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Aligning State Sovereignty with Transnational Public Policy

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The rationale for "delocalizing" transnational public policy is not that domestic authorities lack the capacity to delineate the scope of transnational public policy. Rather it is that the public policy that is articulated solely through a domestic judicial lens can be fractionalized as national courts internalize public policy differently to comport with their discrete and sometimes conflicting domestic requirements. This Article uses controversial litigation in the United States and Russia to illustrate the disturbing ripple effect of domestic courts declining to enforce foreign judgments that have annulled arbitration awards. It proposes a way for domestic judges to apply transnational public policy to international commercial transactions, without displacing or circumventing domestic public policy. It applies this analysis to the "public policy exception" by which domestic judges decline to recognize and enforce international arbitration awards under the New York Convention.

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I. INTRODUCTION

A controversial but important issue facing international commercial arbitration is how the public policy exception to the recognition and enforcement of arbitral awards under article V(2)(b) of the New York Convention (N.Y. Convention) should be construed.[1] Some argue that it ought to be construed restrictively, encompassing only the localized interests of signatory states.[2] Others contend that it should be construed expansively to include transnational public policy considerations as well.[3] Yet others worry that national courts invoking

1. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter N.Y. Convention]. On the status of the N.Y. Convention, see *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, U.N. COMMISSION ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 13, 2018).

2. For analysis of construing the public policy exception restrictively in accordance with a mono-local theory of arbitration, see, for example, ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION 61 (2013); L. Yves Fortier, *Arbitrability of Disputes*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 269, 274-76 (Gerald Aksen et al. eds., 2005); F.A. Mann, *Lex Facit Arbitrum*, *in* INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157, 159 (Pieter Sanders ed., 1967). *See also* Ralf Michaels, *Dreaming Law Without a State: Scholarship on Autonomous International Arbitration as Utopian Literature*, 1 LONDON REV. INT'L L. 35, 39-40 (2013) (critiquing transnational conceptions of international commercial arbitration law as utopian).

3. For a discussion of re-delineating and expanding the public policy exception beyond territorial or mono-local boundaries, see Karl-Heinz Böckstiegel, *Public Policy as a Limit to Arbitration and Its Enforcement*, 2 DISP. RESOL. INT'L 123, 123 (2008); Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards*, 1 OHIO ST. J. ON DISP. RESOL. 365, 372-74 (1986). *But see* Bernard Hanotiau & Olivier Caprasse, *Public Policy in International Commercial Arbitration*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 787,

mono-localized interests to annul international arbitration awards may do so partially and in deference to the state's executive.[4] These different perspectives raise the question of whether the public policy defenses adopted by courts of state signatories to the N.Y. Convention include, or prevail over, transnational conceptions of public policy.[5]

Attenuating these different perspectives is a further limitedly endorsed Hague Convention on the Recognition and Enforcement of Foreign Judgments.[6] Article V of that Convention provides an

802 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008) (construing public policy expansively on grounds that it is "central to the law of arbitration"); Maxi Scherer, *Violation of Due Process, Article V (1)(b)*, *in* NEW YORK CONVENTION: CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 COMMENTARY 279, 281-83 (Reinmar Wolff ed., 2012) [hereinafter CONVENTION COMMENTARY] (extending the scope of the procedural public policy exception under the N.Y. Convention).

4. The consternation is both over domestic courts adopting a mono-local theory of arbitration in order to defer to local interests, including the executive, and theories that transcend such local interests. In contention are five different dimensions of public policy: mono-local, identified with internal-domestic public policy; multi-local, identified with the local policies of a multiplicity of states; transnational, identified with the public policy shared by a plurality of nation states; international, identified with the "law of nations"; and autonomous or universal, identified with principles of public policy that prevail over the policies of states. This Article concentrates on mono-local, transnational, and autonomous conceptions of public policy. For other scholarly adaptations of the public policy defense under the N.Y. Convention, see, for example, EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 24-29, 60-61 (2010). Emmanuel Gaillard argues against a pluralist theory of arbitration in favor of an international arbitral order based on the *jus gentium*. However, he grounds the latter in mono-local public policy in which courts incorporate transnational into domestic public policy. *See id.*; *see also* Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?*, 4 J. INT'L DISP. SETTLEMENT 587, 592-610 (2013) (evaluating the potentially deleterious effects of a domestic public policy defense).

5. Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 ARB. INT'L 179, 179-80 (2006) ("dreaming" of an autonomous regime of international commercial arbitration); Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 249, 251-55 (2003) (discussing incorporating transnational public policy into domestic law). *See generally* JAN PAULSSON, THE IDEA OF ARBITRATION 29-50 (2013) (arguing against a mono-local theory of arbitration, and in favor of a pluralist theory that, when conceived vertically, supports an autonomous international order); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313 (2003) (proposing the globalization of due process in international arbitration); William W. Park, *The* Lex Loci Arbitri *and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983) (arguing for the delocalization of international commercial arbitration); Jan Paulsson, *Arbitration in Three Dimensions*, 60 INT'L & COMP. L.Q. 291 (2011) [hereinafter Paulsson, *Three Dimensions*] (evaluating territorial, plural, and autonomous transnational dimensions of arbitration law).

6. Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 257 [hereinafter Hague Convention]. The signatories to the Hague Convention are Albania, Cyprus, Kuwait, Portugal, and the Netherlands. *See Convention on the Recognition and Enforcement of Foreign Judgements in*

exception to the enforcement of foreign judgments of courts in signatory states, if the judgment is "manifestly incompatible with the public policy of the State addressed or if the decision resulted from proceedings incompatible with the requirements of due process of law or if, in the circumstances, either party had no adequate opportunity to fairly present his case."[7] While the Hague Convention has few signatories, it does raise the specter of domestic courts declining to recognize decisions of foreign courts enforcing or annulling international arbitration awards. Centrally at issue is not whether domestic courts may decline to enforce foreign judgments that conflict with their localized interests. They clearly can do so. The issue is whether they disregard countervailing transnational public policy in the process of doing so.[8]

A growing number of controversial domestic decisions, including in the United States, have annulled foreign arbitration awards on domestic public policy grounds or refused to enforce foreign judgments ruling on those awards.[9] Among these is a recent litigation saga in New York, which concluded with the 2017 decision of the Appellate Division of the New York Supreme Court in *Citigroup Global Markets, Inc. v. Fiorilla*.[10] That court upheld an earlier New York decision vacating an arbitration award under the N.Y. Convention on grounds that the arbitrators had "manifestly disregarded the law in failing to enforce a prior settlement agreement between the parties."[11] More significantly, the court enjoined the award creditor from enforcing in France an arbitral award annulled in New York.[12] The case raises the

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Civil and Commercial Matters, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f140b&clang=_en (last visited Oct. 13, 2018).

7. Hague Convention, *supra* note 6, art. V.

8. *See* Georges R. Delaume, *Enforcement Against a Foreign State of an Arbitral Award Annulled in the Foreign State*, 1997 INT'L BUS. L.J. 253, 254; Juliane Oelmann, *The Barriers to the Enforcement of Foreign Judgments as Opposed to Those of Foreign Arbitral Awards*, BOND L. REV., Dec. 2006, at 77, 81-91; Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding Local Standard Annulments*, 6 ASIA PAC. L. REV., no. 2, 2008, at 1, 3-6 (1998); Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 198 (2013).

9. *See* discussion *infra* Part III.

10. 54 N.Y.S.3d 586, 586 (N.Y. App. Div. 2017).

11. *Id.* (citing Citigroup Global Mkts., Inc. v. Fiorilla, 4 N.Y.S.3d 528, 529 (N.Y. App. Div. 2015)). In support of its injunction against enforcement of the award, the court cited *Indosuez International Finance, B.V. v. National Reserve Bank*, 758 N.Y.S.2d 308, 310 (N.Y. App. Div. 2003). It is noteworthy that this cited decision did not involve arbitration.

12. *Fiorilla*, 54 N.Y.S.3d at 586 (citing Sebastian Holdings, Inc. v. Deutsche Bank AG, 912 N.Y.S.2d 13, 14-15 (N.Y. App. Div. 2010)). The court so held, even though, based

specter of a domestic court imposing orders with extra-territorial application on a party, "in the interests of protecting the New York judgment on the merits."[13] Such judicial action ignites potential conflict between determining and enforcing courts over whether to recognize international arbitration awards based on localized interests that transcend transnational public policy.[14] Resolution of these judicial differences is further impeded by the fact that the Hague Convention has few signatories and limited legitimacy as a source of law and policy.

Nor is the N.Y. Convention particularly helpful in resolving issues arising from the judicial annulment of arbitral awards. While it provides that "[r]ecognition and enforcement of the award may be refused," it permits this "only if" the party so requesting furnishes proof that the award was set aside by "a competent authority of the country in which . . . that award was made."[15]

The public policy exception in the N.Y. Convention is also terse and unqualified. It states only that a signatory state has the right to decline to enforce an arbitration award in accordance with "the public policy of that country,"[16] without elaborating on the nature and scope of that "public policy." Neither the *travaux préparatoires* to the N.Y. Convention, nor the jurisprudence since 1958, have resolved this uncertainty, despite efforts of the International Law Association (ILA)

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on the facts, it did not appear to have acted on the award debtor's specific request to direct the award creditor to release any assets whose attachment was premised on the award.

13. *See id.* In chronological order, following the award's annulment by the court, the award creditor moved in New York to vacate the previously annulled award there, notwithstanding that the award had already been enforced in France. The award debtor responded by petitioning the court to direct the award creditor to release any assets whose attachment was premised on the award. The court refused to vacate its judgment of annulment, holding that the award creditor had not informed the French court that the award had been annulled in New York and that the award creditor had "commenced the French proceeding in bad faith." *Id.*

14. Interestingly, the court did not clarify why the case was international and why the dispute was subject to the N.Y. Convention. However, both can be inferred from the fact that the award was recognized and enforced in France and that the United States and France are long-standing signatories to the N.Y. Convention. *See id.*

15. N.Y. Convention, *supra* note 1, art. V(1). For a discussion of the article's use of a discretionary "may"—rather than "shall" or "must"—refuse recognition and enforcement of a foreign arbitral award, see WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 185 (2006); Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT'L 227 (1998). *See also* Dallal v. Bank Mellat [1986] 1 QB 441 at 441-42 (Eng.) (discussing English courts' recognition of arbitral awards as valid when awarded by competent foreign jurisdictions).

16. N.Y. Convention, *supra* note 1, art. V(2)(b).

to elaborate on the scope of public policy under that Convention, including whether it includes transnational public policy.[17]

The difficulty with limiting the public policy exception to internally generated domestic interests is that determining and enforcing courts are likely to differ over the parameters of those local interests, as arose in *Fiorilla*.[18] They are also likely to vary over whether the public policy exception includes transnational public policy only if it affirms localized interests, even though those interests may oscillate from state to state.[19] If domestic courts maintain that fundamental conceptions of transnational public policy transcend domestic interests, they need to determine their nature, as well as their comparable application across state boundaries.

There are several hurdles to overcome in propagating an autonomous transnational public policy. The first hurdle is to determine whether there are transcendent principles arising in natural law,[20] reflected in comity among states,[21] or embedded in a mandatory *jus cogens* that ought to be treated as more fundamental than the

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17. For a discussion of the *travaux*, see U.N. COMM'N ON INT'L TRADE LAW SECRETARIAT, GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, at 237-38 (2016) [hereinafter UNCITRAL CONVENTION GUIDE], http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf. For an analysis of the ILA's conception of public policy, see INT'L LAW ASS'N, REPORT OF THE SEVENTIETH CONFERENCE HELD IN NEW DELHI 2-6 APRIL 2002, at 16, 16-19 (2002); Mayer & Sheppard, *supra* note 5, at 255. *See infra* text accompanying notes 144-149.

18. This Article construes the local interests of New York identified in *Fiorilla* as domestic public policy because they are the only U.S. interests raised; however, U.S. interests at large may not coincide with New York interests. This difference may eventuate, as the dispute is now before the federal court. *See* Fiorilla v. Citigroup Global Mkts., Inc., 17-cv-5123 (PKC), 2018 WL 3130604 (S.D.N.Y. June 25, 2018), *appeal filed*, No. 18-2196 (2d Cir. July 26, 2018).

19. *See* SUBCOMM. ON RECOGNITION & ENF'T OF ARBITRAL AWARDS, INT'L BAR ASS'N, REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION 2 (2015) (finding that, of more than forty jurisdictions surveyed, only Australia and the United Arab Emirates had established explicit statutory definitions of "public policy").

20. For a discussion of judicial independence in western liberal democracies, see LORD WOOLF, THE PURSUIT OF JUSTICE 161-74 (Christopher Campbell-Holt ed., 2008); Shimon Shetreet, *The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges*, 10 CHI. J. INT'L L. 275 (2009).

21. *See* Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]; OPPENHEIM'S INTERNATIONAL LAW: PEACE 51 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (discussing comity among nations); *see also* ANDREW TWEEDDALE & KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES 443-44 (2005) (considering comity as a ground for enforcing international arbitration awards); Elisa D'Alterio, *From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?*, 9 INT'L J. CONST. L. 394, 399 (2011) (discussing comity based on mutual respect between states).

countervailing local and multi-local interests of states.[22] The second hurdle involves establishing when these higher principles ought to bind states and their domestic courts.[23] The third hurdle is to determine how these higher principles of transnational public policy are applied, or ought to be applied, in judicial practice.

In evaluating these issues, the Article explores how domestic courts can apply transnational public policy in deciding whether to enforce international arbitration awards. It proposes how domestic courts can incorporate fundamental conceptions of procedural or substantive justice into domestic law. It assesses the extent to which these fundamental conceptions are shared among states, rather than being autonomous in nature. It concludes by illustrating how shared conceptions of justice can redress introspective local interests without disregarding them, while also avoiding overreliance on autonomous principles of public policy.[24]

II. THE VARIABLE SCOPE OF PUBLIC POLICY

Domestic courts[25] often conceive of public policy as not only inconstant in nature[26] but unpredictable in application.[27] Public policy

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22. *See* Valentina Vadi, Jus Cogens *in International Investment Law and Arbitration*, 46 NETH. Y.B. INT'L L. 357 (2015) (discussing *jus cogens* in international commercial arbitration).

23. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 360 (1981) (evaluating the binding nature of "fundamental" public policy).

24. For a discussion of the adaptive potential of international public policy under the N.Y. Convention, see NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 530-68 (6th ed. 2015); James D. Fry, *Désordre Public International Under the New York Convention: Wither Truly International Public Policy*, 8 CHINESE J. INT'L L. 81, 86-87 (2009); discussion *infra* Part V.

25. Court decisions from various countries are cited throughout this Article, many of which can be found on two websites focusing on the N.Y. Convention. *See Case Law*, 1958 N.Y. CONVENTION GUIDE, http://newyorkconvention1958.org/?opac_view=2&menu=491 (last visited Nov. 27, 2018); *Court Decisions—Decisions Per Country*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/court+decisions/decisions+per+country (last visited Nov. 27, 2018)

26. *See* Veena Anusornsena, Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: The United States, Europe, Africa, Middle East and Asia (Nov. 16, 2012) (unpublished S.J.D. thesis, Golden Gate University School of Law), https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1033&context=theses (analyzing the complex conceptualization of public policy across legal systems). *See generally* HANDBOOK OF PUBLIC POLICY ANALYSIS (Frank Fischer et al. eds., 2007) (discussing normative and ethical issues surrounding public policy).

27. For an analysis of the unpredictable application of public policy in general, see JAMES E. ANDERSON, PUBLIC POLICYMAKING (7th ed. 2011); FARSHAD GHODOOSI,

is referred to as tempestuous,[28] depicted as "a very unruly horse, and when once you get astride it you never know where it will carry you."[29] To this observation the House of Lords added that "[public policy] is a vague and unsatisfactory term . . . [that] is capable of being understood in different senses."[30] Still, public policy has its defenders, with the late Lord Denning asserting that "[w]ith a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles."[31]

The interpretation of the public policy defense under article V(2)(b) of the N.Y. Convention, including transnational public policy, is similarly contentious. Some envisage it as exceptional,[32] not least of all because "[i]t seems impossible to define 'public policy.'"[33] Others stress the difficulty of establishing a uniform procedure by which to determine and apply it.[34]

INTERNATIONAL DISPUTE RESOLUTION AND THE PUBLIC POLICY EXCEPTION (2017); INTERNATIONAL ARBITRATION AND PUBLIC POLICY (Devin Bray & Heather L. Bray eds., 2015).

28. For a discussion of applying transnational public policy in a complex transnational order, see YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 33-67 (1996); RICHARD H. KREINDLER, TRANSNATIONAL LITIGATION: A BASIC PRIMER 238-39 (1998); Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and Some of Its Consequences*, 2 J. INT'L DISP. SETTLEMENT 59, 60-61 (2011).

29. *See* Richardson v. Mellish (1824) 130 Eng. Rep. 294, 303; 2 Bing. 229, 252 (Burrough, J.) (Eng.); *see also* Deutsche Schachtbau-und Tiefbohrgesellschaft M.B.H. v. Shell Int'l Petrol. Co. [1990] 1 AC 295 (HL) 316 (Eng.) ("Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution."); Fender v. St. John-Mildmay [1938] AC 1 (HL) (Eng.) (exemplifying the way in which public policy had evolved over time in England); Janson v. Driefontein Consol. Mines, Ltd. [1902] AC 484 (HL) (Eng.) (applying public policy considerations with caution in English courts).

30. Egerton v. Brownlow, (1853) 10 Eng. Rep. 359, 408-09; 4 HLC 1, 123 (Eng.).

31. Enderby Town Football Club Ltd. v. Football Ass'n [1971] 1 Ch. 591 at 606 (Eng.).

32. *See* Burkhard Hess & Thomas Pfeiffer, *Interpretation of the Public Policy Exception as Referred to in EU Instruments of Private International and Procedural Law* (2011), http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf (considering the "multi-dimensional character" of public policy across the EU); *see also* Joost Blom, *Public Policy in Private International Law and Its Evolution in Time*, 50 NETH. INT'L L. REV. 373, 383-98 (2003) (discussing the various changes and application of public policy over time); *infra* notes 41 & 48 (analyzing how Australian courts differ over the scope of transnational public policy).

33. Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 720 (2016); *see* Jacob Dolinger, *World Public Policy: Real International Public Policy in the Conflict of Laws*, 17 TEX. INT'L. L.J. 167, 170 (1982).

34. *See* Sameer Sattar, *Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?*, TRANSNAT'L DISP. MGMT., Dec. 2011, at 1, 4-5; *see also* Troy L. Harris, *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention*, 24 J. INT'L ARB. 9, 10 (2007) (asserting that article V(2)(b) of the N.Y. Convention is "probably the most misused ground [of non-enforcement] of all"

A tempered response is that however imprecise public policy may be in the N.Y. Convention, it is "a dynamic concept that evolves continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions."[35] Public policy tolerates differences in its construction over time, place, and space, without regressing into judicial whim.

Conceived more restrictively, public policy safeguards "basic notions of morality and justice" as conceived by forum courts.[36] As the United States Court of Appeals for the Second Circuit declared in a widely cited decision, "Enforcement of foreign arbitral awards may be denied on th[e] basis [of public policy] only where enforcement would violate the forum state's *most basic notions* of morality and justice."[37] The Federal Court of Australia, too, has orated that "it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in th[e] jurisdiction [in which enforcement is sought] which enliven this particular statutory exception to enforcement."[38] The Hong Kong Court of Final Appeal has held, to

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(alteration in original) (quoting Jan Paulson, *The New York Convention in International Practice—Problems of Assimilation*, *in* THE NEW YORK CONVENTION OF 1958, at 100, 113 (Marc Blessing ed., 1996))).

35. Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 PENN ST. L. REV. 1227, 1230 (2009); *see also* Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc., 665 F.3d 1091, 1098 (9th Cir. 2011) (noting the "principal purpose" for the United States adopting the N.Y. Convention was "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries" (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974))); Saad U. Rizwan, Note, *Foreseeable Issues and Hard Questions: The Implications of U.S. Courts Recognizing and Enforcing Foreign Arbitral Awards Applying Islamic Law Under the New York Convention*, 98 CORNELL L. REV. 493, 495-97 (2013) (discussing the streamlining of arbitral award enforcement through the N.Y. Convention).

36. Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974).

37. *Id.* (emphasis added); *see also* Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 107 (2d Cir. 2016) (enforcing an arbitration award annulled in Mexico on grounds that Mexican annulment proceedings were so "extraordinary" that failure to enforce the award would be "repugnant to fundamental notions of what is decent and just" under U.S. public policy (quoting Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986))); Ameropa AG v. Havi Ocean Co., No. 10 Civ. 3240(TPG), 2011 WL 570130 (S.D.N.Y. 2011) (addressing what makes an award contrary to notions of justice); Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 820 (D. Del. 1990) (holding that simply validating an arbitral award in favor of the Libyan government did not violate American morals and justice).

38. *Traxys Eur SA v Balaji Coke Indus Pvt Ltd (No 2)* (2012) 201 FCR 535, 560 (Austl.).

similar effect, that an award violates public policy if it is "so fundamentally offensive to [the enforcing] jurisdiction's notions of justice that, despite its being party to the [N.Y.] Convention, it cannot reasonably be expected to overlook the objection."[39]

Civil law courts, too, have circumscribed public policy to "essential and broadly recognized values" in the state, which it presupposes that other states share. For example, a Swiss court held that an arbitration award contravenes public policy "if it disregards those essential and broadly recognised values which, according to the prevailing values in Switzerland, should [form the basis] of any legal order."[40] A Swiss Federal Tribunal concluded that an award violates public policy if it offends Swiss conceptions of justice in an "intolerable manner."[41] Similarly, the Court of Appeal in Paris defined international public policy as "the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character."[42] German courts, too, have stipulated that an arbitration award violates public policy when it derogates from German public and economic life or contradicts German perceptions of justice in an irreconcilable manner.[43] Japanese courts have declined to enforce an arbitration award if its content "is in conflict with the public policy or good morals of Japan."[44]

However, despite national courts localizing core principles of public policy, it is debatable to what extent principles ascribed to

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39. Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co., [1999] 2 H.K.C.F.A.R. 111, 123 (C.F.A.) (H.K.).

40. Tribunal fédéral [TF] [Federal Supreme Court] Mar. 8, 2006, 132 ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [ATF] III 389, 392 (Switz.); *see also* Paolo Michele Patocchi, *The Swiss Practice*, *in* THE NEW YORK CONVENTION OF 1958, *supra* note 34, at 145, 188-96 (addressing arbitral awards that contravene Swiss conceptions of justice).

41. *See* TF July 28, 2010, 4A_233/2010 (Switz.). An Austrian court has held similarly. *See* Oberster Gerichtshof [OGH] [Supreme Court] Jan. 26, 2005, 3 Ob 221/04b, https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20050126_OGH0002_0030OB00221_04B0000_000/JJT_20050126_OGH0002_0030OB00221_04B0000_000.pdf (Austria) (holding that, where an arbitral award violated Austrian conceptions of justice, there could only be partial enforcement of the award).

42. *See* Cour d'appel [CA] [regional court of appeal] Paris, Oct. 16, 1997, 96/84842 (Fr.).

43. *See* BGH Jan. 18, 1990, III ZR 269/88 (Ger.); OLG Nov. 28, 2005, 34 Sch 019/05 (Ger.); OLG July 21, 2004, VI Sch(Kart) 1/02 (Ger.). *See generally* Wolfgang Kühn, *Current Issues on the Application of the New York Convention: A German Perspective*, 25 J. INT'L ARB. 743 (2008) (discussing the German perspective regarding the N.Y. Convention).

44. *See* Chusaihō [Arbitration Law], Law No. 138 of 2003, arts. 44-46, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=5&re=2&dn=1&gn=99&sy=2003&ht=A&no=138&x=43&y=15&ia=03&ky=&page=1&vm=02 (Japan).

"fundamental justice" are shared across states and how they are distinguished from lesser conceptions of justice.[45] The added impediment is that fundamental principles of justice are seldom elucidated. Typically, the U.N. Commission on International Trade Law (UNCITRAL) Model Law[46] and N.Y. Convention both identify public policy with "fundamental principles" of justice. However, neither elaborates on the scope of this concept.[47] The inferred task is for domestic courts to give fundamental principles of justice coherent meaning based on shared conceptions of morality that do not deviate substantially from one jurisdiction to the next.[48]

A key difficulty for domestic courts is in identifying whether transnational public policy is sourced primarily from mandatory precepts of natural law ascribed to "civilized nations" and whether they are overridden by a *jus gentium* based on consensus among nations.[49] Important, too, is the question of whether such policies are directed primarily at regulating fundamental human rights—such as to redress discrimination based on ethnicity, gender, or religion—or whether, and to what extent, they extend to economic and political interests beyond

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45. *See* Hon. James Allsop, *The Authority of the Arbitrator*, 30 ARB. INT'L 639, 646-49 (2014) (noting Australian judges differ over the nature of public policy but prefer plural and transnational to mono-local public policy in recognizing international arbitration awards); *see also* Richard Garnett, *"International" Arbitration but Subject to "National" Law: The Rejection of Delocalisation in Australia*, 28 AUSTL. BUS. L. REV. 351, 351-53 (2000) (discussing delocalization and its recognition by some national laws). *But see Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109 (30 September 2013) (Austl.) (criticizing plural and transnational conceptions of arbitration law and policy).

46. *See* U.N. COMM'N ON INT'L TRADE LAW, MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, at 19-20 (2008) [hereinafter UNCITRAL MODEL LAW], https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (applying public policy at the seat of arbitration).

47. *See* Dirk Otto & Omaia Elwan, *Article V(2)*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 345, 366 (Herbert Kronke et al. eds., 2010); *see also supra* text accompanying notes 39-43 (conceptualizing "fundamental justice").

48. *See* Gibson, *supra* note 35, at 1235-36 (evaluating the tension between the moral values shared by "civilized" nations and their national cultural values in applying the public policy defense). *See generally* Fry, *supra* note 24 (discussing state obligations to consider international public policy in decision making).

49. *See* M. DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 15-19, 68 (London, J. Newbery et al. 1760) (identifying the natural law foundations of the "Law of Nations"); PHILIP C. JESSUP, A MODERN LAW OF NATIONS (1958) ("modernizing" the *jus gentium*); BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW 1150-1625, at 56, 136 (1997) (discussing the disparate nature of natural rights).

those rights.[50] Reconciling the normative attributes imputed to fundamental principles of morality is crucial to identifying the sources of "fundamental justice." Recognizing that fundamental rights are founded on competing conceptions of public morality raises questions about the source and scope of those moral "rights."[51] It is one thing for a domestic court in Milan to assert that public policy refers to "a body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions."[52] It is another to determine which nations are "similar civilizations" and whether nations of "other civilizations" are perceived to be not "civilized" for not subscribing to these self-same fundamental human rights.

Furthermore, the identification by a judge of any given "right" within a scheme of "public morality" is a deeply contingent decision. If courts are to adopt widely imbued notions of substantive and procedural justice, they ought to transcend injudicious speculation about moral virtue and allay accusations of succumbing to judicial whim, fancy, or caprice. Their responsibility to provide justice, while depersonalizing their sense of injustice, is formidable. As Justice Cardozo of the United States Supreme Court once interposed, "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness."[53] But judicial attempts to avoid "individual notion[s] of expediency and fairness" are ambitious at best.[54] Public policy that is morally informed is inescapably subjective. It is also culturally, religiously, and politically infused. The very glue that unifies "fundamental justice," such as in the pursuit of global peace, amity, and stability among states, is itself contestable, including in relation to international commercial

50. *See* Lord Steyn, *The Challenge of Comparative Law*, 8 EUR. J.L. REFORM 3, 6-7 (2007) (reconciling divergence in law and policy across legal systems); Ryan M. Welch, *National Human Rights Institutions: Domestic Implementation of International Human Rights Law*, 16 J. HUM. RTS. 96, 103-09 (2017) (evaluating tensions in implementing international human rights).

51. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 9-22 (Lewis White Beck trans., 1959) (discussing a duty arising from violating a deontological "natural right" that is wrong in and of itself).

52. *See Corte di Appello di Milano, sentenza 4 dicembre 1992 n. 2091,* Allsop Automatic Inc. *(avv. Rittatore Vonwiller, Barié) c.* Tecnoski s.n.c. *(avv. Manzoni)*, 30 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATE E PROCESSUALE 873 (1994).

53. Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918).

54. *Id.*

law.[55] As Pierre Lalive observes, "[F]ew subjects are more vague, more difficult to seize and more controversial than that of the existence, contents and function of a public policy which would be 'really' or 'truly' international."[56] At its most forlorn, "[t]he reason why the concept of public policy is so difficult to grasp is that the degree of fundamentality of moral conviction or policy is conceived differently for every case in the various States."[57]

Subsuming transnational public policy within the law of nations is similarly generalized, not least of all in distinguishing between public law attributed to the law of nations and private international law ascribed to international traders.[58] Similarly generalized is the disjuncture between transnational public policy as a subset of domestic public policy and as an independent and overriding source of it.[59]

Normative choices inevitably arise in responding to these generalizations. Those who treat domestic and transnational conceptions of public policy unequally need to rationalize their preference between them. For example, if a domestic court considers localized due process as more exacting than under transnational policy, it is likely to construe these two policies as "unequal." It is also likely to adopt its localized conception of due process over a transnational

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55. For Hugo Grotjus' famous early seventeenth century rules of war and peace, see 2 HUGO GROTIUS, DE JURE BELLI AC PACIS (Francis W. Kelsey trans., 1925) (1646). For an illustration of centuries of treaties of peace, friendship, and commerce, see Treaty of Friendship, Commerce and Navigation, China-U.S., Nov. 4, 1946, 63 Stat. 1299. The Treaty provides that any disputes regarding the terms of the Treaty that cannot be resolved through diplomacy are to be resolved by either the International Court of Justice or other peaceful means. *Id.* art. XXVIII.

56. *See* Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 259 (Pieter Sanders ed., 1987).

57. *See* VAN DEN BERG, *supra* note 23, at 360.

58. *See* INT'L LAW ASS'N, REPORT OF THE SIXTY-NINTH CONFERENCE HELD IN LONDON 25-29TH JULY 2000, at 340, 345 (2000) (discussing the ILA identifying international public policy with private international law); Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 217, 220 (2003) (analyzing the ILA treating *jus cogens* as a constituent element of international public policy); discussion *infra* Part VIII.

59. For discussion of the relationship between domestic and transnational public policy, see 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2744 (2009); SUBCOMM. ON RECOGNITION & ENF'T OF ARBITRAL AWARDS, INT'L BAR ASS'N, *supra* note 19 at 2; Javier García de Enterría, *The Role of Public Policy in International Commercial Arbitration*, 21 LAW & POL'Y INT'L BUS. 389, 401-02 (1990).

one.[60] Those who treat domestic and transnational public policy equally and without preferring one over the other would need to reconcile any inconsistencies in applying them. For example, the French court could have responded to the New York court's decision in *Fiorilla* by determining whether New York's interests in the administration of justice diverged from transnational public policy.[61]

A further complicating factor is the extent to which transnational public policy is adopted by states acting separately, or in concert. If it is limited to discrete states, the result is two tiers of public policy operating in each state—the one applying to purely domestic transactions and the other applying to transactions with transnational elements.[62] If a conception of transnational public policy is shared across states, a plurality of states conceivably subscribes to it, even though they may apply it differently.[63] Alternatively, if transnational public policy is identified with fundamental norms of substantive and procedural justice operating beyond the endorsement of states, it is more closely aligned with universal natural rights that are binding upon both state and non-state parties, beyond a *jus gentium* that states endorse collectively.[64]

In the absence of a unified and authoritative source, it is arguable that transnational public policy is aspirational in nature and not an inherent and functioning part of domestic public policy in particular.[65]

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60. For a discussion of this preference in *Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Co.*, see *infra* text accompanying notes 104-108.

61. *See* 54 N.Y.S.3d 586, 586 (N.Y. App. Div. 2017).

62. 2 BORN, *supra* note 59, at 2822-23.

63. *See* Clive M. Schmitthoff, *The Unification of the Law of International Trade*, 1968 J. BUS. L. 105, 108-09 (arguing that international trade law extends beyond national law to transnational law and policy shared by a plurality of states); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1594-96 (2003) (analyzing transnational law and policy that transcends the nationality of contracting parties).

64. *See* Emmanuel Gaillard, *The Representations of International Arbitration*, 1 J. INT'L DISP. SETTLEMENT 271, 278 (2010) (grounding arbitration in "higher values" identified with "the nature of things or of society"); discussion *infra* Part VII.

65. For an evaluation of the tenuous nature of an independent transnational public policy, see, for example, Fry, *supra* note 24, at 87-89; Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note*, *in* 50 YEARS OF THE NEW YORK CONVENTION 649 (2009). *See also* Vesselina Shaleva, *The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia*, 19 ARB. INT'L 67 (2003) (evaluating the public policy exception applied on grounds of public morality in Central and Eastern European states).

It is determined by norms that transcend, while still exerting an influence upon, domestic law.[66]

There are nevertheless cogent reasons to attribute normative values to "fundamental justice," even if domestic courts sometimes construe those values disparately. A court can determine whether an award or decision violates fundamental justice, not absolutely, but according to its perceived deleterious nature and consequential harm.[67] The purpose is not for domestic courts to agree on the precise nature of fundamental justice nor upon the exact quantum of public harm caused by its violation.[68] The purpose is rather for them to concur in the kinds of interests that are fundamental, the normative reasons for so determining, and the ensuing legal consequences.[69]

Domestic courts may also diverge over applicable remedies, while still responding to transnational public policy. For example, U.S. and Chinese courts are likely to disagree whether enforcing an arbitration award that legitimates the supply of oil to North Korea violates transnational public policy by posing a threat of nuclear conflict. Domestic courts in the West are also likely to vary on when to annul arbitration awards enforcing such agreements and when to impose criminal liability for endangering international security.[70] Equally disparate is the extent to which domestic courts are likely to recognize the autonomy of transnational traders to contract out of domestic policies.[71] For example, courts would need to determine when choice of law clauses infract on "core" domestic policies, in purporting to legitimate fraudulent courses of dealings or undermine public safety.[72]

Furthermore, even where courts agree in principle on the kinds of conduct that offend "core" conceptions of justice, they are unlikely to agree on the egregiousness of the offense or the means of redressing it. For example, typically, courts that agree not to enforce damage awards against an indispensable local enterprise to avoid devastating that

66. *See* Fry, *supra* note 24, at 124-33.
67. *See* KANT, *supra* note 51, § 1.
68. *Id.*
69. *Id.*
70. *See* JIE HUANG, INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS 258 (2014).
71. *Id.*
72. *Id.*

state's fledging economy are unlikely to agree on the quantum of damages that is excessive.[73]

But the functional rationale behind protecting "core" conceptions of transnational public policy is not to seek an elusive consensus across nation states but to focus on core norms of transnational public policy that operate beyond that consensus. The kinds of interests that are considered fundamental are, for example, declining to recognize foreign decisions in order to protect the national security of the forum;[74] enforcing state sanctions imposed on trade with foreign countries, such as U.N. sanctions against North Korea directed at averting further nuclear armament;[75] preserving public health and the environment from the importation of dangerous goods;[76] and according states' sovereign immunity to avert their political or economic destabilization.[77]

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73. For analysis of judicial divergence over contractual autonomy and remedies based on public policy, see *Laminoirs-Trefileries-Cableries de Lens S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1069 (N.D. Ga. 1980); OGH Jan. 26, 2005, 3 Ob 221/04b, https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20050126_OGH0002_0030OB00221_04B0000_000/JJT_20050126_OGH0002_0030OB00221_04B0000_000.pdf (Austria).

74. For a discussion of forum public policy as the primary determinant of the enforceability of an arbitration award under the N.Y. Convention, see *Agility Public Warehousing Co. K.S.C. v. Supreme Foodservice GmbH*, 495 F. App'x 149, 151 (2d Cir. 2012); *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (no 2)* (2012) 201 FCR 535, 542 (Austl.); *IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corp.* [2005] EWHC (QB) 726, [2005] All ER (D) 385 (Apr.) (Eng.); *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] 1 H.K.L.R.D. 627 (C.A.) (H.K.); *Renusagar Power Co. v. General Electric Co.*, (1993) 3 S.C.R. 22, 70 (India); *Brostrom Tankers AB v. Factorias Vulcano SA* [2004] IEHC 198 (Ir.); TF Oct. 10, 2011, 5A_427/2011, *translation at* http://newyorkconvention1958.org/doc_num_data.php?explnum_id=821 (Switz.). *See also* MAURER, *supra* note 2, at 54 (discussing nations that decline to recognize arbitral awards for national security purposes).

75. *See U.N. Documents for DPRK (North Korea)*, SECURITY COUNCIL REP., http://www.securitycouncilreport.org/un-documents/dprk-north-korea/ (last visited Oct. 14, 2018) (listing the U.N. Security Council resolutions imposing sanctions on North Korea). There are, as of yet, no reported judicial reports involving sanctions against North Korea on public policy grounds. However, there are reported cases on sanctions imposed, *inter alia*, by the United States against Iran in 2011. *See, e.g.*, Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc., 665 F.3d 1091, 1091 (9th Cir. 2011); *see also* Ameropa AG v. Havi Ocean Co., No. 10 Civ. 3240(TPG), 2011 WL 570130, at *2-3 (S.D.N.Y. Feb. 16, 2011) (holding that plaintiff's alleged involvement in a scheme that violated U.S. sanctions against Iran was irrelevant to the award plaintiff received).

76. *See* Postanovlenie Prezidiuma VAS RF ot 3 avgusta 2010 g. No. 8786/10 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of August 3, 2010, No. 8786/10], *translation at* http://newyorkconvention1958.org/doc_num_data.php?explnum_id=1418 (annulling arbitration awards for violating "universally recognized moral and ethical rules or threatening the citizens' life and health, or the State's security").

77. For an illustration of sovereign immunity as a public policy rationale to limit state liability, see Georges R. Delaume, *Sovereign Immunity and Transnational Arbitration*, 3 ARB. INT'L 28 (1987).

However, these illustrations do not exhaust the scope of transnational public policy. They do not address autonomous principles of public policy that transcend both localized and shared conceptions of public policy. Nor do they allay the realization that no conception of public policy is capable of perfect certainty and predictability. Transnational public policy is necessarily variable precisely because it needs to respond to differences in its functional application in specific cases, including differences in the laws and judicial practices of states.[78] Nor is the purpose of transnational public policy to eliminate all divergences across national boundaries in order to contain alleged procedural or substantive injustices that transcend states.[79] It is both unrealistic and potentially self-defeating to purport, overzealously, to impose exacting standards of transnational procedural justice in order to delocalize conceptions of justices en masse. Whatever the justification for promoting transnational standards of procedural justice may be, those standards cannot, in and of themselves, rely on domestic courts to act unconstitutionally, disregard domestic legislation, or prevail over the rulings of the highest domestic court.

However, transnational public policy is rendered more tenable when states agree to it, whether expressly by convention or treaty, endorse it through state practice, or where domestic courts recognize its legitimacy and efficiency under international law. In some respects, the endorsement by states, however incrementally, of transnational principles of procedural and substantive justice, is the most realistic means of superseding mono-local policies that deviate not only substantially but also deleteriously from those transnational policies.[80] Transnational public policy is also most functional when states and their courts adopt it, not only because of its inferred moral integrity, but as a demonstrated commitment to "join" the international community of states, to maintain so called "rule of law" values, and to avoid being considered recalcitrant by transnational traders and investors.[81] None of this infers that there is a single conception of the "rule of law" or a singular source of it, such as in allegedly western liberal democracies. What is inferred is that rule of law values, however named, that are

78. *See* Richard H. Kreindler, *Approaches to the Application of Transnational Public Policy by Arbitrators*, 4 J. WORLD INV. 239, 245-46 (2003).

79. *Id.* at 346.

80. *Id.* at 342.

81. *Id.*

refined through practice across nation states, are likely to be more sustainable and, ultimately, more beneficial to the international community at large, including those who engage in trade and investment within it.[82]

Importantly, too, attaining the first plateau of transnational public policy through mercantile practice that is endorsed by a critical mass of states necessarily entails appropriate consideration of (1) the origins and development of transnational public policy, (2) the extent to which the tenets underlying those developments are shared by states, and (3) the potential to extend them strategically through affirmative state action. At issue is the goal of encouraging state concordance on the attributes of transnational public policy that are considered most essential or fundamental, while accepting variable conceptions of policy preserved by due deference to the sovereignty of states. Also at issue is the realization that this endorsement of transnational public policy is likely to evolve functionally, and not always linearly, in response to the graduated endorsement by states. The challenge is to encourage states to reconcile disparate domestic laws and policies in order to promote transnational policies they consider to be fundamental or essential to global trade and commerce. Reconciling incongruent conceptions of public policy in order to promote that essentiality is explored in Parts III and IV below.

III. CONTROVERSY OVER THE BOUNDARIES OF PUBLIC POLICY

A restrictive assumption is that domestic courts should rarely apply public policy to deny enforcement of an arbitration award and only in response to a serious and severe affront to the national interest.[83] In contention is whether they should apply transnational public policy only to affirm national interests—for example applying it as "an

82. *Id.*

83. For a discussion of this restrictive conception of public policy, see, for example, Oelmann, *supra* note 8, at 82. For an illustration of a court applying public policy only in exceptional circumstances, see Case C-7/98, *Krombach v. Bamberski*, 2000 E.C.R. I-1956. *See also* Enron Nigeria Power Holding, Ltd. v. Fed. Republic of Nigeria, 844 F.3d 281, 289 (D.C. Cir. 2016) (discussing restricting the public policy defense under article V(2)(b) of the N.Y. Convention to an arbitration award that "tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property" (quoting Termorio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 938 (D.C. Cir. 2007))); Case C-38/98, Régie Nationale des Usines Renault SA v. Maxicar SpA, 2000 E.C.R. I-3009 (considering the other contracting party's public policy conventions in deciding whether or not to recognize an award).

international rule of French law and not a transnational rule"[84]—or whether to adopt it as an allegedly autonomous rule of transnational public policy.

A further submission is that domestic public policy should be "designed to protect the public interests of that State, not of any particular private individual or entity."[85] In effect, public policy should redress affronts to the constitutional or other basic laws of the domestic state, not other, presumably lesser, localized public and private interests.[86]

Illustrating these issues, relating to the refusal to enforce a foreign judgment rather than an arbitration award on procedural due process grounds, is the long-standing oil and gas dispute between Yukos Capital, a private corporation, and Rosneft Oil, a Russian state-owned corporation, on grounds that the latter failed to repay a loan owed to Yukos Capital.[87] There, a Russian court annulled arbitration awards that favored Yukos Capital. In declining to recognize the Russian annulment judgment, the Amsterdam Court of Appeal enforced the arbitration awards, allowing Yukos Capital to seize Rosneft Oil's assets in the Netherlands. In refusing to endorse the Russian court's annulment decision, the Amsterdam court maintained that the Russian court had engaged in a partial and dependent judicial process, contrary to article V(1)(e) of the N.Y. Convention.[88] Thereafter, the English High Court replicated the Dutch decision by refusing to recognize the Russian annulment judgment as a violation of procedural public

84. JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 145 (Stephen V. Berti & Annette Ponte trans., Sweet & Maxwell 2007); *see* discussion *supra* Part II.

85. Fry, *supra* note 24, at 86.

86. For a discussion of the hierarchy of procedural and substantive norms of public policy in international commercial arbitration, see Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 252-58 (1987); Zeynalova, *supra* note 8, at 198; Dora Marta Gruner, Note, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 929-32 (2003). *See also* BCB Holdings Ltd. v. Attorney Gen. of Belize, [2013] CCJ 5 (AJ) (Belize) (addressing the hierarchy that exists and influences Caribbean court decisions involving arbitral awards).

87. *See* Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Co. [2011] EWHC (QB) 1461, [2012] 1 All ER (Comm.) 479 (Eng.) (providing background information on the dispute between Yukos Capital and Rosneft Oil).

88. Hof Amsterdam 28 april 2008, JOR 2009, 208 (Yukos Capital S.a.r.l./OAO Rosneft) (Neth.) (seeking a total relief of US$425 million).

policy,[89] only to be reversed by the English Court of Appeals, which held that Dutch public policy was not binding in England.[90]

While the Amsterdam court's decision was not based on the public policy defense under article V(2)(b), it is significant in holding that "the manner in which the [Russian] judgment was brought about does not satisfy the principles of due process and recognition of the judgment is therefore in conflict with Dutch public order."[91] The Amsterdam court's decision is also significant in finding that the Russian judiciary "is guided by the interests of the Russian state and is instructed by the executive" and that the Russian court had failed to rebut Yukos Capital's allegation that Russian courts were "not impartial and independent."[92]

The Amsterdam court's analysis is contestable in subscribing to a separation of powers doctrine that is far from universally adopted. Even in established western liberal democracies, the executive often influences the operation of the judiciary by nominating candidates who favor the ideology of the dominant political party, such as the libertarian ideology of minimizing governmental fetters on international commerce.[93] National courts in liberal democracies also decide cases between state-owned and private entities in the ordinary course—albeit on the presupposition that the judiciary is an independent arm of government and not dependent on the executive in deciding specific cases.[94]

The Amsterdam court's decision is also subject to evidentiary objections. In particular, it relied primarily on the contention by authors and human rights organizations that Russian judges lacked independence and less upon a lack of impartiality based on the case record.[95] This is not to assert categorically that the Amsterdam court's findings were unjustified. It did identify decisions of European and British courts that also identified a lack of judicial independence by

89. *See Yukos Capital* [2011] EWHC (QB) at [104], [2012] 1 All ER (Comm.) at 503.

90. *See* Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Co. [2012] EWCA (Civ) 855, [2014] QB 458 (Eng.) ("It is our own public order which defines . . . whether such decisions are truly to be regarded as dependent and partial as a matter of English law . . . [not] whether such decisions are to be regarded as dependent and partial in the view of some other court according to that court's notions of what is acceptable or otherwise according to its law.").

91. *See* JOR 2009, 208 (*Yukos Capital*) ¶ 3.5.

92. *Id.* ¶ 3.9.3.

93. For an examination of judicial independence in western liberal democracies, see WOOLF, *supra* note 20, at 161-74; Shetreet, *supra* note 20, at 275.

94. *See* WOOLF, *supra* note 20, at 161-74; Shetreet, *supra* note 20, at 275.

95. JOR 2009, 208 (*Yukos Capital*) ¶ 3.9.3.

Russian courts, including in relation to officers of Yukos Capital—albeit in indirectly related criminal proceedings.[96] The Amsterdam court also noted the finding of the district court of "exceptional circumstances" arising from the Russian decision.[97] Specifically, the court noted the violation of generally accepted principles of due process in the proceedings prior to the decision to set aside, the partiality and dependence of the Russian court, and the utterly insufficient motivation of its decisions.[98] Further supporting the court's decision is the difficulty that enforcing courts face in identifying a lack of impartiality and independence that determining courts studiously avoid revealing on the record.[99] Judicial practice also includes taking judicial notice of systemic violations of procedure, notwithstanding the absence of a causal connection between the discrete due process violation and the partiality of the tribunal.[100]

The Amsterdam court's decision is nevertheless questionable as a source of transnational public policy for reasons beyond the English Court of Appeal's determination that Dutch conceptions of procedural public policy were not binding in England. The proposition is not that the Amsterdam court attempted to apply its local public policy extra-territorially. It did not do so, notwithstanding the English High Court's deference to Dutch public policy that the English Court of Appeals overruled.[101] The concern is functional, in recognizing that a public policy exception that is measured solely according to domestic requirements, rather than due process transnationally, can lead to a medley of assorted requirements that vary from state to state.[102] What is also suggested is that Dutch due process requirements are conceivably more exacting than transnational standards that seek to accommodate divergence across nation states.[103]

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96. *Id.* ¶ 3.8.8. *See generally* William E. Butler, *State Interests and Arbitration: The Russian Model*, 113 PENN ST. L. REV. 1189 (2009) (discussing the Russian arbitration model).

97. JOR 2009, 208 (*Yukos Capital*) ¶ 3.2.

98. *Id.*

99. *See* Butler, *supra* note 96 (discussing the Russian arbitral system and its distrust of foreign courts).

100. *See* Apex Tech Investment Ltd. v. Chuang's Development (China) Ltd. [1996] 2 H.K.L.R. 155 (C.A.) (H.K.).

101. *See supra* notes 89-90.

102. *See* A.N. Zhilsov, *Mandatory and Public Policy Rules in International Commercial Arbitration*, 42 NETH. INT'L L. REV. 81, 100 (1995) (examining courts invoking forum public policy to exclude the application of foreign law); discussion *supra* Part II. *See generally* Anselmo Reyes, *Due Process Paranoia*, 19 ASIAN DISP. REV. 160 (2017) (discussing divergence over the scope of due process).

103. *See* discussion *supra* Part II.

Controversial, too, is whether the Amsterdam court should have deferred to the Russian court based on "comity" between states—an argument raised by Rosneft Oil in its defense. The rationale is that, had the court enforced the Russian annulment decision, it would have promoted a more sustainable public policy based on mutual respect and reciprocal treatment, even if the Russian judiciary was dependent on the executive.[104]

Similarly, a French court could have applied the principle of comity in response to the New York annulment of the arbitration award in *Fiorilla*.[105] Had the claimant raised the New York decision annulling that award, the French court could have enforced the award in the interests of promoting mutual respect and reciprocity between New York and French courts.[106]

More challenging in both *Fiorilla* and *Yukos* is the nature and application of four incongruent conceptions of public policy. The first challenge entails incongruous conceptions of public policy across national legal systems, such as those that relate to judicial dependence and partiality.[107] The second challenge involves disparate conceptions of transnational public policy based on the divergent applications of the principle of comity.[108] The third challenge encompasses variations in applying localized interests, such as adhering to Dutch internal conceptions of due process in *Yukos*.[109] The fourth challenge is to reconcile fundamental principles of justice that are attributed to civilized nations and localized interests that are deemed to conflict with those principles.[110]

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104. For a discussion of comity between nations, see sources cited *supra* note 21.

105. *See* 54 N.Y.S.3d 586, 586 (N.Y. App. Div. 2017); *see also* text accompanying notes 10-14 (analyzing the New York court's decision to refuse enforcement of an arbitration award deemed enforceable in France).

106. See TWEEDDALE & TWEEDDALE, *supra* note 21, at 444; D'Alterio, *supra* note 21, at 399.

107. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 208-09 (2d ed. 2012) (commenting on incongruent conceptions of public policy across states).

108. For a depiction of the divergent scope of international comity, see Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375, 376 (1919); Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19, 19-20 (2008); Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 11-16 (1966). *But see* UPENDRA BAXI, HUMAN RIGHTS IN A POSTHUMAN WORLD: CRITICAL ESSAYS 58 (2009) (examining the "destruction of comity").

109. *See supra* notes 104-108 and accompanying text.

110. *See* Mayer & Sheppard, *supra* note 5, at 255 (discussing the ILA's multiple sources, and potentially inconsistent application, of international public policy).

These challenges lead to seemingly intractable tensions over the scope of a domesticated public policy defense. Defenders of a localized public policy defense stress its sovereign source and territorial application.[111] Critics insist that domestic courts should rarely nullify arbitration awards on public policy grounds.[112] Skeptics opine that "[p]ublic policy is one of the most important weapons in the hands of the national court which allows it to refuse enforcement of an arbitral award which is otherwise valid."[113] In light of such challenges, Part IV considers the case for transnational public policy and provides a rationale for reconciling competing constructions of it.[114]

IV. THE CASE FOR TRANSNATIONAL PUBLIC POLICY

Based on the foregoing discussion and introducing further synthesis, there are five broad arguments favoring national courts adopting transnational conceptions of public policy in determining whether to recognize and enforce international arbitration awards.

First, transnational public policy is directed at counter-balancing domestic conceptions of public policy that are ill-conceived, incoherent in nature, unduly malleable in application, or that vary unduly among domestic courts.[115] The proposition is not that reliance on domestic conceptions of fundamental justice is unjustified, but that transnational conceptions can help to remedy undue variations across jurisdictions and states.

Second, transnational conceptions of public policy can avoid being sublimated by domestic interests that are unjust or discriminatory, such as by affirming price-fixing, de facto collusion, and other anticompetitive behavior.[116]

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111. *See, e.g.*, MAURER, *supra* note 2, at 61; Fortier, *supra* note 2, at 274-76; Mann, *supra* note 2, at 159; Michaels, *supra* note 2, at 35.

112. For an explanation of such a restrictive approach, see, for example, MAURER, *supra* note 2, at 61; Fortier, *supra* note 2, at 274.

113. Sattar, *supra* note 34, at 4; *see also* ANDERSON, *supra* note 27, at 5-21 (demonstrating the influence of domestic public policy on international public policy).

114. For a discussion of the functioning of transnational public policy, see Hossein Fazilatfar, *Transnational Public Policy: Does It Function from Arbitrability to Enforcement?*, 3 CITY U.H.K. L. REV. 289, 294 (2012); Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L.J. 400, 417-20 (2002).

115. *See* BLACKABY & PARTASIDES, *supra* note 24, at 112 (discussing how public policy varyies from state to state).

116. *See* Tim Büthe, *The Politics of Market Competition: Trade and Antitrust in a Global Economy, in* THE OXFORD HANDBOOK OF THE POLITICAL ECONOMY OF INTERNATIONAL TRADE 213 (Lisa L. Martin ed., 2015) (examining depoliticizing policies directed at price-fixing, bid-rigging, and other forms of anticompetitive behavior and abuses of market power).

Third, domestic courts can advance transnational public policy in response to widely accepted commercial practices operating across national boundaries. For example, they can refine export and import regulations in light of evolving transnational public policy in trade between the U.K. and EU following the anticipated Brexit.[117]

Fourth, just as "wholly" domestic interests can redress unfair domestic market practices, such as corporations not acting socially responsibly, transnational public policy can redress irresponsible market practices that undermine the economies of developing countries.[118]

Fifth, states that endorse transnational public policy can discourage their domestic courts from conflating that policy with lesser commercial or private interests that sublimate those shared policies.[119]

These five arguments for recognizing transnational public policy are, at best, imperfect responses to those who would dismiss transnational policy as sublimating state sovereignty.

Not unexpectedly, state signatories to the N.Y. Convention are divided over the legitimacy of transnational public policy. In support of its legitimacy in the enforcement of foreign judgments[120] are laws in France,[121] Singapore,[122] Portugal,[123] Italy,[124] and Algeria.[125] The Highest Arbitrazh Court of the Russian Federation has identified public policy with a pervasive natural law consisting of "universally recognized moral and ethical rules."[126] The Quebec Court of Appeal

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117. *See Foreign & Security Policy*, EU, https://europa.eu/european-union/topics/foreign-security-policy_en (last visited Oct. 14, 2018).

118. Peter Utting, *Corporate Responsibility and the Movement of Business*, 15 DEV. PRAC. 375, 376-77 (2005).

119. *See, e.g.*, Intergovernmental Working Group on a Code of Conduct, Rep. on Its Fifteenth, Sixteenth and Seventeenth Sessions, U.N. Doc. E/C.10/1982/6 (June 5, 1982) (reviewing long-standing international efforts to regulate the conduct of transnational corporations).

120. MAURER, *supra* note 2, at 128-29.

121. *See* CODE DE PROCEDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] arts. 1492, 1502 (Fr.); Décret 2011-48 du 13 janvier 2011, portant réforme de l'arbitrage [Decree 2011-48 of January 13, 2011, on the Reform of Arbitration] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 14, 2011, p. 777.

122. International Arbitration Act, Cap. 143A (2002) (Sing.).

123. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE] art. 1096(f) (Port.).

124. CODICE DI PROCEDURA CIVILE [C.P.C.] [CODE OF CIVIL PROCEDURE] art. 839 (It.).

125. CODE DE PROCEDURE CIVILE [C.P.C.] [CODE OF CIVIL PROCEDURE] art. 458 bis. 23(h) (Alg.).

126. Postanovlenie Prezidiuma VAS RF ot 3 avgusta 2010 g. No. 8786/10 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of August 3, 2010,

has contended, "*erga omnes*," that "public order" is so widely conceived internationally that it "does not require translation into the national system of law."[127]

In contrast, other courts resist transnational public policy, based on the preeminence of state sovereignty and by contending that "international" conceptions of public policy are unworkable.[128] For example, the Supreme Court of India has explicitly rejected the concept of "international public policy" for the lack of a "workable definition" of it.[129] Australian courts have ruled that "[t]here is no express reference in the [N.Y.] Convention to any concept of international or transnational public policy," and have adopted a narrow view focusing on the public policy of the enforcement state.[130]

Scholars and jurists also differ over the extent to which "international public policy" applies to the judicial enforcement of foreign arbitration awards. Some consider it necessary to avoid narrow conceptions of domestic public policy and to harmonize transnational law and practice.[131] Others, such as the ILA, construe "international public policy" expansively, as being of "universal application [and] comprising fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as 'civilised nations.'"[132]

Domestic judges also differ on the functional value of transnational public policy due to its open-ended boundaries. Some affirm "international" public policy only insofar as it is "fundamental

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No. 8786/10], *translation at* http://newyorkconvention1958.org/doc_num_data.php?explnum_id=1418.

127. La Compagnie Nationale Air France c. Mbaye, [2003] R.J.Q. 1040, *translation at* http://newyorkconvention1958.org/doc_num_data.php?explnum_id=1713 (Can. Que. C.A.) (quoting Mémoire de L'Appelante at 156, *La Compagnie Nationale Air France*, [2003] R.J.Q. 1040 (No. 500-09-009391-004)); *see also* VAN DEN BERG, *supra* note 23, at 382 (discussing a uniform interpretation of public policy).

128. *See generally* Sandeep Gopalan, *The Creation of International Commercial Law: Sovereignty Felled?*, 5 SAN DIEGO INT'L L.J. 267 (2004) (analyzing the "harmonization" of international commercial law).

129. Renusagar Power Co. v. Gen. Elec. Co., (1993) 3 S.C.R. 22, 71 (India).

130. *See Traxys Eur SA v Balaji Coke Ind Pvt Ltd (No 2)* (2012) 201 FCR 535, 557 (Austl.).

131. *See, e.g.*, MOSES, *supra* note 107, at 208-09; Fazilatfar, *supra* note 114, at 311 (analyzing a broader conception of transnational law).

132. *See* INT'L LAW ASS'N, *supra* note 58, at 345 (discussing "[t]ransnational or truly international public policy"). For an explanation of "international public policy" as one of the five categories of public policy, see *supra* note 4.

to . . . notions of [morality and] justice."[133] Others limit it to exceptional circumstances arising only in the applicable state, such as the "violation of really fundamental conceptions of the legal order in the country concerned."[134] Yet others endorse international public policy solely as a gap filler, involving public policy considerations that "do not belong to any particular legal system."[135] Skeptics warn that "truly international public policy" is only "quasi-universal [in] nature."[136] Naysayers reject it as unclear and unnecessary, conceptually, functionally, or both.[137] The ILA, in turn, limits international public policy to disputes with foreign elements arising in private international law but does not establish the boundaries of those foreign elements.[138]

Transnational conceptions of public policy nevertheless have a lengthy history in jurisprudence, not only in universal principles of natural law attributed to civilized nations but also in mercantile practice.[139] Economic libertarians identify a long-standing tradition in which transregional merchants developed commercial policies and practices, embodied in an autonomous Law Merchant and unchecked by government incursions.[140] The nature of transnational public policy

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133. Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co., [1999] 2 H.K.C.F.A.R. 111, 123 (C.F.A.) (H.K.).

134. *See, e.g.*, Pieter Sanders, *Trends in the Field of International Commercial Arbitration*, 145 RECUEIL DES COURS 205, 224 (1976); *see also Hebei Imp. & Exp. Corp.*, [1999] 2 H.K.C.F.A.R. at 118 (concluding that arbitration decisions should only be nullified if they violate basic ideas of justice).

135. For discussion on invoking public policy to protect fundamental conceptions of justice, see 2 FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 996-97 (Emmanuel Gaillard & John Savage eds., 1999).

136. Fry, *supra* note 24, at 83.

137. van den Berg, *supra* note 65, at 650, 661.

138. *See* INT'L LAW ASS'N, *supra* note 58, at 345; *see also* Zhilsov, *supra* note 102, at 81, 95-98 (discussing international public policy but not addressing the foreign elements that apply to international public policy).

139. INT'L LAW ASS'N, *supra* note 58, at 345 (considering transnational public policy as "the general principles of morality accepted by what are referred to as 'civilised nations'"); *see also* Sheppard, *supra* note 58, at 220 (analyzing international public policy and the accepted laws and shared morals of civilized nations).

140. *See, e.g.*, ANA M. LÓPEZ RODRÍGUEZ, LEX MERCATORIA AND HARMONIZATION OF CONTRACT LAW IN THE EU 87 (2003) ("For several hundred years uniform rules of law, those of the law merchant, were applied throughout the market tribunals of the various European trade centers." (footnote omitted)); Harold J. Berman & Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy*, *in* LEX MERCATORIA AND ARBITRATION 21, 61 (Thomas E. Carbonneau ed., 1990); Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347, 356 (2001) (ascribing the origins of the modern *lex mercatoria* to the customs of medieval merchants); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447 (2007)

attributed to the Law Merchant and controversies surrounding its application are discussed immediately below.[141]

V. THE LAW MERCHANT AND TRANSNATIONAL PUBLIC POLICY

The Law Merchant is depicted as a timeless source of transnational law and policy, despite having detractors.[142] It is identified with mercantile policies directed at liberalized commerce and applied by merchant judges who are depicted as precursors to modern international commercial arbitrators.[143] Relying on canon law concepts like the "just price,"[144] Law Merchant judges delivered mercantile justice expeditiously and expertly at medieval markets and fairs transregionally across the then "known" world, identified today as

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(identifying the Law Merchant as "truly" transnational law operating beyond the nation state); Leon E. Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage*, 12 J. MAR. L. & COM. 1, 5 (1980) [hereinafter Trakman, *The Evolution*] ("The only law which could effectively enhance the activities of merchants [was] . . . suppletive law, *i.e.*, law which recognized the capacity of merchants to regulate their own affairs through their customs, their usages, and their practices."). For a tempered view of the universality of the Medieval Law Merchant, see Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265 (2003) [hereinafter Trakman, *E-Merchant Law*]. *See generally* ROBERT S. LOPEZ, THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES (1976) (analyzing the Law Merchant's transnational identity).

141. *See generally* Chris Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux*, 97 HARV. L. REV. 1495 (1984) (reviewing LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983)). Williams labels Trakman as a "post-realist scholar" whom she identifies with American realist Karl Llewellyn. For assertions that Trakman's work on the Law Merchant, among others, is ahistorical, see Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012).

142. For detractors of a customary medieval Law Merchant, see Jean-Denis Bredin, *La loi du juge*, *in* LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONLES 15, 16 (1982); Georges R. Delaume, *The Myth of the Lex Mercatoria and State Contracts*, *in* LEX MERCATORIA AND ARBITRATION, *supra* note 140, at 77; Paul Lagarde, *Approche critique de la* lex mercatoria, *in* LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONLES, *supra*, at 125, 125-26; Charles Donahue Jr., *Medieval and Early Modern* Lex Mercatoria*: An Attempt at the* Probatio Diabolica, 5 CHI. J. INT'L L. 21, 37 (2004); Celia Wasserstein Fassberg, Lex Mercatoria—*Hoist with Its Own Petard?*, 5 CHI. J. INT'L L. 67, 67-69 (2004); Kadens, *supra* note 141; Charalambos Pamboukis, *Lex Mercatoria: An International Régime Without State?*, 46 REVUE HELLÉNIQUE DE DROIT INT'L 261, 262-63 (1993); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant,'* 21 AM. U. INT'L L. REV. 685, 685-86 (2006).

143. *See infra* notes 165-166.

144. For analyses of the religious foundations of the "just price," see JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 93 (1954); HENRY WILLIAM SPIEGEL, THE GROWTH OF ECONOMIC THOUGHT 63 (3d ed. 1991); R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 40-44 (reprt. 1972); EARLY ECONOMIC THOUGHT 65-66 (Arthur Eli Monroe ed., 1930). *See also The School of Salamanca*, HIST. ECON. THOUGHT, http://cepa.newschool.edu/het/schools/salamanca.htm (last visited Oct. 14, 2018) (defining the just price as the exchange-established price).

Western Europe.[145] Enshrined in medieval merchant codes, such as the Rolls of Oleron, the Laws of Visby, and the Rhodean Laws,[146] Law Merchant policies often responded effectively and fairly to transactional risks arising from the acts of pirates, acquisitive merchant guilds, and authoritarian local princes.[147] Merchant judges decided disputes *ex aequo et bono*, or "justly and fairly,"[148] according to merchant custom as distinct from peremptory local law.[149]

Importantly, these transnational policies underlying the medieval Law Merchant were entrenched in the sixteenth century commercial codes of western liberal states and in the English common law.[150] Commercial codes prioritized the courses of dealings and usages of trade of transnational merchants,[151] while domestic courts perpetuated

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145. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 341-44 (1983) (evaluating the Law Merchant's evolution in the western legal tradition). *See generally* Leon E. Trakman, *A Plural Account of the Transnational Law Merchant*, 2 TRANSNAT'L LEGAL THEORY 309 (2011) (analyzing the plural nature of the Law Merchant).

146. For evidence of the *Lex Rhodia*, see DIG. 14.2.1 (Paul, Views 2) (Alan Watson ed., 1998). *See generally* THE RHODIAN SEA-LAW (Walter Ashburner ed., Scientia Verlag Aalen 1976) (1909) (analyzing the origins, form, and application of Rhodian law); Robert D. Benedict, *The Historical Position of The Rhodian Law*, 18 YALE L.J. 223 (1909) (discussing the lack of support for the existence of a Rhodian law). The Rolls of Oleron are reproduced in Guy Miege, *The Ancient Sea-Laws of Oleron, Wisby, and the Hanse-Town, Still in Force*, *in* 2 GERARD MALYNES, CONSUETUDO, VEL, LEX MERCATORIA: OR, THE ANCIENT LAW-MERCHANT 3, 3-13 (1685). For more on the Champagne Fairs, see Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 2 (1990); Irineu Strenger, *La notion de* lex mercatoria *en droit du commerce international*, 227 RECUEIL DES COURS 207, 255-60 (1992).

147. For recognition that local rulers influenced medieval Law Merchant courts, such as at the fair at St. Ives, see DOROTHY USHER, TWO STUDIES OF MEDIÆVAL LIFE (1953); Lilian J. Redstone, *St. Ives*, *in* 2 THE VICTORIA HISTORY OF THE COUNTRIES OF ENGLAND 210 (William Page ed., Dawsons of Pall Mall 1974) (1932). *See generally* Francis M. Burdick, *What Is the Law Merchant?*, 2 COLUM. L. REV. 470 (1902) (discussing the ancient Law Merchant and accompanying customs).

148. *See* Leon Trakman, Ex Aequo et Bono*: Demystifying an Ancient Concept*, 8 CHI. J. INT'L L. 621, 630 (2008); Hong-lin Yu, *Amiable Composition—A Learning Curve*, 17 J. INT'L ARB. 79, 82 (2000).

149. *See, e.g.*, Berman & Dasser, *supra* note 140, at 53, 60-65; Trakman, *The Evolution*, *supra* note 140, at 3-11.

150. For commentary on the evolving nationalization of the Law Merchant in the common law, see, for example, THE COURT BARON 3-18 (Frederic William Maitland & William Paley Baildon eds., London, Bernard Quaritch 1891); J.H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295 (1979); Lord Mustill, *The New* Lex Mercatoria*: The First Twenty-Five Years*, 4 ARB. INT'L 86 (1988).

151. *See generally* JAMES STEVEN ROGERS, THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES (1995) (discussing the commercialization of the modern Law Merchant); Adamas Mgmt. & Servs. Inc. v. Aurado Energy Inc. (2004), 228 N.B.R. 2d 136 (Can. N.B. Q.B.) (applying the International Commercial Arbitration Act (ICAA)).

these commercial dealings and usages into the nineteenth century.[152] Leading this ongoing domestication of the Law Merchant were judges of the stature of Justice Story, being "a firm believer in the existence of a supranational law of commerce."[153]

The domestication of the *Lex Mercatoria* has influenced the development of international commercial arbitration into the twenty-first century. Modeled on medieval judges appointed by itinerant merchants, modern-day arbitrators are depicted as merchants appointed by transnational parties to decide commercial disputes expeditiously and expertly, according to the parties' choices of jurisdiction and law.[154] Authenticating the transnational scope of arbitral justice is a plural account of the Law Merchant that harmonizes disparities in the laws governing international commercial transactions.[155]

Public policies originating in merchant practice enforced by nation states are depicted as an important attribute of a contemporary Law Merchant that transcends deficiencies in both global and localized governance.[156] Typifying that policy is the extensive recognition of international commercial arbitration by transnational merchants who adopt it by contract, arbitrators that interpret those contracts, and state courts that enforce the ensuing arbitration awards ordinarily as a matter of course.[157] These public policies are also formally embodied in treaties such as the N.Y. Convention[158] and in enabling domestic statutes and their judicial application.[159] Illustrating these public

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152. *See* TRAKMAN, *supra* note 141, 23-37; Berman & Dasser, *supra* note 140, at 53, 58-61.

153. Friedrich K. Juenger, *The* Lex Mercatoria *and Private International Law*, 60 LA. L. REV. 1133, 1143 (2000).

154. *See id.* For a discussion of the "Arbitration Law Merchant," see Berthold Goldman & F.A. Mann, *Introduction* to LEX MERCATORIA AND ARBITRATION, *supra* note 140, at xv; ANDREAS F. LOWENFELD, LOWENFELD ON INTERNATIONAL ARBITRATION 171 (2005); discussion *infra* Part VIII.

155. For argument that the Law Merchant embodied mercantile custom and usage, see Berman & Dasser, *supra* note 140, at 61; Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317, 320 (1984); Trakman, *supra* note 145, at 309, 345.

156. *See* Trakman, *supra* note 145 (applying the twenty-first century Law Merchant to international commercial arbitration).

157. *See* UNCITRAL CONVENTION GUIDE, *supra* note 17, at 141 (analyzing choices of law in arbitration agreements).

158. *See generally LEX MERCATORIA* AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE (Mary Elizabeth Basile et al eds. & trans., 1998) [hereinafter *LEX MERCATORIA* AND LEGAL PLURALISM] (analyzing the legal framework of English commerce during the time of the Law Merchant).

159. *See generally* Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards Under the New York Convention—Practice in U.S. Courts*, 3 INT'L TAX & BUS. LAW.

policies are modernized national commercial codes,[160] such as the American Uniform Commercial Code (UCC),[161] and transnational codes, such as the UNIDROIT Principles developed by the International Institute for the Unification of Private Law.[162] The policies underlying the contemporary Law Merchant are also mirrored in the revised 2013 UNCITRAL Arbitration Rules directed at guiding the recognition and enforcement of international commercial arbitration.[163]

Transnational public policy attributed to this contemporary Law Merchant is also expressed through the principle of freedom of contract and the offsetting principle that renders transnational contracts unenforceable for violating statutory law, public morality, or public policy.[164] These policies and principles are explicated domestically, through the *opinio juris* in civil law and judicial precedent in common

249 (1986) (discussing U.S. and Russian courts' enforcement of arbitral awards under the N.Y. Convention); Ilya Nikiforov, *Interpretation of Article V of the New York Convention by Russian Courts: Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement*, 25 J. INT'L ARB. 787 (2008) (considering the obstacles to enforcing arbitral awards under the N.Y. Convention in Russia).

160. For commentary on the incorporation the Law Merchant into domestic commercial law, see 2 WYNDHAM BEAWES, LEX MERCATORIA: OR, A COMPLETE CODE OF COMMERCIAL LAW (London, F.C. Rivington et al. 6th ed. 1813); W. MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 39-78 (1904); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 450 (2d ed. 1898); JOHN WILLIAM SMITH, A COMPENDIUM OF MERCANTILE LAW (1987); Philip W. Thayer, *Comparative Law and the Law Merchant*, 6 BROOK. L. REV. 139, 141 (1936). *See generally* AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE (2006) (analyzing social and economic institutions' roles in commercial law).

161. *See infra* text accompanying note 177.

162. *See* Michael Joachim Bonell, *The UNIDROIT Principles and Transnational Law*, *in* THE PRACTICE OF TRANSNATIONAL LAW 23 (Klaus Peter Berger ed., 2001); Fabrizio Marrella, *Lex Mercatoria and the UNIDROIT Principles: A Shock or a New Chapter of Contemporary Private International Law?*, *in* INTERNATIONAL COMMERCIAL ARBITRATION AND THE NEW LEX MERCATORIA 75, 76 (Ahmet Cemil Yildirim & Serhat Eskiyörük eds., 2014).

163. *See* U.N. COMM'N ON INT'L TRADE LAW SECRETARIAT, UNCITRAL ARBITRATION RULES (WITH NEW ARTICLE 1, PARAGRAPH 4 AS ADOPTED IN 2013): UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (2014), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf; *see also* Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New* Lex Mercatoria*?*, 15 ARB. INT'L 115, 126-30 (1999) (presenting the UNIDROIT principles as the modern *Lex Mercatoria*).

164. *See* Martin Shapiro, *Globalization of Freedom of Contract*, *in* THE STATE AND FREEDOM OF CONTRACT 269, 269-98 (Harry N. Scheiber ed., 1998) (describing the Law Merchant's impact on freedom of contract).

law.[165] They are embodied in regional state practices, such as in the EU's attempt to harmonize regional economic policies across its "unified internal market"[166] and the besieged renegotiation of NAFTA.[167]

In its modernized incarnation, transnational public policy is perceived as informing and being informed by mercantile customs, operating pluralistically,[168] and functioning distinctively in discrete industries.[169] States adopt such policies through centuries of treaties,[170] personified in modern conventions, administrative regulations, and judicial decisions.[171] Further incarnating this espousal of merchant

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165. *See* David Vong, *Binding Precedent and English Judicial Law-Making*, 21 JURA FALCONIS 318 (1985); Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 220-24 (1987); W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1903-06 (2010) (applying a theory of precedent to commercial arbitration); discussion *infra* Part V.

166. *See* Bela Balassa, *The Theory of Economic Integration: An Introduction*, *in* THE EUROPEAN UNION: READINGS ON THE THEORY AND PRACTICE OF EUROPEAN INTEGRATION 173, 173-74 (Brent F. Nelson & Alexander C-G. Stubb eds., 2d ed. 1998) (integrating economically disparate domestic and regional interests of EU members, including on regional public policy grounds); *see also* LÓPEZ RODRÍGUEZ, *supra* note 140, at 87 (concluding that modern international disputes have begun to be governed by a more uniform, private international law); Tony Cole et al., *Legal Instruments and Practice of Arbitration in the EU* (2014), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf (studying the arbitration practices across the EU and Switzerland and analyzing whether the practices are regional or transnational).

167. *See* Press Release, Office of the U.S. Trade Representative, USTR Releases NAFTA Negotiating Objectives (July 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-releases-nafta-negotiating (detailing the renegotiation of NAFTA by the U.S. Trade Representative (USTR)); David Shepardson, *U.S. Congress Won't Vote on New NAFTA in 2018—Throwing Wrench in Trade Deal's Timeline*, GLOBAL NEWS (Oct. 16, 2018), https://globalnews.ca/news/4556786/new-nafta-agreement-usmca-congress-approval/.

168. For further discussion of the roots of the Law Merchant in merchant practice, see Berman & Dasser, *supra* note 140, at 61; Cremades & Plehn, *supra* note 155, at 320; Trakman, *supra* note 145, at 309, 345.

169. *See* UNCITRAL CONVENTION GUIDE, *supra* note 17, at 141 (observing that parties to international commercial arbitration agreements often fail to make express choices of law to govern their arbitration agreements).

170. *See generally LEX MERCATORIA* AND LEGAL PLURALISM, *supra* note 158 (discussing how the *Lex Mercatoria* has lived on in modern arbitration law).

171. *See* McLaughlin & Genevro, *supra* note 159 (reviewing U.S. courts' application of the N.Y. Convention); *cf.* Michael Hwang & Shaun Lee, *Survey of South East Asian Nations on the Application of the New York Convention*, 25 J. INT'L ARB. 873, 885 (2008) (analyzing Singapore's distinctive pro-arbitration laws and judicial decisions including in interpreting article V of the NY Convention and article 34 of the Model Law); Nikiforov, *supra* note 159, at 787 (evaluating the progress of Russian courts in meeting international standards in their application of the N.Y. Convention).

policy is the libertarian account of merchant practice as evolving "spontaneously,"[172] beyond the formal application of law.[173]

These depictions of the contemporary Law Merchant are not without controversy. Law Merchant defenders laud the allegedly self-generating policies underpinned by merchant autonomy,[174] incorporated into the very fabric of global commerce,[175] and mirrored in policies that drive international trade and finance.[176] Exemplifying the adoption of the Law Merchant into domestic law is comment 3 to the UCC section 1-301, which states that the "[a]pplication of the Code . . . may be justified by . . . the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries."[177]

In contrast, detractors of the Law Merchant have dubbed its transnational trajectory as mythological and its prevalence over local

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172. For an explanation of "spontaneous ordering," see 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 35-54 (1973); F.A. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 96-105 (1967); Norman Barry, *The Tradition of Spontaneous Order*, *in* 5 LITERATURE OF LIBERTY no. 2, at 7, 8-12 (1982); L. Goldschmidt, *Handelsrecht*, *in* 5 HANDWÖRTERBUCH DER STAATSWISSENSCHAFTEN 316, 316-27 (J. Conrad et al. eds., 1910); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 644-45 (1989).

173. *See* Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 635 (7th Cir. 2010) (Posner, J., concurring) ("The common law of contracts evolved from the law merchant."). For a discussion of the influence of the transnational Law Merchant on the common law, see JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 102 (2004); POLLOCK & MAITLAND, *supra* note 160, at 450.

174. *See* Berman & Dasser, *supra* note 140, at 61; David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1389 (1996); Fabrizio Marrella & Christopher S. Yoo, *Is Open Software the New Lex Mercatoria?*, 47 VA. J. INT'L L. 807, 808 (2007); Alec Stone Sweet, *The New* Lex Mercatoria *and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627, 663 (2006); Trakman, *E-Merchant Law*, *supra* note 140, at 265; Leon E. Trakman, *The Twenty-First-Century Law Merchant*, 48 AM. BUS. L.J. 775, 780 (2011). *But see generally* ORSOLYA TOTH, THE LEX MERCATORIA IN THEORY AND PRACTICE (2017) (analyzing whether the modern merchant creates policy through autonomy).

175. *See generally* Klaus Peter Berger, *The New Law Merchant and the Global Market Place*, *in* THE PRACTICE OF TRANSNATIONAL LAW, *supra* note 162, at 1 (evaluating the milestones and present state of the *Lex Mercatoria*).

176. Norbert Horn, *The Use of Transnational Law in the Contract Law of International Trade and Finance*, *in* THE PRACTICE OF TRANSNATIONAL LAW, *supra* note 162, at 67.

177. U.C.C. § 1-301 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 2017). *But see* EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 2, 5 (3d ed. 1984) (discussing grounding the international Law Merchant in commercial custom as "distinct from the ordinary law of the land"); *see also* sources cited *supra* note 168 (detailing the roots of the Law Merchant in merchant practice).

state interests as fantasy.[178] These detractions have some validity. However much transnational public policy is purportedly universalized by customs, usages, and contracts ascribed to the transnational practices of merchants, it is unsustainable if it is not endorsed by nation states. Whether the public policies underlying the Law Merchant are conceived as transnational in nature, they are also subject to domestic public policies that may, but need not necessarily, coexist with those merchant-driven policies.[179] Just as libertarian policy is depicted as striving to liberate transnational markets from overregulation by domestic states, domestic public policy can, but need not necessarily, seek comparable market liberalization to minimize barriers to international commerce.[180] Inasmuch as transnational public policy is depicted as impelled to offset self-regulation by transnational merchants that subverts free and fair trade, domestic standards of procedural justice and substantive fairness can serve comparable ends.[181]

However, there is a countervailing force favoring the expansive incorporation of transnational public policy into domestic law. In particular, domestic courts that strive to adopt it consistently, transparently, and impartially, can promote greater predictability and efficiency than if they relied exclusively upon homespun local interests that are variable in nature and operation.[182] The prospect of local courts reconciling competing domestic and transnational conceptions of public policy is explored in Part VIII.

VI. ATTEMPTING TO "DELOCALIZE" TRANSNATIONAL PUBLIC POLICY

This Article, thus far, has explored transnational public policy as a means of preserving and also regulating transnational commercial

178. *See* Kadens, *supra* note 141, at 1153 n.1 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004)) (discussing the myth of the customary Law Merchant); *see also* DEZALAY & GARTH, *supra* note 28, 41 n.19 (discussing the denunciation of, and the controversy surrounding, the *Lex Mercatoria*); Delaume, *supra* note 142, at 77-79 (discussing the category of transactions that relate to the *Lex Mercatoria*).

179. *See generally* Trakman, *The Evolution*, *supra* note 140 (describing the relationship between the Law Merchant's autonomy and domestic laws).

180. DAVID BOAZ, LIBERTARIANISM: A PRIMER 1-26 (1997).

181. *See, e.g.*, Zeynalova, *supra* note 8, at 161-62 (identifying procedural safeguards such as personal jurisdiction and notice requirements that prevent U.S. enforcement of awards from unfair systems).

182. *See* Mayer & Sheppard, *supra* note 5, at 251 (discussing invoking transnational public policy to unify domestic differences).

transactions. In doing so, it acknowledges that opinions on the contours of transnational public policy diverge, including among domestic courts applying the public policy exception under article V(2)(b) of the N.Y. Convention. It underscores that the scope of transnational public policy is hampered by the absence of wording in the N.Y. Convention that defines "public policy," and by domestic courts invoking it to enforce or to annul foreign arbitration awards.[183] Limiting it, too, are overgeneralized criteria justifying the annulment of arbitration awards based on fundamental public policies that are informed by natural law and the law of nations, that are allegedly universal in application, and affirmed by merchant custom.[184] Further impeding the development of transnational public policy are variations among nation states over when their sovereign independence prevails over their political, economic, and legal interdependence.[185]

An issue arising from divergence over the boundaries of transnational public policy is whether it is best situated in the sovereign domain of states acting separately, through their aggregated sovereignty, or through a transcendent order beyond both. Those who subscribe to a strict conception of state sovereignty are likely to envisage "a body of truly international customary rules" that "does not form part of the *jus gentium*, but . . . is applied in every national jurisdiction by tolerance of the national sovereign whose public policy may override or qualify a particular rule of that law."[186] Those who identify transnational public policy with the aggregation of state sovereignty are likely to identify it within the will of a plurality of nation states. Those who subscribe to a transcendent transnational public order, beyond that aggregation, are likely to cling to natural

183. *See* discussion *supra* Parts I, III (discussing the absence of a definition of public policy in the N.Y. Convention). For a discussion of the tension between the public policy defense being invoked to support, or alternatively, to deny the enforcement of foreign arbitration awards, see, for example, *Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Natural Gas*, 314 F. Supp. 3d 95, 109 (D.D.C. 2018) (confirming predominant U.S. public policy *in favor of enforcing* foreign arbitration awards unless doing so would violate the "most basic notions of morality and justice"). *Cf.* Newco Ltd. v. Gov't of Belize, 650 F. App'x 14, 16 (D.C. Cir. 2016) (restricting the public policy defense to "clear-cut cases" in which "enforcement would violate the forum state's most basic notions of morality and justice" (quoting Termorio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 938 (D.C. Cir. 2007))).

184. *See* DEZALAY & GARTH, *supra* note 28, 41 n.19 (1996).

185. *See, e.g.*, Catherine Kessedjian, *Transnational Public Policy*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 857, 859-60 (Albert Jan van den Berg ed., 2007) (relating transnational public policy to the sovereignty of states).

186. *See* Schmitthoff, *supra* note 63, at 108-09.

rights conceptions of public policy, to a pervasive *jus cogens*, or to a merchant-inspired theory of transnational self-ordering.[187] At issue, therefore, is how states realistically can reconcile sovereigntist, pluralist, and transcendent depictions of transnational public policy.

Domestic courts can also elevate transnational over domestic public policy for competing reasons. For example, they could have enforced the decisions of the Russian courts in *Yukos*, deferring to them as a measure of comity among nations.[188] Quite differently, they could have encouraged disputants to incorporate "rule of law" jurisdictions into their ensuing contracts on the assumption that Russia is not such a jurisdiction. Conversely, they could have adopted transnational public policy to decline to enforce the Russian judgments, basing their determinations on the law of nations, natural law, or both.

Whatever construction of transnational public policy courts adopt, state courts are likely either not to "domesticate" it or to do so differently. In treating internally generated notions of equity and fairness as definitive exemplars of natural justice, many will embed domestic rather than plural conceptions of liberty.[189] In demarcating liberty and human dignity differently across states, some states will engrain conceptions of public policy that are neither shared by the global community of states, nor embody autonomous transnational policy.[190] Even domestic courts that share so-called "rule of law"

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187. For analyses of the incremental reception of disparate transnational public policies into domestic law, see, for example, KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 100-01 (1999); Gunther Teubner, *'Global Bukowina': Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 3, 3-4 (Gunther Teubner ed., 1997) (evaluating the plural nature of law and policy globally); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1647 (1996); Cremades & Plehn, *supra* note 155, at 324. *But see* TT Arvind, *The 'Transplant Effect' in Harmonization*, 59 INT'L & COMP. L.Q. 65, 66-69 (2010) (evaluating the "transplantation effect" in harmonizing law and policy transnationally); Renata Brazil-David, *Harmonization and Delocalization of International Commercial Arbitration*, 28 J. INT'L ARB. 445, 465 (2011) (arguing for harmonizing transnational law and policy governing international arbitration).

188. *See* Hof Amsterdam 28 april 2008, JOR 2009, 208 (Yukos Capital S.a.r.l./OAO Rosneft) (Neth.).

189. *See* Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L. & COMP. L. REV. 565, 602-03 (2006) (assessing collective liberty in Sharia law). *See generally* John Makdisi, *Legal Logic and Equity in Islamic Law*, 33 AM. J. COMP. L. 63 (1985) (evaluating equity in Islamic law).

190. For illustrations of philosophical divergence over the conception of liberty in western liberal thought, see ISAIAH BERLIN AND THE POLITICS OF FREEDOM: "TWO CONCEPTS OF LIBERTY" 50 YEARS LATER (Bruce Baum & Robert Nichols eds., 2013). *See also* KATRIN FLICKSCHUH, FREEDOM: CONTEMPORARY LIBERAL PERSPECTIVES (2007) (evaluating the conceptions of liberty of Berlin, MacCallum, Nozick, Steiner, Dworkin, and Raz); MORDECAI

traditions can be expected to differ over when to nullify an award for being "at odds with fairness, equal treatment of the parties and consequently public policy."[191]

States and their courts that adopt mono-local conceptions of public policy are also likely to vary over the policy significance of trade liberalization itself. Western liberal economies inevitably diverge from planned economies over the ambit of the sanctity of contracts.[192] Domestic courts of states that share legal traditions, such as the common law, vary over the right not to perform a contract on grounds of frustration or economic impracticability.[193] Civil and common law courts differ over when to declare contracts unenforceable,[194] while civil law courts sometimes decline to enforce foreign judgments based on common law fraud.[195] Even states that share religious values, such as Islamic states, deviate in interpreting Sharia law, such as when to annul an international arbitration award that includes costs on interest.[196] These interpretative differences, in turn, increase the challenges for courts in western liberal states in deciding whether to recognize arbitral awards applying Islamic law under the N.Y. Convention.[197] However much "[t]he genius of the New York

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ROSHWALD, LIBERTY: ITS MEANING AND SCOPE (2000) (analyzing the various forms and applications of liberty).

191. *See* Smart Sys. Techs. Inc. c. Domotique Secant Inc., 2008 QCCA 444 (Can. Que. C.A.). *See generally* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (2000) (considering the impact of legal traditions on the rule of law); Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 97 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (critiquing the rule of law in liberal democracies).

192. For a discussion of the variability of freedom of contract in international and comparative law, see Leon Trakman, *Pluralism in Contract Law*, 58 BUFF. L. REV. 1031, 1032-35 (2010); David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 52-53 (2013). *See generally* NAGLA NASSAR, SANCTITY OF CONTRACTS REVISITED: A STUDY IN THE THEORY AND PRACTICE OF LONG-TERM INTERNATIONAL COMMERCIAL TRANSACTIONS (1995) (discussing the varying types of contracts and duties in commercial transactions).

193. Leon E. Trakman, *Frustrated Contracts and Legal Fictions*, 46 MOD. L. REV. 39, 44 (1983) [hereinafter Trakman, *Frustrated Contracts*]; Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 504-05 (1985) [hereinafter Trakman, *Winner Take Some*].

194. *See, e.g.*, Nelson Enonchong, *Effects of Illegality: A Comparative Study in French and English Law*, 44 INT'L & COMP. L.Q. 196, 198-99 (1995); Leon E. Trakman, *The Effect of Illegality in the Law of Contract: Suggestions for Reform*, 55 CAN. B. REV. 625, 625-26 (1977).

195. This is exemplified by Chinese courts declining to enforce Hong Kong judgments grounded in common law fraud. *See* HUANG, *supra* note 70, at 258.

196. *See* Kutty, *supra* note 189, at 604-06.

197. For a discussion of the public policy defense in the Middle East, see Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to*

Convention is to have foreseen, and made provision for, the progressive liberalization of the law of international arbitration,"[198] the reality is that state courts ordinarily propagate localized variants of liberalized trade and investment.[199]

A formalistic response to such divergence in law and policy is that however much sovereign states subscribe to a transcendent conception of transnational public policy, no state is bound by it, other than by inculcating it into domestic law. However much the New York court in *Fiorilla*[200] purported to order the award creditor not to enforce in France an arbitration award annulled in New York, French law empowers French courts to decide whether to recognize a foreign judgment.[201] Sovereign states ordinarily authorize their courts to determine when to recognize the local interests of other states,[202] such as when to permit a party to submit an award for authentication under the law where the award was made, the place where enforcement is sought, or the law of a third state.[203]

A further rationale for a French court to have declined to enforce the New York judgment in *Fiorilla* could be based on the policy of mutual reciprocity in which purely localized self-interests are tempered

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Refuse Enforcement of Non-Domestic Arbitral Awards?, 18 FORDHAM INT'L L.J. 920, 941-52 (1995); Mark Wakim, *Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East*, 21 N.Y. INT'L L. REV. 1, 44-45 (2008); Rizwan, *supra* note 35, at 494.

198. UNCITRAL CONVENTION GUIDE, *supra* note 17, at 3; *see* TF Mar. 14, 1984, 110 ATF Ib 191, 194, *translation at* http://newyorkconvention1958.org/doc_num_data.php?explnum_id=807 (Switz.) (describing that article VII(1) enshrines "the rule . . . of maximum effectiveness" or "*règle . . . de l'efficacité maximale*").

199. *See, e.g.*, Javier Rubinstein & Georgina Fabian, *The Territorial Scope of the New York Convention and Its Implementation in Common and Civil Law Countries*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, *supra* note 3, at 91, 95; Hossein Esmaeili, *On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System*, 26 ARIZ. J. INT'L & COMP. L. 1, 6-7 (2009) (discussing the limited development of the rule of law in Saudi law). *But cf.* ISLAMIC DEMOCRATIC DISCOURSE: THEORY, DEBATES, AND PHILOSOPHICAL PERSPECTIVES (M.A. Muqtedar Khan ed., 2006) (analyzing democratic principles attributable to Islamic philosophy).

200. 54 N.Y.S.3d 586, 586 (N.Y. App. Div. 2017).

201. *See, e.g.*, CA Paris, Dec. 19, 1991, 90-16778 (holding that French courts are not required to take into account a foreign judgment annulling an international arbitration award), *aff'd*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, Bull. civ. I, No. 104 (Fr.).

202. *See* Trakman, *supra* note 145, at 343-48.

203. *See, e.g.*, Cass., 8 maggio 2008, n. 24856 (It.) (limiting a party's freedom to seek enforcement of an award under the law of the place where enforcement is sought). *See contra* OGH June 11, 1969, 3 Ob 62/69, 42 ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ] No. 87 (Austria).

by the mutual interests of both states.[204] Such reciprocity of treatment can be replicated by courts in third states.[205] However, it is unlikely that a plurality of states would subscribe to the same reciprocal treatment, other than through an international convention. The more likely result is a multiplicity of two-tiered public policies between reciprocating states, not unlike the historical proliferation of bilateral free trade agreements.[206] Even such limited reciprocity can reduce the proliferation of mono-local public policies directed at not enforcing foreign judgments. However, reciprocal treatment cannot comprehensively redress the dilution of domesticated public policy exceptions beyond those reciprocating states. Nor can it displace two-tiers of public policy in each state, consisting of both domestic and international public policy.[207]

A plural response is to cultivate a delocalized conception of public policy that is shared by states, beyond the mutual interests of two or more reciprocating states.[208] This plural approach conceives of each state as incorporating, as far as practicable, a shared conception of public policy into its domestic law extending beyond reciprocated policies. The perceived result is that public policy "floats" across multiple states and is not "anchored" either in the local interests of one state or the reciprocated interests of two or more states.[209]

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204. The argument is not that the French court sought to protect local interests in not enforcing the New York decision. Indeed, the judgment creditor did not invoke the New York decision when seeking enforcement, in France, of the arbitration award annulled in New York. The argument is rather that had the French court refused to enforce the New York judgment, this could have led to reciprocal nonenforcement of judgments between French and New York court more generally.

205. The N.Y. Convention provides for reciprocity between states. Article 1 provides that "any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." N.Y. Convention, *supra* note 1, art. I. Additional articles also provide for reciprocity. See *id.* art. X (colonial territories); *id.* art. XI (federal states); *id.* art. XIV (general reciprocity).

206. *See, e.g.*, Leon E. Trakman, *Bilateral Trade and Investment Agreements*, *in* REGIONALISM IN INTERNATIONAL INVESTMENT LAW 59, 62 (Leon E. Trakman & Nicola W. Ranieri eds., 2013).

207. For an explanation of a two-tier public policy regime in domestic states, see GAILLARD, *supra* note 4, at 28-35, 60-62.

208. *See* Masood Ahmed, *The Influence of the Delocalization and Seat Theories upon Judicial Attitudes Towards International Commercial Arbitration*, 77 ARB. 406, 478 (2011) (evaluating how delocalization influences the judicial enforcement of international commercial arbitration); *see also* Matthew Barry, *The Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts*, 32 J. INT'L ARB. 289, 295 (2015) (analyzing the mono-local theory of international law).

209. *See* THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION 82-90 (2014) (evaluating the "relative legality" of an

The problem with a pluralistic conception of public policy is in reconciling it with the localized interests of states. Inasmuch as a domestic court can decline to enforce a "procedurally delocalised award, whether rendered inside or outside the state where enforcement is sought,"[210] it can decline to enforce a foreign judgment annulling that award on sovereigntist grounds, notwithstanding plural support for annulment elsewhere.

The issue of how to engender an autonomous public policy that transcends both local and plural accounts of public policy is explored in Part VII below.

VII. "FUNDAMENTAL" NORMS OF TRANSNATIONAL PUBLIC POLICY

A key argument in support of courts prioritizing transnational public policy is in determining whether to enforce an international arbitration award on grounds that such policy is so "fundamental" or "core" that it surpasses competing local and plural interests.[211] As articulated in the English *Yukos* case: "[I]t would be both unsatisfactory and contrary to principle if the Court were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy."[212]

In propagating an autonomous transnational public policy, it is difficult to determine whether there are transcendent principles arising in natural law,[213] reflected in comity among states,[214] or embedded in a mandatory *jus cogens* that ought to be treated as more fundamental than

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autonomous arbitral order); Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 INT'L & COMP. L.Q. 358, 358-59 (1981) (discussing delocalized arbitral awards "floating" or "drifting" across jurisdictions); *see also* Dell Comput. Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801 (Can.) ("The arbitrator has no allegiance or connection to any single country."); Cass. 1e civ., Jun. 29, 2007, Bull. civ. I, No. 250 (considering "[a]n international arbitral award, which is not anchored in any national legal order"). However, regarding favoring localized international commercial arbitration awards, see S.A. Coppée Lavalin N.V. v. Ken-Ren Chemicals & Fertilizers Ltd [1995] AC 38 (HL) 63 (Eng.); Bank Mellat v. Helliniki Techniki S.A., [1984] QB 291 at 301 (Eng.); F.A. Mann, *England Rejects "Delocalised" Contracts and Arbitration*, 33 INT'L & COMP. L.Q. 193, 197-98 (1984) (analyzing the doctrine of the *contrat anational*).

210. STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS 127 (1990).

211. For a discussion of the divergence in ranking principles of justice, see *supra* text accompanying notes 48-52.

212. Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Co. [2014] EWHC (QB) 2188, [2014] All ER (D) 62 (July) (Eng.) (Simon J).

213. *See* Shetreet, *supra* note 20 (identifying the natural law foundations of western liberal democracies).

214. *See* Vienna Convention, *supra* note 21.

countervailing local and lesser plural interests.[215] It is also difficult to establish when these higher principles ought to bind states and their domestic courts.[216]

A partial response to this is that "core" transnational public policy operates both affirmatively and reactively. Articulated affirmatively, "core" procedural norms are directed at resolving disputes transparently and impartially[217] and in accordance with fundamental principles of natural justice.[218] Expressed reactively, "core" norms are required to respond definitively to the denial of natural justice and to a lack of judicial impartiality and independence from the executive.[219] Articulated normatively, these "core" norms provide minimal standards of procedural fairness[220] and extend beyond mere "procedural irregularities."[221]

The arduous third challenge is to determine how domestic courts can realistically apply these "core" norms of transnational public policy, such as regulating anticompetitive conduct.[222] Applied by

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215. *See generally* Vadi, *supra* note 22 (discussing *jus cogens* in international commercial arbitration).

216. *See* VAN DEN BERG, *supra* note 23, at 263 (evaluating the binding nature of "fundamental" public policy).

217. For commentary on the standards of procedural justice in international commercial arbitration, see Richard Kreindler, *Standards of Procedural International Public Policy*, *in* INTERNATIONAL ARBITRATION AND PUBLIC POLICY, *supra* note 27, at 9, 16-21; JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 150-53 (2006); Stephen M. Schwebel & Susan G. Lahne, *Public Policy and Arbitral Procedure*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, *supra* note 56, at 205.

218. *See Fluor Austl Pty Ltd v Anaconda Operations Pty Ltd* [2003] VSC 276 (28 July 2003) (Austl.); BGH May 15, 1986, III ZR 192/84 (Ger.) (balancing procedural fairness against efficiency in international commercial arbitration); *see also* JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 15-17 (2012) (analyzing free choice and procedural fairness).

219. *See supra* text accompanying notes 111-112 (evaluating the partiality and dependence attributed by the Amsterdam Court of Appeal to the Russian judiciary in *Yukos*); *see also Corruption Perceptions Index*, TRANSPARENCY INT'L, https://www.transparency.org/research/cpi/overview (last visited Oct. 15, 2018) (ranking states according to judicial independence).

220. *See, e.g.*, Piero Bernardini, *The Role of the International Arbitrator*, 20 ARB. INT'L 113, 116 (2004) (discussing three minimal standards of justice: the right to be heard, the right to be apprised of the opponent's case, and the right to be treated alike).

221. *See* Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co., [1999] 2 H.K.C.F.A.R. 111, 138-39 (C.F.A.) (H.K.) (considering the relationship between procedural irregularity and public policy).

222. *See, e.g.*, TF Mar. 8, 2006, 132 ATF III 389 (Switz.) (subjecting EU competition law to fundamental values that are necessarily part of any legal order *and* to prevailing opinions in Switzerland); *see also* Manu Thadikkaran, *Enforcement of Annulled Arbitral Awards: What Is and What Ought To Be?*, 31 J. INT'L ARB. 575, 598-603 (2014) (justifying the annulment of arbitration awards for violating basic procedural fairness, the wrongful assumption of primary

analogy to *Yukos*, applying "core" norms of transnational public policy requires more than universalizing anecdotal evidence that the Russian judiciary in general lacked independence from the executive.[223] It requires case specific evidence that the Russian courts demonstrated actual or perceived biases in favor of a state-owned enterprise, Rosneft Oil, and against a private corporation, Yukos Capital.[224]

The evidentiary burden for reviewing courts is to find compelling reasons to annul an arbitration award for offending "fundamental standards of fairness."[225] Discharging this procedural burden is exemplified by one negotiating party appointing himself as the sole arbitrator in a manner that "is so extreme, that it is hard to imagine that any free and democratic legal system could equate the award rendered by such an arbitrator to a sovereign State act and enforce it."[226]

The substantive challenge is for a court to identify egregious violations of good morals, such as in sanctioning human trafficking and indenturing employees, and when those violations prevail over countervailing localized public policies.[227] This tension between fundamental and lesser violations of public policy is likely to arise in the impending trial of Shell and its senior executives for the alleged US$1.2 billion bribery of Nigerian officials.[228] At issue more pervasively is whether state reservations, grounded in localized

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jurisdiction, technicalities based on local standards, and violating fundamental notions of justice).

223. *See* Bernardini, *supra* note 220, at 116.

224. *See id.*

225. *See* Jorf Lasfar Energy Co., S.C.A. v. AMCI Export Corp., No. Civ.A. 05-0423, 2005 WL 3533128 (W.D. Pa. Dec. 22, 2005); Louis Dreyfus S.A.S. c. Holding Tusculum B.V., 2008 QCCS 5903 (Can. Que. S.C.).

226. *See, e.g.*, *Entscheidung*, 93 SCHWEIZERISCHE JURISTEN-ZEITUNG 223, 226 (1997).

227. For cases annulling arbitral awards for violating public morality, such as for bribery and corruption, see, for example, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak*, 364 F.3d 274 (5th Cir. 2004); *Geotech Lizenz AG v. Evergreen Sys., Inc.*, 697 F. Supp. 1248 (E.D.N.Y. 1988); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 ABQB 616, 435 A.R. 58 (Can. Alta. Q.B.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ., diciembre 19, 2011, M.P: Fernando Giraldo Gutiérrez, Expediente 1100102030002008-01760-00 (Colom.); *Gater Assets Ltd. v. Nak Naftogaz Ukrainiy* [2008] EWHC (QB) 237, [2008] All ER (D) 223 (Feb.) (Eng.); *Westacre Investments Inc. v. Jugoimport-SDRP Holding Co.* [1999] EWCA (Civ) 1401, [2000] QB 288 (Eng.); *Minmetals Germany GmbH v. Ferco Steel Ltd.* [1999] 1 All ER (Comm.) 315 (Eng.); CA Paris, Apr. 10, 2008, 06/15636 (Fr.); *Karaha Bodas Co. v. Perusahaan Pertambangan Minydak Dan Gas Bumi Negara*, [2007] 4 H.K.L.R.D. 1002 (C.A.) (H.K.).

228. *See* Chiara Albanese et al., *Eni, Shell to Face Trial in Italy in $1 Billion Bribery Case*, BLOOMBERG (Dec. 20, 2017), https://www.bloomberg.com/news/articles/2017-12-20/eni-shell-to-face-trial-in-italy-over-1-billion-bribery-case.

economic policy in acceding to the N.Y. Convention, ought to prevail over countervailing transnational public policy.[229]

More complex is the task of domestic courts to mediate between core and lesser violations of transnational public policy, such as mediating between conduct threatening the administration of justice and conduct perceived to be non-felonious and subject to less severe public reprobation.[230] If they are to mediate between free and fair global commerce, they need to determine when transnational public policy "adequately redresses" an abuse of bargaining power, without stultifying international commerce.[231] If they are to promote reasonable damage awards, they need to apply mediatory norms to determine when arbitration awards grant excessive interest on future damages.[232]

The purpose of domestic courts applying mediatory norms to transnational public policy is not to seek a perfectly level playing field across multiple states but to promote standards of fairness that satisfy localized interests, without being wholly captive to them.[233] An illustration of norms that mediate between transnational and domestic

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229. *See* Jaranilla v. Megasea Mar. Ltd., 171 F. Supp. 2d 644, 646 (E.D. La. 2001) (holding that a seafarer's employment contract was outside the scope of a "commercial dispute" arising from the United States exercising a commercial reservation under article 1(3) in acceding to the N.Y. Convention). For a discussion of such commercial reservations, see *Sumitomo Corp. v. Parakopi Compania Maritima, S.A.*, 477 F. Supp. 737, 740-41 (S.D.N.Y. 1979); *The District Manager Food Corp. of India v. Mardestine Compania, Naviera*, AIR 1977 Ker 108 (India) (holding that Section 3 of the Amending Act did not apply to a dispute that commenced before its enactment).

230. For a discussion of egregious violations of public policy, see Comm'n on Human Rights, Report on Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1367 (Mar. 5, 1980); Inter-Am. Juridical Comm., *Draft Convention Defining Torture as an International Crime*, 19 I.L.M. 619 (1980).

231. *See* discussion *supra* Part II (discussing degrees of violation of public policy).

232. *See* Zuigao Renmin Fayuan Guanyu ED&F Manshi (Xianggang) Youxian Gongsi Shenqing Chengren He Zhixing Lundun Tangye Xiehui Zhongcai Caijuean De Fuhan (最高人民法院关于ED&F曼氏（香港）有限公司申请承认和执行伦敦糖业协会仲裁裁决案的复函) [Reply of the Supreme People's Court Regarding the Request of Instruction by Beijing Higher People's Court on the Recognition and Enforcement of a London Sugar Association Arbitral Award by the Applicant ED&F Man (Hong Kong) Co. Ltd.], ED&F Manshi (Xianggang) Youxian Gongsi Yu Zhongguo Tangye Jiulei Jituan Gongsi Zhongcaian (ED&F曼氏（香港）有限公司与中国糖业酒类集团公司仲裁案) [ED & F Man (Hong Kong) Co., Ltd. v. China Nat'l Sugar & Wines Grp. Corp.], [2003] Min Si Ta Zi No. 3. (Sup. People's Ct., July 1, 2003) (China) (determining whether charging interest on future damages violates public policy).

233. *See* MARIO MARINIELLO ET AL., ANTITRUST, REGULATORY CAPTURE, AND ECONOMIC INTEGRATION (2015), https://www.ictsd.org/sites/default/files/research/E15-Competition-Mariniello%2C%20Neven%2C%20Padilla-FINAL.pdf (considering, *inter alia*, the impact of EU antitrust regulations on consumer welfare).

public policy is the N.Y. Convention's requirement that signatory states "shall not . . . impose[] substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."[234] The mediatory principle here is not to set an exact quantum of fees or charges. It is rather to ensure that, in determining whether to enforce a foreign arbitral award, the fees imposed are not higher than those imposed in enforcing a domestic award.

The overriding mediatory purpose is to discourage domestic courts from applying principles of justice, identified with so-called civilized nations, in an intemperate or capricious manner. The collateral function is to dissuade states and their courts from interposing procedural and substantive requirements on foreign parties in a discriminatory or otherwise inequitable manner, leading to fundamental injustice.[235]

The purpose of courts mediating between local and transnational norms of public policy is nevertheless not to arrive at an exhaustive list of rules of natural justice. Courts cannot be expected to incorporate, or even adapt, every norm underlying transnational public policy comprehensively and indelibly into domestic law. Nor can they be relied on to embody those norms infinitely and determinatively in all cases. Their judicial purpose, in mediating between transnational and domestic public policy, is nevertheless to do more than fill gaps in domestic public policy selectively, such as in arbitrarily determining when to recognize the "course of dealing[s]" or "usage[s] of trade" of the parties.[236]

Nor is the judicial function, in mediating between transnational and domestic public policies, all-encompassing. Courts that apply

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234. *See* N.Y. Convention, *supra* note 1, art. XXXI; *see also* Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1121 (9th Cir. 2002) (holding that although the N.Y. Convention provides subject matter jurisdiction for enforcement of arbitral awards, a court must still have personal jurisdiction over a potential party); Yukos Oil Co. v. Dardana Ltd. [2002] EWCA (Civ) 543, [2002] 1 All ER (Comm.) 819 (Eng.) (finding that a provision of security could not be used as a condition to avoid enforcement of an arbitral award).

235. For judicial reasoning based on "nondiscrimination," see *Glencore Grain*, 284 F.3d at 1121; *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 380-82 (S.D.N.Y. 2001); *Gater Assets Ltd. v. Nak Naftogaz Ukrainiy* [2007] EWCA (Civ) 988, [2008] 1 All ER (Comm.) 209 (Eng.); HR 25 juni 2010, NJ 2010, 55 m.nt. van H.J. Snijders (*OAO Rosneft/Yukos Capital Sarl*) (Neth.); Rb. Hof 's-Gravenhage 20 december 2011, TvA 2012, 27 (*Catz Int'l B.V./Gilan Trading KFT*) (Neth.).

236. *See, e.g.*, U.C.C. § 1-303 (AM. LAW. INST. & UNIF. LAW COMM'N 2017) (establishing the rule for course of performance, course of dealing, and usage of trade).

"core" values underlying transnational public policy cannot realistically achieve full convergence across legal systems, such as by propagating a uniform conception of the "just price."[237] Nor can they produce a hermetically sealed regime of global public policy to supersede cultural, economic, and religious divergence over fair exchange in transnational markets. What they can do is advance a normative framework that informs domestic law and policy, without mandating the exact nature of that exchange, such as determining the precise perimeters of usury.[238]

The function of mediatory norms is therefore directional, and not necessarily decisive. It includes discouraging states and their courts from insulating themselves, purposefully or inadvertently, from the responsibility to protect core principles of substantive justice, such as by promoting protectionist trade barriers to entry, or tolerating the de facto bribery of state officials.[239] The application of such norms is pragmatic in seeking to produce efficient and fair outcomes, without purporting to deliver perfect justice.[240]

Applying norms to mediate among competing transnational and domestic public policy is both principled and functional. It is principled in limiting the application of the public policy favoring party autonomy in the face of false and misleading statements that induce a contract. As illustrated in *BKMI Industrienlagen GmbH v. Dutco Construction*, the French Court of Cassation held that the principle of

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237. *See* Trakman, *The Evolution*, *supra* note 140, at 5 (discussing the "just price" in the medieval Law Merchant). For cultural and economic determinants of the "just price" in the common law, see 1 W.J. ASHLEY, AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY 133 (Longmans, Green & Co. 1911) (1888); MAX WEBER, ECONOMY AND SOCIETY 578, 583, 589, 1198 (Guenther Roth & Claus Wittich eds., 1978); James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1604-09 (1981). For discussion of "just price" in civil law, see John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 12 TUL. L. REV. 42 (1937).

238. *See* A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 160 (2003) (evaluating how the law of usury limits mercantile freedom); Gruner, *supra* note 86, at 938-49.

239. *See* Carlos Ragazzo & Mariana Binder, *Antitrust and International Arbitration*, 15 U.C. DAVIS BUS. L.J. 173, 174-75 (2015) (noting international arbitration redressing antitrust violations); sources cited *supra* note 227; *see also Interaction Between Trade and Competition Policy*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited Oct. 15, 2018) (discussing the interaction between international competition policy and trade). *See generally* MARTYN D. TAYLOR, INTERNATIONAL COMPETITION LAW: A NEW DIMENSION FOR THE WTO? (2006) ("internationalizing" competition policy in world trade).

240. For a discussion of how fairness and efficiency must be weighed in construing public policy in enforcing arbitration awards, see *Fluor Austl Pty Ltd v Anaconda Operations Pty Ltd* [2003] VSC 276 (28 July 2003) (Austl.); BGH May 15, 1986, III ZR 192/84 (Ger.); WAINCYMER, *supra* note 218, at 15-17.

party equality in appointing arbitrators inheres in international public policy as it is understood in France.[241] In so reasoning, it set aside an arbitral award rendered by a three-member tribunal, one of whom was appointed under protest and with all reservations by the two defendants.[242]

Delineating the mediatory scope of transnational public policy is also functional. The functional aspiration is to maintain a level playing field in which the global polity, beyond discrete states, share "core" policy aspirations, conceived illustriously as the betterment of humankind.[243] That betterment is directed at promoting an evolving, variable, yet responsive transnational legal order that acknowledges perceived threats to the "betterment" of humankind and functional means of allaying those threats.[244] It is by these functional means that a transnational "rule of law" evolves out of generally accepted principles of natural justice that are otherwise encumbered by incongruent state practices and transnational mercantile customs.

However, neither principled nor functional conceptions of transnational public policy are fixated on achieving an all-encompassing transnational "order," nor in attaining a definitive mercantile "good." They aspire, proactively, to augment a shared transnational order that includes, but is not exhausted by, mercantile interests.[245] They seek, reactively, to reign in potentially dysfunctional domestic and transnational conceptions of the "rule of law."[246]

Embodying mediatory norms of justice in a principled and functional manner is not peculiar to the public policy defense under the N.Y. Convention. Article 38 of the Statute of the International Court of Justice directs that court to consider the "rules expressly recognized by the contesting states," "international custom," and "general principles of law recognized by civilized nations."[247] However much

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241. Cass. 1e civ., Jan. 7, 1992, Bull. civ. I, No. 2 (Fr.).

242. *Id.*; Martin Platte, *Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, *supra* note 3, at 481, 491-94.

243. "That is true culture which helps us to work for the social betterment of all." CHARLES LEMERT, DURKHEIM'S GHOSTS: CULTURAL LOGICS AND SOCIAL THINGS 37 (2006) (quoting Henry Ward Beecher).

244. *See* Paulsson, *Three Dimensions*, *supra* note 5, at 317-23.

245. *See* Trakman, *supra* note 174, at 798-800.

246. Int'l Law Comm'n, Second Rep. on Identification of Customary International Law, U.N. Doc. A/Cn.4/672, at 22 (May 22, 2014) (evaluating the rule of law as customary international law).

247. *See* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031, 3 Bevans 1153.

"international custom" is embodied in law, it is mediated through state practice. However much international law is determined by "general principles of law recognized by civilized nations," those principles are subject to a mediatory discourse over sometimes elusive boundaries between "civilized" and "uncivilized" conduct.[248]

VIII. RE-DELINEATING TRANSNATIONAL PUBLIC POLICY

As identified in Part V, "core" procedural and substantive norms underlying transnational public policy are, undisguisedly, subject to disparate application.[249] Domestic courts sometimes adopt incongruent conceptions of procedural justice, such as in applying the maxim *exceptio non adimpleti contractus*, which prohibits a claimant from proceeding against someone to whom that claimant owes a preexisting contractual or other duty.[250] Domestic courts also vary over substantive conceptions of justice, such as in determining whether to enforce an award of consequential damages that is expressly excluded by contract.[251] This leads courts to integrate dissimilar constructions of transnational public policy into domestic law and to reach discordant results.[252]

Centrally at issue is how courts can espouse transnational norms of justice both functionally and evenhandedly in determining whether to enforce international arbitration awards. As a preliminary observation, it is more feasible for domestic courts to develop transnational standards of procedural justice than substantive standards under the N.Y. Convention.[253] It is also more realistic for them to

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248. *Id.*; *see also* INT'L LAW ASS'N, *supra* note 58, at 345 (relating the international law of civilized nations to international commercial arbitration).

249. For an explanation of such "core" principles, see *supra* text accompanying note 48.

250. *See, e.g.*, S.T.J., SEC 507 No. 2005/0209540-1, Relator: Gilson Dipp, 19.10.2006, *translation at* http://newyorkconvention1958.org/doc_num_data.php?explnum_id=1682 (Braz.).

251. *See* Fertilizer Corp. of India v. IDI Mgmt. Inc., 517 F. Supp. 948, 958 (S.D. Ohio 1981) (evaluating consequential damages excluded by contract); BLACKABY & PARTASIDES, *supra* note 24, at 159. *See generally* Inae Yang, *International Enforcement of Punitive Damage Awards*, 9 J. COMP. L., no. 1, 2014, at 353 (discussing punitive damage awards).

252. *See* Mayer & Sheppard, *supra* note 5, at 255 (discussing potential discordant results in applying the ILA's conception of international public policy).

253. *See* VAN DEN BERG, *supra* note 23, at 297; Scherer, *supra* note 3, at 292-97. For examples of domestic courts developing transnational standards of procedural justice rather than substantive standards, see *Yukos Capital S.A.R.L. v. OAO Samaraneftegaz*, 963 F. Supp. 2d 289, 291-94 (S.D.N.Y. 2013); *China National Building Material Investment Co. v. BNK International L.L.C.*, No. A-09-CA-488-SS, 2009 WL 4730578, at *6 (W.D. Tex. Dec. 4, 2009); *Sesostris S.A.E. v. Transportes Navales S.A.*, 727 F. Supp. 737, 741 (D. Mass. 1989); Zuigao Renmin Fayuan Guanyu Buyu Chengren Menggu Guojia Zhongcai Fating 73/23-06

harmonize minimum standards of procedural, rather than substantive justice.[254] However, they may still insist that minimum standards of justice, even if harmonized transnationally, must comply with domestic interests, such as with "the interests of India."[255] They also need to determine both whether transnational public policy is determinative and when it unjustifiably trammels national sovereignty. As the Brazilian Superior Court asserted, "The issue [in dispute] does not have a public policy character and . . . does not relate to the concept of national sovereignty."[256]

Domestic courts that subscribe to minimum standards of justice are also bound by the applicable state's sociocultural, political, and legal identity.[257] They may predictably hold that while transnational public policies personify idealized conceptions of natural law, comity among nations, or economic liberalism elsewhere, they do not comport with prevailing domestic interests.[258] Jurists may opine that it is still "too early to predict that international arbitration will soon arrive at the point in which the entire arbitral procedure can be driven and evaluated

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Hao Zhongcai Caijue De Baogao De Fuhan (最高人民法院关于不予承认蒙古国家仲裁法庭 73/23-06 号仲裁裁决的报告的复函) [Reply of the Supreme People's Court regarding the Request for Instruction on the Non-Recognition of the Award No. 73/23-06 Issued by the Mongolia National Arbitration Court], Meng Aiduoladuo Youxian Zeren Gongsi Yu Zhejiang Zhancheng Jianshe Jituan Youxian Gongsi Zhongcaian (蒙—艾多拉多有限责任公司与浙江展诚建设集团股份有限公司仲裁案) [*Aiduoladuo (Mongolia) Co. v. Zhejiang Zhancheng Construction Group Co.*], [2009] Min Si Ta Zi No. 46. (Sup. People's Ct., Dec. 8, 2009) (China); OLG Sept. 7, 2009, 26 Sch 13/09 (Ger.).

254. *See* JOSHUA KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 242 (2013) ("[International commercial arbitration] has already generated a set of harmonized, autonomous procedural rules that enjoy general acceptance."); *see also* GAILLARD, *supra* note 4, at 9; Andrés Jana et al., *Article V(1)(b)*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, *supra* note 47, at 231, 231-39 (explaining the procedural requirements under the N.Y. Convention).

255. Renusagar Power Co. v. Gen. Elec. Co., (1993) 3 S.C.R. 22, 73 (India); *see* Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433 (2013) (India); Penn Racquet Sports v. Mayor Int'l Ltd., (2011) 1 Arb. LR 244 (India).

256. S.T.J., SEC 507 No. 2005/0209540-1, Relator: Gilson Dipp, 19.10.2006, *translation at* http://newyorkconvention1958.org/doc_num_data.php?explnum_id=1682 (Braz.).

257. *See* Filippo Fontanelli & Paolo Busco, *What We Talk About When We Talk About Procedural Fairness*, *in* PROCEDURAL FAIRNESS IN INTERNATIONAL COURTS AND TRIBUNALS 17, 22 (Arman Sarvarian et al. eds., 2015) ("[T]he idea of procedural fairness prevailing in a community at a certain time depend on social features and legacies. This is perhaps the greatest obstacle to attempts to extrapolate a universal notion of procedural fairness, especially when applied to international legal proceedings.").

258. *See* discussion *supra* Parts V-VI (discussing transnational public policy's roots in natural law, comity, and economic rationality).

by reference to transnational procedural rules."[259] More realistically, they may recognize that transnational procedural rules are unlikely ever to drive "the entire arbitral procedure."[260]

Despite these predictions, commonly espoused principles of substantive and procedural justice are material sources of domestic—not only transnational—public policy, such as in regulating money-laundering schemes.[261] Norms of transnational public policy are not insulated abstractions, flying above the fray of localized economic and social rights. Nor do they personify unremitting faith in the illusion of a wholly self-perpetuating merchant order.[262] A transnational tenet of "fair dealings" in global commerce does not evolve independently of, or unresponsively to, domestic conceptions of public policy.[263] However much transnational public policy prevails, localized interests are significantly responsible for nurturing that policy,[264] such as in balancing the sanctity of promises against the abuse of superior bargaining power[265] and in adopting "winner take some" remedies in response to economic impracticability.[266]

Nor can transnational public policy seamlessly merge inherently asymmetrical merchant practices into a homogeneous commercial order, such as by transforming a plurality of local market into an

259. Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20 ARB. INT'L 333, 337 (2004).

260. *Id.*

261. *See* Inan Uluc, Corruption in International Arbitration (Mar. 29, 2016) (unpublished S.J.D. thesis, Pennsylvania State University Law School), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1000&context=sjd (evaluating bribery and corruption as public policy grounds to annul arbitration awards).

262. *See* Trakman, *E-Merchant Law*, *supra* note 140, at 299-300 (discussing the controversial libertarian attributes of the transnational Law Merchant).

263. For a discussion of the interface between transnational and domestic public policy grounds for annulling arbitration awards, see Teubner, *supra* note 187, at 3-5; Zumbansen, *supra* note 114, at 400-06.

264. *See* Zumbansen, *supra* note 114, at 402-04. *But see* GAILLARD, *supra* note 4, at 9 (evaluating the mono-local view of foreign policy).

265. For public policy responses to alleged abuses of corporate power, see generally MARSHALL B. CLINARD, CORPORATE CORRUPTION: THE ABUSE OF POWER (1990) (analyzing corporate abuses of power); SEAN MICHAEL WILSON & BENJAMIN DICKSON, FIGHT THE POWER! (2013) (illustrating historical examples of protest and struggle); CORPORATE GOVERNANCE: ECONOMIC AND FINANCIAL ISSUES (Kevin Keasey et al. eds., 1997) (giving an economic and financial analysis of governments).

266. *See generally* Trakman, *Frustrated Contracts*, *supra* note 193 (analyzing the implied terms courts have recognized in contracts in the interest of fairness); Trakman, *Winner Take Some*, *supra* note 193 (discussing the allocation techniques utilized in international arbitration).

equalitarian utopia.[267] What transnational norms of public policy can do, however, is elevate principles of procedural and substantive justice into workable transnational standards. Applied to *Yukos*,[268] the Amsterdam court could have adopted minimum transnational standards of procedural justice, notably the right to be heard, the right to be apprised of the opponent's case, and the right to be treated alike.[269] While these standards are subject to disparate constructions, they serve as functional benchmarks by which to determine whether an arbitrator or court has violated a requisite standard of natural justice, including in light of its domestic construction.

Adjudicators can also adopt functional standards of social justice to weigh free against fair business practice and merchant autonomy against regulatory action.[270] They can weigh consent to contract against "vices" of consent, without over-relying on formalized principles of contract law.[271] They can harmonize disparate merchant practices in trading markets without seeking an all-encompassing unity.[272] They can draw on mercantile custom and habit in determining when and how to regulate social interaction in transnational markets.[273] They can do so in the tradition of treaties of "friendship" that include the positive *freedom to* trade, subject to the *freedom from* public harm to signatory states, such as under the 1946 China-U.S. Treaty of Friendship, Commerce, and Navigation.[274] They can also balance

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267. For a discussion of the diffuse sources and boundaries of transnational public policy, see Fry, *supra* note 24, at 85-88; Lalive, *supra* note 56, at 287; Oelmann, *supra* note 8, at 77, 80-83. *But cf.* Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 9-14 (1986) (exploring a uniform system of international commercial arbitration).

268. Hof Amsterdam 28 april 2008, JOR 2009, 208 (Yukos Capital S.a.r.l./OAO Rosneft) (Neth.); *see supra* text accompanying notes 88-92.

269. Discussing this threefold test, see Bernardini, *supra* note 220, at 226.

270. *See* BOAZ, *supra* note 180; David Friedman, *Libertarianism*, *in* 5 THE NEW PALGRAVE: DICTIONARY OF ECONOMICS 103 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008) (identifying the antithetical relationship between libertarian rights and government regulation).

271. *See* Trakman, *supra* note 192; *cf.* Herbert A. Holstein, *Vices of Consent in the Law of Contracts*, 13 TUL. L. REV. 560, 569 (1939) (evaluating the "just price" as a "vice" in consent).

272. *See* TRAKMAN, *supra* note 141, 23-37; Trakman, *supra* note 174, at 762-66; Lorena Carvajal Arenas, Good Faith in the Lex Mercatoria: An Analysis of Arbitral Practice and Major Western Legal Systems (Dec. 2011) (unpublished Ph.D. thesis, University of Portsmouth School of Law), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.467.6981&rep=rep1&type=pdf.

273. *See* Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 2-4 (1969).

274. *See* Treaty of Friendship, Commerce and Navigation, *supra* note 55, art. IV(i) (freedom to trade); *id.* art. IV(i) (restricting such freedom in the domestic interest).

regulatory and market indicators to assess when state action sponsors unfair competition against merchant conduct that exploits market stabilization measures.[275]

Transnational public policy is nevertheless functionally impacted by, not only interdependent with, domestic interests. If domestic courts are to address negligent, duplicitous, or anticompetitive conduct transnationally, they need to consider domestic standards of substantive and procedural justice, not bypass them as per se nullities in pursuit of a single common good.[276] If transnational public policy is to have a functional history, it ought not blithely elevate England's thirteenth century Magna Carta into a transcendent template for a twenty-first century transnational "rule of law."[277] If transnational public policy is to have a sustainable future, domestic courts need to mediate between the vicissitudes in both self-regulatory norms supporting trade liberalization and regulatory norms addressing market distortions.[278] If it is to support a "spontaneous" merchant order, it should also rectify ever-intruding abuses of that order, such as extortionate pricing.[279]

The assertion is not that norms of mediation anthropomorphize an omnipotent common good that triumphs over disparate cultural, political, and religious differences, such as in determining the effect of economic hardship upon the performance of long-term contracts.[280] Nor are differences between policies that are ingrained in national

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275. *See* RICHARD COBDEN, SPEECHES ON QUESTIONS OF PUBLIC POLICY BY RICHARD COBDEN, M.P. 44-47 (John Bright & J.E. Thorold Rogers eds., 1908); C.P. Kindleberger, *The Rise of Free Trade in Western Europe, 1820-1875*, 35 J. ECON. HIST. 20, 55 (1975).

276. *See generally* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1 (2015) (discussing the impact of competition policy upon economic equality).

277. Magna Carta 1297, 25 Edw. 1 c. 29 (Eng.). For a discussion of the Magna Carta's influence on constitutional policy, see ELWIN LAWRENCE PAGE, THE CONTRIBUTIONS OF THE LANDED MAN TO CIVIL LIBERTY 100-30 (1905); EVENTS THAT CHANGED GREAT BRITAIN FROM 1066 TO 1714, at 19-37 (Frank W. Thackeray & John E. Findling eds., 2004); SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 135 (Ernest F. Henderson trans. & ed., 1965).

278. For a discussion of inter-state trade, particularly treaty regulation of transnational trade, see Trakman, *supra* note 206. For a discussion of the impact of transnational public policy on the liberalization of commerce, *see* Karl Heinz Böckstiegel, *Public Policy and Arbitrability*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, *supra* note 56, at 177, 179-92; Gibson, *supra* note 35, at 1236; Trakman, *supra* note 174, at 784.

279. For analyses of "spontaneous ordering," see sources cited *supra* note 172. For a discussion of the tension between transnational policy and the regulatory state, see BOAZ, *supra* note 180; Friedman, *supra* note 270.

280. *See* AHMET CEMIL YILDIRIM, EQUILIBRIUM IN INTERNATIONAL COMMERCIAL CONTRACTS 84-93 (2011); Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 657, 663-64 (1992).

cultures readily, or even desirably, dismantled. Disparate views of reason and the common good are often deeply imbedded in domestic legal systems. Courts applying Sharia law customarily treat the award of interest on damages with circumspection, as being religiously reprehensible, unfair, and uncertain.[281] Civil law courts in centrally planned economies treat the liberalization of damage awards with greater caution than courts in common market economies.[282]

Importantly, domestic courts are also likely to vary over the legal significance of party autonomy in determining whether to enforce international arbitration awards. This is discussed immediately below.

IX. THE AUTONOMY OF THE PARTIES

A prospective response to the multiple sources of supranational public policy is the rationale that "core" norms of transnational public policy should be guided by the choice of the parties, including their "legitimate expectations."[283] Insomuch as the contract serves as the

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281. For a discussion of contract damages in Sharia law, see WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 78 (2005); Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT'L L. 169, 189 (2006); Almas Khan, *The Interaction Between Shariah and International Law in Arbitration*, 6 CHI. J. INT'L L. 791, 794-97 (2006).

282. For an illustration of the divergence over contract damages in civil and common law, see, for example, Zuigao Renmin Fayuan Guanyu ED&F Manshi (Xianggang) Youxian Gongsi Shenqing Chengren He Zhixing Lundun Tangye Xiehui Zhongcai Caijuean De Fuhan (最高人民法院关于ED&F曼氏（香港）有限公司申请承认和执行伦敦糖业协会仲裁裁决案的复函) [Reply of the Supreme People's Court Regarding the Request of Instruction by Beijing Higher People's Court on the Recognition and Enforcement of a London Sugar Association Arbitral Award by the Applicant ED&F Man (Hong Kong) Co. Ltd.], ED&F Manshi (Xianggang) Youxian Gongsi Yu Zhongguo Tangye Jiulei Jituan Gongsi Zhongcaian (ED&F曼氏（香港）有限公司与中国糖业酒类集团公司仲裁案) [*ED & F Man (Hong Kong) Co., Ltd. v. China National Sugar & Wines Group Corp.*], [2003] Min Si Ta Zi No. 3. (Sup. People's Ct., July 1, 2003) (China); Wukelan Gongheguo Keliukefusiji Cheliang Zhizaochang Yu Shenyangshi Changcheng Jingji Maoyi Gongsi Shenqing Chengren He Zhixing Guowai Zhongcai Caijue Jiufenan Liaoningsheng Shenyangshi Zhongji Renmin Fayuan Minshi Zhongcai Caijueshu (乌克兰共和国克划克夫斯基车辆制造厂与沈阳市长承经济贸易公司申请承认和执行国外仲裁裁决纠纷案辽宁省沈阳市中级人民法院民事仲裁裁决书) [*Ukraine Kryukovskiy Car Building Works v. Shenyang Changcheng Economic & Trade Co.*], (2002) Shen Min Zi No. 16 (Shenyang Interm. People's Ct., Apr. 22, 2003) (China).

283. For a discussion of such autonomy of the parties, see *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 (Can.) ("[A]rbitration is a creature that owes its existence to the will of the parties alone."). *But see* CA Paris, Sept. 22, 1995, 94/4957 (Fr.) (noting that arbitrators declining to adhere to the agreement of the parties constituted a breach of public policy); Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, *supra* note 56, at 227, 227-29.

primary means of regulating commercial relationships, it limits the authority of arbitrators who are appointed by contract and courts that review those arbitration awards. Article II(1) of the N.Y. Convention explicitly recognizes the "agreement" of those parties to arbitrate.[284] Article V(1)(d) requires the enforcing court to establish whether the parties had agreed upon the composition of the arbitral tribunal or the arbitration procedure and whether that agreement had been violated.[285] Enforcing courts are also expected to interpret contracts in accordance with the parties' choices of law.[286] This includes requiring that they decline to enforce contracts entered into in bad faith that vitiate consent under the applicable law.[287] It also encompasses compliance with transnational law, such as laws regulating the international sale of goods, which preserves the autonomy of transnational parties.[288]

However, the problem is to determine the limits of party autonomy and in particular, when, if ever, arbitrators and judges can invoke transnational public policy to prevail over party choices.

Favoring the paramountcy of mono-local public policy is the argument that if adjudicators apply the choice of law of the parties, they have limited authority to apply transnational public policy that supersedes those choices.[289] The rationale is that protecting a domestic choice of law itself exemplifies public policy, excluding countervailing policies, even those arising transnationally.[290] For example, under U.S.

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284. For a discussion of the application of article II(1) of the N.Y. Convention, see, for example, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 658-60 (1985); *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 (10 April 2002) (Austl.). Article 2 of Geneva Protocol on Arbitration Clauses provides that "[t]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place." Protocol on Arbitration Clauses, art. 2, Sept. 24, 1923, 27 L.N.T.S. 157.

285. N.Y. Convention, *supra* note 1, art. V(1)(d).

286. *See, e.g.*, Fazilatfar, *supra* note 114, at 303 (discussing party autonomy in international arbitration).

287. *See* Leon E. Trakman & Kunal Sharma, *The Binding Force of Agreements to Negotiate in Good Faith*, 73 CAMBRIDGE L.J. 598 (2014) (noting English courts, as distinct from civil law courts, declining to enforce contracts to negotiate in good faith).

288. *See, e.g.*, Filip De Ly, *Sources of International Sales Law: An Eclectic Model*, 25 J.L. & COM. 1, 1-3 (2005) (evaluating the tension between transnational and domestic law and policy in the international sale of goods).

289. For a discussion of domestic codes that permit contracting parties to exclude the judicial review of awards involving foreign elements, see CODE JUDICIAIRE [C.JUD.] art. 1717(4) (Belg.); 51 § LAG OM SKILJEFÖRFARANDE (Svensk författningssamling [SFS] 1999:116) (Swed.); SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS [SR] Dec. 18, 1987, SR 291, art. 192(1) (Switz.).

290. *See* Roy Goode, *The Role of* Lex Loci Arbitri *in International Commercial Arbitration*, 17 ARB. INT'L 19, 31 (2001) (arguing for the primacy of party autonomy). For a

law, the deliberate refusal of an arbitrator to apply the applicable law constitutes a ground to set aside the award as a "manifest disregard of the law."[291]

A contrary view is that transnational public policy prevails over party autonomy in protecting fundamental conceptions of morality from localized subjugation. "[W]henever fundamental and universal notions of contractual morality or the fundamental interests of international trade are involved," they are applied negatively to "exclude the law applicable . . . or to exclude a given state's public policy that contravenes the transnational public policy standard."[292] The rationale is that insofar as transnational public policy embodies a higher measure of due process than a domestic choice of law,[293] transnational policy should prevail.[294]

There is a sequential approach to reconciling party autonomy with public policy constraints on that autonomy. The first principle is to sanctify the parties' choices of law and jurisdiction, for example by recognizing the validity of their arbitration agreement.[295] The second principle is to displace the sanctity of those choices if they violate "core" tenets of transnational policy.[296] The third principle is to revert

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domestic court favoring the choice of the parties over the International Convention on the Sale of Goods in determining whether to annul an arbitration award, see OLG Feb. 15, 2000, 9 Sch 13/99 (Ger.).

291. *See* Citigroup Mkts., Inc. v. Fiorilla, 54 N.Y.S.3d 586 (N.Y. App. Div. 2017).

292. Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 530 (1988) (quoting Lalive, *supra* note 56, at 313); *see also* INST. DE DROIT INT'L, ARBITRATION IN PRIVATE INTERNATIONAL LAW (1957) (providing that the law of the seat of the arbitration may override the procedural agreement of the parties).

293. For a discussion of the hierarchy of transnational public policies in international arbitration, see Fazilatfar, *supra* note 114, at 303-04; *supra* text accompanying note 102.

294. For a discussion of subjecting the parties' choice of law to fundamental principles of transnational public policy, see Postanovleniye Federal'nyy Arbitrazhnom Sude Moskovskogo Okruga ot 17 yanvarya 2012 g. No. A40-65888/11-8-553 [Resolution of the Federal Arbitration Court of the Moscow District of January 17, 2012, No. A40-65888/11-8-553], *translation at* http://newyorkconvention1958.org/doc_num_data.php?explnum_id=2411 (Russ.); S.T.S., Feb. 10, 1984 (ECLI: ES:TS:1984:16A) (Spain); UNCITRAL CONVENTION GUIDE, *supra* note 17, at 639 (citing Patricia Nacimiento, *Article V(1)(a)*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, *supra* note 47, at 205, 227); VAN DEN BERG, *supra* note 23, at 265; Todd J. Fox & Stephan Wilske, *Commentary of Article V(1)(a)*, *in* CONVENTION COMMENTARY, supra note 3, at 267, 275.

295. *See* Fazilatfar, *supra* note 114, at 303-06.

296. *See Entscheidung*, *supra* note 226, at 225 (interpreting articles 19(2) and 24(1) of the Model UNCITRAL Rules providing that "parties who choose arbitral tribunals desire more flexible and informal proceedings than those offered by the courts, especially in Germanic legal systems"); *see also* Hof 's-Gravenhage 28 april 1998 (Rice Trading (Guyana) Ltd./Nidera Handelscompagnie B.V.) (Neth.) (upholding a decision that the "arbitral tribunal violated the fundamental right to contradictory proceedings").

to transnational public policy should the parties not make an applicable choice.[297] These three principles extend the "tendency [of courts] for applying transnational public policy . . . where there is a lack of any choice . . . by parties or . . . where a violation of transnational public policy exists and it overrules the applicable laws."[298]

Resolving the tension between party autonomy and countervailing transnational policy, which underlies the second principle above, is unavoidably contentious.[299] Typifying that tension, W. Michael Reisman argues against transnational norms being treated as higher and therefore overriding municipal law and policy chosen by the parties.[300] Catherine Kessedjian differs—arguing contextually, she maintains that arbitrators should prioritize transnational over domestic public policy in light of the increasing arbitrability of commercial disputes and the declining role played by state courts in reviewing arbitral awards based on predominantly domestic public policy.[301]

There are several difficulties in applying the third principle, namely, in relying on transnational public policy when the parties have failed to make a choice of law. The first difficulty is in erroneously holding that the parties have failed to exercise such a choice, thereby undermining their "legitimate expectations."[302] The second difficulty is in an arbitrator or court hypothecating such a choice, leading to the imputation of a fictionalized intention to the parties at the time of contracting.[303]

A structural method of resolving the tension between party autonomy and transnational public policy is to rely primarily upon international commercial arbitrators to make such a determination on grounds that, on balance, they are better equipped than domestic courts to do so. This structural method is explored immediately below.

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297. *See* Fazilatfar, *supra* note 114, at 303-06.

298. *See, e.g.*, *id.*

299. *See, e.g.*, Bad Ass Coffee Co. of Hawaii Inc. v. Bad Ass Enters. Inc., 2008 ABQB 404, 435 A.R. 58 (Can. Alta. Q.B.) (evaluating the tension between autonomy of the parties and public policy). For scholarly division over the boundaries of autonomy and procedural justice in the global Law Merchant, see Schultz, *supra* note 28; Peer Zumbansen, *Debating Autonomy and Procedural Justice: The* Lex Mercatoria *in the Context of Global Governance Debates—A Reply to Thomas Schultz*, 2 J. INT'L ARB. 427, 430-33 (2011).

300. W. Michael Reisman, *Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, *supra* note 185, at 849, 849-52.

301. Kessedjian, *supra* note 185, at 862-66.

302. *See* Derains, *supra* note 283, at 297.

303. *See* Trakman, *Frustrated Contracts*, *supra* note 193.

X. ARBITRATORS AS GUARDIANS OF TRANSNATIONAL PUBLIC POLICY

The case for arbitrators, as modern-day law merchant judges, having more discretion to apply transnational public policy than domestic courts of general jurisdiction is identified with their greater familiarity with the nature and impact of custom and trade usage upon transnational public policy.[304] This proposition is buttressed by the assertion that arbitrators are appointed by the parties to decide transnational disputes expeditiously and unimpeded by the parochial procedures that bind domestic courts as officers of the state.[305] The further rationale is that arbitrators enjoy strategic advantages over domestic courts in redressing transnational public policy in particular. Arbitrators are not "anchored" in one place.[306] They can apply "delocalized" principles of justice beyond the situs.[307] They can enjoin anticompetitive behavior that offends fundamental norms of transnational public policy.[308] They can condemn conduct that violates international standards of human rights.[309]

In support of these contentions, international commercial arbitrators are presumed to be more attuned to evidence of transnational commercial custom,[310] to be able to avert restrictive procedural requirements of the forum,[311] and to decide such issues both privately

304. *See* Richard H. Kreindler, *Approaches to the Application of Transnational Public Policy by Arbitrators*, 4 J. WORLD INV. 239, 244 (2003).

305. *But see* Leon E. Trakman & Hugh Montgomery, *The 'Judicialization' of International Commercial Arbitration: Pitfall or Virtue?*, 30 LEIDEN J. INT'L L. 405, 417-20, 428-32 (2017) (discussing resolving tensions between arbitration replicating time consuming judicial proceedings and deciding commercial disputes expeditiously).

306. Jan Paulsson, *supra* note 209, at 358-87; *see also* Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983) (addressing the detachment of arbitral proceedings from the location in which they were conducted).

307. *See* Ahmed, *supra* note 208, at 478; Barry, *supra* note 208, at 295. For courts delocalizing international arbitration proceedings, see *supra* note 209.

308. *See* Luke Villiers, *Breaking in the 'Unruly Horse': The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards*, 18 AUSTL. INT'L L.J. 155, 179-80 (2011); Hanotiau & Caprasse, *supra* note 3, at 791-94.

309. *See* Jan Oster, *Public Policy and Human Rights*, 11 J. PRIV. INT'L L. 542 (2015); Villiers, *supra* note 308, at 155.

310. *See, e.g.*, Avery Wiener Katz, *The Relative Costs of Incorporating Trade Usage into Domestic Versus International Sales Contracts: Comments on Clayton Gillette,* Institutional Design and International Usages Under the CISG, 5 CHI J. INT'L L. 181 (2004); *see also* Lisa Bernstein, *Custom in the Courts*, 110 NW. U. L. REV. 63 (2015); *supra* text accompanying notes 155-156 (noting the Law Merchant's embodiment of local custom and it's twenty-first century application).

311. *See* Trakman & Montgomery, *supra* note 305, at 423-27.

and confidentially.[312] The related assumption is that arbitrators are more insulated than courts from inward-looking domestic public policies, such as domestic policing policies.[313] Arbitrators are subject to the more commercially focused rules of international arbitration associations than the rules governing domestic courts. Arbitrators can rely on the rules of associations such as the London Court of International Arbitration (LCIA) that are more adaptable than judicial rules in determining whether a party has infringed a legal or equitable right or acted in a vexatious, oppressive, or unconscionable manner.[314] Arbitrators also enjoy greater flexibility in relying on transnational public policy to resolve transnational disputes effectively.[315]

The attribution of greater flexibility to arbitrators to decide based on rules of procedure of international arbitration associations nevertheless does not necessarily suggest that arbitrators are likely to address abuses of public policy more equitably than domestic courts. Arbitrators cannot circumvent the choice of jurisdiction and law of the parties, just as they cannot summarily enforce contract provisions that purport to sublimate fundamental principles of substantive justice.[316] Nor can arbitrators reasonably defer to party autonomy to enforce contracts that legitimate acts of bribery and corruption[317] or anticompetitive conduct,[318] in blatant violation of public policy, whether it is conceived domestically or transnationally. That "arbitrators owe a paramount duty to the international community" and that they should "refuse to enforce such mandatory laws [that]

312. *See* Leon E. Trakman, *Confidentiality in International Commercial Arbitration*, 18 ARB. INT'L L. 1 (2002).

313. *See* Marc Blessing, *Mandatory Rules of Law* Versus *Party Autonomy in International Arbitration*, 14 J. INT'L ARB. 23, 27 (1997).

314. *See* Elektrim S.A. v. Vivendi Universal S.A. [2007] EWHC (QB) 571 (Eng.).

315. For judicial assessments of these supposed attributes of international commercial arbitration, see CA Paris, Mar. 23, 2006, 04/19673 (Fr.); BGH Jan. 18, 1990, III ZR 269/88 (Ger.); Areios Pagos [A.P.] [Supreme Court] 1665/2009 (Greece); *C.O.S.I.D. Inc. v. Steel Authority of India*, AIR 1986 Del 8 (India); Rb.'s-Gravenhage 27 mei 2004, ECLI:NL:RBSGR:2004:AP1830 (*Mktg. Displays Int'l Inc./VR Van Raalte Reclame BV*), *aff'd*, Hof 's-Gravenhage 24 maart 2005, ECLI:NL:GHSGR:2005:AT4660 (Neth.); Case C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, 2006 E.C.R. I-10421; Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, 1999 E.C.R. I-3055.

316. *See, e.g.*, Poudret & Besson, *supra* note 84, at 83-84.

317. For a discussion of transnational public policy directed against bribery and corruption, see Ragazzo & Binder, *supra* note 239, at 174-75. For cases annulling arbitral awards for violating public morality, such as for bribery and corruption, see, for example, sources cited *supra* note 227.

318. For a discussion of public policy in EU competition law, see Villiers, *supra* note 308, at 155, 168.

contravene[] transnational public policy"[319] is aspirational at best. Arbitrators cannot disregard the mandatory law of the forum, even if the parties authorize them to decide *ex aequo et bono*.[320] Nor can arbitrators craft inventive remedies, such as extraordinary damages, autonomously from the applicable law or law of the forum.[321]

International commercial arbitrators are also subject to constraints not ordinarily borne of domestic courts.[322] They are disincentivized from applying transnational public policies that diverge from the perceived wishes of the parties, so as not to jeopardize future arbitral appointments.[323] In some jurisdictions, such as Switzerland, their awards are not subject to challenge before discrete courts unless the parties have so expressly agreed.[324]

Nor are international commercial arbitrators indubitably better able to capture or craft transnational public policy than domestic courts.[325] An arbitrator may "seem to be in a *better position* than a State judge when called upon to ascertain and understand the specific needs of the *international* community (at least that of businessmen), and

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319. OKEZIE CHUKWUMERIJE, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 193 (1994); Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELBORNE J. INT'L L. 205, 218 n.60 (2005).

320. *See* Mauro Rubino-Sammartano, Amiable Compositeur *(Joint Mandate to Settle) and* Ex Bono et Aequo *(Discretional Authority to Mitigate Strict Law)—Apparent Synonyms Revisited*, 9 J. INT'L ARB. 5 (1992); Trakman, *supra* note 148, at 621, 625-29.

321. Such divergence is most likely to arise when domestic courts determine whether to recognize and enforce punitive damages in international commercial arbitration awards. For a discussion of the willingness of U.S. courts to enforce such awards, see Markus A. Petsche, *Punitive Damages in International Commercial Arbitration: Much Ado About Nothing?*, 29 ARB. INT'L 89, 89-92 (2013). For an illustration of the long-standing reluctance of English courts to grant punitive damages, see, for example, *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 497-99.

322. For commentary on arbitrators' concerns not to have their awards challenged, see WHITE & CASE, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 6-7, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (last visited Oct. 16, 2018).

323. *See* Anton Strezhnev, You Only Dissent Once: Re-Appointment and Legal Practices in Investment Arbitration (Sept. 15, 2017) (unpublished manuscript), http://scholar.harvard.edu/files/astrezhnev/files/dissent_draft_1.pdf.

324. *See, e.g.*, SR Dec. 18, 2008, SR 272, art. 389, 390(1) (Switz.) (providing that review/appeals of awards be directed to the Swiss Federal Supreme Court, unless the parties have expressly agreed that the award can be challenged before the competent cantonal authority); *see also* TF Mar. 8, 2006, 132 ATF III 389, 392 (Switz.) (providing that challenges to the application of Swiss mandatory law fall under the review authority of the Swiss Federal Tribunal, unless the challenged law belongs in the realm of "public policy" as defined by the Public International Law). *But see* UNCITRAL MODEL LAW, *supra* note 46, at 19-20 (providing exceptions to the authority of the parties).

325. *See* Robert French, *Arbitration and Public Policy*, 24 ASIA PAC. L. REV. 1 (2016) (discussing judicial supervision of arbitration awards).

[that] is precisely one of the reasons why the parties . . . have resorted to international arbitration."[326] However, that assumption does not address the extent to which transnational public policy is antithetical to international business practice and not consciously invoked by international commercial arbitrators. As Martin Hunter and Gui Conde E. Silva aptly observe: "If asked, many international arbitrators would claim that they have never applied transnational public policy principles in formulating their awards. This is no doubt true at a subjective, conscious level, but the reality is often different."[327] The further reality is that arbitrators are no better equipped than domestic courts to synthesize abstract transnational policies that are difficult for adjudicators in general to dissect.

International commercial arbitrators also lack the legal authority of courts to imbed core principles of transnational justice into domestic law. Unlike domestic courts, arbitral awards are not buttressed by common law precedent or by the *opinio juris* of civil law.[328] Domestic courts, not arbitrators, review arbitral awards for violating procedural and substantive justice,[329] trammeling civil liberties,[330] and awarding compound interest that is disproportionate to a claim.[331] Domestic judges, not arbitrators, are more rigorously constrained by due process constraints arising from local constitutional, criminal, and private law.[332] Judicial decisions, not arbitral awards, are subject to appeal of the facts and are open to public scrutiny.[333]

Importantly, the awards of arbitrators bind only the parties. Unlike the decisions of International Court of Justice and the European Court of Human Rights, they do not determine human and civil rights beyond those parties on grounds of international public policy.[334]

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326. *See* Lalive, *supra* note 56, at 287.

327. Martin Hunter & Gui Conde E Silva, *Transnational Public Policy and Its Application in Investment Arbitrations*, 4 J. WORLD INV. 367, 370 (2003).

328. Reissman, *supra* note 300, at 855-56.

329. *See* Soinco S.A.C.I. v. Novokuznetsk Aluminium Plant [1998] QB 406 (Eng.) (noting that divergent public policies based on generally accepted principles of international law favor both judgement creditor and debtor).

330. *See* Oster, *supra* note 309; Villiers, *supra* note 308, at 161.

331. *See* OLG Jan. 26, 1989, 6 U 71/88 (Ger.); TF Jan. 9, 1995, 5P.201/1994 (Switz.) (holding that the domestic prohibition of compound interest does not violate international public policy).

332. *See* Tom Ginsburg, *Constitutional Law and Courts*, *in* COMPARATIVE LAW AND SOCIETY 290 (David S. Clark ed., 2012).

333. *See* Trakman, *supra* note 312, at 1-2.

334. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 ("In the determination of his civil rights and obligations

In an ideal world, arbitration awards and judicial decisions should complement, rather than compete with, each other in promoting fair and efficient transnational public policies.[335] The obdurate challenge is in progressing towards that ideal world.

XI. CONCLUSION

This Article argues for greater judicial appreciation of transnational public policy in the recognition and enforcement of international arbitration awards under the N.Y. Convention of 1958. It does so, in part, to encourage mediation among divergent domestic public policies and to reconcile them through norms of transnational public policy.

This Article acknowledges the important influence of domestic public policy upon the application of transnational public policy. It asserts that transnational public policy that is not subject to "translation into the national system of law"[336] is likely to recede into abstraction. However, were domestic courts to determine public policy along wholly introspective lines, from national security to local protectionism, they would reduce transnational public policy to an abstract principle of morality, lacking both principled and functional value. The fate of transnational public policy would depend on the proclivities of audacious judges who are willing to fly in the face of domestic introspection.

This Article focuses on three primary tensions faced by jurists in extending the scope of transnational public policy. The first is between transnational parties choosing domestic law by contract and "fundamental" public policies that allegedly transcend their choices. The second tension is between public policies that states share through a "law of nations" and domestic public policies that states adopt individually, to the exclusion of the public policies of other states. The third tension is between a "law of nations" that is supposedly binding on states and a *jus commune* ascribed to transnational merchants who are loosely identified with a modern Law Merchant.

. . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

335. *See* Berthold Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration Is Effective*, *in* 60 YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 257, 272 (1984).

336. Compagnie Nationale Air France c. Mbaye, [2003] R.J.Q 1040 (Can. Que. C.A.).

In seeking to resolve these tensions, this Article expresses doubt about the existence of public policy that is independent of both the local public policies of states and the public policies of a plurality of states. An autonomous international public policy that relies on transcendent principles of public policy, beyond the concurrence of a plurality of states, is unavoidably ambiguous in relying on abstract principles such as those that are loosely identified with natural law. However, there is support for autonomous regime of public policy that emanates from a western liberal tradition rooted, albeit loosely, in protecting fundamental values such as life, liberty, and more arguably, the sanctity of private property.

This Article highlights the centrality of party autonomy in the judicial recognition of international arbitration awards. It stresses, however, that transnational public policy is often thwarted precisely because the parties' choices of law fail to address transnational policies adequately, fairly, efficiently, or at all. Given this, the purpose of transnational public policy is to modulate party autonomy in light of countervailing transnational and domestic policies.[337] The further purpose is to acknowledge the sanctity of parties to contract, without also sanctifying their freedom to exclude "core" transnational policies directed at remedying procedural and substantive injustice.

There are compelling reasons to endorse transnational public policy in determining whether to enforce international commercial arbitration awards. Bribery by international corporations and corruption in domestic governments, among other violations of transnational public policy, are deep-seated concerns across international organizations.[338] Transnational public policies are needed to avert and redress felonious conduct, such as the expropriation of property, that denies and abuses personal freedoms and undermines economic liberty. Reconciliatory policies are needed to guide the fair and efficient conduct of transnational commerce, beyond the localizing penchants of both nation states and contracting parties.

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337. *See* Catherine Kessedjian, *Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?*, 18 AM. REV. INT'L ARB. 147, 149 (2007) (reconciling mandatory domestic, regional, and transnational law and policy relating to international commercial arbitration).

338. *See, e.g.*, Comm. on an Int'l Agreement on Illicit Payments, Rep. on Its First and Second Session, U.N. Doc. E/1979/104 (May 25, 1979); Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices, Rep. on Its First, Second, Third and Resumed Third Session, U.N. Doc. E/6006 (July 4, 1977); Intergovernmental Working Group on the Code of Conduct, Rep. on Its First Session, U.N. Doc. E/C.10/31 (May 4, 1977); Economic and Social Council Res. 2041 (LXI) (Aug. 5, 1976).

Judges and arbitrators who dismiss transnational public policy in order to protect the autonomy of merchant contracts in global markets overlook the public harm arising from under-regulated markets. Jurists who insist that international commercial arbitrators are better equipped than domestic courts to enshrine transnational public policy engage in overgeneralizations in the absence of contextual verification. Idealists who strive for an autonomous regime of public policy fail to recognize that substantive and procedural justice is inevitably demarcated by states acting individually or collectively.