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GENERAL EDITOR:
ALBERT JAN VAN DEN BERG

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Transcending National Legal Orders for International Arbitration

*Emmanuel Gaillard**

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I. INTRODUCTION

The role of national courts in international arbitration is a relatively well defined concept. National courts may intervene at the end of the arbitral process for purposes of the enforcement or review of an arbitral award; they may also intervene during the arbitral process, most frequently to assist the arbitral process, for example in relation to the constitution of the arbitral tribunal. Opinions differ, however, as to the extent to which national courts can and should interact with the arbitral process, and whether national court decisions rendered in relation to the arbitral process should be given transnational effect. The reason for these conflicting views is to be found in the manner in which one views the fundamental relationship between national legal systems and international arbitration.

International arbitration is increasingly recognized as a system, although there remains a sharp divide between those who root international arbitration in individual national legal systems and those who recognize the transnational character of the process and view arbitration as a mechanism transcending national legal orders. This divergence in views, in fact, reflects the issues of the respective role of arbitral tribunals and domestic courts in the arbitral process and, more fundamentally, the underlying source of legitimacy and validity of international arbitration.

Three visions of international arbitration appear to constitute a dividing line, each having a distinct theoretical ground and implying extremely concrete practical consequences. Each of these three visions entails a particular role for national legal systems in international arbitration, and determines, amongst other things, the extent to which national courts may be involved in the arbitral process. A potent example of the practical consequences of adhering to one or the other vision of international arbitration is provided by anti-suit injunctions, as recognizing that national courts may decide whether or not an arbitration may proceed ultimately calls into question the fundamental

* Professor of Law at Sciences Po Law School; head of the International Arbitration Group of Shearman & Sterling LLP; ICCA Governing Board Member. Rachel Laut, an associate in Shearman & Sterling LLP's Paris office arbitration group, assisted in the preparation of this article.

autonomy of the arbitral process. These visions will be described below (II), before further consideration is given to their practical consequences, focusing on anti-suit injunctions by way of example (III).

II. THE REPRESENTATIONS OF INTERNATIONAL ARBITRATION

There are three competing visions of international arbitration, which structure the way in which one thinks about international arbitration. These visions, mental constructs, or representations¹ reflect what their proponents consider to be the source of legitimacy of international arbitration, namely the source of the arbitrator's power to adjudicate.²

The first and most traditional view is what can be characterized as the 'monolocal' representation. It is a territorialist view that considers the law of the seat of the arbitration to be the sole source of legitimacy and validity of the arbitral process. In this vision, the seat of the arbitration is more than a location chosen for convenience or neutrality; it provides the exclusive basis for the power of the arbitrators to adjudicate and produce an arbitral award, which will bear the "nationality" of the seat of the arbitration. Accordingly, the courts of the seat of the arbitration are given wide latitude to determine the extent of their involvement in the arbitral process, and proponents of the territorialist view consider the decisions rendered by those courts to be binding internationally. In this vision, international arbitration does not transcend national legal orders; to the contrary, it concentrates the source of validity and legitimacy of the arbitral process in one national system, that of the seat of the arbitration.

The second vision is the "Westphalian" representation, a model in which each state decides for itself the conditions under which it will consider an arbitral process to be legitimate and the resulting award worthy of recognition.³ Because this vision legitimizes the arbitral process *a posteriori*, namely if an award meets the enforcing state's criteria, the seat of the arbitration is not of ultimate importance. Unlike the territorialist view, the Westphalian vision considers that international arbitration can derive its legitimacy from a plurality of legal systems, namely various States of enforcement. However, the Westphalian vision does not transcend national legal orders any more than the territorialist vision; it simply allocates differently the source of validity and legitimacy of international arbitration amongst various individual national legal orders.

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1. For an analysis of the notion of a representation from a cognitive science perspective, see Emmanuel GAILLARD, "The Representations of International Arbitration", *Journal of International Dispute Settlement* (2010) pp. 1-11.
 2. See generally Emmanuel GAILLARD, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010). 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).
 3. 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 judges, arbitrators have 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).

Only the third vision, which truly constitutes the ‘transnational’ representation, accepts that international arbitration transcends national legal orders and that it constitutes a transnational system of justice sometimes labeled as the “arbitral legal order”.⁴ Importantly, national legal systems are not excluded from this transnational legal order, but the arbitral process no longer hinges on the particularities of the national legal order at the seat of the arbitration or elsewhere. Instead, this vision recognizes that the validity and legitimacy of international arbitration is rooted in the collectivity of national legal orders, as opposed to one or even several individual national legal systems. In other words, the arbitral legal order incorporates and reflects the trends stemming from national legal systems.

Transcending national legal orders is therefore not synonymous with the creation of an a-national legal order, which would be characterized by a rejection of, or opposition to, national legal systems.⁵ To the contrary, the transnational view of international arbitration is a vision that embraces rather than rejects the laws derived from national legal systems, acknowledging and following trends developed collectively by national legal systems.⁶ Thus, the transnational vision recognizes an arbitral legal order that is founded on national legal systems, while at the same time transcending any individual national legal order.

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4. For a discussion on the evolution and usage of the expression “arbitral legal order”, see Emmanuel GAILLARD, *op. cit.*, fn. 2 at pp. 38-46. On the recognition in certain jurisdictions of the existence of an arbitral legal order, see Dominique HASCHER, “The Review of Arbitral Awards by Domestic Courts – France” in *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 jurisdiction 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 Schiavoni : 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).
 5. 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*?” *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*”, *Collected Courses of the Hague Academy*, volume 322 (2006), Sect. 503; for a discussion of this idea, see Emmanuel GAILLARD, *op. cit.*, fn. 2 at pp. 46-47.
 6. The views developed collectively by the community of nations can be seen in instruments such as the 1958 New York Convention, the UNCITRAL Model Law and numerous guidelines which reflect a common view as to how an arbitration should be conducted so as to be recognized as a legitimate means of adjudication. For a discussion on the role of the New York Convention in the development of international arbitration and its relation to the three visions of international arbitration, see Emmanuel GAILLARD, “International Arbitration as a Transnational System of Justice” in *Arbitration – The Next Fifty Years*, ICCA Congress Series no. 16 (2011) p. 66.

III. PRACTICAL CONSEQUENCES OF THE REPRESENTATIONS: THE EXAMPLE OF ANTI-SUIT INJUNCTIONS

The competing representations of international arbitration do not merely provide grounds for theoretical debate, they carry significant practical consequences. They influence not only how arbitrators address various aspects of an international arbitration, but also the approach taken by parties, counsel and national judges. Further, they will dictate how all the players in the field will view the role of national legal systems in the arbitral process, and to what extent national courts may be allowed to influence the arbitral process.

Given their recent proliferation in international arbitration, anti-suit injunctions provide a compelling example as to how adherence to one of the three visions could greatly influence the arbitral process.⁷ Although anti-suit injunctions have their roots in common law, courts in certain civil law and common law countries have become increasingly disposed to resort to this device at the request of one of the parties in order to disrupt the arbitral proceedings or impede enforcement of an award. As international arbitration becomes an increasingly prominent mechanism for settling international disputes, parties do not feel constrained to having the seat in a limited number of jurisdictions known as having a long-standing pro-arbitration bias. This is a welcome trend. However, in conjunction with this positive expansion of international arbitration, the temptation for the parties to seek anti-suit injunctions from biased national courts, often in their home country, to abuse and disrupt the arbitral process has also intensified. Such anti-suit injunctions could be issued at the seat of the arbitration or elsewhere, although anti-suit injunctions issued at the seat of the arbitration provide particular insight into the consequences of the three representations of international arbitration.

Moving away from the well-established advantage of neutrality offered by arbitration, with increasing frequency the situation arises in which one party to an arbitration has the advantage of having the seat of the arbitration in its home state. Should that party become dissatisfied with the arbitral process, it then applies to its courts, i.e., the courts at the seat of the arbitration, for an anti-suit injunction in an attempt to disrupt the arbitral process. If the national court indulges that party's request, either out of unfamiliarity with arbitration or nationalism, it may order the opposing party, or even the arbitrators, to suspend or terminate arbitral proceedings, potentially imposing heavy penalties in connection with a failure to comply.

A very recent example of this phenomenon was an injunction issued by the Federal High Court of Nigeria on 29 February 2012 against arbitral proceedings arising out of disputes over a production sharing agreement between the Nigerian National Petroleum

7. For an discussion of the development of the use of anti-suit injunctions in international arbitration, see Emmanuel GAILLARD, "Reflections on the Use of Anti-Suit Injunctions in International Arbitration" in Loukas A. MISTELIS and Julian D.M. LEW, eds., *Pervasive Problems in International Arbitration* (Kluwer 2006) p. 201; Julian D.M. LEW, "Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings" in *IAI Series on International Arbitration No. 2, Anti-Suit Injunctions in International Arbitration* (Juris Publishing 2005) p. 25. For a further discussion of anti-suit injunctions in relation to the three representations of international arbitration, see Emmanuel GAILLARD, *op. cit.*, fn. 2 at pp. 70-86.

Corporation (NNPC) and various oil companies.⁸ The Nigerian Federal Inland Revenue Service (FIRS), be it spontaneously or at the behest of the NNPC as alleged by the oil companies, requested an injunction from the Nigerian Federal High Court, on the basis that arbitration was not an appropriate forum for issues of taxation that were raised by the dispute. The Nigerian Federal High Court agreed with FIRS, determining that issues of taxation were within the exclusive jurisdiction of the Federal High Court, and thus not arbitrable. The Federal High Court issued an order restraining the parties “from continuing with, or purporting to take any benefit from or abiding by any obligations no matter howsoever described or arising from the arbitral proceedings or awards made pursuant thereto”.⁹

Faced with such an order from the national court at the seat of the arbitration, what should an arbitral tribunal do? Should it abide by the order or, on the other hand, proceed with the arbitration? The answer to this question will depend on the vision of international arbitration endorsed by each arbitrator. A proponent of the territorialist representation, which views the arbitrator as an organ of the legal order of the seat, will feel that the decision rendered by the national courts at the seat of the arbitration is binding and must be complied with.

However, many arbitrators do not accept this view, particularly if they consider that the courts’ decision was not legitimate. To the contrary, they would consider that they have a duty to ensure that the arbitration agreement between the parties is not frustrated and to proceed with the arbitral process so as to render an award. Proponents of the Westphalian vision would consider that they may issue an award in consideration of the fact that it may be recognized as valid in other jurisdictions, regardless of whether or not the award is ultimately set aside at the seat of arbitration. From the transnational viewpoint, the primary source of the arbitral tribunal’s power is to be found in the collective will of the states which accept the binding nature of an arbitration agreement that meets certain widely accepted criteria.¹⁰ The transnational vision acknowledges that national courts may have differing approaches to questions brought before them but this does not mean that the parties have accepted that any particular local court has the ultimate decision-making power as regards the outcome of an international arbitration. If parties intended for national courts to have this authority they could have chosen to submit their dispute to the local courts rather than an arbitral tribunal. Thus, arbitrators endorsing a transnational view would likely consider that they are not bound by decisions rendered by local courts, particularly in situations where such courts appear to be improperly attempting to assist a local party in the arbitral process.

8. Federal High Court of Nigeria in the Abuja Judicial Division, Judgment of 29 February 2012 in Suit No. FHC/ABJ/CS/774/11 between Federal Inland Revenue Service (Plaintiff) and Nigerian National Petroleum Corporation, Shell Nigeria Exploration and Production Company Limited, Esso Exploration and Production (Deep Water) Limited, Nigerian AGIP Exploration Limited and Total Exploration and Production Nig. Limited (Defendants).

9. *Ibid.* at pp. 3 and 44.

10. This view was expressed by the arbitral tribunal in *Salini Costruttori SpA v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, Award of 7 December 2001, ICC Case No. 10623, published in Emmanuel GAILLARD, ed., *op. cit.*, fn. 7, p. 227.

Even the proponents of the territorialist view have difficulty accepting that the decisions of the courts at the seat of the arbitration should be followed in instances where those decisions are considered to be illegitimate, thus exposing the limitations of the traditional view.¹¹ For instance, Sébastien Besson generally considers that international arbitration is anchored in the seat of arbitration, and that consequently “arbitrators do not have a discretionary power to disregard injunctions issued by the courts at the seat of the arbitration”.¹² Nevertheless, in the case of illegitimate interference by national courts at the seat of the arbitration, he has conceded that international standards can make an exception to the territorialist imperative, stating that arbitrators “should obey such decisions, unless they are manifestly abusive”.¹³

To illustrate this point, Dr. Besson has referred with approval to the ICSID award in the matter of *Saipem SpA v. Bangladesh*,¹⁴ in which the arbitral tribunal (composed of Professor Gabrielle Kaufmann-Kohler, President, Professor Christoph Schreuer and Philip Otton) found that the Bangladeshi courts had “violated the internationally accepted principle of prohibition of abuse of rights” by issuing an injunction against an ICC arbitration seated in Dhaka.¹⁵ The Supreme Court of Bangladesh had issued the injunction and purported to revoke the ICC arbitral tribunal’s authority at the request of a Bangladeshi State-owned company, on the basis of the ICC tribunal having rejected certain trivial procedural requests made by the Bangladeshi party.¹⁶ Despite the Bangladeshi Supreme Court’s decision, the ICC tribunal proceeded with the arbitration and rendered an award on the merits, finding the state-owned company liable for

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11. Jean-François Poudret and Sébastien Besson concede that the decision of the ICC arbitral tribunal to refuse to stay the arbitral proceedings despite the injunction issued by a court at the seat of arbitration in *Salini Costruttori SpA v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, Award of 7 December 2001, ICC Case No. 10623, was “possibly correct in light of the facts”: Jean-François POUDRET and Sébastien BESSON, *Comparative Law of International Arbitration* (Sweet & Maxwell, London 2007) at para. 146a, pp. 116-117. For a critical view of the arbitral tribunal’s decision, see Eric SCHWARTZ, “Do International 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 Light of a Recent ICC Award” in *Liber Amicorum in honour of Robert Briner*, ICC Publication 335 (2005).
 12. Jean-François POUDRET and Sébastien BESSON, *ibid.* at para. 146a, p. 117. See also Sébastien BESSON, “Reflections on Abusive Interference of Courts at the Arbitral Seat”, this volume, pp. 378-388 [p. 63].
 13. Jean-François POUDRET and Sébastien BESSON, *op. cit.*, fn. 11 at para. 146a, p. 117. See also Sébastien BESSON, *op. cit.*, fn. 12, p. 381.
 14. See Sébastien BESSON, *op. cit.*, fn. 12, p. 381.
 15. Award rendered on 30 June 2009 in ICSID Case No ARB/05/07, *Saipem SpA v. Bangladesh*, available at <www.italaw.com/sites/default/files/case-documents/ita0734.pdf> (last accessed 28 August 2012) at para. 161, p. 49.
 16. For a more detailed account of the background of this case, see Decision on jurisdiction and provisional measures rendered on 21 March 2007 in ICSID Case No ARB/05/07, available at <www.italaw.com/sites/default/files/case-documents/ita0733.pdf> (last accessed 28 August 2012).

damages resulting from the breach of its contractual obligations.¹⁷ Seized of an application to set aside the ICC arbitral award, the Bangladeshi Supreme Court determined that the award was “non-existent” since the authority of the ICC tribunal had been revoked, and thus could be neither set aside nor enforced.¹⁸

Thus, Dr. Besson proposes that applying international standards to decisions rendered by national courts at the seat of the arbitration would serve as an appropriate safeguard against unfair and abusive measures by those courts. At the same time, Dr. Besson argues that transcending national legal orders in international arbitration is neither necessary nor desirable.¹⁹ However, by proposing that decisions made in the national legal order of the seat of the arbitration be subject to international standards, Dr. Besson effectively introduces an exception to his own theory that the legitimacy and validity of international arbitration is anchored exclusively in the national legal order of the seat of arbitration, and concedes that, at least in certain cases, international arbitration must transcend national legal orders.²⁰

The ICSID tribunal’s commendable decision in *Saipem* to apply transnational standards to the arbitral process provides a powerful example of international arbitration transcending national legal orders. Notwithstanding, the even more courageous decision in this case was the unpublished and lesser known decision rendered by the ICC tribunal, composed of longstanding ICCA Counsel member Werner Melis as President, Riccardo Luzzatto and Ian Brownlie.²¹ Faced with the injunction by the Bangladeshi Supreme Court and considering the court’s obstruction to be illegitimate, the ICC tribunal decided to fulfill its duty pursuant to the arbitration agreement and proceeded to render an award. This exercise of arbitral courage not only enabled the ICSID tribunal to reach a decision without the need to reconstruct the potential outcome of the ICC arbitration, but also effectively conveyed that its authority was not rooted in the national legal order of the seat, but rather in a transnational, arbitral legal order.

All these ideas will be discussed further in the contributions that follow by Dr. Sébastien Besson from a territorialist standpoint, and by Professor Frédéric Bachand²² from a more internationalist viewpoint.

17. ICC Case No 7934, unpublished, described in the Decision on jurisdiction and provisional measures rendered on 21 March 2007 in ICSID Case No ARB/05/07, *Saipem v. Bangladesh*, available at <www.italaw.com/sites/default/files/case-documents/ita0733.pdf> (last accessed 28 August 2012).

18. Cited in *ibid.* at para. 36.

19. See Sébastien BESSON, *op. cit.*, fn. 12, p. 381.

20. For further discussion of this point, see Emmanuel GAILLARD, *op. cit.*, fn. 1, pp. 4-5.

21. ICC Case No. 7934, unpublished, described in the Decision on jurisdiction and provisional measures rendered on 21 March 2007 in ICSID Case No. ARB/05/07, *Saipem v. Bangladesh*, available at <www.italaw.com/sites/default/files/case-documents/ita0733.pdf> (last accessed 28 August 2012).

22. See this volume, pp. 389-396