

Part 6: Objectivity and International Arbitration

§ 11 Stateless Justice: The Evolutionary Character of International Arbitration

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* The conclusions of this Article were presented by the author at the Young Scholars Conference ('The Law Between Objectivity and Power') organized by the Max Planck Institute for Tax Law and Public Finance that was held on 12 and 13 October 2020. I wish to thank the participants of the conference for thoughtful feedback. Some of the ideas of this paper were inspired by the ideas presented at the conference 'Arbitration as a Spontaneous Legal Order' that I organized along with THÈMIS and Enfoque Derecho on 26 and 27 November 2020.

[Arbitration] is like a river. It is unfortunate that there are so many hydraulic engineers.
Inspired by Quino, *Mafalda*.

I. Introduction

Arbitration is today the principal mechanism of resolving international disputes involving states, individuals, and corporations. This is one of the consequences of the increased globalization of world trade and investment.¹ However, the theoretical foundations of arbitration are still disputed. The actors of international arbitration lack a compass to guide them and that allows the arbitration order to be coherent and effective.²

In the following, I will analyse arbitration in Hayekian terms: should it be the product of human design (*construction* or *taxis*) or spontaneous human action (*evolution* or *cosmos*)?³ I will argue that arbitration should be decentralized and evolutionary rather than centralized and constructivist. The process of creating arbitration rules should not be one in which legislators exercise their own discretion. Instead, legislators should only create arbitration rules that either are a result of the spontaneous arbitration practice and the behavior of the market participants or that create legal certainty for the spontaneous order to develop. In the terms of this book, one can say that arbitration should follow the logic of *observational objectivity*⁴: the spontaneous order guides and limits legislative power. Immutable rules are only at place to prohibit individual behavior contrary to the market order free from discrimination and protectionism.

The article proceeds as follows: In a first part, I will outline my main position: that most of the current arbitration practice can and should be understood as a spontaneous order (II.). In a second step, I will focus on the role of legislators and show what it means for them to respect the spontaneous order. I will do by giving two examples: the disappointing experience of a country in which legislators designed an arbitral institution

1 Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law of Arbitration, 2015).

2 Sonsoles Huerta de Soto and Fabio Núñez del Prado, 'International Arbitration as a Spontaneous Legal Order' (2020) 28 *Procesos de Mercado* Journal 117, 119.

3 Friedrich A Hayek, 'Kinds of Order in Society' in *New Individualist Review* [1981] Indianapolis Liberty Fund <<https://oll.libertyfund.org/page/hayek-on-kinds-of-order-in-society>> accessed on 28 November 2020.

4 Philip M Bender, 'Ways of Thinking about Objectivity' (§ 1).

constructively, and a successful experience of a country in which lawmakers legislate under the awareness that arbitration is a spontaneous order (III.). In a third step, I will take a doctrinal stance and describe two arbitration concepts – ‘consent’ and ‘arbitrability’ – that illustrate the evolving nature of arbitration (IV.). Finally, I briefly conclude (V.).

II. Arbitration as a Spontaneous Order

International arbitration is praxeological. Its formation has been the product of constant interaction of individuals. As explained by De Benito and Huerta de Soto, no one could ever have sat down and designed international arbitration as we know it today: with the innumerable corporations that include arbitration clauses in their contracts, the states that enter into thousands of bilateral investment agreements, all arbitral institutions, arbitration law firms, arbitrators competing for new appointments, organizations such as the International Bar Association (IBA) or the United Nations Commission on International Trade Law (UNCITRAL) that frequently create soft law rules or arbitral associations that promote academic discussion.⁵ No one could have the intelligence, knowledge or information necessary to create a sophisticated system from scratch.⁶

Despite the multiple interventions from different states, international arbitration has remained functional because human action has always prevailed. It is impossible to deny that international arbitration has been evolving during the last decades. But this has not happened because of the State, but despite the State: international trade operators have frequently corrected mistakes from states. This is not surprising. Indeed, spontaneous orders with their component of trial and error best implement mechanisms of Popperian falsificationism.⁷

Each state of the arbitral order that we accept today as legitimate has the character of provisionality and is open to rebuttal. Each new refutation implies an evolution in international arbitration. As explained by Huerta de Soto, something fascinating about international arbitration is that, de-

5 Marco de Benito and Sonsoles Huerta de Soto, ‘El Arbitraje Internacional como Orden Jurídico Espontáneo’ (2015) 22 *Spain Arbitration Review* 113, 126.

6 *ibid* 126.

7 Karl Popper, *The Logic of Scientific Discovery* (Routledge Classics 2005) 32. The aspect of trial and error as the most appropriate way of resolving conflicts was already highlighted by David Hume, *A Treatise on Human Nature* (1st edn, David F Norton and Mary J Norton eds, 2011) 315.

spite its inherent diversity, everyone speaks in the same code. Nationality, culture, religion, ethnicity or language are of secondary nature. South American lawmakers did not sit down to negotiate with Asian lawmakers to make international arbitration work in the same way in both continents. That was a gift of spontaneous order.⁸ What is more, Huerta de Soto correctly stresses that the formation of international arbitration is itself not far from the formation of language, traffic rules, family, the market economy, the price system, money, and so on. All of these institutions are, *mutatis mutandis*, formed by the same evolutionary and spontaneous process. They are like a river, which flows with all the impetus and irregularity of nature.⁹ Arbitration rules are created by the participating actors of the arbitration community.¹⁰ The arbitration system consists of reciprocal expectations that arise out of human interaction.¹¹ Consequently, it could best be defined as a language of interaction.

A current academic debate might illustrate that point – the debate between proponents of the IBA Rules and the Prague Rules: The assertion that the IBA Rules were one of the keys to the success of international arbitration has been refuted through the launch of the Prague Rules, which largely contradict the IBA Rules. It is yet to be determined which of the two rules ensures to a greater extent the success of international arbitration. However, what is important here is that this question will not be a decision taken by the IBA committee, nor the ICC Secretariat, nor the most reputable arbitrators in the world, nor a group of experts who will meet to discuss it. It will be the interaction of thousands of arbitral actors that will determine which set of rules is more suitable for the success of international arbitration. It will be the interaction of arbitrants, the arbitral tribunals, the arbitral institutions, the states, among others, which will determine whether or not the IBA Rules are the appropriate set of rules of evidence for international arbitration. Indeed, no single individual or entity has enough information to determine that one set of rules is

8 Huerta de Soto (n 2) 130–131.

9 De Benito (n 5) 126. In the words of Leoni, ‘People who ignore this fact ought to take seriously a couplet once sung in a cabaret in Montmartre: “Voyez comme la nature a en un bon sens bien profonds à faire passer les fleuves justement sous les ponts.” (See how nature had the extreme good sense to make the rivers flow exactly under the bridges).’ Bruno Leoni, *Freedom and the Law* (3rd edn, Liberty Fund 1991) 50–51.

10 Alfredo Bullard González, ‘Comprando justicia: ¿genera el mercado de arbitraje reglas jurídicas predecibles?’ (2007) 53 THÈMIS Law Journal 71, 86.

11 Lon L Fuller, *The Principles of Social Order* (1st edn, Kenneth L Winston 1981) 673.

better than the other. As Hayek points out in *The Use of Knowledge in Society*, knowledge is dispersed among thousands of individuals.¹² It is the spontaneous order of the arbitration order which will take the decision. The arbitration order is formed through a process of natural selection. When problems arise, the practices that are most efficient in facilitating dispute resolution displace those that are inefficient.¹³

III. Why Is It Important to Understand International Arbitration as a Spontaneous Order?

Only by understanding that international arbitration is praxeological, it is possible to avoid tragedies that discredit the legitimacy of international arbitration. When one is aware that international arbitration has a praxeological foundation and, therefore, is formed through a spontaneous order, it is much easier to be a good recipient of paradigm shifts. At the end, it is human action that is demanding them.

Several decades ago, for example, it did not make sense to think about the existence of an international treaty by virtue of which the parties were entitled to enforce an award derived from an arbitral proceeding rendered in any state of the world. Then, however, spontaneous order gifted us with a precious universal treaty under which the parties can enforce an international award in virtually any country of the world: the New York Convention. Today, many specialists are demanding a new New York Convention (or as some have called it, a 'New York Convention 2.0'). In my view, it is the spontaneous order that is demanding this new convention. International arbitration cannot be analysed from the lens with which it was viewed in 1958, that is, more than half a century ago. It has evolved dramatically, and we cannot be oblivious to this reality.

A century ago, it also seemed illusory to think that an investor could be entitled to sue a state through investment arbitration. And it was absurd: the investor was not a subject of international law. But international law evolved and what seemed impossible became possible. Therefore, investment arbitration is nothing more than a sophisticated system created praxeologically as a result of spontaneous order.

12 Friedrich A. Hayek, 'The Use of Knowledge in Society', (1945) 35 Am Econ Rev 519, 520.

13 Bruce L Benson, *The Enterprise of the Law: Justice without the State* (2nd edn, Independent Institute 2011) 47–48.

With the purpose of demonstrating how catastrophic it can be for the arbitration community to ignore the praxeological foundation of international arbitration, we will briefly describe two experiences: a disappointing experience from a country that ignored the praxeological foundation of international arbitration (1.), and a successful experience from a country that understood arbitration as a spontaneous order (2.).

1. Disappointing experience: the elimination of the recourse of annulment in Belgium in 1985

In Belgium, in the year 1985, a statute was passed, which eliminated all motions to set aside awards in order to increase the attractiveness and effectiveness of international arbitration. The Belgian legislator naively believed that through the elimination of the setting aside, the arbitral procedures would conclude more quickly and, consequently, Belgium would become an attractive seat.¹⁴

On what sources did the Belgian legislator rely to adopt such an extreme decision? Nobody knows. All we know is that a group of experts decided in a constructivist way that by eliminating the recourse of annulment they were – allegedly – going to attract hundreds of arbitrations to Belgium. However, no one had claimed a measure like that in the business community. The Belgian legislator did not support his decision in surveys, statistics or data. It was a simple whim. In other words, the Belgian legislators illusively thought that they had the information to adopt a decision of such magnitude *motu proprio*.

Nevertheless, the result was exactly the opposite, and dramatically so. The number of arbitrations that were seated in Belgium while this measure was in force can be counted on the fingers of one hand. The country was forced to return to the previous system, and on 19 May 1998, an amendment to the Belgian Judicial Code was approved, under which the setting aside was reintroduced.¹⁵

14 In this regard, Vandereist explains that 'the legislation was adopted with the expectation that it would increase Belgium's attractiveness as an arbitral seat.' Alain Vandereist, 'Increasing the appeal of Belgium as an international arbitration forum? The Belgian Law of March 27, 1985 concerning the annulment of arbitral awards' (1986) 3 J Int'l Arb 77, 80.

15 Article 1717(4) of the Arbitration Law 1998 (Belgium), amending the Judicial Code 1985.

This event was so controversial internationally that it was recounted in books and articles by many of the most important specialists in international arbitration. William Park describes the tragic transition in Belgium in the following words:

Perhaps the best evidence of business community desire for court scrutiny at the tribunal situs lies in Belgium's failed experiment in mandatory 'non-review' of awards. Hoping that a completely laissez-faire system would attract arbitration, 1985, Belgium eliminated all motions to vacate awards in dispute between foreign parties. Consequently, in 1998, the Belgian legislature enacted a new statute that now leaves a safety net of judicial review as the default rule.¹⁶

This is a perfect example of how things should not be done. The problem was that the Belgian legislator had ignored that international arbitration is to be understood as a spontaneous order.

2. *Successful experience: the recognition of the non-signatory theories in the Peruvian Law of Arbitration in 2014*

The Legislative Decree 1071, Peruvian Arbitration Law, has been recognized by many experts as one of the most successful in the world. The reason for its success is not a coincidence. Peruvian arbitration legislators like Alfredo Bullard and Fernando Cantuarias are recognized intellectuals who have deeply read the Austrian literature. In fact, the President of the commission that drafted the Peruvian Arbitration Law is an illustrious member of the Mont Pelerin Society. Consequently, the Peruvian legislators knew they just needed to recognize (not create) the arbitral order as something that had been previously formed and to ensure that it can develop freely and organically in the future.¹⁷ The example par excellence that demonstrates that the Peruvian legislators understood very well the evolutionary foundation of arbitration is Article 14 of the Peruvian Law of Arbitration. This rule states:

The arbitration agreement comprises all those whose consent to submit to arbitration is determined in good faith by their active and decisive participation in the negotiation, execution, performance or termination

16 William Park, 'The specificity of International Arbitration: the case for FAA Reform' (2003) 36 Vanderbilt J of Transnational Law 1241, 1267.

17 De Benito (n 5) 122.

of the contract that contains the arbitration agreement or to which the agreement is related.¹⁸

Peruvian arbitration legislation is – to the best of my knowledge – the only legislation on arbitration in the world that has incorporated a specific rule that allows arbitrators to incorporate parties that did not execute the arbitration agreement to the arbitral procedure.¹⁹

Peruvian legislation sought to incorporate this rule because it considered it to be consistent with international arbitration practice, which for decades had allowed the possibility of incorporating a party into the arbitral procedure that did not sign the arbitration agreement. The arbitral legislator recognized in the Peruvian Law of Arbitration the arbitral *ius* – it thereby did precisely what the Austrian School of Economics suggests. In this regard, Silva Romero has affirmed:

Arbitral and foreign jurisprudence was the one that inspired the Peruvian legislator to write Article 14 of the Peruvian Arbitration Law.²⁰

Likewise, Cristián Conejero and René Irra de la Cruz have argued:

Article 14 of the Peruvian Arbitration Law has been elaborated on the basis of a rich experience in the extension of the arbitration agreement to non-signatory parties constructed from jurisprudence and doctrine compared, mainly European and American.²¹

Similarly, Alfredo Bullard – President to the Commission that drafted the Peruvian Law of Arbitration – has stated:

From the legislative point of view, article 14 is a worldwide novelty. There is no other law or regulatory body that includes a rule like this one. However, it is not an absolute novelty because the principles contained in

18 Alfredo Bullard, ‘Arbitration Guide IBA Arbitration Committee: Peru’ (2012) 7 Int’l Bar Ass’n <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=B C90E22B-3A24-4B9B-86F20B 9744A936F5>> accessed 29 November 2021.

19 International Council for Commercial Arbitration, ICCA’s Guide to the Interpretation of the 1958 New York Convention (1st edn, Pieter Sanders ed 2011) 58.

20 Eduardo Silva Romero, ‘El artículo 14 de la nueva Ley Peruana de Arbitraje: Reflexiones sobre el Contrato de Arbitraje – Realidad’ (2011) 4 Lima Arbitration Review 53, 55.

21 Cristián Conejero y René Irra de la Cruz, ‘La Extensión del Acuerdo Arbitral a Partes No Signatarias en la Ley de Arbitraje Peruana: Algunas Lecciones del Derecho Comparado’ (2013) 5 Lima Arbitration 56, 57.

the rule are included in different arbitral and judicial jurisprudence and also in the doctrine.²²

The Peruvian arbitral legislator recognized an already existing phenomenon that had spontaneously evolved for many years. Indeed, by drafting article 14 of the Peruvian Law of Arbitration, the Peruvian legislator relied on two emblematic international cases: (i) the case *Dow Chemical v Isover Saint Gobain*²³ in which a French tribunal recognized the group of company's doctrine, and (ii) the case *Thomson*²⁴ in which five additional theories of non-signatory parties were systematized by the US Court of Appeals for the Second Circuit. As faithful followers of the Austrian School, the Peruvian legislators recognized the theories of the non-signatory parties as a spontaneous order. The result: article 14 of the Arbitration Law is a resounding success.

These two legislative experiences – the Belgian and the Peruvian one – demonstrate how important it is to understand that international arbitration is a spontaneous order. Only by being aware that it is a spontaneous order, states are prudent enough to avoid the creation of artificial or constructivist rules, which very often end up stagnating the evolution of international arbitration. Understanding the foundation of international arbitration is a recipe that provides legislators with moderation: the legislation of an arbitral rule should be an act of recognition, not of creation.

IV. The Evolutionary Character of Consent and Arbitrability

In recent decades the arbitration order has suffered from a tireless struggle against constructivism. States have created innumerable constructivist rules that have stagnated the development of international arbitration, such as (i) the duality of the arbitration clause/arbitration commitment; (ii) the requirement that the arbitration agreement be executed in writing; (iii) rules that establish that only lawyers can act as arbitrators; (iv) a minimum scope for the arbitrability of disputes, among many others. It is the arbitration market itself that has spontaneously corrected some of these irrational situations that for many years caused – and continue to cause

22 Alfredo Bullard González, ‘¿Y Quienes Están Invitados a la Fiesta?’ [2010] Latin Arbitration Law <<http://www.latinarbitrationlaw.com/y-quienes-estan-invitados-a-la-fiesta/>> accessed 29 November 2021.

23 ICC Award No 4131 de 1982, Yearbook Commercial Arbitration, 1984.

24 *Thomson-CSF, SA vs American Arbitration Association*, US Court of Appeals 2nd Circuit, judgment 64 F3d, 1995, 773–776.

– much damage to the arbitration order. In the following, I will show how the spontaneous order dealt with two concepts: the requirement of consent (1.) and the requirement of arbitrability (2.).

1. The spontaneous evolution of the concept of consent

The history of consent is the history of a tragedy. Once upon a time there was a New York Convention that stated in its article II that for an arbitration agreement to be valid, it had to be in writing. With the passing of time, human action relativized this requirement and consent is in decline. As Karim Youssef has correctly pointed out:

The tradition of consensualism is so deeply rooted in international arbitration theory and practice that evoking non-contractual or less-contractual international commercial arbitration would have seemed until recently a self-contradiction or an abuse of language. However, as all empires rise and fall, the empire of consent in arbitration, believed eternal, is falling.²⁵

After a long time in which the formality of the arbitration agreement being executed in writing was understood as an *ad solemnitatem* formality, most of the judges of different states of the world began to recognize it as an *ad probacionem* formality. Moreover, article 7 of the UNCITRAL Model Law was amended, making it clear what it specifically meant that the arbitration agreement needed to be executed in writing and giving several options of what counts as arbitration agreement and as writing.

Later on, substantive exceptions to the consent-requirement were created, such as (i) ‘arbitration without privity’ in investment arbitration²⁶; (ii) theories of non-signatory parties in which consent was tenuous²⁷ or virtually non-existent²⁸; (iii) the abbreviated procedure of the ICC; or (iv) Gary Born’s proposal called the ‘cross-institution consolidation protocol’. What is more, (v) the proposal of default arbitration at the international level is currently being highly debated. For example, Gilles Cuniberti has proposed a system of default arbitration for international disputes, and

25 Karim Youssef, *Consent in Context: Fulfilling the Promise of International Arbitration* (1st edn, West 2012) 53–54.

26 Jan Paulsson, ‘Arbitration Without Privity’ (1995) 10 ICSID Review – Foreign Investment Law Journal, 232, 232.

27 Within this category is included the theory of the group of companies recognized in the case *Dow Chemical v Isover Saint Cobain* from ICC case No 4131.

28 *Hill v GE Power Systems, Inc*, US Court of Appeals for the Fifth Circuit, 282 F3d 343 (5th Cir 2002).

Gary Born has proposed Bilateral Arbitration Treaties (BATs). Finally, one might also count (vi) the recognition of theories of ‘good faith’ or ‘estoppel’ as a weakening of the consent-requirement.

However, in many countries, judges have failed to understand that the concept of ‘consent’ has evolved. They continue to deny recognition of arbitral awards by contending, for example, that the theories of non-signatory parties are inadmissible because the arbitration agreement must be executed in writing. They start from the wrong premise: that international arbitration is a static order. Instead, the New York Convention must be interpreted from an evolutionary perspective. It does not create international arbitration: it only takes note, records its existence and its development. It only intends to promote its evolution.²⁹

2. *The spontaneous evolution of the concept of arbitrability: towards universal arbitrability*

Arbitrability determines the types of issues which can and cannot be resolved by arbitration. Arbitrability is used by every country to exclude some matters from the scope of arbitration.³⁰ Thus, the arbitrability of a certain matter depends, fundamentally, on the legislation of each country. It is ultimately a question of state sovereignty, public interest and public policy.³¹ Arbitrability is a concept that is adapted periodically in order to meet the changing societal needs, including political, social, cultural, moral and economic dimensions. In the following, I will describe the evolution and continuous expansion of the concept of arbitrability.

a. *The original criterion of arbitrability: economic nature or similar concepts*

One of the basic paradigms of arbitration originally was that only matrimonial or economical disputes can be submitted to arbitration. In that vein, state legislators usually require an *economic nature* for a matter to

29 De Benito (n 5) 126.

30 Veena Anusornse, ‘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’ [2012] Theses and Dissertations 4 <<https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1033&context=theses>> accessed 29 November 2021.

31 *ibid* 13.

be arbitrable. According to this general criterion of arbitrability, typical examples of non-arbitrable subjects include criminal matters; family claims; inheritance law; bankruptcy law; antitrust claims; consumer claims; labor grievances; and certain intellectual property matters. The concrete framing of this general criterion of arbitrability differs from country to country:

The Swiss, Austrian, and German legislations explicitly refer to the economic nature of the dispute ('*jeder vermögensrechtliche Anspruch*'), as is shown by article 177(1) of the Swiss Federal Act on Private International Law, section 582(1) of the Austrian or section 1030(1) of the German Code of Civil Procedure.

In a similar vein, article 1 of the Brazilian Arbitration Law (No 9307 of 1996) conditions arbitrability upon the requirement of 'freely transferable property rights'. This approach is also followed by articles 2 and 18 of the Law on Alternative Dispute Resolution and Promotion of the Social Peace of Costa Rica (No 7727 of 1997).

A third group of countries uses the concept of tradability: one might refer to article 1676, subsection 1, of the Belgian Judicial Code, article 115 of the Colombian Statute of Alternative Dispute Resolution Mechanisms (Decree No 1818 of 1998); article 1 of the Arbitration and Mediation Law of Ecuador of 1997; article 806 of the Italian Code of Civil Procedure; article 2 of the Paraguayan Arbitration Law (No 1879 of 2002); article 1 of the Swedish Arbitration Act 1999 or article 3 of the Commercial Arbitration Law of Venezuela of 1998).

Finally, there are legislations that simply refer to matters within the free disposition of the parties, such as article 3 of the Bolivian Arbitration and Conciliation Law (No 1770/96); article 2(1), of the Spanish Arbitration Law (No 60 of 2003); article 2059 of the French Civil Code; article 3, subsection 1, of the Arbitration Law of Guatemala (Decree No 67 of 1995); article 1020, subsection 3, of the Dutch Civil Procedural Code (according to the arbitration law of 1986); article 2 of the Law of Arbitration, Conciliation and Mediation of Panama (Decree-Law No 5 of 1999) and article 2(1) of the Peruvian Law of Arbitration (Legislative Decree No 1071 of 2008).

b. The expansion of arbitrability: broad interpretation of the general criterion

In recent years, however, the concept of arbitrability has evolved significantly. As a result of the rulings of several courts and arbitration tribunals, the arbitrability of disputes has been expanding by leaps and bounds. With the passing of time, there are fewer and fewer matters that cannot be submitted to arbitration. Thus, in different parts of the world, arbitrability has

been expanded to disputes that initially would never have been possible to submit to arbitration. In this regard, Roque Caivano has expressly stated:

One of the greatest advances has been made in the area of ‘arbitrability’: issues that a few decades ago were considered insusceptible to be resolved by arbitration, are gradually being admitted as ‘arbitrable’ matters. As a result, the list of matters that can be validly submitted to arbitration has undergone a notable expansion.³²

In the same vein, Karim Youssef has stated:

In recent years, the scope of rights amenable to arbitration has grown to such an extent that, the concept of arbitrability (or its mirror image, inarbitrability) as central as it may be to arbitration theory, has virtually died in real arbitral life. Gradually, the issue of arbitrability faded in disputes on jurisdiction. The defence that a particular subject matter is not arbitrable has almost disappeared in the practice of developed fora, and arises less frequently in emerging ones. Arbitrability seems to be the least of a modern practitioner's problems.³³

One of the most paradigmatic cases is that of the United States. Before 1970, the United States had a very restrictive view of the arbitrability of disputes. However, *Scherk*³⁴ and *Mitsubishi*³⁵ represent an overall trend of US courts expanding the scope of arbitrability since 1970.³⁶ As explained by Gary Born, ‘as in France, the past four decades have witnessed a substantial evolution of the non-arbitrability doctrine in the United States.’³⁷

Over the last three decades, the US Supreme Court has pioneered the international expansion of arbitrability to areas of economic activity heavily impregnated with public interest. More and more US courts have provided a much-needed conceptual frame for universal arbitrability.³⁸

Another paradigmatic example is Switzerland. Article 177(1) of the Swiss Private International Law Act (PILA) provides that ‘any claim involving an economic interest may be submitted to arbitration’. The term used

32 Roque Caivano, ‘Arbitrabilidad y Orden Público’ (2013) 12 Foro Jurídico 62, 63.

33 Karim Youssef, ‘The Death of Inarbitrability’ in Loukas A Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (1st edn, Kluwer Law International, 2009) 47, 47.

34 *Scherk v Alberto-Culver Co*, 417 US 506 (1974).

35 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985), 105 S Ct 3354.

36 Rufus V Rhoades and others, *Practitioner’s Handbook on International Arbitration and Mediation* (1st edn, JurisNet 2007) 223–224.

37 Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law of Arbitration 2014) 981.

38 Youssef (n 33) 57.

in this article – ‘economic interests’ – is not given a statutory definition. However, Swiss courts have interpreted the notion of economic interest of article 177(1) of PILA broadly: it ‘covers all claims which have an either active or passive financial value for the parties or, in other words, all rights which, at least as far as one of [the parties] is concerned, can be appreciated in money.’³⁹ Under this interpretation, it is difficult to conceive how virtually all non-criminal would not be arbitrable: even issues such as divorce or a declaration of bankruptcy involve pecuniary value.⁴⁰ As explained by Karim Youssef, this is an extremely broad notion of arbitrability, perhaps unparalleled in the modern history of arbitration. Arbitrability is virtually ‘universal’; and parties are given the autonomy to arbitrate almost all disputes.⁴¹

One might also refer to Germany, notably to section 1030 of the German Code of Civil Procedure, which uses the same criterion, requiring an economic matter.⁴² As explained by Klaus Peter Berger and Catherine Kessedjian, this formulation is intended to be interpreted expansively (and to limit the scope of the non-arbitrability doctrine in Germany).⁴³ What is more, a number of German statutory provisions that previously excluded certain categories of disputes from arbitration have been expressly repealed.⁴⁴

Finally, in Canada, the Supreme Court has ruled that parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding.⁴⁵ In effect, while it is true that the decision deals with the arbitrability of copyright disputes, the generality of the court's pronouncement suggests the general presumption that claims which parties have chosen to arbitrate are arbitrable.⁴⁶ What is more, Canada not only allows the parties to

39 Judgment of the Swiss Federal Tribunal, DFT 118 II 353, 767 (1992).

40 Born (n 37) 970.

41 Youssef (n 33) 60.

42 Youssef (n 33) 61. See also Austrian ZPO, § 582 (‘Any claim involving an economic interest that lies within the jurisdiction of the courts of law can be the subject of an arbitration agreement. An arbitration agreement on claims which do not involve an economic interest shall be legally effective insofar as the parties are capable of concluding a settlement on the issue in dispute.’).

43 Klaus Peter Berger and Catherine Kessedjian, *The New German Arbitration Law in International Perspective* (1st edn, Kluwer Law International 2000) 7.

44 Born (n 37) 970.

45 *Les Éditions Chouette inc and Christine l'Heureux v Hélène Desputeaux and others*, 2003 SCC 17.

46 Youssef (n 33) 61.

arbitrate almost any kind of dispute, but has established that arbitration is the default jurisdiction for professional artists contracts. Thus, section 37 of the Quebec Professional Artists Act states the following: 'In the absence of an express renunciation, every dispute arising from the interpretation of the contract shall be submitted to an arbitrator at the request of one of the parties.'

In other words, the default rule has been switched. Unless parties to a professional artists contract agree otherwise, the dispute will be resolved through arbitration.

One can conclude from these developments that the expansion of arbitrability has been spontaneous and evolutionary in several countries, and the consequence of multiple decisions of various courts. Over time, states have realized that, in order to decongest their judicial branch and get the parties to internalize the costs of their disputes, expanding the arbitrability of disputes was a very efficient measure. In this regard, Karim Youssef has affirmed the following:

While some authors have warned that an absolute freedom to arbitrate may undermine State sovereignty, the evolution of legal systems to expand the definition of arbitrable claims did not slow down. On the contrary, the trend in favour of arbitrability has recently taken a new dimension, with the inception of what can be termed 'universal arbitrability.' Put simply, this means that arbitrability today is rarely an issue.⁴⁷

Commentators have described this trend as the 'ultimate doctrinal ascendancy of arbitration'.⁴⁸ With arbitration being the rule rather than the exception in international settings, legal systems need to determine the exceptions, ie, what disputes are not arbitrable.⁴⁹

c. Concrete examples of extended arbitrability

In the following section I will analyse how concretely this trend of expanded arbitrability lead to the extension of arbitration in areas which have originally been excluded from arbitration:

47 *ibid* 55.

48 Douglas Jones, 'Arbitration and Party Autonomy: How free is the Choice to Arbitrate?' in G M Beresford Hartwell (ed), *The Commercial Way to Justice* (1st edn, Kluwer Law International 1997) 121.

49 Bernard Hanotiau, 'L'Arbitrabilité et la favor arbitrandum: un réexamen' (1994) 4 *Journal du Droit International Clunet* 899, 899.

(i) *Family Law*. Family law is one of the areas with great restriction to party autonomy. For a long time, it was thought that family disputes could not be submitted to arbitration simply because they were not freely disposable.⁵⁰ According to Augusto C Belluscio, these restrictions are supposedly justified by the institutional nature of the family and by the need to perform the ethical purposes of the legal organization of the family nucleus.⁵¹ Thus, for a long time it was unimaginable to think that family disputes could be resolved through arbitration.

However, over time, several legislations started to allow the parties to submit their family disputes to arbitration. This process occurred spontaneously. It is precisely due to the inefficiency of courts – that are saturated with family cases – that arbitration has appeared as a viable answer for the resolution of this type of controversy. For example, in Texas, according to title 1 and 5 of the Texas Family Code⁵², and in Australia, according to section 5 of Family Law Regulations 1984 (Statutory Rules No 426)⁵³, it is perfectly possible to submit family disputes to arbitration, and it has proven to work very well. In this regard, McLaughlin has stated: '(...) most courts in the U.S. now allow binding arbitrations of family law matters, such as disputes over alimony, property division, and spousal support, as long as the matters do not involve children.'⁵⁴

(ii) *Inheritance Law*. In some legislations it is perfectly possible to submit inheritance law controversies to arbitration. For example, Bolivia⁵⁵,

50 Article 2059 of the French Civil Code establishes, for example, that 'disputes relating to divorce and separation of bodies or those that interest public communities and public establishments cannot be resolved in arbitration'.

51 Augusto C Belluscio, *Manual de Derecho de Familia* (1st edn, Depalma 1987) 29.

52 In this respect, Compere and Pool have stated that 'on written agreement of the parties, the court may refer a suit under Title 1 (spouses and property) and Title 5 (parent and child) of the Texas Family Code to arbitration.' John Compere, 'How to use arbitration and other ADR procedures in Texas Family Law?' Texas Barcle <http://www.texasbarcle.com/Materials/Events/2141/24054_01.pdf> accessed 29 November 2021.

53 In Australia it is also perfectly possible to arbitrate family disputes in accordance to section 5 of Family Law Regulations 1984 (Statutory Rules No 426), available at <<https://www.refworld.org/docid/4d3eb7ae2.html>> accessed 29 November 2021.

54 Joseph T McLaughlin, 'Arbitrability: Current Trends in the United States' (1996) 59 Albany L Rev 905, 929.

55 Article 3 of the Bolivian Arbitration Act No 1770/96.

Spain⁵⁶, France⁵⁷, Guatemala⁵⁸, the Netherlands⁵⁹, Panamá⁶⁰ and Perú⁶¹ condition the arbitrability of disputes to the fact that the rights that are submitted to the controversy are freely disposable, which does not exclude succession law controversies.

(iii) *Antitrust Law*. In *Mitsubishi v Soler Chrysler*, the US Supreme Court declared arbitrable the questions related to the legislation that protects free competition ('Antitrust Act'). Indeed, in that case, it was expressly stated that 'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration.'⁶²

With the US Supreme Court opening the way, today international antitrust disputes are widely arbitrable, in jurisdictions as diverse as New Zealand⁶³, France⁶⁴, Italy⁶⁵, the United Kingdom and Switzerland.⁶⁶ For example, the Paris Court of Appeal (*Cour d'appel*) upheld the validity of an international arbitration agreement that was invoked for civil claims under EU competition law:

If the character of the economic policy of community competition law rules prohibits arbitrators from granting injunctions or levying fines, they may nonetheless assess the civil consequences of conduct held to be illegal with respect to public order rules that can be directly applied to the parties' relations.⁶⁷

Indeed, French courts have repeatedly upheld the arbitrability of antitrust law claims categorically.⁶⁸ As explained by Gary Born, the result of the

56 Article 2 literal 1) of the Spanish Arbitration Act (No 60 of 2003).

57 Article 2059 of the French Civil Code.

58 Article 3 literal 1) of the Guatemalan Arbitration Act (Decreto No 67 of 1995).

59 Article 1020 literal 3) of the Dutch Code of Civil Procedure (Arbitration Law of 1986).

60 Article 2 of the Panamanian Law of Arbitration, Conciliation and Mediation (Decree-Law N° 5 of 1999).

61 Article 2.1 of the Peruvian Arbitration Act (Legislative Decree N° 1071 of 2008).

62 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985), 105 S Ct 3354.

63 *Attorney General of New Zealand v Mobil Oil New Zealand Ltd* (NZ High Court) [1989] 2 NZLR 649.

64 CA Paris, *Aplix v Velcro*, 14 October 1993, [1994] Rev Arb 164, Note Ch Jarroson.

65 Antoine Kirry, 'Arbitrability: Current Trends in Europe' (1996) 12 Arb Int'l 373, 376.

66 Youssef (n 33) 53.

67 Born (n 37) 974.

68 See Judgment of 18 November 2004, *SA Thalès Air Défense v GIE Euromissile*, 2004 Rev Arb 986 (Paris Cour d'appel) (2005). See also Judgment of 4 June 2008, SNF

past four decades' judicial development in France has been a substantial retrenchment of non-arbitrability limits in the international context. Notwithstanding potentially expansive (and archaic) non-arbitrability provisions of the Civil Code, and almost equally expansive historic judicial interpretations of those provisions, French courts have progressively narrowed the scope of non-arbitrable matters.⁶⁹ The United Kingdom has followed the same trend. For instance, in the case *ET Plus SA v Jean-Paul Welter*, the English High Court has affirmed that there is no realistic doubt that competition or antitrust claims are arbitrable.

(iv) *Labour Law*. The US Supreme Court's decision in *Gilmer v Interstate/Johnson Lane Corp* rendered most employment disputes arbitrable.⁷⁰ Concretely, it declared arbitrable the claims based on a public order rule such as the one that prevents age discrimination in employment, even though it acknowledged that said legislation is intended to protect an obvious public interest. The US Supreme Court simply held that there is no inconsistency between this social function and arbitration, to the extent that arbitration is equally adequate to protect the public interests at stake: the arbitrators are capable of properly protecting them – as much as the judges would – and they can apply all the remedies provided by law.⁷¹

In addition, in *Granite Rock v International Brotherhood of Teamsters (IBT)*⁷², the US Supreme Court resolved two important issues in federal labor law. The first one was whether there was an agreement between parties or not, and the other one was about tortious interference claimed by the employer, Granite Rock.⁷³ In the same vein, in the case *Perry v Thomas*, the US Supreme Court declared that the disputes arising from an employment contract are arbitrable⁷⁴.

International employment disputes are now arbitrable in France, too. In effect, *Grenoble* was the first French decision to hold that the 'arbitration agreement included in an international individual employment agreement is valid.'⁷⁵

⁶⁹ *Cytec*, 2008 Rev Arb 473 (French Cour de cassation, civ 1e); Judgment of 20 March 2008, *Jacquetin v SA Intercaves*, 2008 Rev Arb 341, 341 (Paris Cour d'appel).

⁷⁰ Born (n 37) 974.

⁷¹ *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20 (1991).

⁷² *Caivano* (n 32) 73.

⁷³ *Granite Rock v Int'l Bhd. of Teamsters*, Local 287, 546 F3d 1169 (9th Cir 2008).

⁷⁴ *Anusornsen* (n 30) 37.

⁷⁵ *Thomas Kenneth v Perry, Barclay*, 482 US 483 (1987), no 86-566.

⁷⁶ *Grenoble Cour d'appel*, 13 September 1993, Rev Arb (1994) 337.

(v) *Intellectual Property Law*. The US and most European countries⁷⁶ are likely to accept the arbitrability of almost all intellectual property disputes.⁷⁷ In this regard, Youssef has stated: ‘(...) copyrights and contractual disputes related to patents and trademarks (such as licensing) are arbitrable in most European jurisdictions and the U.S.’⁷⁸ Indeed, intellectual property gives exclusive rights between contractual parties.⁷⁹ This trend is illustrated by the *Saturday Evening Case* of 1987 in which a US court ruled in favour of the arbitrability of copyright validity.⁸⁰ Thus, after that case, it is likely that all issues regarding copyright will be arbitrable in the United States.⁸¹

(vi) *Bankruptcy Law*. In the case *United States Lines* the court affirmed that ‘the [Federal Arbitration Court] as interpreted by the Supreme Court dictates that an arbitration clause should be enforced unless doing so would seriously jeopardize the objectives of the [Bankruptcy] Code.’⁸² As a consequence, US courts have to conduct a case-by-case analysis to determine whether the circumstances of particular bankruptcy proceedings, and particular arbitrations, justifies overriding the parties’ agreement to arbitrate.⁸³

In a similar vein, there are authors who have already proposed expanding arbitrability for bankruptcy matters in Peru and Chile. In this regard, Brenneman, Arce, Mori and Schwartz have pointed out the following:

There is, however, another alternative, which to date remains largely untested in the region: a local bankruptcy proceeding, with some or all of the case handled through arbitration proceedings. With this option, debtors could have the certainty of a full and final resolution of their restructuring, but with the flexibility to use arbitration and mediation procedures that in many circumstances provide for a quicker resolution of the case by arbitrators that are more familiar with the sorts of issues

76 Article L 615-617 of the French Intellectual Property Code (FIPC) states: ‘The above provisions shall not prevent recourse to arbitration in accordance with Article 2059 and 2060 of FCC.’

77 Anusornsen (n 30) 41.

78 Youssef (n 33) 53.

79 Julian D M Lew and others, *Comparative International Commercial Arbitration* (1st edn, Kluwer Law International 2003) 32.

80 *Saturday Evening Post Co v Rumbleseat Press, Inc*, 816 F2d 1191 (7th Cir 1987).

81 David W Plant, ‘Arbitrability of Intellectual Property Issues in the United States’ [1994] *Am Rev Int’l Arb* 11, 36–38.

82 *United States Lines Inc v American Steamship Owners Mutual Protection & Indemnity Ass’n Inc*, 197 F3d 631, 640 (2d Cir 1999).

83 Born (n 37) 1030.

that arise in international financial contracts and that are less susceptible to judicial corruption.⁸⁴

(vii) *Consumer Law*. US law currently recognizes the validity of agreements to arbitrate between consumers and businesses and permits the arbitration of both existing and future consumer disputes, subject to restrictions based on principles of unconscionability and due notice.⁸⁵ Thus, today virtually all American consumer contracts contain arbitration clauses. In this regard, Gilles Cuniberti has stated:

In most legal orders, arbitration is confined to commercial matters. Exceptions exist, however, the most remarkable being the United States, where arbitration has been accepted in consumer and employment disputes. In such legal orders, the proposed model would then be part of a wider phenomenon of privatization of adjudication.⁸⁶

In contrast to that, Germany does not allow any kind of arbitration in consumer matters *before* a dispute has arisen. However, *after* a dispute about securities has arisen, arbitration agreements are possible even here.⁸⁷

A third group of countries is more lenient towards consumer arbitration than Germany, but still requires some protective formalities. In that direction, section 11 of the New Zealand Arbitration Act states that an arbitration agreement will be enforceable against a consumer only if the consumer, by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it. Similarly, article 4(2) of the Brazilian Arbitration Law states that 'in adhesion contracts, the arbitration clause will only be valid if the adhering party initiates arbitral proceedings or if it expressly agrees to arbitration by means of an attached written document, or if it signs or initials the corresponding contractual clause, inserted in boldface type.'

(viii) *Securities Law*. In *Shearson v McMahon*, the US Supreme Court declared arbitrable the actions based on rights contained in the legislation

84 Pablo Mori and others, 'You Have Options: The Use of Alternative Dispute Resolution in Insolvency Proceedings' (2017) 17 Pratt's J Bank L 336, 336–337.

85 Born (n 37) 1049.

86 Gilles Cuniberti, 'Beyond Contract. The Case for Default Arbitration in International Commercial Disputes' (2008) 32 Fordham Int LJ 417, 464.

87 On that, see eg German Securities Trading Act, § 37h. On the position of the German courts, see eg German Federal Court of Justice (*Bundesgerichtshof*), 9 March 2010, XI ZR 93/09, RIW 2010, 391.

on stock transactions (securities claims).⁸⁸ A couple of years later, in the case of *Rodríguez de Quijas v Shearson/American Express Inc*, the Supreme Court upheld this criterion by reinterpreting the 1933 law (Securities Act of 1933).⁸⁹

(ix) *Constitutional Law.* In Argentina, it is perfectly possible to submit constitutional issues to arbitration. Indeed, it was determined that the arbitrators retain their competence in the face of unconstitutionality claims and, if necessary, are empowered to declare the unconstitutionality of legal rules.⁹⁰ This is possible provided that the declaration of unconstitutionality only projects consequences among those who are parties to the process, having no other effects than the non-application of the rule declared contrary to the Constitution.

Likewise, in Peru the Constitutional Court has established that arbitrators are empowered to exercise constitutional control. Indeed, in the binding precedent *María Julia* rendered through judgment No 142-2011-PA/TC, the Constitutional Court affirmed that 'it is a necessary consequence of this that the guarantee of decentralized control of constitutionality, provided for in the second paragraph of article 138 of the Constitution, may also be exercised by the arbitrators in the arbitration jurisdiction, since Article 138 cannot be the object of a restrictive and literal constitutional interpretation.'⁹¹

(x) *Criminal Law.* Finally, although we disagree with the reasonings, several US courts have found certain criminal law claims, especially fraud claims, to be arbitrable.⁹² For example, the US Supreme Court ruled that the claims based on the violation of the anti-fraud-legislation –the Racketeer Influenced and Corrupt Organizations Act (RICO) – are arbitrable, insofar as it is not possible to interpret that Congress has tried to reserve their application in exclusivity to state legislation.⁹³

88 *In re Shearson/American Express Inc v McMahon*, 482 US 220 (1987). See also Michael Reisman and others, *International Commercial Arbitration* (1st edn, Foundation Press 1997) 309.

89 *In re Rodriguez de Quijas v Shearson/American Express Inc*, 490 US 477 (1989).

90 Roque Caivano, 'Planteos de Inconstitucionalidad en el Arbitraje' (2006) 2 *Revista Peruana de Arbitraje* 107, 107.

91 Judgment of the Constitutional Court, Case № 142-2011-PA/TC, 21 September 2011, 24 (own translation).

92 *Shearson/American Express Inc v McMahon*, 482 US 220 (1987) (finding RICO claims arbitrable); *Meadows Indemnity Co v Baccala & Shop Ins Services Inc*, 760 F Supp 1036 (EDNY 1991) (finding fraud claims arbitrable).

93 *In re Shearson/American Express Inc v McMahon*, 482 US 220 (1987).

d. Towards universal arbitrability

Having reviewed the evolutionary process that has occurred with arbitrability in different jurisdictions, we can affirm that international arbitration has dramatically changed on its face. Evolution is leading us towards universal arbitrability.

The review that we have made on the arbitrability of different matters in several countries is reliable proof that conditioning the arbitrability of disputes on whether the disputes are economic is at least questionable. I believe that in countries that have institutional weaknesses and that have highly congested judiciary, the expansion of arbitrability to other matters should be the subject of intense debate as a possible legislative policy.

It has been argued, however, that expanding arbitrability to family, inheritance, antitrust or bankruptcy disputes is contrary to public order or public interest. It is unpersuasive, however, to affirm that submitting these types of disputes to arbitration is contrary to public order or public interest without further arguments; it must be explained why it allegedly contravenes these concepts, and such explanation is conspicuously absent. As explained by Karim Youssef, an expansion of arbitrability can be justified by several reasons:⁹⁴

- *first*, the simple yet fundamental observation that, over the last few decades, arbitration has become a better justice. For many contemporary thinkers, arbitration is the normal forum (if not *the juge naturel*);
- *second*, international arbitration is a sophisticated justice that has ‘matured’ to provide sufficient protection for weaker parties or the public interest;
- *third*, the classic fear that arbitrators would under-enforce public laws is no longer tenable, since international arbitrators routinely apply mandatory rules, foreign *lois de police* and may occasionally be brought to apply constitutional or international rules;
- *fourth*, arbitrators are not insensitive to considerations of equity or efficacy, and may even apply moral rules;
- *fifth*, arbitrators are also equipped to deal with complex contracts or highly technical subject matters.

Arbitrability will continue to evolve and, therefore, it will increasingly gain ground. As the years go by it will become more obvious that there are several disputes that should never have been left to the state. In a few years

94 Youssef (n 33) 65–66.

it might seem absurd for the state to establish which are the arbitrable controversies. The rule might rather be the opposite: the State will have to determine which are the non-arbitrable controversies. As explained by Karim Youssef, in the not-too-distant future, national laws would find vain the provision of definitions of what claims are arbitrable.⁹⁵

In my opinion, prohibiting the parties from submitting their family, inheritance, antitrust, intellectual property, or bankruptcy disputes to arbitration is an illegal restriction to party autonomy and freedom of contract. Defending that parties should not be always entitled to decide how their disputes should be resolved – regardless of the type – implies assuming that the state knows better than the parties how their disputes should be resolved. However, in accordance with the principle of consumer sovereignty, it is the parties who know better than anyone what is the best way to resolve their disputes.

In the US discourse, much has been written about when the State is entitled to enact a mandatory rule. In the words of Ayres and Gertner:

(...) immutable rules are justifiable if society wants to protect (1) parties within the contract, or (2) parties outside the contract. The former justification turns on paternalism; the latter on externalities. Immutable rules displace freedom of contract.⁹⁶

Thus, immutability is only justified if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves.⁹⁷ None of this would happen if the arbitrability of disputes is expanded, especially in countries with institutional weaknesses. Indeed, the expansion of arbitrability in various jurisdictions has not led to socially undesirable, but rather positive results.

Finally, it is worth mentioning that the proposal to expand arbitrability to any type of dispute is also in harmony with International Law. In effect, the New York Convention establishes in article II (1):

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, *whether contractual or not*, concerning a subject matter capable of settlement by arbitration. (emphasis added)

95 ibid 66.

96 Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1990) 99 Yale Law Journal 87, 88.

97 ibid 88.

Additionally, article V(2)(a) of the New York Convention states:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration *under the law of that country*. (emphasis added)

It follows from this provision that the New York Convention provides states with discretion to decide the scope of arbitrability of their own legal system. Therefore, in accordance to International Law, States are entitled to expand arbitrability to administrative, family, consumer, antitrust, bankruptcy and other types of disputes without inconvenience.

V. Conclusion

Arbitration rules and institutions should not be an invention of the legislature, but rather the result of an evolutionary process. The legislator has to let the spontaneous order do its job. In arbitration, the *lex* has only one function: to recognize the arbitral *ius* as prior to it and to ensure that it can continue to develop freely and organically. Thus, one might say that the arbitral legislator, bound by *observational objectivity*, must do as the Royal Spanish Academy does with language: just polish and recognize the words that make up the language, which is the first and most important spontaneous order. It should give splendor to arbitration, which is the only thing that, at the end, must shine.⁹⁸

98 De Benito (n 5) 126.