

Beyond the Dream: Theorising Autonomy in international Arbitration

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Abstract: Assertions of autonomy in international arbitration have to date been grounded in state-centred legal positivism. This theoretical foundation generates a paradox: an autonomous 'arbitral legal order' is said to emerge from the law making of the very same states from which autonomy is proclaimed. Brekoulakis evades this paradox by proposing an alternative account of autonomy grounded in legal pluralism. However, his exclusive focus on norms of procedural conduct results in a form of relative autonomy that fails to satisfy the autonomy advocates' principal objective. In order to overcome these limitations, this paper proposes expanding the legal pluralist analysis to the question of the underlying source of validity or 'juridicity' of arbitration.

1 Introduction

The idea of an autonomous arbitral legal order has long been present in French arbitration scholarship.² In the early 2000's, however, the idea spread throughout the international arbitration community and beyond. The growth in interest was fuelled largely by the publication of two texts: Julian Lew's inspiring polemic 'Achieving the Dream: Autonomous Arbitration',³ and the English translation of Emmanuel Gaillard's seminal *Legal Theory of International Arbitration*.⁴ The notion of autonomous arbitration is conceptually related to, but distinct from, the delocalisation movement of the 1970's and 1980's.⁵ The proponents of both movements have evidently been motivated by the same concern: state interference in international arbitration. But where the autonomy advocates differ from their predecessors is in the scope of their ambitions.⁶ The aim of delocalisation was simply to sever the tie between the national law of the seat and the conduct of the arbitration and enforcement of the award.⁷ Those

2 E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) 38). Originally published in French as *Aspects philosophiques du droit de l'arbitrage international* (Martinus Nijhoff 2008).

3 JDM Lew, *Achieving the Dream: Autonomous Arbitration* (2006) 22(2) *Arbitration International* 179.

4 Gaillard (n 2).

5 For representative examples of both sides of the delocalisation debate, *See*: FA Mann, *Lex Facit Arbitrum* in P Sanders (ed) *International Arbitration: Liber Amicorum for Martin Domke* (Nijhoff 1967); J Paulson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin* (1981) 30 *International and Comparative Law Quarterly* 358; J Paulsson, *Delocalisation of International Commercial Arbitration: When and why it matters* (1983) 32 *International and Comparative Law Quarterly* 53; WW Park, *The Lex Loci Arbitri and International Commercial Arbitration* (1983) 32 *International and Comparative Law Quarterly* 51.

6 Some delocalisation proponents, such as Gaillard and Lew, graduated from one movement to the next. Others, such as Paulsson, are more sceptical of autonomy claims. *See*, for example: J Paulsson, *Arbitration in Three Dimensions* (2011) 60 *International and Comparative Law Quarterly* 60.

7 Paulsson, *Delocalisation of International Commercial Arbitration* (n 5) p. 54.

advocating for autonomy, however, envisage an arbitral legal order existing somehow independently of state and international legal orders.

The autonomy advocates have, unsurprisingly, faced much criticism.⁸ However, beyond the obvious legal dogmatic objections, the more interesting criticisms have taken aim at perceived theoretical deficiencies. While the specifics vary, critics have been united in accusing the autonomy advocates of failing to properly ground their claims in legal theory and engage with broader legal scholarship.⁹ In light of these critical responses, this paper does not attempt to engage with Lew or Gaillard at the level of legal dogmatics. Rather, its more modest goal is to examine the adequacy of the legal theory underpinning the claims of the autonomy advocates. Ultimately, it seeks a theoretical foundation that would enable us to make sense of arbitrations' claims to autonomy in the context of its interdependence with state and international legal orders.

Autonomy is a broad concept. But settling on a precise meaning would be to prejudge the issue. The approach adopted is therefore to use the specific aspirations of the autonomy advocates as a measuring stick when evaluating alternative theoretical foundations. It should however be noted that this paper is concerned with autonomy as it relates to international arbitration *per se*. That is, as a private dispute resolution mechanism. As Gaillard has said, the question of autonomous arbitration 'does not amount to reviving the debate over the *lex mercatoria*',¹⁰ an autonomous substantive merchant law purportedly applied by arbitrators.¹¹ The two are treated together by some commentators,¹² though

8 See, for example: WM Reisman and B Richardson, *The Present – Commercial Arbitration as a Transnational System of Justice: Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration* in AJ van den Berg (ed), *Arbitration: The Next Fifty Years*, ICCA Congress Series (Volume 16, Kluwer Law International 2012); S Besson, *Is There a Real Need for Transcending National Legal Orders in International Arbitration? Some Reflections Concerning Abusive Interference from the Courts at the Seat of the Arbitration* in AJ van den Berg (ed), *International Arbitration: The Coming of a New Age?*, ICCA Congress Series (Vol 17, Kluwer Law International 2013) 378.

9 See for example: T Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences* (2011) 2 *Journal of International Dispute Settlement* 59; P Zumbansen, *Debating Autonomy and Procedural Justice: The Lex Mercatoria in the Context of Global Governance Debates - A Reply to Thomas Schultz* (2011) 2 *Journal of International Dispute Settlement* 427.

10 Gaillard (n 2) p. 37.

11 Summarising the *lex mercatoria* debate, Lew says that the 'concept of a separate substantive body of legal rules or law to be applied in international arbitration was widely discussed in the 1950s-1970s by the early pioneers and practitioners of this subject, described by the AG as "the 'grand old men' of yesteryear". These included great private international lawyers like Professors Berthold Goldman and Clive Schmitthoff, and others who argued that there was an emerging *lex mercatoria*, or international commercial law, which could where appropriate be directly applied to govern substantive rights and obligations of parties in international arbitration, in the absence of an express choice of a national law. JDM Lew, *Is There a Global Free-standing Body of Substantive Arbitration Law?* in AJ van den Berg (ed), *International Arbitration: The Coming of a New Age?*, ICCA Congress Series (Vol 17, Kluwer Law International 2013) p. 53-4 (footnotes omitted).

12 See, for example: R Michaels, *Dreaming Law Without a State: Scholarship on Autonomous International Arbitration as Utopian Literature* (2013) 1 *London Review of International*

there are good reasons for keeping them distinct. Apart from academic fatigue with the by now long-raging *lex mercatoria* dispute,¹³ that debate raises arguably less significant questions. The controversies of the autonomy debate go beyond the question of what law(s) may be applied by arbitrators to the substantive dispute between the parties, to more fundamental issues regarding the legal foundations of international arbitration.¹⁴

Following this introduction, the remainder of the paper is set out as follows. Part 2 begins with an exposition of the claims of the autonomy advocates, as exemplified by Lew and Gaillard. This analysis highlights two key points. First, that the autonomy advocates' principal concern is to prevent state courts from applying state laws that depart from the norms of international arbitration. Second, that there is an unresolved paradoxical tension between the claims of the autonomy advocates and their simultaneous recognition of arbitration's interdependence with state and international legal orders. From a theoretical perspective, the most problematic aspect of this interdependence is the manner in which autonomous arbitration is alleged to emerge from, but somehow transcend, those legal orders. Gaillard is more explicit than Lew in addressing this tension. However, his reliance on state-centred legal positivism forces him to resort to an undeveloped analogy with international law that is inadequate as a theoretical foundation for the autonomy he seeks to establish.

Part 3 then engages with two of the most pertinent theoretical responses to Lew and Gaillard.¹⁵ Ralf Michaels sees the paradox inherent in their claims as unresolvable and dismisses them as utopian – irrational dreams for a 'better', though presently unobtainable, future.¹⁶ However, it is argued that Michaels goes too far in his indictment, prematurely dismissing Gaillard's claims as an invocation of 'faith', without ever attempting to grapple with his arguments. Stavros Brekoulakis, on the other hand, gives due credit to Gaillard's attempt to theorize an arbitral legal order, while criticising Gaillard's failure to engage with socio-legal analysis. Employing such an analysis himself, Brekoulakis moves

Law 35, p. 36; R Cotterrell, *Spectres of Transnationalism: Changing Terrains of Sociology of Law* (2009) 36 *Journal of Law and Society* 481, p. 481-2; Zumbansen, (n 9) p. 427-8.

13 According to Lew the 'debate was never concluded with any definitive acceptance by either side' and since then there 'has been an awkward silence'. Lew (n 11) p. 54.

14 As Gaillard notes, 'through this reference to *lex mercatoria*, international arbitration is not apprehended as such, namely as a private form of dispute resolution, but rather for its ability to create norms other than those originating from national legal orders. Yet, this aspect of the phenomenon is far from exhausting the philosophical questions raised by international arbitration.' Gaillard (n 2) p. 5. See also: E Gaillard, *The Representations of International Arbitration* (2010) 1 *Journal of International Dispute Settlement* 271, p. 273-4.

15 This is not to dismiss the importance of the other lines of critique. However, developing a sound basis for theorizing autonomy seems to be logically antecedent to secondary matters such as question of justice and legitimacy as raised by, for example, Schultz and Zumbansen. See footnote 155 and accompanying text for further discussion on this point.

16 Michaels (n 12).

from a state-centred legal positivist to a legal pluralist account of autonomy, thereby avoiding the paradox that plagues Lew and Gaillard.¹⁷

However, Part 0 identifies two interrelated problems with Brekoulakis' otherwise valuable contribution to the debate. Both result from his exclusive focus on procedural rules. In the first case, Brekoulakis has essentially reduced the autonomy debate to the level of the *lex mercatoria*. This renders it subject to the same criticisms raised in that debate. In particular, non-state procedural arbitration law, like non-state substantive commercial law, is, in at least one sense, a 'mirage'.¹⁸ Secondly, and more importantly, Brekoulakis' leaves unanswered the question of the underlying source of the validity or 'juridicity' of arbitration. As a result, the relative autonomy he advances fails to address the principal concern of the autonomy advocates.

Part 0 draws together the ideas of Gaillard and Brekoulakis to propose a way forward. Specifically, it suggests expanding the legal pluralist analysis to the question of juridicity, as a means of overcoming both the paradoxical tension in Gaillard and Lew's accounts and the relative autonomy resulting from Brekoulakis'. A legal pluralist account of juridicity would not bind the hands of state courts in the manner in which the autonomy advocates wish (not even sovereign states enjoy such privileges). However, it may help to challenge, and eventually displace, the seat theory. A coherent theoretical account of arbitration as autonomous may, over time, encourage states to respect it as such.

2 The Autonomy Advocates

2.1 *Lew's Dreams of Autonomy*

Lew asks us to consider whether the idea of autonomous arbitration is a dream or a nightmare: is every arbitration necessarily bound to a state legal order?¹⁹ He answers by proclaiming that international arbitration is an 'autonomous' dispute resolution process existing independently of all national jurisdictions, and should be recognized as such.²⁰ It is, however, difficult to grasp either a coherent account of autonomy or a systematic chain of reasoning in support of these assertions. At times Lew seems to rely on a sort of circular reasoning, grounded in a fear (or rather nightmare) of interference and control by state laws and courts. He argues, for example, that there 'can be no justification for national courts to intercede in the arbitration process', because doing so would 'ignore the intention and expectation of the parties and the autonomy of international arbitration.'²¹ But this merely seems to beg the question: arbitration needs to be autonomous because it needs to be protected from state interference; it needs to

17 S Brekoulakis, *International Arbitration Scholarship and the Concept of Law* (2013) 36 Fordham International Law Journal 745.

18 R Michaels, *The Mirage of Non-State Governance* (2010) 1 Utah Law Review 33.

19 Lew (n 3) p. 179.

20 *ibid* p. 181.

21 *ibid* p. 179-180.

be protected from state interference because it is autonomous. This kind of spurious reasoning is useful only for illuminating the fundamental motivating role that this concern plays in assertions of autonomy.²²

Lew also invokes a kind of historical argument in three parts. He first posits international arbitration as originally existing and autonomous, subject to 'non-existent or minimal' regulation by state law.²³ Then a period in which this autonomy was usurped by states, who seized control of the arbitral process out of a kind of 'judicial jealousy'.²⁴ In the third phase, Lew suggests a new period of liberalization in which international arbitration has regained, or is regaining, its autonomy. The historical accuracy of such accounts has been questioned.²⁵ But more importantly, even if there *was* a form of autonomous arbitration that existed before the rise of the modern nation state, that does not tell us anything about the possibility of autonomy *after* that time.²⁶ Indeed, Lew does not seem to hide from this issue, asserting instead that international arbitration has evolved in 'a slow process of assimilation and convergence' of 'the commercial community and the state, which have together provided the bedrock of ideas and beliefs upon which international arbitration is based.'²⁷ This thought leads to Lew's most intriguing assertion: that autonomy is generated not only by the principle of party autonomy and the use of non-national arbitration rules, but by state laws and international instruments.²⁸ In particular, Lew sees autonomy as the natural development of the internationalisation of arbitration, inherent in the terms and principles of the New York Convention,²⁹ the UNCITRAL Model Law³⁰ and modern arbitration legislation.³¹

Far from denying the role played by state laws, Lew says that arbitration users 'expect that state laws will recognize and support the arbitration process.'³² It seems that Lew wants international arbitration to have its cake and eat it too; asserting that the role of state laws is one of *enabling* autonomous arbitration, but not one involving control, interference, or, more importantly, validation.³³ But how are we to conceive of this relationship? It appears that international

22 Not everyone agrees that Lew's concern represents a real threat to the effectiveness of international arbitration, or, if it does, that transcending national and international law is the solution to the problem. *See* especially: Besson (n 8).

23 Lew (n 3) p. 182-3.

24 *ibid* p. 183.

25 *See* Part 0 below. *See* also: Michaels (n 12) p. 41.

26 *See* Michaels (n 18) 39-40; Michaels (n 12) p. 49-50.

27 Lew (n 3) p. 184.

28 *ibid* 186-7.

29 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (opened for signature 10 June 1958, entered into force 7 June 1959) 330 UNTS 4739.

30 24 ILM 1302 (1985).

31 *ibid* p. 185, 188-195.

32 *ibid* p. 181-2.

33 *ibid* p. 181-2, 185, 187.

arbitration emerges from, but somehow transcends, state and international law. Lew also speaks of 'tentacles that descend from the domain of international arbitration to the national legal arena' whenever an arbitration agreement or award needs to be recognized and enforced, or when an arbitral proceeding requires support.³⁴ However, he does not provide any theoretical analysis that would explain this interaction or, more importantly, how it is that autonomous arbitration is created by the very state and international legal orders it is said to transcend.

2.2 *Gaillard's Autonomous Arbitral Legal Order*

In contrast to Lew's bold declaration of independence, Gaillard begins with the observation that philosophical notions of autonomy lie at the core of the study of international arbitration.³⁵ To illustrate his point, he frames his enquiry in the following terms:

[T]he arbitrators' power to render a decision, which is private in nature, on the basis of an equally private agreement of the parties, begs a fundamental question. Where does the source of such power and the legal nature of the process and of the ensuing decision stem from? This question may be referred to as that of the 'juridicity' of international arbitration.³⁶

It is this question of 'juridicity' that Gaillard seeks to resolve by establishing a foundational theory that can explain 'the entire phenomenon of international arbitration'.³⁷ He identifies three such potential 'structuring representations', as he calls them. The first, 'monolocal', representation corresponds to the traditional seat theory. The 'juridicity' of international arbitration is said to be rooted in the state law of the seat of the arbitration, the *lex arbitri*, which recognizes and gives legal effect to the agreement to arbitrate, the conduct of the arbitral proceedings, and the resulting arbitral award.³⁸ It is the view espoused by

34 *Ibid* p. 182, 203.

35 Gaillard (n 2) p. 2.

36 *ibid* p. 2 (footnotes omitted) (emphasis added).

37 *ibid* 14. See also: E Gaillard, *Three Philosophies of International Arbitration* in AW Rovine (ed) *Contemporary Issues in International Arbitration and Mediation - The Fordham Papers* (Martinus Nijhoff 2009) 305, p. 306; Gaillard (n 14) p. 273.

38 Gaillard (n 2) p. 15-24. See also: Gaillard (n 37) p. 306; Gaillard, *The Representations of International Arbitration* (n 14) p. 277; E Gaillard, *Transcending National Legal Orders for International Arbitration* in AJ van den Berg (ed) *International Arbitration: The Coming of a New Age?* ICCA Congress Series (Vol 17, Kluwer Law International 2013) p. 372; E Gaillard, *The Present - Commercial Arbitration as a Transnational System of Justice: International Arbitration as a Transnational System of Justice* in AJ van den Berg (ed) *Arbitration: The Next Fifty Years*, ICCA Congress Series (Vol 16, Kluwer Law International, 2012) p. 67-8.

opponents of the delocalisation movement such as F A Mann and William Park.³⁹

The second, 'Westphalian',⁴⁰ representation moves away from this attempt to root the juridicity of international arbitration in one state legal order.⁴¹ For Gaillard, this move is brought about by the New York Convention, which he considers authorizes states to recognize and enforce awards that have been set aside at the seat.⁴² It is highly contested as to whether this interpretation is correct.⁴³ However, such dogmatic questions are beyond the scope of this paper. From a theoretical perspective, the interesting point is the claim that international arbitration may derive validity from any state legal order that is willing to recognize and enforce an award.⁴⁴ In this way, the Westphalian representation can be seen as corresponding to the delocalisation movement.⁴⁵ Like the proponents of delocalisation,⁴⁶ Gaillard does not see the Westphalian representation as disconnecting international arbitration from state legal orders and basing it purely in the will of the parties.⁴⁷ Rather, it simply recognizes that more than one state may legitimize or validate the arbitration agreement, the arbitral proceeding and the award that flow from the exercise of that will.⁴⁸ However, Gaillard rejects the Westphalian position on the basis that it requires

39 Gaillard (n 2) p. 21-2; Gaillard (n 37) p. 307; *See also*: footnote 5 above.

40 Gaillard *Arbitration* (n 2) p. 29. *See also* Gaillard, *The Representations of International Arbitration* (n 14) p. 279; Gaillard, *The Present - Commercial Arbitration as a Transnational System of Justice* (n 38) p. 66, 68.

41 Gaillard, *Legal Theory of International Arbitration* (n 2) 24. *See also*: Gaillard, *The Representations of International Arbitration* (n 14) p. 277; Gaillard, 'Transcending National Legal Orders' (n 38) p. 372; Gaillard, 'The Present - Commercial Arbitration as a Transnational System of Justice' (n 38) p. 66, 68.

42 Gaillard (n 2) 30-31. For instances where state courts have done just that, *See for example*: *Hilmarton Ltd v Omnium de Traitement et de Valorisation* (OTV) (1994) *Revue de l'Arbitrage* 327; *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices* (2007) *Revue de l'Arbitrage* 507; *Chromalloy Aeroservices Inc v Arab Republic of Egypt* 939 F Supp 907 (DDC 1996).

43 *See, for example*: D Schramm, E Geisinger and P Pinsolle P, 'Article II' in H Kronke, P Nacimeniento and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (Kluwer Law International 2010) p. 44-6; Reisman and Richardson (n 8); Besson, *Is There a Real Need* (n 8); LG Radicati di Brozolo, *The Present – Commercial Arbitration as a Transnational System of Justice: The Control System of Arbitral Awards: A Pro-Arbitration Critique of Michael Reisman's "Architecture of International Commercial Arbitration"* in AJ van den Berg (ed), *Arbitration: The Next Fifty Years*, ICCA Congress Series (Volume 16, Kluwer Law International 2012) p. 74.

44 Gaillard (n 2) p. 24. *See also*: Gaillard, *The Representations of International Arbitration* (n 14) p. 277; Gaillard, *Transcending National Legal Orders* (n 38) p. 372; Gaillard, *The Present - Commercial Arbitration as a Transnational System of Justice* (n 38) p. 66, 68.

45 *See* footnote 5 and accompanying text.

46 *See* footnote 7 and accompanying text.

47 Gaillard (n 2) p. 26. *See also*: Gaillard, *Transcending National Legal Orders* (n 38) p. 372.

48 Gaillard (n 2) p. 26-8.

arbitral tribunals to assess the validity of the arbitration against the cumulative enforcement requirements of every potential place of enforcement.⁴⁹

The third representation takes as its starting point this impasse. On what authority can an arbitral tribunal, faced with a multitude of potentially applicable and conflicting state laws, elect to disregard those it deems parochial, and instead apply a rule generally endorsed by the international arbitration community?⁵⁰ According to Gaillard, the source of this authority is not to be found in any state legal order, but rather in a 'distinct transnational legal order...the arbitral legal order'.⁵¹ This term can only be justified, he says, where jurisdiction can be autonomously accounted for.⁵² However, he is simultaneously at pains to make clear that the autonomous arbitral legal order 'is not to be understood as a collection of pre-existing rules whose source is wholly extraneous to national laws'.⁵³ Rather, 'it is entirely based on the normative activity of states'.⁵⁴ What Gaillard seems to mean by this, is that there are a core set of conditions or requirements for the validity of international arbitration that are commonly recognized by the majority of states at both the national and international level. It is this 'convergence' of state arbitration laws, and the (alleged) fact that no one state has a monopoly over recognition and enforcement, that gives rise to an autonomous arbitral legal order.⁵⁵ Gaillard describes this as the 'transnational positivist trend'.⁵⁶ Thus, in a move reminiscent of Lew's, the 'autonomous' source of the jurisdiction of international arbitration, that which makes it autonomous from state legal orders, is the collective activity and consensus among those very states.⁵⁷ Like Lew, Gaillard's autonomous arbitral legal order emerges from, but somehow transcends, state and international legal orders.⁵⁸

2.3 *The Autonomy Advocates' Paradox*

The preceding discussion reveals the paradoxical tension inherent in the autonomy claims advanced by both Lew and Gaillard. This tension arises from arbitration's interdependence with state and international legal orders. The

49 *ibid* p. 34-5.

50 *Ibid* p. 36-37.

51 *ibid* p. 35

52 *ibid* p. 39.

53 *ibid* p. 45-46. See also: E Gaillard, *Transcending National Legal Orders* (n 38) p. 373; Gaillard, *The Present - Commercial Arbitration as a Transnational System of Justice* (n 38) p. 66, 68-9.

54 Gaillard (n 2) p. 46.

55 *ibid* 46. See also: Gaillard, *Three Philosophies of International Arbitration* (n 37) p. 307-8; Gaillard, *Transcending National Legal Orders* (n 38) p. 373; Gaillard, *The Present - Commercial Arbitration as a Transnational System of Justice* (n 38) p. 66, 68.

56 Gaillard (n 2) p. 45.

57 *ibid* p. 35, 37, 46-7.

58 Gaillard, *Transcending National Legal Orders* (n 38) p. 373.

problem is not the fact that international arbitration at times relies on state courts at the seat and at the place of enforcement. Even undoubtedly autonomous sovereign states must rely on the courts of foreign legal orders when it comes to the enforcement of local court judgments in foreign jurisdictions.⁵⁹ This is not so much a challenge to autonomy, as a recognition of the jurisdictional limitations experienced by every legal order, state or otherwise. The real difficulty lies in the theoretical foundation that Lew and Gaillard use to support their claims. Both rely, implicitly or explicitly, on a form of state-centred legal positivism, which sees the law making of states as the ultimate source of legal authority. The autonomous arbitral legal order emerges (unintentionally and unforeseen) from the typically thoughtful and deliberate positivist law making of states at the national and international level - the very same states from which arbitration is said to be autonomous. Despite emerging from them, it somehow transcends and is therefore independent of them, beyond the interference of their 'parochial' laws.

The motivation for anchoring the arbitral legal order in legal positivism is understandable. Gaillard, in particular, does not want to be accused of positing autonomous arbitration as 'floating in the transnational firmament, unconnected with any municipal system of law'.⁶⁰ But as a result of this theoretical foundation, neither Gaillard nor Lew is able to disentangle arbitration from the legal orders from which they wish to liberate it. Gaillard is at least more explicit in trying to address the paradox, but having bound himself to legal positivism he is forced to rely on an undeveloped analogy with international law that is unsatisfying as an ultimate foundation for his theory.⁶¹ Is the arbitral legal order a part of the international legal order? A branch of international law developed as customary international law? If so, why does Gaillard forsake an international law analysis for a mere analogy? One likely explanation is that such an analysis is unlikely to yield the result Gaillard seeks. As Paulsson astutely observes:

[T]he international legal order of States has been painstakingly (and even so incompletely) constructed on the basis of unanimity. States have never accepted that the norms of the international community are derived from 'progressive tendencies' embraced by other States; they insist on their own individual adhesion. They are even less likely to embrace such amorphous norms as limitations on their laws, in their national space, when dealing with a private-law feature like arbitration.⁶²

But if it is not *actually* international law, and merely *like* it, then it behoves Gaillard to explain exactly what it is. How and on what basis have states unwittingly legislated autonomous arbitration into existence, an autonomy they are now required to respect? Gaillard's 'transnational legal positivist' account

59 R Michaels, *The True Lex Mercatoria: Law Beyond the State*, (2007) 14 *Indiana Journal of Global Legal Studies* p. 447, 458, footnote 52.

60 *Bank Mellat v Helliniki Techniki SA* [1984] 1 QB 291, 301 cited in Gaillard, (n 2) p. 26.

61 Gaillard, (n 2) p. 59.

62 Paulsson, *Arbitration in Three Dimensions* (n 6) p. 302-3.

leaves us no more enlightened than Lew's un-theorized polemic. Whatever the objections to the legal dogmatics underlying Lew and Gaillard's claims,⁶³ the greater objection is this failure to develop a theoretical account of autonomy that can deal with and resolve the paradox arising from arbitration's interdependence with state and international legal orders.

3 The Critics

3.1 *Michaels and the Utopian Dream of Law Without a State*

This interdependence forms the starting point for Michaels' critique of the autonomy advocates. He considers the paradox to be unresolvable. International arbitration is, for Michaels, clearly not autonomous, 'but instead presents a complex and interesting amalgam of state and non-state, public and private law.'⁶⁴ What he is interested in exploring, is why claims of autonomy persist in the face of this 'proven theoretical and empirical inadequacy.'⁶⁵ One 'obvious' explanation, as he sees it, is the economic interests of arbitration practitioners.⁶⁶ However, Michaels himself has argued that commercial parties do not care whether or not arbitration law is autonomous.⁶⁷ As those parties are the clients of the autonomy advocates, it is unclear how such proclamations would further their economic interests. The more important explanation for Michaels is, however, that autonomous arbitration is an ideological dream, and the writings of its advocates a form of utopian literature.⁶⁸ They are 'ideas of a better world: a world governed entirely by the free will of the parties, "free from the controls of parochial national laws".'⁶⁹ For Michaels, the only useful response to such claims is to offer competing conceptions of the future of international arbitration. Michaels wants to encourage scholars from outside the arbitration community to present alternatives to the visions of the autonomy advocates.⁷⁰

In his analysis of the utopian language in autonomy literature, Michaels is particularly critical of Lew and Gaillard. With regard to Lew, he makes two interesting points. Firstly that, historically, arbitration has 'never been truly autonomous.'⁷¹ Therefore, claims such as those made by Lew⁷² are really

63 See, for example: Reisman and Richardson (n 8); Paulsson, *Arbitration in Three Dimensions* (n 6).

64 Michaels, (n 12) p. 37.

65 *ibid* p. 37.

66 *ibid*.

67 See footnote 139 and accompanying text.

68 Michaels, (n 12) p. 37, 39.

69 *ibid* 39, quoting Lew, *Achieving the Dream* (n 3) p. 179.

70 Michaels (n 16) p. 62.

71 *ibid* (n 12) p. 40.

72 See Part 0 above.

nothing more than 'foundation myths'.⁷³ Secondly, that 'the plea for autonomous international arbitration is, at the same time, the plea to state courts to support arbitration and enforce its results.'⁷⁴ That is, what the autonomy advocates really want is not to do away with the state altogether, but to constrain the manner in which state legal orders interact with arbitration. In his treatment of Gaillard, Michaels is especially critical of Gaillard's stated stance regarding the truth of his theory of the autonomous arbitral legal order. Michaels quotes Gaillard's own statement to the effect that, these are 'not matters that may be disposed of by scientific demonstration, but rather matters that belong to the realm of belief, or faith.'⁷⁵ For Michaels, this amounts to an astonishing dereliction of duty:

[F]aith is used here to establish nothing less than the very foundations of the whole theory—the autonomy of arbitration. Precisely at the point, at which arbitration must be legitimised (and therefore at precisely the point at which philosophy of law should furnish answers), we find, instead of an argument, a genuinely Kierkegaardian leap from rationality to faith.⁷⁶

However, in spite of what he may have said on the matter, Gaillard does in fact attempt a theoretical justification for his vision of the autonomous arbitral legal order.⁷⁷ In fact, Gaillard himself joins the chorus of criticism against the arbitration community for its failure to engage with legal theory.⁷⁸ It is uncharitable of Michaels to simply dismiss Gaillard's arbitral legal order as 'utopian dreaming', without making an effort to engage with his arguments. As demonstrated above,⁷⁹ the real problem with Gaillard is not the absence of a theoretical account of autonomous arbitration, but rather the misguided attempt to ground the arbitral legal order in a quasi-international law based on state-centred legal positivism.

3.2 *Brekoulakis and the Legal Pluralist Turn*

Like Michaels, Brekoulakis wants to widen the scope of international arbitration scholarship. But both his aim and his approach differ greatly. Whereas Michaels considers autonomy to be an elusive utopian dream, Brekoulakis argues that contemporary legal and socio-legal theory can help ground an account of the autonomy of international arbitration. Brekoulakis is critical of arbitration scholarship generally, arguing that it has, for the most part, failed to engage with

73 Michaels (n 12) p. 50.

74 *ibid* p. 41.

75 Michaels (n 16) quoting Gaillard, *The Representations of International Arbitration* (n 14) p. 272. See also, Gaillard (n 2) p. 9.

76 Michaels (n 16) p. 46.

77 See Part 0 above.

78 Gaillard (n 2) p. 2-3.

79 See Parts 0 and 0 above.

legal theory.⁸⁰ The only exceptions he is willing to make to this general indictment are the contributions to the delocalisation and autonomy debates.⁸¹ However, the autonomy advocates are not spared entirely. Brekoulakis acknowledges Lew for 'putting forward an appealing vision of an autonomous arbitration system', but criticizes him for basing it exclusively on dogmatic analysis.⁸² As regards Gaillard, Brekoulakis praises his 'erudite studies on the theory of arbitration', but laments the absence of socio-legal analysis.⁸³ Indeed, it is Brekoulakis' theory that the development of an account of international arbitration as autonomous has been obstructed by a failure to engage with contemporary legal and non-legal scholarship, particularly regarding anti-formalism and legal pluralism.⁸⁴

Brekoulakis points out that, outside the world of arbitration, advances in the concept of law have been informed by developments in international legal scholarship.⁸⁵ Specifically, he remarks on the legal pluralists' rejection of the exclusive respect once accorded to state-based legal orders, with their formal law making processes and positivistic law backed by either the threat of force, secondary rules or basic norms.⁸⁶ States must now share⁸⁷ the international legal stage with 'horizontal, transnational and specialized non-state communities', which are characterized by their normative, rule generating capacities.⁸⁸ Meanwhile, however, the arbitration community has remained wedded to state-centred notions of sovereignty and legal positivism.⁸⁹ To illustrate his point, Brekoulakis' points to the seat theory, which has dominated the traditional conception of arbitration law: the idea that 'arbitration is derivative of national laws'.⁹⁰ According to Brekoulakis this conception is reflected not only in state arbitration laws and the New York Convention, but also in the conduct of arbitral tribunals, who have 'felt bound to follow a national law when determining the arbitration process and when deciding whether the subject matter of a dispute is capable of settlement by arbitration.'⁹¹ The same criticism could also be made of the Westphalian view, which simply multiplies the number of possible state legal orders from which the validity of arbitration can be derived. It could also be read

80 Brekoulakis (n 17) p. 768-770.

81 Brekoulakis (n 17) p. 771-2.

82 *ibid* p. 771, footnote 84.

83 *ibid* p. 771-2, footnote 85.

84 *ibid* p. 747.

85 *ibid* p. 756.

86 *ibid* p. 756-8, 775.

87 *ibid* p. 762 (It is important to note that the realization of the role and significance of non-state legal norms does not suggest the eradication of state. The majority of scholars unequivocally accept the importance of state law and state order.) See also Part 0 below.

88 *ibid* p. 757-761, 777.

89 *ibid* p. 771-7.

90 *ibid* p. 772.

91 *ibid* p. 775.

as directed toward Gaillard's desire to root his autonomous arbitral legal order in the positivistic normative conduct of states. However Brekoulakis never makes this point explicitly himself, for reasons that will be discussed shortly.⁹²

Brekoulakis' main contention is that, in the wake of the collapse of legal formalism and the move toward pluralism, international arbitration itself should be conceptualized and recognized as a normative, rule generating community.⁹³ To substantiate his claim, he points to the accepted norms for the conduct of arbitral proceedings that have been established in arbitration practice.⁹⁴ For Brekoulakis, the source of these norms is not only arbitral institutions and their rules, but also the interactions of arbitration practitioners, through associations and councils and their conferences, events and seminars, and the publication of arbitration cases and blogs, all of which 'rapidly produces a burgeoning volume of highly technical knowledge which continuously informs the members of the arbitration community.'⁹⁵ Also of importance is the development of soft law, such as IBA rules and guidelines, which, although non-binding, are widely accepted by the participants of international arbitration.⁹⁶

For Brekoulakis, the significance of these rules of arbitral procedure lies not just in their existence, but more so in their normative value, in that 'the members of [the] arbitration community tend to follow these rules and accept them to guide their conduct.'⁹⁷ He argues that some arbitration practices have become so harmonized and well-established that they 'breed expectations of compliance or 'normative expectations.'⁹⁸ Furthermore, these norms are not accidental, but rather emerge in response to 'the fundamental legal principle of fair process.'⁹⁹ Fair or due process is one of the mandatory laws in most modern arbitration legislation, including the UNCITRAL Model Law. But interestingly, Brekoulakis argues that arbitration laws themselves do not lead to the application of the principle, they merely give it 'institutional support'.¹⁰⁰ This interaction between 'norms' of arbitration practice and state law is analysed in detail below.¹⁰¹ For now, it need only be noted that Brekoulakis, following the work of Dworkin, considers that the existence of fair or due process as a legal principle distinguishes international arbitration as a normative community.¹⁰²

Like Gaillard and Lew, Brekoulakis must account for arbitration's interdependence with state and international legal orders. However, because his

92 See part 0 below.

93 Brekoulakis (n 17) p. 777.

94 *ibid.*

95 Brekoulakis (n 17) p. 778-9.

96 *ibid* p. 780.

97 *ibid* p. 781.

98 *ibid.*

99 *ibid* p. 782.

100 *ibid.*

101 See Part 0 below.

102 Brekoulakis (n 17) 783.

legal pluralist account bases autonomy on the normative capacity of the international arbitration community itself, rather than on the conduct of state and international legal orders, he avoids the paradoxical tension generated by Lew and Gaillard's adherence to state-centred legal positivism. As regards enforcement, Brekoulakis emphasizes that, in a normative community such as that exemplified by international arbitration, what matters is not enforcement and coercion, but compliance and normative persuasion.¹⁰³ He asserts that 'the vast majority of procedural orders and arbitral awards are voluntarily complied with by the parties.'¹⁰⁴ Accordingly, he sees arbitral awards as having normative effect 'without the intervention of state courts'.¹⁰⁵ However, even cases where a party is forced to turn to state courts do not undermine the normative autonomy of arbitration. In a legally pluralistic world, non-state normative communities and state legal orders exist side by side, with overlapping jurisdiction. In this sense, Brekoulakis says that 'arbitration's claim of autonomy entails *co-existence* and *cooperation* with national states rather than *isolation* and *antagonism*.'¹⁰⁶

4 Two Deficiencies in Brekoulakis' Theory

Injecting a legal pluralist analysis into the debate is a positive step forward in resolving the paradoxical tension in the claims of the autonomy advocates. However, Brekoulakis' exclusive focus on the production of procedural rules gives rise to two interrelated concerns that undermine, or at least limit, the value of his contribution. Firstly, it reduces the autonomy debate to the level of the *lex mercatoria*, inviting the criticism that autonomous non-state procedural arbitration law, like autonomous non-state substantive commercial law, is a 'mirage'.¹⁰⁷ Secondly, and more importantly, it avoids the fundamental question of juridicity. As a result, it fails to challenge the seat theory. Ultimately, Brekoulakis advances a relative form of autonomy that offers little in the way of insulation from parochial state laws as sought by Lew and Gaillard.

4.1 *The 'Mirage' of Non-State Procedural Arbitration Law*

Brekoulakis is unambiguous in stating that the normative capacity of his autonomous international arbitration community is limited to the production of rules of procedure.¹⁰⁸ What is important is not the label 'procedural' that Brekoulakis' attaches to these norms. Lew, for example, refers to a 'substantive

103 *ibid* p. 784.

104 *ibid* p. 783.

105 *ibid* p. 784.

106 *ibid*.

107 Michaels, *The Mirage of Non-State Governance* (n 18), p. 33.

108 Brekoulakis (n 17) p. 778.

body of arbitration law' when discussing essentially the same subject matter.¹⁰⁹ What is important, and what both Brekoulakis and Lew could agree on, is that these rules relate to the conduct of the arbitral proceedings. As Lew acknowledges with respect to his own work, this means that the issues raised by Brekoulakis 'are not new but rather revisit old ground'.¹¹⁰ Instead of a non-state substantive commercial law to be applied by arbitrators to determine the merits of the dispute, Brekoulakis is advocating a non-state procedural law to be applied by arbitrators to determine the conduct of the proceedings. This is no more than the *lex mercatoria* 'in a different guise'.¹¹¹ Indeed Gaillard explicitly considers the law applicable to the arbitral procedure to be part of the *lex mercatoria* debate.¹¹² One significant problem that this raises is that it opens Brekoulakis up to many of the same criticisms made in the old *lex mercatoria* debate. Not the least of these is the argument that autonomous non-state laws are a 'mirage'.¹¹³ Michaels has pointed out that state legal orders have three methods for dealing with *lex mercatoria* without actually acknowledging its legitimacy as autonomous law.¹¹⁴ The first and third of these methods are relevant for the current analysis of Brekoulakis' autonomous procedural norms.

4.1.1 Incorporation

The first method is 'incorporation', whereby the state internalizes norms produced outside of it, by codifying or otherwise adopting them.¹¹⁵ Schultz talks about this as a process of 'formal positivization', whereby 'shared principled beliefs' about how to conduct an arbitration are 'translated into formal amendments or creations of regulations - model laws, institutional procedural

109 Noting himself that the label may 'appear or at least intriguing', he states that this body of substantive arbitration law comprises '(i) the forms and content of the arbitration agreement, (ii) the procedure to be followed, (iii) private international law rules, (iv) substantive arbitration rules including independence and impartiality of arbitrators, (v) the obligations of due process and for all parties to have the opportunity to present their case and answer that of the other parties, and (vi) that the decision of the arbitral tribunal should be final and binding.'. Lew, *Is There a "Global Free-standing Body of Substantive Arbitration Law"?* (n 11) p. 54-5.

110 *Ibid* p. 54.

111 *ibid*.

112 Gaillard (n 2) p. 37. (The 'controversies on *lex mercatoria* mainly focused on the law applicable to the merits of a dispute *or to the arbitral procedure*' (emphasis added)).

113 Michaels, *The Mirage of Non-State Governance* (n 18) p. 33.

114 R Michaels, *The Re-Statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralis* (2005) 51 *Wayne Law Review* 1227; Michaels, *The True Lex Mercatoria* (n 59) p. 461.

115 Michaels, *The Re-Statement of Non-State Law* (n 114) p. 1232-1233. *See also*: R Michaels, *Globalization and Law: Law Beyond the State* in Banakar, R and Travers M (eds), *Law and Social Theory* (Hart Publishing 2013) p. 299; Michaels, 'The True Lex Mercatoria' (n 59) p. 461.

rules and revisions of national arbitration laws.¹¹⁶ Returning to the earlier discussion of the principle of fair or due process, Brekoulakis sees the inclusion of this principle in state arbitration laws as 'institutional support'.¹¹⁷ However, even if it is true that the principle first emerged from within the arbitration community, it is possible to view its adoption by states in a far less favourable light. Through the process of incorporation, states do not so much 'support' autonomously generated norms as 'domesticate' them, thereby denying them their 'autonomy', 'independent existence' and 'revolutionary potential'.¹¹⁸ A similar example is provided by Poudret and Besson, who point out that the principle that arbitration clauses are to be interpreted according to transnational rather than state law, a principle accepted by French courts, is 'in reality part of French law and not of any international or transnational system'.¹¹⁹ Paulsson provides an illuminating analysis of Poudret and Besson's insight and its endorsement and application,¹²⁰ with the UK Supreme Court concluding that 'transnational law is French law'.¹²¹ To paraphrase Michaels then, what appears to Brekoulakis to be the state's acknowledgment of autonomy could be viewed equally as the colonization or enslavement of the norms of the international arbitration community.¹²²

4.1.2 Delegation

However, state arbitration laws do not cover many of the detailed rules for the conduct of arbitral proceedings. As such, incorporation cannot completely account for the state's treatment of the norms produced by Brekoulakis' autonomous normative community. The other method utilized by states relevant here is 'delegation', whereby states permit a degree of self-regulation within certain groups.¹²³ These groups are indeed able to autonomously generate their own law to be applied within the group. However, by the very act of granting them the space in which they are permitted to do so, the state denies the group

116 T Schultz, *Secondary Rules of Recognition and Relative Legality* (2011) 56 *American Journal of Jurisprudence* 59, p. 64. However, it is important to note that Schultz explains these 'shared principled beliefs' not through the theory of legal pluralism, but rather through a 'social thesis of legal positivism', drawing on Hart's secondary rules.

117 See Part 0 above.

118 Michaels, *The Re-Statement of Non-State Law* (n 114) p. 1232-4.

119 J-F Poudret and S Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, London 2007) 180.

120 Paulsson, *Arbitration in Three Dimensions* (n 6) p. 305-306.

121 *Dallah Real Estate and Tourism Holding Company v Government of Pakistan* [2010] UKSC 46, para 15.

122 Michaels, *The Re-Statement of Non-State Law* (n 114) p. 1232.

123 Michaels, *The Re-Statement of Non-State Law* (n 114) 1234; See also: Michaels, *Globalization and Law* (n 115) p. 299; Michaels, *The True Lex Mercatoria*, (n 59) p. 461.

'full autonomy'.¹²⁴ Importantly, for the state, it does not matter whether the norms of these communities are created before or after the fact of delegation, either way they are subordinated.¹²⁵ As Michaels says:

The state's delegation is frequently no more than the acceptance of a *fait accompli*. But from the state's viewpoint, this does not change the nature of delegation or the subordination of these norms to those of the state. Rather, from the state's standpoint, these norms acquire the status of law from the very moment they are attached and subordinated to the state and its law. Again, as with incorporation, as soon as these norms are recognized as law, they lose their autonomous status.... Non-state law turns into sub-state law.¹²⁶

Arbitral tribunals and parties may develop and apply their own procedural norms for the conduct of their arbitration. But as far as states are concerned, this is only because states have (*ex ante* or *ex post facto*) delegated a space¹²⁷ in which tribunals and parties are permitted to do so; because states are willing to accept those norms as a form of subordinated law. An example of this process of delegation is evident in the liberalisation of state arbitration laws.¹²⁸ Like the principle of fair or due process that has been incorporated into state arbitration laws, those norms that are recognized through delegation are 'denied the status of autonomous law.'¹²⁹

124 Michaels, *The Re-Statement of Non-State Law* (n 114) p. 1234.

125 *ibid* p. 1235

126 *ibid*.

127 An analogy may be drawn here with Simon Roberts' analysis of local autonomous regions within centralized polities. Roberts states that: '[e]ven the smallest centralised polities in their nature provide more or less extensive arenas within which qualified local autonomy - locally negotiated order - is permitted, encouraged (sometimes required) to operate. The presence of these spaces is, of course, a notable feature of the metropolitan orders of nation states and their colonial extensions. The legal order of the nation state creates and monitors these spaces, retaining in the background its capability of centralised, imposed decision and enforcement.' S Roberts, *After Government? On Representing Law Without the State* (2005) 68 *The Modern Law Review* 1 p. 16.

128 Schultz says that the private regulation of arbitral procedure is likely 'a consequence of "the space left by the states", in other words the liberalization of arbitration by national laws. The regulatory void had indeed to be filled with new norms: Anthropological observations suggest that the parties typically seek to increase the predictability of the regulatory framework that governs their dispute settlement processes.' At the same time Schultz notes that this increase in private regulation is likely to have spurred on more liberal arbitration laws: 'A private field that is more fully self-regulated more easily triggers a state policy of *laissez-faire*.' Schultz, *Secondary Rules of Recognition* (n 116) p. 12.

129 Michaels, *The Re-Statement of Non-State Law* (n 114) p. 1235.

4.1.3 Relative Autonomy

By reducing the norms of the international arbitration community to a form of *lex mercatoria*, Brekoulakis has opened them up to an attack on their autonomy. Brekoulakis would likely make two replies in his defence. Firstly, to the extent that the procedural orders and awards of arbitral tribunals are regularly obeyed, states and their courts often play no part in the arbitration process.¹³⁰ Secondly, to the extent that the international arbitration community and its norms are required to interact with state legal orders, that interaction is one of 'co-existence' and 'cooperation'.¹³¹ These are both important and valid points. Indeed, Michaels points out that the analysis of the way in which states subsume normative orders within state law, and thus deny them autonomy, is always taken 'from the perspective of the state'.¹³² States do not have an 'objective' legal monopoly, and 'normative orders' such as the international arbitration community are not subordinate 'in some abstract or universal way'.¹³³ Therefore, to say that states deny the autonomy of the international arbitration community and its norms through processes of incorporation and delegation is *not* necessarily to deny the existence of that community or the effectiveness or legality of its norms.¹³⁴

In a similar vein, Schultz uses a distinction between relative and absolute legality to make the point that the status of a 'non-state normative system' cannot be determined by reference to its treatment by a particular state legal order.¹³⁵ Relative legality equates to the subjective perspective of the state. It is 'the internal point of view of one specific legal system regarding the legality of another rule system'.¹³⁶ Absolute legality, on the other hand, refers to the perspective of an objective outsider: 'the external point of view of the analyst studying the question whether a given system of rules instantiates the characteristic features of law'.¹³⁷ The same point is made by Paulsson, although in reverse, when criticising Gaillard for relying on French court judgments to support the claim for the autonomy of international arbitration. Paulsson points out that comments by the French judiciary do not prove the existence of an autonomous arbitral legal order. They are simply 'the reaction of a single national legal order among the multiplicity of orders which may have the occasion to play a role in the life of an arbitration.'¹³⁸ At an objective level, states cannot, by their judicial pronouncements, either deny or grant autonomy to international arbitration.

130 See footnote 105 and accompanying text.

131 See footnote 106 and accompanying text.

132 Michaels, *The Re-Statement of Non-State Law* (n 114) p. 1236.

133 *ibid* p. 1235-6.

134 *Ibid*.

135 Schultz, *The concept of law* (n 9) p. 68.

136 *ibid*.

137 *ibid*.

138 Paulsson, *Arbitration in Three Dimensions* (n 6) p. 303-304.

In one sense then, we can speak of the autonomy of the international arbitration community and its norms regardless of the position taken on this point by states and their courts. Importantly, the conduct of states does not affect Brekoulakis' analysis of the way in which these procedural norms are produced and obeyed internally. Moreover, it may be argued that, for the users of international commercial arbitration, the parties, it is irrelevant whether the procedural norms generated by the international arbitration community remain autonomous or are subsumed within state law through incorporation or delegation; what matters is simply their efficiency and functionality.¹³⁹ But as discussed in the next section, seen from another perspective, this form of relative autonomy is plainly insufficient for the autonomy advocates and their concerns for the effectiveness of international arbitration for the parties they represent.

4.2 What About 'Juridicity'?

The second and related problem with Brekoulakis' exclusive focus on procedural norms, is that it does not address the question of the underlying source of the validity of international arbitration. Or, to adopt Gaillard's language, arbitration's 'juridicity'. As a result, although he criticizes it, Brekoulakis does not in fact challenge the seat theory. In fact, Brekoulakis is explicit that he is not concerned with this subject, which he disregards as merely a contractual issue.¹⁴⁰ However, simply relegating this to a matter of contract is unsatisfactory, because it leaves unanswered the question of which legal order(s) have ultimate authority to determine and give legal effect to the parties' agreement to arbitrate, and the corresponding empowerment of the arbitral tribunal to deliver an enforceable award. This is precisely the question that Gaillard was trying to resolve.¹⁴¹ While Gaillard's answer was theoretically inadequate, Brekoulakis does not answer it at all, avoiding the question altogether.

Not only does Brekoulakis' theory fail to account for the juridicity of international arbitration, but the autonomously generated norms of his international arbitration community are easily reconciled with the seat theory. The existence of such a community does not, in itself, suggest the need for an autonomous arbitral legal order of the sort proposed by Gaillard. According to this view, in relation to any given arbitration, you would look to the *lex arbitri* to determine, firstly, which autonomously generated norms of the international arbitration community are applicable because they had been incorporated into the state legal order. And secondly, those that are potentially applicable because the *lex arbitri* delegates permission to the arbitral tribunal or to the parties to develop and apply them as a form of subordinated law. In each case, to the extent that a norm autonomously generated by the international arbitration community has not been subsumed within, and conflicts with, the *lex arbitri*, it will not be

139 Michaels, *The Mirage of Non-State Governance* (n 18) 38. See also: Michaels, *The True Lex Mercatoria*, (n 59) p. 452, 463.

140 Brekoulakis (n 17) p. 777-8.

141 Gaillard (n 2) p. 38.

recognized or applied by the courts at the seat. Conversely, the existence of such a norm will not prevent the courts at the seat from applying a conflicting state law purporting to affect an arbitration. That is not an issue in and so far as arbitration does not come into contact with state legal orders. But as the autonomy advocates and Brekoulakis himself recognize, arbitration must occasionally interact with and rely on states and their courts.

Hence we return to the principal concern of Lew and Gaillard: how to prevent state courts, particularly those at the seat, from applying state laws that conflict with accepted norms of international arbitration. This concern operates on at least two levels. Firstly, that courts at the seat will apply a 'parochial' law to, for example, deny the jurisdiction of the arbitrators, injunct the arbitration from proceeding, or set aside the award. Secondly, that a court in an enforcing state considering a request for enforcement may defer to the decision of a court at the seat in refusing to enforce the award. What is important here is not the fact that a state court may be required to give effect to an arbitration agreement or an award. In both instances, the key challenge is the assumption that the state legal order at the seat is the source of the juridicity of the arbitration, in accordance with the seat theory. Because the state legal order of the seat is considered to be the underlying source of the validity of the arbitration, it may apply its laws to invalidate the arbitration, and other state legal orders will, generally, respect that invalidation. By avoiding the foundational issue of juridicity and settling for a form of relative autonomy, Brekoulakis fails to address the problem of state interference.

5 Towards a Theory of Autonomy

The problem with Lew's account of autonomy is the complete absence of any theoretical analysis that would enable us to make sense of arbitration's alleged transcendence out of state and international legal orders. Gaillard valiantly attempts to fill this void, but is brought undone by his adherence to state-centred legal positivism. Even as he seeks to establish his autonomous arbitral legal order, he is forced to ground it in a form of quasi-international law based on the normative activity of states. Brekoulakis' legal pluralist account overcomes the paradox inherent in Lew and Gaillard's accounts, but falls short of their aims by focusing exclusively on procedural norms. One way forward, then, would be to expand the legal pluralist analysis commenced by Brekoulakis to Gaillard's question of juridicity. On such a view, the normative capacity of the international arbitration community would be capable not only of generating procedural norms for the conduct of arbitral proceedings, but of replacing the legal order at the seat as the underlying source of validity or juridicity.

It should be unnecessary at this stage to point out that a legal pluralist account of juridicity would not posit the international arbitration community as the *sole* source of regulation of international arbitration. On the contrary, the very definition of legal pluralism is the 'situation in which two or more legal systems

coexist in the same social field'.¹⁴² In transnational commercial spheres, there are multiple and overlapping claims to jurisdiction by a plurality of legal orders.¹⁴³ To paraphrase Cotterrell, international arbitration would be the *source* of its own legal regulation, but would nonetheless be subject to legal regulation created in other networks that impinge on it.¹⁴⁴ Accordingly, it should be acknowledged that not even a legal pluralist account of juridicity would fully address the principal concern of the autonomy advocates, at least not in the manner in which they may wish. Indeed, it must be conceded that no account of autonomy is capable of doing so. The pursuit of autonomy as a means to the end of definitively binding the actions of state courts is intrinsically quixotic. As previously noted, not even the unquestioned autonomy of sovereign states can force the courts of state A to recognize and enforce a decision of the courts of state B.¹⁴⁵ At present, the only means of imposing such a requirement is by way of bi- or multilateral treaty.

How then, would a legal pluralist account of juridicity go beyond Gaillard's legal positivist account, or Brekoulakis' relative autonomy? As has been discussed,¹⁴⁶ the key issue is the currently accepted monopoly that the legal order at the seat enjoys as the underlying source of juridicity. Whatever their freedom to determine and apply procedural rules, so long as the seat theory reigns arbitrators will feel constrained by the authority of the *lex arbitri*. So too will courts at the place of enforcement feel constrained to follow court decisions from the seat. While it is not possible to bind state courts (other than by way of a treaty), it may be possible, over time, to influence the currently accepted stance towards the issue of juridicity. Bearing in mind that the behaviour of state courts is not determinative of autonomy in an objective sense,¹⁴⁷ what is needed is an account of autonomy that is capable of challenging and displacing the seat theory. Brekoulakis' account can be reconciled with the seat theory, and therefore does not represent an alternative to it. Lew and Gaillard's has the unresolvable paradox that states must accept that they have unwittingly legislated an autonomous legal order into existence. Moreover, as the creators of this legal order, they can presumably legislate it out of existence once more.

The way in which legal pluralism may gradually bring about changes in the accepted view of juridicity is helpfully illustrated by (mis)appropriating and adapting a model provided by Michaels.¹⁴⁸ Michaels discusses the way in which legal positivism came to replace natural law, by overcoming limitations that had

142 SE Merry, *Legal Pluralism* (1988) 22 *Law & Society Review* 869, p. 870.

143 See footnote 106 and accompanying text. The key difference with the Westphalian representation being that a legal pluralist account does not simply suggest that it is a plurality of *state* legal orders that may validate the arbitration.

144 R Cotterrell, *What is transnational law* (2012) 37 *Law & Social Inquiry* 500, p. 515.

145 See footnote 59 and accompanying text.

146 See Part 0 above.

147 See part 0 above.

148 Michaels, however, would consider this to be a matter of 'faith', rather than reason. See Michaels (n 2) p. 55.

been exposed in natural law's explanatory power as a result of historical and religious developments. He then suggests that, in the same way, 'the literature on law beyond the state can be viewed as a sign of the crisis that legal positivism is suffering today.'¹⁴⁹ This crisis is brought about by 'the transcendence of national boundaries in commerce and communication' and 'the growing importance of norms formulated and enforced by non-state entities'.¹⁵⁰ While legal pluralism is anything but uncontested,¹⁵¹ its attractiveness as a theoretical foundation for autonomous arbitration lies in its ability to explain aspects of the regulation of transnational legal phenomena which increasingly cannot be adequately dealt with under legal positivism, transnational or otherwise.

6 Conclusion

The purpose of this paper has not been to engage in any kind of 'anarcho-capitalist fantasy'.¹⁵² It has simply sought to elucidate the theoretical implications of the claims of the autonomy advocates. Specifically, it has evaluated the adequacy of the legal theory underpinning their claims for the purposes to which they themselves seek to put it. This analysis has revealed that state-centred legal positivism is not an appropriate legal theory for an autonomous arbitral legal order imbued with the qualities and ambitions ascribed to it by Lew and Gaillard. If Lew and Gaillard wish to remain adherent to legal positivism, the appropriate way forward to increasing international arbitration's autonomy would be to more explicitly embrace the international law analogy alluded to by Gaillard. More specifically, to advocate for the negotiation of a new multilateral treaty further restricting the grounds on which states may interfere with the arbitration process.¹⁵³ If, however, Lew and Gaillard wish to establish international arbitration as truly autonomous, then the legal pluralist analysis commenced by Brekoulakis represents a more promising theoretical model on which to proceed with such a project. Provided, of course, that the analysis goes beyond the question of procedural rules to the issue of juridicity.

However, this paper should not be read as an ideological crusade - picking and adopting whichever theoretical model best supports international commercial arbitration's claims to autonomy.¹⁵⁴ There is an important difference between identifying legal pluralism as a legal theory with the potential to explain

149 *ibid.*

150 *ibid* 55-6.

151 *See* for example Roberts (n 127).

152 Reisman and Richardson (n 8) p. 17.

153 For such a proposal, *See* for example: J Templeman, *Towards a Truly International Court of Arbitration* (2013) 30 *Journal of International Arbitration* 197. Templeman advocates for 'the creation of a truly international court of arbitration, established through a multilateral convention, to usher in a new age of international commercial dispute resolution.' Perhaps the best argument against Gaillard's transnational legal positivist account is the fact that such a convention has not been concluded.

154 Gaillard (n 2) p. 6-9.

and support those claims, and advocating for their acceptance on that basis. Once the theoretical possibility is established, the question then necessarily turns to whether it ought to be embraced: should autonomous arbitration be recognized and permitted to exist?¹⁵⁵ Another matter again is whether states have the ability to resist such a development. This paper has endeavoured to lead the debate to the point where there is utility in asking such questions. Developing answers to them is equally important if the ambitions of the autonomy advocates are ever to be realized.

155 On the question of the legitimacy or desirability of autonomous arbitration, *See* especially: Schultz, *Secondary Rules of Recognition* (n 116) p. 12-29; Schultz, *The Concept of Law* (n 9). Besson also makes the important point that '[t]ranscending national legal orders would...establish a legal regime, which would be far less predictable than the existing legal orders and their important case law.' Besson, *Is There a Real Need* (n 8) p. 383. *See* also, Cotterrell, *What is transnational law* (n 144) p. 516.