

## B. Judicial Supervision as Risk Management

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### *QUIS CUSTODIET IPSOS CUSTODES?*<sup>1</sup>

The genesis of the material in this section derives from a decades-old debate about the extent to which an arbitral award's validity should depend on the law of the country where the proceedings are held. The problem is complex not only because it implicates several legal systems, but also because the place of arbitration sometimes represents a legal fiction.<sup>2</sup> An "arbitral seat" is often designated (by the contract or the arbitral institution) to serve as the official venue at which the award is deemed made,<sup>3</sup> notwithstanding that hearings and deliberations unfold elsewhere for the convenience of witnesses, counsel, and arbitrators.<sup>4</sup>

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<sup>1</sup> The context for this well-known line from Juvenal's Sixth Satire has been all but forgotten, perhaps wisely so. In suggesting that husbands lock up their wives to safeguard their chastity (seemingly a preoccupation in ancient Rome) Juvenal slyly adds, "But who will guard the guards themselves? Your wife is as cunning as you, and begins with them." *Sed quis custodiet ipsos Custodes? Cauta est et ab illis incipit uxor*. See Juvenal, *Satires VI* (The Ways of Women), 347.

<sup>2</sup> For a Swedish case rejecting the effect of an arbitral seat deemed a fiction, see *Titan v. Alcatel*, Svea Court of Appeal (29 March 2005), reproduced in 20 Int'l Arb. Rep A-1 (July 2005). The place of arbitration chosen by the arbitration clause was Stockholm. The sole arbitrator, however, had conducted hearings in Paris and London for convenience of the parties and witnesses. The Court held itself to lack jurisdiction to hear a challenge to the award, finding that a "Swedish judicial interest" (absent in that case) must exist as a prerequisite for judicial review. Insightful commentary on the case can be found in Sigvard Jarvin & Carroll S. Dorgan, *Are Foreign Parties Still Welcome in Stockholm?*, 20 Int'l Arb. Rep. 42 (July 2005).

<sup>3</sup> The arbitration seat is less a matter of real geography than a link to the legal order of the place whose mandatory curial law will govern the proceedings. See Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn., 2004, with Nigel Blackaby & Constantine Partisides). See also Francis A. Mann, *Where Is An Award "Made"?*, 1 Arb. Int'l 107 (1985).

<sup>4</sup> See e.g., Article 14(2) of the International Chamber of Commerce Arbitration Rules, providing that unless otherwise agreed by the parties, the arbitral tribunal may "conduct hearings and meetings at any location it considers appropriate." Article 14(3) goes further, and permits the tribunal to deliberate "at any location it considers appropriate" regardless of whether the parties agree.

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During the 1960s, French scholars had begun to explore notions of “anational” arbitration autonomous from national law.<sup>5</sup> In England and the Netherlands, more traditional perspectives continued to prevail, with eminent authors arguing that even awards rendered in cross-border disputes should remain subject to judicial review at the arbitral situs.<sup>6</sup> Innovative case law spurred practicing lawyers to give further thought to applications of “delocalized” proceedings.<sup>7</sup>

The passage of new arbitration statutes in England (in 1979)<sup>8</sup> and France (in 1982)<sup>9</sup> provided occasions for dialogue. Some observers feared that cutting arbitration loose from the law of the arbitral situs would create more problems than it solved. What legal regime gives legitimacy to a “delocalized” award? In “anational” arbitration, would losers in unfair proceedings be forced to defend against recognition of the illegitimate award everywhere in the world they might have assets? Would no opportunity exist to have defective awards uprooted once and for all at the arbitral seat?

Much of the early dialogue underestimated the complexity of the problem, often conflating (in a provocative “simplify and exaggerate” style) analysis of three distinct yet intersecting questions present themselves. First, on what grounds should courts at the place of arbitration annul awards? Second, should award annulment in one country be recognized in another? And finally, what mechanisms should restrain arbitrators tempted to ignore the applicable substantive law and decide according to their own private notions of justice?

Mature reflection teaches that the job of monitoring potential arbitral excess falls to both the place of arbitration and the country called to recognize the award. Annulment standards are matters for the place of arbitration, to be addressed in statutes interpreted by local judges. The effect of annulment lies within the province of both treaty and the law of the enforcement forum. The issue is not whether arbitrators should be subject to judicial supervision, but when and how such supervision should be exercised.<sup>10</sup>

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<sup>5</sup> See Berthold Goldman, *Les Conflits de lois dans l'arbitrage international de droit privé*, 109 II Recueil des cours 347, 379–380, 479–480 (1963); Philippe Fouchard, *L'Arbitrage commercial international* (1965). The tradition of the late Professors Goldman and Fouchard has been admirably carried on by their intellectual successor, Emmanuel Gaillard. See Philippe Fouchard, Emmanuel Gaillard, & Berthold Goldman, *Traité de l'arbitrage commercial international* (1996), Sections 1172–92 at 650–662.36.

<sup>6</sup> See Francis Mann, *Lex Facit Arbitrum*, in *Liber Amicorum for Martin Domke* (P. Sanders, ed., 1967) 157, reprinted in 2 *Arb. Int'l* 241 (1986); Michael Kerr, *Arbitration and the Courts: The Uncitral Model Law*, 34 *Int'l & Comp. Law Q.* 1, 15 (1985) (“No one having the power to make legally binding decisions . . . should be altogether outside and immune from [the legal] system.”); Albert Jan van den Berg, *The New York Convention of 1958* (1981) § III(4), (5), at 331–358; Albert Jan van den Berg, *Annulment of Awards in International Arbitration*, in *International Arbitration in the 21st Century* (R. Lillich & C. Brower, eds., 1994) 133.

<sup>7</sup> See Jan Paulsson, *Arbitration Unbound: An Award Detached From the Law of the Country of Origin*, 30 *I.C.Law Q.* 358 (1981); Jan Paulsson, *Delocalisation of International Commercial Arbitration*, 32 *I.C. Law Q.* 53 (1983).

<sup>8</sup> *Judicial Supervision of Transnational Commercial Arbitration*, 21 *Harv. Int'l Law J.* 87 (1980).

<sup>9</sup> French Codification of a Legal Framework for International Commercial Arbitration, 13 *Georgetown J. Law & Pol. Int'l Bus.* 727 (1981).

<sup>10</sup> An arbitrator's duty to follow the law rather than his or her own sense of justice triggers recollection of a seventeenth-century incident testing the power of English judges to stop church commissioners from arresting people for non-ecclesiastical offenses. To discuss the matter on 10 November 1612, King James I summoned Sir Edward Coke, then Lord Chief Justice. Coke asserted that the function of royal judges could not be exercised by the King's church delegates, who would decide according to “natural reason” rather than the

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Many of us have seen our views become more tentative and nuanced. Once cast in black and white, many positions have taken on shades of gray with the passage of time. In this connection, one can only take some refuge is Emerson's classic observation that "a foolish consistency is the hobgoblin of little minds."<sup>11</sup>

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"reason and judgment of the law." Seeing his prerogatives put into question by this line of argument, the King was much offended, and suggested that such an approach might constitute treason. Coke answered in words attributed to Bracton, that although subject to no human authority, the King was still *sub Deo et lege* – "under God and the law." See Edward Coke, *Prohibitions del Roy*, in 12 Coke's Reports 63, 65 (London 1608). For a description of that "memorable Sunday Morning" see Roscoe Pound, *The Spirit of the Common Law* (1921) 60.

<sup>11</sup> Ralph Waldo Emerson, *Self Reliance*, reproduced in *Essays by Ralph Waldo Emerson* (Leonard S. Davidow, ed., 1936) at 39.

