INTERNATIONAL COUNCIL
FOR COMMERCIAL ARBITRATION

ARBITRATION – THE NEXT FIFTY YEARS

GENERAL EDITOR:
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with the assistance of the
Permanent Court of Arbitration
Peace Palace, The Hague

International Arbitration as a Transnational System of Justice

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I. INTRODUCTION

International arbitration is increasingly recognized as a transnational system of justice, if not a genuinely autonomous legal order, sometimes labeled as the arbitral legal order.[1] This evolution, however, continues to generate robust controversies on the extent of autonomy of international arbitration from national legal systems and the role, if any, that the seat of the arbitration should have over the arbitral process.

This pervasive debate suggests that the longstanding relationship between autonomy and international arbitration is still ill-defined to some extent. It also demonstrates that considerations of autonomy, without more, cannot provide answers to certain more fundamental and practical questions ubiquitous in international arbitration, such as questions related to applicable law, procedure and the enforcement of awards.

A more fundamental approach is to examine the reasons for the sharp divergence in views between those who root international arbitration in a national legal system and those who recognize the transnational character of the process. These differences cannot be explained solely by considerations of autonomy, or by focusing on isolated practical aspects of international arbitration. Instead, one must consider the source (or sources) of validity and legitimacy of the arbitral process and the ensuing award. In this respect,

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1. For a discussion on the evolution and usage of the expression "arbitral legal order", see Emmanuel GAILLARD, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) pp. 38-46. On the recognition in certain jurisdictions of the existence of an arbitral legal order, see Dominique HASHER, "The Review of Arbitral Awards by Domestic Courts – France" in Emmanuel GAILLARD, ed., *IAI Series on International Arbitration, No. 6. The Review of International Arbitral Awards* (Juris 2010) p. 97 ("The French concept of arbitration is based on the premise that there is an arbitral legal order, which is distinct from the legal order of individual States.... It is this arbitral legal order – and no national legal order – that confers juridicity to arbitration."); Jean-Pierre ANCEL, "The Decree of 13 January 2011: Increasing the Efficiency of Arbitration in France", *The 13 January 2011 Decree, The New French Arbitration Law* (Paris the Home of International Arbitration, 2011) p. 9 (noting that the French view of international arbitration law is based on "the recognition of the existence of a truly autonomous arbitral legal order"); Ugo DRAETTA, Report given at the Seminar *Journée d'étude en l'honneur de Giorgio Shiavoni : La résolution des différends commerciaux en Méditerranée : quel rôle pour l'arbitrage?: "L'arbitrage international est-il une fonction publique?"* (Camera Arbitrale di Milano, 27 June 2011).

three visions of international arbitration appear to constitute a dividing line, each having a distinct theoretical ground as well as entailing extremely concrete practical consequences. These visions will be described below (II), before further consideration is given to the role of the 1958 New York Convention[2] in this debate (III).

II. THE REPRESENTATIONS OF INTERNATIONAL ARBITRATION

There are three competing visions of international arbitration, defined by what their proponents consider to be the source of legitimacy of the phenomenon: the monolocal vision, the Westphalian vision and the transnational vision.[3] These visions, mental constructs or representations,[4] strongly influence the views held on a number of questions ranging from whether the arbitrators are empowered to determine their own jurisdiction, the conduct of the arbitral proceedings, the determination of the law applicable to the merits of the dispute, or the fate of the resulting arbitral award, including the controversial question of whether an award set aside in the country of the seat of the arbitration may nevertheless be enforced in other jurisdictions.

This Comment will focus on dispelling two common misunderstandings that go to the heart of both the philosophical underpinnings of the representations of international arbitration and their practical consequences: First, none of these representations suggests that international arbitration does not ultimately derive its legitimacy or validity from states (*1*). Second, whether or not one is conscious of their existence, these representations carry major practical consequences for all the players in the field of international arbitration, not just arbitrators (*2*).

1. The Source of the Legitimacy and Validity of International Arbitration

The three representations of international arbitration are defined by what they hold to be the source of legitimacy of international arbitration, namely what is the arbitrator's source of power to adjudicate. This assumption carries far-reaching implications for how one views the entirety of the arbitral process.

The first and most traditional view is the monolocal vision, which considers the sole source of legitimacy and validity of international arbitration to be the law of the seat of the arbitration, or as proponents of this view might say, the "country of origin". In this

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2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958 (hereinafter the New York Convention or the Convention). As of 30 September 2011, 146 states were parties to the New York Convention. The membership status is available at: <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.
3. See generally Emmanuel GAILLARD, *Legal Theory of International Arbitration*, fn. 1 above. See also Emmanuel GAILLARD, "Three Philosophies of International Arbitration" in Arthur W. ROVINE, ed., *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Martinus Nijhoff Publishers 2010).
4. For an analysis of the notion of representation from a cognitive science perspective, see Emmanuel GAILLARD, "The Representations of International Arbitration", Journal of International Dispute Settlement (2010) pp. 1-11.

vision, the seat of the arbitration is more than a location chosen for convenience or neutrality; it provides the exclusive basis for the binding nature of the arbitration. Consequent to this view, if the arbitration is taking place in Mexico it is a Mexican arbitration, even if the dispute is between a French company and an American company, and governed by Swiss law. If these diverse parties are allowed to arbitrate, it is because the Mexican legal order has given a preauthorization to do so. The resulting award is considered a Mexican award.

The second representation is the Westphalian vision, which considers that if international arbitration is a legitimate process, it is because there are a number of states that are prepared to recognize the legitimacy of an adjudication process based on the common intent of the parties, as well as the binding nature of the resulting award. This vision is a radical departure from the monolocal view in two respects. First, the arbitral process is no longer preauthorized, but rather legitimized *a posteriori* if an award meets the enforcing state's criteria. Second, this view considers that international arbitration can derive its legitimacy from a plurality of legal systems, including the state or states of enforcement. Under this representation, the law of the seat is just one amongst other potentially relevant legal systems, and the seat itself is considered more as a physical location where the arbitration is held as opposed to a legal forum defining the extent of the arbitrators' role, just as it would for a local court. This vision of judicial plurality is best described as Westphalian because it is based on a model in which each state has an equally legitimate title to decide for itself the conditions under which it will consider as valid the arbitration process and the ensuing award as worthy of enforcement.[5]

The third representation, the transnational vision, goes one step further than the Westphalian approach to contemplate the states collectively, rather than individually. This representation recognizes the source of legitimacy of arbitration as rooted in the views developed collectively by the community of nations through instruments such as the 1958 New York Convention, the UNCITRAL Model Law and numerous guidelines which express a common view as to how an arbitration should be conducted so as to be recognized as a legitimate means of adjudication. In other words, in this vision, the source of validity and legitimacy of the arbitral process is found in the collective normative activity of states. This representation also corresponds to international arbitrators' strong perception that they do not administer justice on behalf of any particular state, but that they play a judicial role for the benefit of the international community.

Some have mistaken this transnational representation to be a vision of judicial anarchy. Michael Reisman has suggested that "[a]dvocates of arbitration often assume ... that arbitration is a free-standing procedure, conceptually and politically quite independent of the apparatus of the state". He goes on to describe these advocates as "[t]hose who

5. For an example of this approach, see, e.g., Arthur von Mehren, who eloquently described at a lecture given in Tel Aviv in 1986 the ambulatory nature of arbitration and the fact that, unlike a judge, the arbitrator has no lex fori: Arthur T. VON MEHREN, "Limitations on Party Choice and the Governing Law: Do They Exist for International Commercial Arbitration?" (The Mortimer and Raymond Sackler Institute of Advanced Studies, Tel Aviv University, 1986).

wish to think of arbitration without any role for government".[6] This suggestion confounds the notion of an autonomous legal order with an a-national legal order, which would be characterized by a rejection of or opposition to national legal systems.[7] In contrast, the transnational vision considers that international arbitration is anchored in the collectivity of legal systems. As such, this vision of judicial collectivism embraces rather than rejects the laws derived from national legal systems.

Thus, none of the three representations described above suggests that international arbitration promotes a system of international justice that is "floating in the transnational firmament",[8] entirely divorced from the national legal systems of states. Instead, the relevant question in understanding these three views is *which* state, *or states*, provides the relevant source of legitimacy and validity for the arbitration agreement, the arbitral process and the ensuing award.

2. *Practical Consequences of the Representations*

The competing visions of international arbitration do not merely nourish a theoretical debate, they translate into highly practical consequences. They influence not only how arbitrators address various aspects of an international arbitration, but also the approach taken by all other players in the field, including parties, counsel and national judges.

Of course, the representations have significant consequences for arbitrators, and for the arbitrations over which they preside. For example, in choosing the applicable law,[9] an arbitrator adhering to the first representation and sitting in Mexico will consider he or she is bound by Mexican choice of law rules. An arbitrator adopting the Westphalian vision would not shy away from selecting, amongst the various conflict of laws rules at play, the choice of law rule which he or she considers appropriate to the arbitration at hand. An arbitrator adhering to the transnational representation will be more prone to look to the international trend for the determination of the relevant choice of law rule

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6. W. Michael REISMAN and Brian RICHARDSON, "Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration", this volume pp. 17-18.
7. In contrast to the transnational representation of international arbitration, the doctrine of lex mercatoria stemmed from a more critical view of national legal systems, arising out of the perceived inadequacy of those systems to address disputes arising in a global commercial environment, and through its selectivity, constituting a form of "legal Darwinism". See Eric LOQUIN, "*Où en est la lex mercatoria?* in "*Souveraineté Étatique et Marchés Internationaux à la Fin du 20ème Siècle. A Propos de 30 Ans de Recherches du CREDIMI. Mélanges en l'Honneur de Philippe Kahn* (Litec 2000) at p. 26; Eric LOQUIN, "*Les règles matérielles internationales*" in Collected Coursesof the Hague Academy, volume 322 (2006) Sect. 503; for a discussion of this idea, see Emmanuel GAILLARD, *Legal Theory of International Arbitration*, fn. 1 above, at pp. 46-47.
8. Another example of this misperception of a transnational philosophy is *Bank Mellat v. Helliniki Techniki SA*, where Kerr LJ stated that: "[d]espite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law" [1984] 1 QB 291, 301.
9. For a detailed discussion on the consequences of the representations of international arbitration on applicable procedure and rules of law, see Emmanuel GAILLARD, *Legal Theory of International Arbitration*, fn. 1 above, pp. 93-134.

or, in appropriate cases, the rule which reflects the consensus of nations to resolve a particular substantive issue. Like the Westphalian arbitrator, this transnational arbitrator does not consider himself or herself bound by the Mexican choice of law rules simply because he or she is sitting in Mexico. Unlike the Westphalian arbitrator who views himself or herself as having unfettered discretion, however, an arbitrator adopting the transnational vision looks to the trend developed by the international community as guidance. Whereas the Westphalian vision is characterized by a margin of unpredictability, the transnational view aims at promoting certainty through its endorsement of majoritarian principles and its rejection of idiosyncratic or outdated rules of law.

This example of the choice of the law applicable to the merits of the dispute illustrates the far-reaching effects the representations can have on arbitrators, and how they may in turn have a significant impact on the outcome of the arbitration itself. The same is true for all the other players in the field of international arbitration. To take another example, these representations greatly influence national courts, such as when a court is asked to enforce an arbitral award that was set aside in the country of the seat of the arbitration. National courts adopting a monolocal view will consider an award rendered in Mexico as a Mexican award, even if none of the parties is Mexican, and will treat it as they would a local judgment issued by Mexican courts. Consequently, if the award is set aside in Mexico, there is nothing to recognize in another state.

Courts with a Westphalian view will not necessarily adhere to the way an award rendered in Mexico is treated by the Mexican legal system. They would not consider a Mexican court's determination that an award issued in Mexico was not valid, for instance for the arbitrators' failure to comply with a local procedural rule, as having an absolute extraterritorial legal effect. They consider that they are free to make their own determination as to whether such failure should lead to the rejection of the award as a binding legal instrument. Thus, English courts may enforce an arbitral award that Mexican courts have held as being invalid, or vice versa.

Courts adhering to the third, transnational representation accept the same result for different reasons. They will look to what constitutes a valid award by international standards, such as those set forth in the New York Convention. Their adherence to these international standards does not suggest that these courts exercise no control over the recognition of the award in their own national legal system. To the contrary, the New York Convention has preserved the discretion of every legal system to decide for itself, based on the collective guidelines set forth in the Convention and its own standards, whether or not an award meets the conditions of recognition and enforcement.[10] In this respect, national legal systems continue to shape international arbitration, both through their adherence to collective standards and their development of national jurisprudence on arbitration when exercising their discretion within those standards.

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10. From a procedural point of view, Art. III of the New York Convention provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them *in accordance with the rules of procedure of the territory where the award is relied upon*" (emphasis added). In other words, the standards according to which an award "shall" be recognized are those of the country where recognition and enforcement are sought.

III. THE ROLE OF THE 1958 NEW YORK CONVENTION

Because of its crucial role in the development of international arbitration during the past fifty years, the 1958 New York Convention provides a forceful illustration of the question whether international arbitration can be viewed as a transnational system of justice.

The rules established by the New York Convention represent a collective, pro-enforcement movement by the international community. Despite the Convention's relatively straightforward approach to promoting enforcement by limiting the grounds of review for enforcement of arbitral awards, it has been interpreted by some as creating a jurisdictional hierarchy between national legal systems reviewing awards. This interpretation is not only unfounded in the text of the Convention, but is also contrary to the Convention's fundamental objectives.

One proponent of this idea, Michael Reisman, has argued that the New York Convention creates a "normative architecture" of international arbitration, dispatching competence to "two tiers of review competence, making a distinction between so-called 'primary' or 'venue' jurisdictions and 'secondary' or 'enforcement' jurisdictions".[11] This view suggests that the Convention establishes, on the one hand, a primary jurisdiction, that of the seat of the arbitration – regardless of the other criterion adopted by the Convention, that of law chosen by the parties to govern the arbitration – and, on the other hand, a secondary jurisdiction (or secondary jurisdictions) at the place (or places) of enforcement.

In reality, the objective of the New York Convention is much more straightforward. It is to facilitate the recognition and enforcement of arbitral awards, not to dispatch relative competence to national legal systems. The idea that the New York Convention would place the seat of the arbitration at the top of a jurisdictional hierarchy for enforcement purposes is counter to its fundamental objectives.[12] If accepted, it would shift the focus from the award itself, which is the subject matter of the Convention, to the judicial process surrounding the award in the country where it was rendered, and would fly in the face of one of the greatest achievements of the New York Convention. Indeed, one must recall that the drafters of the Convention set out to abolish the requirement of double exequatur, which governed enforcement under the 1927 Geneva Convention on the Enforcement and Recognition of Foreign Arbitral Awards. Until 1958, awards had to be rubber-stamped by courts at the seat of the arbitration before they could be enforced elsewhere. Thus the 1927 Geneva Convention recognized the "country of origin" as having primary competence to determine whether an award was valid. It did, at the time, organize the world into a primary jurisdiction, that of the seat, and secondary jurisdictions. The drafters of the New York Convention intended

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11. W. Michael REISMAN and Brian RICHARDSON, "Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration", this volume p. 25).

12. It is also contrary to the letter of the Convention, which places the seat and the law under which the award is made on the same footing (see Art. V(1)(*e*) of the Convention). Thus if the Convention were to be seen as allocating jurisdictions between countries, which it does not, it would have created primary jurisdictions (plural), not a primary jurisdiction.

precisely to move away from this anti-enforcement system, and adopt a system where review of awards for enforcement would be limited to the grounds defined in the Convention.[13] The abolition of double exequatur has massively been applauded since 1958 as a major step towards a pro-enforcement system. That the drafters of the Convention moved away from the notion that the seat of the arbitration is somehow the controlling state, does not suggest that no state would have control over the arbitral process; rather, they shifted the authority to review awards for enforcement to the states at the place (or places) of enforcement.

For this reason, the Convention does not address at all the extent of review of arbitral awards for the purposes of annulment at the seat of arbitration. It does not say, for instance, that the seat should have a maximum of five, six or eight grounds to annul. There is no breach of the Convention if, for instance, courts in the United States review an award for "manifest disregard of the law" for the purposes of *annulling* an award rendered in the United States. If, on the other hand, a state were to review an arbitrator's "manifest disregard of the law" for the purposes of *enforcing* an award falling within the ambit of the Convention, it would be in breach of the Convention.

Conversely, the Convention does not prevent the state of enforcement from being more permissive as to the grounds set forth in the Convention, which represent the maximum standard of review acceptable under the Convention when a country is requested to recognize and enforce an arbitral award.[14] If a state reviews the merits of the dispute, it breaches the Convention. If a state uses a ground other than those set out in the Convention to deny enforcement, it breaches the Convention. But if a state chooses to enforce awards according to more liberal standards, it is free to do so. More specifically, the Convention does not prohibit a state from enforcing an award which has been set aside at the seat of the arbitration, or in the country of the law governing the arbitration.[15] As such, any positions taken by the courts of the seat with respect to the validity of the award do not have a binding effect in other legal systems.

Widespread acceptance of the New York Convention by states thus evidences a shift away from the traditional paradigm that grants unwarranted discretion to the seat of

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13. See, e.g., Art. VII(2) of the New York Convention, which states that "[t]he Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention".

14. This fact is made clear by the New York Convention's more-favorable-right provision under Art. VII(1), which expressly provides that courts must pay heed to domestic laws that are more favorable than the Convention: "The provisions of the present Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." A number of domestic courts have exercised this discretion by applying more favorable provisions of domestic law. See Emmanuel GAILLARD, "The Relationship of the New York Convention with Other Treaties and with Domestic Law" in Emmanuel GAILLARD and Domenico DI PIETRO, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May 2008) at pp. 70-71, 76-86.

15. For a more detailed analysis of enforcement of arbitral awards set aside at the seat in relation to the three representations of international arbitration, see Emmanuel GAILLARD, "The Representations of International Arbitration", New York Law Journal (4 October 2007).

arbitration. By giving some discretion to the national legal systems at the place (or places) of enforcement to review arbitral awards, the Convention appears at the very least to accommodate the Westphalian representation of international arbitration. But the Convention is primarily a declaration of the overarching international standards to which contracting states agree to adhere, the boundaries within which they will exercise their discretion. In this way, the Convention exemplifies the normative, collective activity of the states in which the legitimacy and validity of the transnational arbitral legal order is anchored.