“Party Autonomy” in international contracts: from the makings of a myth to the requirements of global governance

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Abstract: The entry into force of the new Rome I Regulation on the law applicable to contractual obligations (EC n° 593/2008) provides the opportunity to reflect on the makings of the myth of party autonomy (the empowerment of private actors to choose the governing law, and indeed the competent forum for dispute resolution). This article aims to shed light on the way in which the law has accredited freedom of choice as the foundational principle of a whole parallel world of private transnational ordering. The interests thus served, ostensibly those of a purported community of merchants, do not necessarily encourage adequate regulation of cross-border economic transactions in the field of trade or investment. Since it would be unrealistic and indeed to an extent undesirable to challenge the inexorable trend towards contractualisation of private international law, it is suggested that a better path would be to consider that the evident lack of accountability and transparency in the legal principles governing private economic activity beyond state borders might be filled by turning to emerging principles of good governance, designed to satisfy the requirements of democracy in (equally necessary but equally problematic) public decision-making processes now taking place in supranational institutional settings without government.

Résumé: L’entrée en vigueur du nouveau règlement Rome I sur la loi applicable aux obligations contractuelles (CE n° 593/2008) fournit l’occasion de réfléchir à la construction du mythe de l’autonomie des parties (le pouvoir donné aux acteurs privés de choisir la loi applicable, et en réalité le juge compétent pour la résolution des litiges). Cet article veut mettre en lumière la façon par laquelle la loi a posé la liberté de choix comme le principe fondateur de tout un monde parallèle de commandes transnationales. Les intérêts ainsi servis, ostensiblement ceux d’une prétendue communauté de marchands, n’encouragent pas nécessairement une régulation adéquate de transactions économiques trans-frontières dans le domaine du commerce ou des investissements. Comme il ne serait pas réaliste et en réalité dans une certaine mesure inopportun de vouloir contrer la tendance inexorable vers la contractualisation du droit international privé, il est suggéré qu’un meilleur chemin consisterait à considérer que le manque évident de responsabilité et de transparence dans les principes juridiques gouvernant l’activité économique privée au-delà des frontières des États pourrait être comblé en se tournant vers les principes émergents de bonne gouvernance, destinés à satisfaire les exigences de la démocratie dans les (également nécessaires mais également problématiques) processus de décisions publiques qui ont lieu aujourd’hui dans des cadres institutionnels supranationaux dépourvus de gouvernements.

Zusammenfassung: Die Verabschiedung der neuen Rom-I-Verordnung zum auf Verträge

1. Now enshrined in Article 3 of the Rome I Regulation¹, the principle that

¹ The New ‘Rome I’ Regulation on the law applicable to contractual obligations (EC n° 593/2008) replaces the 1980 Rome Convention as from December 17th 2009 before the courts of all Member States except Denmark. Academic criticism once rife about the lack of legal basis for the transformation of the Convention into a Community instrument, or the violation of the principle of subsidiarity, seems to be dwindling, no doubt in the face of a political ‘fait accompli’. In the case of the United Kingdom, a decision of the Commission of 22nd December 2008 extends its application to that country in response to the latter’s request to opt-in, requiring it to implement the Regulation by its date of entry into force in other Member States. The United Kingdom’s own decision to opt-in is the result of a public consultation, which deemed it to be in the interest of British business to participate in the uniform rules applicable throughout the rest of the European Union. Indeed, certain perceived improvements made to the substance of the Rome Convention or to the Commission’s own proposals for the new instrument owed much to the United Kingdom’s own stance during the negotiations; a ‘final positive result’ once achieved, it was considered economically and strategically worthwhile to join in (see point 104 of the UK Government’s Response to the Consultation: ‘Some respondents expressed the view that our original decision to opt out of the Regulation had helped to achieve the final positive result. However, they also made the point that if the UK did not participate in Rome I now, having achieved such a good result, it could significantly weaken the effectiveness of our right to not participate in future and damage our negotiating strength in relation to other EU dossiers’). In this respect, the Regulation introduces several noteworthy features, all designed to enhance legal certainty throughout the choice of law process. Most changes, which include efforts to simplify and modernise the applicable rules, are explicit, with additional articles entailing a modification in the initial numbering; some however nestle more discretely among the recitals, whose normative status is anything but clear. Most remarkably no doubt, the principles determining the law applicable in the absence of choice have been overhauled, and the hallmark of the Rome Convention, the sophisticated concept of ‘characteristic performance’, has practically disappeared in favour of a set of special – and no doubt more predictable – rules for various categories of
has come to be known as ‘party autonomy’\(^2\), according to which parties to an international business contract are free to choose the governing law\(^3\), emerged apparently unscathed by the upheavals which affected some of the other important provisions of the Rome Convention. Celebrated as the cornerstone of legal regulation of cross-border commercial transactions\(^4\), it rallies apparently unquestioned support\(^5\) as the expression of a tradition common to developed contracts. In the same vein, consumer protection has been extended to cover the holes gradually revealed in the case-law of member States art 6; choice of law rules for insurance contracts, previously contained in directives and excluded from the Rome Convention, have been included for clarity’s sake within the Regulation (art 7); contracts of carriage of goods are now gratified with an article to themselves (art 5); multilateral security systems are introduced among the default rules for specific categories of contract (art 4h); assignment of intangibles appear in art 14. Arguably more significantly still – although many might claim that such significance is of symbolic rather than practical import, particularly as some Contracting States had opted not to subscribe to the faculty thus conferred – the overture made by the old art 7 of the Rome Convention towards international judicial cooperation by allowing courts to give affect to \textit{lois de police} or internationally mandatory rules of a third state is now a thing of the past, although account may still be taken, according to an exception (closely resembling the Court of Appeal’s 1920 decision in \textit{Ralli Bros v Compania Naviera Sota y Aznar}, 2 KB 287), of prohibitive statutes at the place of performance, when it is not the country whose law otherwise governs the contract. All these changes have been thoroughly analyzed, so that for the moment, there is little to add before we know how practice has received them and whether the expected benefits from the greater certainty of the new rules are effective. The ambition of this article is not therefore to repeat the abundant commentaries already written on the improvements (or at any rate, the novelties) introduced by the Regulation. For some excellent overviews see P. Lagarde and A. Tenenbaum, ‘De la Convention de Rome au règlement Rome I’ \textit{Rev crit DIP} 2008, 727; P. Solomon, ‘The Private International Law of Contracts in Europe: Advances and Retreats’ \textit{Tulane Law Review} 82 (2008) 1709, 1722; P. Mankowski, ‘Die Rom I-Verordnung’ \textit{Zeitschrift für Europarecht} 2009, 2, 3; F. Garcimartín Alférez, ‘The Rome I Regulation: Much Ado about Nothing?’ \textit{European Legal Forum} 2008, I-6.


\(^3\) On the meaning of ‘law’ in this context, see below § 10.

\(^4\) According to recital 11, Rome I Regulation, ‘The parties’ freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations’. The ambit of party autonomy is seriously restricted, on the other hand, in the context of contracts other than B to B. For three categories of reputedly weaker parties (consumers, employees and insurance policy holders) party choice of law is allowed only to increase the protection provided under the law of the weaker party’s habitual residence (or place of employment). When this law is that of a Member State of the EU, such protection will result largely from EU directives, rendering choice of the law of another Member State virtually pointless in most cases and the choice of the law of a third country practically impossible given the comparatively high level of protection provided.

\(^5\) This tendency to consider freedom of choice as so natural as to need no justification is
nations and beyond. In this propitious environment, it has spawned the principle of freedom of choice of forum, which is in turn relayed by both European and international instruments. Indeed, its centrality in the European tradition is so taken for granted, or at least, appears to be so solidly rooted in the history of western private international law that astonishingly little attention has been paid to the function with which it is henceforth invested – or rather, the function being implicitly accepted, the steps which led there – within a vastly changed economic and political environment. Instead, any resistance that might still be opposed to its natural expansion now appears to require a crusade ‘to promote the principle of party autonomy’. This paper attempts to deconstruct the technical process by which the law has accredited freedom of choice as the foundational principle of a whole parallel world of identical in the domestic laws of Member States: see for example, in French law, C. Pérès, ‘La liberté contractuelle et l’ordre public dans le projet de réforme du droit des contrats de la chancellerie (à propos de l’article 16, alinéa 2, du projet)’ Rec Dalloz 2009, n° 6, 381; for a common law approach see, A. Briggs, Agreements on Jurisdiction and Choice of Law (Oxford: Private International Law Series, 2008).

6 See for a recent example, H. Heiss, ‘Party autonomy’, in F. Ferrari and S. Leible (eds), Rome I Regulation: The Law Applicable to Contractual Obligations in Europe (Munich: Sellier de Gruyter, 2009). The article starts likes this: ‘Party Autonomy: The Fundamental Principle in European PIL of Contracts. Party autonomy has been and will remain the fundamental principle in European private international law in matters of contractual obligations. It came without surprise when the Rome Convention of 1980 codified this principle in its art 3.2. It is also no surprise that Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) restates the principle in very similar words’…

7 See recital 14, Regulation Brussels I: ‘The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation’.

8 See the 2005 Hague Convention on choice of forum agreements (comp too the provisions on jurisdiction and arbitration in the new 2009 UNCITRAL ‘Rotterdam Rules’ on the international carriage of goods: below § 23).


10 This appears to warrant the negotiation of yet another, world-wide, convention designed to ensure freedom of choice: the website of the Hague Conference announces that ‘The Council invited the Permanent Bureau to continue its work on promoting party autonomy in the field of international commercial contracts. In particular, the Permanent Bureau was invited to form a Working Group consisting of experts in the fields of private international law, international commercial law and international arbitration law and to facilitate the development of a draft non-binding instrument within this Working Group’.
private transnational ordering, complete with its own institutions and governing principles. The interests thus served, ostensibly those of a purported community of merchants, do not necessarily encourage adequate regulation of cross-border economic transactions in the field of trade or investment. Since it would be unrealistic and indeed to an extent undesirable to challenge the inexorable trend towards contractualisation of private international law, it is suggested that a better path would be to consider that the evident lack of accountability and transparency in the legal principles governing private economic activity beyond state borders might be filled by turning to emerging principles of good governance, designed to satisfy the requirements of democracy in (equally necessary but equally problematic) public decision-making processes now taking place in supranational institutional settings without government.

2. As a methodological concept, party autonomy developed throughout the XXth Century, like freedom of contract in domestic law, as an essential component of the liberal model of market regulation. Today, its consequences are increasingly far-reaching, justifying the spread of market mechanisms to ever-new fields. The most remarkable illustration is certainly the extraordinary growth and institutionalisation of international commercial arbitration – particularly remarkable in the field investment contracts between private, often multinational, actors and developing states – which has now established itself as a largely auto-poetic, parallel, world of private justice, supposedly secreted by a self-regulating transnational merchant community. Less visibly, party autonomy now also provides the foundation for the extension of the arbitra-

11 And indeed, even a legal philosophy: see the excellent account of the three theoretical representations of international arbitration by E. Gaillard, 'Aspects philosophiques du droit de l’arbitrage international’ RCADI 2007, 329.

12 On contract as a methodological concept and its varying role in comparative law, see the enlightening account by G. Samuel, The Law of Obligations (Cheltenham: Edward Elgar, 2010) 56 and importantly 26: ‘Perhaps then there is nothing inevitable about contract’. Much the same can be said, of course, for party autonomy in private international law.

13 And subject to similar limits when weaker parties are involved: see n 4 above.

14 The progression of party choice of law in EU legislation is particularly significant. It now appears in the field of tort (Regulation Rome II, no 864/2007, art 14): ‘To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case’ (recital n° 31).

15 On the auto-poiesis of the law and the subsequent collisions of autonomous systems of private ordering, see A. Fischer-Lescano and G. Teubner, ‘Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law’ 25 Michigan Journal of International Law 999 (2004). To a large extent, the belief in an integrated private merchant community echoes that of a benign public community of liberal states which
tion market to judicial services in the global arena\footnote{See J. Damman and H. Hansmann, ‘Globalizing Commercial Litigation’ 94 Cornell Law Review no 1 (2008); and below § 26.}, expanding free choice of law or forum in areas deemed in the past to involve public policies or the common weal\footnote{A.E. von Oeverbeck, ‘L’irrésistible extension de l’autonomie de la volonté en droit international privé’, in Hommage à F. Rigaux (Bruylant, 1993) 619. Today, a new example can be found in the draft ‘Rome III’ Regulation in the field of divorce.}. Indeed, the fact that universal values and common regulatory policies are, realistically, hard to find, undoubtedly contributes to enhance the status of free choice as an apparently desirable methodological basis on which to build a peaceful, democratic, liberal crossborder society. In a similar vein, party autonomy also entertains a symbiotic relationship with free movement within the European Union, which in turn explains why consumer transactions, employment contracts and even family relationships\footnote{On the indirect expressions of party autonomy in family law through free movement, of which choice of law can be seen to be the metaphorical expression in that it allows virtual displacement from one jurisdiction to another, see H. Muir Watt, ‘Aspects économiques de droit international privé (Réflexions sur l’impact de la globalisation économique sur les fondements des conflits de lois et de juridictions’ RCADI 2005, vol 307, 25-384 (hereafter ‘Aspects économiques du DIP’); T. Marzal Yetano, ‘The Constitutionalisation of Party Autonomy in European Family Law’ Journal PIL 2010, 155.}, are not immune from the indirect effects of party choice, notwithstanding the ostensibly different path ‘visible European regulation’\footnote{This expression borrowed from H. Micklitz, ‘The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation’ 28 Yearbook of European Law 3 (2009).} has taken in this field.

3. The expansion of party autonomy as a foundational principle in cross-border economic transactions is apparently unimpeded by the fact that significant issues as to its real ambit remain unsettled: for instance, whether freedom of choice authorises the choice of non-state norms, or how an international contract can be defined; a similar haze surrounds its relationship to overriding mandatory rules\footnote{For a curious re-discovery of a supposedly novel category of rules which are mandatory in domestic law but may be set aside in international contracts, see M. Lehmann, ‘Liberating the Individual from Battles Between States – Justifying Party Autonomy in Conflict of Laws’ 41 Vanderbilt Journal of Transnational Law 381-434 (2008). For a highly enlightening analysis of ‘semi-mandatory’ overriding rules, see L. Radicati di Brozolo, ‘Mondialisation, juridiction, arbitrage: vers des règles d’application semi-nécessaires?’ Rev crit DIP 2003, 1; for equally rich accounts of the ‘available’ status of national mandatory rules, see G.P. Romano, ‘Règles internationalement supplétives et règles internationalement disponibles’, in Regards comparatistes sur le phénomène contractuel (PU-AM, 2009); C. Gibson, ‘Arbitration, Civilization and Public Policy: Seeking Counterpoise between arbitral Autonomy and the Public Policy Defense in View of ERCL 3/2010 Horatia Muir Watt 6
gree, its dominant justification is essentially utilitarian, linked to the needs of international trade. Although methodological, political and economic objections do appear from time to time outside mainstream doctrine, they remain largely unheeded; thus, neither the functionalist arguments drawn from governmental interests analysis, nor the potential democratic deficit resulting from the permission to contract out of local rules, nor indeed the uncertain economic rationality underlying the apparent indifference of states to free-riding by foreign parties on proven or novel regulatory models, detract from its remarkable success.

4. Such unquestioning acceptance of the principle and foundational status of party freedom points to its status as a foundational myth of private international economic law. This myth owes much to the theoretical framework within which this discipline developed its vision of the world. Indeed, it evolved within the Westphalian model of the public international legal order, composed (exclusively) of equal and sovereign states – at least, irrebuttably


21 Kant’s philosophy of personal autonomy implies constraints grounded in a system of ethics which distances individual self-determination from the pursuit of self-interest.

22 Romano, n 20 above.


25 Myths in law are empowering narratives, which have an important epistemological function as aids to knowledge (Ch. Atias, Philosophie du droit [Thémis: PUF, 2004] devoting a chapter to ‘La mythologie positive: Présence des mythes dans le droit; Vers une théorie des mythes juridiques’). Their relationship with legal fictions (defined by Rudolf von Jhering in Law as Means to an End as a technique borne of necessity), are analogous to those of legal principle with legal categories. Thus, party autonomy is a myth which tells of an autonomous community of private actors with specific but homogeneous needs who are enabled by their sole membership of this community to step out of any given state’s courts and regulation. On this basis has grown up, inter alia, a particularly powerful legal fiction according to which arbitration awards are jurisdictional and must therefore benefit from the recognition and enforcement processes available to foreign judgments (see below § 16). In a similar way, the myth of a public international ‘legal order’ provides the framework for the elaboration of the legal fiction that states as subjects of international law are sovereign and equal.

26 Indeed, in many respects, the myth of party autonomy reinforces the equally mythical ‘private history’ of international law: see on the latter, showing the distinction between public and private international law to be a myth, A. Mills, ‘The private history of international law’ 55 JICL 1 (2006).

presumed as such. Together, state sovereignty and freedom of contract combined to produce a liberal view of the relationship between law and market in the transnational economic sphere. Thus, according to traditional discourse, the empowerment of private actors to choose the law governing their relationship is a natural consequence, and indeed the mirror image, of freedom of contract in the domestic sphere. While of course its ambit is far greater, it is nevertheless and similarly subject to the limits – whether framed in terms of public policy or overriding mandatory rules – imposed on private parties in the name of the general interest, by a presumptively like-minded community of sovereign states similarly desirous of promoting the reciprocal benefits of international trade. The reasons for which any sovereign state would allow parties, subject to these limits, to contract out of its own rules and substitute those of a neighbouring community, are to be found both in the purported special needs of cross-border transactions and the dilution of the claim of any


28 On the strength of a myth as powerful as that of party autonomy, just over the (similarly artificial) border in private international law. See Mills, n 26 above.

29 Interestingly, a historical and comparative study of the concept of freedom of contract or enforceable promises in domestic law reveals that the idea of contract as ‘private legislation’, so elegantly codified as such in the Napoleonic Code (now 1134 Code civil), certainly originated as much a means to justify binding the parties to their word – and no doubt in the French post-revolutionary context, to keep the judge at bay – as to empower them to create their own brand of law. Freedom of contract is as much about obligation as about empowerment. Within the common law tradition, Geoffrey Samuel shows that while the principle of enforceable promises was also established during the nineteenth century, contract took time to emerge as a methodological principle and even then was a very far cry from the concept of ‘private legislation’ (Samuel, n 12 above, 54: ‘one might note that contract was enforceable at common law not as a form of private legislation, despite the consistent emphasis during the 19th century on the doctrine of freedom of contract’). It was in Continental Europe that the evolution from obligation to empowerment was the most significant, clearly influencing the emergence of private autonomy in private international law where the idea of private legislation was taken as far as meaning a ‘contrat sans loi’ at the dawn of the twentieth century (in France: Cass civ 5 décembre 1910, *American Trading C*, *Grands arrêts jurispr f DIP* by B. Ancel and Y. Lequette, n° 11, before being brought back by the 1950s within the fold of les ‘droits étaiques’ under the moderating influence of Henri Batifol: see Cass civ 21 juin 1950, *Messageries maritimes, ibid*, n° 22).

30 Due to its boot-strap quality (less readily accepted in English law: see Briggs, n 5 above, n° 10.28). However, the traditional justifications for the empowerment of parties to determine contractually the law governing the existence and validity of the contract containing the choice are either that a cross-border transaction does not ‘belong’ exclusively to any one state so that none has naturally any superior title to do so, or that the applicable law results from the ‘localisation’ of the contract, of which party choice is merely an indication (H. Batifol, ‘Subjectivisme et objectivisme en droit international privé des contrats’, *Mél Maury* vol I, 39).
one state to regulate them exclusively. No ‘contrat sans loi’, then, but a regulated freedom to be subject to the sovereign legal order of one’s choice.

From this representation of the relationship between free choice of law and sovereign authority stems the fiction of an autonomous private transnational legal order, widely accepted as the (conceded) source of regulation of cross-border relationships between economic actors.

5. Quite remarkably, this representation of party freedom as being subordinate to state authority appears to have survived both the demise of the liberal state in the domestic sphere and the decline of the Westphalian model in international relations31 – it is thus apparently unaffected by the transformation of the nature and function of private law32, the profound changes induced by globalisation in the structure of the international legal order, and more generally the tectonic upheavals within the theory of law and sovereignty and the reality of cross-border trade and investment33. Yet within the changed normative, political and economic environment, party autonomy has evidently ceased to imply subordination of private actors to state authority, but actually reverses this relationship. Today, parties are empowered to attain ‘regulatory lift-off’ because the liberal state has renounced the means to ensure the primacy of its own – or another’s – public policy regulation over ‘private legislation’34. By allowing parties to cross jurisdictional barriers unhindered35, the principle of free choice generates a competitive market for legal products and judicial services36; it can no longer be represented as a carefully monitored concession of the liberal sovereign state37. Philosophically, the shift from ob-

31 On the components of the Westphalian model and the decline of the sovereign state, see Jansen and Michaels, n 27 above.


33 A similar hiatus can be observed at the substantive law level, where academic representations of general contract law (including the traditional construction and ambit of freedom of contract) do not seem to have integrated the transformations induced, in particular, by the ‘competitive contract model’ which now inspires contract law in the European Union. Thus, on ‘the forgotten issues in the codification projects on European contract law’, including the draft academic frame of reference, see Micklitz, n 19 above, 3.


35 Through liberalisation of control at the enforcement stage: see below § 16.

36 On the competitive paradigm, see Muir Watt, n 18 above (Aspects économiques du DIP), 51 et seq.

37 Jansen and Michaels, n 27 above.
ligation to empowerment can be described in Foucault-ien terms as a move to a neo-liberal model of private governance.

If the evolution has gone to a large extent unnoticed, the explanation may lie in the reluctance of private international lawyers in the European tradition to come to terms with contemporary epistemological changes which go to the heart of the public/private distinction or the many disciplinary categories through which the law approaches the economy, and their impact on the dogmatic foundations of the savignian-multilateral approach to the conflict of laws. Indeed, the latter are still implicit in the way in which the Rome I Regulation continues to elaborate the concept of party autonomy today. The first section of this paper will analyse this methodological misfit between the principle of free choice of law as it grew up within the framework of the liberal state, and the needs of governance in a global economy (I). The second section will show how the relationship between party autonomy and mandatory rules designed to protect public policy has been reversed by the development of free choice of forum and arbitration, along with the liberalization of the recognition of judgments and awards. Indeed, overriding regulatory policies through which sovereign states purportedly retain the last word over private economic activity, have been reduced to a ‘semi-mandatory’ status (II). The expansion of party autonomy as a principle of governance is all the more problematic that in fields as important as international sales or carriage of goods, third parties are included within its ambit, by a sort of ‘plug-in’ effect which generalizes the scope of contractual ordering (III). At the same time, as the fourth section will show, the expansion of international commercial arbitration in the name of freedom of contract has led to the establishment of ‘a global market for judicial services’ which is seriously problematic in

38 Both are contained within the principle of party autonomy: see n 29 above.
40 The multiplicity of legal categories is ignored by the traditional structure of private law: see Micklitz, n 19 above, 7; ‘Fields such as network law (telecommunications, energy, transport), private competition law (*Kartellprivatrecht*), public procurement law, intellectual property rights, fair trading law, investor protection and company law, anti-discrimination law, product safety and food safety law, and standardization of service contracts are largely set aside’.
41 On its content, rise and fall, see D. Bureau and H. Muir Watt, *Droit international privé* (2nd ed, Thémis: PUF, 2010) vol 1, n 357.
42 See the references n 20 above.
terms of law-production (IV). This shows the need for countervailing principles apt to provide democratic legitimacy for decision-making processes that bind participants to international trade.

I. ‘Private legislation’ and the liberal state: theoretical representations of party autonomy

7. The notion that party autonomy in the international arena, like freedom of contract in the domestic context, is a concession by the liberal state to private ordering, rests on theoretical premises which are also to be found, outside the field of contract, at the heart of multilateral conflicts methodology. Thus, the very representation of the conflict between laws within the continental savi gnian tradition presupposes a certain commonality of normative preferences among like-minded (and pre-regulatory) sovereigns45. The conflicting claims of idiosyncratic national policies over cross-border situations have no place within this analysis. In particular, private law – whose province is that of horizontal relationships between non-state actors – is perceived to be largely facilitative of private transactions46, so that a conflict of laws may be seen essentially as the virtual availability of as many interchangeable sets of rules as there are connections between a given set of facts and different legal systems. Because any system of private law is supposedly of potentially universal scope47, the determination of the applicable law operates through external criteria (that is, external to the policies involved in each case48), compatible at a high level of generalisation with the purported needs and interests of each disciplinary area and of international commerce as such. In the field of contract, party autonomy emerged on similar theoretical grounds; national laws were all equally available as it were49, none asserting any particular claim over

44 See Damman and Hansmann, n 16 above.
45 C.F. von Savigny’s ‘universal community of laws’ appears in his Treatise of Roman Law (1848) vol III, § 361. See Bureau and Muir Watt, n 41 above.
47 This supposition stems from a conception of private law as expressing a common truth based on the ‘nature of things’ and devoid of any regulatory content. It explains the hostility of XXth century European academics to the invasion of governmental interest analysis, presented as impracticable: see G. Kegel, ‘The Crisis of the Conflict of Laws’ RCADI 1964, vol 112, 91.
48 This is precisely why functionalism was so firmly rejected; see Kegel, n 47 above.
49 On the conflict of laws as a choice between all the co-available (private) laws bearing a connection to the case, each potentially apt to bring an adequate solution to the legal issue, whatever its geographic context, P. Mayer, La distinction entre règles et décisions en droit international privé (Paris; Dalloz, 1973) n° 140 et seq, explaining the difference between a conflict of laws and a conflict between decisions, which gives rise to a more
transactions which reached beyond national borders\textsuperscript{50}. In a context conducive
to the growth of free trade, party choice, relaying freedom of contract in
domestic law, appeared as appropriate a criterion as any.

8. But the power thus conceded to private actors to harness state legislation to
the needs of their transaction was perceived as doubly conditional, presup-
posing two distinct safeguards. The first, which was already enshrined in the
Rome Convention, restricted party autonomy to international contracts – or
rather, due to the extraordinary difficulty of defining this cardinal require-
ment, to contracts of which all the elements relevant to the situation at the time
of the choice were not located within one state. The Regulation introduces, in
addition, the idea that, for the purposes of European legislation, a domestic
contract is one which is connected solely to Member States’ territories as a
whole (Article 3–4)\textsuperscript{51}. However, whether the perspective adopted is national
or, now, European, it presupposes a bright line separating the parochial, clos-
ely regulated world of the domestic (or intra-European) economy, from the
area of freedom where, beyond national (or European) frontiers, state policies
relax their grip. Like international commercial arbitration whose growth fol-
lowed on the generalisation of party autonomy as choice of law, the empo-
werment of private actors is deemed to cater to the special needs of interna-
tional economic intercourse. At the same time, this implies that sovereign
states are unconcerned by transactions which do not directly involve their
domestic economy; in a world where market was coextensive with territory,
this idea translated methodologically into a presumption of territoriality of
national regulation. And indeed, this separation of the two worlds of domestic
and international transactions had a functional justification: social and econo-
ic policies were non-negotiable in homogeneous cases which fell clearly
within their regulatory ambit; on the other hand such policies were not en-
dangered by contracting-out when the relationship, bearing foreign elements,
was not perceived to ‘belong’ to the local economy.

9. However, the rise of the regulatory state\textsuperscript{52}, entailing the multiplication of
overriding mandatory rules or ‘lois de police’ claiming to extend domestic

\textsuperscript{50} For an analysis of this theoretical standpoint, in the field of contract, see Romano, n 20
above.

\textsuperscript{51} Where all other elements relevant to the situation at the time of the choice are located in
one or more Member States, the parties’ choice of applicable law other than that of a
Member State shall not prejudice the application of provisions of Community law, where
appropriate as implemented in the Member State of the forum, which cannot be dero-
gated from by agreement.

\textsuperscript{52} The first sign of regulatory rules in Europe were export controls put in place between the
two world wars. They gave rise to path-breaking methodological reflection at that time
in Germany on what later became to be known as overriding mandatory rules: on the
social or economic policies to situations with foreign elements, made it difficult to maintain the bright line between domestic and international spheres in terms of the respective intensity of state interests. In other words, the idea that sovereign regulatory concerns stopped at national borders could not survive either the appearance of new forms of market regulation or the growing interconnexion of local economies. Across the Atlantic, attempts were made to adjust methodology to the increasingly regulatory function of private law. Although these attempts were not always successful in the long run53, the important lesson of the American realist revolution was that multilateralism was unworkable in a world where private law is neither purely facilitative nor indeed interchangeable. In a functionalist perspective, conflicts of laws arise from the existence of contradictory regulatory interests, identified by sounding out the policies of the states involved. To a certain extent, these arguments were taken into account when, first in the Rome Convention and now in the Regulation, room was made for ‘provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract”54. Such rules may override the otherwise applicable law when a court thinks this makes sense in terms of the policies they express55. However, they are considered as strictly derogatory, in the sense that they do not represent the ‘normal’ way of reasoning in the conflict of laws. Therefore, they do not affect the initial requirement that the contract be international, or non-domestic, for the principle of party choice to come into play as a choice of law rule, accrediting in turn the distinctiveness of the world of international transactions. Maintaining this multilateralist fiction contributes to perpetuate the underlying world-view of a community of states conceding an area of party freedom beyond their frontiers, but over which they retain the ultimate control.

10. This representation of an orderly world in which benign liberal states determine the outer limits of private economic activity no doubt explains why, today, within the Rome I Regulation, like half a century ago in national case-law56, although parties may choose any law in the world, with no requirement


54 Under art 9-2 of the Rome I Regulation: ‘Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum’.

55 Given the links between the facts and the territory/economy of each potentially implicated state. See expressing similar requirement of a close link to the contract, the Basel Resolution of the International Law Institute, 1991, on autonomy in contracts between private actors (art 9).
of any geographical link to the state whose law is thus chosen\textsuperscript{57} and no condition as to the completeness, modernity or democratic legitimacy of its legal system, their freedom nevertheless stops short of non-state norms such as the \textit{lex mercatoria} or the Unidroit rules for international contracts. These, according to recital 13 of the Rome regulation, may merely be ‘incorporated by reference’ into the contract, where they are necessarily subject to the contrary provisions of the governing law\textsuperscript{58}. Underlying this second restriction is the idea that the contract law of liberal states is presumptively interchangeable, because it is deemed to be based on shared conception of societal needs (albeit largely facilitative and exclusive of specific regulatory interference), whereas norms of purely private origin cannot be supposed to implement similar conceptions. In other words, according to this vision, it was important that the parties should not escape the network of state regulation.

11. The fear that the concept of ‘private legislation’ – or, even more forbidding, le \textit{contrat sans loi} – inspires may or not be justified: it could well be, as frequently argued, that the content of the new law merchant has now developed sufficiently so as to present a coherent, reasonably complete and generally acceptable set of operative principles; it is also arguable that carefully thought out principles of substantive contract law drafted at an international level may be more valuable and adjusted to the needs of cross-border trade than many state laws which might be less progressive, less clear, more parochial etc. In economic terms, the burden of over-regulation could be an evil greater than excessive freedom in the international sphere. But the point here is

\textsuperscript{56} See the \textit{Messageries Maritimes} case cited n 29 above.

\textsuperscript{57} This requirement took longer to disappear in the US. See UCC \textsection{}1-105 (1): ‘Parties’ Power to Choose Applicable Law. Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state’. Previously: ‘(2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated’. Under a functional analysis, the requirement of a reasonable relation reappears through the identification of state interests (which, obviously, will not exist in the absence of a link with the economic transaction involved).

\textsuperscript{58} ‘(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention’. Of curse, this restriction to the aptitude of a body of substantive non-State principles of international trade law (or \textit{lex mercatoria}) does not apply to those enshrined in an international convention of uniform law, such as the 1980 Vienna Convention on the international sale of goods (whose provisions are themselves merely default rules, however, under art 6) or the Geneva Convention of 19th May 1958 on the International Carriage of Goods by Road (whose provisions, by contrast, are mandatory, under art 41-1).
that if the mandatory social and economic policies of connected states are implemented whenever it makes sense to do so in functional terms, then the quality of whatever non-state contract norms the parties may have chosen – in the unlikely event they have committed themselves to incomplete, incoherent or non-progressive principles – hardly matters. In the absence of a specific regulatory interest, which would trump any other chosen rule anyway, the choice of non-state law does not endanger the public policies of potentially concerned states, of which, on the other hand, the protection is inadequately ensured by the sole requirement that the parties choose a state law.

12. Like the condition of internationality, the requirement of the public origin of the chosen law merely serves to perpetuate a vision of the world, including the relationship between regulation and party autonomy, on the foundations on which the myth of autonomous private ordering was built. Although the demise of the liberal state has now rendered the liberal scheme largely obsolete, it continues no doubt to serve powerful economic interests to maintain the illusion that private actors are subject to limits corresponding to a (albeit nebulous) public interest. Be that as it may, beneath its smooth surface, this illusion is increasingly undermined by the growing empowerment of economic actors, who attain ‘regulatory lift-off’ in face of the receding authority of states. In other words, party choice, for all its liberal foundations, has paved the way for the primacy of the neo-liberal model. Hence the idea, firstly, that party autonomy be recognized for what it is – a myth developed to provide a visible legal basis for auto-poëtic private ordering; this involves deconstructing the various legal fictions which reinforce the empowerment of economic actors. Secondly, like processes of public regulation or decision-making in transnational institutional settings without government, such private ordering should, in so far as it purports to bind participants to international trade, be amenable to governance principles of accountability and transparency.

II. Undermining regulation: ‘barrier-crossing’ through free choice of forum

13. As we have seen, under the liberal paradigm, party autonomy was desig-

59 It is highly unlikely that the parties make a foolish choice (this contract shall be governed by the rules of monopoly). If they do, however, it is unimportant (the problem is theirs) as long as the court (exercising jurisdiction or supervision) can enforce public values or policies nevertheless. For a more sophisticated version of this argument, see D. Sindres, La distinction entre ordres et systèmes juridiques dans les conflits de lois (Paris: LGDJ, 2008) § 398 et seq.
60 Comp Romano, n 20 above.
61 See n 33 above for this expression.
62 On the difference between the two models, see n 39 above.
ned to be exercised within a political framework which ensured the ultimate primacy of market regulation. Thus, while contractual choice of law might be allowed or encouraged in the interests of cross-border trade, its corollary was the power of the community of states – specifically, those which were sufficiently closely connected to the parties to justify their courts being seized – to determine the limits of party freedom. In a sense, this scheme replicates in an international context the sphere conceded to private autonomy in purely domestic situations; overriding derogatory provisions of closely connected states are likewise supposed to fix the boundaries within which private empowerment is acceptable. Similarly, state largesse extends consensually, in the interests of cross-border trade, to the private ordering of jurisdiction over contractual disputes in the form of choice of forum or arbitration clauses; however, here again, this does not imply that the chosen forum itself is not constrained to implement (its own) regulatory policies, nor does it mean, if indeed the bargain includes a more permissive forum, that its decision – judgment or award – may prevail over the mandatory policies applicable at the place of enforcement. Indeed, the very concept of 'lois de police' or derogatory, overriding provisions ostensibly implies that there remain absolute limits to party autonomy, which are apt to apply either in proceedings before the chosen court or at the enforcement stage. However, in reality, jurisdictional mobility through choice of forum means that there is never any guarantee that such policies will be upheld.

14. Contractual choice of court is but one of the many forms of free jurisdictional movement, which has gradually transformed law – including its mandatory provisions – into mere product on a global market. Such change has also come about through increased financial mobility of powerful investors, who are in a position to shop for the most congenial – or the least costly – regulatory environment. It can also come in the indirect form of consumer

63 The disappearance of foreign 'lois de police' (except those which render the contract unenforceable at the place of performance) from art 9 of the Rome I Regulation (comp, more propitious to international cooperation on this point, art 7 § 1 of the Rome Convention; for a first and recent application, see the French decision, Cass com March 16th 2010, A.P. Moller Maersk A/S v Société Viol Frères, JCP Ed. Gén. 2010 II.996, note D. Bureau and L. d’Avout) means that, in any event, derogatory overriding provisions other than those of the forum state will be ignored. There is of course no need to point out that an arbitrator is under no duty to apply mandatory rules of third states, and is indeed no doubt precluded from doing so, except to the extent that they impact on enforcement of the award.

64 It metaphorical free movement in that it obviously does not involve any geographical transfer from one location to another. Indeed there are many expressions of virtual free movement. Thus, free movement of goods gives equivalent mobility to consumers through choice of product regimes see Muir Watt, n 18 above (Aspects économiques du DIP), § 134, 177 et seq.

65 Muir Watt, n 18 above (Aspects économiques du DIP), 140 et seq and the references.
arbitrage when there is free movement of goods and services. However, the general acceptance of free choice of forum in cross-border litigation, in the name of party autonomy, along with the generalised favour for the validity of arbitration clauses in international contracts and the spectacular rise of arbitration has no doubt been the most significant factor in the reversal of the status of regulation in respect of party choice. Traditionally justified in terms of the promotion of international commerce through the benefit of predictability, choice of forum agreements also contribute by the same token to procedural economy and partake of litigation risk-management. Reputedly more flexible, international commercial arbitration presents all these advan-

66 On the ways in which courts have, through using tools such as forum non conveniens, fostered a regulatory race to the bottom by depriving the local workforce of jurisdictional mobility, see Muir Watt, n 18 above (Aspects économiques du DIP), §173, 215.


68 The cost of diverse rules of civil and commercial jurisdiction for litigants, whether for the weaker party or, more recently, businesses (J.C. Damman, ‘A New Approach to Corporate Choice of Law’, 38 Vand J Transnational L 51–107 (2005), is attracting an increasing amount of attention. There is of course nothing novel in bringing economics into international adjudicatory jurisdiction. Even in the most orthodox civilian legal tradition, where any cost-benefit analysis applied in a domestic setting to the working of the courts (or indeed to anything else) is perceived as having undesirable neo-liberal overtones, economic considerations are routinely invoked to justify the actor sequitur principle, the advantages of international commercial arbitration, or the need for a forum geographically close to the facts in terms of ‘administration of justice’. Usually, of course, the analysis stops here. In a purely domestic context, economic analysis of adjudication first developed as a response to the inefficiencies of the North American judicial system as early as the 1980s (W. Landes and R. Posner, ‘Adjudication as a private good’ 8 Journal of Legal Studies 235 (1979), then became increasingly present in Europe through management-orientated reform (in England, the Wolf reforms; in France la ‘L.O.L.E.’). However, the focus is now on cross-border litigation and the quest for ‘efficient administration of justice’, for example within the European common judicial area. This concern is clearly behind the allocation of jurisdiction as among the courts of Member States under EC Regulation nº 44/2001 ‘Brussels I’ of 22nd December 2000. A closer look would no doubt reveal that even the most traditional jurisdictional rules were often conceived in terms of the burden of the risk of cross-border litigation, and indeed pay frequent lip-service to the more managerial concern for the efficient administration of evidence, or the need to promote international commerce. It has led to more careful crafting of fora for provisional measures, accelerated enforcement for small claims and alternative forms of dispute resolution specifically designed to reduce parasitic procedural costs See for ex, EC Regulations on cross-border enforcement orders (nº 805/2004), small claims (nº 861/2007).

69 The creation of a market in litigation risk would of course represent a significant leap in Europe, given the existing difficulty of contingency fees for plaintiffs. Indeed, litigation risk means extending an analogous approach to defendants, for whom contingency fees do not generally work. See, J.T. Molot, ‘A Market in Litigation Risk’ 76 University of Chicago Law Review 367–440 (2009).
tages, with the added attraction of confidentiality. Furthermore, when political
stakes are high, such as in state investment contracts, it offers an appearance of
neutrality, its legitimacy being enhanced by increasing institutionalisation70.
Increasingly commonplace in practice, such agreements have thrived as initial
doubts as to the desirability of allowing private actors to appropriate access to
the courts have dwindled71. A major contribution to this evolution has been
the expansion of competition between judicial or arbitration market places for
revenue-generating litigation72.

15. That choice of forum agreements should be upheld, even when interna-
tionally mandatory provisions are at stake73, promotes perfectly legitimate
interests74. However, the liberal scheme on which party autonomy rests pre-
supposes that any extension of the scope of party choice of court, or the
enlargement of arbitribility, is compensated by the right to a ‘second look’
by the natural or supervising forum75 over the judgments or awards issuing
from the chosen forum. This scheme is apparent in the Supreme Court of the
United States’ famous dictum in the Mitsubishi case, whereby ‘in the event that
choice-of-law forum and the choice-of-law clauses operated in tandem to as
prospective waiver of a party’s right to pursue statutory remedies . . . for
antitrust violations, we would have little hesitation in condemning the agree-
ment as against public policy’76. But it rapidly became apparent that the ‘se-

70 On the issue of state-investment arbitrations, see below, n 132 above.
71 See notably, the recent 2005 Hague Convention on Choice of Forum Agreements, the
provisions on jurisdiction and arbitration in the new 2009 UNCITRAL ‘Rotterdam
Rules’ on the international carriage of goods, and of course the revised art 23 of Regu-
lation Brussels I.
72 This market was long dominated by the English courts in the field of maritime trade
through the action of interest groups in the field of shipping, insurance and arbitration
This may well explain why, in sharp contrast to the objective of simplicity and legal
certainty which forum agreements are supposedly designed to promote, highly complex
legal issues arise whose difficulty can only be measured against the importance of the
financial stakes involved. It is certainly no coincidence that choice of forum clauses,
whether in favour of courts or arbitrators, currently give rise to intense normative and
jurisdictional activity and a large amount of academic literature Most remarkably, the
recent monography by Briggs, n 5 above.
73 See the position of the US courts in the Lloyds litigation (Roby v Corporation of Lloyd’s,
996 F.2d 1353 (2d Cir 1993); Bonny v Society of Lloyd’s, 3 F.3d 156 (7th Cir 1993); and in
France, in the Monster Cable case: Cass civ 1re, 22 octobre 2008, JCP (G) 2008, II, 10187,
note L. d’Avout; JCP (E) 2008, 2535, note N. Mathey; Contrats, conc consom 2008, comm
270, note M. Malurie-Vignal; D 2009, 200, note F. Jault-Seseke, D. Bureau and H. Muir
Watt, ‘L’impérativité désactivée? (à propos de Cass civ 1re, 22 octobre 2008)’ Rev crit DIP
2009, 1.
74 See Briggs, n 5 above, 7.
75 Which could be the forum ordinarily competent in the absence of choice, or the court at
the place of enforcement, or ‘ in the case of arbitration, the place of the seat.
cond look’ was, in many instances, either unrealistic (when no enforcement was required, the parties having settled, for instance), or problematic (when the supervising court is not better equipped than the arbitrator to make an assessment on the merits in economic terms\(^\text{77}\). It has been ignored in the case of foreign judgments issuing from a (more liberal) chosen court\(^\text{78}\). A more cynical observer\(^\text{79}\) might feel that there was a more than powerful economic incentive for states to renounce their ‘second look’ and provide a free zone for the arbitration industry\(^\text{80}\). Whatever the reasons, some courts – notably the very permissive Court of appeals of Paris – soon went down that very road in the name of party autonomy, notably by relaxing the requirement that, in order to be recognised or enforced in the forum state, foreign judgments and international awards must conform to usual standards of ordre public\(^\text{81}\). Thus, despite the increasing number and weight of the overriding derogatory


\(^{78}\) Richards v Lloyd’s of London, 135 F.3d 1289 (9th Cir 1998).


\(^{80}\) According to *Gulfnews*, January 2010, Bahrain has become the first country in the world to establish an arbitration ‘free zone’ and introduce the concept of statutory arbitration after it formally launched the Bahrain Chamber of Dispute Resolution. The Chamber, an initiative of Bahrain’s Ministry of Justice and delivered in partnership with the American Arbitration Association, a provider of conflict management and dispute resolution services, will be known formally as the BCDR-AAA. The BCDR-AAA will provide the region with an international ADR centre of excellence, but with the distinct added advantage of operating an arbitration ‘free zone’ under Bahrain’s new legislation. As a result, where international disputes are heard at the BCDR, where the parties involved agree to be bound by the outcome, the award will be guaranteed and not subject to challenge in Bahrain (emphasis added).

provisions in the legislation of the various states, there is no guarantee either that such provisions will be applied by a foreign court or international arbitral tribunal, or even that they will be sanctioned if the judgment or award of the chosen forum comes back before the court whose jurisdiction was displaced by party choice.

16. Thus, the liberalization of the requirements for recognition and enforcement of foreign judgments and arbitral awards has allowed economic actors to escape from the internationally mandatory provisions which would otherwise have been applicable before their ‘natural forum’. Once that forum has been ousted, those provisions become ‘semi-mandatory’ because their authority becomes uncertain. Economists call this ‘barrier-crossing’. Importantly, the barriers crossed through party choice are not only jurisdictional but also disciplinary, in the sense that they are the frontiers which separate the public sphere (regulation) from the private (market): by choosing a more permissive forum, private actors change the nature of law, which thereby becomes product. The only obvious way of ensuring that law retains its authority when parties have the licence to cross barriers is to make the ‘second look’ effective at the enforcement stage. This has been made possible within the European Union, where Member States have the obligation to refuse recognition to arbitral awards given in violation of European competition and consumer law. Judgments handed down by the courts of Member States, presumably more likely to be conform to those standards in the first place, may also be

82 In European law, the Ingmar case (C-381/98), whose definition is reproduced in art 9 of EC Regulation ‘Rome I’ on the law applicable to contractual obligations, mandates an extremely extensive conception of such provisions, which appear to be all those which prevent distortion of conditions on the internal market.

83 See above n 15.

84 Public policy requirements have been considerably lightened in certain leading arbitration-friendly jurisdictions (for France, see n 78 above). Also under French law, in the field of foreign judgments, the (somewhat archaic) requirement that the law applied must be conform to the forum choice of law rule or at least or equivalent in content to the law it designates, has been abolished (see Cass civ 1re, Cornelissen, Cass civ 1er, 20 février 2007, D 2007, 115, note L. d’Avout and S. Bollée; D 2007, Pan 1758, obs F. Jault-Seseke; cette Revue 2007, 420, note B. Ancel and H. Muir Watt; LPA, 22 mai 2007, n° 102, 15, note C. Lecuyer-Thieffry; M.-L. Niboyet, ‘L’abandon du contrôle de la compétence législative indirecte’ Gaz Pal, 29 avril-3 mai 2007, n° 119-123, 2; JDI 2007, 1195, note F.-X. Train.

85 The concept of ‘natural forum’ is of course in itself problematic. Here it must be taken to mean any court with a reasonable basis for jurisdiction under due process (US) or close connection (EU) requirements.

86 Radicati di Brozolo, n 20 above.


88 See Muir Watt, n 18 above (Aspects économiques du DIP), § 93, 140 et seq.

89 In the field of competition law, within the limits prescribed by national procedural law:
subjected to scrutiny under European values at the recognition and enforce-
ment stage, unless of course the exequatur procedure is abolished. How-
ever, outside a federal or quasi-federal context, there is no guarantee that forum
mandatory policies will be taken into account at the enforcement stage. In the
absence of any requirement as to the law applied by the foreign judge or
arbitrator, public policy is the only remaining tool and is not necessarily well-
adapted to this task as it does not necessarily allow for a functionalist analysis
of the objectives and necessary scope of the mandatory rules of the forum.
Failing a rehabilitation of the status of mandatory provisions, however, the
imbalance created by the excessive empowerment of private actors through
the autonomy principle could only be remedied by disallowing party choice in
fields where another court cannot be trusted to implement the protection of
the interests involved.

17. To the de-activating effect of party autonomy on overriding mandatory
rules must be added, in the field of international arbitration, the position
of certain courts (French courts in particular), supported by a large part of the
arbitration lobby, which disqualify any claim by the state of the seat of the
arbitration to determine the status of an international award. Thus, an award
annulled by the courts of the state of the seat may nevertheless be enforced
before a more liberal forum. The underlying argument is that an international
award belongs to an autonomous transnational legal order, so that no state
court – and in particular, the state which represents the mere geographical
locus of the arbitration – has any legitimacy to cancel it, once in orbit in a
‘arbitral legal order’. To a certain extent, this argument has its weight. Indeed,
the seat is simply the place which, for all sorts of reasons including pure
convenience, the parties have selected to set the arbitration proceedings; it

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90 Procedural requirements of due process, issuing from art 6 of the European Convention
on Human Rights, are part of Member States’s public policy exception, under the ECJ’s
91 See the Commission’s press release of June 10th 2009 and the discussion in the Guest
Editorial on Conflictoflaws.net, 14th February 2010 by B. Hess, ‘Should Arbitration and
European Procedural Law be Separated or Coordinated?’.
92 See D. Bureau and H. Muir Watt, ‘L’impérativité désactivée? (à propos de Cass civ 1re, 22
93 In particular, the Cour de cassation’s initial position, approving the Court of appeals of
Paris’s liberalism in the Hilmarton case, see Cass civ 1re, 23rd March 1993, Hilmarton,
JDI 1994, 701, note E. Gaillard, reiterated several times, most recently in Putrabili (Cass
internationale, qui n’est rattachée à aucun ordre juridique étatique, est une décision de
justice internationale . . .’).
94 On this position, see E. Gaillard, ‘Aspects philosophiques de l’arbitrage international’,
has no natural vocation to regulate the dispute. This is because an arbitral award is a purely contractual or private act95 which, like a contract, does not have any ‘natural’ seat within a particular territory. Indeed, the rise of party autonomy during the last century sealed the emancipation of international transactions from the claims of territoriality; even the default conflict of law rules for contracts for which parties have not chosen the governing law tend to designate the law of the country whose economy is presumptively most affected by the transaction, disqualifying purely geographical links96. Thus, a contract annulled or otherwise held to be unenforceable at the place of its conclusion may well be considered valid and enforceable elsewhere.

18. However, the analogy can only go so far: the private, contractual status of arbitral awards has long been repressed by means of a (another) legal fiction, widely endorsed by the community of states and enshrined in the 1958 New York Convention for the recognition and enforcement of international arbitration awards, according to which such awards will be enforced internationally as if they were judgments, thereby benefiting from a lighter form of supervision which excludes any intrusion in the merits of the dispute under the applicable law and is largely restricted to issues of public policy97. That international arbitration thus benefits from a liberal recognition regime ensuring free movement of awards may well be desirable; this is not the issue here. What is clear, on the other hand, is that since arbitral awards are treated as quasi-judgments for purposes of facilitating their international recognition, they also call correlatively for some sort of analogous supervisory control. Of course, it is well known that the problem of arbitration is that it has no natural forum. However, it is not illegitimate to entertain a further fiction according to which an award is ‘attached’ to the place of the (freely chosen) seat, which will then be invested with a supervisory role. And if the vocation of the place of the seat does not convince, then it is probably no less illegitimate that the courts of the place (or places) of enforcement – which is not necessarily more predictable nor less accidental than the location of the proceedings – would be equally legitimate in exercising similar supervision.

19. Indeed, what is in issue here is not the merits of the place of the seat as the

96 Art. 4 of Regulation Rome I contains a catalogue of ‘special’, contracts, indicating for each one a connecting factor considered to represent a significant economic link between the contract and a given legal system. The current catalogue replaces the across-the-board reference in the Rome Convention to the habitual residence of the party providing the ‘characteristic performance’ of the contract (now relegated to art 4-2 in a residual role). However, both versions retain an escape clause in favour of the law bearing the most significant connection with the contract (Regulation 4-3).
97 Spelling out this contradiction, see our comment on Court of appeals of Paris, 29th September 2005, Bechtel, Rev arb 2006, 695.
most appropriate locus to reconnect arbitration to a public forum, but to point out that party autonomy cannot be invoked on the one hand, to justify the privileged status of arbitral awards as a species of judgment, and on the other, at the same time, to ensure that, as private, de-localised, acts, such awards are free from any state supervisory control. In other words, even in the world of legal fictions, coherence may count. Indeed, if arbitration is to be considered – as its jurisdictional status clearly implies – as having a significant role in regulating cross-border economic transactions, then coherence in the legal regime of awards is surely part of governance requirements of accountability and transparency. One may indeed wonder why, if the arbitrator exercises a jurisdictional function and arbitration is the default means of dispute resolution in international trade, the proceedings are not subject to the requirements of due process.

III. The ‘plug-in’ effect: drawing third parties into the net

20. Freedom to choose the forum – public or private – for the resolution of disputes arising under the contract or, more widely, in the relationship between the parties, is considered as a highly desirable expression of party autonomy, in the interests of predictability and procedural economy. However,

98 Coherence could be said to be a principle of governance insofar so it contributes to transparency and legitimacy (§ 28).
100 One may indeed wonder, why arbitrators are not subject to art 6-1 ECHR, cannot raise questions of unconstitutionality (it would obviously not be up to arbitrators to exercise judicial review, but they might need to refer a difficulty to a constitutional court) or indeed refer for a preliminary ruling to the Court of justice since they have an (indirect) duty (of which the breach might lead to non-enforcement of the award and thereby to professional liability) to ensure that the award conforms to EU mandatory consumer and competition law. On this last point, the explanation is clearly pragmatic (the Court could not cope...). As a theoretical matter, nevertheless, the status of arbitration as either a default system of dispute resolution or as an excluded private circuit, is far from clear not entirely clear. On the applicability of art 6-1 to arbitration, see O. Jacot-Guillarmod, ‘L’arbitrage privé face à l’article 6, 1 de la Convention européenne des droits de l’homme’, in M. Gérard and J. Wiarda, Protection des droits de l’homme: la dimension européenne (Cologne: Heymanns, 1988) 292.
101 One of the main difficulties which cross-border litigation now raises is how to protect jurisdiction agreements from opportunistic violations by one of the parties. These are in effect a form of efficient breach of contract, and might therefore presumably be justified by the profit generated by the violation of the contract. However, as with efficient breach in an ordinary contractual setting, these profits must be offset against the harm done to the confidence of the market in the reliability of forum agreements. Although at first glance it might seem that the interests involved here are confined to those of private
it might seem equally obvious, under ordinary principles of privity of contract, that upholding a choice of forum agreement in the interests of predictability and procedural economy as between the parties to that agreement, does not mean that it should bind unconditionally other economic actors who are strangers to it. However, the recourse to party autonomy to justify the binding effect of a choice of forum agreement on the parties tends curiously to obscure the issue of its effect in relation to third parties. To a certain extent, the myth of an international community of merchants (on which, as we have seen, party autonomy draws extensively in order to justify the emancipation of international contracts from regulatory constraints), justifies a ‘plug-in effect’ whereby the sole fact of participating in international trade – even at the receiving end of a long manufacturing, commercial and transportation process – is enough to draw participants into a contractual network through which they will be bound by dispute resolution clauses to which they had no means to consent102.

21. Thus, the expansion of international arbitration has often involved extending the effect of arbitration clauses to third parties, particularly in groups of corporations and within contractual networks103. It is sometimes held that the severability of the clause, which is itself a consequence of autonomy in the relationship between the parties to the agreement, implies that the agreement should also, by the same token, bind third parties, who are thereby precluded from challenging the applicability of the clause104. This is clearly a misuse of severability105. However, in the field of choice of forum agreements (with the actors with varying degrees of financial pull, playing out a power game through the strategic use of parallel proceedings, a more complex picture appears when this policy choice is framed in terms of a choice between protecting the private interests or implementing public regulation. The conflict thus appears to oppose the liberal approach of the common law courts, giving free reign to private regulation of access to courts, and a mandatory centralised allocation of jurisdiction as a public good (see below).

102 See n 43 above. The ‘plug-in effect’ also applies to other, different mechanisms which are purportedly contractual, like adhesion contracts, which also work to bind parties in the absence of real consent.


105 See Adam Samuel www.adamsamuel.com/pdfs/separabi.pdf: ‘Separability has its origins in the different functions of the arbitration clause and much of the main contract. It is a device for ensuring both the sustainability of arbitration clause, where this does no
remarkable exception of the new UNICITRAL ‘Rotterdam rules’\textsuperscript{106), the}
effect of such agreements in respect of third parties is largely overlooked by
international instruments on jurisdiction or choice of forum agreements – such
as the Brussels I Regulation (art 23) or the 2005 Hague Convention on choice
of forum agreements – as if it sufficed to deal with the validity and enforcea-
bility of the choice of forum clause as between the parties to overcome all the
difficulties raised by the clause, including its effects in respect of third parties.

22. The protection of the forum clause as between the initial parties in the
name of party autonomy appears therefore to allow it to work to the detriment
other, potentially more vulnerable, operators, succeeding to rights under the
contract. While the issue is of general import, in the sense that it affects any
forum agreement covering all sorts of claims that might be assigned, or other-
wise transferred to, or exercised by, a third party, it is particularly acute in
practice in the field of the international carriage of goods by sea, where bills of
lading passing from hand to hand frequently contain a choice of forum – court
or arbitrator – clause, negotiated by the parties to the initial contract of car-
rriage. Indeed, if the holder, often the final recipient of the goods, brings an
action against the carrier for cargo loss or damage, the issue will arise as to the
extent to which the holder is bound by the forum agreement contained in the
bill of lading\textsuperscript{107}. Behind the interests of these various categories of actors, also
undoubtedly lie those of various nations as players – for instance, in the field of
maritime transport, those of developing economies versus the great seafaring
powers protective of shipping and insurance industries\textsuperscript{108}. In the face of this

harm to the parties’ agreement, what is sensible for them and public policy. This explains
why separability has nothing to say about the effect of a contract assignment on the
arbitration clause” (emphasis added).

\textsuperscript{106} On which, see below § 25.

\textsuperscript{107} This is no doubt why discussion on this point was so prominent during the drafting of
the Rotterdam Rules and why these Rules actually contain provisions regulating the
effects of forum agreements in respect of suits brought by third party holders against the
carrier. Furthermore, it must also be borne in mind that in the sea liner trade, where such
issues are of very considerable practical importance, bargaining power may be distri-
buted unequally among the various categories of economic actors. While the strongest
interests may well be those of the big shippers, it is generally feared that carriers will
impose unfair contract provisions on small shippers; the Rotterdam Rules reflect this
preoccupation – but attract criticism from pro-carrier lobbies for this very reason.

\textsuperscript{108} J.A. Estella Faria, ‘Uniform Law for International Transport at Unicitral: New Times,
New Players and New Rules’ 44 \textit{TIJL} 277. See Ch.D. Hooper, ‘Forum Selection and
Arbitration in the Draft Convention on Contracts for the International Carriage of
Goods Wholly or Partly by Sea, or the Definition of Fora Conveniens Set Forth in
against abuse contained in the Rotterdam rules, see M. Sturley, ‘Modernizing and
Reforming US Maritime Law: The Impact of the Rotterdam Rules in the United States’
44 \textit{Texas International Law Journal} 427 (2009). On the specific question of choice of
complex intermingling of public and private interests, the economy of the choice of forum agreement needs to be thought out as a whole and against the backdrop of the need for global governance, rather than in the piecemeal fashion characteristic of practice and legislative action in this field.

23. The challenge here is to ensure the holder adequate protection against the unforeseeable or otherwise unfair effects of a choice of forum dictated in the context of a negotiation in which he had no part, but here again without undermining the otherwise salutary function of the agreement itself, as initially negotiated. In practice, such a balance between the interests of legal security provided by the clause and fairness towards third parties, is clearly very difficult to find. In European law, according to the Court of justice’s ruling in Coreck109, regard must be had to the content of the law governing the contract containing the agreement, to see if third parties can succeed to the rights and duties to the parties to the contract. Thus, ‘in so far as the jurisdiction clause incorporated in a bill of lading is valid under Article 17 of the forum agreements whether in relation to contracting or third parties, it is generally recognised that the practical effect of such clauses may be to reduce carriers’ liability through the choice of a forum which will award a low level of damages. Hence a state of issues in the United States relating to the conformity of choice of forum to the Carriage of Goods by Sea Act, which is undoubtedly an internationally mandatory provision or ‘loi de police’. This is why, as studies seem to show, cargo interests tend to accept low settlements rather than commence suit in the chosen forum (see Hooper, n 108 above). In addition, public or state interests, and arbitration interests, may interfere either because the extension of forum agreements brings additional adjudication or dispute resolution to the chosen forum, adding to the weight of a given ‘place’ in the global market for judicial services, or conversely, because considerations of social justice, which may or may not hide protectionist concerns in crossborder trade, mandate the protection of small traders in their relationship with the carriers.

109 Case C-387/98. See too Tilly Russ case 71/83, Castelletti case C-159/97, on which both Chambers of the French Cour de cassation recently aligned their positions Cass Civ 1re et Com, 16 décembre 2008, D 2009, Panorama, 1565. In the United States, the courts appear largely to uphold the carriers’ interests. Thus, a cargo owner ‘accepts’ a bill of lading to which it is not a signatory by bringing suit on it and is therefore subject to the jurisdiction of the court designated in the bill of lading: see A.P. Moller-Maersk A/S v Ocean Express Miami, 550 F Supp 2d 454, 2008 AMC 1236 (SDNY 2008).

110 Moreover, it is also very difficult to know what ‘succession’ means in the terms of the various legal mechanisms which might be considered as allowing a non privy party – assignee, subrogor, agent, consignee, endorsee – to step into the shoes of one of the contracting parties. Perhaps most importantly, appealing to the governing law does not answer the complex ‘who decides on jurisdiction?’ (competenz-competenz): if the choice of forum agreement is invoked by the defendant before a non-chosen court, is it this court which decides not only on the validity of the agreement between the initial parties under art 23 of the Regulation, but also on the ‘succession’ issue, governed by the law of the main contract? Or should it stay the proceedings before it until the chosen courts itself decides on these matters? And indeed, is it not somewhat bizarre to require the third party challenging the jurisdiction of the chosen court to show that under a...
Convention as between the shipper and the carrier, it can be pleaded against
the third party holding the bill of lading so long as, under the relevant national
law, the holder of the bill of lading succeeds to the shipper’s rights and obliga-
tions\textsuperscript{111}. The reference to the law governing the question of ‘succession to
rights and obligations’ under the shipping contract, is not intended to under-
mine separability\textsuperscript{112}, but to ensure that the choice of forum agreement is not
opposed to the recipient if under the applicable law, the primary obligations
contained in the contract cannot be.

24. The desire to avoid a ‘floating’ clause, detached from the content of the
contract it serves, is undeniably coherent. However, on second thoughts, it
may be wondered whether this sort of legal logic is really relevant here. Se-
parability itself is a (useful) legal fiction, which responds to policy considera-
tions rather than to a convincing legal construction. It works essentially to
prevent paralysis of the dispute resolution clause whenever the validity of the
contract in which it is contained, is challenged. It was not designed to affect
the rights of a third party – say, the final recipient of goods manufactured abroad
and carried by sea – bringing suit against the seller\textsuperscript{113}. The interest served by
referring the issue of ‘succession to rights’ to the applicable law appear to be
largely formal or esthetic: the internal ‘logic’ of the law (a dispute resolution
clause cannot pass to the recipient if the rest of the contract does not) over
policy considerations and workable results\textsuperscript{114}. The practical impact of this
solution, which requires determining the applicable law as between the parties
to the initial contract before solving the jurisdictional issue in respect of a third
party, is more than burdensome.

25. A more balanced solution is suggested in the field of bills of lading by the
new Rotterdam rules\textsuperscript{115}; which are notably less liberal on the question of party

\begin{quote}

foreign law governing a contract to which he is not privy, he does not succeed to the
rights and obligations of the shipper?
\end{quote}

\textsuperscript{111} Comp Tilly Russ, paragraph 24, and Castelletti, paragraph 41.
\textsuperscript{112} That is, the choice of forum agreement is not subject to the law governing the main
contract.
\textsuperscript{113} A similar (useful) fiction is at work to establish ‘direct actions’ in contract for the benefit
of third parties, which allow the final participant in a contractual chain of contracts to
invoke a warranty, or more generally the content of the initial contract, as against the
seller; see J. Bauerreis, ‘Le rôle de l’action directe contractuelle dans les chaînes interna-
tionales de contrats’ Rev crít DIP 2000, 331.
\textsuperscript{114} Ceding to the ‘temptation of elegance’ (in the terms of Lord Goff) is a recurrent
objection to the case-law of the Court of justice, particularly by common lawyers.
\textsuperscript{115} The Hague Rules were adopted by UNCITRAL in 1924 to standardize the law govern-
ing the carriage of goods by sea. They were followed in 1968 by the Visby Amend-
ments (Hague-Visby Rules), then, in 1978 by the Hamburg Rules, negotiated at the
initiative of developing countries in order to give more room to the cargo interests and
largely ignored by the great sea-faring powers, who remained supportive of shippers’
autonomy than their predecessors, the Hamburg rules. Thus, under the new Article 67–2: ‘A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if: (a) The court is in one of the places designated in article 66, subparagraph (a)’

This provision seeks to counteract the risk that the carrier might put the claimant at considerable disadvantage by designating an inconvenient forum; therefore, the contractual choice of forum may be opposed to the third party only if the chosen court is one of the ones which would otherwise have had jurisdiction in the absence of a choice of forum agreement. However, beyond the merits of the balance struck here, the important point is that the extensive role played by party autonomy as a guiding principle for the elaboration of a legal regime for transnational economic transactions, and the myth of the transnational community of private actors on which it feeds, can lead to consequences which are unfair for various categories of real-world economic actors. Here again, requirements of transparency and fairness should also serve to constrain and channel its effects.

The new Rotterdam Rules were approved by UNCITRAL in July 2008 and adopted by the U.N. General Assembly on December 11, 2008. The jurisdiction provisions in these Rules are however ‘opt-in’ provisions.

In the absence of a forum agreement, art 66(a) opens a wide choice of fora for the claimant and is largely favourable to the convenience of the cargo owner; nevertheless, it protects the defendant carrier by the fact that all the possible fora are predictable in that they are reasonably linked to the carriage. Now, if the contract of carriage contains a choice of forum agreement, the balance would normally swing back in favour of the carrier, who might thus paralyse the claimant’s choice and put it at considerable disadvantage by designating an inconvenient forum. It has been suggested that ‘if a purchaser of cargo does not want the carrier to choose the art 66 place to litigate or the art 75 place to arbitrate, the purchaser should specify in a contract of sale or letter of credit that such clauses in the transport document or electronic record are not acceptable’.

One may wonder, however, what the value of such a disclaimer might be. The author observes, on the subject of the Rotterdam Rules, that ‘These provisions improve the current law in the United States. At this time, a carrier may choose any place it wishes to litigate or arbitrate by placing a clause on the reverse side of a bill of lading. In all likelihood, under present law neither the sender nor the receiver of the cargo will be aware of such a clause unless loss or damage occurs’.
IV. Trading in court access: the global market for judicial services

26. The generalisation of choice of court agreements, along with the parallel growth of international arbitration, is now understood as giving rise to a worldwide market in adjudication or dispute resolution. The development of such a market is also presented as desirable by Henry Hansmann and Jens Damman, whose reflection on this point stems initially from a reflection on the American intra-federal market for corporate charters.\(^\text{120}\) It is suggested that Delaware’s undeniable competitive advantage in this field is due less to the sole quality of its substantive corporate law than to the efficiency of its judicial services. In other words, the choice of Delaware as place of incorporation is in fact a ‘package’ including access to the local courts (as an after-sales service, as it were), which – according to this thesis – should be made available to economic actors from all over the world in order to enhance global jurisdictional competition and reap its benefits in terms of the improvement of the quality of courts worldwide. In such a context, it is not inconceivable that court access might give rise to the payment of fees by foreign litigants.\(^\text{121}\) And, the argument goes, while the market for corporate charters and auxiliary judicial services is a reality in intra-federal, and now intra-European relations,\(^\text{122}\) there is no reason not to extend it to other fields of economic activity, such as contract law; indeed, purely domestic transactions in countries with corrupt or inefficient judiciaries should also be allowed to accede to foreign courts.\(^\text{123}\) Alt-

\(^\text{120}\) Damman and Hansmann, n 16 above. Their work does not appear to have attracted much attention – including critique – that it deserves outside the US, with the exception of G.-P. Calliess and H.B. Hoffmann, ‘Judicial Services for Global Commerce – Made in Germany?’ 10 German Law Journal n° 2, 2009; see also, H. Muir Watt ‘Economie de la justice et arbitrage international: réflexions sur la gouvernance privée dans la globalisation’ Revue de l’arbitrage 2008, 389; Muir Watt, n 18 above (Aspects économiques du DIP), § 93, 140 et seq; Conference IHEJ 18 mai 2009, ‘L’offre internationale de justice étatique: l’essor du modèle néolibéral’ (and, taking up the same ideas and the references contained therein, S. Bollée, ‘La concurrence des justices nationales (éléments d’une analyse économique du conflit de juridictions)’, in S. Bollée, Y. Laithier and Péris (eds), L’efficacité économique en droit (Paris: Economica: 2010).

\(^\text{121}\) They recognize however that this could raise difficulties in terms of discrimination in the access to a public service, at least in a European Union setting. It may be however that at present the direct profits reaped by the local bar and the more indirect benefits which attach to prestige of the legal system as a whole may provide sufficient incentive for competition in this field. There may also be competition between judges, see H. Muir Watt, ‘La régulation des services judiciaires’, in M. Audit, H. Muir Watt and E. Patout (ed), Conflits de lois et régulation économique (Paris: LGDJ, 2008).

\(^\text{122}\) On the emergence of an intra-European market for corporate charters, see Muir Watt, n 18 above (Aspects économiques du DIP), § 60, 103.

\(^\text{123}\) The authors’ first draft (see University of Texas Law, Law and Econ Research Paper no 98, Yale Law & Economics Research Paper no 347, available on SSRN) proposed that states could set up ‘extraterritorial’ courts, but the final version replaced this idea with
hough this conclusion will of course come as no surprise to private international lawyers, accustomed to the enforceability of choice of forum agreements – except perhaps insofar as it is not always clearly recognized that there is indeed no bright line between the domestic and the international – it sheds new light on the current situation resulting from free choice of law and forum, in terms of a the idea of a global exchange for judicial services and legal products.

27. Such a slant on choice of forum agreements also receives support from Adrian Briggs’ powerful analysis of the two types of potential effects of such agreements – in personam or in rem – before the courts. Thus, English courts will give effect to the private, contractual effects of the agreement as between the parties, even when such agreement could not be effective erga omnes because of a rule of exclusive jurisdiction – such as a rule contained in Article 22 of the Brussels I Regulation – purports to paralyse the access to any other court. After all, the courts are there to serve the business community and not the reverse. The emphasis placed on one or the other effect – the private or the public – is clearly culturally conditioned. Thus, the stance of the English courts on this point stands in stark contrast to that of the European Court of justice and more largely the courts of the continental tradition, for whom the obligational content of a contract (its effects in personam) cannot be dissociated from the effects it can produce under a public law rule (effects in rem). To a certain extent, therefore, under the contractual approach, court access becomes privatised as between the parties, in the same way as one might talk about the chosen law as being their ‘private legislation’. Moreover, a court that is willing to enforce jurisdictional agreements as between the parties despite a public law rule allocating exclusive jurisdiction to another court, appears much as a player in the market for judicial services, on the same footing as an arbitrator whose investiture proceeds directly from the will of the parties to the contract. Indeed, as the author explains, the English Commercial Court acts ‘as an umpire’ in much the same way as an arbitrator, conceiving its mission as deciding on private interests as between the parties.

28. Now there is no doubt much to be said, here again, in terms of predictability and preventing opportunistic breaches, for upholding choice of forum agreements, just as there are considerable benefits, both to the parties involved

access fees providing incentives for (non-mobile) courts to provide access to foreign litigants.

124 Except insofar as the authors extend the idea of choice of forum to domestic contracts.
125 See § 8 above.
126 Briggs, n 5 above, § 1.17.
127 See the Supreme Court of Australia’s decision in Pan Foods Co Importers and Distributors Pty Ltd (2000) discussed in Briggs, n 5 above, § 13.04.
128 Briggs, n 5 above, § 13.15.
and in terms of the smooth running of crossborder trade, in the spread of international commercial arbitration. However, the real problem lies in the fact that when court access is thus privatised, there is a correlative absence of judicial (or arbitral) regulation of interests beyond those of the parties to the dispute. In this respect, it can be useful to turn to the conclusions reached by Landes and Posner using economic analysis of justice in respect of the domestic judicial system. Reflecting on whether lessons could be gained in view of improving the working of the overburdened, unwieldy and costly (federal) courts, from observing the functioning of arbitration, reputedly the more efficient form of dispute resolution, these writers concluded that the real difficulty lay in the irreducible incompatibility between the private investiture of the arbitrator, and the vocation of arbitration to produce general normative principles beyond case-by-case decisions geared exclusively to the needs of the litigating parties. In other words, privately designated (and financed) arbitrators lack both the legitimacy and the incentive to take account of societal interests in their decision-making process. Moreover, in the absence of any supervisory framework capable of ensuring a system of binding or at least persuasive precedent, there is no continuity between discrete decisions from which new conclusions can be reached (inductively or deductively). Although of course the public financing of the court system establishes both the legitimacy and the incentive which arbitration lacks in protecting societal interests beyond those of the parties to the litigation, the tendency of courts designated by choice of forum agreements to act ‘as if they were arbitrators’ obviously detracts from this particular regulatory function. Such a lack may not be problematic as long as the scope of choice of forum is limited to purely commercial disputes of private interest. However, when general interests require protection, the enforceability of private agreements ‘as between the parties’ becomes far more problematic, as does the arbitrability of such disputes. This is why rules of exclusive jurisdiction channel disputes to certain courts and paralyse private agreements; in the case of arbitration, the extension of arbitrability mandates a control of non-negotiable values at the enforcement stage. Both contribute if not to ensure the regulatory effect of litigation in international disputes, at least, more modestly, to prevent the expansion

129 Landes and Posner, n 68 above.

130 The cost of arbitration is borne directly by private actors, with all the drawbacks of private financing, including incentive and legitimacy to consider wider interests but also the risk of bias to retain or attract clientele. This is why good governance of arbitration might dictate an ethical principle prohibiting a lawyer (or a law-firm) from being designated as arbitrator for five years after having represented or advised one of the parties; and to prohibit an arbitrator from representing or advising one of the parties for five years after the arbitration.

of the market for judicial services from detracting from potentially valuable sources of global regulation.

29. Indeed, from the standpoint of global economic governance, and in the absence of a supranational institutional framework, the privatization of judicial services in cross-border disputes will tend to reduce the sources of rulings apt to promote the general interest. Of course, defining the general interest at a global level is in itself rife with difficulty; it would be equally inaccurate to suggest that arbitrators, or courts chosen by private agreement, are systematically biased in favour of private interests\textsuperscript{132}. But it might nevertheless to legitimate to expect that public courts acting by virtue of an ordinary jurisdictional rule in the context of disputes which are not wholly disconnected from the local economy might be more likely to feel freer or inclined to curb at least the most blatant forms of self-serving and encourage private actors to internalising harmful externalities\textsuperscript{133}. Promoting party autonomy, on the other hand, entails the risk that exclusive attention to private interests might neglect more general societal values in a world which lacks other forms of regulation – at least beyond regulatory competition through party choice, an idea sometimes advanced but which has not necessarily proved to be entirely convincing in practice\textsuperscript{134}. As Adrian Briggs rightly asks, is commercial jurisdiction about civil regulation or dispute resolution\textsuperscript{135}? If the second, then the dearth of methods of regulation other than litigation calls for the elaboration of some sort of governance ‘touchdown’\textsuperscript{136}.

\textsuperscript{132} The issue of the interests served by arbitration, particularly in state investment contracts, where there may be natural bias in favour of the private investor, is too complex to be dealt with here. There is considerable literature on the issue of accountability and transparency of the investor-state arbitration process (see for example, in the context of NAFTA, J. Atik, ‘Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process’, in T. Weiler (ed), \textit{NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects} (Ardsley: Transnational Publ, 2004). It is obviously equally problematic to equate the interests of a state party to an investment contract with the general interest. However, many investment contracts now contain charters of public interest, imposing ethical duties on the private party: see C. Raynaud, ‘La responsabilité sociale des multinationales spécialisées dans l’extraction des minerais et hydrocarbures. Nouveaux enjeux éthiques et juridiques’ \textit{JDI} 2008, 485.

\textsuperscript{133} On this principle, minimalist if it is to be realistically envisaged in the global arena, see Muir Watt, n 18 above (Aspects économiques du DIP), § 198, 244.


\textsuperscript{135} Briggs, n 5 above, viii: ‘The view taken here is that the common law of private international law is much more about the resolution of civil disputes than the regulation of civil relations’.

\textsuperscript{136} Wai uses the expression of ‘regulatory touchdown’ to express the need for some sort of accountability counterweight to excessive autonomy of private actors (n 34 above).
V. Conclusion: Private ordering and principles of transnational governance

30. This paper has looked at party autonomy as a self-perpetuating myth at work in the elaboration of a universally acceptable legal regime for international economic transactions. Yet the apparent consensus in favour of private choice of law and forum hides conflicting policy objectives and very diverse interests which call respectively for proper management and treatment. Quite clearly, fostering cross-border exchanges means protecting party freedom from over-regulation by simultaneous regulatory claims, and upholding choice of forum agreements against opportunistic breach as between the parties or strategic interference from the outside. In order to this in the complex stateless environment beyond the frontiers of the various national communities, it is perfectly legitimate, and indeed admirable, that the law – that is, the combined efforts of legal theory and political will – has managed to create the conditions for generalised (political and academic) acceptance of a series of guiding principles and institutions which ensure a minimum of order and predictability. The circumstance that these principles are built on a series of legal fictions is neither surprising nor condemnable. Nevertheless, on many points, the extraordinary success encountered by the idea of ‘private legislation’ and in its wake, the market for judicial services, generates imbalance – between categories of private or collective interests, or between these and state policies, or indeed between the need for regulation and the pull towards private ordering in global trade. This is why the emancipatory effect of party autonomy and its exclusive focus on private interests calls for the application of principles of governance – that is, principles apt to provide democratic legitimacy for decision-making processes that bind participants to international trade. The starting point, suggested here, is to take stock of the interests at stake and deconstruct the mechanisms at work behind the myth of party autonomy. This will pave the way for implementing the requirements of transparency and accountability which are now applied to new public methods of law-making taking place outside the frontiers of the traditional state model.

137 Meaning, the absence of the traditional attributes of state, in the form of accountable courts and democratic law-making processes.

138 See Muir Watt, n 120 above, 389; more generally, questioning the legality of the rule of law in global context, U. Mattei and M. de Mopurgo, ‘Global law and Plunder: The Dark Side of the Rule of law’ Bocconi School of Law Papers n° 2009-03. For the implementation of values of transparency, accountability and legitimacy to the state-investor arbitration process, see n 132 above.

139 For the field of European private law particularly in the use of new regulatory devises such as comitology or the ‘open method of coordination’, see Micklitz, n 19 above, 36 on the ‘new processes of “law” making – or the privatization of law-making’. For reflections on the law-making processes at work in ‘the emergence of a global adminis-
trative law', see the NYU website, research project on global administrative law run by B. Kingsbury, N. Krisch and R. Stewart.