipal law, public policy is used to “designate ‘imperative’ or mandatory rules from which the parties cannot derogate”.<sup>187</sup> This is, as Pierre Lalive says it, a notion which changes in time and space. Public policy is not an exhaustive list of rules that the award must respect but rather a moving and changing core of the legal order of the state. That is the reason why Lalive held that public policy must be understood “in concreto”<sup>188</sup>, not theoretically. For that reason, the real content of public policy can be understood only with state laws. This adds an unpredictable feature in the ICA context that will be evoked later.

Public policy intervenes in ICA in two occasions: in the case of one party instigating a court procedure to decide the validity of the arbitration agreement or when the winning party is wishing to see his arbitral award recognized and enforced in the state where the assets of the losing party can be found. This section will mainly focus on the second occasion where the public policy issue is at stake even though considerations will be the same if the first occasion would have been taken as a basis of analysis.

When autonomy of the ICA is evoked, it is considered that arbitration will become completely unrelated to the state, freed from it. However, the reality is much more complex. The current functioning of ICA shows that unpredictability and diversity dominate even though courts have tried to simplify public policy concept in ICA. The autonomous theory does not apply for public policy issues and its absence brings the question of how it would look as theorized by transnationalists. Once imagined as the transnational public policy, this autonomous theory for public policy is not considered as flawless. Indeed, there are limits to this new theory even though it remains the lesser evil.

### 4.1.1 Current functioning of public policy exception in ICA

The current functioning of ICA does not permit to call it autonomous because of its lack of autonomy on two elements including the public policy issue. This lack of autonomy is clear

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<sup>185</sup> García, E. J. (1990).

<sup>186</sup> Lalive, P. (1987).

<sup>187</sup> *Ibidem*.

<sup>188</sup> *Ibid*.

even though States have tried to smooth the public policy exception through the distinction between national public policy and international public policy while the NY Convention encouraged this development. However, the international public policy doctrine is not sufficient and creates problems.

#### *4.1.1.1 Notion of “international public policy”*

As said above, States are keeping the recognition and enforcement part of ICA and it allows them to judicially review awards. Article V(2)(b) of the NY Convention allows the State of enforcement to review the award regarding its own public policy. However, States’ arbitration-friendly stance has kept them from using this article as a blank cheque. There has not been a lot of abuses concerning the use of public policy as an excuse for parochial views from the Court. Indeed, the scholarship agrees on the fact that this is mostly a theoretical problem.<sup>189</sup> This behaviour can be seen through major countries having distinguished their national public policy and their international public policy. The international public policy of a State can be defined as the core values of the legal order of the State “that must be maintained for the preservation of the legal and social order”.<sup>190</sup> It is a limited version of the actual national public policy that is considered as fitting the special needs of international trade. Indeed, ICA cannot be treated as a national arbitration because of its scale and the number of countries involved. Moreover, party autonomy applied in international trade is completely different and does not ground itself on any state’s legal order and for that reason, it is not possible to impose all mandatory rules of the State of enforcement. So, most States are now imposing a lighter public policy review over foreign arbitral awards.

This distinction is present in most countries in either law or case law. The first example is French law which is among the most liberals in ICA. Article 1514 of its Code of Civil Procedure held that foreign arbitral awards are recognized or enforced only if the existence of this award is proven and if the latter is not infringing international public policy.<sup>191</sup> Along with France, Italy, Spain, and Belgium are also recognizing this difference.<sup>192</sup> In United States, there is also

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<sup>189</sup> “public policy seems to be more important in theory rather than in the practice of ICA. Only in very limited cases has the exception been applied by the national courts of the countries who are members to the NYC” in García, E.J. (1990).

<sup>190</sup> García, E. J. (1990).

<sup>191</sup> Article 1514, Code de Procédure Civile.

<sup>192</sup> For Spain, see *Ruling of the High Court of Justice of the Basque Country dated April 19, 2012 (RJ 2012, 6133)*, in Benito, M. & Elizalder, F. For Italy, see *Court of Appeal of Venice, January 16, 2013, No. 91 [Helios Technology S.p.A. v. Jiangxi Ldk Solar Hi-Tech Co. Ltd]*, in Benedetelli, M. & Sabatini, M. (2015). For Belgium, see *First Instance Brussels, 30 March 2011, R.D.C. 2012, 186. No.*, in Hollander, P.

this distinction, which has been developed by case law as in other countries apart from France. Thus, the basis of the concept has been developed with the case *Scherk v. Alberto-Culver Co.* where the American judge clearly stated that the refusal of enforcement in this case would be clearly parochial and would damage party autonomy and the wealth of international trade.<sup>193</sup> Indeed, the judge refused to apply the Securities Act in this case and made the international arbitration “subject to less restrictive standards of enforcement than those in purely domestic situations”.<sup>194</sup> This case law was clearly confirmed in *Mitsubishi* case<sup>195</sup> where antitrust claims were made arbitrable even though national parties are not allowed to arbitrate such public laws. Scholars agree on the fact that, for the purpose of being arbitration-friendly, States are more and more “reduc[ing] the scope of public policy exceptions when dealing with ICA”.<sup>196</sup> However, it must be noted that there are exceptions as China and its article 213(3) of the Civil Procedure of 2008 which held that: “If a people’s court determines that the enforcement of an arbitration award would contradict the social and public interest, it shall make a ruling of not to enforce the award”. This concept seems to cover much more compared to what normal public policy would cover. For example, the famous case concerning an arbitration initiated by U.S. musical performers who were not paid in China for their performance is striking. The arbitration awarded them damages but in the enforcement process, Chinese courts refused to recognize and enforce this award because it was against ‘the social and public interest’ of China. However, this case is old and it appears that Chinese courts would not decide the same nowadays, even though they have the grounds to do it.<sup>197</sup>

#### 4.1.1.2 Role of the New York Convention

Concerning the role of the NY Convention in the public policy, an analysis of Article V must be made. Indeed, this article is the one listing elements that would probably justify a refusal for recognition and enforcement. In this regard, it is possible to divide this list in two: the arguments

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<sup>193</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506. Supreme Court of the United States, June 17, 1974. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

<sup>194</sup> Garcia, E. J. (1990)

<sup>195</sup> *Mitsubishi Motors Co. v. Soler Chrysler-Plymouth, Inc.*, 105 U.S. 3326, Supreme Court of the United States, July 2, 1985.

<sup>196</sup> Garcia, E. J. (1990).

<sup>197</sup> Chinese Courts are required to request approval of the Supreme People’s Court in order to refuse recognition and enforcement of foreign arbitral awards. See Chen, H. & Howes, B. T. (2009) and (2010)

that can constitute a ground for refusal in case it is argued by one party who brings the evidence with him and the arguments that can be used by the judged without the parties' will.

The arguments that can be brought by parties with evidence of its claim are incapacity, lack of fairness, excess of jurisdiction, improper composition of the arbitral tribunal, and set aside or suspended award.<sup>198</sup> The court can bring the questions of arbitrability and public policy.<sup>199</sup> It is not difficult to understand the reasons why these arguments are divided as such. The underlying reason is to prevent State courts to use parochial reasons to refuse recognition and enforcement. In that sense, it can be said that “the New York Convention was based upon a liberal policy favouring the recognition and enforcement of foreign arbitral awards”.<sup>200</sup> This liberal stance of the NY Convention is clear because of its limitation of grounds for refusal, but Article V(2)(b) constitutes an exception regarding the rest of Article V.

This public policy ground is considered “a loophole”.<sup>201</sup> Is it so? Considering the overall NY Convention, there is a liberal implied point of view in order to prevent State courts to be parochial. However, public policy has been brought in order to allow further grounds because, otherwise, grounds in Article V(1) are substantially constitutive of a public policy exception. A realistic approach of the drafting process shows that this article can be considered rather as a safeguard against the unforeseen. Without this loophole, it is possible to think that the NY Convention could not have been so massively ratified.

Thus, the NY Convention has given some leeway to States to deal with unforeseen cases in order to legally deny recognition and enforcement. This loophole, however, has not been really used widely and is almost not used nowadays. Indeed, as seen below, the State parties have decided to interpret this article in a liberal way and brought the concept of an international public policy along with their national public policy.

#### *4.1.1.3 Problems of the current functioning*

There are two problems of the current functioning: the problem that international public policy constitutes in itself and also the barrier that it constitutes to the expansion of the autonomous theory. In this part, these two problems are going to be studied in order to show the need of an autonomous theory in the context of public policy issue.

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<sup>198</sup> Article V(1) of the New York Convention.

<sup>199</sup> Article V(2) of the New York Convention

<sup>200</sup> Garcia, E. J. (1990).

<sup>201</sup> *Ibidem*.

The first problem of the actual functioning of public policy issue is the lack of predictability. As said before, international public policy is not truly international.<sup>202</sup> The concept of international public policy is as domestic as private international law, a domestic solution for cross-border disputes which is not taking into account the whole implications of cross-border dispute because it is a national decision. Another country can have another international public policy and it constitutes a problem of predictability for parties to ICA because they do not know what to expect before knowing in which countries are the assets of the losing party.

This lack of predictability is showed by the problem of the chancellor's foot as expressed by Paulsson.<sup>203</sup> The problem of the chancellor's foot is defined as such: "judicial dissimulation of secret preferences under the raiment of high-sounding principle".<sup>204</sup> This constitutes a real problem because it undermines the trust of businesses towards the system of enforcement made by the NY Convention. In this actual system, it is clear that, under the name of international public policy, State courts can apply parochial views. This kind of deviation is always possible unless an autonomous concept of public policy exists.

The other problem created by international public policy is the continuing reliance on State courts. As said above, this problem constitutes both a barrier to the autonomous theory and an actual problem of enforcement of foreign arbitral awards. Indeed, reliance on State courts is a problem especially when the rest of the arbitration is so autonomous that it gives the false impression that the project of autonomy is almost achieved. However, the fact that States keep the most important part, the one dealing with limitations of the ICA process in order for it to be legitimate, is a tremendous barrier to the realization of the autonomy.

#### 4.1.2 Theory of a transnational public policy

In the general theory of an autonomous ICA, the question of public policy has been studied extensively. Among the most famous scholars who wrote about it, Paulsson and Gaillard can be found, but also Pierre Lalive, who wrote an extensive report about the question of the existence of a transnational public policy. In this part, the question of how the scholars have imagined the transnational public policy is going to be answered.

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<sup>202</sup> Lalive, P. (1987).

<sup>203</sup> Paulsson, J. (2013). p.200

<sup>204</sup> *Ibidem*.

The first assessment of scholars about the current functioning of public policy issue in the context of ICA is that it is not working properly. Garcia explains the emergence of transnational public policy due to the failure of the current system.<sup>205</sup> Thus, failures of the current functioning of public policy issue brought the concept of transnational public policy which is thought to be versatile, consensual, self-regulatory and capable to resist to any challenges.

In the theory of autonomous arbitration, the public policy is transnational or “truly international” as Lalive would say.<sup>206</sup> One of the features of this transnational public policy is its fundamental versatility. In this regard, transnational public policy is close to national public policy. A public policy, as the core values of a legal order, must be versatile and able to change according to time and context. This versatility is also useful in order to “address unforeseen legal problems”.<sup>207</sup> Like the national public policy, the transnational public policy is not either an exhaustive list of rules and is rather core values of the transnational legal order. Indeed, Ghodoosi clearly states that “any form of public policy inevitably should stem from a legal order”.<sup>208</sup>

Secondly, this transnational public policy is considered consensual due to its method of discovery which is the “transnational rules method”.<sup>209</sup> This method, systematized by Gaillard can already be found in Lalive’s report when he defines transnational public policy as the “basis of values endorsed by the international community”.<sup>210</sup> Considering the sum of legal orders in the world, the method allows to look at emerging trends and to consider them part of the transnational public policy while parochial views must be ignored. Gaillard compares it to Article 38 of the Statute of the International Court of Justice in order to bring legitimacy to his method which is not only coming from his imagination on how to achieve the dream<sup>211</sup> of an autonomous arbitration.<sup>212</sup> This majoritarian principle is possible to achieve because of the high-level harmonization in Europe and the continuing reconciliation between common law and civil law. In this order, Gaillard and Lalive do not rely on off-ground principles in order to

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<sup>205</sup> “The notion of transnational public policy emerged out of a need of predictability and speed in cross-border litigations” *see* Garcia, E. J. (1990).

<sup>206</sup> Lalive, P. (1987)

<sup>207</sup> Conde, E. S. G. J. (2009). p.115

<sup>208</sup> Ghodoosi, F. (2016) p.106

<sup>209</sup> Gaillard, E. (2012) p.48

<sup>210</sup> Lalive, P. (1987)

<sup>211</sup> Lew, J. D. M. (2006)

<sup>212</sup> The idea is to ascertain the prevailing trend within national laws, which obviously does not mean that the rule in question has received unanimous recognition. Such a requirement would deprive the method of any meaning, as the whole idea is to segregate rules that are widely recognized from those which are idiosyncratic or outdated. *See* Gaillard, E. (2012) p.48

constitute substantive content of the transnational public policy but rather a clever mixture of the most accepted principles constituting international public policy of different states. Lalive concedes that “the respective domains of ‘classical’ international public policy of States and of transnational public policy largely coincide, each of them “feeding” so to speak the other or others”<sup>213</sup> while admitting, at the same time, the “particular or even selfish character”<sup>214</sup> of international public policy of States. Indeed, transnational public policy is as narrow as international public policy or even more because it “requires the acknowledgment of a rare degree of consensus”.<sup>215</sup>

The last feature of transnational public policy is its self-regulatory character. With the application of transnational public policy, the arbitral award will be checked according to its own specific transnational public policy. As it is self-regulatory, it also implies that the arbitrator knows the elements considered during judicial review before national courts, so he can write his award knowing the criteria. This self-regulatory and transnational public policy simplifies the stage of going to the national court because, then, the process is not unpredictable. Pierre Lalive analyses in details the questions of how this transnational public policy will be applied. He concedes that judges are not really able to use the exact terminology because of their limitations in the legal order of the State but he does not seem to take that element seriously because, for Lalive, it is possible to evoke private international law principles and implicitly apply a transnational public policy. Lalive’s proposal is the exact opposite of the problem of the Chancellor’s foot evoked by Paulsson.<sup>216</sup>

Finally, Lalive argues that transnational public policy, that already exists according to him, is capable of responding to its critics in several points. Concerning the vagueness of the concept, he argues that national public policy is also vague because of its very nature: “it is a malleable concept”.<sup>217</sup> This criticism would probably come from statist. Indeed, Lalive takes into account criticisms concerning the limit to party autonomy that it would constitute. He does not refute it but adds that “it is hardtop see how it could be an additional restriction”.<sup>218</sup> Then, he argues that the main reason for the restriction is to maintain legitimacy of the arbitration process even

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<sup>213</sup> Lalive, P. (2006)

<sup>214</sup> *Ibidem*.

<sup>215</sup> Paulsson, J. (2013). p.125

<sup>216</sup> *Ibidem*. p.200

<sup>217</sup> *Ibidem*. p.205

<sup>218</sup> Lalive, P. (2006)

though it is an autonomous one. Indeed, an autonomous arbitration freed completely from the State but without any legitimacy is useless. This autonomist position is already criticized for its lack of democratic accountability and its control by multinational corporations.<sup>219</sup> For that specific reason, transnational public policy which suits specific needs of cross-border disputes and, at the same time, respect the will of the majority of states' international public policy is a proper way to maintain legitimacy of the general theory. However, there are some other challenges that can be evoked from the point of view of the autonomous arbitration theory such as lack of ambition and the fundamentally unpredictable character of State courts.

#### 4.1.3 Challenges and contextualization of the problem

The autonomous consideration of public policy is facing several challenges that constitute another problem in the path towards the possibility of an autonomous ICA. In this regard, two challenges can be evoked: absence of a private regulation concerning public policy exception, and a clear lack of ambition because it continues to rely on State courts. However, these critics are no constructive because the existence of a system lacking any defaults is not possible. Indeed, there is no alternative as Margaret Thatcher would say.

##### 4.1.3.1 *Absence of a private regulation*

The first challenge is about non-reliance of transnational public policy on private entities. This is a criticism that can be made because, then, arbitration would not be fully autonomous if the transnational public policy is fully implemented. Thus, the question that can be asked is about the ability of private entities to regulate arbitration with the public policy exception. Indeed, is this challenge a real one?

If the concept of public policy must be looked through the lenses of law and economics, it has three functions: protecting parties, non-parties and achieving redistributive justice.<sup>220</sup> Indeed, the State's role is the protect people and one of the means is law and public policy as limits to private activities. For example, in domestic law, people are free to contract within the limits of public policy. The same must be applied to cross-border commercial arbitration. Unlimited freedom for multinational corporations would mean lesser freedom for some parts of the population and an illegitimate system.<sup>221</sup> In this regard, the role of the State is crucial because

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<sup>219</sup> Cutler, A. C. (2003).

<sup>220</sup> Ghodoosi, F. (2016) p.42

<sup>221</sup> Article 4 of the Declaration of Human and Civic Rights of 26 August 1789. « Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other



it is considered as a neutral institution in the domestic context and as the only one which can limit parties. However, what is the situation in cross-border trade? Especially in the context of ICA, can parties arbitrate every matter? They should not be allowed because then, the rule of law would be infringed.

The primary question regarding the functions of public policy in this context is whether it would be possible to give them to private entities. Is it possible to rely on the only arbitrator to respect transnational public policy so that arbitration becomes truly autonomous? If law and economics approach is used, private entities are considered following their profits and so the arbitrators who are private adjudicators. Self-regulation would then give a public mission to a private entity and the sole profit-seeking private entities are not going to be able to properly apply public policy which is a matter of rule of law. Differences between an arbitrator and a judge are clearly showed by Claire A. Cutler in the following sentence: “While judges operate as part of the public sphere and are duty-bound to protect unrepresented public interests, private arbitrators are not: their duties go to resolving the differences of the parties before them”<sup>222</sup>. Here, the arbitrator is not bound to serve justice but its duty is to solve disputes between the parties. Thinking about the global justice is not in his interest nor in his mandate.

It is not possible to think about a private implementation of public policy exception because of the lack of neutrality and damages it can bring to international rule of law. William W. Park has defined this problem through the following dichotomy: it is either finality of the award or fairness of the award.<sup>223</sup> In this regard, transnational public policy implemented by national courts seems to be the lesser evil choice regarding the autonomy theory of arbitration. Indeed, the autonomous theory of arbitration must be legitimate in regard of the rule of law, otherwise, it would be considered as the dictatorship of multinational corporations.

#### *4.1.3.2 Lack of ambition*

The theory of transnational public policy can also be challenged on the ground that it lacks change and does not think of any other alternatives beyond impossible self-regulation and reliance on unpredictable State courts. When looking at the general literature of transnational law, there is a minority of scholars who is standing for the creation of an international court

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than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law. »

<sup>222</sup> Cutler, A. C. (2003) p.233

<sup>223</sup> Park, W. W. (2001).

which would solve “disputes concerning the enforceability of international commercial arbitration awards”.<sup>224</sup>

This international court would apply “provisions of international public policy, rather than attempt to discover and effectuate the public policy of any particular State”.<sup>225</sup> This Court would solve most of the problems and challenges of both actual and prospective public policy for cross-border disputes. Indeed, an international court would prevent parochial views while public policy would be in the hands of a judiciary which would rather serve justice than parties. When Cutler talks about the scope of both private and public international law, she says that the liberal myth associates public international law “with unnatural activities such as dumping, cartels, subsidies, price supports, and the like” while private international law is associated with “normal and natural economic activities”.<sup>226</sup> This liberal division corresponds perfectly with the need of an international court. Non-compliance and public policy infringement can also be seen as ‘unnatural’ regarding international commercial arbitration and its statistics.

However, this decision of making an international court is the continuing theory of state positivism which denies political power from multinational corporations.<sup>227</sup> This denial is not satisfying for international trade and that is also the reason why autonomous theory of arbitration is also fighting for. With an autonomous theory subject to a last review by the State regarding transnational public policy, multinational corporations are going to be the builders of this arbitral legal order along with major law firms. This would increase the responsibility of such stakeholders because parochial arguments would not be available anymore in case of problems. Indeed, this would bring clarity in the relation between private power and State control. It would be a controlled interference which would solely bring legitimacy and limits to the arbitration proceedings in terms of rule of law.

Furthermore, the idea of creating an international court is quite common in legal scholarship and especially for environment issues.<sup>228</sup> However, this classic international law of legislating through conventions is outdated and impractical. It is not possible now for such a big amount of States to bind themselves to such a heavy commitment which would oblige states to enforce

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<sup>224</sup> Holtzmann, H. (1995).

<sup>225</sup> Cutler, A. C. (2003) p.54

<sup>226</sup> *Ibidem.* p.55

<sup>227</sup> *Ibid.*

<sup>228</sup> *see* Postiglione, A. (2010). Global environmental governance: The need for an International environmental Agency and an International Court of the Environment. Bruxelles: Bruylant.

foreign arbitral awards without passing through their own national courts. The NY Convention was successful because of its loophole and its general pro-business point of view while the commitment asked from States was not so high.

So, transnational public policy is the lesser evil choice which suits the needs of international trade while still relying on State courts and their unpredictability. There seems to be no better solution than transnational public policy bringing legitimacy and rule of law in ICA.

However, it seems that the ‘dream’<sup>229</sup> of an arbitration completely delinked from the State has found its first obstacle. However, this obstacle is better with transnational public policy because even though it does not fit well with the autonomous idea which was about to abandon any links with the state, this solution is realistic and practically autonomous. However, it would be interesting to see whether enforcement issues constitute also an obstacle.

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<sup>229</sup> Lew, J. D. M. (2006).

## 4.2 Enforcement

In this section, the question will be limited to enforcement and not the traditional ‘recognition and enforcement’. Indeed, this terminology is used as if it was a sole concept but recognition is a completely different topic which serves other arbitration cases or a case before a national court. For this reason, recognition will not be analyzed.

Enforcement is the process by which the Court is forcing parties to comply with a national court’s decision or an arbitral award. As the State has police powers, it can force parties or even take their assets with the threat of force in order to ensure compliance. To look at the enforcement issue in ICA, the current functioning must be analyzed and studied. This study will allow the introduction of the theory of self-enforcement system and challenges to its fully implementation in ICA.

### 4.2.1 Current functioning of the question of enforcement

The current functioning of the enforcement system constitutes a problem for the autonomous theory of arbitration. Thus, enforcement is supposed to be harmonized with the role that the New York Convention play. However, the determining actors in the enforcement process are still national courts. For that reason, the enforcement system is still considered unpredictable and parochial by the scholarship.

#### 4.2.1.1 *The role of the New York Convention*

If the role of the New York Convention is to be considered, three elements must be analyzed: absence of a requirement of double exequatur, *prima facie* recognition and enforcement and use of limited grounds for refusal of recognition and enforcement.

The first important role of the New York Convention in the recognition and enforcement procedure before national courts is the removal of the double exequatur requirement. The double exequatur requirement forced parties who wanted to enforce their awards to get an exequatur from the national court of the place of arbitration showing that the place of arbitration recognized arbitration proceedings and the award. Once this exequatur obtained, the party who wanted to enforce the award had to go before the national court of the place where he sought recognition and enforcement in order to make this award enforced with the help of the previous exequatur. Thus, the party who wanted to enforce an arbitral award had to receive two “leave for enforcement”<sup>230</sup> from two national courts and it was considered a burdensome procedure.

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<sup>230</sup> Freyer, D. H., & Gharavi, H. G. (1998).

This double *exequatur* was made possible by previous international conventions on international arbitration which required an award to be final.<sup>231</sup> However, the NY Convention does not require such finality but a sole binding award.<sup>232</sup> In this regard, it can be said that the majority of scholars have agreed on a single interpretation of this binding award: “there seems to be a consensus among national courts that the term ‘binding’ does not require the party seeking enforcement of an award first to obtain leave for enforcement in the country where the award was rendered”.<sup>233</sup> Concerning the positive interpretation of what ‘binding’ means, there are four approaches to the ‘binding’ approach as written in the article of Freyer and Gharavi. The other role that the New York Convention had was one “provid[ing] the obligation of national courts to enforce foreign awards and harmoniz[ing] the grounds for the refusal of recognition and enforcement”.<sup>234</sup> Article IV states that, for recognition and enforcement, the party must bring “(a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof”.<sup>235</sup> These elements have been considered by national courts as sufficient to have a *prima facie* recognition and enforcement.<sup>236</sup>

Moreover, concerning grounds for refusal of recognition and enforcement, Article V is clear and exhaustive and also quite different from the Geneva Convention. Article I of the Geneva Convention used to require five cumulative conditions in order for recognition and enforcement to occur. In the NY Convention, the process is reversed and the conditions are made to deny recognition and enforcement. The Geneva Convention was using two ways of limiting the scope of recognition and enforcement: cumulative conditions for the approval and a non-exhaustive list of grounds for denial. Article III of the Geneva Convention authorizes parties to bring other arguments for denying recognition and enforcement. The objective of the NY Convention is different, it was made to “facilitate the recognition and enforcement of arbitral awards to the greatest extent possible and to provide a maximum level of control which Contracting States may exert over arbitral awards”.<sup>237</sup> Moreover, these five grounds are not mandatory to the

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<sup>231</sup> Article 1(d) of the Convention on The Execution of Foreign Arbitral Awards (1927).

<sup>232</sup> “The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made” in Article V(1)(e) of the New York Convention.

<sup>233</sup> Freyer, D. H., & Gharavi, H. G. (1998).

<sup>234</sup> Brekoulakis, S. (2008).

<sup>235</sup> Article IV of the New York Convention.

<sup>236</sup> NEW YORK CONVENTION GUIDE (website). Article IV.

<sup>237</sup> *Ibidem*. Article V

extent that the goal of the national court is to facilitate the recognition and enforcement<sup>238</sup>. Article VII can be an explanation of how the convention allowed for State parties to expand their right in order to have a more favorable policy towards foreign arbitral awards. It must be noted that the NY Convention does not evoke any review of the merits and Article V is looking only at arbitration proceedings.

To finish with the NY Convention, its main objectives can be defined as facilitating recognition and enforcement and limiting the dominance of parochial views in national courts where recognition and enforcement is sought. Did the theoretical objectives of the NY Convention change the way the recognition and enforcement is practiced?

#### *4.2.1.2 Unpredictability and lack of a harmonization*

How does recognition and enforcement work in practice? This question has been too much invaded by biased views and that is why this section is trying to bring some empirical studies in order to see the real practice of businesses. The basis of the empirical evidence chosen in this section can be found in Brekoulakis' article.<sup>239</sup> To show the practice of ICA in the enforcement branch, Brekoulakis uses empirical evidences from two different surveys and comment them.<sup>240</sup> One of the first figure he gives in his article is 40% of settlements in the post-award stage with discounted damages compared to the original. The study shows that 35% of these settlements include a discount between 76% and 100% from the original damages. These figures do not show any confidence on the current system of enforcement and Brekoulakis states that "ideally, there should be no reason for an award-creditor (presumably the winner in the arbitration) not to seek to recover the full value of the award through enforcement".<sup>241</sup> As a conclusion of these figures, one would think that enforcement procedure before national courts is so bad that businesses prefer to get discounted awards through post-award settlements than to try to enforce their awards which, in this case, would be costlier.

Brekoulakis studies, for this reason, the real practice of enforcement stage before national courts. He concludes that "enforcement proceedings are more efficient than parties perceive them to be". The survey gives 43% of proceedings which are completed between six months and one year. In the European Union, this figure is much more impressive because 100% of

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<sup>238</sup> "In accordance with this objective, the Convention grants courts of the Contracting States the discretion to refuse to recognize and enforce an award on the grounds listed in article V, without obligating them to do so" *in* NEW YORK CONVENTION GUIDE. Article V.

<sup>239</sup> Brekoulakis, S. (2008).

<sup>240</sup> Misteles, L., & Baltag, C. (2008).

<sup>241</sup> Brekoulakis, S. (2008).

enforcement cases are resolved within a year. This is an “alarming finding, indicating that award-debtors are allowed room to abuse the enforcement system”<sup>242</sup>. Indeed, these figures show that enforcement stage is working properly but that businesses are not considering it that way because they rather prefer to get less damages through a quicker and more flexible way: settlement. However, Brekoulakis points out the bias that this mismatch of perception and reality produces. When the system fails, the losers in arbitration become winners.

The reasons for such wrong perception of ICA are clear and underscored by scholarship literature. Even though it does not correspond to empirical studies, the perception of the enforcement system has some grounds, even if it is residual, in the reality of State courts which are generally slow, unpredictable and mostly adversarial.<sup>243</sup>

State courts are slow because of their procedural constraints. It is one of the problems businesses are afraid of. Commerce does not fit well with the procedural constraints of national courts. Even if empirical evidences show that they are not so slow, it became a dogma for businesses that courts are slow and will remain slow. Indeed, one of the element that make them think that way is the importance that procedure law has in state courts. Moreo, with the economic crisis of 2008, the budget given to State courts generally decreased.<sup>244</sup> This decrease is producing slow justice in the country and degradation of the business relationship because longer a case is pending, longer is the threat to the business relationship between the parties.

These procedural constraints make businesses think that State courts are unpredictable. For this matter, enforcement of set aside awards operated after a new interpretation of Article V and VII of the NY Convention is a tangible evidence of their unpredictability. These articles were thought to be mandatory grounds for refusal of recognition and enforcement but it turned out that State courts emphasized on the use of “may” in Article V and also on the significance of Article VII. This interpretation allowed recognition and enforcement of set aside awards as French courts did. This trend just appeared in 1973 with the Supreme Court of the Netherlands<sup>245</sup> giving effect to a set-aside Swiss international award. Even though it started in the field of international investment law, this case law influenced ICA and appeared in it.<sup>246</sup>

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<sup>242</sup> *Ibidem*.

<sup>243</sup> “enforcement proceedings are perceived as inherently adversarial, which can potentially undermine long-standing business relationships” *in* Brekoulakis, S. (2008).

<sup>244</sup> The main example is the State of California in the U.S. where “drastic cuts in the budget of the judicial branch” have been carried out. See in Cuniberti, G. (2017). p.186

<sup>245</sup> *Société Européenne d’Études et d’Entreprises (SEEE) v. Socialist Federal Republic of Yugoslavia*. Supreme Court of the Netherlands, October 26, 1973. Reported in *Nederlandse Jurisprudentie*, 1974, no. 361. *see* Gaillard, E. (2013). p.137

<sup>246</sup> Court of Cassation, June 29, 2007, 1st Civil Chamber, PT Putrabali Adyimulia v. Rena Holding.

These changes brought unpredictability in arbitration proceedings because the party who won the challenge in the place of arbitration found himself forced to enforce the award and pay damages. Even if this new case law is beneficial from the autonomous theory perspective, it shows how the construction of case-law allows for a loss in legal security.

The last problem of perception, which is not even a residual problem of State courts is their basic adversarial feature. It cannot be otherwise because it is a judicial tribunal and it does not consider the goals of the business community who is not to get the exact amount of damages they have been awarded but rather keeping their reputation and their business with the other party. This inadequacy between the expectations of businesses and State courts is the very reason for the existence of ICA and the reliance on State courts for enforcement shows the persistence of this mismatch.

Even if residual in practice, the problem of relying on State courts during enforcement is both theoretical and perceptual and must be answered by a new theory. This theory is embodied in the autonomous theory of arbitration: self-enforcement.

#### 4.2.2 Theory of self-enforcement system in ICA

The possibility of self-enforcement is increased with the residual problems appearing in the enforcement stage of ICA. As said above, current problems come from a lack of business-oriented State courts. What does the business community need? Flexibility, speed, non-adversarial proceedings and efficient enforcement. Is there already such a system that challenge State courts in the enforcement stage? There is the self-enforcement system widespread in specialized arbitration and this part of the thesis will study the possibility of a generalization of the theory of self-enforcement.

##### 4.2.2.1 Needs of the business community

As said above, the business community has some specific needs due to the features of commerce. Flexibility, speed, and non-adversarial proceedings are present in arbitration proceedings due to the expansion of the autonomous theory of arbitration. However, ICA is not completely autonomous and problems of State interference appear still in some areas including the enforcement of arbitration. It constitutes a problem because the rest of the arbitration proceedings are free from these inadequacies and correspond to the needs of the business community but not the last part, enforcement, which is the most important because it is the implementation of the autonomously-made decision.



Thomas Dietz shows this problem in an original way in his article<sup>247</sup> by stating that “clearly, arbitration works better than litigation in state courts. But, on the other hand, ICA seems far away from offering economic agents engaged in global commerce a viable universal legal infrastructure”.<sup>248</sup> By that sentence, he means that adjudication fails in some points as the interference of courts on the enforcement stage.

This problem cannot be compared to public policy issues which concerned rule of law and democratic review of awards. In enforcement case, the State court is only used as a mean to implement the award. Then, there is no superior principle anchoring the enforcement issue to the control of State courts. In this order, the generalization of the specialized arbitration can be theoretically thought and proposed to correct the problems of lack of autonomy on that stage.

#### *4.2.2.2 Generalization of the self-enforcement doctrine*

Specialized arbitration has always taken a different place in the legal scholarship and has never been assimilated to ICA. The whole procedure is completely different and specialized arbitration is truly autonomous. In this part, the purpose of the thesis is not to say that they are similar. On the contrary, the purpose is to clearly try to propose a generalization of the self-enforcement doctrine that is already implemented in specialized arbitration. For that reason, the functioning of the specialized arbitration will be studied first in order to, in a second time, propose a generalization of this functioning self-enforcement system.

##### *4.2.2.2.1 Self-enforcement doctrine in specialized arbitration*

Specialized arbitration has some different features that separates itself from mainstream ICA. The most known features are their own substantial and formal rules of arbitration. Specialized arbitration is mostly an arbitration system which belongs to a special trade association where members are very close. Thus, the trade association precedes the arbitration system and it is an important feature of specialized arbitration.

The analysis of specialized arbitration will limit itself to the study of their enforcement procedure which is quite different from what happens in ICA. First, enforcement is not based on the sole dichotomy between the voluntary compliance and the assistance of national courts. The voluntary compliance is the basic and most of the parties are voluntarily complying. In case of non-compliance, the specialized arbitration institution foresees some private

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<sup>247</sup> Dietz, T. (2014).

<sup>248</sup> *Ibidem.* p.186-187

enforcement or self-enforcement systems which allows the institution to order the award-debtor to pay damages and execute the award. This self-enforcement system is insured by a reputation-based system. If the party is not complying after a notice, his name will be publicly disclosed as a non-compliant party. This type of reputation-based enforcement can only work in case of a strong trade association which could prevent the good functioning of the non-compliant party's business. For example, in the diamond industry, the famous New York Diamond Dealer's Club is constituted of the biggest stakeholders of the business and outside of this club, it is rather difficult to continue the business normally.<sup>249</sup> Brekoulakis summarizes this feature as follow: "Any corporations not abiding by these commercial rules will be at risk of suffering business sanctions which can be more dire than many sanctions of legal nature".<sup>250</sup> This special self-regulation can only work in case of an organized trade association which can put this pressure on the award-debtor's business. Otherwise, the self-regulation system would not work. Indeed, private sanctions must have more impact on the award-debtor than legal sanctions<sup>251</sup>. This power is generally ensued from the importance of reputation in these fields and also from the solidarity between members. It means that if the award-debtor does not comply with the award, his name is going to be showed in public (online or in the office). If the non-compliance continues, the sanctions are going to be either suspension or expulsion from the association and that would mean a significant loss because this sanction means a lot for other members.<sup>252</sup> The perfect examples of these associations are the Grain and Feed Trade Association, the Diamond Dealer's Club and the cotton industry in Manchester. However, to try to imitate such specialized arbitration, some elements regarding the market and its organization must be taken into consideration. Moreover, the actual market value of trust of reputation must be assessed before such an enterprise of generalization.

This self-regulation system works properly because it transforms economic incentives to enter into the trade association into arms against the non-compliant party. Moreover, actual dominance of the trade association and its members in the specific market concerned are also elements that must not be undermined.

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<sup>249</sup> Bernstein, L. (2009).

<sup>250</sup> Brekoulakis, S. (2008).

<sup>251</sup> This type of trade association can be accused of infringing competition or antitrust laws of the country where they are incorporated. Indeed, the Federal Trade Commission has a constant eye on the New York Diamond Dealer's Club. *See* Bernstein, L. (2009).

<sup>252</sup> "Their non-compliance quickly becomes known throughout the merchant communities and the mill typically finds itself either unable to purchase cotton, or able to purchase it only at a relatively high price or for cash prior to delivery". *See* Bernstein, L. (2001).

#### 4.2.2.2.2 Generalization of the self-enforcement doctrine

In order to complete the autonomous theory of arbitration, the enforcement system must be made autonomous from State courts. This part is going to make a plea for a generalized self-enforcement in ICA and assess its possibility according to the criteria invoked before.

Before to think about the possibility of a self-enforcement system, an assessment must be made of how it would look to have ICA with a self-enforcement system. It would mean that arbitration proceedings would see only the obstacle of public policy in front of State courts and no other interference from the national level. As said above, this sole interference would be in order to anchor autonomous ICA in its own legit legal order. Parties would be able to choose their own procedure, substantive law, place of arbitration and not be constrained by parochial national laws. Moreover, the parties would not have to worry about the end of the process because reputation-based self-enforcement procedure would deal with the enforcement of their awards. The State courts would be exceptional as thought by Paulsson.<sup>253</sup>

Concerning the possibility of implementing such a self-enforcement system in ICA, a new international trade association gathering most of the stakeholders of international trade in order to have a bargaining power over award-debtors is needed. Moreover, an efficient system of reputation-based would be needed, a rule, like in the New York Diamond Dealer's Club<sup>254</sup>, which would organize the publication of the name of non-compliant party in order for other traders to know with whom they can make deals with. It would not be a formal boycott of the trader but rather an efficiency-based boycott in the sense that no traders would deal with the non-compliant one for the very reason that he is not a reliable partner.<sup>255</sup> The scale of international trade makes it hard to have a personal reputation system and for that reason, an IT-based reputation database would have to be implemented. This IT-based system is what the Diamond Dealer's Club is starting to do due to new heterogeneity of the industry in the last years<sup>256</sup>

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<sup>253</sup> Paulsson, J. (2013). p.46

<sup>254</sup> Bernstein, L. (2009)

<sup>255</sup> "dispute resolution mechanisms that aim at providing a viable legal infrastructure for modern globalized markets with high numbers of impersonal market participants need to be supported By either coercive state sanctions or systems of organized blacklisting". See Dietz, T. (2014) p. REFERENCE NEEDED

<sup>256</sup> "IT-base regimes lower barriers to entry by reducing an individual's cost of informing others about his reputation". *in* Bernstein, L. (2009).

This generalization must work properly because “the private regime must be Pareto superior to the established legal regime in order to survive”.<sup>257</sup> If the system is not working, there is going to be an automatic shift towards the State enforcement. As said before, the problems of State enforcement are only residual and fictional<sup>258</sup> and it is expected from the new system of self-enforcement to be only better or it would not work. Normally, this system assisted by adequate economic sanctions should trump legal sanctions and make the State enforcement irrelevant because self-enforcement would be quicker, more efficient, and amicable. If these new sanctions are more prohibitive for businesses, shift to self-enforcement may be a success. However, this proposition is faced with challenges and other empirical evidences.

#### 4.2.3 Challenges to the self-enforcement doctrine

Self-enforcement can be implemented in the field of ICA but there are some challenges to it. The reasons why it would be possible were studied above, but now, in this part, possible challenges must be studied in order to assess the possibility of implementing the self-enforcement doctrine in ICA. The main challenges are the scale and the complexity of ICA but also the inherent advantage of State courts which allow them to still matter in the landscape of enforcement.

##### 4.2.3.1 Scale of ICA

International Commercial Arbitration is a big scale adjudication system, all types of commercial acts from all around the world can be subject to arbitration. When compared to specialized arbitration, the latter is either limited in matters or in place. The perfect examples are cotton and diamond industries<sup>259</sup> which are limited in their matters. Specialized arbitration works so well precisely because of the limited amount of cases they receive. These two limitations are not present in ICA because it is all commercial cases around the world. In this regard, the scale of ICA constitutes an apparent challenge to the implementation of the self-enforcement system.<sup>260</sup>

The main argument behind the limitations to specific matters and places is the impossibility to deal with such a big scale system through self-enforcement system. As said before, specialized arbitration works properly because its limited number of stakeholders are represented in the

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<sup>257</sup> Bernstein, L. (2009)

<sup>258</sup> Mainly in the perception that the business community have, *see* Brekoulakis, S. (2008)

<sup>259</sup> *See* Bernstein, L. (2001 ;2009)

<sup>260</sup> Drahozal, C. R. (2009)

trade association which makes arbitration. Moreover, outside this trade association, it is much more difficult to make business in this field. However, in ICA, there is no such association and that would be problematic to try to establish one *ex nihilo* without the particular link between the traders. It is certain that diamond traders share the same business and this same business pushed them to create a trade association and make a common arbitration system. In ICA, the process would be reversed for the sole purpose of getting the advantages of specialized arbitration. This *ex nihilo* creation would not work properly because of its biased start: the enforcement system work because there is already a trade association which contains most of the stakeholders of the field. The fictional reconstitution of the specialized arbitration system can hardly work.

#### 4.2.3.2 *Complexity of ICA*

The second challenge is mostly linked to the first: ICA is not only a big scale business but also a complex one. Drahozal<sup>261</sup> argues in his paper that specialized arbitration (that he calls ‘trade association arbitration’) is mostly dealing with simple cases. For example, diamond industry does not have complex cases because they only need “customs and usages”<sup>262</sup> in order to solve disputes. Drahozal links the simplicity of the products to the self-enforcement doctrine and makes it a pre-condition to the implementation of the doctrine.<sup>263</sup> ICA is indeed complex especially in cases of construction projects or in the energy sector. This complexity “affects the difficulty of verifying performance under the contract and the degree of contract standardization”.<sup>264</sup> It seems that complexity constitutes another impediment to the implementation of the self-enforcement doctrine.

#### 4.2.3.3 *Advantages of State courts*

The third challenge is not much an impediment due to the features of ICA but rather an inherent advantage of State courts. They are constitutive of the judicial branch which is responsible for controlling the respect of the law and for that purpose, they retain police powers to investigate properly or force parties to comply with their ruling. This power of the State is inaccessible for private entities. No private entities are able to legally force parties to comply with an award and

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<sup>261</sup> *Ibidem*.

<sup>262</sup> Bernstein, L. (2009).

<sup>263</sup> “Parties dealing with simpler products are likely to have more routine, repeat transactions and smaller amounts at stake in those transactions. Such parties will be better able to organize into trade associations and to use reputational sanctions to enforce contracts.” in Drahozal, C. R. (2009).

<sup>264</sup> Drahozal, C. R. (2009)

in case of a *mala fides* award-debtors, police powers are needed. It means that the State is always needed in extreme cases. Economic sanctions and private enforcement works when all the members of the system are rational but it is no news that human beings are far from being rational.<sup>265</sup>

To conclude with, the self-enforcement system has little chance to achieve its goal in ICA because of its complexity and scale. However, small initiatives can be made in different sectors and that could work but the reliance on the State courts would continue and the ‘dream’<sup>266</sup> seems to get impossible to achieve in practice. However, empirical evidences are contradictory because they tend to undermine the problem of lack of autonomy for both public policy and enforcement.

### 4.3 Theoretical problems insignificant in practice

Based on empirical research, this section is trying to argue for an insignificance of these theoretical problems because of their little representativeness of the real practice of the business community. The general argument appears as supporting the possibility of an autonomous theory of arbitration even though some problems are present in it.

Garcia admits it already in his study of public policy, “public policy seems to be more important in theory rather than in the practice of ICA. Only in very limited cases has the exception been applied by the national courts of the countries who are members to the NYC”<sup>267</sup>. It is the same for the enforcement problem, it is a false problem only based on theoretical possibilities which rarely occurs. For this study, two surveys are going to be taken as examples, the Study<sup>268</sup> of Naimark and Keer (called “Study” hereinafter), and also the Survey<sup>269</sup> made by PWC and the School of International Arbitration (called “PWC Survey” hereinafter).

The Study made by Naimark and Keer is quite a slow-scale survey compared to the PWC Survey but it is still “representative of worldwide international business arbitrations” according to the authors.<sup>270</sup> According to the Study, it is clear that there is a high number of fully complied awards – the article establishes 61 out of 100 cases where the compliance was voluntary and

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<sup>265</sup> The problem can be also the end-game problem in case of expulsion of the trade association in specialized arbitration, *see* Bernstein, L. (2009).

<sup>266</sup> Lew, J. D. M. (2006)

<sup>267</sup> Garcia, E.J. (1990)

<sup>268</sup> Richard W. Naimark & Stephanie E. Keer, *Post-award experience in international commercial arbitration* in Drahozal, C. R., & Naimark, R. W. (2005).

<sup>269</sup> PricewaterhouseCoopers LLP., & School of International Arbitration (Queen Mary, University of London). (2008).

<sup>270</sup> Drahozal, C. R. & Naimark, R. W. (2005). p.274

only 12 cases were enforced by Court. Indeed, these numbers are different from the PWC Study but there is still a preponderance of voluntary compliance or of negotiation (26 out of 100). The most interesting part of the Study is found in the reasons invoked for the 35 cases of non-compliance. Among these 35 cases of non-compliance, there are 14 cases of bankruptcies and 6 cases of “lack of practical court enforcement/jurisdiction, either for accessible assets to attach or because of relative inaccessibility of a foreign jurisdiction”.<sup>271</sup> The real problem seems not to be enforcement and public policy issues because in 61% of cases, the awards are fully and voluntarily complied. The remaining 39% of non-compliance cases are mostly due to external reasons such as bankruptcies. In a case of bankruptcy, all the techniques to enforce the award would be a failure.

Concerning the PWC Survey, “84% of the participating corporate counsel indicated that, in more than 76% of their arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award; in most cases, according to the interviews, compliance reaches 90%”.<sup>272</sup> This figure of 90% is much bigger than the previous study. This survey notes a sole 3% of non-compliance. Indeed, Brekoulakis’ analysis of the PWC study gives more information about the insurance and re-insurance companies which have a 100% full compliance level.<sup>273</sup> The PWC study indicates that “the principal reason given for compliance with the arbitral awards was to preserve a business relationship. The highest level of compliance appears in the re-insurance, pharmaceuticals, shipping, aeronautics and oil and gas sectors.”<sup>274</sup>

More than these raw figures, there is a constant in these studies: an increasing number of voluntarily complied with awards which makes all the problem of public policy and enforcement irrelevant. Indeed, if the parties are *bona fides* and comply with the award, either by negotiation or directly, there are no such problems and the evoked ones are solely theoretical. Concerning the autonomous theory of arbitration, it appears that if public policy and enforcement are indeed irrelevant, the theory is still possible. That is what is going to be studied in the following chapter.

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<sup>271</sup> *Ibidem*. p.272

<sup>272</sup> PricewaterhouseCoopers LLP., & School of International Arbitration (Queen Mary, University of London). (2008).

<sup>273</sup> Brekoulakis, S. (2006).

<sup>274</sup> PricewaterhouseCoopers LLP., & School of International Arbitration (Queen Mary, University of London). (2008).

## 5 Actual development and realism

This last chapter is dedicated to a theoretical recap about the actual place of the autonomous theory of arbitration in the legal field. Autonomous theory looks like an utopia about to replace a previous another utopia. However, the question arising out of the establishment of the autonomous theory of arbitration is its desirability. This desirability will be assessed regarding different evolutions of the world order and minor roles that States are getting compared to private entities which are becoming much more important. Once the current paradigm is analyzed, the possibility to bring the new paradigm will be studied. The question of how this theory could be applied will be the interrogation of the last section.

### 5.1 Autonomous theory as an utopia

The autonomous theory is an utopia, a dream, a fantasy of arbitration practitioners. However, these denominations are not negative in themselves, they just show that legal theory needs a fiction in its ground in order to survive. However, the autonomous theory is the dream of a certain category of ideology: neo-liberalism and proponents of self-regulated private powers.

#### 5.1.1 State positivism v. Legal pluralism

Since the Westphalian Treaties, legal theory is based on State positivism. It means that the only source of power is the State or community of States. This Westphalian approach is strict on the sources of law and does equate “law with state law”.<sup>275</sup> The Thirty Years War that the Treaties ended had been caused by legal pluralism that existed before.<sup>276</sup>

The most prominent figure representing State positivism since the Treaties is Kelsen and his *Gründnorm* theory. For Kelsen, the only possible way to achieve justice is through law made by the State.<sup>277</sup> This dictatorship of State positivism forbidding all other legal systems in a territory<sup>278</sup> was justified at the time of the climax of the State power and sovereignty. The Westphalian Treaties formalized State positivism which was already discussed among the intellectuals of that time. Jean Bodin and Hobbes were the strongest proponents of sovereign States which would not tolerate any parallel legal systems in their territory. Before the Westphalian Treaties, France had a period going towards the Absolute Monarchy with different intellectuals as Bodin, Loiseau or Domat which were feverous proponents of an absolute

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<sup>275</sup> Schultz, T. (2014) p.50

<sup>276</sup> *Ibidem*.

<sup>277</sup> *Ibid.* p.51

<sup>278</sup> Due to the concept of “no one can serve two masters”, in Kelsen, H., & Knight, M. (2009). p.329



monarchy with an exclusive and supreme sovereignty.<sup>279</sup> However, this exact definition of sovereignty was expanded to the definition of a legal system considered then as comprehensive, exclusive and supreme.<sup>280</sup> These were State positivists criteria to consider social norms as law. It refers directly to State law because State positivists could not think of law outside of the State.

However, this paradigm of State positivism is about to falter because of the crisis of the State and its power regarding the level of cross-border exchanges and the incapacity or unwillingness of States to regulate these parts of trade. It is certain that the paradigm is still State positivism because every new theory – candidates for paradigm – are referring to State positivism to show how this latter is inadequate to the current context. Moreover, the new theories have not yet arrived in the handbooks of law and constitute rather the margins rather than its centre for now. One of the new competing theories is legal pluralism which embodies the autonomous theory of arbitration. In this general theory, legal systems are multiple and can be superposed and the concept of “no one can serve two masters”<sup>281</sup> would not work because in some matters, other legal systems could be used. This open paradigm would allow coexistence and consideration of specific social norms that were undermined until now. One of the main element of this new theory is also the fact that other legal systems would be living without the need of the State as the autonomous theory of arbitration. Though, this new theory is labelled as utopia or fantasy.<sup>282</sup>

Especially when coming from a State positivist point of view, the autonomist, pluralist, and transnational views seem utopian and impossible to achieve. It would be “governance without government”.<sup>283</sup> Ralf Michaels studied the literature of autonomous theory and remarked that this utopian character was not only a criticism but rather a label that the proponents have used themselves.<sup>284</sup> This label can be considered realistic because of the paradigm shift that it constitutes from state positivism. However, Ralf Michaels adds that State positivism is also based on an utopia. He emphasizes that “normative bindingness of positive law rests on the

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<sup>279</sup> Jean Bodin explains its vision of sovereignty in these two quotes : « La souveraineté est la puissance absolue et perpétuelle d'une République » (Sovereignty is the absolute and perpetual power of a Republic – author's translation) and « La souveraineté est le pouvoir de commander et de contraindre sans être commandé ni contraint » (Sovereignty is the power to command and constrain without being commanded nor constrained – author's translation) in Bodin, J. (1576) *Les Six Livres de la République*.

<sup>280</sup> Schultz, T. (2014). P. 74

<sup>281</sup> Kelsen, H., & Knight, M. (2009). p.329

<sup>282</sup> Michaels, R. (2013).

<sup>283</sup> Reference to the name of the book of Czempiel; Rosenau (1992) called “*Governance without Government Order and Change in World Politics*”.

<sup>284</sup> Michaels, R. (2013).

socially observable fact that people in fact recognize the rulemaking power of the sovereign.”<sup>285</sup> Michaels reminds his readers that State and also sovereignty are not real concepts but rather existing due to “our mutual faith in it”.<sup>286</sup> This is the same with the transnational view, it is thought to be a virtuous new paradigm but it is an utopia. However, it would still work as the utopian State positivism has worked because people believed in it. In this regard, the utopian character of the autonomous theory is not a handicap but rather an element to trust more in its possibility.

### 5.1.2 Origins of the dream

This dream or utopia is originating from two elements: the medieval period nostalgia and neo-liberal myths.

Not even entering the debate of knowing whether there was a unified law in medieval period, it is sure there was legal pluralism and something that went beyond frontiers. The less controversial transnational law was Church law which was the same in whole Europe because the head was in Rome and not inside national frontiers. This was not only religious moral but rather a well-constructed law with all the features belonging to a legal order. The other transnational law is the law merchant but as said in the beginning of this study, this existence of transnational law merchant is subject to debate in the legal scholarship even though historical scholarship is agreeing on a fragmented reality which includes an important part of autonomous legislation. However, this medieval past which was a time when different legal systems were surviving side by side without anyone reigning supreme over others is deleted by modern Westphalianism. The State tried to declare its supremacy for the sole reason of having the territory which made him entitle to control whatever happen in this territory. This territorial understanding of legality has not been challenged until the middle of the 20<sup>th</sup> century with the appearance of transnational law theories. These theories are trying to show state positivism is not the only possible way of seeing legality and that other understandings have prevailed in history. This nostalgia can be felt by groups which conceive non-state law as “liberating social groups from the oppression of the State”.<sup>287</sup>

The other element at the origin of the autonomous theory of arbitration is the neo-liberal discourse which appeared in the 80s in the political realm with the election of Ronald Reagan

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<sup>285</sup> *Ibidem*.

<sup>286</sup> *Ibid*.

<sup>287</sup> Schultz, T. (2014) p.59 *quoting*: Di Robilant, A. (2006).

in the United States, and Margaret Thatcher in the United Kingdom. Neoliberalism emphasizes autonomous arbitration privately guided as being “natural, neutral, consensual, [and of] efficient nature of private exchange relations”.<sup>288</sup> Cutler insists on the “art of separation”<sup>289</sup> operated by neo-liberals in order to make understand that law and economy are two different elements and that economy is not supposed to be political. Then, self-regulation would not be considered as political but rather a correct management of business disputes.<sup>290</sup> This lack of political matters in economy theoretically allows for the possibility to move to an autonomous theory of arbitration because this move could be justified by criteria of neutrality and efficiency. In this regard, a mixture of medieval nostalgia and neo-liberal concepts, transnational law appears as a myth capable to replace the myth of State positivism and operate a paradigm shift.

## 5.2 Desirability of an autonomous theory

An autonomous theory is a myth which could be implemented. Should it be? The question is about the desirability of having an autonomous ICA refers to the adequacy between the needs of the current system and propositions offered by the autonomous theory. The crisis of State positivism can be resolved only with a paradigm shift embodying responses to challenges that made State positivism outdated. The overall point of view supported in this section is the unsustainability of a situation in which the current paradigm does not explain the new developments of law, leading to an urgent, new, and more open-minded theory.

### 5.2.1 End of the State

First of all, the level of the State is outdated and does not correspond anymore to the needs and expectations of the contemporary world. Since 1648, there has been this paradigm of State positivism where the State was the exclusive legislator either alone for its internal affairs or with other states for international affairs. Private entities were forbidden to openly intervene because economy did not belong to the realm of the political and that is why there has been a gap between theory and the actual practice because they intervened in the political arena through their self-regulation. This State positivist theory is what is still taught in Public International Law while private powers are mostly ignored. However, there is more than one element making a new theory desirable.

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<sup>288</sup> Cutler, A. C. (2003). p.54

<sup>289</sup> *Ibidem*. p.104 quoting Walzer, M. (1984).

<sup>290</sup> *Ibid*. p.14

The first element that can be considered as a plea for a new paradigm is the incapacity of the State to deal with globalization. Indeed, globalization means that the basis of State positivism, the territory, is made irrelevant. International trade is less and less dealt within national borders because of their inadequacy. Apart from it, the State lacks also interests in regulation of such matters. In sum, there is a lack of interest from both sides: The State does not have any benefits from trying to deal with international trade matters because these are external elements and the net benefit to the territory of that State can be zero. International trade, at the same time, perceives national courts as parochial and tend, more and more, to prefer international arbitration.<sup>291</sup> Moreover, adversarial disputes are not beneficial for businesses and arbitration seems to be the lesser evil compared to dispute in court.<sup>292</sup> So, the level of State is easily avoided and it no longer corresponds to the needs of the current functioning of economy. Globalization pushes States to their paroxysm and it seems that State positivism has already surrendered. Model Laws, Institutional Arbitration Rules and all these privately-made laws are regulating most of the arbitration proceedings. This ‘end of the State’ or at least of State positivism calls for a new understanding of law which would consider private entities and their already-existing regulatory powers.<sup>293</sup>

Secondly, the impact of postmodernism on legal theory will be studied with an eye on State positivism and legal pluralism. Starting in philosophy and art, postmodernism has also influenced legal theory. It can be said that the whole movement of legal plurality and proponents of the autonomy of arbitration are deeply influenced by postmodern thinking. Postmodernism is characterized mostly by an irreverence, a doubt on the truth which gives way to a total relativism. These characteristics can be found applied to law by Boaventura de Sousa Santos which defines legal pluralism as a “key concept in a post-modern view of law”.<sup>294</sup> However, his legal pluralism is different because “the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions”.<sup>295</sup> To the argument of exclusiveness of State positivists, Santos answers with the fact that people’s life is “constituted by an intersection of different legal orders, that is, by interlegality”.<sup>296</sup> This kind

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<sup>291</sup> Maduro, M., Tuori, K., & Sankari, S. (1956). p.307

<sup>292</sup> *Ibidem*.

<sup>293</sup> See Cutler, A. C. (2003) p.204

<sup>294</sup> Santos, B.S. (1989)

<sup>295</sup> *Ibidem*.

<sup>296</sup> *Ibid*.

of vision paves the way to the end of the State positivism and the start of the possible legal pluralism which would include an autonomous arbitral legal order.

Thirdly, Cutler's assessment of the current situation sees the end of the State because of the "disjunction [that exist] between theory and practice".<sup>297</sup> Cutler talks about this disjunction as causing a possible "crisis of legitimacy".<sup>298</sup> This disjunction is between the theoretical role of States in international law and their actual practice. The difference is a big gap because in practice, non-State entities are powerful and they are creating the real content of private international law while States are recognized as the architects of international law without having any clue of its building because of their territorial limits. Indeed, private entities are not considered as politically relevant and it makes these latter invisible in legal theory.<sup>299</sup> As Cutler held, "The corporation is undertheorized, while the state is overtheorized".<sup>300</sup> One of the reasons for this disjunction is State positivism<sup>301</sup> which pressed for an ultra-focus on States because only they can enact laws. However, the practice shows that social norms of private entities became similar to law while the focus was on the State in the international arena. This rise of private powers is going to be the topic of the next part.

### 5.2.2 Private powers

While the State is decreasing its relevance in international relations, private entities are taking it on the fields in which States have no interest neither capacity to regulate. These are the non-regulated parts which needs to be regulated anyway. As the old saying goes "*ubi societas ibi jus*", there is no society or community without law. For that reasons, when public institutions do not have any incentives to regulate, private powers have some room to regulate. These residual non-regulated parts are created either by lack of incentives by nation-States or by lack of jurisdiction to cover global issues. For example, international commercial arbitration is not regulated as a result of a lack of jurisdiction and that is why party autonomy is authorized and private arbitration institutions are growing all over the world.

Private regulatory powers cannot really be compared to State law because they lack formal recognition as law. Since it is private, these norms are not called law but rather rules or

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<sup>297</sup> Cutler, A.C (2003). p.249

<sup>298</sup> *Ibidem*. p.250

<sup>299</sup> *Ibid*. p.104 *quoting* Walzer, M. (1984). Liberalism and the Art of Separation

<sup>300</sup> *Ibid*. p.255

<sup>301</sup> *Ibid*. p.36

recommendations – it is the domain of soft law. The power of soft law lies in the authority of the drafters of this soft law. For example, the International Bar Association (hereinafter ‘IBA’) issued IBA Rules on the Taking of Evidence in International Arbitration. This rule issued by a private association met the demands of such regulation and the standing of the IBA allowed this soft law to be highly complied in ICA. Regarding other points in ICA<sup>302</sup>, there is not much regulations made by States but rather some soft laws which naturally dominate the regulatory domain in this area. As international trade is growing fast, soft law is much more appropriate for business-oriented decisions because it allows for flexibility and infringement. Cutler writes in her book that the “enhanced significance of soft law, informal, discretionary, ad hoc, and private legal regulation is quite inconsistent with and, perhaps, even eroding the foundation of the rule of law as a system of global governance”.<sup>303</sup> The growth of private ordering is harming public regulations and emphasizing the defaults of the latter. State law is not flexible neither open to negotiation, but rather expensive and time-consuming.<sup>304</sup>

This growth of private powers in practice is not theorized sufficiently. It constitutes a disjunction already studied above. Theory is not recognizing this power that private powers got in practice. This non-recognition harms the values calling for a democratic control because they have power without any constraints. Cutler’s argument is about giving balance between responsibility and power. On her book, she denounces a disjunction between these two elements and argues that private powers are regulated out of the democratic control. This element of the lack of democratic control has been studied above.<sup>305</sup> This important power that private entities retains without being subject to any constraints is also calling for a new paradigm which would recognize these private powers and ascertain a weighted responsibility. Indeed, a legal system once recognized always has its own limits.<sup>306</sup>

To finish with, the desirability of the autonomous theory is clear – State positivism cannot stand anymore and the need of a new open-minded paradigm appears. This would be a paradigm embodying the values of pluralism in legal theory and would entail the arbitral legal order. However, the last question which can be asked now is about the possibility and the conditions of possibility of such a theory.

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<sup>302</sup> Arbitration rules of arbitration institutions.

<sup>303</sup> Cutler, A. C. (2003) p.71

<sup>304</sup> *Ibidem*. p.23

<sup>305</sup> see 5.1.2. *Origins of the dream*.

<sup>306</sup> Once a market has its rules, the ruling of the market fades instantly: “any form of responsive governance faces perennial demands to depart from market discipline.” in Grewal, D. S. & Purdy, J. (2015).

### 5.3 Possibility of an autonomous theory

The utopian autonomous theory of arbitration is desirable. It corresponds to the needs of legal theory which no longer recognizes State positivism as its explanatory paradigm. Instantly, the question relates to the possibility of such a theory and the conditions for that. In this regard, the State must be the last-resort choice while, at the same time, the concept of self-regulation must be one of the conditions for its success.

#### 5.3.1 Self-regulation: condition of a success

It is complicated to see the possibility of a self-regulated system. This difficulty was explained by Hayek and its theory on spontaneous order, also known as *kosmos*. This order is spontaneous – it is the result “de l’action humaine mais non d’un dessein humain”.<sup>307</sup> However, Hayek acknowledges the complexity of conceptualizing a spontaneous order which would function as a natural order just because of its own virtue. Hayek would speak about the *kosmos* of the market in a competitive situation. For this thesis, the spontaneous order could be the autonomous arbitration which would order itself spontaneously. This comparison with Hayek’s *kosmos* is relevant in the extent that the idea of an autonomous arbitral legal order raises doubts on its capacity to exercise his functions in probity and not only in the interests of multinational corporations, as some would argue.<sup>308</sup> However, if the arbitral legal order can be compared to a spontaneous order, there will be no problem because each spontaneous order requires a juridical framework in order to work properly.<sup>309</sup>

What looks like as a chaos in State positivist’s point of view is rather an ordered anarchy. The competitive market that Hayek has theorized as the spontaneous order is not freed from legislation. On the contrary, Hayek recognizes the need for laws to organize the market in order to prevent the failures. Indeed, without the imposition of certain rules, the very existence of the market is at risk. In Hayek’s competitive market, the monopoly of multinational corporations is the risk that he evokes. In the case of the arbitral legal order, the problem is similar because multinational corporations could transform the whole system to avoid the most basic rules of

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<sup>307</sup> Bourdeau, M. (2014). “human’s actions but not from a human’s intentions” (Author’s translation)

<sup>308</sup> see Cutler, A. C. (2003) p.6

<sup>309</sup> “Il a été établi plus haut que l’ordre spontané du marché ne pouvait fonctionner en dehors d’un cadre juridique approprié.” (“It has been established above that the spontaneous order of the market would not work outside of an appropriate legal framework” – Author’s translation) in Bourdeau, M. (2014).

law. In this regard, the Hayekian solution is that there is a need of “an intelligently designed and continuously adjusted legal framework as much as any other. Even the most essential prerequisite of its proper functioning, the prevention of fraud and deception (including exploitation of ignorance) provides a great and by no means yet fully accomplished object of legislative activity.”<sup>310</sup> In this sentence, Hayek recognizes both the needs for a public policy which would stop the fraudulent acts of market players and a need for an ‘intelligently designed’ law. Concerning Hayek’s perspective, he sees the market in the national term and for that reason, transnational concerns are not really included in his analysis. However, from the transnational perspective, this ‘adjusted legal framework’ may be non-state law but rather self-regulation. The only element that Hayek does not wish to have is a planning legislation from the State. So, it can be argued that Hayek would not have refused the idea of a self-regulatory system because it constitutes laws limiting the system.

In the matter of this thesis, it brings a theoretical possibility of an autonomous arbitration which would work as a spontaneous order with its own limitations. The rule of law must be established in the Hayekian market<sup>311</sup> and in that way, it differs from liberalism which was the sole *laissez-faire*. Hayek insists, on the contrary, in the legal framework. This self-regulation would work through reputation-based systems and also through the empowerment of arbitrators, who would have to think themselves as not only chosen by parties but rather members of an autonomous legal order that they help to sustain with each of their decisions. Moreover, what have been said in the previous chapter was that public policy issues would be considered in the transnational level and if needed, State Courts could intervene to stop free-riders.

### 5.3.2 State: last resort

If autonomous arbitration is to be considered already achieved in its majority, there is one element that must be noted on the conditions of its actual application. Paulsson’s view would prevail over Gaillard’s because the actual system would not be totally free from the State. It has been seen that this total freedom was possible in practice but less in theory. For that reason, the autonomous ICA would work “routinely without judicial assistance”<sup>312</sup> but it is impossible to do without the State assistance in the theoretical functioning of international arbitration.

The State is to be the last resort. As the paradigm has not changed yet, it is not possible to think beyond the State and its police powers which are quite convincing when the topic is

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<sup>310</sup> Hayek, F. A. (2009) p.40-41

<sup>311</sup> Foucault, M., Senellart, M., In Ewald, F., & In Fontana, A. (2004). p.179

<sup>312</sup> Paulsson, J. (2013) p.46



enforcement or public policy. There are still some private alternatives for every matter as self-enforcement and consideration of transnational public policy by arbitrators but the State remains the last resort when the proceedings are not going well.

## 6 Conclusion

The dream of Julian D.M. Lew<sup>313</sup> of a pure autonomous ICA is not possible. At least, it is not possible to consider such a theory applied in its entirety in the real world. So, the real question that scholars must respond to is not about the sole possibility of an autonomous ICA but rather about conditions of the implementation of an autonomous system for ICA. The question is then not about the presence or the absence of the State but rather about the level and quality of its presence.

State interference is not always a problem. On the contrary, when State power is used in a virtuous manner, it could increase the overall quality of arbitration proceedings. Cases of non-compliance and abuse of the ICA system illustrate benefits that State intervention can bring. This type of interference is beneficial when framed carefully. Indeed, the role of the State must be framed as precisely as possible when dealing with ICA - businesses must not get afraid of the downsides of the State power. As said by Cutler, the State acts in cases of unnatural activities<sup>314</sup> and it must be the case for ICA as well. It means that the State's role must be framed in a way to allow only interventions when there are abuses of the system. Then, the State is needed and suitable because he does retain police powers and the sense of justice. This role could be considered as undermining the autonomous ICA but, on the contrary, it largely restores its legitimacy in regard of the legal theory. Indeed, it brings limits to a private system, limits that even F. Hayek did not oppose.

The State is present in the prospective autonomous ICA but his power is not triggered as a daily routine.<sup>315</sup> His role is rare and cannot amount to be a part of the basic features of the autonomous system of ICA. The State is then considered as the lesser evil that allows legitimacy and fluidity in the functioning of ICA. The substantial limits to State interference were presented as transnational public policy and self-enforcement. These elements are going to limit the scope of interference of State power in ICA.

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<sup>313</sup> Lew, J. D. M. (2006).

<sup>314</sup> Cutler, A. C. (2003) p.55

<sup>315</sup> Paulsson, J. (2013) p.54