

Arbitration – a Law unto itself?

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ABSTRACT

This article¹ argues that theses advocating an independent or transnational system of arbitration lack coherence. Arbitration is not, and should not become, a law unto itself. Arbitration already faces problems in maintaining coherence in its jurisprudence and confidence in its efficacy as a dispute-resolution mechanism, particularly given that no general means exist to ensure that awards are consistent. These problems could only be exacerbated by a declaration of unilateral independence.

Decisions of the court of the seat should in the ordinary case be treated as final and binding. This reflects the choice of the parties. Empirical evidence suggests that the choice of seat is usually the result of a careful consideration of the legal consequences and not merely a matter of convenience. To view arbitral awards as autonomous of national courts is a step back in terms of the comity of nations and also contradicts the wording of the New York Convention. Siren calls for complete or yet further autonomy for arbitration should be viewed with scepticism. An increasingly inter-connected world needs mutually supportive and inter-related systems for the administration of law, not more legal systems.

1. INTRODUCTION

Is international arbitration part of an autonomous legal order, not anchored in or attached to any state legal order? What does it mean to speak of an autonomous arbitral order? What would be the consequences if one existed and should we welcome them?

¹ This is the full text of the 2015 School of International Arbitration – 30th Freshfields Lecture given in London on 4 November 2015. A number of the ideas in it were also raised in a speech given to the Academy of Law in Singapore on 28 August 2015. The article is to be published in *Arbitration International* in early 2016.

If you think these are jurisprudential questions, unlikely to feature in lunchtime discussion, if you ever have time for this, I agree. Jan Paulsson has said that the definition of a legal order falls within

“a domain to which erudite and disputatious scholars, as generations come and go, have devoted pages as countless as the stars, destined to be read, it seems, chiefly by others intending to add to the production”².

I discovered this only after writing the bulk of my text. It was too late to turn back. My excuse is that the questions are also of practical significance. They link directly with more familiar questions, such as: What is the role of the law and courts of the seat of an arbitration? Do these have any special claim to determine the validity of an arbitration or an award? Or does each enforcing state have an equal claim?

Domestic legal systems have learned to inter-relate and to coordinate their activities. They develop conflicts of law principles, international or regional treaties and measures such as the European Union’s Brussels Regulation. But the leitmotif of arbitration is autonomy and consent – as regards the composition and jurisdiction of the tribunal, procedure, evidence, confidentiality, etc. Today’s judges, I believe, understand why arbitration is often preferred to litigation, respect the virtues of party autonomy and see why court intervention should be minimised, save where necessary to support the parties’ agreement - and they do so independently (I am sure) of any interest which many former judges clearly display in the subject. But how far does arbitration’s basis in consent mean that it floats free of national legal systems, particularly that of the seat?

2. ENGLISH LAW

That has not been English law’s traditional view. As the House of Lords held in the *Fiona Trust* case³, there are, of course, two separate agreements: the commercial agreement and the agreement to arbitrate

² Written text of lecture delivered 4th November 2015. Jan Paulsson’s *The Idea of Arbitration* (OUP, 2013), p.33. I came across the book through reading a review in (2015) 78 (5) MLR 883, which commends it with justice as stimulating and thought-provoking.

³ *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40.

disputes arising under it: “[t]he doctrine of separability requires direct impeachment of the arbitration agreement”, before it can be set aside⁴. But each has its roots in a governing law, which may or may not be same as the other’s. In particular, English law does not recognise what Kerr LJ once called “arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law”⁵. An arbitration must therefore be assigned a juridical seat. Nowadays, the seat can be designated by simple agreement of the parties, or, that failing, by the tribunal (s.3 of the Arbitration Act 1996), and it does not have to coincide with the place where the arbitration is actually held. Further, the chosen seat is where English law treats any award as made for the purposes of the New York Convention. In English law eyes, the effectiveness and probably attraction of arbitration depends upon the possibility of more or less circumscribed court intervention at potentially critical points: e.g. to determine whether or not an arbitration agreement exists, to assist its implementation if it does, e.g. by appointing, removing or replacing an arbitrator, or (save between EU or Lugano states) to injunct proceedings brought in breach of an agreement to arbitrate, to issue interim measures and to enforce or in some cases to set aside any award. In English arbitration, in contrast to many other legal systems, courts also have a limited but significant appellate or review role.

Because English law views any arbitration as rooted in its seat, an English Court of Appeal, on which I sat, has held that it was for the English courts to determine the scope of arbitrators’ jurisdiction under a bilateral investment treaty providing for an arbitration with a seat which was in the event fixed (by the tribunal itself) as English: *Occidental Exploration Production Co v Republic of Ecuador*⁶. The Dutch courts in proceedings between Ghana and a Malaysian telecoms company and the US Supreme Court in *BG Group plc v Argentina*⁷ have also regarded it as their role to adjudicate on similar BIT issues under their domestic arbitration law. Further, in the much-publicised Dutch arbitration under the Energy Charter Treaty in

⁴ An example of direct impeachment would be a plea that the agreement to arbitrate was never made or was forged or procured by bribery. But the much more common sort of plea that the commercial agreement should be set aside because of duress or misrepresentation is for the arbitrators to determine.

⁵ *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, recently cited by Simon J in *Yukos Capital SarL v OJSC Oil Co. Rosneft* [2014] EWHC 2188 (Comm), [2014] 2 Lloyd’s Rep 435. See also *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs of Pakistan* [2010] UKSC 46, [2011] 1 AC 763, paras 14-16 for the French position as agreed in that case.

⁶ [2005] EWCA Civ 1116, [2006] QB 432.

⁷ No 12-138 572 US (2014).

which GML Ltd., former 60% owner of Yukos Oil Co, has been awarded some US\$50 billion against The Russian Federation in respect of events leading to that company's demise, the Russian Federation is positively relying on the jurisdiction of the Dutch courts in applying to set aside the award. This is, I understand, on the interesting ground, among others, that an assistant to the tribunal appears from his fee notes to have played an allegedly unexpected role in drafting the tribunal's reasons and/or decisions. I must at once acknowledge my gratitude to my own judicial assistant for helpful suggestions.

Some expert commentators give strong support to the law of the seat. Decisions supposedly failing to do so have been castigated by Albert van den Berg and Gary Born as "infamous". In a critique coming close to home, Gary Born has called the United Kingdom Supreme Court's decision in *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs of Pakistan*⁸ an "example of a pathological international arbitration"⁹, undermining the "most fundamental objectives of the [New York] Convention includ[ing] ensuring uniform treatment of arbitral awards", and involving "a foreign court [i.e. the UK Supreme Court] disagreeing with the [French] courts of the arbitral seat over the application of its own law".

I do not myself see the *Dallah* case as raising any doubt under English law about the seat's relevance. *Dallah* had obtained a French award against the State of Pakistan over the State of Pakistan's objection that it was not party to any contract or arbitration agreement. *Dallah* brought English enforcement proceedings in which the State successfully maintained this objection at two instances. Only then and after three years of litigation, did *Dallah* have the bright idea of bringing parallel French enforcement proceedings and seek to stay its own appeal to the UK's highest court. The Supreme Court refused a stay and decided the appeal on the expert evidence given below. Gary Born's concern rests, I understand, on the failure to grant a stay. The refusal of a stay was the product of a particular procedural course of events, not disinterest in the law of the seat, which (rightly or wrongly) we thought we were applying¹⁰. It is always unfortunate if different courts take different views. We would have been very interested in

⁸ [2010] UKSC 46, [2011] 1 AC 763.

⁹ *Dallah and the New York Convention*, Kluwer Arbitration Blog 7 April 2011.

¹⁰ The position is very crisply summarised by Jan Paulson in the *Idea of Arbitration* (FN 1 above) at p.45, FN 50.

the Paris Cour d'appel's analysis of French law, had it been available. Whether it would necessarily have bound us is a different question.

3. DIFFERENT THESES ABOUT THE ESSENCE OF ARBITRATION

Does the English approach to the seat give too little weight to the consensual basis of arbitration? Why should the seat have any special claim to control, or adjudicate upon the outcome of, consensual activity? Why should an award not be given effect in any way and by any process available in any other country of the world? Is this not the more international view of an international phenomenon? Views to this effect have been propounded in French case-law and doctrine. However, if one sees *Dallab* as a case where the views of the French courts of the seat should have prevailed, it is ironic that French courts and doctrine would not themselves allow the courts of the seat any such significance. The French law view is that an international arbitral award is “not anchored in any national legal order”, but “is a decision of international justice, whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought”. The quotation comes from the Cour de cassation in its well-known *Putrabali* decision of 29 June 2007, developing thinking in its earlier decisions in *Hilmartin Ltd v Sté Omnimium de traitement et de valorisation* (1994)¹¹ and *Société Pabalck v SA Norsolor* (1984)¹². By an international arbitration is evidently meant an arbitration with international commercial elements¹³.

Two previous lecturers in this series, with high credentials, have forcefully advocated a thesis of autonomous or transnational arbitration. Professor Julian Lew QC lectured in 2006 under the title *Achieving the Dream: Autonomous Arbitration*. In his view, the English courts should in the *Occidental* case have left well alone what he described as “an international award, between non-English parties, made by international arbitrators of different national origins” with a seat of arbitration which “was a mere

¹¹ 1^{ère} chambre civile, 23 mars 1994. According to a seminal article by Dr Francis Mann, the thinking can be traced back internationally to a Greek scholar who in 1960 suggested that parties might be able to “détacher l'arbitrage de tout ordre juridique et lui donner un caractère supranational” : Ref. Crit. 1960, 1, 14.

¹² 1^{ère} Chambre civile, 9 octobre 1984.

¹³ Article 1504 of the Code de procédure civile provides “Est international l'arbitrage que met en cause des intérêts du commerce international ».

coincidence”. To my mind, my distinguished predecessor’s criticisms should have been more appropriately addressed to the Arbitration Act 1996 than to his one-time pupil-master who sat on the Court, but I shall also suggest that they under-value the significance of a choice of seat.

The other lecturer is Emmanuel Gaillard, partner in Shearman and Sterling, arbitrator and professor at Paris XII. He looked last year at the players in the arbitral world. But he has argued extensively¹⁴, that international arbitration is rooted in and constitutes its own separate legal order, based on a general consensus on governing principles, which give it its own legitimacy, govern both procedural and substantive matters and are under-pinned by a “comparative law methodology”¹⁵.

On 8 July 2015, this thesis received renewed support from the Cour de cassation. This was in the unexpected context of the distinction in France between civil and administrative jurisdictions (*l’ordre judiciaire* and *la juridiction administrative*). Ryanair had obtained a London arbitration award against a French public body (“SMAC”) under French law contracts relating to airports in the Charente. SMAC maintained that the award violated French public procurement law. The Conseil d’État in April 2013 declined competence to set the award aside because of its foreign seat¹⁶, but expressed its view that any application for enforcement raising issues of French public policy would be for it to decide. The Paris Cour d’appel agreed. Reversing this decision, without even referring the matter to a Tribunal des conflits¹⁷, the Cour de cassation (in a judgment reputedly written by Judge Dominique Hascher) described the award as “an international award”, which was “not attached to any state legal order”, but was “a decision of international justice the regularity of which falls to be examined with regard to the rules applicable in the country where its recognition and execution are sought”. The Cour d’appel had

¹⁴ Very accessibly in *Legal Theory of International Arbitration*, 2010, based on a course given at the Hague Academy of International Law in the summer of 2007.

¹⁵ E.g. *Legal Theory of International Arbitration* (FN 1, above), p.77.

¹⁶ A Tribunal des conflits (see FN 16 below) had previously ruled that a challenge by INSERM (the French institute for health and medical research) to a French award made against it in favour of the Norwegian Fondation Letten F Saugstad on grounds of incompatibility with imperative rules of French public procurement law fell within the competence of the Conseil d’État, rather than the Cour de cassation (No 3754 of 17 May 2010).

¹⁷ A Tribunal des conflits is a tribunal composed, half and half, of representatives of both jurisdictions to resolve disputes as to their respective competence. Article 35 of a decree of 26 October 1849 provides that such a tribunal may be constituted when either the Conseil d’État or the la Cour de cassation is seised of a dispute « qui présente une question de compétence soulevant une difficulté sérieuse et mettant en jeu la séparation des autorités administratives et judiciaires. ». That no step was taken to constitute such a tribunal is perhaps even more notable in view of the previous decision of a Tribunal des conflits constituted at the instance of the Conseil d’État in the case *INSERM c Fondation Letten F Saugstad* (No 3754 of 17 May 2010) (FN 15 above).

violated the texts “constituting the international arbitral order”. The Cour de cassation identified these as the New York Convention and articles of the French Code of civil procedure governing international arbitration. It noted that these precluded any review of a foreign award on the merits (*au fond*). That goes without saying. But even the French code in article 1514 and of course the New York Convention in article V.2(b) refer to public policy as a potential ground for non-recognition of a foreign award. Presumably, the Cour de cassation viewed SMAC’s defence and any concerns which the Conseil d’État had on that score as unfounded. But its reasons do not address this explicitly.

Emmanuel Gaillard is reported, unsurprisingly, as heralding the Cour de cassation’s soaring reasoning as marking a “ground-breaking decision” in which “the court does not hesitate to acknowledge the existence of a true, autonomous, arbitral legal order”, adding that “in international arbitration, just as in any other field, concepts become reality when they shape the way in which the players, be they counsel, arbitrators or national judges, comprehend a situation”.

In his *Legal Theory of International Arbitration* (2010) (page 39) Emmanuel Gaillard explains his conception of an arbitral legal order:

“The term ‘arbitral legal order’ is only justified where it can describe a system that autonomously accounts for the source of the juridicity of international arbitration. Without the consistency offered by a system enjoying its own sources, there can be no legal order. Without autonomy vis-à-vis each national legal order, there can be no arbitral legal order.”

The reference to a system enjoying its own sources appears to postulate a coherent and consistent body of principles, independent of any particular national system, which exists or would find mutual acceptance among all those involved with arbitration across the world.

At a procedural level, Emmanuel Gaillard gives some impressive examples of arbitration tribunals whose members have, in reliance on international public policy, declined “to comply with an order issued by a court of the seat, in the fulfilment of the Tribunal’s larger duty to the parties”. This quotation is from a decision on jurisdiction issued on 7 December 2001 by a tribunal chaired by M. Gaillard himself in *Salini*

Costruttori SpA v Federal Democratic Republic of Ethiopia. There, the tribunal, in an arbitration of which the seat was Addis Ababa, maintained a previous decision to hold the arbitration physically in Paris, and declined to obey injunctions of the Ethiopian courts purporting to stay the arbitration pending further decisions of those courts. A refusal of this nature certainly witnesses, in one very practical sense, the international nature of arbitration. It is unlikely to be wise if the arbitrators are closely connected with, or have any need or wish to visit, the country of the seat.

That aside, there is something noble, as well as bold, about a decision taken in the higher interests of justice and of the parties' agreement to ignore a court order made by the court of the seat. Such a decision may be presented as giving effect to the parties' intentions. Court involvement was what they hoped to avoid. Why should the arbitration they initiated depend for its legitimacy or pursuit on the attitude of any court? And at which court or courts would it anyway be appropriate to look? The transnationalists go on to argue that the court of the seat may have, and have been chosen because it has, nothing to do with the parties or their assets. A court of enforcement may also depend on the haphazard presence of assets long after any award.

4. HOW FAR CAN AND SHOULD ANY OF THESE THESES BE ACCEPTED?

Although Emmanuel Gaillard would I think disagree, his reference to "the consistency offered by a system enjoying its own sources" has at core a flavour of natural law or *lex mercatoria* thinking. I am sceptical about the ability even of the world's arbitration community to agree on common transnational principles to govern all the multi-faceted disputes which come before them. We may each of us as individuals be confident of our ability to act, if asked, as amiable compositeur or to decide according to justice and equity. But that does not mean that we would agree on the principles to adopt or the outcome. Europe has in recent years seen interesting and inspiring attempts to agree common principles of

contract, tort, property, insurance, etc. But each proposal has met with as much disagreement as agreement¹⁸.

In arbitration, the ad hoc nature of arbitration and its finality and privacy militate against overall consistency. No general means as yet exist to ensure that arbitral decisions are consistent¹⁹. In bilateral investment arbitration, there is nowadays more openness, but it too appears to be a field where decision-making by different tribunals may differ (on central points such as what is an investment and what amounts to fair and equitable treatment)²⁰.

Recognising the potential for argument about what common transnational principles might be, some authors suggest that lack of consensus about what is, for example, corruption and how to tackle it “does not mean that the fight against corruption should not have a natural force and be recognised as a principle of transnational public policy”²¹. This more or less admits that transnational justice cannot claim the general consensus about principles and rules which is the hallmark of a legal system. That we – and hopefully most legal systems - share certain fundamental conceptions of justice is beside the point. Thus, there are disputes which one would expect or hope that it would be against any law to litigate or arbitrate – the division of spoils between two highwaymen or (to update the example) between money launderers would be an example. No arbitrator can be taken to have agreed to arbitrate such subjects, with the result that, when he learns that this is what the arbitration is about, he can and should resign. And no arbitrator can be taken to have agreed to undertake a task which would involve committing or

¹⁸ Having followed over the eleven years the European Commission’s efforts to promote common principles of contract law which could be suitable for at least optional use within the EU, and seen how every set of proposals has been swiftly and effectively challenged as inappropriate in principle or unworkable in practice, I may be forgiven some scepticism.

¹⁹ In a recent table ronde organised by the Conseil d’Etat and Cour de cassation, Professor Catherine Kessedjian of the University of Panthéon-Assas (Paris II) was I believe expressing a similar scepticism, when she observed that “arbitral practice in the field of commercial arbitration is in large measure little known because it is not published and it is conserved, by certain arbitral institutions, for a small number of initiates who alone have the right to know this practice” – it was “en grande partie méconnue car non publiée et conservée, par certaines institutions d’arbitrage, pour un petit nombre d’initiés qui seuls ont le droit de connaître cette pratique”.

²⁰ The Chief Justice of Singapore, The Hon Sundaresh Menon SC, said in his keynote address to the ICCA conference in Singapore in 2012 that the body of substantive law with a public or administrative law character which has emerged over the last 15 or so years in the area of bilateral investment treaty arbitration suffers “from a lack of coherence and consistency because its development has been piecemeal” and that “With no central organising structure or underlying appellate control and no doctrine of binding precedent, the results are often conflicting”. That might of course change if, for example investor-state arbitrations began to be resolved by publicly appointed investment courts, with a process of appeal to permanent appeal courts as proposed by the European Commission in its latest negotiating text concerning TTIP . But we are a long way from any such general development.

²¹ Yasmine Lahiou and Marina Matousekova in *The role of the arbitrator in combating corruption* [2012] I.B.L.J. 621, 630. The authors also argue (p.628) that certain principles have such force that, where corruption is concerned, arbitrators may be constrained to seek the proper solution “beyond the parties’ choice of law”.

giving effect to an offence in the law of the seat or any state where the arbitrator may have to perform his or her duties. One does not need a thesis of a separate arbitral order underpinned by transnational legal principles to reach such conclusions.

What then of autonomy from any national legal order in other respects? In his 2010 book, Emmanuel Gaillard recognises that arbitration may not satisfy the criteria of law or of a legal system suggested by Professor Herbert Hart²². We cannot easily speak of officers of an autonomous arbitral world who accept and apply rules of recognition which specify the criteria for valid arbitral laws accepted by citizens of the arbitral world. Who would be the officers and who the citizens? Emmanuel Gaillard argues for a more realist or Holmesian view, affirming the existence of an international arbitral order because of the effect given to arbitration by the actors involved and by states. I offer six points.

First of all, there is here, I think, a linguistic problem. We know that words mean different things in different contexts²³. But there are some limits. In the context of *Liversidge v Anderson*, history has favoured Lord Atkin when he dissented from Humpty Dumpty's proposition that "When I use a word, it means just what I choose it to mean — neither more nor less"²⁴. Party autonomy and consent certainly have both a recognised value and recognised effects – but these do not amount to, and can exist quite independently of, the law. Parties who agree something will, if honourable, respect their agreement, without more. Even if they are not intrinsically honourable, peer, industry or regulatory pressure may make them do so, without the law entering into it. Much old-fashioned arbitration in esoteric areas like reinsurance took place under this convention, without the parties dreaming that it would ever be necessary to go to court for any purpose. It would in theory also be perfectly possible to agree to arbitrate, on the basis that nothing done or concluded will be legally binding. Consumer references to the United Kingdom's Financial Ombudsman Service operate on that basis, as regards the consumer.

²² In *The Concept of Law*, 2nd ed. (Clarendon Law Series).

²³ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

²⁴ In Lewis Carroll's *Alice through the Looking Glass*, Chapter 9.

One might describe self-accepted and self-executing values and effects of this sort as a sort of party-agreed law, but it would over-stretch the concept of law. In practice, parties who agree to arbitrate look for the more solid underpinning provided by available court assistance and enforcement. Despite Emmanuel Gaillard's subtle exposition, I do not see how a system of arbitration that relies essentially on that underpinning can itself be regarded as "a separate arbitral legal order". Even if an award is seen as valid in one country, but invalid in another, that does not to my mind establish autonomy. It merely confirms the award's dependence upon recognition by at least one national legal system.

A second problem about treating international arbitration as not anchored in or even attached to any state legal order, is that this depends upon adopting the language and analysis of a particular legal system, the French. Whatever the law of the seat or elsewhere might provide, French law judges the validity and effect of international arbitration agreements by transnational standards of its own creation²⁵. Now French private international law is a matter for the French legislature and courts. When the Brussels Regulation was recently recast²⁶, France and the United Kingdom joined to resist any further incursion of EU law into the world of arbitration. But the French approach is a mix of parochialism and universalism – parochialism since French law looks at international arbitration only through its own eyes, universalism since it insists that its own standards applying to all international arbitration. In terms of the comity of nations, this approach is a large step backwards. And it cannot claim a consensus.

A third problem about treating arbitration as independent of any national legal system, particularly the law of the seat, is this appears irreconcilable with the New York Convention. The Cour de cassation in *Putrabali* thought it could avoid this problem, by relying on article VII of that Convention. Article VII provides that the earlier articles do 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" of the enforcing court. The Court de cassation viewed this as enabling it to apply articles of the French Code of Civil Procedure

²⁵ The French law position in this respect is discussed in *Dallab*, para 19, citing from Professor Pierre Mayer's note in [1990] Rev. Arb. 675 and Poudret & Besson's *Comparative Law of International Arbitration* (2d ed) (2007), para 180, itself cited in the *Dallab* case, [2010] UKSC 46, [2011] AC 763, paras 16 and 115. French law treats international arbitration as outside the scope of article 2061 of the French Civil Code, which it thereby confines to domestic arbitrations.

²⁶ Council Regulation (EU) No 1215/2012.

which provide for enforcement of foreign awards without specifying the setting aside of an award at its seat as a cause for non-recognition²⁷. The drafters cannot have envisaged this by article VII. The Cour de cassation's view undermines the scheme of articles III to VI of the Convention. If there is any flexibility enabling an award set aside at the seat to be granted recognition and enforcement in a foreign court, it should be found not in article VII but in the positive provisions of article V, which provide that recognition and enforcement of an award set aside at the seat "may" be refused in specified situations which it then sets out and which include reference to the public policy of the enforcing state.

Fourthly, Emmanuel Gaillard is correct that arbitrators differ from judges in that they do not administer justice as an organ, on behalf or in the name of any state. But it does not follow that they administer justice as part of a separate legal system. Although consent is the hallmark of arbitration, we should not forget that consent is also a common basis of court jurisdiction²⁸. Even judges depend, though in a differing degree to arbitrators, on other bodies to recognise and enforce their decisions. Domestically, in countries subject to the rule of law, it is axiomatic that the state will recognise and enforce decisions of its own courts. Arbitrators, not being an arm of the state, depend on laws to that effect. But for court decisions to have any relevance abroad, arrangements must be made with other states, whether by treaty, statute or common law. Claimants who bring claims before common law courts, with broad powers to authorise service out of the jurisdiction, sometimes find that they have overstretched internationally. The fruits of success may be difficult to reach abroad, if the defendant does not submit to the domestic jurisdiction. So even judicial authority is, like arbitral decision-making – and the universe generally, relative. We do not suggest that this means that court authority needs further explanation in the form of some underlying international consensus or legal order. Arbitration is merely a more extreme case.

²⁷ In its recent judgment in the litigation between Ryanair and SMAC the Cour de cassation also identified the relevant "international legal order" as consisting in the texts of article VII as well as articles III and V of the New York Convention and article 1516 of the French Code of civil procedure.

²⁸ It is not of course the only basis and the world to date has given a choice of court agreement less weight than an agreement to arbitrate. There is a notable absence for judgments of any worldwide equivalent to the New York Convention. In parenthesis, that may of course change, if the Hague Choice of Court Convention 2005 receives the recognition it deserves. With the European Union's recent ratification, the Convention will enter into force on 1 October 2015. Mexico so far the only other party ratifying, but the only other signatories to date, Singapore and the United States, will hopefully not be far behind.

Fifth, any thesis which severs or denies that the existence of a special link between an arbitration and its seat conflicts with, rather than promotes party autonomy. Where parties choose, or allow an institution or the arbitrators to choose on their behalf, a particular seat, how can they disclaim the attitude of the law of that seat? As noted, the English Arbitration Act 1996 operates on the basis that an arbitration must have a seat. If England is the seat, the 1996 Act provides for the possibility of an appeal on a point of law, unless the parties have otherwise agreed. A theory of international arbitration which looks only to the award, and ignore the attitude of the law of the chosen seat to the award upon such an appeal, undermines the parties' agreement. Jan Paulsson criticises the United States' federal courts for referring to the "primary" jurisdiction of courts of the seat²⁹. But I think there were justified in doing so.

Take the Cour de cassation's *Putrabali* decision. It concerned a trade (GAFTA) arbitration in London. Putrabali, a seller of white pepper, failed under a first award dated 10 April 2001 to recover any part of the price from the buyer, Rena. It succeeded in having the award set aside in part after appealing on a point of law to the English Commercial Court under the Arbitration Act 1996. On the remission for rehearing, the tribunal on 21 August 2003 substituted a fresh award bearing the same number, but now awarding Putrabali 163,000 Euros.

Rena's cunning riposte to this unfavourable turn of events was to seek and on 30 September 2003 to obtain exequatur or enforcement of the first 2001 award in France. Only on 10 February 2004 did Putrabali obtain enforcement of the second award. Too late. The Cour d'appel, upheld by the Cour de cassation, sustained Rena's enforcement of the first award and set aside Putrabali's enforcement of the second award³⁰. I have already indicated my view that the French courts' reliance on article VII to use national law to justify enforcement was a clear distortion of the general scheme of the Convention.

So Rena's cunning riposte triumphed. The fact that it had agreed London arbitration, fought and lost Putrabali's High Court challenge to the first award, presumably fought and lost a rehearing before the

²⁹ See *The Idea of Arbitration* (op cit FN 1 above) p.36.

³⁰ The enforcement of the second award was set aside on the basis that the enforcement of the first award gave rise to *res judicata* (*l'autorité de la chose jugée*). Similar reasoning led the Cour de cassation to refuse recognition of a second award issued to replace the first award set aside at the seat in the *Hilmartin* case (Footnote 10 above): see 1^{ère} chambre civile, 10 juin 1997.

arbitration tribunal and waited until then before seeking exequatur in France of the first award exonerating it from liability all passed for nothing. If this is what an autonomous arbitral order involves, its effects are idiosyncratic and fragmenting, if not infamous. It is interesting to note in passing that Dominique Hascher himself, in his earlier capacity as General Counsel and Deputy Secretary General of the ICC Court of Arbitration, wrote in 1996 of “the chaos that results for [i.e. *from*] the disregard of a decision to nullify the award”³¹.

Of course there are cases where courts of the seat – a seat for better or worse chosen by the parties – interfere or try to interfere unacceptably with arbitral proceedings. But they are hopefully exceptional. As I hope to show, exceptional cases can, I believe, be catered for under the language of the New York Convention without subverting its general scheme³².

Finally, I see a basic inconsistency at the heart of the thesis that internationalism requires one to ignore the law of the seat. It invokes a unified order, but at the same time leads to disunity. What the world needs today is, I suggest, greater coordination and coherence between different legal systems – more, rather than less, mutual recognition and enforcement of each other’s decisions. The European Union has added significantly to this within the sphere of the Brussels Regulation and Lugano Convention. The Choice of Court Convention is a promising new arrival on the scene. Developments like the Singapore International Court are in the same sense very welcome. The thesis of a detached arbitral system taking no account of the law of the seat is divisive, when we should be holistic.

³¹ *Recognition and Enforcement of Arbitration Awards and the Brussels Convention*, *Arb Int*, Vol 12, No. 3, 233, 265.

³² Even apparently striking cases like *Salini Costruttori SpA v Federal Democratic Republic of Ethiopia*, where the Ethiopian courts sought to injunct the pursuit of the arbitration by Emmanuel Gaillard and his co-arbitrators, are worth looking at in closer detail, to see if what happened in Ethiopia was really so insupportable, or necessarily justified the arbitrators’ response. A close study in a paper by Eric A Schwartz, entitled *Do Arbitrators have a duty to obey the orders of courts at the place of the arbitration? Reflections on the role of the Lex loci arbitri in the light of a recent ICC award* suggests that this is not clear. The parties had chosen Ethiopia as the seat of the arbitration and the FIDIC General Conditions which provide for ICC arbitration of disputes “unless otherwise specified in the Contract”, but they had also expressly stipulated that “The rules of arbitration shall be the Civil Code of Ethiopia under Article 3325 et seq (Arbitral Submission)”. It was in issue whether the choice of the Ethiopian Code excluded ICC arbitration. The Republic resisted the jurisdiction of the tribunal constituted by the ICC on this ground. The tribunal decided, purportedly under the ICC Rules, that it would hold a hearing in Paris. The Republic challenged this as unfair. Article 3342 of the Ethiopian Civil Code expressly permits appeals from arbitrators to the courts. The Ethiopian courts granted the Republic injunctions suspending pursuit of the arbitration, pending determination of the issues of jurisdiction and fairness. In these circumstances, it is not clear that the arbitrators were, by going ahead under the ICC rules, giving effect to the parties’ real agreement, as opposed to deciding for themselves what the agreement was, in circumstances when the parties had on any view agreed a seat and a law, the Civil Code, which might be thought to have assigned that decision to the Ethiopian courts.

5. THE SOUND APPROACH

In short, the English view is in my opinion a principled one. Decisions of the court of the seat are decisions which the parties must, on the face of it, be taken to have accepted when that seat was chosen, and should in the ordinary case be treated as final and binding. This is what the Arbitration Act 1996 contemplates in England. More importantly, it is what the New York Convention contemplates, at least as the norm:

in Article V.1(a), providing for non-recognition of an award made under an arbitration agreement which “is not valid under the law to which the parties have subjected it”, since that law will almost invariably be the law of the seat;

in Article V.1(e), providing for non-enforcement of an award which “has not yet become binding on the parties, or has been set aside or suspended by a competent authority” in the country or under the law of the seat; and

in article VI, providing for the possibility of a stay of enforcement pending an application to set aside or suspend an award to such an authority.

What the parties must be taken to have contemplated is particularly important, because it meets the transnationalists and those who give no particular weight to the seat on their own ground. They are the advocates of party autonomy and of giving effect to the parties’ agreement to arbitrate. On the face of it, parties who agree a particular seat deliberately submit themselves to the law of the seat and whatever controls it exerts. They do this in the interests of certainty. This may be a more parochial vision of arbitration than romantic transnationalism. But I believe it to be more realistic.

It could be interesting here to look at some customer research. Jan Paulsson, with much more direct experience than I, writes that “the putative ‘primary’ jurisdiction is often chosen either fortuitously, or precisely because of its *lack* of connection with the dispute”³³. One hears of the tireless travel and

³³ In *The Idea of Arbitration* (op cit, FN 1 above), p.36.

geographical dislocation in the life of the modern arbitrator, of arbitrations in featureless hotel rooms or institutions giving no clue to outside climate or culture. It sounds depressing. Having attended an ICCA conference, with excellent after-parties in surroundings sensibly located in a seat where attendees could also conduct a few arbitration hearings in the margin of the conference, it is probably also untrue. I question how often the seat of arbitration is fortuitous. Particularly under systems like the English, where the place and seat of arbitration can be differentiated, one would expect the seat to be chosen for good legal reasons, not just for hotel convenience or as a good place to dine or party. That this is increasingly understood appears to be confirmed by a comparison of the Queen Mary International Arbitration Surveys conducted in 2006 and 2015. The former suggested that in 2006 seats may have been chosen as much for convenience as legal relevance, whereas the latter indicated that in 2015:

“preferences for seats are predominantly based on users’ appraisal of the seat’s established formal legal infrastructure: the neutrality and impartiality of the legal system; the national arbitration law; and its track record for enforcing agreements to arbitrate and arbitral awards

On this basis, the 2015 Survey concludes, and I agree, that:

“The importance of selecting a suitable seat for an international arbitration cannot be overstated. The choice of seat impacts arbitral proceedings in various ways, such as the level and nature of the supervisory jurisdiction of the domestic courts of the seat”³⁴.

6. WHAT THEN IS THE POSITION IF AN AWARD IS SET ASIDE AT ITS SEAT?

The possible answers lie on a spectrum. A rigidly territorial approach would treat the international validity of an award as linked inseparably to its domestic validity in the law of the seat. The opposite French approach would mean that no account whatever was taken of an award’s validity at its domestic

³⁴ Chief Justice Allsop of the Full Court of the Federal Court of Australia was surely right to stress in his Keynote Speech to the 2nd Annual Global Arbitration Review in Sydney in November 2014 that

“The quality and legal culture of the court of the seat of any arbitration is critical. The court of the seat has a crucial role in the supervision of the procedural conduct of the reference and thus of its fairness.”

seat. In a recent *Clash of the Singapore Titans* between Chief Justice Menon and Gary Born, as President of the Singapore International Arbitration Centre, the former is saying that “there is something to be said for the territorial approach”, to which the latter is reported as responding that “There is indeed something to be said for the territorial approach. From my perspective, that something is that we should reject it, and reject it emphatically”³⁵. For my part, there is more to be said for the territorial approach than its French opposite. However, the true position may lie in between³⁶.

English authority suggests that there can be exceptional circumstances in which the setting aside of an award in its seat need not prevent its enforcement in another state. This is not because English courts have suddenly begun to see attractions in the French approach or in article VII of the New York Convention. Rather, it is for a reason grounded more solidly in the Convention – the perceived flexibility of the word “may” in the English version of article V.1, carried through into section 103(2) of the 1996 Act.

Under article V.1, recognition and enforcement “may be refused only if” one of the specified situations applies. These include in (e):

“The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”.

There is nothing in this wording to distinguish between setting aside by a court of the seat on purely domestic grounds, e.g. after an appeal on English law under section 69 of the 1996 Act, and setting aside on grounds that might find more international resonance. So there is no support for a qualified version of the French view according to which an enforcing court could disregard setting aside by the courts of the seat under article V.1(e), if this occurs on purely domestic grounds, not reflected at the international

³⁵ Text as reported in a Global Arbitration Review article of 12 October 2015.

³⁶ In *Enforcement of annulled awards: logical fallacies and fictional systems* (2013) Arbitration 244, M D Holmes is basically sympathetic to a territorial approach, but ultimately suggests that “Such decisions often turn on facts which suggest that the annulment is at best a ‘purported annulment’ that lacks validity or legitimacy”. But this itself opens up a middle ground, leading to the critical question: when is a (purported) annulment not valid, legitimate or real?

level in article V.1(a) to (d)³⁷. The real question is whether a provision that enforcement may only be refused in certain situations means that it must be refused if one of such situations exists? Of the other equally authentic languages, neither the Spanish nor the French texts - nor according to Gary Born the Russian or Chinese texts - helps. But two points suggest that it allows a degree of flexibility.

The first is that, in article 2 of the predecessor Convention on the Execution of Foreign Arbitration Awards of 1927, the equivalent word used was “shall”³⁸, and during negotiations for the 1958 Convention the word “shall” became “may”. The second pointer lies in the other situations covered by Article V. Minor failures to comply with the law or procedure of the seat might, for example, well appear immaterial at an international level.

What then are the situations in which the word “may” might be significant? The Court of Appeal noted in *Dardana Ltd v Yukos Oil Co Ltd*³⁹ that it cannot have a purely discretionary (or arbitrary) force. We suggested that it must have been intended to cater for situations where the right to rely on such situations had been lost by, for example, subsequent agreement or waiver.

In *Dallah*⁴⁰, Lord Collins went further. He suggested that “may” could be relevant if an enforcing state concluded that the only reason why an arbitration agreement was invalid under the law of the seat was some foreign law outraging the enforcing court’s sense of justice or decency, for example a discriminatory or arbitrary law. This takes one back to the House of Lords’ refusal in *Oppenheimer v Cattermole*⁴¹ to recognise the Nuremburg race laws of 1935, or its refusal in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*⁴² to recognise the Iraqi law which, in clear breach of Security Council Resolutions

³⁷ The UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2005) has a similar provision in article 36(1)(a)(v), dealing with the international recognition of awards, but does not provide for setting aside on purely domestic grounds in article 34(2), dealing basically with setting aside at the law of the seat. This might lend support to an argument that article 36(1)(a)(v) should be limited in application to setting aside on one of the limited grounds identified in article 34(2).

³⁸ Article 2 read: “Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:—

(a) That the award has been annulled in the country in which it was made;
(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
(c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.”

³⁹ [2002] EWCA Civ 543, [2002] 2 Lloyd’s Rep 326, para 8 (see also *Dallah*, para 67)

⁴⁰ Para 128.

⁴¹ [1976] AC 249.

⁴² [2002] UKHL 19, [2002] 2 AC 883.

under Chapter VII of the UN Charter, had handed over to Iraqi Airways the Kuwait Airways aviation fleet after its removal to Iraq by Iraqi forces. On Lord Collins' analysis, the word "may" introduces a certain balance. Just as article V.2(b) recognises that the recognition or enforcement of a foreign award may be contrary to public policy, so the common law recognises that the recognition or enforcement of a foreign judgment may be contrary to public policy, at least if the foreign judgment was based on the sort of opprobrious foreign law which, exceptionally, a United Kingdom court will disregard.

Could a corrupt court decision setting aside an award also be disregarded and the award recognised and enforced? Foreign judicial acts have been seen as a category outside the foreign act of state doctrine. On that basis, although great caution is always necessary, there is no taboo against determining disputed factual issues and giving effect to cogent evidence proving that a foreign court decision is the outcome of fraud, corruption or political influence. "Otherwise", as the Privy Council said in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*⁴³:

"the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it."⁴⁴

Thus, David Steel J held in *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya Naftogaz Ukrainy*⁴⁵ that it was possible to recognise a first-instance judgment which had been set aside on appeal, by denying the appellate judgment recognition. He said:

"The issue is not so much the enforcement of the original judgment but the recognition of the judgment setting it aside. If the judgment setting aside the judgment of the lower court lacked due process then the default judgment [enforcing the foreign lower court judgment] will stand It is well established that a foreign judgment is impeachable on the ground that

⁴³ [2011] UKPC 7.

⁴⁴ In para 9, the Privy Council stressed that "Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required."

⁴⁵ [2011] EWHC 1820 (Comm). The decision was upheld on a narrower ground, but with provisional expressions of view in favour of David Steel's reasoning, at [2012] EWCA Civ 196.

its recognition would be contrary to public policy: Dicey & Morris: The Conflict of Laws, 14th Ed, Rule 44.”

Two further decisions in the saga of Yukos Oil Co’s demise examine the issue in relation to foreign awards. First, in *Yukos Capital Sarl v OJSC Rosneft Oil Co. (No 2)*⁴⁶, the Court of Appeal held, following *AK Investment*, that the act of state doctrine did not itself preclude enquiry into whether decisions of the Russian courts setting aside four awards made in favour of Yukos by a tribunal with a Russian seat had resulted from political instructions or influence⁴⁷. Secondly and more recently in the same case⁴⁸ Simon J squarely addressed the question whether, if the court decisions had resulted from political instructions or influence, the awards must still be regarded as a nullity. Relying on Professor Albert van Berg’s aphorism, OJSC argued *ex nihilo nil fit*⁴⁹. But, following David Steel J’s reasoning, Simon J concluded that an enforcement court could treat an award as having legal effect notwithstanding a later order of the court of the seat setting it aside, if recognition of the foreign court decision would offend “against basic principles of honesty, natural justice and domestic concepts of public policy”⁵⁰.

The current English view is therefore that a foreign enforcing court may, consistently with the New York Convention, take a different view of an award to that taken by the law and courts of the seat, by relying on the word “may” in article V.1⁵¹. But this is only in exceptional circumstances when justified on some recognised common law principle, and not as a matter of open discretion. In other circumstances, a decision of the law and courts of the seat setting aside an award will prevail.

⁴⁶ (No 2) [2012] EWCA Civ 855, [2014] QB 458.

⁴⁷ Yukos’s pleaded case was that the Moscow court decisions were tainted by bias, contrary to natural justice, perverse and part of an illegitimate campaign by the Russian Federation against Yukos for political reasons.

⁴⁸ [2014] EWHC 2188 (Comm), [2014] 2 Lloyd’s Rep 435.

⁴⁹ *Enforcement of Annulled Awards?* (1998) 9 ICC Int’l Ct Arb Bull 16, *Enforcement of Arbitral Awards Annulled in Russia* (2010) Journal of Int’l Arb 27(2) 179, 189.

⁵⁰ The position adopted by Simon J appears to have first been advanced by Professor William Park in a 1999 article, *Duty and Discretion in International Arbitration*, 93 Am. J. Int’l L. 805 1999, which the author kindly drew to my attention while this text was being prepared for publication.

⁵¹ Gary Born in his recent remarks in Singapore and Jan Paulsson in his book cite the United States Court of Appeals for the District of Columbia Circuit decision in *Termorio SA ESP v Electranta SP* (25 May 2007) as an illustration of a case where the enforcing court should have ignored the attitude of the law and courts of the seat. An ICC award under a clause providing for binding arbitration under ICC rules in Colombia had been set aside by the Colombian courts on the unsatisfactory ground that Colombian law did not expressly permit the use of ICC procedural rules in arbitration. Colombia was committed internationally under article II(1) of the New York Convention to recognise agreements in writing to submit differences to arbitration, The Court of Appeals refused nonetheless to recognise the award. Whether the parties should have known of Colombian law’s attitude to ICC rules is not clear. Assuming they had no reason to know, one can understand the view that the Court of Appeals might have treated so fundamental a breach of international policy and of Colombia’s international commitments as a ground for refusing, exceptionally, to recognise the Colombian court decision.

7. WHAT ABOUT DECISIONS OF THE COURT OF THE SEAT UPHOLDING (OR OF ANY OTHER COURT RECOGNISING OR ENFORCING) AN AWARD?

If other courts should normally recognise decisions of the court of the seat to set aside, what about decisions of the court of the seat upholding an award? The question assumes that the party losing under the award has sought unsuccessfully to challenge the award in the court of the seat, rather than await the attempt to enforce abroad and resist enforcement there under article V.

The New York Convention does not give a direct answer to the question. Some of the grounds in article V for resisting enforcement are or may be grounds that can only be raised in the enforcement court. Take, for example, article V.2, which refers to situations where the subject matter is not arbitrable, or where enforcement would conflict with public policy under the law of the enforcement court.

The grounds to in Article V.1 differ. They are all grounds which the losing respondent either raised or could have been expected to raise in any proceedings, if there were any, in courts of the seat. If the courts of the seat ruled against the respondent, why should the respondent have a bite at a second cherry? The question can be extended: if the court of *any* other state, even though not it is the court of the seat, has ruled against the respondent on such grounds, why should the respondent be able to trawl round the world, hoping to do better in some other jurisdiction?

As a starting point, one would expect any enforcement court, in today's world, to pay attention to the reasoning and decision of any other court, particularly the court of the seat, on an issue coming before it. Colman J said precisely this in *Minmetals Germany GmbH v Ferco Steel Ltd*⁵². His approach has been strongly endorsed in other jurisdictions, including Singapore⁵³, Hong Kong⁵⁴ and Australia⁵⁵. A further possible tool in the armoury of common law enforcement court is abuse of process. It is by definition a discretionary power exercisable only in a clear case of attempted re-litigation of an issue already fully and

⁵² [1999] 1 AER (Comm) 315.

⁵³ *Newspeed Int'l Ltd v Citus Tracking Pte Ltd* OS No 600044, where the judge at first instance went so far as to say that two bites at the cherry were inadmissible.

⁵⁴ *Hebei Import and Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111.

⁵⁵ *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109.

regularly litigated before another court and also only exercisable after taking all the circumstances into account: *Owens Bank v Bracco*⁵⁶.

Differing views are expressed in these cases whether the respect due to a prior court decision on a particular issue may be clothed in the even stronger language of estoppel. This is controversial, because of the perceived greater inflexibility of estoppel and because not all courts have it in their armoury. Nonetheless, in *Diag Human Se v The Czech Republic* [2014] EWHC 1639, Eder J (as he then was) held that an Austrian court decision to refuse enforcement of a Czech award on the ground that the award was not binding gave rise to an issue estoppel on a later attempt to enforce the same award in England⁵⁷. He rejected counsel's submissions that what was binding might vary from enforcing state to enforcing state, and that the New York Convention excludes any possibility of estoppel, because it contemplates the possibility of an award creditor seeking to forum shop or enforce in multiple jurisdictions.

Ultimately, it may not matter how the matter is approached. Even issue estoppel is itself a flexible tool in the context of foreign proceedings. It is sensitive to over-riding considerations of justice: *Good Challenger Navegante SA v Metalexportimport SA*⁵⁸. Whatever the position regarding estoppel, I believe that most, even if not all, courts see themselves today as part of an international legal order – and rightly so. We should respect each other's decisions in the fullest sense, and so far as possible avoid duplication, repetition and inconsistency in decision-making. In *Dallah*, as I have said, if the decision of the Paris Cour d'appel had preceded ours, it would have received the closest attention.

The relevance of a prior decision of course depends on the identity of the issues. For that reason, in *Yukos Capital SarL v OJSC Oil Co. Rosneft* [2013] 1 WLR 1329, the Court of Appeal held that no issue estoppel could result from a previous decision of the Dutch courts refusing on public policy grounds under Article V.2(b) of the New York Convention to recognise the Moscow court decisions setting aside the four arbitration awards. Rightly or wrongly, it regarded public policy as inherently a matter on which

⁵⁶ [1992] 2 AC 443.

⁵⁷ In so deciding, Eder J was applying an approach endorsed, despite my best efforts to the contrary as counsel, by the House of Lords in *The Sennar* (No 2) [1985] 1 WLR 499.

⁵⁸ [2003] EWCA Civ 1668.

each state and its courts may take different views. The issue had thus to be re-litigated in England. In *Hebei Import & Export Corp v Polytek Engineering Co Ltd*⁵⁹, Bokary JA considered whether public policy in this context meant some public policy common to all civilised nations, or those elements of a state's own public policy which are so fundamental that its courts feel obliged to apply them not only to purely internal matters but also to matters with a foreign element by which other States are affected. He answered his own question in favour of the latter analysis, taking the view that a search for the former would be impossible of achievement. He at any rate was not convinced that it was possible to identify transnational or universal standards of public policy⁶⁰.

8. ORDERS TO PREVENT OR SUPPORT ARBITRATION

The theme of this talk is that a degree of order and coordination is necessary, if both arbitration and litigation are to be conducted efficiently and economically in a globalised world. Injunctions are a particularly brutal intervention - and not surprisingly resisted in arbitration circles - when issued to restrain arbitration. Even where a court of the seat issues the injunction, it is likely to infringe the beneficial principle that arbitrators should be given the first opportunity to rule on their own jurisdiction. Where a court of a third state does so, it is even more problematic. Emmanuel Gaillard gives some dramatic examples of inappropriate injunctions.

But court intervention is not always inappropriate. Take an injunction issued by the courts of the seat or potential seat restraining proceedings *inconsistent* with an arbitration clause⁶¹. English courts retain power to injunct proceedings brought outside the EU/Lugano area in breach of a London arbitration

⁵⁹ (1999) HKCFAR 111.

⁶⁰ In a judgment dated 29 July 2015 in the case of *X1 and X2 v Y1 and Y2* in the Dubai International Financial Centre Court of First Instance, Justice Sir Anthony Colman cited the UNCITRAL Digest of Case Law for what he described as the general international approach to the public policy exception under article V.2(b), viz that it should be applied "only if the arbitral award fundamentally offended against the most basic and explicit principles of justice and fairness in the enforcement State, or evidences intolerable ignorance or corruption on the part of the arbitral tribunal". See also ARB 003/2013 *Banyan Tree Corporate Pte Ltd v Meydan Group LLC* (2 April 2015) in the same Court before Justice Omar Al Muhairi, to like effect.

⁶¹ This is less publicised because largely confined to common law jurisdictions. Within the European Union, such injunctions are now prohibited as inconsistent with mutual trust between member states' legal systems: Case C-185/07 *Allianz SpA v West Tankers SA*.

clause: *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35⁶². The efficacy and value of such support seems to me clear.

Courts of the seat assist arbitration in all sorts of other ways, including by appointing arbitrators and making available the state's coercive powers to enforce arbitral orders. Perhaps there are advantages in recognising them as collaborators, rather than as unwelcome interferers in a separate arbitral order. Courts, as Michael Hwang said in his 2014 Clayton Utz University of Sydney International Arbitration Lecture, "should supervise with a light touch but assist with a strong hand". It is unrealistic, and I think unwise, to expect the latter without the former.

9. IN CONCLUSION

Let me draw together some themes:

An unfortunate difference in attitude has developed between common law and French civil law and between different strands of doctrinal thought as regards the fundamental basis of arbitration.

I question both the coherence and the wisdom of theses advocating an independent or transnational system of arbitration, while detaching this from the web of existing legal systems whose inter-relationship is well established by rules of private or public international law and treaties.

Arbitration already faces problems in maintaining coherence in its own jurisprudence and confidence in its efficacy and appropriateness as a dispute-resolution mechanism. I suggest that these could be exacerbated, if either arbitration or courts dealing with arbitration issues seek to declare unilateral independence.

⁶² The Supreme Court held (para 1): "An agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever forum is prescribed. The (often silent) concomitant is that neither party will seek such relief in any other forum."

Parties can be taken generally to have submitted themselves to decisions of the court of the seat which has been chosen by them or by an institution chosen by them. Even decisions of other courts on identical issues merit closest consideration.

In short, an increasingly inter-connected world needs mutually supportive and inter-related systems for the administration of law, not more legal systems. Arbitration already offers those engaging in it very substantial autonomy. Siren calls for complete or yet further autonomy should be viewed with scepticism. We – judges, arbitrators and lawyers – are engaged in a common exercise, the administration of justice for the benefit of litigants and society. A degree of order, coordination and inter-dependence is necessary and desirable, if this exercise is to be conducted efficiently and economically in a globalised world.