The Center for Global Energy, International Arbitration, and Environmental Law
The University of Texas-School of Law

Research Paper No. 06-10

Understanding (and Misunderstanding) Primary Jurisdiction

Alan Scott Rau

Working Draft
Comments Solicited

Understanding (and Misunderstanding) "Primary Jurisdiction"

Alan Scott Rau*

There is always disputed territory. It is the interaction within this substantial administration that determines the random walk of the world: everything interesting happens at the borders between domains of power.[1]

Any private mechanism of dispute resolution--- wherever it falls on the spectrum running from consensual settlement all the way through binding arbitration---depends in the last resort on public sanctions and the public monopoly of force. It is in this sense at the very least that we can speak of a hierarchical, or vertical, relationship between courts and arbitral tribunals. At the same time, though, in our world of comparative advantage, of global ventures, and connected markets, transactions---and disputes---

* Burg Family Professor of Law, the University of Texas at Austin

This paper was originally prepared for the Symposium, "Arbitration and National Courts: Conflict and Cooperation," held in Houston on May 13-14, 2010, and co-sponsored by the University of Texas School of Law Center for Global Energy, International Arbitration, and Environmental Law; the Permanent Court of Arbitration; and the Houston International Arbitration Club.

[1] David Eagleman, Sum: Forty Tales from the Afterlives 77 (2009).

will routinely flow over national boundaries; they will inescapably involve parties of different nationalities--- distant from each other not only geographically but culturally and politically[2]---and will implicate different sovereign interests. And here---when we add a horizontal dimension---is where things truly become interesting: In this "Westphalian" world, conflict and competition between national jurisdictions, with overlapping and yet plausible claims to supervise the process, become inevitable; here is where the demands of tolerance become strained. And where our powers of systematization are truly put to the test.

Because arbitrators do not at least for the moment have armed marshals at their personal disposition, we must at some point look to those that do---that is, to a state court charged with assessing whether to lend, or to withhold, its support to the arbitration process (or, if need be, to interpose itself between private individuals and mere officious interlopers with no plausible claim to power over them). We may (at least some of us may) cherish the vision of a mechanism for mercantile self-government that is entirely self-contained---even autarkic, one independent of local peculiarities, and with a claim to universal recognition. But (thank goodness) for the moment such an ideal lacks any organized, permanent, hierarchical structure, any supranational standing bureaucracy, that could make it a concrete reality.[3]

I. "The Seat"

> The dichotomy between states of "primary jurisdiction" and states of "secondary jurisdiction" in the architecture of the Convention [is] purely an American invention.[4]

We are I think obligated to enter into this subject through the gate of the well known and generally accepted---to start off together on ground that seems common and familiar enough, and only slowly head towards contested territory. At the outset then I will (changing metaphors) be painting with a pretty broad brush, trying as best I can to

---

[2] See generally Christopher R. Drahozal, Private Ordering and International Commercial Arbitration, 113 Penn. St. L. Rev. 1031, 1042 (2009).

[3] See W. Michael Reisman, Systems of Control in International Adjudication and Arbitration: Breakdown and Repair 4-7,108 (1992)("where an effective and distinct institutional framework does not exist and cannot be created, the designers of control systems have little choice but to seek to adapt and channel what is available: national judicial systems").

[4] Jan Paulsson, Note [on *TermoRio v. Electrificadoria Dela Atlantico*], [2007] Rev. de l'Arb. 559, 561.

Now the distinction between the state where an arbitration is "situated," and other states where an award might possibly be "enforced," is (as I rehearse below at tedious length) universal and commonplace and often critical. Doubtless, though, the objection is to the tendentious nature of the phrasing---just as the Mensheviks undoubtedly resented Lenin's rhetorical coup which after some favorable vote at an obscure Congress allowed his faction henceforth to be known as "the majority" ("Bolshevik"): For arguably, "if anything, the primary jurisdiction should be the one where the economic or other consequences of an award are sought," Jan Paulsson, "Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment," *in* 9 ICC Int'l Ct. Arb. Bull. 14, 27 (May 1998).

spare you a tedious pointillist reconstruction of received wisdom and traditional learning.[5]

We have to begin, at least provisionally, *somewhere*---and the conventional starting point has been the supervisory role of the state "on whose territory" the arbitration was conducted, and "where" the award was "made." (This formula invoking the "territorial" jurisdiction of the state where the arbitration "took place" is canonical, but I am aware that it can readily mislead---I'd ask, though, that you defer the inevitable objections until, say, a few pages have passed).

The "seat" of the arbitration has been the fulcrum around which the entire arbitral enterprise pivots; in any discussion the fault line has been the supposed dichotomy between this state---where the arbitration finds its juridical "home," and whose jurisdiction over the process is therefore "primary"---and all other states whose jurisdiction must therefore be deemed only "secondary."[6] What after all does a modern arbitration statute amount to, other than a delegation of a state's power to private parties permitting them to create legal consequences---final and binding settlement---for themselves? (If this be "positivism"[7]---as opposed, say, to simple tautology---why then make the most of it). It may well be (to turn Rousseau on his head) that arbitration as a social practice, arbitration as a system of private ordering, aspires to be "unbound" and "free"[8]----but first we must understand that it is born, everywhere, in chains---that it enters life as the creature of a given legal system whose legislation first gives it legitimacy.

Here is what really amounts to another way of saying the same thing: Any "arbitration legislation" will create a regime intended to set in motion—to facilitate---and to regulate---"local" proceedings. This abundantly obvious fact is usually made quite explicit in the text of the statute itself---although it is also necessarily implicit in the very

---

[5] In an ideal form, rather hard for me to achieve here, this is invoked by the Chinese phrase, *zou ma guan hua*, "glimpsing flowers from horseback."

[6] The *locus classicus* for this formulation is Reisman, supra n.3 at 113.

[7] See, e.g., Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international* 341-42 (Academie de droit international de la Haye 2008)(as throughout, my translation).

[8] See Jan Paulsson, Arbitration Unbound: Award Detached from the Law of its Country of Origin, 30 Int'l & Comp. L.Q. 358 (April 1981); Jan Paulsson, Arbitration Unbound in Belgium, 2 Arb. Int'l 68 (1986). See also Thomas Clay, Note [to *Société PT Putrabali Adyamulia v. Société Rena Holding* (*Cour de Cassation*, June 29, 2007], [2007] J. Droit Int'l (Clunet) 1240, 1246 (French case law aims at "emancipating, liberating," international arbitration from "all the restrictions aimed at preventing it from achieving its true fulfillment").

Metaphors are invariably tendentious, which makes them extremely dangerous unless handled with care: Alternative---and more pejorative---tropes remain available: The "anational" school of arbitration may nicely be caricatured, the door opened wide to ridicule, merely by suggesting that where the link of the process to the "seat" is weakened, the resulting award "took off and disappeared into the firmament." See Roy Goode, The Role of the *Lex Loci Arbitri* in International Commercial Arbitration, 17 Arb. Int'l 19, 21 (2001).

enterprise of law-making.[9] Creation of a legal regime for "English arbitrations" is after all the *raison d'être* of the English Arbitration Act; this is the justification for the state's exercise of its legislative jurisdiction and may at the same time be close to its permissible boundaries.[10] And as part of the bargain extended to them, contracting parties are expected to submit to the oversight of this state's own courts:[11] Here is at least a first cut at an allocation of competence among "co-archical"[12] national jurisdictions.

Thus the UNCITRAL Model Law as a general rule confines the statute's application to cases where "the place of arbitration is in the territory of [the enacting] state."[13] Exceptions are unintrusive and relatively uncontroversial and themselves speak volumes; they recognize that even a state which has not been selected as the "seat" of the arbitration may nevertheless be expected to orient its behavior *precisely in order to give effect to the parties' preference to arbitrate elsewhere*.[14]

---

[9] See the discussion in W. Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, 30 Tex. Int'l L.J. 1, 36 (1995)(UNCITRAL Model Law).

[10] Gary Born distinguishes between the "external" and the "internal" issues regulated by a state's arbitration legislation---

(a) the former encompassing "the relationship between the international arbitral proceeding and national courts," including the resolution of jurisdictional questions, judicial assistance to the proceedings, and judicial review of awards;

(b) the latter encompassing "various procedural issues that arise 'internally' in the arbitral proceedings," such as "the conduct of hearings, including the opportunity to be heard," the discovery powers of the arbitrators, and their "remedial powers," including the power to issue provisional relief.

1 Gary B. Born, International Commercial Arbitration 1240-42 (2009).

This is a familiar bit of taxonomy and may serve as a convenient checklist. Perhaps we shouldn't exaggerate its explanatory power, for after all, any "internal" issue is in itself of little or no consequence, unless and until some order of a national court later sanctions what has happened in the arbitral forum. ("Sanctioned" here being an antagonym capable of indicating either "to ratify or confirm," or "to penalize."). Still the dichotomy does perhaps capture one significant distinction: The arbitration legislation of "the seat" will invariably tell us *what the courts of the enacting state may do* in relation to the arbitral process---for example, which courts in particular are empowered by legislation to rule on requests to set the proceeding in motion, or to annul awards? (This is "(a)"). With "(b)" the emphasis shifts slightly: Consideration of "internal" issues calls for an inquiry into *the requisites of a legitimate arbitral proceeding*---what, for example, are the respective roles of arbitrators and contracting parties, and what the permissible scope of arbitral autonomy? *This*, as we will see, is an inquiry that can be carried out by any national court in any state---once, of course, it has sorted out the *lex arbitri*, that is, the applicable governing law that it is bound to respect.

[11] See Minmetals Germany GmbH v. Ferco Steel Ltd., [1999] C.L.C. 647 (Q.B.D. (Comm.))("a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration").

[12] Reisman, supra n.3 at 112.

[13] UNCITRAL Model Law on International Commercial Arbitration art. 1(2).

[14] Thus art. I(2) expressly relaxes this territorial limitation when it comes to

- staying domestic litigation "in a matter which is the subject of an arbitration agreement";
- granting "interim measures of protection" in the interest of an ongoing arbitration---for example, in order to "conserve the subject matter of the dispute," to "preserve evidence," or to "secure an eventual award";

a. Setting the Arbitration in Motion

Along with most other legislation, then, the Model Law envisages an exclusive role for the state of the seat in setting the process in motion---for example, by appointing the arbitrators.[15] In this respect the general scheme of the Law is clear enough, (although the usual "intriguing" questions occasionally pop up in the interstices: What if an inept draftsman has failed to specify any "seat" at all?[16] What of the truly aberrant case where

---

- enforcing interim measures of protection ordered by the arbitral tribunal itself, and to
- recognizing and enforcing foreign awards.

Id. arts. 8, 9, 17H, 17I, 17J, 35 and 36; see Howard M. Holtzmann & Joseph E. Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary 35, 332-33 (1989)(the exceptions to art. I(2) all direct the courts of the enacting state "to provide assistance to arbitrations" taking place elsewhere). Cf. Prema Birkdale Horticulture (Macau) Ltd. v. Venetian Orient Ltd., [2009] HKCU 1163 (H.K. Ct. First Instance)(court may grant an interim injunction in relation to arbitration proceedings commenced outside Hong Kong if they are capable of giving rise to an award enforceable in Hong Kong; however the court "in the exercise of [its] discretion" declined to grant relief since in the case of irrevocable obligations under "on demand" bonds an injunction should only be granted "in exceptional cases").

There is no exception in the Model Law in favor of art. 27, dealing with court assistance in taking evidence---which as a consequence applies only to arbitrations in the enacting state: However, other legislation in some jurisdictions may empower local courts to take such measures in aid of foreign arbitrations. See Alan Scott Rau, Evidence and Discovery in American Arbitration: The Problem of "Third Parties," 19 Amer. Rev. Int'l Arb. 1, 28-38 (2008)(28 U.S.C. § 1782); cf. id. at 33-34 n.98 ("characterization of a measure as a form of 'interim relief' for emergency purposes of 'preservation of evidence'---rather than as disclosure or discovery"---is a useful frame "calculated to allow a litigant to bypass otherwise applicable limits on production").

[15] See UNCITRAL Model Law, art. 11 (failing an agreement by the parties "on a procedure for appointing the arbitrator or arbitrators," "the appointment shall be made, upon request of a party, by the court" of the enacting state).

[16] Where the parties themselves have not designated "the seat" it is best to presume that they would have wanted the arbitrators---as their agents---to do so; this is the sense of the Model Law in art. 20 (1). Allowing the seat to be selected by arbitrators named, not directly by the parties, but instead by a contractually-designated arbitral institution, requires no special principle; such a surrogate for party choice merely operates at one further remove. See Anysys, Inc. v. LMS Int'l, 2007 WL 1231830 *3, *4, *amended*, 2007 WL 1202998 (W.D. Pa.). Here, after much ill-informed bumbling [when the ICC Rules say that "the Court" shall name an arbitrator, is that really a grant of power to the federal court for the Western District of Pennsylvania?], the court ultimately ordered that arbitration "be instituted by the filing of a request for arbitration" with the ICC. See also In United States Lines, Inc. v. Liverpool & London Steamship Protection & Indemnity Ass'n, Ltd., 833 F. Supp. 350 (S.D.N.Y. 1993)(arbitration was required under the "Rules of the Liverpool and London Steamship Protection and Indemnity Association," but the seat of the arbitration was not designated; held, the "issue of venue is itself a proper issue for resolution" by arbitrators named by the Association); NCR Corp. v. Korala Assoc. Ltd., 2006 WL 2640219 (S.D. Ohio), *aff'd in relevant part*, 512 F.3d 807 (6th Cir. 2008)(in the absence of party agreement the arbitrator was to be chosen "by the President of the Law Society"; the parties were ordered to proceed to arbitration "and, if necessary, submit the issue of the venue of the arbitration to the arbitrator").

All of these cases conclude, quite correctly, that it is unnecessary to read FAA § 206 as requiring that the parties have specified a particular geographic location with precise map coordinates; it is perfectly consistent with the language (directing arbitration "in accordance with the agreement at any place therein provided for") to defer to an institutional determination: What would be more natural, after

there has been a failure of agreement, not only with respect to the seat but also with respect to any mechanism for the selection of arbitrators?)[17]

By contrast, the "plain meaning" of the FAA does seem to allow American courts to appoint arbitrators even in foreign arbitral proceedings[18]: It seems very far from obvious

---

all, than to treat the implementing legislation for the Convention as being congruent with both the expectations of the parties and international practice?.

[17] If this really, inescapably, is what happened, then there may be no single and obvious candidate---although some court with at least an arguable claim, if not a clear mandate, can be expected to step in to try to salvage the process. See, e.g., National Iranian Oil Co. v. Israel, [2002] Rev. Arb. 427 (Cour d'Appel de Paris 2001). Here an agreement for an ad hoc, tripartite arbitration did not designate a seat---saying only that in the absence of party agreement, the president of the tribunal was to be named by the ICC. The claimant (the National Iranian Oil Co.) named "its" arbitrator, but the respondent (the state of Israel) refused to do so, and the French courts affirmed their power to name the second arbitrator on its behalf---even though French legislation permitted the French courts to aid in setting up a tribunal only for "an arbitration which takes place in France or which the parties have agreed shall be governed by French procedural law," CPC art. 1493---neither of which was the case. But the claim that the implications of *NIOC* are "far-reaching"---that it "reflects the internationalist doctrines that apply in jurisdictions that are hospitable to global commerce," and [expresses] the unfailing allegiance of the French judiciary to contract freedom in global commerce and dispute resolution"---seems far too sweeping, and far too orotund, to be particularly helpful; cf. Thomas E. Carbonneau, Arguments in Favor of the Triumph of Arbitration, 10 Cardozo J. Conflict Resol. 395, 421 (2009). The French court itself noted, more modestly and sensibly, that it simply happened to be "the least badly placed (*le moins mal placé)"* to name an arbitrator so as to allow the claimant access to the agreed arbitral forum. The natural alternative of applying to the home courts of the respondent could not in these particular circumstances have been reasonably expected to lead to a way out of the impasse---at least not until "Iran changes its attitude towards Israel!" See Note, [2002] Rev. de l'Arb. 442, 448 (Philippe Fouchard). Cf. *Holtzmann & Neuhaus*, supra n.14 at 131-32 (difficulty of finding a single "acceptable connecting factor").

But that one man's "hospitable" "internationalism" can readily become another's "officious usurpation," is suggested by the ever-irrepressible Indian jurisprudence; see, e.g., Citation Infowares Ltd. v. Equinox Corp. (Sup. Ct. India, April 20, 2009)(one clause in an outsourcing agreement between Indian and U.S. corporation provided that "the agreement shall be governed by . . . the laws of California" and that any disputes "shall be referred for arbitration to a mutually agreed Arbitrator"; the Indian Supreme Court appointed a former Chief Justice of the Court as the sole arbitrator).

We can confidently expect that the Indian judge named by the Indian court in *Citation* will make this an "Indian" arbitration. American and English courts, in similar circumstances, may be said to have gone even further---being willing to fix the seat themselves while bypassing the arbitrators altogether. The American decisions are perhaps constrained by the happenstance of legislative drafting; where FAA § 206 is unavailable---because the parties have named *neither* a seat nor a mechanism for selecting one---then there is apparently no statutory alternative, if arbitration is to be compelled at all, to directing it to proceed under § 4 in the district where the motion to compel is filed. E.g., Jain v. de Mere, 51 F.3d 686 (7th Cir. 1995)(agreement between citizens of India and France provided that any dispute "may only be presented to an arbitrary commission applying French laws"); Bauhinia Corp. v. China Nat'l Machinery & Equipment Import & Export Corp., 819 F.2d 247 (9th Cir. 1987)(where contract was fatally "ambiguous" with respect to the intended forum, the trial court "took the only action within his power" by ordering arbitration before the AAA in California). The English cases are perhaps more familiar and coherent to the extent they claim to deduce some contractual intention with respect to the seat from conflict-of-law rules governing the overall agreement, see Tonicstar Ltd. v. American Home Assurance Co., [2004] EWHC 1234 (QBD (Comm.)); cf. *Dubai Islamic Bank PJSC*, infra n.20.

[18] See 9 U.S.C. §§ 206, 303 (in a case falling under the New York or Panama Convention, a court "may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether

what can possibly be made of such a surprising and unqualified grant of power---and as usual, considerable skepticism is warranted.[19]

b. Monitoring the Process

And above all, it is clear that that an exclusive role is reserved for the courts of the seat in monitoring compliance with the agreement---for example, by annulling or vacating the resulting award. So, with the inevitable qualifications:

- These are, for all practical purposes, the only national courts with the power to annul an award[20] (although by legislation, of course, the state where the arbitration is held may surrender any right to do so).[21]

---

that place is within or without the United States," and "may also appoint arbitrators in accordance with the provisions of the agreement").

[19] Thankfully §§ 206 and 303 have never been carried anywhere near this far. *Cf.* 1 Born, supra n.10 at 1433 fn.424. See the cases discussed in n.16 supra; see also Euro-Mec Import, Inc. v. Pantrem & C., S.p.A., 1992 WL 350211 (E.D.Pa.)(agreement called for arbitration in Geneva but provided no method at all for the selection of arbitrators; the court "refer[red] the parties to arbitration in Geneva" with the warning that if they should be "unable to reach a mutual agreement, the Court will order the location and terms [sic] of the arbitration."

In none of the cases, then, did an American court go so far as to appoint arbitrators to sit in a proceeding whose seat was understood to be in a foreign state. Should they be asked to do so they can be counted on to deploy their good sense and discretion in order to narrow appropriately the unconsidered language of the statute. Some of the same respect for party autonomy that would lead a court to defer to an institutional mechanism for arbitrator selection, should lead it to defer to the courts of the seat---at least until it is convinced that the national courts of the seat are themselves unable to act. Note that in any event, any power to appoint arbitrators rests on the necessary predicate that a court will have first satisfied itself that there is an enforceable agreement to arbitrate---and that it is thus willing to grant a motion to compel. This is as it should be (and is suggested by both the structure of § 206, and cases like *Jain,* supra n.17). Granted, courts have sometimes opined that "a somewhat less stringent standard governs the court's decision to appoint an arbitrator as opposed to its decision to compel arbitration"---with the result that "before proceeding with the appointment of an arbitrator," the court is not required to grant a party a hearing on the question of the "existence" or "validity" of an arbitration agreement. ACEquip Ltd. v. American Engineering Corp., 315 F.3d 151, 156-57 (2nd Cir. 2003). But as I have written, "this is hard to take very seriously," since if the question of validity is to be deferred, "the entire exercise may well be futile." In *ACEquip* itself, there was in fact little doubt that the respondent was obligated to arbitrate *with someone.* See the discussion at Alan Scott Rau, Arbitral Jurisdiction and the Dimensions of "Consent," 24 Arb. Int'l 199, 248-49 fn. 170 (2008).

[20] See, e.g., Karaha Bodas Co., L.L.C . v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004)(only the courts of Switzerland, designated "the site of the arbitration," had "primary jurisdiction to decide to annual the Award"); 1 Born, supra n.10 at 1260 ("arbitral seat as exclusive annulment forum"). See also C. v. D., [2008] 1 Lloyd's L. Rep. 239 ¶ 30 (C.A. 2007)(arbitrators had issued in England a "partial award" on liability, but defendant "intimated its intention to apply to a Federal Court applying US Federal Arbitration law" to order vacatur"; held, anti-suit injunction ordered preventing the defendant "from initiating proceedings on the Partial Award in New York").

Compare Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193 (2000). An award is rendered in Alabama in a dispute arising out of a construction project. A unanimous Supreme Court holds that the respondent may move to vacate the award in federal court in *Mississippi*--where the project was located. In other words, the venue provisions of § 10 of the FAA--allowing an award to be vacated by a

- The national courts of the "seat" may exercise this power to annul awards, on the basis of whatever grounds for vacatur the local arbitration legislation provides---in the case of the U.S., then, FAA § 10---unfettered by international conventions.[22] (The troubling prospect of idiosyncratic local grounds is of course

---

federal court "in and for the district wherein the award was made"--are now to be understood as "permissive" and not mandatory. So, is it possible to deduce from this simple holding that under the FAA, *awards rendered in London may now be vacated in Boston*? See William W. Park, Amending the Federal Arbitration Act, 13 Am. Rev. Int'l Arb. 75, 114, 125- 26 (2002) (given such possibilities, "reform [of the FAA] is warranted" in this area to "significantly improve the climate for international arbitration in the United States"); William W. Park, The Specificity of International Arbitration: The Case for FAA Reform, 36 Vand. J. Transnat'l L. 1241, 1276, 1286-87 (2003).

But "well, naturally we couldn't have meant *that*"---the universal solvent of the common law---seems in these circumstances, as it so often is, a perfectly adequate response. This is not a matter of "venue" at all, but of power (or perhaps even of "jurisdiction"). When post-*Cortez* cases reiterate that under the New York Convention, the courts of only one state---presumptively, the courts of the seat---can possibly purport to annul an award, it has never occurred to anyone that such a conclusion could in the slightest degree be affected by the *Cortez* case itself. Cf. Catherine A. Giambastiani, Lex Loci Arbitri and Annulment of Foreign Arbitral Awards in U.S. Courts, 20 Am. U. Int'l L. Rev. 1101 (2005) (missing the point; "it is unclear whether the U.S. Supreme Court would agree with [the *Karaha Bodas*] line of reasoning").

In all cases, then, a court must satisfy itself before it presumes to set aside an award that it is indeed sitting at the arbitral "seat." See, e.g., Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc., [2001] 1 Lloyd's L. Rep. 65 (QBD (Comm.)). In this case involving a disputed chargeback on a VISA transaction, the arbitration procedure before VISA's "International Arbitration Committee" had been conducted entirely on paper. The request for arbitration had been filed with VISA in California and documentation sent there ("the VISA worldwide payment card scheme has its headquarters in California"); however, an appeal from the initial award was heard and decided at a VISA International board of directors meeting held in London. The English court held that, considering "all the relevant circumstances," the seat should be deemed to have been in California, so that it lacked jurisdiction to hear any challenge to the award.

[21] The leading examples are Switzerland and Belgium: Where neither of the parties are local residents or has a local "business establishment," they are permitted to make an agreement expressly excluding any possibility that the award may be set aside in the local courts; see Elliott Geisinger & Vivienne Frossard, "Challenge and Revision of the Award," *in* Gabrielle Kaufmann-Kohler & Blaise Stucki (eds.), International Arbitration in Switzerland: A Handbook for Practitioners 135, 153 (2004); Judicial Code art. 1717 (Belg.); Bernard Hanotiau & Guy Block, La loi du 19 mai 1998 modifiant la législation belge relative à l'arbitrage,, [1998] Bull. ASA. 528, 532 (*le système Suisse de l'opting-out*").

[22] This is at least the conventional wisdom. See, e.g., Craig, supra n.9 at 11 ("the Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration"); William Laurence Craig, Uses and Abuses of Appeal from Awards, 4 Arb. Int'l 174 (1988)("no international agreements control how national courts supervise arbitrations taking place on their own territory," with the result that each state "is free to apply whatever measures of judicial control it wishes to international arbitration taking place within its own jurisdiction").

There is obviously some tension between this received learning and the mandate of the Convention's art.II: Could the courts of the seat, for example, take the extreme position that arbitration awards are inherently non-binding---that they may routinely be vacated and re-examined de novo by local tribunals? Could they do this, that is, consistently with their obligation under art. II to "recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences . . . which may arise between them"? "If a Contracting State violates its obligations with regard to recognition of arbitration *agreements*, through its treatment of arbitral *awards*, that is still a breach of Article II of the

increasingly marginalized by the fact that most modern statutes, like the Model Law, provide "only one means of recourse, available during a fairly short period of time, and for a limited number of reasons.")[23]

- And so even an "international" award "falling under" the New York Convention may be annulled under the domestic standards of the FAA as long as the award was rendered within the United States.[24] This quite uncontroversial proposition

---

Convention," 2 Born, supra n.10 at 2559. For a game attempt to reconcile this tension---by asserting that art. II should be interpreted at the very least to require "that any judicial review of international arbitral awards in an annulment action not compromise the parties' basic agreement" to submit to arbitration---see id. at 2556 ("implied limits imposed by New York Convention on Grounds to Annul Awards"). I am, I confess, quite skeptical about any such claim:

- For one thing, it seems to assume that a contracting state has an international obligation to honor, as required by the Convention, agreements calling for "international" arbitrations *to take place within its own territory*. While the text of the Convention is hardly crystalline, I find this most dubious. Article I clearly leaves it within the discretion of each state to choose if, and to what extent, awards rendered within its own territory are to be accorded Convention status, and "the obligations of the Convention should be read as congruent for both agreements and awards"; "by analogy to Article I, the Convention can be read as requiring the enforcement only of *agreements* that would in turn lead to "foreign" or "non-domestic" *awards* that themselves come within the scope of the treaty." See Alan Scott Rau, The New York Convention in American Courts, 7 Amer. Rev. Int'l Arb. 213, 233-34 (1996). The U.S. is in fact rather unusual in having elected to make anything at all of the "non-domestic" category in art. I, whether for agreements or awards; compare Australia International Arbitration Act 1974 §§ 3(1), 7(1)(a court shall stay proceedings subject to an arbitration agreement where " the procedure in relation to arbitration . . . is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country"---and the term "Convention country" is defined to mean "a country (*other than Australia*)" that has ratified the Convention).
- In any event, whether it is wise to go any distance down this path---indulging in some sort of "reverse-*Erie*" inquiry, weighing in particular cases the strength of parochial local interests against some overriding transnational substantive policy---seems doubtful. Cf. Alan Scott Rau, Federal Common Law and Arbitral Power, 8 Nev. L.J. 169, 193 (2007)(the "respective roles of state and federal law," requiring an inquiry into "the federal interest in particular outcomes," and "what obstacles may be thrown up in the way of the federal scheme by the organization of a state's judiciary"). A state's refusal to countenance any arbitration administered by the ICC, for example---however scandalous in the eyes of the international arbitration establishment---is unlikely to amount to a repudiation of that state's solemn treaty obligation. *Compare* 2 Born, supra n.10 at 2558 ("annulment decisions that . . . denied effect to ad hoc (or institutional) arbitration agreements" would be "contrary to the New York Convention"), *with* Termorio S.A. v. Electrantra S.P., 487 F.3d 928 (D.C. Cir. 2007)(deferring to "lawful" Columbian annulment, where Columbian law "did not expressly permit the use of ICC procedural rules in arbitration').

[23] Seventh Secretariat Note, Analytical Commentary on Draft Text, A/CN.9/264 (25 March 1985), in *Holtzmann & Neuhaus*, supra n.14 at 964.

[24] See, e.g., Jacada (Europe) Ltd. v. Int'l Marketing Strategies, Inc ., 401 F.3d 701, 709 (6th Cir. 2005)(contract "envisaged performance exclusively overseas," but "because this award was made in the United States, we can apply domestic law, found in the FAA, to vacate the award"); Saipem America, Inc. v. Wellington Underwriting Agencies, Ltd., 2008 WL 2276210 (S.D Tex.)(ICC arbitration with seat in Houston; "the Convention does not restrict the grounds on which primary jurisdiction courts may annul an award," so that "a court in the country under whose law the arbitration was conducted may apply domestic arbitral law, such as the FAA, to a motion to set aside or vacate" that award); Apache Bohai

is obliquely confirmed by the structure of the New York Convention: An award is generally understood to be "made" at the seat,[25] and foreign states are relieved of any obligation under the Convention to enforce an award which has been "set aside or suspended" by a court of the state "in which" it was "made";[26] "one can---if this helps---conceive of an American court that (under § 10 of the FAA) vacates an award, and then (under the Convention) refuses to enforce the award it has just vacated, as being 'two separate courts with the judges wearing two different hats.'"[27] Any contrary view would have the apparent consequence that no motion to vacate the award might be available *anywhere*---creating true "a-national" awards, challengeable only where, and when, the successful party himself chose to seek enforcement.[28]

Corp, LDC v. Texaco China B.V., 2005 WL 6112664 (S.D. Tex.)(Houston arbitration under AAA International Arbitration Rules; "this court has primary jurisdiction over the award and may entertain a motion to vacate" the award "on any of several grounds identified in the [FAA] and case law"). An elaborately-reasoned and still "leading" case is Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2nd Cir. 1997)("as the award can be set aside in the country of origin on *all* grounds contained in the arbitration law of that country, including the public policy of that country, the grounds for refusal of enforcement under the Convention may indirectly be extended to include all kinds of particularities of the arbitration law of the country of origin").

This dominant authority has now bypassed commentary to the contrary, which---being largely a priori anyway---should not be followed. See, e.g., Lawrence F. Ebb, Developing Views on What Constitutes a "Foreign Arbitration Agreement" and a "Foreign Award" Under the New York Convention, 1 AM. REV. INT'L ARB. 364, 370-71 (1991)("[f]rom a theoretical viewpoint," an American court would treat the Convention as "precluding an action for setting aside [a "non-domestic" American award] under any inconsistent list of objections" appearing in the "domestic" FAA); Craig, supra note 9 at 35 n.185 ("[i]n theory," "manifest disregard" of the law "should not be available as a ground for resisting enforcement of, or for vacating, a nondomestic award rendered in the United States between foreign parties, which is considered covered by the Convention"). Cf. n.28 infra.

[25] See 2 Born, supra n.10 at 2368-71 (with the exception of some older, "idiosyncratic" and "misconceived" decisions); see also Restatement of the Law Third, The U.S. Law of International Commercial Arbitration, Tentative Draft No. 1 (March 29, 2010) [hereinafter, "*Restatement*"], § 1-1 *cmt. r* ("made" is a term "used by statutes and treaties to signify the coming-into-existence of an award," and for this purpose the seat "is conclusive"); UNCITRAL Arbitration Rules, R.16(4)("the award shall be made at the place of arbitration").

[26] New York Convention, art. V(1)(e).

[27] Rau, *The New York Convention in American Courts*, supra n.22 at 240 (quoting Hiscox v. Outhwaite, [1991] 3 All E.R. 641, 649 (H.L.)). "But all this of course is unnecessary conceptualism: Combining the two functions retains the supervisory functions of the forum state, while still giving the broadest possible currency international arbitration agreements and awards." Id.

[28] I suppose one might (just possibly) take the position that since § 207 does not on its face distinguish between foreign awards and "non-domestic" Convention awards rendered in the U.S., then---even in the latter case---"confirmation" may be resisted only "on the grounds for refusal or deferral of recognition or enforcement . . . specified in the said Convention." This at least seems to be the assumption, largely a priori and unexamined, in the Eleventh Circuit, see Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte Gmbh, 141 F.3d 1434, 1446 (11th Cir. 1998)(the Convention does not include a defense against enforcement on the ground that the award was "arbitrary and capricious," and "the omission is decisive"; "the Convention's enumeration of defenses is exclusive").

Now to begin with, invocation of the "Convention's enumeration of defenses" must then---presumably and embarrassingly—pass over art. V(1)(e) in silence. OK: In addition, though, neither the Convention nor Chapter 2 of the FAA say anything about actual annulment. Could one then go further,

Now suppose that an award is brought to a state *other than* the state in which it was rendered---a state that was not "the seat," that is, a so-called state of "secondary jurisdiction": Here too the losing party will ask the courts to refuse to enforce or recognize the award; if he is successful in this, then the practical effect --at least within that state---will be the functional equivalent of an actual annulment. It is true that while local annulment at "the seat" is largely unrestricted by international agreement, a state's freedom of appreciation with respect to "foreign" awards is, by contrast, limited by the New York Convention---in which the grounds for refusal of recognition or enforcement are carefully circumscribed by art. V.[29] But in most states with modern legislation---in the U.S., in particular---this will be an empty and thus profoundly uninteresting distinction: As a practical matter, after all, it seems highly unlikely--to put it mildly--that actual results in concrete cases will tend to diverge significantly depending on whether an award is scrutinized under Article V of the Convention or under § 10 of the FAA: "I think it is reasonably safe to assume that in operation the standards of the Convention and the FAA will be identical."[30]

---

and argue that "by drafting as broadly as it did in § 202, the U.S. retained the power to vacate U.S. awards under § 10, but limited this power to grounds equivalent or analogous to those grounds contained in art. V(1)(a)-V(1)(d)"? It would follow, then, that a U.S. court could always refuse to enforce an award vacated in Dubai for idiosyncratic Dubai-esque grounds, but could neither vacate nor refuse to enforce an award rendered in the U.S. on idiosyncratic *American* grounds. I am quite unable even to begin to trace out the interpretative path that has to be followed to reach such a conclusion. By contrast the French legislation---unlike § 207---makes no mention of and does not rely on the Convention at all.

[29] So, for example, the arbitration legislation of a given state may not permit

- ad hoc arbitrations; or
- arbitrations conducted under the ICC Rules; or
- arbitrations presided over by foreign nationals; or
- arbitrations in which the witnesses did not swear to an oath in a prescribed form before making their statements.

Cf. Gaillard, supra n. 7 at 103-04 (China); *Termorio S.A*, supra n.22 (Columbia); Int'l Bechtel Co. Ltd. v. Dept. of Civil Aviation of the Govt. of Dubai, 300 F.Supp.2d 112 (D. D.C. 2004); Direction générale de l'aviation civile de l'Emirat de Dubai v. Société international Bechtel, 2006 REV. ARB. 695 (Cour d'Appel de Paris, Sept. 29, 2005)(Dubai) ; 1 Born, supra n.10 at 1442-43 (Saudi Arabia). This fact alone might justify annulment of awards rendered locally in such arbitrations---but would presumably not in itself justify a refusal to enforce an award rendered in such arbitrations in another contracting state.

[30] See generally Rau, *The New York Convention in American Courts*,, supra n.22 at 236; see also id. at 237 fn. 97 ("the vagueness and almost infinitely manipulable character of many of the grounds for challenge"). Of course the particular verbal formulations differ----but then, they differ across various jurisdictions within this country in "domestic" FAA cases, without altering our recognition that "[h] owever nattily wrapped, the packages are fungible." Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990). The underlying purpose in every case is to alert the court on review that something has gone seriously wrong in the conduct of the arbitration, whether in the form of arbitral overreaching or the denial of a fair hearing, and simply "to prevent an award from being enforced when some injustice in the proceedings taints its validity," Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2nd Cir. 1984). See, generally Management & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp., 820 F.2d 1531, 1534 (9th Cir. 1987)("in interpreting the grounds specified [for overturning awards], it is generally recognized that the Convention tracks the [FAA]"); Amoco Overseas Oil Co. v. Astir Navigation Co., Ltd., 490 F. Supp. 32, 36 (S.D.N.Y. 1979)("standards for vacating [sic] the award under Article V of the Convention are equivalent in this case to the corresponding standards under §§ 9 and 10 of the [FAA]").

Sometimes, as every academic knows, the most trivial hypotheticals can be the most challenging---if one is really intent on taking the time to brood about them: What, for example, should be done with the "non-Convention award"---an award rendered abroad but, perhaps, made in a state like Liechtenstein that is not a party to the Convention? [31] (That just about exhausts the category of the "non-Convention award."). [32] It is unclear whether such awards can even be confirmed in the U.S.,

---

I readily admit that in cases where it seems that foreign courts may have some role to play, waving the banner of "international comity" can often be a useful way of intimidating a judge into being more than usually circumspect in review. Conversely, Laurie Craig has suggested (with particular reference to the *Mitsubishi* problem) that when reviewing a *U.S. award* rendered in an international arbitration, "[i]t is by no means clear" that an American court "would use exactly the same judicial review standards" it would use with respect to enforcement of a *foreign* award, since "[i]t would perhaps be entitled to take an even closer second look." Craig, Uses and Abuses of Appeal from Awards, supra n.22 at 216. This is intriguing but seems to me to have limited predictive value: Could any "look" be more perfunctory, for example, than the passing glance bestowed by the Seventh Circuit in Baxter Int'l, Inc. v. Abbott Laboratories, 315 F.3d 829 (7th Cir. 2003)("whether the tribunal's construction of [the license] has [the effect of commanding the parties to violate rules of positive law] was a question put to, and resolved by, the arbitrators," and as between the parties "their answer is conclusive"). Although Judge Easterbrook at no point even alludes to this fact in his opinion in *Baxter*, the arbitral tribunal, consisting "of a U.S. attorney, a Spanish attorney, and a Japanese law professor," had rendered its award *in Chicago*. See generally Alan Scott Rau, The Arbitrator and "Mandatory Rules of Law," 18 Amer. Rev. Int'l Arb. 51, 74-79 (2007)("mandatory provisions that are thought to govern arbitration proceedings and that are thought sufficiently critical to justify vacatur of an award where the tribunal does not honor them"; "at least outside the ghetto of consumer affairs . . . this will remain, if not exactly a null set, then at least a concept rapidly being drained of content").

One common concern with permitting annulment of "international" awards under Chapter One of the FAA is that it seems to open the door to review on the ground of "manifest disregard of the law"---a much-fraught doctrinal construct, clearly unavailable when a party resists enforcement under the Convention of a *foreign* award. See, e.g., William W. Park, Amending the Federal Arbitration Act, 13 Amer. Rev. Int'l Arb. 75, 88-89 (2002)("a ground for challenge as vague as 'manifest disregard' hangs over international arbitration like a sword of Damocles, to be grasped by litigators and judges alike"; "[s]uch temptations should be placed out of reach through a new chapter in the FAA, expressly foreclosing back door judicial interference with the merits of international cases"). I agree of course that it is always wise parenting to keep dangerous toys out of the hands of children. But if one peers closely at the whole notion of "manifest disregard," it is hard to avoid the impression that really, at bottom, there just isn't anything there. I have tried to demonstrate this at some length in Alan Scott Rau, The Culture of American Arbitration and the Lessons of ADR, 40 Tex. Int'l L.J. 449, 509-533 (2005)("the red herring of 'manifest disregard'"; when one accounts for possible "alternative analytical constructs," the doctrine is left "with no subsisting function whatever"); and in Alan Scott Rau, Fear of Freedom, 17 Amer. Rev. Int'l Arb. 469, 496-502 (2006)("essentially irrelevant").

[31] There is also Taiwan---and among several others, prominent arbitration venues such as North Korea, Suriname, Chad, Angola, Myanmar, Somalia, Yemen, Eritrea, Bhutan, and Sudan. Awards from these states are outside Chapter Two of the FAA by virtue of our reservation of "reciprocity."

[32] Awards arising out of "non-commercial" legal relationships are excluded from Convention coverage---although not from the "domestic" FAA. (But for the particularly narrow meaning given to the "non-commercial" exception in U.S. law, see Emmanuel Gaillard & John Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration 39 (1999)). U.S. courts also hold that where an agreement is between two American citizens, with no foreign connection other than that the contemplated place of arbitration is London, "the relation with a foreign state . . . required to invoke the Convention is lacking"---with the apparent implication that a federal court has no jurisdiction under the Convention either to compel arbitration in London, nor to confirm an award rendered there. These cases are grotesquely,

although I believe that this should be possible.[33] But if confirmation (unavailable by definition under the Convention) remains open under § 9 of the "domestic" FAA, then

---

inexplicably, mistaken; see Rau, *The New York Convention in American Courts*, supra n.22 at 242-57. Unfortunately the error now seems to be ineradicable; see Matabang v. Carnival Corp., 630 F.Supp.2d 1361(S.D. Fla. 2009)(motion to remand granted and motion to compel denied; "the law is clear").

That's about it, though. I do not believe it is sensible to say that where an agreement fails to satisfy the rather antiquated "writing" requirement of art. II(2) of the Convention---which may insist on an agreement being "signed by the parties or contained in an exchange of letters or telegrams"--- then the resulting award must also be relegated to the status of a "non- Convention award." Cf. *Restatement*, supra n.25 at § 1-1 *cmt*. t. ("an award that does not arise out of an 'agreement in writing' also is not a Convention award"), § 5-1 *cmt*. c ("the arbitration agreement a party submits to the court when seeking recognition or enforcement of an international arbitral award must be an agreement in writing as defined in the applicable Convention").

It is a familiar proposition that the Convention formula bears little connection to commercial reality; the paradigmatic counter-example is a contract formed by a written offer, accepted orally, or tacitly, or by performance. So it seems far preferable to interpret the Convention as *obligating states to take certain minimum steps* to enforce arbitral agreements---but not imposing a *ceiling* on what they may do---so that the Convention could still be satisfied if an arbitration agreement would be deemed enforceable under the jurisdiction's general arbitration statute, or under ordinary domestic contract law standards. Is it sensible that where one party adopts a written proposal by beginning performance, he should be able to sue for breach of the substantive terms of the contract---but that at the same time, thanks to the notion of "separability," he is able to wash his hands *of the arbitration clause contained in it*? Can it really be that a state which now chooses---in its eagerness to conform to international standards---to track in its arbitration legislation the recent "modernized" version of art. 7 of the UNCITRAL Model Law, is thereby systematically taking itself out of the Convention for the agreements it enforces?
There are indeed American cases suggesting that a court may enforce an arbitration clause "only if it satisfies the Convention's more stringent [writing] requirement," because "the Convention controls in case of any conflict" with the FAA, e.g., Sen-Mar, Inc. v. Tiger Petroleum Corp., 774 F.Supp. 879 (S.D.N.Y. 1991). But these decisions can easily be explained away on simpler and more satisfactory grounds; see Rau, *Federal Common Law and Arbitral Power*, supra n.22 at 184 fn.50. See generally Zambia Steel & Bldg. Supplies Ltd v. James Clark & Easton Ltd., [1986] 2 Lloyd's L. Rep. 225 (C.A.)(oral assent to sales note containing arbitration clause is sufficient under English legislation intended to implement the Convention; the holding that this constitutes "an agreement in writing" cannot "constit[ute] departure by this country from any obligation assumed under the Convention"). To say that "an agreement formed by an oral or tacit acceptance" should nevertheless be treated as *within the Convention*, means that any recourse to art. VII---and the apparent need for an independent source of federal jurisdiction---is simply unnecessary. The fact that a given state makes this choice, in the interest of ensuring congruence with its domestic law of "agreement," does not of course prevent *any other state* from withholding recognition of the award under arts. IV and V

[33] See *Restatement*, supra n.25 at § 5-3(d) & § 5-3 *cmt.* f ("Applying Chapter One of the FAA to non-Convention awards would result in their receiving treatment similar to the treatment accorded to domestic awards in interstate commerce").

The conclusion is buttressed by dicta in *Cortez Byrd Chips, Inc*., supra n.20. The Supreme Court held there that the venue provisions of § 10 of the FAA (and by implication, those of § 9; the "venue sections of the FAA are best analyzed together," 529 U.S. at 198), were "permissive" and not mandatory. Apparently a contrary holding "would create anomalous results": For while the New York Convention "provide[s] a liberal choice of venue for actions to confirm" Convention awards, a reading of §§ 9 and § 10 as mandatory "would preclude any action under the FAA in courts of the United States, to confirm, modify or vacate awards rendered in foreign arbitrations not covered by" the Convention. 529 U.S. at 202-203. (It would be charitable to pass over in silence the words "or vacate"---this must be the familiar phenomenon of the fatally superfluous word heedlessly thrown out in the full flow of rhetoric.) But cf. Int'l Bechtel Co. v. Dept. of Civil Aviation of Dubai, 360 F. Supp. 2d 136 (D.D.C. 2005), which trivializes *Cortez*

obviously the losing party has to have some means of resisting a flawed award: And this can be provided, by analogy, by § 10: That § 10 requires "an order vacating the award" can obviously not be taken literally here---for the U.S. is not the seat of the arbitration, and no order of annulment can claim international recognition--- but nevertheless § 10 provides a useful formula for the refusal of recognition and enforcement. [34]

The preceding discussion does serve to remind us that in at least one respect the distinction between the annulment of local awards, and the non-recognition of foreign awards, may be critical: While (as I have just noted) the effect is pretty much the same within the forum state itself, still, a decision to "vacate" a local award may have pretensions to international legitimacy to the extent other jurisdictions can be expected to defer to it. Thus a perfectly banal English award, otherwise clearly entitled to recognition and enforcement in the United States under the Convention, might still be denied recognition if it had been reviewed and vacated under English law for a "mistake of law." For an American (or Italian) court might conclude that the award, vacated at the seat, no longer "exists."[35] In the absence of an English annulment , however, the U.S.,

---

as a case dealing only with the "venue appropriate for a suit otherwise properly brought within the FAA"---and which dismissed the plaintiff's claim for confirmation of a non-Convention award for "failure to state a claim upon which relief can be granted," since the contract between the parties did not expressly provide that judgment could be entered on the award in a U.S. court as required by § 9.

[34] See *Restatement*, supra n.25 at § 5-3 *Reporters' Notes note f* ("the Section 10 grounds for vacating awards should be construed as grounds for denying enforcement, operating the same way as the [Conventions'] grounds for denying enforcement").

The argument to this point does not address the question of the effect to be given to a Liechtenstein annulment---perhaps, most troublingly, one rendered on idiosyncratic grounds with no domestic statutory counterpart. Section 10 of course would have no reason to address foreign orders of vacatur, and so there is no domestic counterpart to art. V(1)(e) of the Convention, which makes a vacated award presumptively unenforceable elsewhere. Perhaps a U.S. court could retreat to the prophylactic position that, after annulment, the award simply "does not exist" so that there is no longer anything left to enforce; cf. *Termorio S.A.,* supra n.22 at 936 (calling this a "principal precept of the New York Convention"). Surely the New York Convention does not incorporate a policy that extends to states, as a particular benefit of ratification, the universal recognition of their local annulments. At the same time a U.S. court would presumably assess a Liechtenstein decision of annulment in light of its usual restrictions on the recognition of foreign judgments; cf. Int'l Bechtel Co. Ltd. v. Department of Civil Aviation of the Gov. of Dubai, 300 F.Supp.2d 112 (D.D.C. 2004)(Dubai court's annulment on the ground that witness oaths were not properly administered "registers at the hypertechnical fringe of what Americans would call justice," but whether this is "repugnant to fundamental notions of what is decent and just . . . remains to be seen"). See generally text accompanying nn. 157-166 infra.

[35] See *Termorio S.A.,* supra n.22 and n.32 supra.

Contractual agreement with respect to the arbitral "seat" may imply submission to the supervision and oversight of the local courts. But it hardly follows from this that an aggrieved party must--- before challenging an award in a state of "secondary jurisdiction"---first exhaust his remedies by seeking annulment where the award was rendered: Even on the assumption that we would defer to an actual local annulment [see text accompanying nn. 84-99 infra], or to an actual local judgment of confirmation, [see text accompanying n.172 & n.172 infra], such a requirement could not be justified---as it would be both

- anachronistic, see Dallah Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Gov. of Pakistan, [2009] C.L.C. 84 (CA) ¶ 19 (the effect of such a requirement "would be to reinstate in all but name the 'double exequatur' rule which the Convention displaced"), and

as a state of "secondary jurisdiction," might still find conventional Convention grounds to refuse recognition---although any other state of secondary jurisdiction might well conclude otherwise.

This is a distinction that is commonplace here (and just about everywhere else). It is, by contrast, totally insignificant in states like France where art V(1)(e) of the Convention forms no part of local law---with the result that local law requires courts to pay no attention whatever to a foreign annulment. This is often said to rest on an underlying "philosophical" premise, to the effect that an international arbitral award is "not attached to any national legal order" at all[36]---that it simply "has no nationality"[37] (or even, in a related point, that the very agreement to arbitrate "has no need of any national law in order to exist.").[38] Instead the international award forms a part of an autonomous "arbitral legal system," occupying a juridical universe of its own just like the decision of some permanent adjudicative body formed by international agreement.[39] It is a poignant irony that despite such rhetorical flourishes, French law does not go on to draw the conclusion that an award rendered *in France,* too, is "unattached" to the *French* legal order:[40] No, on the contrary: Such awards---however little contact the parties, or the underlying transaction, or the governing law, may have with France, and even in the absence of any actual attempt at enforcement in France—may also be set aside by the courts of the seat.[41]

- burdensome (cf. Convention art. VI; if an application for vacatur has been made to the courts of the seat, a putative enforcement court may adjourn the decision "and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security").

Further on the practical drawbacks of such a view, see Gaillard, supra n.7 at 203-05; see also id. at 206. (Apparently, and conveniently, one arrives at precisely the same result---relieving the losing party of any obligation to first seek annulment at the seat--- whether one takes the antiquated "Westphalian" view of international arbitration, or adheres instead to the author's faith in an independent "arbitral legal order").

See also Paklito Investment Ltd. v. Klockner East Asia Ltd, [1993] 2 HKLR 39 (High Ct.)(held, "the defendants were prevented from presenting their case and this constituted a serious breach of due process"; there is nothing in the Convention "which specifies that a defendant is obliged to apply to set aside an award in the country where it was made as a condition of opposing enforcement elsewhere," and so the defendants' "rights are not in any way cut down because of their failure to challenge the matter in the courts of China").

[36] Société PT Putrabali Adyamulia v. Société Rena Holding, 2007 Rev. Arb. 507, 514 (Cour de Cassation, June 29, 2007)(an English award, annulled by an English court for having "misapplied English law," is nevertheless enforced in France). See generally text accompanying nn. 97ff. infra.

[37] Id. at 509, 511 (report of President Jean-Pierre Ancel).

[38] Cf. Comité populaire de la municipalité de Khoms v. Soc. Dalico Contractors, [1994] Rev. Crit. Droit Int'l Privé 663 (Cour de Cassation, Dec. 20, 1993)(the existence and validity of an arbitration agreement must be tested only "by looking at the parties' mutual consent, any reference to any state law being unnecessary").

[39] Gaillard, supra n.7 at 60. 97.

[40] I call this a "poignant irony," but I am being uncharacteristically tolerant and indulgent---Professor Mayer perceives instead a "shocking asymmetry." Pierre Mayer, "L'insertion de la sentence dans l'ordre juridique français," *in* Yves Derains (ed.), Droit et pratique de l'arbitrage international en France 81, 100 (1984).

[41] CPC art. 1504; see Gaillard & Savage, supra n.31 at 903-04.

c. "In which, or under the law of which . . ."

That the "seat" of the arbitration is the privileged starting point with respect to any allocation of judicial authority has traditionally been a simple reflection of the power of any sovereign over acts taking place within its "territory."[42] An alternative and perhaps more robust explanation would be somewhat more "contractualist": It would give priority

---

That French legislation contemplates judicial review of awards rendered in France, may be explained in part by a desire to demonstrate that such awards---however trivial or indeed inexistent their connections with France may be--have undergone some local vetting process, tending to insure arbitral authority and procedural integrity: The reassurance this supposedly provides to the international community is in turn likely to enhance the worldwide currency of "French" awards. See William W. Park, Why Courts Review Arbitral Awards, *in* William W. Park, Arbitration of International Business Dispute s: Studies in Law and Practice 147, 151 (2006). But where as in the celebrated *Götaverken* case, neither party is French, contractual performance is to take place outside of France, and there is no express submission to French procedural law, it is rather hard to discern the national interest in this---other than, of course, the guild interest of local *arbitrati*, attorneys and arbitrators. That this is in fact the driving engine behind most of French jurisprudence is rarely acknowledged, and only by the most self-aware.

There is something else, however: The exercise of judicial review in France carries with it at the same time the general understanding that no other state (with the exception perhaps of a handful similarly inclined) is likely to undertake to second-guess any actual French decree of *annulment*. The power of French courts to annul "French" awards may perhaps tend to insure transnational "coordination," and a rational "allocation of jurisdictional power," cf. Philippe Fouchard, "L'arbitrage international en France après le décret du 12 mai 1981," *in* Philippe Fouchard, *Ecrits* 301, 329 (2007)---but after all, it can do so *only* if other states can be expected ultimately to defer to a French order of vacatur. Cf. Philippe Fouchard, "La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine," *in id*. at 441, 456 ("Why set aside an award if there has been no attempt to enforce it locally? And why set it aside at all if the vacatur is not intended to have extraterritorial effect"?). Thus it is hard to understand why the legislature should have provided for a setting-aside process (as opposed to merely providing for the denial of recognition and enforcement) "if the purpose was not to permit [or encourage?] foreign states to attribute the usual effect to a French annulment." Cf. Mayer, supra n.40 at 100.

An imminent revision of French legislation will now permit "opting out" of annulment proceedings in France, see the proposed art. 1521 ("by special agreement, the parties may at any time expressly waive the right to seek annulment," although they may of course always resist actual enforcement of an award on the usual grounds). Unlike the Swiss model, this possibility is offered to all contracting parties and not merely to foreigners; just as in Switzerland, however, it is not expected that the option will be widely exploited. See also n.21 supra.

[42] See, e.g., Craig, *Uses and Abuses of Appeal from Awards*, supra n.22 at 182-83, 191-92 ("within its frontiers"; while "arbitrations in the 'home jurisdiction' are much more likely to involve domestic concerns," a large number of international arbitrations "have nothing to do with the home jurisdiction, except that that they use conference rooms in the home jurisdiction's Hilton hotel," and quite often states "have more interests at stake in the meeting of the local jockey club than in the proceedings of an international arbitral tribunal").See also F.A. Mann, The UNCITRAL Model Law---*Lex Facit Arbitrum,* 2 Arb. Int'l 241, 246 (1986)("Is not every activity occurring on the territory of a State necessarily subject to its jurisdiction?"); UK Comments to UNCITRAL Model Law art. 1, A/CN.9/263/ADD.2 (21 May 1985), *in* Holtzmann & Neuhaus, supra n.14 at 112 ("It would be unacceptable to have the jurisdiction of the local court completely ousted in respect of arbitrations taking place within its territory"). Cf. Hannah L. Buxbaum, Territory, Territoriality, and the Resolution of Jurisdictional Conflict, 57 Amer. J. Comp. L. 631, 636 (2009)("historically, a claim of territorial jurisdiction was irrefutable and unproblematic in that it rested on conduct occurring within the regulating state and, by definition, could not overlap with a competing claim by another country").

to the parties' exercise of autonomy in the very act of selecting the place of arbitration---and to the intuition that, by extension, they have presumptively chosen to subject themselves both to a certain body of "arbitration law," and to the supervisory jurisdiction of the courts charged with applying that law.[43]

It may indeed once have been taken largely for granted that the state of the "seat" would necessarily coincide with the state where the arbitrators are physically present---where they physically convene hearings---and where they physically sign awards; any decoupling would likely be seen as a freak accident and so the cause of much bewilderment.[44] But any such assumption has largely been undermined by technological advances, by the prevalence of multifaceted transactions spanning multiple frontiers, and by a greater sophistication in the techniques of complex "case management." So it is now a familiar proposition that the arbitral "seat" may be a "pure fiction"---in the simple sense that it is but a notional legal construct, one that may not accurately describe the world as it is.[45] For arbitrators may be forgiven if they should

---

[43] See *C. v. D.,* supra n. 20 at ¶¶ 16-17("by choosing London as the seat of the arbitration, the parties must be taken to have agreed that the proceedings on the award should be only those permitted by English law"; "a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award"; "any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of [an award] is agreed to be made only in the courts of the place designated as the seat of the arbitration"); Shashoua v. Sharma, [2009] 2 Lloyd's L. Rep. 376 (QBD (Comm.)) ¶ 23 ("not only is there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration").

[44] See, e.g., the now-obsolete case of Hiscox v. Outhwaite, supra n.27 (arbitration clause called for arbitration in London, but the arbitrator, an English barrister, signed the final award when he was in Paris; "I find it anomalous and regrettable that the fortuitous circumstance of signature in Paris should stamp what was clearly intended to be an award subject to all the procedural regulations of an English arbitration with the character of a Convention award [on the ground that it was "made in France," but] I find the conclusion that it did irresistible")((Lord Oliver of Aylmerton). It is now more generally understood that the place of the hearings and of the signature of the award may vary subject only to "the whims or the clumsiness of the arbitrators," but that this does not effect any change in the arbitral situs itself. *Société Procédés de préfabrication pour le béton v. Libye,* [1998] Rev. de l"Arb. 399 *(*Cour d'Appel de Paris, Oct. 28, 1997*)*(contract designated Geneva as the seat of the arbitration; held, award had not been "made in France" despite the fact that the tribunal had held all hearings in Paris and the chairman had signed the award there).

[45] Gabrielle Kaufmann-Kohler, *Le lieu de l'arbitrage à l'aune de la mondialisation*, [1998] Rev. de l'Arb. 517, 522. Certainly not, however, in the sense that these words imply any "lack of legal consequence," cf. Noah Rubins, "The Arbitral Seat is No Fiction," 16(1) Mealey's Int. Arb. Rep. 12 (Jan. 2001)("the arbitral seat is anything but fictitious," since the choice of the seat "is perhaps the most essential negotiating point of any international arbitration agreement").

This is precisely what a legal fiction is: The "seat" is where the arbitration is conclusively "deemed" to "take place," and the location of this "place" is the first question we (Continentals and "Anglo-Saxons" alike) ask in evaluating any arbitral agreement or award. The parties are thus enabled, and expected, to identify a single governing body of law, and a single court system, which will constitute the legal framework for their arbitration---all without impairing in any way the convenience and efficiency of the process. Cf. Philippe Fouchard, *Suggestions pour accroître l'efficacité internationale des sentences arbitrales*, in Fouchard, supra n. 41 at 456, 466 ("the law of the state on whose territory the arbitration

(understandably enough) prefer to dine in Paris rather than in Addis Ababa;[46] the Court of Arbitration for Sport may understandably wish to develop a stable and unitary body of procedural law to govern its jurisprudence, even though the need for rapid on-site dispute resolution may require the evaluation of testimony in Sydney or Beijing.[47]

---

takes place—or at least where it is deemed to take place [*censé se dérouler*] gives the proceedings a legal framework"). The familiar language of the physical world ("place," "rendered," "territory") is evoked, but this is a space where neither parties nor arbitrators may ever have stood or walked around; it is "constructive."

[46] See, e.g., Salini Costruttori S.p.a. v. Federal Democratic Republic of Ethiopia, ICC Arbitration No. 10623/AER/ACS, *in* Emannuel Gaillard (ed)., Anti-Suit Injunctions in International Arbitration 227 (2005). In the view of the respondent Government, the contractual choice of Ethiopia as the "place of arbitration" at the very least "created a presumption" that the hearings would physically take place in Addis Ababa---which would also allow the tribunal to make a visit to the site of the project. In a preliminary ruling, however the arbitrators---professors from Italy, France, and Ireland---decided instead, "based on considerations of convenience and costliness," to hold at least the first meeting in Paris.

[47] See generally Gabrielle Kaufmann-Kohler, Arbitration at the Olympics: Issues of Fast-Track Dispute Resolution and Sports Law 47-49 (2001)(the seat of every CAS arbitration is therefore deemed to be Lausanne; while on-site arbitration, at the Olympic games or otherwise, makes the process as convenient and expeditious as possible for the participants, a " uniform regime" of arbitral procedural law ensures an "equal treatment in matters of dispute resolution [which is] in line with the equal standards that govern sports competition").

See Raguz v. Sullivan, [2000] NSWCA 240 (New South Wales Ct. App.). Here the Australian court refused leave to appeal a CAS award, on the ground that having selected Switzerland as the "seat" of their arbitration, the parties had necessarily entered into an "exclusion agreement" under § 40 of the New South Wales Commercial Arbitration Act 1984---thus barring any right of appeal to Australian courts that they would otherwise have. I have always been somewhat puzzled as to why the *Raguz* court did not take a simpler and more direct route to the same result: Invoking the UNCITRAL Model Law---which has the force of law in Australia under the International Arbitration Act 1974---would lead irresistibly to the conclusion that submission to the CAS constituted an agreement for an "international arbitration," with the "place of arbitration" to be outside of Australia; it should follow that an Australian court would lack any jurisdiction to set the award aside. See text accompanying nn. 13-14 supra. Sharing my bemusement are Jean-François Poudret & Sébastien Besson, Droit comparé de l'arbitrage international 104-05 (2002). But doubtless the proper explanation lies in the current assumption of Australian jurisprudence---an assumption quite curious and entirely indefensible---that by choosing a body of institutional procedural rules (like the rules of the CAS), the parties had necessarily excluded the applicability of the Model Law. (Under § 21 of the Act, the Model Law "does not apply" if the parties have agreed that disputes are "to be settled otherwise than in accordance with the Model Law".). See American Diagnostica Inc. v. Gradipore Ltd., 1998 NSW Lexis 1051 at *26 (New South Wales Sup. Ct.)(contract provided for arbitration "pursuant to the rules of the Australian American Arbitration Agreement" [sic], and the parties later agreed on the UNCITRAL Arbitration Rules; "there was clearly agreement that disputes falling within the arbitration clause were to be settled otherwise than in accordance with the Model Law," and so the New South Wales Commercial Arbitration Act governed); Australian Granites Ltd. v. Eisenwerk Hensel Bayreuth Dipl.-Ing Burkhardt GmbH, [2001] 1 QdR. 461, 465 (Queensland Ct. App.)("It would have made little sense to agree to subject disputes to arbitration under both the Model Law and the ICC Rules, since the two are irreconcilable in a number of respects").

By contrast the courts of Switzerland regularly undertake to review CAS awards on motions seeking annulment; see, e.g., Decision of Feb. 9, 2009 (Trib. Fed. 4A_400/2008)(award set aside under art. 190(2)(d) of the Swiss Private International Law Act on the ground that a party's "right to be heard in an adversary procedure has not been observed").

Now perhaps one shouldn't erect too elaborate a structure on examples like these which, however seductive, are exceptional: Doubtless the parties' natural ex ante assumption is that the designated "seat" is precisely where the actual proceedings will begin and unfold---and this is an expectation that is likely as a general matter to be respected.[48] And perhaps, some modicum of actual physical connection with the state of the "seat" may in any event be thought well-advised, if the award is to have its intended legal effect.[49] But there is nevertheless no general legal barrier to conducting

---

[48] The UNCITRAL Notes on Organizing Arbitral Proceedings suggest a number of "factual and legal factors [that should] influence the choice of the place of arbitration" and which any tribunal or administering institution should take into account in making the decision. Among the more prominent factors are, indiscriminately, both those that address the "seat" as a legal construct---e.g., the "suitability of [its] law on arbitral procedure," and the existence of international conventions dealing with the enforcement of awards to which the state is a party---and those that suggest the inevitability of a physical presence---e.g., the "convenience of the parties and the arbitrators, including the travel distances," and the "availability and cost of support services needed." http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf, List of Matters for Possible Consideration in Organizing Arbitral Proceedings, Note 3 (1996). This suggests a working presumption that after balancing the various considerations, whichever place is chosen is likely to serve both as the "seat" of the arbitration and the physical location of the hearings. See also Tatsuya Nakamura, "The Place of Arbitration in International Arbitration---Its Fictitious Nature and Lex Arbitri," 25 (10) Mealey's Int. Arb. Rep. 11 (2000)("it seems natural to assume" that if the parties agree that the place of arbitration is London, "in principle" "they intended to choose it not only for legal reasons but also for other reasons such as neutrality or geographical convenience").

With respect to American arbitrations, the overwhelming importance of federal law means that (as long as it is within the United States) the concept of the "seat" as a legal construct---distinct from the physical conduct of the proceedings---will have virtually no purchase. Indeed, except in the rare case where state law is thought (usually mistakenly) to be relevant, the former is largely an alien concept; the "situs" is the nation at large. See generally Alan Scott Rau, "Does State Arbitration Law Matter at All?," *in* ADR & the Law 199, 207 (AAA 15th ed. 1999)("the notion that state arbitration law, which is at odds with the dictates of the FAA, can be reintroduced through the device of a choice-of-law clause has been steadily eroding, and is being increasingly ignored"). As a consequence the "place of arbitration" will usually be understood to refer merely to the physical location where the arbitration is to be set in motion. (How else to explain the occasional kerfuffle arising from the supposed "unconscionability" of an inconvenient forum clause? See Alan Scott Rau et al., Processes of Dispute Resolution 703-04 (4th ed. 2006)). See, e.g., FAA § 4, which grants a federal court the rather unusual power to direct the parties to arbitrate "in accordance with the terms of [their] agreement," but also specifies that should it exercise this power, "*the hearing and proceedings*, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed." All of this of course is routinely superseded by institutional rules permitting arbitrators to hold hearings elsewhere; see, e.g., Spring Hope Rockwool v. Industrial Clean Air Inc., 504 F.Supp.1385 (D.C.N.C. 1981)(*forum non conveniens* does not justify overriding a contractual provision with respect to the seat, but "any question of where the arbitrators will hold their hearings is to be decided by the American Arbitration Association in accordance with its rules").

[49] See, e.g., Titan Corp. v. Alcatel CIT, S.A., 20 (7) Mealey's Int. Arb. Rep. at A-1 (Svea Court of Appeal, 28 Feb. 2005). Here the arbitration clause provided that the place of arbitration was to be Stockholm; the parties were French and American, and the dispute concerned an agreement regarding a telecommunications system to be installed in Benin. The English arbitrator held oral hearings in London and Paris, and performed the remainder of his work in England. The Swedish court held that in these circumstances it had no jurisdiction over a challenge to the award, as there was no "Swedish judicial interest" in the case---which "normally required that the dispute or the parties to the dispute have some, albeit minor, connection to Sweden." The award, then, "could not be deemed to have been rendered in Sweden." The court's observation that there was "no reason to believe that [the challenge to the award]

arbitration outside the named "seat"---and to conducting it, not only anywhere, but indeed *nowhere*---on the high seas or in cyberspace.[50] By the same token it must follow that should the tribunal think it appropriate to hold hearings, receive testimony, or deliberate in any other state, their decision to do so cannot alter the legal "seat" of the arbitration---cannot, that is, confer jurisdiction to vacate on the courts of a state other than the one the parties had selected for that purpose.[51]

---

would not be dealt with by *e.g.* a French court" is obviously uninformed. A further, and a nice, point is that if the award had been challenged on the ground that the arbitral procedure was not in accordance with the agreement of the parties---because they had expected the hearing to be conducted *within* Sweden---the same jurisdictional defect would presumably be present---even though this absence of any physical link to Sweden would be precisely what the moving party was complaining about! Cf. Swedish Arbitration Act, §§ 34(2)(vacatur if the arbitrators have "exceeded their mandate"), 34(6)(vacatur "if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case"). See Sigvard Jarvin & Carroll S. Dorgan, "Are Foreign Parties Still Welcome in Stockholm?," 20 (7) Mealey's Int'l Arb. Rep. 42 (July 2005).

See also Poudret & Besson, supra n.47 at 105 ("it might be prudent" to conduct certain "minimal activities" in the state of the seat in order to "cut short any discussions" arising out of the "supposedly fictitious" nature of the chosen place); Marc Blessing, The New International Arbitration Law in Switzerland: A Significant Step towards Liberalism, 5 J. Int'l Arb. 9, 22 (1988)("it is a practical recommendation to avoid an overly strong connection being established with a place other than the formal seat of the arbitral tribunal," relying, for illustrative purposes, on attributes of German law which are probably no longer in play after Germany's adoption of the Model Law).

[50] Obviously it does not matter much for our purposes whether we conceive of "cyberspace" as an actual location, albeit one much like "outer space" or the high seas---"a new territory, virgin, without frontiers and with virtually infinite dimensions, a little like the Far West of westerns"---or instead as nothing but a metaphor. See the admirable work by Thomas Schultz, Réguler le commerce électronique par la resolution des litiges on ligne: une approche critique 23-25 (2005); see also Kaufmann-Kohler, supra n.45 at 529-34.

[51] In a New York arbitration, the tribunal issues a subpoena to a non-party in Houston, commanding him to appear at a deposition in Houston. If the non-party is recalcitrant, the subpoena may be a dead letter since there is no court to enforce it. One possible solution may be to ask the arbitrators to "move the location of the hearing" to the place of production and deposition; this may cleverly obviate the problem, since § 7 of the FAA permits the federal court "for the district *in which such arbitrators, or a majority of them, are sitting*," to compel production or attendance. For the details, see Rau, *Evidence and Discovery in American Arbitration*, supra n.14 at 52-59.

There are of course an infinite number of reasons why a tribunal may deem a change of physical venue warranted; there is, for example, the celebrated *Himpurna* arbitration, in which a state-controlled entity had obtained an injunction in the Indonesian courts against continuation of the arbitral proceedings, and the tribunal felt it necessary to conduct witness hearings in the Hague rather than in Jakarta. See Jan Paulsson, Denial of Justice in International Law 149-52 (2005)("without changing the legal place of arbitration"). For one colorful account of the difficulties, see H. Priyatna Abdurrasyid, "They Said I Was Going To Be Kidnapped," 18(6) Mealey's Int'l Arb. Rep., June 2003 at p. 29.

Such peripatetic tribunals, responsive to the interests of efficient case management, will not in any way affect the identity of the arbitral "seat" or override the legal framework established by the parties. See *Dubai Islamic Bank PJSC*, supra n.20 ("an arbitration must have a seat when the arbitration starts," and "once an arbitration starts and it has a 'seat' then I cannot see how it can be changed"; the location of the board meeting in London was "adventitious"). And given a general presumption to that effect, the mere failure of the parties to object to the conduct of hearings elsewhere should be probative of precisely nothing. But cf. Mann, supra n.42 at 247-48 (a Stockholm arbitrator "decides to hold the arbitration in Zurich"; "either party may object to a change to Switzerland, but in the absence of objection the original seat would become varied to a Swiss seat")).

However explained or rationalized, the choice of a "seat" as the notional legal "home" of an arbitration is critical precisely because this will presumptively determine the body of law that will govern the arbitral procedure.[52] And conversely, a contractual choice of a governing body of procedural law will presumptively determine where the arbitration will be "located" and thus where the ultimate award will have been

---

Of course, while it is true that the tribunal's conduct may not deprive the parties of the contractual choice of a *lex arbitri*, it is equally true that merely invoking the law of a foreign "seat" cannot serve to evade whatever mandatory rules at the physical place of arbitration govern conduct taking place there---relating, perhaps, to the practice of law or to the taking of testimony---however it is envisaged that such rules might be enforced. Cf. Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Services Ltd., [2008] EWHC 426 (TCC)) ¶ 17(f)(where the curial law was to be the law of England, and Glasgow to be merely where "the parties agreed that the hearings should take place," then "the Scottish courts would have no real control or interest in the arbitral proceedings other than in a criminal context").

[52] See Adam Samuel, Jurisdictional Problems in International Commercial Arbitration 64 (1989)("it is commonly accepted that a choice of the place of arbitration carries with it an implication that the law of that location will govern the proceedings"; "a party selection of the seat . . . is often made on the actual assumption that the *lex loci arbitri* will govern the proceedings"); Klaus Peter Berger, Re-examining the Arbitration Agreement: Applicable Law---Consensus or Confusion?, *in* International Arbitration 2006: Back to Basics? 301, 315 (ICCA Congress ser. No. 13, 2007)*(*"the choice of the seat by the parties . . . functions as an indirect choice of law not only for the law applicable to the arbitration procedure but also for the law applicable to the substantive validity of the arbitration agreement").

This is a point made with monotonous regularity in the English decisions; see, e.g., Halpern v. Halpern*,* [2006] 2 Lloyd's Rep. 83 (QBD (Comm))("in the absence of a clear pointer to the contrary, there is a strong presumption that the place where the arbitration takes place [here, Zurich] is to constitute its "seat'"; it then followed inexorably that "the law applicable to *the arbitration itself*, sometimes called the curial law or the *lex arbitri*,"---governing "how the proceedings in the arbitration are to be conducted by the arbitrators and the extent to which the courts will supervise the conduct of the arbitration"---would be that of Switzerland). See also Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.. [1993] AC 334, 457-58 (H.L.)(contract provided that the "seat" shall be Brussels, and so "the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration. . . "must I believe be the law of Belgium"; "the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible")(Lord Mustill).

It is commonly said on the Continent that unlike a state judge, the arbitrator "has no forum state" [*for*]---or perhaps, in a more grandiloquent fashion, that "he has a forum but, as in the novels of Balzac, it's the universe." See, e.g., Thomas Clay, Le siege de arbitrage international entre "ordem" et "progresso," *Les Cahiers de l'"arbitrage*, [2008] 2 Gaz. Pal. 20, 22. This is of course but a figure of speech---serving to remind us that just as the arbitrator (unlike the judge) is not the emanation of the sovereignty of a state, so he has no particular duty to anyone to formulate or apply or uphold its substantive law. But really, one must make some effort not to take rhetorical flourishes too literally: For there is a danger of concluding that in the absence of a *for,* there is necessarily (again, unlike the case of a state judge) no *lex fori*, no governing procedural law: Instead, rather than an applicable curial law, there exists a "range of possible tailor-made procedures, and combinations of different procedural systems, with which the parties can do what they please." Id. I sense a rather fundamental misunderstanding here: For it seems evident that party autonomy, and institutional rules, can only determine an arbitration's procedural regime *if and to the extent that the applicable arbitration legislation of the forum permits.* Recall the discussion of the Australian jurisprudence at n.47 supra. There as here: it is not that the ICC Rules supplant the Model Law, but on the contrary, it is only the provisions of the Model Law itself that may permit these Rules to be effective.

"rendered."[53] Both serve precisely the same function---both, at least until displaced by agreement to the contrary, are a function of party autonomy[54]---both respond to the overarching principle that the process is to be "the parties' dream."[55]

So worrying[56] the choice between "two views"[57]----trying to decide whether we should in fact attribute greater importance to "the seat," or to the "law chosen by the

---

[53] See Zenol, Inc. v. Carblox, Ltd., 334 F.Supp. 866 (W.D. Pa. 1971), aff'd per curiam, 474 F.2d 1338 (3rd Cir. 1973)(arbitration clause provided that it "shall be deemed to be a submission to arbitration within the Arbitration Act 1950," understood to be a reference to the English statute; the court stayed the action "pending arbitration under the British [sic] Act of 1950"; where the proceedings should actually be held "is a matter for the British Courts," but "if it is required to arbitrate in England, plaintiff cannot complain, having agreed to such a result by incorporating the British Arbitration Act in the contract"); Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru, [1988] 1 Lloyd's L. Rep. 116, 119 (C.A.)("in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also to be the 'seat' of the arbitration" and that "the Courts which are competent to control or assist the arbitration are the Courts exercising jurisdiction at X").

See also *Tonicstar Ltd.,* supra n.17. Here, since the parties had contracted in England, "in the Lloyd's market on a Lloyd's slip policy," it seemed "clear that the proper law of the whole contract is English law." It also seemed to follow that "the applicable law of the arbitration agreement" would be no different "from the applicable law of the reinsurance contract in which it has been incorporated." The inevitable conclusion was that England was the "natural forum for the dispute." The court therefore granted an injunction barring the defendant from seeking to compel arbitration in New York: For if the defendant were allowed to pursue its petition, the necessary and undesirable result under the terms of the FAA would be, "in the absence of an express choice of seat, [that] the seat [would] be in the Southern District of New York."

[54] E.g., Decision of May 10, 1984, Bundesgerichtshof (Germany), 10 Y.B. COM. ARB. 427, 429 (1985)(law governing the arbitration is "determined by the will of the parties," and the "choice" to be governed by the arbitration law of New York "could be inferred from the arbitration clause referring to arbitration in New York under the Arbitration Rules of the AAA").

Redfern and Hunter write that:

> To say that the parties [by choosing a place of arbitration in a particular country] have "chosen" that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has "chosen" French traffic law. . . [I]t would be an odd use of language to say that this national motorist has opted for "French traffic law."

Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 87 (4th ed. 2004).

This is engaging but essentially meaningless. One carefully weighs all the various considerations, and then one "decides." In fact, however charming the Devon countryside, my "choice" of Provence as a place to vacation instead will be largely determined by my unwillingness to drive on the left. Should I find myself paralyzed in a London roundabout, "well, you asked for it" would be an appropriate reproach. And as is often true of the "seat," neither Devon nor Provence may have the slightest connection with my business or professional life---but it is where I know from the outset that I will be behind the wheel.

[55] Cf. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 310 (1994):

> Within broad limits * * * private parties who submit an existing dispute to arbitration may write their own ticket about the terms of submission, if they can agree to a ticket. There is an old story about the girl who, dreaming, found herself threatened by an ominously male character, and said tremulously, "Wh-what are you going to do now?", only to receive the answer, "How do I know, lady? This is *your* dream." The arbitration of an existing dispute is the parties' dream, and they can make it what they want it to be.

parties"---inevitably appears to be the product of a particularly abstract, arid, and conceptual mind set.[58] Any attempt to disassociate the two---any attempt to posit that the parties may have chosen to arbitrate "in" one jurisdiction but to submit to the "arbitration law" of another---is quite unrealistic---doubtless a theoretical possibility,[59] but a *hypothèse d'école*.[60] We do indeed come across arbitration clauses that seem to have such an effect, although I suspect they are far more likely to be the result of inadvertence or ineptitude[61] than of deliberate choice. At the very least such

---

[56] "To seize by the throat with the teeth and tear or lacerate; to harass by rough or severe treatment; in a lighter sense, to plague or pester with reiterated demands, requests, or the like." (OED).

[57] Cf. Mann, supra n.42 at 245.

[58] See U.N. Conference on Int'l Commercial Arbitration, Summary Record of 4th Meeting, May 22, 1958, *reprinted in* INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION III.C.13,16-17 (Giorgio Gaja ed.) (remarks of German delegate; "the nature, and hence the nationality, of an arbitral award" should be derived from the "rules of procedure under which it had been made," which in turn depended on "the will of the parties"); Summary Record of 6th Meeting, May 23, 1958, id. at C.32, 40 (remarks of German delegate; where an arbitration tribunal sat in London but "followed the German procedure,", "German law regarded that award as German"; by contrast applying the "territorial" criterion "would have the effect of seriously infringing the autonomy of the will of the parties, which should be respected"); cf. Jean-Denis Bredin, The New York Convention of June 10th 1958 for the Recognition and Enforcement of Foreign Arbitral Awards, 87 J. DROIT INT'L (CLUNET) 1003, 1011 (1960)("while the territorial criterion has attracted some authors ... it is nowadays rejected by the majority of doctrinal writers who rely on the law of autonomy"; "the place where the award was made is at present a mere factor amongst others to assist in determining the law by which the parties intended to be governed").

[59] See 1 Born, supra n.10 at 1244 ("properly defined, the arbitration legislation of the arbitral seat is a different and broader concept, with a necessarily wider scope, than the procedural law of the arbitration"; therefore "it is often possible for parties to agree for a foreign procedural law to govern, or foreign court to have competence over, some of the subjects ordinarily governed by the law of the arbitral seat").

[60] Just as a well-known cognitive hiccup causes us in our purchasing decisions to attribute exceptional importance to the interval between $1 and "free" ---far greater importance than, say, to the interval between $3 and $4---so here, whole structures of legal analysis have been erected in the vanishing space between "virtually unthinkable" and "when Hell freezes over." For the former case, see Dan Ariely, Predictably Irrational: The Hidden Forces That Shape Our Decisions 49 (2008).

[61] See, e.g., Decision of July 5, 1955 (Cour d'appel de Paris), [1956] Rev. Crit. Droit Int'l Privé 79. Here a contract between two French parties provided for "arbitration in Paris to be held pursuant to English jurisdiction exclusively [*suivant la juridiction anglaise seule admise*]." The court concluded, sensibly enough, that the parties had wanted (a) a "French arbitration," but had also wanted (b) to waive any right of appeal that they would otherwise have under French law---appeal being possible under English law only if the arbitrators' error was "manifest," and a *waiver* of appeal being something which is both "frequent in France and which in no way violates French public policy." Cf. Ernst Mezger, Comment, id. at 81 (such a clause is an example of "reality surpassing fiction").

See also Pepsico Inc. v. Oficina Central de Asesoria y Ayuda Tecnica, C.A., 945 F. Supp. 69 (S.D.N.Y. 1996). A contract provided that "this Agreement shall be governed by the laws of the Republic of Venezuela"; arbitration under ICC rules, "including the rendering of an award, shall take place in New York," and "the arbitrators shall apply the substantive law of the State of New York." The respondent argued that the arbitration clause was "inoperative" because of its "obscurity and ambiguity," but the court held that the determination of this question was "plainly a matter of Venezuelan law": For the agreement "clearly contemplates that matters subject to determination by a court, such as threshold disputes over arbitrability, will be governed by Venezuelan law, while matters to be determined by arbitrators will be governed by New York law." 945 F. Supp. at 71 fn. 3. So the court denied for the moment a motion to

agreements are both extremely rare---"exceptional, almost unknown, a purely academic invention, almost never used in practice, a possibility more theoretical than real, and a once-in-a-blue moon set of circumstances"[62]--- and extremely foolish. [63] Doubling the number of jurisdictions with a plausible interest in seeing their law applied, and in entertaining actions to supervise proceedings or vacate awards, could only be calculated to create confusion—and this alone would justify a virtually irrebutable presumption that it is not what the parties have done.

Now should that presumption somehow be overcome---if we are indeed faced with an incorrigible, or insistently playful, draftsman---we do have to wonder about the consequences: Recall the New York Convention, which allows states of "secondary jurisdiction" to refuse enforcement of awards that have "been set aside or suspended by a competent authority of the country in *which, or under the law of which*, that award was made."[64] Does this really suggest that if separate states can be identified---if the parties have designated *both* a "seat" and an applicable "procedural law"--- then *both* are simultaneously the "competent authorities" envisaged by the Convention? Are both, then, states of "primary jurisdiction," with the power to appoint arbitrators and set aside awards"? (It is in any event of course the rare jurisdiction these days that will venture to annul an award not actually "rendered" on its territory, but merely made subject to its "law."). [65] That both such states may set aside an award has in fact been seriously

---

compel arbitration, so that a Venezuelan court could first "be afforded the initial opportunity to determine this threshold question of Venezuelan law before a non-Venezuelan court is called upon to do so."

Now what is this all about? Perhaps the *Pepsico* court may have been trying to invoke the rather arcane distinction---

- not between the "law of the seat" and the "contractually chosen curial law"---but instead,
- between the two of these, on the one hand, and "the law governing the arbitration agreement itself" (here, the law of Venezuela) on the other.

See generally the text accompanying nn. 297-316 infra. This may be making the best of a bad job---although the problems with *Pepsico* are self-evident: The boundary between what is "subject to determination by a court" and what is a matter "to be determined by arbitrators" is a fraught and shifting and controverted frontier---and of course, at any given moment New York and Venezuela are likely to have quite different ideas as to just what a "threshold dispute over arbitrability" amounts to.

[62] *Karaha Bodas Co., L.L.C,* supra n.20 at 291 (citations omitted).

[63] Since their physical convenience, or the possibility of travel for hedonic purposes, need not be impaired---and can in any event be separately provided for--- "it is not easy to understand why parties might wish to complicate the conduct of an arbitration in this way (unless, as is possible, they do not understand what they are doing"). Redfern & Hunter, supra n.54 at 87.

[64] Art. V(1)(e).

[65] See text accompanying nn. 13-14 supra; see also Poudret & Besson, supra n.47 at 89 ("even if the parties have agreed to apply the arbitration law of the judge to whom the request is made"); Gabrielle Kaufmann-Kohler, Identifying and Applying the Law Governing the Arbitration Procedure---The Role of the Law of the Place of Arbitration, *in* Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 336, 338-43 (ICCA Congress series no. 9, 1999). So, for example, awards rendered outside Germany under German procedural law are no longer subject to setting aside proceedings in Germany, id. at 341.

asserted.[66] Still, this may strike us not only as heresy,[67] but as an invitation to confusion.[68] Such a result is not in any way mandated by the text of the Convention[69]---

---

Counter examples are hard to find; For one, the provisions of Egypt's Law Concerning Arbitration in Civil and Commercial Matters, including its provisions on judicial review, apply to all arbitrations "conducted in Egypt or when the parties to an international commercial arbitration conducted abroad agree to subject it to the provisions of this Law." (Arts. 1, 9(2)). Apparently India too still cannot be counted on to fall in line with international standards, see Raghav Sharma, *Bhatia International v. Bulk Trading S.A.:* Ambushing International Commercial Arbitration Outside India?, 26(3) J. Int'l. Arb. 357, 363-69 (2009)(appointment of arbitrators and vacatur of foreign awards); see also Venture Global Engineering v. Satyam Computer Services Ltd., [2008] INSC 40 (Ind. Sup. Ct. 2008) at ¶¶ 13, 19 (London arbitration, but under the shareholders' agreement, "necessarily enforcement has to be in India"; "the judgment-debtor cannot be deprived of his right under [§ 34 of the Arbitration and Conciliation Act, 1996] to invoke the public policy of India, to set aside the award"; and that section, identical to art. 34 of the Model Law and dealing with the annulment of awards, is equally applicable "to international commercial arbitrations which take place out of India").

With respect to the United States, see n.21 supra. Most everyone accepts that by "law," art. V(1)(e) intended to "reference the complex thicket of the *procedural* law of arbitration obtaining in the numerous and diverse jurisdictions of nations in attendance at the time the Convention was being debated"---and certainly not the substantive law governing the contract; see International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Commercial, 745 F.Supp. 172 (S.D.N.Y. 1990)("the whole point of arbitration is that the merits of the dispute will *not* be reviewed in the courts, wherever they be located"). This is overdetermined, reflecting the likely abstraction of the seat (for which this is a surrogate) from the realities of the underlying transaction, as well as the venerable notion of the "separability" of the agreement to arbitrate. But even an award rendered abroad "under the FAA"---if one can shut one's eyes and imagine any such animal---should be beyond the jurisdiction of an American court to vacate.

[66] *Restatement,* supra n.25 at § 1-1, *cmt. f & Reporters' Notes note f* ("in the exceptional circumstance in which the parties expressly choose an arbitration law other than that of the seat," then an "adjudicative body within the system whose arbitration law was designated by the parties is authorized . . . concurrently with the authorities at the seat, to set aside or suspend an award").

See also V.S. Deshpande, Article V.1(e) of the 1958 New York Convention: A Plea for Harmonious and Purposive Interpretation, 8 J. Int'l Arb. (Sept. 1991) at pp. 77, 86 ("there are courts of two countries which are recognized as being competent to set aside an award;" "they will independently exercise the same [jurisdiction] and may come to different conclusions"). Going even further down this perilous Indian path, there is also Ved P. Nanda & David Pansius, 2 Litigation of International Disputes in U.S. Courts § 19:2 2009): "There are potentially two courts with primary jurisdiction: the courts of the arbitration state and the courts of the applicable 'arbitration' law state"; "it will be a rare instance where there are two primary jurisdiction states unless a court should interpret the Convention language to include substantive law as well"). And cf. Florida's International Arbitration Act, Fla. St. §§ 684.05(3), 684.24(1)(b), which forthrightly asserts that the "selection of the place of arbitration shall not in itself constitute selection of the procedural or substantive law of that place as the law governing the arbitration." As hard as it is to credit, Florida courts may apparently vacate an award not only if (a) "the place of arbitration was in this state"---but also (b) if the arbitration was "conducted in accordance with the law of this state"---and indeed, (c) if the "undertaking to arbitrate" "forms part of a contract the interpretation of which is to be governed by the law of this state"! More generally on Florida's shockingly lame legislation, see Rau, *Federal Common Law and Arbitral Power,* supra n.22 at 202-03 fn.103.

[67] See *Karaha Bodas Co., L.L.C.,* supra n.20 at 308-09 & fns. 127-128 ("exclusive primary jurisdiction in the courts of a single country" "facilitates the orderliness and predictability necessary to international commercial agreements"; this is the "predominant view").

[68] If both are indeed states of "primary jurisdiction," the mechanism for jurisdictional coordination provided in art. VI of the Convention could no longer be relied on.

the elusive disjunctive does not lend itself so readily to dogmatism. The law may occasionally permit folly, but it can never make it totally obligatory---and no judge worthy of the name would be unable to avoid this result.

So, assume a proceeding where the place of arbitration is to be Lima, but which is somehow expressly made subject to the arbitration law of England. Is a duplication of competence between competing jurisdictions---with all the confusion entailed by a concurrent power in each to vacate awards---truly inevitable? Surely it would be more natural simply to say,

- that the Peruvian courts, in exercising their authority, are expected to refer and defer to English legislation? Since autonomy with respect to the procedural regime of an arbitration is a feature of any modern legislation, the result would simply be to assume that English law has been incorporated into the agreement---in the same way that the parties could have taken the pains to copy out the text of the Arbitration Act at length into their contract.[70]

It will not do to suggest as a palliative that the party who wishes to challenge an award may have the option of proceeding in either of the two states, his choice, however, being definitive---binding on everybody. This does not particularly conduce to coherence or certainty---but more to the point, it still does not preclude dislocation and disorder: For it is not uncommon for Party A to be dissatisfied with an award in some respects, and for Party B to be equally dissatisfied with the same award in others: It "could scarcely be supposed that a party aggrieved by one part of an award could proceed in one jurisdiction and a party aggrieved by another part of an award could proceed in another jurisdiction," nor that "the aggrieved party could complain in one jurisdiction and the satisfied party be entitled to ask the other jurisdiction to declare its satisfaction with the award. There would be a serious risk of parties rushing to get the first judgment or of conflicting decisions which the parties cannot have contemplated." *C. v. D.,* supra n.20 at ¶ 16. Co-equal courts could I suppose simultaneously evolve rules of *lis pendens* and *res judicata* to avoid multiple litigation and inconsistent results, but the unseemly rush to the courthouse would continue..

[69] See *Restatement,* supra n.25 at § 5-12 *cmt. b.* (that an award "in exceptional circumstances" will be subject to the "primary jurisdiction" of two countries---both the state of the seat, and the state to whose arbitration law the parties have "expressly subject[ed] their arbitration"---with the consequence that the courts of *both* states "will have competence to set it aside"---is a consequence "explicitly recognized" in art. V(1)(e) of the Convention).

Assume a text provides that, absent party agreement or arbitral order, the arbitration "may be conducted in the official language of the "country in which, or under the law of which, [the award is to be] made." The plain meaning may perhaps mandate a "concurrent" cacophony of English and Spanish---but I would hope not

[70] So the desire to entrust the arbitral tribunal with the power to order depositions "for discovery purposes" could be accomplished by lengthy drafting to that effect---or by a "direct and specific" reference to the Texas General Arbitration Act, Tex. Civ. Prac. & Rem. Code § 171.050(a)(2); cf. Georgios Petrochilos, Procedural Law in International Arbitration 94-95 (2004)(suppose that in an arbitration "under the FAA," the parties agree that arbitral procedure is to "follow the civil procedure of the state of New York"; presumably the award can be set aside, either by state or federal court, should the tribunal not provide for witness and cross-examination as required by that law). Likewise the desire to impose tight time limits on the party appointment of arbitrators could be accomplished by an explicit provision to that effect---or by the incorporation of English law, see Arbitration Act 1996 (Eng.), § 16. See also Laconian Maritime Enterprises Ltd. v. Agromar Lineas Ltd., [1986] 3 S.A.L.R. 509, 530 (Durban and Coast Loc. Div. 1985)("incorporation in the contract of certain domestic provisions of a foreign law" "may simply be

- Or in the alternative, could one say that the parties---by subjecting themselves to the English Act---have entrusted *the English court alone* with the power to monitor the arbitration and to set aside the award? On this view, then, they have chosen to withhold the usual effect given to the selection of a "seat"---they have negated the usual assumption that the choice of a "seat" carries along with it a body of law and a judicial system designated to control the validity of the proceedings. (Recall the Convention's use of the disjunctive ("or")). In such circumstances, what could it possibly mean, anyway, for Lima to be the "seat" of the arbitration if the entire body of Peruvian legislation has been displaced?[71]

---

regarded as a 'short-hand method' of expressing certain agreed terms"). Cf. Arbitration Act 1996 (Eng.), § 4(5):

> The choice of a law other than the law of [England] as the applicable law in respect of a matter provided for by a non-mandatory provision of this *Part is equivalent to an agreement making provision about that matter*.[Italics added.].

This was apparently the solution adopted by the lower court in *Amazonica Peruana S.A.*, supra n.53, where the agreement provided that the insured "accepts, from now on, the jurisdiction and competence of the City of Lima," but that there was to be "Arbitration under the Laws and Conditions of London." The court concluded that the effect of this language was that any arbitration should "be held in Lima," but "governed by English law in every respect." By contrast, the Court of Appeal understandably feared that this would be likely to "produce a highly complex and possibly unworkable result which the parties could hardly have intended," [1988] 1 Lloyd's L. Rep. at 121.

Granted, if one were inclined to go very far down the path marked out by the lower court in *Amazonica Peruana*, one would probably be compelled to go further, and distinguish between the "external" issues regulated by English arbitration law---unlikely to be incorporated, for as a practical matter the "supervisory jurisdiction" of an English court would not readily extend beyond local proceedings---and the Act's "internal" rules applicable to arbitral tribunals, see n.10 supra. This does not seem insuperably difficult; cf. Union of India v. McDonnell Douglas Corp., [1993] 2 Lloyd's L. Rep. 48 (QBD (Comm))(agreement provided that "the seat of the arbitration proceedings shall be London," but that "the arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act"; held, "the parties have chosen English law as the law to govern their arbitration proceedings [and thus the arbitration "is subject to the supervisory jurisdiction" of the English courts], while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law"). Whether the law of the designated "seat" would permit parties to enlist local courts in applying the standards of vacatur of another jurisdiction, is precisely the question left open by the very unsatisfactory opinion in *Hall Street.*

Cf. Mauro Rubino-Sammartano, International Arbitration Law and Practice 499 (2nd ed. 2001), who seems to conflate the parties' choice of a "procedural law . . . different from . . . the lex fori" with their choice of the "arbitration rules of an international arbitral institution"; "the situation is in principle the same." Now I would not, as adolescents say, particularly want to "go there"; the incorporation of the ICC Rules is hardly what art. V(1)(e) of the Convention is talking about, and the point elides the whole problem of conflict with the mandatory law of the arbitral "seat." But Professor Rubino-Sammartano's discussion certainly has the virtue of reminding us that the apparent "choice of a procedural law" may at bottom be no more complicated than this---that it amounts to a contractual election to proceed on the basis of certain favored rules. That this choice should be honored even in preference to the otherwise-applicable law of the seat, also appears to be the teaching of the Convention's art. V(1)(a).

[71] See Georgios C. Petrochilos, Enforcing Awards Annulled in their State of Origin under the New York Convention, 48 Int'l & Comp. L.Q. 856, 877 (1999)(the fact that art. V(1)(e) makes an "exception" for the

> And would it follow from what has just been said, that the contract's designation of Lima as the "place" of arbitration is deemed to be just an inartful shorthand for the physical location of the hearings?[72]

What, after all, is the function of a legal education other than to train us in such heroic measures of avoidance?[73]

---

case where the state " in which" the award was made "would not coincide with" the state whose law was ‘‘expressly stipulated by the parties to govern the proceedings," suggests that a decision in the latter forum "has the better claim to be internationally recognized").

Cf. Hans Smit, Annulment and Enforcement of International Arbitral Awards: A Practical Perspective, 18 Amer. Rev. Int'l Arb. 297, 301 (2007), who argues that the legislative history of the Convention "squarely rejects" the proposition that a party seeking annulment has "the choice between selecting the place of arbitration or that whose arbitration laws apply in the event the latter place is different." I of course completely agree with this. Professor Smit goes on, however, to conclude that the history "makes clear that the second forum specified is available only if the first is not." I would much prefer to put it this way instead: that "the first forum is indeed presumptively the relevant forum, but if---in the highly unlikely event that---the choice of a second forum points to a different state, then the first forum is supplanted and this second forum becomes exclusively competent."

[72] See *Braes of Doune Wind Farm (Scotland) Ltd.,* supra n.51. Here the agreement provided that, "subject to [arbitration], the courts of England and Wales have exclusive jurisdiction to settle any dispute"; the "arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland." The court held that the "law which governed the arbitral proceedings was that of England and Wales"---and that the contractual reference to the "seat" "must relate to the place in which the parties agreed that the hearings should take place").

In the celebrated Indian case of Oil & Natural Gas Comm'n v. Western Co. of North America, [1987] A.I.R. 674 (Sup. Ct.), the contract provided that "the validity and interpretation [of the agreement] shall be governed by the laws of India," and indeed that "the arbitration proceedings shall be held in accordance with the provisions of the Indian Arbitration Act"; under the arbitration clause, however, the "agreed venue" for the hearings was to be London. The Indian court held that the award could only be set aside in India; "the Indian Court alone has the jurisdiction to pronounce on the validity or enforceability of the award." That alone would have been plausible enough, for the reasons suggested in the text. Characteristically, however, the court proceeded to cross over the line---going on to hold that since an Indian annulment would cause the award to be "non-existent," the prevailing party should be immediately enjoined from seeking to enforce it in the United States---for U.S. confirmation might mean that the U.S. court would then "have acted on and enforced an award which did not exist in the eye of law," ¶¶ 11, 12. "Should not such an unaesthetic situation be foreclosed?" ¶ 13. The Indian court must then have been under the gross misimpression that arts. V(1)(e) and VI of the Convention were not merely hortatory, but *mandatory* for a court of secondary jurisdiction. See text accompanying n.80 infra.

[73] There are lots of others; the English cases are particularly disingenuous in tending to insist that any apparent conflict go away and that all the prerogatives of the natural and preferable forum be preserved. For example, the Court of Appeal in *Amazonica Peruana* preferred to avoid the rather complex route taken by the lower court, see supra n.70, in favor of deploying the familiar canons of contract construction: Quite straightforward, really: Simply presume that the agreement's pre-printed stipulations (with respect to the "jurisdiction and competence of the City of Lima") had been "overridden" by the subsequent typed arbitration endorsement, with which it "cannot co exist"; in that case the specter of dual jurisdictions simply disappears.

Similarly, see Black Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg AG, [1981] 2 Lloyd's L. Rep. 446, 453 (QBD (Comm))(arbitration "shall take place in Zurich and any question as to construction or effect shall be decided according to the laws of England"; really, this amounts to nothing more than" a rather roundabout way of ensuring that the [English] Court has power to stay an action

---

Very little of what I have said in the preceding section is surprising or even controverted: "Surely a man of no very comprehensive search may venture to say that he has heard all this before."[74]

And even where matters arise as to which there happens to be disagreement, all hope of nuance is not irretrievably lost: All that is really necessary before going further is to strip the subject of red herrings and rhetoric. It is, for example, quite untenable to claim, and disquieting to read, that under some supposed "theory" of "a-national" arbitration "transborder commercial arbitrations are completely outside the domestic regulatory reach of national laws and courts"[75]: All the preceding discussion---however superfluous it must have seemed to most observers---demonstrates that this is true in the mind of precisely no-one---neither descriptively nor normatively.[76] At the opposite extreme it is, if possible, even more baffling and misguided to assert that according to some supposed "concept of *lex loci arbitri*," the "legitimacy of an adjudicatory process depends upon the will of a sovereign [and] not the individual will of private parties."[77] And nothing that I have said so far with respect to the critical significance of the law and courts of the arbitral "seat" could possibly amount to a view of the arbitrator as equivalent to---as just another version of--- a member of the local judiciary.[78]

All such views of the matter risk tipping over into caricature: What is called for perhaps is something less in the way of theory and philosophy and overarching "concepts"---and something more in the way of working out a prudential allocation of

---

brought in England in breach of the agreement to arbitrate"; there is certainly "no intention to submit the reference to English arbitration law as a whole").

[74] Samuel Johnson, Life of Alexander Pope 105 (Peter Peterson ed. 1899).

[75] See Thomas E. Carbonneau, Cases and Materials on Arbitration Law and Practice 41 (4th ed. 2007).

[76] See, e.g., n.17 supra (appointing arbitrators in France), text accompanying nn. 35-41 supra (annulling local awards).

More generally, see text accompanying n.29 supra (enforcement of foreign awards); cf. Jan Paulsson, Delocalisation of International Commercial Arbitration: When and Why It Matters, 32 Int'l & Comp. L. Q. 53, 57 (1983)("the delocalized award is *not* thought to be independent of any legal order"; "rather, the point is that a delocalized award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin"); Gaillard, supra n.7 at 56-57, 61, 189 (the state where enforcement is sought has a strong claim to assert its view as to whether an award is "worthy of protection"; again, conveniently, this is true both under the traditional "Westphalian" model, and under an alternative model that conceives of arbitration as part of an autonomous and separate "legal order").

[77] Carbonneau, supra n.75 at 42. Cf. the discussion at text accompanying nn. 52-55 supra.

[78] See Gaillard, supra n.7 at 34-39 (under the "oldest" conception of arbitration as being "purely and simply" a part of the local legal order, the arbitrator would be treated as just one of multiple adjudicatory bodies in the state, "side by side, in France, with the Superior Court, the Commercial Court, and the Land Estate Court (*tribunal paritaire des baux ruraux").* But an arbitrator hearing a dispute between a U.S. and a Japanese party in an arbitration taking place in Cyprus, "does not think or behave 'as if he were part of the Cypriot legal order.'" See Alison Ross, "Gaillard on the Seat of Arbitration," *Global Arbitration Review*, Oct. 5, 2009.

responsibilities among various states in their necessary task of oversight and control of the process of private ordering: Arriving incrementally at such an understanding---attributing the proper role, for example, to the jurisdiction of the chosen "seat"---should call for an inquiry that is highly context-dependent. Some factual patterns in particular are most likely to recur and prove worrisome, and it is to these that I turn now.

II. Annulment at the Seat

> What's the difference between provincialism, which unthinkingly takes its situation for everyone's, and cosmopolitanism, which is confident it has the right to?[79]

One of the most fraught questions in the literature is posed when the courts of the "seat" have exercised their undoubted power to set aside an award made there. What is the fate of the award in states of "secondary jurisdiction"? Of course art. V(1)(e) of the Convention makes local annulment a permissible ground for non-enforcement in other states; nevertheless at the same time the syntax---and indeed the whole *raison d'être*---of the Convention, cohere in conveying the message that contracting states remain perfectly free to *ignore* vacatur by the courts of the seat. That is, while art. V provides states of secondary jurisdiction with certain carefully delimited "outs" justifying non-enforcement, nothing prevents them from going further---nothing prevents them from giving enhanced currency to any award at all should they wish to do so.[80]

And that is more or less where agreement ends. Not surprisingly, then, the subject has become an obsession with *arbitrati* of every age and on every Continent: Analogies and metaphors, often depending fatally on unspoken premises or on the tedious intricacies of Conflicts lore, often indeed tendentious and deployed for rhetorical purposes, abound.[81] To someone obliged to master the literature it might readily

---

[79] James Richardson, Vectors 93 (2001).

[80] See Alexis Mourre, A propos des articles V et VII de la Convention de New York et de la reconnaissance des sentences annulées dans leurs pays d'origine, [2008] Rev. Arb. 263, 271-72, 275 ("given that the overall purpose of the Convention was to *enhance* the recognition of awards, it cannot be interpreted in any way that would *forbid* the recognition of awards which national law would on the contrary wish to enforce"); Paulsson, *Note,* supra n.4 at 562 *("a contracting state cannot violate the Convention in enforcing an award*")(italics in original).

But for an elegant argument to the contrary---an argument, however, which may not give full and appropriate force to the policies underlying art. VII—see Michael Reisman, The Changing Relations of National Courts and International Commercial Arbitration (prepared for the symposium, "Arbitration and National Courts: Conflict and Cooperation," and forthcoming, 2010)("in terms of the dynamic of the Convention," annulment in a primary jurisdiction has "universal effect," and the award "is not supposed to be enforceable anywhere else"; "allowance to courts of discretion or prudential space with regard to technical, nonmaterial defects is not the same as allowing a national option under which a signatory state may elect to remove local courts from any control role under Article 5").

[81] A contract entered into in an Indian airport hotel between representatives of Japanese and American companies, and which relates to an Italian venture, may of course be given effect in America, or Japan, or Italy, whether or not the parties have "complied with Indian formalities" with respect to what constitutes a

appear that indeed, on this subject, just about everything possible has now been said[82]: The moves and countermoves, the accusations and defenses, the inevitable assertions and the no-less-inevitable ripostes, succeed each other with monotonous regularity like the daily squabbles of an elderly married couple, or the daily pilpul of the faculty lounge.

Now while nothing in the Convention *requires* a state of secondary jurisdiction to defer to annulment at the seat, it is a very different, and far more plausible, proposition to suggest that deference is necessary and inevitable. There may in fact still be people out there who are ready to believe that an award once vacated at the seat "no longer exists," so that there is nothing left to be enforced elsewhere---that an award is in that respect just like the judgment of a hierarchically inferior court which, once reversed on appeal, has equally disappeared.[83] That would really be carrying the premise of integration into the local legal order very far indeed---or would be, if it could be taken at all seriously. Such people, if they can indeed still be found, do legitimately lend themselves to ridicule. Although I share their conclusions---although I too believe that annulled awards are presumptively unenforceable---I am embarrassed by their rationale. For rules of law may perhaps be imprudent or ill-advised, but I very much doubt that they can ever be "impossible."

---

valid contractual obligation. See Paulsson, supra n.76 at 57; Jan Paulsson, The Case for Disregarding LSAs (Local Standard Annulments) Under the New York Convention, 7 Amer. Rev. Int'l Arb. 99, 109 (1996); William W. Park, Duty and Discretion in International Arbitration, *in* Park, supra n.41 at 190.

Very true: But the situation would be rather different, would it not, if there had been a contractual choice of Indian law---or if the transaction had had substantial connections with India---and if the Indian courts, clearly the best placed to interpret their own law, had in an adversarial proceeding decided against the contract's validity? See id. at 190 fn.5; Horatia Muir-Watt, Note [to *Direction générale de l'aviation civile de l'Emirat de Duba*i, supra n.28], [2006] Rev. Arb. 700, 703 & fn. 10. The expectation that this Indian judgment would be followed elsewhere could not fairly be described as an attempt by Indian courts to "impose their will on the whole of the civilized world," cf. Clay, supra n.8 at 1245. See also Soc. Locautra v. Soc. Industrie und Baumaschinen Vertriebs, [1975] Rev. Crit. Droit Int'l Privé 504 (Cour de Cassation Dec. 9, 1974)(German judgment, "applying the applicable law in accordance with French conflict rules," had nullified a sale taking place in Germany); cf. id. at 506 (note E. Mezger)(deference to the German judgment was "the only honest solution, the French judge hardly being well-equipped to analyze, in light of German law, the (probably complex) relationship between the German seller and the German buyer, and its impact on the ownership of the property in question").

Now whether that alternative factual matrix is closer to our concerns here is of course *the very question to be determined*: The rabbit has already been placed in the hat if one posits a priori that the chosen site of the arbitration (arising from the "separable" submission to arbitration) is to be deemed "fortuitous" and not the product of instrumental behavior.

[82] And said, as Jan Paulsson points out, more than a generation ago, see Paulsson, *Note,* supra n.4 at 564-65. These days one might be forgiven the impression that a publication on the extraterritorial effects of annulment has become a sort of ticket of admission to an ongoing fraternity party.

[83] See text accompanying n.34 supra; see also Albert Jan van den Berg, , Enforcement of Arbitral Awards Annulled in Russia, 27(2) J. Int'l Arb. 179, 187, 198 (2010)("an award that has been set aside in the country of origin no longer exists legally"; "it is not possible [sic] that an arbitral award that has been set aside could be brought back to life during an enforcement procedure" "e*x nihilo nil fit*"). Cf. Petrochilos, supra n.71 at 857 (there is much eminent authority to the effect that an award set aside at the seat "no longer exists"---so that "enforcing a non-existing arbitral award would be an impossibility"; although "the logic of the thesis seems irrebutable," "it is not what the Convention says").

Nevertheless, non-recognition on the sole ground that an award has been set aside at the seat has become the American norm.[84] This is a nod to the notion that the contractual choice of the seat was not without intended consequences, that it tends to suggest a contractual choice of the legal framework to govern the proceeding.[85] An agreement to arbitrate in London will enlist the commitment of English courts to give broad support to the arbitral process---and at the same time it acknowledges the possible idiosyncrasies of English law with respect to judicial review. If the parties did not actually "seek" the extended review that is a well-known feature of English law,[86] it seems plausible at the very least to suppose that they were aware of, and accepted, the risk.[87] (The extensive professional literature addressed to the choice of an appropriate seat would be incomprehensible if this were not true).[88] So for other states to honor an

---

[84] See, e.g., *TermoRio S.A.,* supra n.22; see also Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194 (2nd Cir. 1999)(" the parties contracted in Nigeria that their disputes would be arbitrated under the laws of Nigeria," and "Baker Marine has shown no adequate reason for refusing to recognize the judgments of the Nigerian court").

[85] See text accompanying nn. 42-55 supra. See also *Termorio S.A*., supra n.22 at 939 (the parties "agreed to be bound by Colombian law," of which Columbia's highest administrative court "is the final expositor"). For a characteristically fair and balanced summary of this position---even though the author finds himself ultimately unable to accept it---see also Fouchard, *"La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*," supra n.41 at 450: Since "the parties chose---or at least had the power to choose---the place of the arbitration," and since in doing so "they wanted---or at least accepted---that the award would be under the supervision of the courts of the seat and perhaps even set aside there," then "to refuse to give international currency to any vacatur would be to betray their common intention" [*leur volonté commune*]."

[86] Cf. Paulsson, "*Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment,"* supra n.4 at 25 (referring to the hypothesis of parties who "intentionally seek a maximum-review regime" as "mythical").

[87] Whether this prospect of expanded review for "errors of law" is in fact welcome or not, one might still find it a reasonable trade-off, consciously assumed, given the generally "unobtrusive efficiency of [the Englilsh forum's] supervisory law," Fiona Trust & Holding Corp. v. Privalov, [2008] 1 Lloyd's Rep. 254, 256 (H.L.)(Lord Hoffmann).

[88] The 2006 Queen Mary/PricewaterhouseCoopers research study concluded that for in-house counsel, "legal considerations" were "the single most important factor" in the choice of a place of arbitration. Nevertheless for these respondents, "convenience came a close second." For the authors of the study, this "might suggest that some do not fully appreciate the significance of choosing the right seat."

Still, I should think that even this modest relevance attributed to considerations of "convenience" is somewhat diluted by the fact that the study questionnaire referred merely to "arbitration venues" rather than using a brightly flashing neon term of art like "seat." In addition, the indifference of many respondents towards "legal considerations"---for example, ratification of the New York Convention, or a local law that is "arbitration friendly"---can be explained simply on the grounds that such considerations were taken "for granted"; this can hardly be surprising given that the most favored "venues" were overwhelmingly countries like Switzerland, France, and the United States, as well as England. See International Arbitration: Corporate Attitudes and Practices (2006), http://www.pwc.com/en_BE/be/publications/ia-study-pwc-06.pdf at ¶6.2; see also Loukas Mistelis, International Arbitration---Corporate Attitudes and Practices, 15 Amer. Rev. Int'l Arb. 525, 567-71 (2004). For an amusing example of a contractual provision which seems to have been driven exclusively by climatic factors---but where the chosen seat would in any event take place in one of two arbitration-friendly jurisdictions---see HSMV Corp. v. ADI Ltd., 72 F.Supp.2d 1122 (C.D. Cal. 1999)(hearing would take place within seven days following the arbitrator's receipt of a notice of claim; the arbitration was to be "conducted" in Melbourne if this occurred between November and April, and in Los Angeles if it occurred between May and October).

English annulment hardly means that the award now amounts to "little more than a judgment of the [English] courts"---whose jurisdiction "the parties had sought to exclude in the first place by agreeing to arbitrate."[89] For precisely the same reasons, the decision to *ignore* an English annulment is not self-evidently a "contractualist" position:[90] Indeed to wrap oneself in the mantle of "contractualism," in the interest of enforcing an award set aside at the chosen seat, is a clever but disingenuous gambit, a high-handed bit of chutzpah.

Routine respect for local annulments may not be ideal, but it strikes me as by far the best of a number of bad solutions. The "case is undoubtedly hard, but in political regulations, good cannot be complete, it can only be predominant."[91]

Before inquiring further into what seems the most constructive path to take, one might note first that this is a presumption firmly rooted in the text of the Convention. In addition to the invitation extended by art. V(1)(e), the Convention permits courts of "secondary jurisdiction" to refuse recognition if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, *under the law of the country where the award was made*";[92] similarly, they may refuse recognition if the composition of the tribunal or the arbitral procedure "was not in accordance with the agreement of the parties, or, failing such agreement, . . . *with the law of the country where the arbitration took place*".[93] I should think that an authoritative formulation by the courts of that "country"---an application of the peculiar requirements of "their" law with respect to what makes a valid agreement or what constitutes proper arbitral procedure---would have a strong claim to be definitive: Who is better placed to judge?[94]

---

[89] Cf. Petrochilos, supra n. 71 at 888.

[90] See Pierre Bellet & Ernst Mezger, *L'arbitrage international dans le nouveau code de procedure civile*, [1981] Rev. Crit. Droit Int'l Privé 611, 648, 655 (French arbitration legislation is "inspired by the contractualist view," and the absence of any provision analogous to art. V(1)(e) of the Convention "is the corollary of the contractualist view of arbitration and of the award").

[91] Samuel Johnson, A Journey to the Western Islands of Scotland in 1773 (Paisley: Alexander Gardner 1906) at 137.

[92] Art. V(1)(a)(emphasis added).

[93] Art. V(1)(d)(emphasis added).

[94] He is "the final exponent of that law," and "we do not see how it is possible for a foreign Court to pronounce his decision wrong." Ingenohl v. Olsen & Co., 273 U.S. 541 (1927)(Holmes, J.)(trademark "depend[s] for its protection in Hong Kong upon the law prevailing in Hong Kong"). Cf. Bellet & Mezger, supra n.90 at 649 (the decision of a foreign judge setting aside an award would have, for a French judge, "only the value of a data point [*une information*] with respect to the foreign law, which might become useful in the event that a rule of conflicts should make that law applicable").

Jan Paulsson of course acknowledges the possible relevance of arts. V(1)(a) and V(1)(d) but then goes on to assert, with enviable bravura, that "one must [simply] disregard [these] incidental *renvois* to the law of the venue"---in order to keep local and peculiar annulments "from returning through the back door." Paulsson, "Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment," supra n.4 at 29.

And then of course there is art. VI---which permits a court of "secondary jurisdiction" to "adjourn" a decision on enforcement of an award if an application for setting it aside is pending before the courts of the seat. It is obvious that such an adjournment can only be of consequence in the architecture of the Convention if an eventual annulment can be expected to evoke deference from judges in other states.[95] The predictable argument to the contrary is that if, indeed, annulment is intended to preclude enforcement, then "as a matter of logic" one would expect that adjournment should be automatic and obligatory---"to ensure that no award will ever be enforced until any possible challenges in the country of origin have been disposed of." On this view, to withhold adjournment on a prudential basis---while at the same time taking the position that any annulment invariably justifies a refusal of enforcement--- is "inconsistent" and "incongruous."[96] But I'm afraid I'm quite unable to see this as anything like a "clincher":[97] One might usefully begin with a working presumption of suspension pending annulment proceedings. But then, surely, one can recognize that any such presumption must on occasion be trumped, by a court's willingness to move ahead where it is convinced the risk is warranted---that is, where the challenge at the seat appears to be dilatory, frivolous, and doomed.[98] Absolutism here (as just about anywhere) would reduce itself to a foolish insistence on abstract principle.

---

[95] See Fouchard, *"La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*," supra n.41 at 455 fn. 49 ("*que si la décision attendue du juge de l'annulation s'impose à lui").*

[96] See Mourre, supra n.80 at 273 (if the Convention had intended to establish as a rule the international currency of annulments at the seat, "it would have provided for an obligation, and not a simple power, on the part of the enforcement judge" to adjourn proceedings in the event of a pending motion to set aside the award); see also Paulsson, "Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment," supra n.4 at 23.

[97] Jan Paulsson, "Rediscovering the N.Y. Convention: Further Reflections on *Chromalloy*," 12 (4) Mealey's Int'l Arb. Rep. 20, text accompanying fn. 29 (April 1997).

[98] So it will be relevant to ask "whether the application before the court in the country of origin is brought *bona fide* and not simply by way of delaying tactics," and whether it "has at least a real (i.e., realistic) prospect of success," IPCO (Nigeria) Ltd. v. Nigerian Nat'l Petroleum Corp., [2005] 2 Lloyd's L. Rep. 326 ¶15 (Q.B.D. (Comm.)). See also Jorf Lasfar Energy Co. v. AMCI Export Corp., 2005 WL 3533128 (W.D.Pa.)(U.S. enforcement action and French setting-aside action were filed on the same day; "[w]e can draw no inference from the timing of the filing, or any other circumstances, that the French action was filed in order to hinder or delay resolution of this dispute"). In this connection the Second Circuit has intriguingly suggested that in circumstances where the courts of the seat apply "less deferential standards of review" in passing on awards, the Convention particularly "favors deference" to proceedings there, "on the premise that, under these circumstances, a foreign court well-versed in its own law is better suited to determine the validity of the award," Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310 (2nd Cir. 1998).

Given the implausibility of most claims of annulment---and the low success rate in setting awards aside at the most popular venues---it may in fact be perfectly sensible to expect the party seeking an adjournment to make a prima facie case demonstrating the likelihood of an ultimate annulment, and to place the burden of proof accordingly. . But cf. Jorf Lasfar Energy Co., supra at *3("although we question defendant's ability to ultimately prove its defenses, we are unable to say that they, or defendant's appeal in France, are frivolous"). Even without any such showing, the court can hedge its bet (as art. VI envisages), by conditioning enforcement on the claimant's furnishing of security in the event that the award is in fact later set aside.

At the opposite extreme is this: If one is at all tempted by the notion of arbitration as an autonomous, parallel, separate legal order----owing its legal effect only to the "international community," which has made it the "expected and routine method of resolving international commercial disputes"[99]--- then one readily arrives at the conclusion that awards should be entirely detached from any consequences of judicial review at the seat. French courts---unique and quite friendless in this respect[100]---do in fact take the position that they "don't have to be concerned at all" with local annulment,[101] which then becomes entirely irrelevant. It is often said that this position "rests on" art. VII of the Convention,[102] but even where the Convention---and thus art. VII---is not applicable, precisely the same result is reached---the key assertion remains that annulment by the courts of the seat "generate no international effects and reflect only an exercise of sovereignty on local territory."[103]

The recent decision of the French Cour de Cassation in *Putrabali*[104] cannot inspire much confidence in the practical wisdom of this "philosophy" for our workaday world: The legal regime that can countenance the absurdities of *Putrabali* is one that needs to take a close look at itself in the mirror--- asking itself, as many of us do with chagrin and dismay on dark mornings, how we could possibly have wound up, after a series of small and imperceptible steps, in this condition.

---

[99] See Emmanuel Gaillard, Note [to *Société Putrabali Adyamulia v. Société Rena Holding* (Cour de Cassation 29 June, 2007)], [2007] Rev. Arb.. 517, 521 ("it is therefore to the international community---not to any of the states taken individually---that the award owes its legal effect [*juridicité]").*

[100] With the exception perhaps of some Swiss, Belgian, and Austrian decisions, "mostly antiquated and probably destined to remain isolated," Mourre, supra n.80 at 266 fn.8.

[101] Gaillard, supra n.99 at 518.

[102] The "most favored right" provision of art. VII would refer us in turn to French domestic legislation, which in art. 1502 of the CPC does not envisage annulment at the seat as a permissible ground for the refusal of recognition. See, e.g., Société PT Putrabali Adyamulia v. Société Rena Holding, 2007 Rev. Arb. 507, 510-11 (Cour de Cassation, June 29, 2007)(report of Président Jean-Pierre Ancel; art. VII is the "legal underpinning" of this solution; in recognizing an award annulled abroad, the French judge is "precisely applying the terms of the Convention"); Gaillard & Savage, supra n.31 at ¶¶ 268-70); Fouchard, "*La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*," *in* Fouchard, supra n.41 at 446-47. But cf. Mourre, supra n.80 at 268-9 (it should not be necessary to rely on art. VII despite the misleadingly peremptory tone of the French-language version of art. V); cf. generally n.80 supra.

[103] *Direction générale de l'aviation civile de l'Emirat de Dubai*, supra n.29; see also Mourre, supra n.80 at 283 (this is a "logical" corollary of the initial premise of delocalization, which posits that even an award that has been set aside can still be effective and recognized in other states)..

At that time the UAE had not yet ratified the New York Convention, and France's ratification was as always subject to the reservation of "reciprocity." It is simply incorrect to assert that France has withdrawn that reservation, *compare* Alexandra Szekely, Note [to *Direction générale de l'aviation civile de l'Emirat de Dubai v. Société international Bechtel*], 95 Rev. Crit. Droit Int'l Privé 392, 398 (2006). Effective November 27, 1989, France withdrew *only* "the second sentence of its declaration" made upon ratification, that is, *the "commercial" reservation*. See Decree No. 90-170 (Feb. 16, 1990), J.O. Feb. 23, 1990, p. 2344.

[104] Société PT Putrabali Adyamulia v. Société Rena Holding, 2007 Rev. Arb. 507 (Cour de Cassation, June 29, 2007).

Putrabali was an entirely ordinary, common garden-variety commercial case, in which the seller had made a claim for the price of his goods (or for damages for the buyers' failure to pay the price). The goods had been lost when the vessel carrying them sank off Indonesia. In a trade association arbitration, held pursuant to the association's rules in London, an umpire's award against the buyer was reversed by a Board of Appeal, which excused the buyer from liability for non-payment: For according to the Board, the seller's declaration of shipment---which had given the name of an unpowered barge contrary to the terms of the contract---had been "defective"; and as the buyers had been unaware of the vessel's classification, they had been unable to object in a timely fashion.

Now every law student who has paid even desultory attention to a course in Arbitration, is familiar with the notion that English courts have long exercised an unusual and much controverted power to review and set aside awards for "errors of law." Then, five minutes on Google would confirm for him that while the possibilities of such review have been sharply curtailed in the perceived interest of users---that is, though much is taken---much abides: The 1996 Act still permits "appeal to the court on a question of law arising out of an award," at least if a court has given leave to appeal---and at least where the parties have not "otherwise agreed" to exclude judicial review.[105] The parties in *Putrabali* had not bothered to avail themselves of the possibility extended to them by the Act of excluding enhanced review on points of law. And so---whether because he believed the decision of the arbitral tribunal to be "obviously wrong," or because he thought the question to be "one of general public importance and the decision of the tribunal [to be] at least open to serious doubt,"[106] the English judge granted permission to "appeal."

The decision on appeal was detailed and meticulous and careful and "commercial"---precisely the sort of exercise at which English courts excel and which they carry out daily.[107] The court concluded that the arbitral Board of Appeal had erred.[108] So the award was set aside, and the case remitted to the arbitral appellate

---

[105] Arbitration Act 1996, § 69(1), (2).

[106] These are the points as to which the English judge must be "satisfied" before granting leave to appeal. Id. § 69(3)(c).

[107] PT Putrabali Adyamulia v. Société Est Épices, [2003] 2 Lloyd's L. Rep. 700 (Q.B.D.)(Comm.)).

[108] Two principal reasons:

- The seller's declaration of shipment was "valid," for there was nothing in the contract forms requiring the seller to include in his declaration a statement as to the vessel's class. And even assuming that the vessel was not, as contractually required, a "first class ship," precedent required a holding to the effect that a declaration could not be "defective" if it did "not indicate by *its express terms* that either, the vessel by reason of her characteristics, or the voyage by reason of the manner in which it is being performed, is not contractual." Id. at ¶¶ 9-10, 19.
- And in any event, the declaration had to be deemed effective unless the buyer objected to it within the limited period provided. "Certainty in matters of this kind is of real importance because traders need to know whether notices of this kind are effective and can be relied upon." Id. at ¶ 20.

tribunal “with a direction that the Board shall assess the measure of the damages due from the buyers to the sellers for the non-payment of the price.”[109] Inevitably, the result of this second arbitration was entirely different---the buyer being found liable for a substantial amount of damages.

Now the first award in *Putrabali*, annulled in England, was of course not enforceable there-- nor, for that matter, anywhere else in the world--*except in France*, where the buyer, first out of the gate, obtained exequatur because

- the award itself was not “English”---indeed it had “no nationality” at all---and was not "attached to [any] particular national legal order, while by contrast,

- the order for setting aside itself “has no claim to be honored internationally,” particularly where the ground for annulment was “ 'local,' that is, closely linked to national legal concepts.”[110]

But of course the *second* award, rendered after remand by the English court, *was* enforceable in England--and, for that matter, just about everywhere else in the world--*except in France*, where exequatur was impossible on the ground of "incompatibility" with the earlier award.[111] (I do not claim to know what would have happened had it been the second award which, fortuitously, had been the first one presented to the French courts.).[112] Some time ago Jan Paulsson deprecated as "more theoretical than real" the often-expressed fear that the French jurisprudence would lead to such inconsistent results--suggesting vividly that the prospect was much like "a two-headed white rhinoceros which might give us a thrill in the cinema but does not really endanger

---

[109] Id. at ¶ 32.

[110] See *Société PT Putrabali Adyamulia*, supra n.103 at 511 (report of Président Jean-Pierre Ancel).

[111] Id. at 517.

[112] The buyer/respondent in *Putrabali*---who was able to speedily seek enforcement in France of the first award in his favor---and who thus managed to evade the legal analysis of the English Commercial Court---was in fact a French company. Professor Gaillard has asserted that French law favoring enforcement of an award despite annulment at the seat “statistically can only be disfavorable to French parties,” since “enforcement of an award against a French party is likely to first be sought in French territory”---concluding that it is therefore “rather implausible” that the French approach “could be grounded in nationalist sentiment.” Emmanuel Gaillard, “Enforcement of Awards Set Aside in the Country of Origin: The French Experience,” *in Improving the Efficiency of Arbitration Agreements and Awards,* supra n.65 at 505, 524. But such an extravagant claim has clearly been overtaken by events. See Richard W. Hulbert, When the Theory Doesn’t Fit the Facts: A Further Comment on *Putrabali,* 25 Arb. Int’l 157, 169 (2009)(“by acting in time to insert the favourable award into the French juridical order, the respondent can block enforcement of any later award’).

It is perhaps not as troubling---but it certainly offers a rich paradox---to consider that in other cases, an award set aside at the seat may be enforced in France even though it would be considered void *in both of the states of which the contracting parties were nationals.* See, e.g., *Direction générale de l'aviation civile de l'Emirat de Dubai,* supra n.29 (award in favor of American company annulled in Dubai at the request of the Department of Civil Aviation of Dubai).

our daily walk to work."[113] Still, it appears, such a beast can occasionally escape into our dimension and be found stomping clumsily along the Quai de l'Horloge

What else can be said in the interest of explaining, or deconstructing, the French position? “Their definitions surround them like a kennel contains a hound. . . Like a thrown stone imagining it will not fall their explanations work to keep the world fixed.”[114]

This insistence on enforcing awards annulled at the seat often seems to erect an entire structure on a frank distrust or deprecation of the judicial systems of other states.[115] Or, at the very least, it may rest on a judgment that some foreign states--neophytes in the recondite world of international arbitration--are not yet able to understand the proper standards for the review of awards: They may, for example, simply fail to grasp that the failure of witnesses to take an oath,[116] or the failure of an award to state the addresses of the arbitrators--or the arbitrators' failure to "follow the

---

[113] Paulsson, *The Case for Disregarding LSAs*, supra n.81 at 111 (‘in most situations in contemporary practice, an award sufficiently defective to be set aside in country A will not pass muster under the enforcement criteria of country B, whereas the Swiss annulment criterion [in the celebrated *Hilmarton* case] (‘arbitrariness’) was an old and much-criticized concept which would not have been applicable if that case had arisen under contemporary Swiss law”).

[114] Stephen Dobyns, “Sleeping Dogs,” Times Literary Supplement, Feb. 3, 2006 at p. 4.

[115] E.g., Clay, supra n.52 at p. 24 (the fact that the courts of Dubai had annulled an award against the state's own civil aviation authority, and in favor of a foreign company, was "perhaps not totally irrelevant to a true understanding of the court's decision"). See also Gaillard, supra n.7 at 46 (“one can think of many cases where the courts of the seat have come up with some rather exceptional notions so as to come to the assistance of one of the parties to the dispute, frequently the local party”); Paulsson, *Note,* supra n.4 at 564 (under the conventional American jurisprudence, “if international businesses take the risk of choosing to arbitrate in one of the (many) states where justice is unreliable, so much the worse [*tant pis*] for them!”); Paulsson, “Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment,” supra n.4 at p. 29 fn. 60 (enforcement courts should not be “subjugated to the will of courts of the place of arbitration, which, as experience has unfortunately shown, are sometimes guilty of egregious chauvinism”); Pierre Lastenouse & Petra Senkovic, Note [to Radenska v. Kajo, Sup. Ct. Austria, Oct. 20, 1993]. [1998] Rev. Arb. 421, 428 (“parties may often have legitimate fears with respect to the impartiality of a national judge who has set aside an award,” particularly “in certain countries and where enforcing the award would severely injure the interests of a local enterprise”).

This is a common ground for deprecating the relevance of annulments at the seat---at least when the seat is not asserted instead to have been merely a “fortuitous” choice, reproached precisely for having no connection to the dispute at all other than for its hotels or conference centers where the proceedings may be held, see Gaillard, supra n.7 at 56. The whipsawing here is evident and dizzying.

[116] See Clay, supra n. 52 at p. 24 ("is it really necessary . . . to allow a judge in Dubai to claim worldwide validity for his decision vacating an award on the ground that in the arbitral proceeding the witnesses had not taken an oath in the proper form?”); see also Jan Paulsson, Delocalisation of International Commercial Arbitration, supra n.76 at 58-59 (a state's requirement "that all arbitrators sign the award" may be "quite reasonable" in terms of "the local legal culture," but in international arbitration "the legitimate expectation of the parties is that the majority rule will prevail”); Paulsson, *Note,* supra n.4 at 559 (states are of course free, if they wish, to refuse enforcement to awards set aside at the seat, even if the grounds for annulment were “preposterous”); Charles Jarrosson, Note [to *Société Hilmarton v. Société OTV*, Cour de Cassation, March 23, 1994], [1994] Rev. Arb. 329, 332 (agreement on a seat should not lead to “paralyzing the arbitration because of local decisions grounded in outmoded legislation, resulting in obsolete forms of control over the arbitral process”).

law"[117]--are all obsolete and inappropriate grounds for vacatur, with no legitimate claim to be respected elsewhere. In such cases the French courts act (a telling phrase) as the "enlightened guardians of the Convention":[118] They are able to assume the pedagogical role they are most comfortable with--providing instruction to other states as to what is in the best interests of this autonomous international legal order---which is itself, after all, so much an achievement of decades of Gallic thought.

In either case, those of us who have internalized the values of the marketplace to a somewhat greater degree than this, may be struck by the meager scope given here to the usual understandings of contract doctrine---which rests, after all, on the attempt to encourage rational decision-making by holding people to "hard" risk-taking choices not actually induced by force or fraud.[119] It is a rum form of "autonomy" that deems it

---

[117] Professor Fouchard doubted that it could it possibly be "legitimate" for an award annulled in England to turn out to be unenforceable abroad, where annulment was for one of the reasons specified in an "impressive[ly]" lengthy laundry list in § 68 of the Arbitration Act---such as "serious irregularity" "caus[ing] substantial injustice," in, for example, the " uncertainty or ambiguity as to the effect of the award." Fouchard, "La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine," *in* Fouchard, *Ecrits*, supra n.41 at 454. I must say that while the Devil is of course in the details, the verbal formulations for annulment in § 68---quite different in this respect from the "appeal on question of law" procedure of § 69---do not on the face of it seem terribly different from those found in or spun out of the FAA.

[118] Thomas Clay, La Convention de New York vue par la doctrine francaise, 27 ASA Bull. 467, 477 (2008). Cf. Gaillard, supra n.7 at 77, 80-81 ("when a significant number of bodies of law have adopted the same solution, the rule they arrive at can be deemed a 'general principle'" even if it is not unanimous; the conflicts-of-law "method of transnational rules" considers the "direction of the general evolution," and must "give priority to the law which follows those lines"; it is a matter of drawing out of all legal systems the "dominant tendency").

Professor Clay summarizes the overall question in the form of an analogy to the perennial civil liberties dilemma of the choice between two evils---of either keeping an "innocent person in prison" or allowing "a guilty person to go free": Just as everyone would prefer the latter, so it seems to follow that we should prefer a system occasionally permitting the enforcement somewhere of a "bad award" rather than tolerate a regime depriving a "good award" of any legitimacy anywhere. Clay, supra n.52 at 27. This does rather seem to load the dice, doesn't it; the whole ingenious metaphor rests, of course, on the tendentious premise that the first award in *Putrabali* can be termed a "good award."

[119] The argument from "assumption of the risk" can, it is true, sometimes be turned on its head: It is a nice rhetorical device, for example, to suggest that while the prevailing party in an arbitration may indeed "have assumed the risk of vacatur by agreeing to arbitrate" in a place with idiosyncratic standards of annulment, he also, at the same time, "knew"---may indeed have counted on the possibility---"that any enforcement of a favorable award outside [of that place] would be governed by the standards of the New York Convention, including its Art. VII"; for *his* part, by contrast, the losing party, who managed to get the award set aside, "assumed the risk" that other countries like France would enforce the award notwithstanding local annulment. David W. Rivkin, The Enforcement of Awards Nullified in the Country of Origin: The American Experience, *in* Improving the Efficiency of Arbitration Agreements and Awards, supra n.65 at 528, 543.

This is undoubtedly clever: But to invoke this speculative possibility is also to draw attention to the fact that for the moment at least, the French solution is in the community of nations largely a lawless outlier. It may be that the French literature claims to attribute determinative importance to the "dominant tendency" among the "majority" of legal systems ---at least with respect to the principles of judicial review and the permitted grounds for the annulment of awards,see n.118 supra: But at the very same time it

desirable to insulate contracting parties from their mere "carelessness" in agreeing to submit to arbitration in a particular jurisdiction, or from their "weakness" in being unable to obtain an alternative seat[120] ---or where the significance of the choice of a seat is deprecated because it may represent nothing more than a mere "concession made in the course of negotiations."[121]

And finally: It will inevitably be claimed that to enforce awards vacated in less enlightened states will actually turn out to be in the best interests of those states--"as properly understood." For once they are freed from the parochial decisions of their own judiciary, newcomers to the system will find their local awards given greater international currency--their entrance into the lucrative world of international arbitration assured.[122] This is a neat paradox, something I always relish--and is it not, as well, the classic neo-colonialist move: the claim that lesser breeds ought to be grateful to us in the long run for overriding--for their own benefit, after all--the policy choices they have made?

These two models that I have just sketched are of course not the only approaches to the problem: More nuanced views are naturally available: We are, after all, engaged in a prudential, instrumental search for solutions likely to maximize

---

does not scruple to completely dismiss or ignore a universal consensus to the effect that local annulments are to be respected: On this subject, supposedly, "as on so many others," "French law plays a pioneering role"; and French jurists—overcoming the occasional "temptation" to look to foreign legal systems for reasons to "doubt" the "well-established" solutions of their own regime---"have every reason to be proud" of it. Emmanuel Gaillard, Note [to Copropriété Maritime Jules Verne v. American Bureau of Shipping (Cour de Cassation, June 7, 2006)], [2006] Rev. Arb. 947, 953.

[120] Gaillard, supra n.99 at 522 (American case law results in "abandoning to their sad fate" parties who have been "so careless, or so weak, as to have agreed to an arbitration taking place in the home state of their contracting partner").

[121] Jarrosson supra n.116 at 331.

Before entering into an agreement with, say, Dubai's civil aviation authority, a rational contractor would be expected to factor into its compensation the risks attendant on fixing Dubai as the seat of any arbitration: Some sort of contractual adjustment would seem called for in return for foregoing supervision of the arbitral process by the courts of a "neutral" state. But I take it that a contractor in this position---who later seeks to avoid the effects of a local annulment of an award in his favor--- does not usually offer at the same time to return any risk premium that it had received as a quid pro quo, an inducement, for this "concession" --a premium that would now be unearned.

[122] See, e.g., Jan Paulsson, *Note*, supra n.4 at 564 (parties "may find it more acceptable to fix the situs in a country that is less experienced in arbitration, and which does not benefit from a serious tradition of judicial independence, if they can be assured that any award ultimately rendered will survive local abuses"; therefore French jurisprudence tends to ensure "that the number of sites of arbitrations will be more widespread throughout the world"). Professor Gaillard, referring to such cases as *TermoRio S.A.,* supra n.22 & text accompanying n.33 supra, deduces that in the eyes of American courts, "an arbitration in Bogota is not worth as much as an arbitration in Geneva or in London"---and suggests that "this is not the best way of encouraging the development of arbitration throughout the world." Gaillard, supra n.99 at 522; see also Gaillard, supra n.7 at 147-8 (recognizing annulments on local and idiosyncratic grounds can only have the effect of encouraging contracting parties to avoid certain seats for their arbitrations---and thus advance the interests of the more "traditional" venues; by contrast, if we recognize the "universal" vocation of the institution, we should strive towards the "flowering" of multiple seats).

coherence and efficiency in dispute-resolution and transactional planning; where, by contrast, is the possible interest in identifying some "fundamental divergence with respect to our philosophical understanding" of the arbitration process?[123] Still, the alternatives do seem to align themselves along either pole like iron filings to a magnet.

For example, the 1961 European Convention on International Commercial Arbitration, as well as a strong current of scholarly writing,[124] attempts to distinguish between

- annulments at the seat based on grounds equivalent to those in art. V (1)(a)-(d) of the New York Convention---that is, "internationally accepted standards" permitting non-enforcement only for the canonical reproaches of arbitral abuse of authority or violation of due process, and

- annulments based on grounds that have no Convention counterpart at all--- but which are instead, as in the idiosyncratic national regimes of Columbia, or Dubai---or England--- merely "local."[125]

Only the latter must be completely ignored. (And in this category, apparently, are local annulments stemming from the conclusion that the award has violated the "public policy" of the seat.)[126] By contrast the former, if they are not indeed absolutely definitive

---

[123] But see Gaillard, supra n.7 at 199.

[124] Of course the primary reference here is to the groundbreaking work of Jan Paulsson, e.g., Paulsson, "*Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment*," supra n.4 at pp. 14 ("the anathema of local 'peculiarities'"), 29 ("a decision [at the seat] consistent with the substantive provisions of the first *four* paragraphs of art. V(1)" is an "international standard annulment"; "everything else would be a local standard annulment, and entitled only to local effect")

[125] See text accompanying n.22 supra and nn.22, 29 supra.

In those cases where the ground for annulment has no Convention counterpart---and where, in addition, the parties to the arbitration agreement are domiciled in different contracting states---then it is quite true that the European Convention replicates the French model---which to that extent, and despite the ridicule of the international community, is not entirely isolated. See Gaillard, supra n.112 at 520-21.

[126] See Radenska v. Kajo, [1998] Rev. Arb. 419 (Austrian Sup. Ct., October 20, 1993).

The particular "public policy" that, within a given legal system, is thought to justify a refusal to honor an award often inevitably strikes us as "parochial"---in the sense, perhaps, that it exemplifies "local protectionist legislation, responsive to the demands of particularly attractive, politically influential weaker" local parties, see Alan Scott Rau, Comment: Mandatory Law and the Enforceability of Arbitration Agreements, 3 World Arb. & Med. Rev. 133 (2009); see also Rau, *The Arbitrator and "Mandatory Rules of Law,"* supra n.30 at 83 (both referring to the well-known Belgian legislation providing for damages for the premature termination of a distribution agreement with an impact on the Belgian market, and giving the distributor the right to bring the dispute before Belgian courts to be decided under Belgian law). It may nevertheless represent a strongly-felt national consensus with respect to matters of economic regulation deemed sufficiently central to the fundamental concepts of the local legal system that it trumps what would otherwise be the appropriate choice of law in an international transaction.

Now it is perfectly understandable that a court of another state will be reluctant to take upon itself the task of affirmatively advancing this policy----it will shrink from becoming the "guardian" or protector of the economic order of another. See Lastenouse & Senkovic, supra n.116 at 426; cf. Dominique Hascher, European Convention on International Commercial Arbitration of 1961: Commentary, XVII Yearbook

for a state of "secondary jurisdiction,"[127] could well be given some indeterminate degree of benefit of the doubt.[128]

This model would expect us then to inquire into the "reasons" for which the courts of the seat have set aside the award. But the common lawyer may perhaps have some

---

Comm. Arb. 711, 739 (1992)("to require that the arbitrators ensure observance of the public policy of the country of origin when enforcement is not sought there, impairs the international currency of the award without reason"). But cf. *Restatement,* supra n.25 at § 5-13 *cmt. c.& Reporters' Notes note c* (suggesting, tentatively, that even where an award has not been set aside at the seat, a court in a state of "secondary jurisdiction" might "in exceptional circumstances," by using its own choice of law rules or its own judgment as to what would offend its own "public policy," "show respect" for the "legitimate national interests" of a foreign state that has "emphatically" declared a particular claim to be "non-arbitrable").

But all of that is already a loaded and rhetorical way of characterizing` the immediate question at hand: The discussion in the text does not, after all, deal with the problem of "applying" or "imposing liability for violation of" a foreign public law; cf. Hannah L. Buxbaum, Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization, 18 Am. Rev. Int'l Arb. 21 (2007). One might well frame the problem otherwise---asking instead whether a state's effort to advance its own regulatory policy, by annulling an award deemed there to be illicit, should be systematically thwarted by a party who somehow manages to "insert" an annulled award in his favor into the legal order of some other contracting state.

[127] See 2 Born, supra n.10 at 2677 ("the European Convention appears to provide that, if an award is annulled on [grounds equivalent to those in the New York Convention], then non-recognition is required").

This doesn't seem quite right to me. Article IX(1) of the European Convention states that the setting aside of an award "shall only constitute a ground [for] refusal of recognition or enforcement" where it was done "for one of the . . . . reasons" equivalent to art. V(1)(a)-(d) of the New York Convention"---the so-called "internationally accepted standards"; art. IX(2) then goes on to say that *as between states which are also parties to the New York Convention*, the previous subsection has the effect of *"limit[ing] the application" of art. V(1)(e)* of the New York Convention solely to the cases of setting aside" for such internationally accepted reasons. The European Convention does then clearly deprive states of any power to refuse enforcement of awards annulled merely for idiosyncratic "local" reasons---such awards continue to benefit from the protection of the New York Convention. By contrast, an award set aside on canonical, consecrated, "international" grounds *no longer benefits* from the protection of the New York Convention---so that contracting states may refuse enforcement. But as always, it hardly follows that refusal of recognition and enforcement is *mandatory*: The European Convention is not a Convention on the Recognition of Foreign Judgments.

While it remains true that the courts of a contracting state may under art. V(1)(e) defer without more to an annulment made on "international" grounds; it remains equally true, given the "discretionary" nature of art. V(1) and the escape hatch of art. VII, that they are never obligated to do so---the European Convention is unlikely to have intended to interfere with their freedom to determine on a case-by-case basis whether enforcement is warranted under their own national standards. But cf. id. at 2696-97 (suggesting that under the New York Convention, courts should give "preclusive effect to annulment decisions in the arbitral seat where those decisions rely on one of the first four grounds under art. V(1)," rather than considering "independently" the grounds set forth there).

[128] Cf. Paulsson, "*Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment,"* supra n.4 at p. 30 & fn. 66, who suggests that courts of a state of secondary jurisdiction (not of course his term of choice) might well choose to accord a "presumption of validity" to annulments made on "international" grounds "---or, quoting Professor Mayer, that to justify enforcement in the face of such an annulment, the proponent might be required to demonstrate that the courts which had set aside the award had in doing so committed something like a "manifest error of judgment." This would strongly contrast with practice in France, where any such presumptions are quite unknown, and where annulments of the seat are deemed to be "entirely irrelevant' and "of no significance whatever," see Roy Goode, The Role of the *Lex Loci Arbitri* in International Commercial Arbitration, 17 Art. Int'l 19, 27 (2001).

difficulty in gauging just what can be truly intended by language like this: He is perhaps more familiar than most with the techniques of disingenuous, tendentious characterization---and has learned to put aside the childish belief that the terms of a reasoned opinion give anything like a reliable indication into the thought processes of the judge.[129] Other difficulties arise from the uncomfortable fact that----just like the optical illusion in the Rubin Vase[130]---what strikes us at first glance as a "perverse," "parochial" ground for annulment might possibly, should we look aside and return with a fresh eye, be visualized instead as a far more benign image, nesting comfortably within the terms of the Convention. So for example:

- Is it possible that annulment on the ground that any agreement to use the rules of the ICC is forbidden by local law---this, for the arbitration community, is about as lumpish and misguided a position as one can imagine[131]-----could be brought within the rubric of art. V(1)(a)?[132]

- Is it possible that annulment on the ground that the witnesses had not been made to swear to an oath in a prescribed form,[133] could be brought within the rubric of art. V(1)(d)?[134]?

- Is it possible that annulment on the ground of an "error of law"[135]---at least where the parties had envisaged or provided for review on this basis---could be brought

---

[129] The Columbian court in the *TermoRio* litigation carefully chose its rationale for setting aside the award, rejecting several grounds before ultimately settling on the conclusion that the arbitration agreement was illegal under Columbian law solely because it specified that the parties were to follow ICC rules. Cf. Termorio S.A. v. Electrificadora Del Atlantico S.A., 421 F.Supp.2d 87, 102 (D.D.C. 2006), aff'd, 487 F.3d 928 (D.C.Cir. 2007)(" if the Columbian court was [as claimant argued] reaching for *any* reason to nullify the award, it is illogical that it would first reject in detail defendants' other arguments for nullifying the award"). Compare Alan Scott Rau, On Integrity in Private Judging, 14 Arb. Int'l 115, 147-48 (an arbitrator or judge "obligated to make a reasoned award may be expected to deploy his rhetorical ability, ingenuity, creativity and imagination in articulating the narrowest, the most plausible, or the most conventional rationale for his decision---all in the interest of commanding the acquiescence of the disputing parties or a reviewing court"; "under the very best of circumstances, the process of crafting reasoned awards will not be congruent with the decision-making process"); Alan Scott Rau & Catherine Pédamon, La contractualisation de l'arbitrage: le modèle américain, [2001] Rev. arb. 451, 476-83.

[130] "Is this a vase, or two faces"?

[131] See n.29 supra.

[132] The "agreement is not valid . . . under the law of the country where the award was made." See 2 Born, supra n.10 at 2686.

[133] See *Direction générale de l'aviation civile de l'Emirat de Dubai*, supra n.29.

[134] The "arbitral procedure was not in accordance . . . with the law of the country where the arbitration took place."

See also Ray Y. Chan, The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of *Chromalloy,* 17 B.U. Int'l L.J. 141, 200 (1999), who suggests that the decision of the Egyptian courts in *Chromalloy*---annulling an award on the ground that the arbitrators had erroneously applied the civil law of Egypt rather than its administrative law---might also have been rationalized on the basis of art. V(1)(d). Cf. Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F.Supp. 907 (D.D.C. 1996).

[135] See *Société PT Putrabali Adyamulia*, supra n.105.

within art. V(1)(c)?[136] I have myself argued---futilely but gamely, and certainly at excessive length--- that where the parties have effectively withheld from their arbitrators the power to adjudicate contested legal issues with finality, then expanded review for "arbitral errors of law" merges inevitably with the concept of arbitral "excess of powers."[137]

In response to such obvious difficulties, the proponents of the European Convention model naturally must hasten to reassure us: If we are indeed asked to engage in the task of drawing distinctions based on the "reasons" for annulment, the argument goes, it does not follow that we must stop at the "words" used by the reviewing court; "there should be no reward for the hypocritical recitation of mantras."[138] But if this is to be at all meaningful, it must entail ---not a futile inquiry into judicial psychology---but a sustained look into the legitimacy of the annulment. At a minimum, I suppose, this implies that a court of "secondary jurisdiction" must be satisfied,

- that the grounds for annulment were well-grounded, or at the very least that they were not pretextual, and had reasonable evidentiary support; and further,

- that the asserted grounds for annulment corresponded to an acceptable Convention ground for the refusal of recognition----which in turn necessarily requires further inquiry, to ascertain

---

[136] The "award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." Admittedly the point would be somewhat easier to see if we were to invoke instead the language of § 10(a)(4) of the FAA---"the arbitrators exceeded their powers"---although § 10(a)(4), and art. V(1)(c) of the Convention, are usually taken to be congruent and concerned with essentially identical problems of arbitral overreaching. See, e.g., Edstrom Industries, Inc. v. Companion Life Ins. Co., 516 F.3d 546 (7th Cir. 2008)(Posner, J.) (arbitration clause "told the arbitrator to apply Wisconsin law 'strictly,'" which "limited the extent to which the arbitrator could indulge his fancy"; here "it is unrealistic to think that the arbitrator was even *trying* to interpret Wisconsin law"; award vacated, presumably for "excess of power").

The British mechanism of expanded review treated as anathema in *Putrabali* does in fact largely consist of default rules made subject to the drafting choices of the contracting parties; see the discussion in Rau, *Fear of Freedom,* supra n.30 at 490-91 fn.62.

[137] See Alan Scott Rau, Contracting Out of the Arbitration Act, 8 Amer. Rev. Int'l Arb. 225 (1997); Alan Scott Rau, "Arbitrability" and Judicial Review: A Brief Rejoinder, 1 J. Amer. Arb. 159 (2002); Rau, *Fear of Freedom,* supra n.30.

Annulments on other grounds can also sometimes be shoehorned into art. V(1)(c). In *Radenska v. Kajo*, supra n. 125, the Court of Appeal of Graz had refused to enforce an award that had been annulled in Slovenia on the ground that it was contrary to "public policy": The court reasoned that since violations of "public policy" were contained in---were a "component of"---the non-recognition provisions of art. V(1)(c), the Slovenian annulment was thus for a permitted "reason" under the European Convention and should be recognized. The Austrian Supreme Court reversed, asserting that "public policy" violations "had nothing to do with the submission or with the arbitration agreement."

[138] Paulsson, "*Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment,"* supra n.4 at p.30.

- that there has been no category error, that the Convention is being invoked "properly": So assume an annulment has resulted from a state's refusal to countenance ad hoc arbitrations or arbitrations conducted under ICC rules: A court in a state of "secondary jurisdiction" may be convinced that however formulated or framed by its counterpart at the seat, the setting aside fails to "truly" fall within what it deems to be "the best interpretation" of art. V---not being based on the requisite "modern," "enlightened" consensus, the "internationally accepted" grounds for the refusal of recognition.[139]

In conclusion, then: It is not evident that were we to go down this path, we would be able to stop meaningfully short of the de novo inquiry familiar to French jurisprudence. In any event, if our primary driving interest is (as it must be) the avoidance of ridicule, it is clear that the modified version of the French model found in the European Convention provides few assurances that the shambles made possible by cases like *Putrabali* can be avoided.[140]

---

[139]A court subject to the European Convention---if it is convinced that this annulment was not for any of the consecrated "reasons" (as properly understood) found in arts. V(1)(a)-(d) of the New York Convention---will simply ignore the annulment and presumably proceed to enforce the award. Respecting art. IX of the European Convention is as far as it needs to go: It need not of course go on to inquire whether the annulment (based, say, on the illicit nature of an ICC arbitration) was a blatant violation of the substantive obligations of the state of primary jurisdiction under art. II of the New York Convention, or whether recognizing the annulment would be contrary to the public policy of the enforcing state.

Still, I suspect that all these positions are largely interchangeable, and as they swim in the same jurisprudential current, they are likely to be shared in the same quarters. See the discussion in n.22 supra. See also 2 Born, supra n.10 at 2686-87 (Columbian decision annulling award because it provided for ICC arbitration rather than for arbitration under Colombian procedural rules "flagrantly violated Columbia's obligation to recognize arbitration agreements under art. II" and therefore "reliance on this decision" on the part of a court in a state of "secondary jurisdiction" would be "gravely mistaken" and in fact "itself a likely violation of the Convention's obligations"), 2692-93 ("indisputably illegitimate," so that "it cannot have been the intention of the Convention" that the Columbian judgment would deprive the award of its binding force); Sylvain Bollée, Note [to Yukos Capital SARL v. OAO Rosneft, Amsterdam Court of Appeal, April 28, 2009], [2009] Rev. Arb. 561, 569 (an annulment such as that in *TermoRio,* based on "a ground simply lacking any genuine or substantial [*sérieux*] character," should be denied recognition as contrary to "public policy"); Linda Silberman, The New York Convention After Fifty Years: Some Reflections on the Role of National Law, 38 Ga. J. Int'l & Comp. L. 25, 34-35 (2009)("such a foreign judgment annulling an arbitration award on this parochial ground is inconsistent with international arbitration principles" and "accordingly" "would be repugnant to the public policy of the United States"); Stephen T. Ostrowski & Yuval Shany, *Chromalloy:* United States Law and International Arbitration at the Crossroads, 73 N.Y.U.L. Rev. 1650, 1691 (1998)(an "intrusive de novo review" of the award at the seat "could well be considered offensive to both international and American public policy regarding arbitration, given its failure to respect party autonomy").

[140] At least until this position has been widely adopted by most relevant states---so that a country with the practice of setting aside awards on idiosyncratic or unacceptable grounds is effectively quarantined. See Pierre Mayer, Revisiting *Hilmarton* and *Chromalloy, in* International Arbitration and National Courts: The Never Ending Story 165, 175 (ICCA Congress ser. No. 10, 2001); see also Hamid G. Gharavi, The International Effectiveness of the Annulment of an Arbitral Award 127 (2002)("disorder possibilities").

Precisely the same thing can be said, in spades, of the proposal in Ostrowski & Shany, supra n.139 at 1687: In what almost reads like a parody of the end-product of three years of American case-law

Closer to the opposite American pole[141] is a further alternative. This would merely interpose one small preliminary step: An absolutist position of uniform non-recognition of annulled awards is qualified by the need to take a somewhat closer look at the judgment that annulled it.

One might begin with the well-known *Chromalloy* case, in which an American court surprisingly undertook to enforce an award that had been set aside in Egypt.[142] Now something of a relic, distinguished out of existence in the best traditions and true spirit of the common law, the defects in craftsmanship in the *Chromalloy* opinion are familiar and justifiably derided.[143]

Perhaps the centerpiece of the *Chromalloy* decision is its insistence that art. V(1)(e) is no barrier to the enforcement of the annulled award since under art. VII a

---

training, the authors churn out an impenetrable and complex balancing test requiring that the court in a state of "secondary jurisdiction" "weigh":

> (1) the specific grounds advanced for the award's infirmity; (2) the intentions of the parties in making the agreement regarding the finality of arbitration and the extent of judicial review; (3) the enforcement policies of the forum where recognition is sought and the strong proenforcement policies of the international system as a whole; (4) the need for uniformity in the application of the Convention; and (5) the general presumption in favor of the recognition of foreign judgments.

[141] See text accompanying n.84 supra.

[142] *Chromalloy Aeroservices*, supra n.134.

[143] The agreement in *Chromalloy* provided that the award "shall be final and binding and cannot be made subject to any appeal or other recourse." For the court, this represented a commitment to the proposition that "the arbitration ends with the decision of the arbitral panel," so that Egypt's attempt to set the award aside amounted to a "repudia[tion of] its solemn promise to abide by the results of the arbitration." *Chromalloy Aeroservices*, supra n.134 at 912. But of course, contractual provisions like this are routine and commonplace and are never thought to have the effect of waiving the right to seek annulment---and in any event could only do so to the extent the arbitration law of the seat permitted such an unlikely result (even Switzerland or Belgium would not permit this where, as in *Chromalloy,* one of the parties was a local national). See *inter multa alia* Silicon Power v. General Elec. Zenith Controls, Inc., 661 F.Supp.2d 524, 538 (E.D. Pa. 2009)(contractual language to the effect that an award "is final and non-appealable generally does not prohibit review of the arbitrator's conduct pursuant to § 10(a)," but "only bars the disgruntled party from appealing the merits of the arbitration award"); Barsness v. Scott, 126 S.W.3d 232 (Tex.App. 2003)(contractual language to the effect that an award "shall be final and conclusive . . . and no appeal thereof shall be made by the parties" does not "preclude judicial review" on the grounds specified in the state's arbitration statute); see also Richard W. Hulbert, Further Observations on *Chromalloy:* A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone, 13 ICSID Rev.-Foreign Inv. L.J. 124, 128-30 (1998).

Still, inevitably relying on this "factor" to render *Chromalloy* irrelevant, see *TermoRio S.A.,* supra n.22 at 937 ("the present case is plainly distinguishable from *Chromalloy* where an express contract provision was violated by pursuing an appeal to vacate the award. Here, Electranta preserved its objection that the panel was not proper or authorized by law, promptly raised it in the Colombian courts, and received a definitive ruling by the highest court on this question of law"); *Baker Marine (Nig.) Ltd*., supra n.84 at 197 fn.3 ("this case is unlike" *Chromalloy* because here, the claimant/prevailing party "is not a United States citizen," and in addition, the respondent "did not violate any promise in appealing the arbitration award within Nigeria").

court "*must*" nevertheless entertain the prevailing party's request.[144] And what is the effect of art. VII? Apparently, it is that the court must consider the rights that the prevailing party "would have in the absence of the Convention"---as "if the Convention did not exist."[145] So the court proceeded to treat the Egyptian award precisely as if it were an American award---and found that enforcement was mandated under FAA §§ 9 and 10.[146]

But such an approach is sadly mistaken on any number of levels: Art. VII does not require a thought experiment that somehow presupposes the non-existence of the Convention: It says instead that no party shall be "deprive[d]" of any right to avail himself of an award "in the manner and to the extent allowed by the law" of the state of secondary jurisdiction. This means simply that the arbitration "law" of any such jurisdiction may go further than the Convention requires in enforcing awards otherwise subject to the Convention---and in doing so may render the Convention limits on recognition irrelevant: That is precisely the effect of art. 1502 of the French decree, and why the Egyptian award in *Chromalloy* was enforced there.[147] Art. VII, in other words, requires us to identify a right of the prevailing party to enforce the Egyptian award under some provision of American domestic law "more favorable" than the rights provided by the Convention itself.

Whether such "more favorable right" exists in American law is most doubtful. The immediate problem is that foreign awards are already the subject of chapter 2 of the FAA---which *is* American "domestic law" for these purposes. § 201 tells us that the Convention "shall be enforced in United States courts in accordance with this chapter," § 202 tells us that an arbitral award that is not entirely "domestic" "falls under the Convention," and § 207 tell us that awards "falling under the Convention" must be confirmed *unless* a court "finds one of the grounds for refusal or deferral of recognition or enforcement . . .specified in" the Convention. Now the Convention of course includes art. V(1)(e)---so by reference, art. V(1)(e) as a ground for non-enforcement is part of the domestic law of the United States (as it is *not* part of the law of France) governing Convention awards.[148]

The only backdoor to a most favorable domestic right must be provided by § 208, which envisages that Chapter One---presumably including § 9---"applies" to motions for confirmation "brought under" the Convention "to the extent that that chapter is not in

---

[144] *Chromalloy Aeroservices*, supra n.134 at 914 (italics in original).
[145] Id. at 910.
[146] Actually, § 9 (as opposed to § 10) was not mentioned, but that must have been what was intended.
[147] See République arabe d'Egypte v. Soc. Chromalloy Aero Services, [1997] Rev. Arb. 395 (Cour d'appel de Paris, January 14, 1997)(note Fouchard).
[148] Similar is the domestic legislation of Switzerland, which simply provides that "the recognition and enforcement of foreign arbitral awards is governed by" the Convention, Switz. Private International Law Act art. 194; see Martin Bernet & Anna K. Müller, "Recognition and Enforcement of Foreign Arbitral Awards," *in* Kaufmann-Kohler & Stucki (eds.), supra n.21 at 167, 178 (2004).

conflict with [Chapter Two] or the Convention" itself.[149] Whether such a disqualifying "conflict" with the Convention is in fact present is critical, but indeterminate: The affirmative argument is sometimes built upon the requirement of § 9 (absent from the Convention) that the parties' agreement contain an "entry of judgment" clause."[150] Or upon the fact that under § 9 a motion to confirm is to be made "to the United States court in and for the district within such award was made"---by definition impossible in the case of a foreign award.[151] Or upon the assertion that the grounds for challenging awards contained respectively in § 10 and in art. V are substantively different.[152] But leaving all that aside, the overriding and obvious problem is that the notion of an

---

[149] The discussion that follows assumes that an action to enforce a foreign Convention award is necessarily "brought under" Chapter Two, even though the claimant may be seeking to avail himself of the "more favorable" confirmation and review provisions of Chapter One. In light of the preceding paragraph I think this is correct, although of course the opinion in *Chromalloy* proceeds on the opposite premise.

[150] "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . " See, e.g., Hulbert, supra n.143 at 134.

Such a clause is not likely to be found in any agreement contemplating arbitration outside the United States, nor should one be necessary in such circumstances. See Polimaster Ltd. v. Rae Systems, Inc., 2009 WL 196169 (N.D. Cal.)(since § 207 preempts § 9," "there is no consent requirement"). However, there is an increasing tendency to hold in any event that the text of § 9 should not be read literally---and so the "consent to confirmation" requirement of § 9 has been found satisfied, for example, by a simple agreement that all disputes "shall be finally settled by arbitration" or that the award shall be "final and binding," provisions routinely found in any body of institutional rules. See, e.g., Daihatsu Motor Co., Ltd. v. Terrain Vehicles, Inc., 13 F.3d 196 (7th Cir.1993) (the "language in the arbitration clause and the parties' conduct, when assessed in its totality, make clear that the parties contemplated judicial confirmation of an arbitral award"); Booth v. Hume Publishing, Inc., 902 F.2d 925 (11th Cir.1990).

[151] See Hulbert, supra n.143 at 134-36; Chan, supra n.134 at 160; Ostrowski & Shany supra n.139 at 1675-76; cf. Gary Sampliner, Enforcement of Nullified Foreign Arbitral Awards: *Chromalloy* Revisited, 14 J. Int'l Arb. 141, 152-53 (1997).

This argument seems considerably less plausible these days in light of the Supreme Court's decision in *Cortez Byrd Chips,* supra nn.20 & 32, to the effect that the venue provisions of §§ 9 and 10 are now to be understood as "permissive" and not mandatory.

[152] Cf. Hulbert, supra n.143 at 138 (if "different confirmation standards are to be imported from the [FAA] that would sustain an award that [the Convention] would not permit to be confirmed," "that would raise the clear 'conflict' that § 208 prohibits"); Chan, supra n.134 at 158 ("grounds for annulling local awards are not necessarily the same in substance from grounds for refusing to enforce foreign awards"); Ostrowski & Shany supra n.139 at 1678 ("[it is difficult to maintain] that the domestic grounds for vacatur listed in § 10 do not conflict with the clear language of § 207, which establishes Article V as the exclusive source of grounds for non-recognition and enforcement"); *Restatement,* supra n.25 at § 5-3 *cmt. d* ("Significantly, the grounds for vacatur of an award under FAA Chapter One differ from the grounds for denying recognition or enforcement of a foreign Convention award under [Chapter Two].).

Section 9 mandates that an award must be confirmed "unless [it] is vacated" under § 10. There is of course no question of actually setting aside a foreign award, but it should be easy enough if necessary to refer to the § 10 grounds by analogy (as in the case of non-Convention awards), as grounds for the refusal of recognition or enforcement. See text accompanying n.33 supra. I very much doubt that any real differences in substance (as opposed to differences in verbal formulations) can be identified here. See Rau, *The New York Convention in American Courts*, supra n.22 at 236-39 ("I think as a practical matter that it is highly unlikely---to put it mildly---that actual results in concrete cases will tend to diverge significantly depending on whether an award is scrutinized under Article V of the Convention or under § 10 of the FAA").

absolute duty (under § 9) to confirm an award in the absence of specified defenses---pointedly not including local annulment---must be at odds with the power of a court (under art. V(1)(e)) to withhold enforcement. The counter-move is of course to the effect that art. VII, too, is just as much a part of the Convention as art. V---that art. VII is also made a part of U.S. law under Chapter Two[153]---and that in fact, enforcement where domestic law does not make local annulment a ground for refusal, is "the most straightforward and uncontroversial application of art. VII."[154]

Here we may feel that we are caught up in a perpetual, self-referential loop, ending only in madness, and where any exit is difficult to discern. Ultimately, though, all this remains a matter of statutory interpretation. It is evident that one consequence of choosing to apply Chapter One to all Convention awards is that it "would allow a party to obviate the supervisory function of the courts in a foreign seat, as contemplated by" the Convention---thereby "undermin[ing] the distinction" between states of "primary jurisdiction" and states of "secondary jurisdiction" which is such "an essential feature of the legal framework underlying" the Convention.[155] This is a truism---but it does not at all follow that this "supervisory function" of the courts of the seat must be in any way a permanent or necessary feature of the Convention structure: States of secondary jurisdiction may after all arrogate this function to themselves---they may, that is, simply legislate the seat into irrelevance. However one feels about the French statute, it is at least a gratifying model of clarity in this respect. The problem is that the route to the same destination in American law is, by contrast, as an exercise in construction, far too oblique to be at all convincing.

One might be tempted to think that the floundering one identifies in *Chromalloy*---the desperate overreaching, and the consequent embarrassment the case presents as a "precedent"----all demonstrated an uneasy consciousness at the same time of having something important to say, and not being able to say it. Is it likely that the *Chromalloy* opinion was at least in part a way of responding to suspicions with respect to the behavior of the Egyptian courts in overturning an arbitral award rendered against the Egyptian Government?[156]

---

[153] See Sampliner, supra n.150 at 152 ("accordingly, enforcement of a foreign arbitral award under U.S. domestic law cannot, by definition, conflict with Chapter Two"); Ostrowski & Shany supra n.139 at 1678 (since art. VII permits reliance on more favorable domestic norms, "such norms would arguably qualify as nonconflicting Chapter One provisions").

[154] Petrochilos, supra n.71 at 874.

[155] *Restatement,* n.25 supra at § 5-3 *cmt. d*. & *Reporters' Notes, Note d*.

[156] The attorney for Chromalloy has written that while his client "could present no 'smoking gun' to demonstrate conclusively that the Egyptian court, or the country's entire judiciary, was biased or corrupt, it was able to show that Egyptian courts have had a disturbing propensity to nullify awards in favor of foreign parties against Egyptians or its government for seemingly arbitrary reasons." (The Cairo court referred at one point to the "irreparable serious harm" that the award would supposedly inflict on Egypt.). See Gary H. Sampliner, Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin, 11 (9) Mealey's Int'l Arb. Rep., Sept. 1996 at 22, 28. See also 2 Born, supra n.10 at 2684 (the *Chromalloy* court did not "expressly address or rely on the central---if uncomfortable---fact that the

For even if it takes the position that an award set aside at the seat is presumptively unenforceable, a court in a state of 'secondary jurisdiction" may readily enforce it nevertheless if it is convinced that the annulment was somehow "fatally flawed" or "other than authentic."[157] In such circumstances, the court may conclude that no true setting-aside has taken place at all---at least, none that it has any need to pay attention to---with the implication that art. V(1)(e) has simply never been triggered.

Perhaps the circumstances surrounding the setting-aside process at the seat were "troubling"---where the losing party was, say, denied the opportunity to present its case, or where the annulment appears to be the product of political pressure or where there is substantial doubt about "the integrity of the rendering court with respect to the judgment in question."[158] Even more conclusive, apparently, would be a conviction of systemic failure---that the "judicial system" of the seat "does not provide impartial tribunals or procedures compatible with due process of law."[159] A court choosing to enforce an award despite a local annulment could do so, then,

- by referring to its general standards that are thought to justify a refusal of recognition or enforcement of any "foreign judgment,"[160]

- by concluding that the foreign annulment is contrary to its "public policy,"[161]

Egyptian courts' annulment decision was in favor of a local Egyptian government entity and against a foreign investor").

[157] *Termorio S.A.,* supra n.22 at 941.

[158] See *Restatement,* supra n.25 at § 5-12, *Reporters' Notes, Note d.* See also Restatement of the Law Third, Foreign Relations Law of the United States § 482(2)(U.S. court "need not" recognize a foreign court judgment if "the defendant did not receive notice of the proceedings in sufficient time to enable him to defend," or if "the judgment was obtained by fraud"); Uniform Foreign-Country Money Judgments Recognition Act (2005) § 4 (c) (a court "need not" recognize a foreign court judgment if it was "rendered in circumstances that raise substantial doubt about the integrity of the rendering court," or where "the specific proceeding . . .. was not compatible with the requirements of due process of law").

[159] See Restatement of the Law Third, Foreign Relations Law of the United States § 482((1)(U.S. court "may not" in these circumstances recognize a foreign court judgment), *cmt. b.* (a court "must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered"); see also Uniform Foreign-Country Money Judgments Recognition Act (2005) § 4(b)(same).

[160] See nn. 158-59 supra; see also Park, *Duty and Discretion in International Arbitration, in* Park, supra n.41 at 199 ("the soundest policy toward annulment orders is to treat them like other foreign money judgments, according them deference unless procedurally unfair or contrary to fundamental notions of justice").

[161] See *Termorio S.A.,* supra n.22 at 939 ("there is a narrow public policy gloss on Article V(1)(e)," so that "a foreign judgment is unenforceable as against public policy to the extent that it is "repugnant to fundamental notions of what is decent and just in the United States"); cf. Paulsson, supra n. 83 at p. 6 ("who would seriously argue that an award set aside in country X because it was rendered by a female or irreligious arbitrator should be rejected by the courts of country Y, making the judges of the latter complicit in a violation of international public policy?").

But note: An annulment at the seat in accordance with a neutral local law---but that nevertheless seems to us "intrusive," or "parochial," or "idiosyncratic," *in the mere sense that it sweeps more broadly*

- or even by relying on a flawed annulment as the critical factor guiding the exercise of the discretion conferred on the court by art. V(1)(e). In practice this exceptional and tightly circumscribed faculty not to take account of a local annulment will be far superior to any prophylactic rule that overrides the contractual choice of a seat largely on the basis of the unprovable premise that the courts there are likely to be unreliable.[162]

Recognizing an annulled award only after a critical assessment of the judgment setting it aside, is not unprecedented.[163] That this will be *rarissime* does not detract

---

than arts. V(1)(a)-(d) of the Convention---cannot in itself be ignored on the ground that it is contrary to the strong American "public policy" in favor of arbitration. Cf. Chromalloy Aeroservices, supra n.134 at 913 ("the U.S. public policy in favor of final and binding arbitration of commercial disputes is unmistakable," and in consequence to recognize the decision of the Egyptian court, annulling an award for "mistake of law," "would violate this clear U.S. public policy"); see generally the discussion in nn. 22,139 supra. For this would simply return us to, and mimic, the solution of the European Convention. The supposed international policy in favor of the enforcement of arbitral awards would invariably trump---would "effectively swallow"---the non-recognition presumptively mandated by art. V(1)(e); see *Termorio S.A.,* supra n.22 at 937; Paulsson, supra n.98, at text accompanying fn. 34 (noting, with approval, that under *Chromalloy,* "art. V(1)(e) is simply neutralized").

[162] See text accompanying n.116 supra.

Cf. Rau, *Comment: Mandatory Law and the Enforceability of Arbitration Agreements*, supra n.126 at 136-37, discussing the "prudential or pragmatic" considerations that drive the choice between "adopting a prophylactic rule of blanket 'inarbitrability,'" and "trying to give content to a focused, *post hoc* standard, inquiring into whether the goals of regulatory legislation have in fact been thwarted." This familiar dichotomy between two models of legal regulation recurs here as well: And obviously our choice will be driven by what our education has led us to believe about the values of particularistic decision making, and about the striving of the common law, in Lord Mansfield's words, over time ultimately to "work its way pure." See Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 377 (1978). So naturally I find rather curious the argument that the "discretion" envisaged by art. V(1)(e) could not possibly refer to a choice given to the enforcing *judge*---for after all, that would necessarily subject us to his "momentary whim," with all the attendant risks of "arbitrariness"---but that it must refer instead only to the permissible discretion of the *legislature* in choosing to enact rules, such as the French art. 1502, governing the enforcement of foreign judgments: See Bollée, supra n.139 at 566-67.

[163] See, e.g., Yukos Capital SARL v. OAO Rosneft, [2009] Rev. Arb. 557 (Amsterdam Court of Appeal, April 28, 2009). The former shareholders of a bankrupted Russian oil company recovered an award against a successor company, now "closely linked" to and owned by the Russian state, and whose directors were politically appointed. The Russian courts annulled the award---but the Amsterdam court concluded that the "Russian judicial system," at least in relation to the politically sensitive struggle over the control and ownership of the Yukos group, "is not impartial and independent, but is directed by the interests of the Russian state and receives its orders from the Russian executive"; It followed that the setting aside of the award "should be ignored," and the original award enforced.

While there was no direct proof of bias on the part of any of the individual judges responsible for the annulment, this could not in the nature of things be expected---such things can only happen "behind the scenes." The court relied instead on an abundant literature, including reports and resolutions of the Council of Europe, reports of NGOs (notably the "Corruption Perception Index" published by Transparency International), and accounts in the international press. Cf. Restatement of the Law Third, Foreign Relations Law of the United States § 482 *cmt*. *b*. ("the recognizing court may make this determination without formal proof or argument, on the basis of general knowledge and judicial notice").

from its value as an available safeguard for deployment in the event of occasional abuse. That it can be a sensitive matter, unneighborly and uncollegial, to evaluate the quality of justice rendered by a fellow jurist---and to find it totally lacking in integrity---is clear[164]---but this may be inevitable in all cases where national courts try to function "in a heterogeneous world lacking shared traditions of judicial independence."[165] In this connection Professor Smit makes the interesting suggestion that all annulments should presumptively be disregarded in cases where the setting aside has taken place in the "home court" of one of the parties, and at his request.[166] Disregarding such annulments, and only such annulments, is an obvious surrogate for the job of explicitly passing judgment on a foreign court: As such it is strikingly overinclusive---but as a "carve out" of cases that we think likely to be particularly problematical, it comes with all the virtues of a bright, apparently neutral, line, one that makes a rough pass at a problem without the need for delicate factual inquiry.

The same moves are often made outside the context of what is "award recognition" in the technical sense: For example, investment arbitration tribunals have imposed liability on states that have equally demonstrated a striking failure to internalize the notions of the rule of law and the independence of the judiciary, all while nevertheless demanding to participate in the international market regime. So where the courts of the seat have set aside an international award without "justification" and in a "grossly unfair" fashion, this may be deemed an "abuse [of their] supervisory juridiction over the arbitration process" and so "tantamount to expropriation" under a BIT to which the state is a party. See, e.g., Saipem, S.p.a. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Final Award ¶¶ 155, 159 (2009). Note that in cases like this "enforcement" of the initial award is in any event not a live issue where the respondent simply lacked assets that could be levied on abroad. But liability under a BIT is a reasonable surrogate; cf. id., Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 155 ("The fact that the indemnity claimed in this arbitration matches the award awarded in the ICC arbitration at least to some extent, does not mean in and of itself that this Tribunal would 'enforce' the ICC Award in the event of a treaty breach"); Final Award ¶ 202 ("the Tribunal considers that in the present case the amount awarded by the ICC Award constitutes the best evaluation of the compensation due").

And outside the context of arbitration entirely, see Osorio v. Dole Food Co., 665 F.Supp.2d 1307 (S.D. Fla. 2009)(Nicaraguan judgment, in favor of workers on banana planations who had allegedly been exposed to pesticides, was refused recognition on the ground that the judgment was "rendered under a system which does not provide impartial tribunals"; "the unanimous view among U.S. government organizations and officials, . . . foreign governments, international organizations, and credible Nicaraguan authorities, is that the judicial branch in Nicaragua is dominated by political forces and, in general, does not dispense impartial justice").

[164] See Paulsson, "*Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment,"* supra n.4 at 28 (it is "wise to eschew invidious comparisons"). Cf. Mobil Cerro Negro Ltd. v. Petroleos de Venezuela SA, [2008] 1 Lloyd's L. Rep. 684 ¶ 46 (QBD (Comm.))(application for worldwide freezing order in aid of New York arbitration; Mobil's submissions "made reference to reports that the judiciary in Venezuela 'is influenced by the executive,'" but "unless there is very strong evidence to the contrary this court does not proceed on the basis that courts of other foreign friendly countries do not behave properly").

[165] Park, *Duty and Discretion in International Arbitration, in* Park, supra n.41 at 200.

[166] See Hans Smit, Annulment and Enforcement of International Arbitral Awards: A Practical Perspective, 18 Amer. Rev. Int'l Arb. 297, 304 (2007)("would provide an appropriate disincentive for the home court to seek improperly to utilize the power of annulment"). An even narrower, alternative classification is suggested by the facts of cases like *Chromalloy* and *TermoRio*, where the "state" of "primary jurisdiction" was at the same time directly implicated in the arbitration (either directly as a party or through a wholly-owned state entity), and also responsible for the setting aside of the award against it.

Under any view of current law, a U.S. court would have no reason that I can see to decline to honor a pre-dispute waiver of the defense of art. V(1)(e)---in the unlikely event that a party is willing to make one:[167] Perhaps, in exchange for agreeing to arbitrate in Egypt, an American party will have extracted the promise that should an award be vacated by local courts on any grounds other than those conventional and intentionally accepted, the award could still be enforced in states of secondary jurisdiction. This form of explicit "contracting in" to *Chromalloy* could hardly be problematical; given the discretion conferred by art. V on courts of states of "secondary jurisdiction," a stipulation in favor of enforcement should not be deemed an "impermissible" contraction of the grounds of review.[168]

A common chess move in the French literature is to protest that in states refusing to recognize annulled awards, the vaunted value of "finality" is in fact "finality in one direction only"---that there is an unacceptable and "illogical" lack of "symmetry" with respect to the respective treatment of foreign annulments (treated as definitive) and foreign confirmations (which are not).[169] Once again the Cartesian logic is not compelling:

---

[167] See Christopher R. Drahozal, Enforcing Vacated International Arbitration Awards: An Economic Approach, 11 Amer. Rev. Int'l Arb. 451, 478 (2000)(it should suffice for the parties to say, that "the arbitral award may be enforced even if set aside by a competent authority in the country in which the award was made"). See also Food Services of America Inc. v. Pan Pacific Specialties, 32 B.C.L.R. 3d 225 (B.C. Sup. Ct. 1997)(in the agreement to arbitrate, "both parties hereby expressly waive any entitlement they have or may have to rely upon the provisions of [the British Columbia statute equivalent to art. 36 of the UNCITRAL Model Law] . . . to seek to avoid recognition or enforcement of an arbitration award made pursuant to this Agreement").

[168] But cf. *Restatement*, supra n.25 at § 5-16 *cmt. a* (contracting parties may "not agree before, during, or after the arbitral proceedings to refrain from opposing recognition or enforcement of an international arbitral award, or to otherwise relinquish the right to oppose recognition or enforcement of the award").

Even more clearly, I should think, such an agreement should not be held to contravene the holding of *Hall Street*---or at least any attempts to extend the reach of that benighted decision should be stoutly resisted. An advance waiver of the right to oppose enforcement on Convention grounds is far indeed from the *ejusdem generis* nonsense on which *Hall Street* seems to rest---far indeed from the "plain meaning" trope to the effect that since the FAA § 10 grounds are the "exclusive" grounds for review, courts cannot be forced to honor any "expansion" of these grounds imposed by contract. But for doubts to the contrary, see 2 Born, supra n.10 at 2736 fn. 162.

If I am wrong in these conclusions as to the state of the positive law---or more broadly, if the parties are for any other reason unwilling to submit to the law of Egypt as the state of primary jurisdiction---that is, if they "do not want to subject themselves to [Egypt's] standards for vacating awards"---nothing of course would prevent them from simply designating by contract any other "seat" for the arbitration, while at the same time retaining fully all the "convenience," "facilities," and hedonistic attractions of being in Cairo. See text accompanying n.44 supra; cf. Drahozal, supra n.167 at 470.

[169] E.g., Fouchard, "*La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine,"* supra n.41 at 451-52; Gaillard, supra n.7 at 99-200 & fn. 367 ("there is no justification for treating any differently a foreign decision setting aside an award, and a foreign decision refusing to set aside the same award"); Clay, supra n.8 at 1248 ("a foreign judgment should have the same fate without regard to whether it validates or invalidates an award"); *Société PT Putrabali Adyamulia*, supra n.35 at 511 (report of President Jean-Pierre Ancel); Paulsson, *Note,* supra n.4 at 561 (American courts must entertain a very curious notion of international arbitration if they think that the "finality of finalities" is to "respect national judgments that *set aside* awards" but not judgments that *approve* them); Paulsson,

- It is one thing to make a prudential decision to presumptively defer to foreign annulments simply in the interest of avoiding the muddle of *Putrabali*: But by contrast, surely, a very different calculus is suggested when a state is asked to deploy its public force, at the behest of a foreign arbitrator, to seize assets within its own territory---surely only in the latter situation is there a risk of the "abdication of sovereignty"[170] that may justify a 'second look" to ensure that local enforcement is warranted. At a bare minimum art. V(2) is congruent with ordinary recognition-of-judgment principles in exempting a court of a state of secondary jurisdiction from having to give effect to any award---whether confirmed at the seat or not---which might be thought to violate its "most basic notions of morality and justice."[171]

- Nor is symmetry, if thought desirable, necessarily attainable only under the French model---it can, after all, work both ways: At least in the United States we can certainly identify a clear tendency to treat confirmations by the courts of the seat as recognizable and enforceable foreign judgments---thus creating a "parallel entitlement" for the prevailing party, without the need for any Conventional reexamination of the award itself.[172] The American solution may

---

"*Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment,"* supra n.4 at 27 ("the issue of asymmetry").

[170] See Mayer, supra n.140 at 172.

[171] Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (Rakta), 508 F.2d 969, 974 (2nd Cir. 1974)("public policy" defense under art. V of the Convention).

[172] '[A] party may often avoid relying on the Convention by applying in the rendering jurisdiction for an order confirming the award, which converts the award into a judgment which may be enforced abroad under the appropriate procedures for enforcement of foreign judgments." Oriental Commercial Shipping Co. (U.K.), Ltd. v. Rosseel, N.V., 769 F.Supp. 514, 516 fn.3 (S.D.N.Y. 1991). See *Restatement,* supra n.25 at § 5-3(e)(if an award "has been confirmed and recognized by a foreign court at the arbitral seat," the prevailing party may seek to have it recognized or enforced "either as an award . . . or as a foreign judgment," under "the standards applicable to the recognition or enforcement of foreign judgments of the forum").

Greater elaboration of the law of foreign-judgment recognition may eventually turn art.V of the Convention into a series of default rules applicable only in the absence of local proceedings. See, e.g., Ocean Warehousing BV v. Baron Metals and Alloys, Inc., 157 F.Supp.2d 245 (S.D.N.Y 2001). Here a Dutch arbitral award "was confirmed as a Dutch judgment, which under Dutch law is final, conclusive, and enforceable in the Netherlands." The plaintiff sought an order of attachment, which under New York law required a demonstration of a "likelihood of success on the merits"---which in turn required a showing that the cause of action was based "on a judgment which qualifies for recognition" under state law. The respondents argued that had they appeared in the Dutch confirmation proceeding, Dutch courts would have refused to entertain their defense that the arbitration agreement was not an "agreement in writing" as required by the Convention---but this was held to be irrelevant: "The Convention defenses simply do not apply to [a proceeding under New York's Uniform Foreign Country Money-Judgments Recognition Act] seeking recognition and enforcement of a foreign judgment." And indeed, since it was possible for the Dutch judgment to be converted directly into a U.S. judgment, "there is some doubt that the Court will ever reach the merits of defendants' Convention defenses." 157 F.Supp.2d at 250 fn.8. See also Island Territory of Curacao v. Solitron Devices, 489 F.2d 1313 (2nd Cir. 1973)(the prevailing party obtained a "writ of execution" in Curacao on the basis of the award, which was declared enforceable in the court of

not, however, be widely shared,[173] and for an American court even to venture down this path may require a delicate exercise of taxonomy with respect to foreign judicial decisions.[174]

First Instance, and the losing party did not take advantage of its ability to move to have the award set aside; "we conclude that the judgment of Curacao was enforceable under [New York law, and in] so holding we need not determine the correctness of the alternative ground advanced by the district court that the arbitration award was independently enforceable under the Convention"). See generally, *Note: Recognition by Circumvention: Enforcing Foreign Arbitral Awards as Judgments under the Parallel Entitlements Approach*, in 92 CORNELL L. REV. 573, 589 (2007)("by permitting parties to enforce awards via foreign confirmation judgments while ignoring defendants' assertions of Article V defenses, courts enforce awards without first considering a potentially problematic arbitration process").

[173] See Sylvain Bollée, Les methods du droit international privé à l'épreuve des sentences arbitrales 260 (2004)("the notion that a judgment confirming an award is capable of being recognized in other countries seems nowadays to elicit an immediate and virtually unexamined rejection").

See also Markus Burianski, "German Federal Court of Justice No Longer Permits the Recognition and Enforcement of Foreign Judgments Entered Upon Arbitral Awards," 24 (10) Mealey's Int'l Arb. Rep. (Oct. 2009) at p.1: In a recent German decision the court, "overturn[ing] its previous line of jurisprudence," held that a California judgment confirming a California award could not itself be recognized and enforced in Germany---since "the creditor's options are limited to enforcing the arbitral award itself, on the basis of the [Convention]." Part of the rationale was that if the result were otherwise---that is, to the extent enforcement of the judgment were permitted---"signatory states could escape the New York Convention . . . unless the requirements of Article 5 of the Convention were analyzed as part of public policy": This is striking: The clear, if heretical, implication is that a proven defense under art. V would necessarily and invariably and in a mandatory fashion prohibit recognition of any award. Cf. the discussion at supra n.80, and *Oil & Natural Gas Comm'n*, supra n.72.

[174] Presumably there should be no recognition of a judgment of enforcement emanating from a third country, i.e., a state other than the seat: No state will be eager to incorporate into its legal order the French enforcement of the original (and annulled) award in *Putrabali.* Cf. Karaha Bodas, Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 372 fn. 59 (5th Cir. 2003)("where the U.S. court acts merely as a secondary-jurisdiction court under the Convention, it only enforces, or refuses to enforce, awards arbitrated elsewhere, and those decisions do not automatically receive *res judicata* effect [in foreign jurisdictions]").

A decree of "enforcement" issued even at the seat has often been thought to be limited by its very nature to the territory where it was rendered, and thus not functionally equivalent to a "judgment of validity." See Dominique Hascher, Recognition and Enforcement of Arbitration Awards and the Brussels Convention, 12 Arb. Int'l 233, 240 (1996) ("the majority of courts have ruled that the effects of an execution order written on or appended to an award, [giving] the award executory force, are territorially circumscribed to the boundaries of the State in which the enforcement courts sits [and] carry no international effect"); cf. Burianski, supra n.173 at p. 2 ("the purpose of a foreign exequatur judgment. . . would be limited to permitting to enforce an award in the exequatur country's territory"; while it "was procedurally an autonomous decision, it was not a foreign judgment based upon an independent, reproducible assessment of the facts and legal conclusions"); Ernst Metzger, Note [to Weisbaum & Sons v. Archaimbault, Trib. civ. de Meaux, April 2, 1958], [1959] Rev. Crit. Droit Int'l Privé 152, 153 ("a decision whose only purpose is to declare an award 'enforceable within the country' is not in itself capable of being enforced in another state, since it is not addressed to the parties themselves but solely to the officials and local authorities of the first state whose duty it is to carry it out").

But see Seetransport Wiking Trader v. Navimpex Centrala Navala, 29 F.3d 79 (2nd Cir. 1994) (action to enforce a French arbitral award may be time-barred under the Convention; nevertheless claimant may bring an "alternative action" to enforce as a foreign judgment the ruling of the French court granting *exequatur* to the award); Peter Hay, Recognition of a Recognition Judgment Within the European Union: "Double *Exequatur*" and the Public Policy Barrier*, in* Peter Hay et al., Resolving International Conflicts: Liber Amicorum Tibor Várady 143, 144-46 (2009)(highlighting "conceptual

III. Enjoining Arbitrations

a. Injunctions and Consent

> [T]o enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present.[175]

So let's review the bidding for a moment: This dichotomy between courts "at the seat" and courts "in the rest of the world" has become second nature to us all: No one can effectively wish it away, and no matter how much we quibble, it is well-understood, and generally functional, for all sorts of purposes. The inevitable problem, though, is that it is not a universal solvent----the world can after all be understood and patterned and divided up in all sorts of ways. Still, courts that come belatedly to this complex system can readily be mesmerized by its simplicity---and I suppose it is inevitable that what began as a rough heuristic to allocate responsibility for setting an arbitral process in motion, and for monitoring the results, has often been sullied and transformed, unthinkingly applied to all sorts of new and unexpected and inappropriate contexts.

Take, for example, the question of a party wishing to enjoin an arbitration against him that has been threatened or initiated.

One begins with the Prime Directive---that the arbitral process, as a "matter of contract," must rest on consent, so that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[176] A necessary corollary,

---

differences between civil law and common law judgment recognition law" in which "the common law does not share the civil law's conceptual difficulty"; at common law a foreign judgment is merely "a *claim*" on which the "successful foreign judgment creditor obtains a *domestic judgment* (not only a declaration of enforceability of the *foreign* judgment")).

Still more difficult problems of conceptualization may be posed by a simple refusal by the courts of the seat to vacate an award rendered there: It is surely unacceptable that Belgium, merely by declaring "inadmissible" any attempt to set aside an award rendered there between two foreign nationals, can be thought to legislate for the world. At the very least the foreign regime should have provided an opportunity to litigate the contested issues of validity. See Gulf Petro Trading Co. v. Nigerian Nat'l Petrol. Corp., 288 F.Supp.2d 783, 794-95 (N.D. Tex. 2003), ***aff'd,*** 115 Fed. Appx. 201 (5th Cir. 2004)(Swiss courts "issued a decision . . . up[holding]" the arbitrators' ruling that the claimant "did not have standing or capacity" to assert its claims; "because the issue has already been decided by the Swiss court, a review of that issue by this court would violate principles of *res judicata* and international comity"); cf. Hascher, supra at 264 (arguing that where a Swiss award was unsuccessfully challenged before Swiss courts, "the issue or points that have been determined by the setting aside court should not be relitigated before the enforcement court," although recognizing that French law is apparently to the contrary).

[175] Société Générale de Surveillance S.A. v. Raytheon European Management & Systems Co., 643 F.2d 863, 868 (1st Cir. 1981)(Breyer, J.)(injunction was sought and granted "under Massachusetts law," the court holding that while the FAA "applies to this dispute," an injunction would interfere with "neither the letter nor the spirit" of federal law).

176 *United Steelworkers of America* v. *Warrior & Gulf Nav. Co*., 363 U.S. 574, 582 (1960).

This is a "point so banal, so commonplace, so formulaic, that readers justifiably wince when they see it repeated." Rau, *Arbitral Jurisdiction and the Dimensions of "Consent,"* supra n.19 at 199. The complexities are explored at inordinate length in id. at 199-206 and in Alan Scott Rau, Everything You

"follow[ing] inexorably," is that this 'question of arbitrability" (whether there is "a duty" to arbitrate" the dispute; whether the parties have consented to a final arbitral judgment on the issues---whether, in short, the arbitrators have "jurisdiction" to decide) is "undeniably an issue for judicial determination."[177] An arbitrator who purports to "adjudicate" a dispute despite the total absence of any consent whatever, is not always—is not necessarily—a con-man and a charlatan. (Although on occasion the conclusion is compelling that this is, in fact, precisely what he is.[178]) But even if a more benign account of his behavior is possible, he is no less an impostor (or more charitably, an "officious intermeddler"). The claim that "nothing is subject to arbitration because there is no agreement to arbitrate must be the mother of arbitrability questions."[179]

American procedure has been exceptionally generous in providing an abundance of devices through which challenges to arbitral authority may be raised: A judicial determination is possible not only on review after an award has been rendered, but also before any proceedings at all have commenced, by a motion to stay litigation or to compel arbitration under §§ 3 and 4 of the FAA.[180]

Really Need to Know About "Separability" in Seventeen Simple Propositions, 14 Amer. Rev. Int'l Arb. 1, 4-13 (2003).

177 *AT & T Technologies, Inc*. v. *Communications Workers of America*, 475 U.S. 643, 649 (1986).

[178] In 2002 Citibank began receiving letters, purportedly from its credit card holders, stating that "notwithstanding any other agreements which may be in conflict with these terms," Citibank, "for valuable consideration given," must now arbitrate disputes under the rules of the "National Arbitration Council [NAC]." The NAC was an "arbitration service" of which a certain Charles Morgan was the "sole proprietor and arbitrator." Although Citibank sent notice to the NAC that it did not agree to arbitrate under NAC rules, the NAC nevertheless conducted 300 "arbitrations" against Citibank. Citibank never participated in any of these "proceedings"—at which no witnesses were called—but in every case NAC issued an "award" against Citibank in the exact amount of the cardholder's outstanding credit card debt, plus NAC's fee. *See* Citibank (South Dakota), N.A. v. National Arbitration Council, Inc., 2004 U.S. Dist. Lexis 28539 (M.D. Fla.) (Citibank is granted a preliminary injunction against NAC, having demonstrated a substantial likelihood of success on its claims for tortious interference with contractual relations and for unfair and deceptive practices,). An identical case is Chase Manhattan Bank USA, N.A. v. National Arbitration Council, 2005 WL 1270504 (M.D. Fla.): At the preliminary injunction hearing, the following colloquy took place between the court and defendant's counsel:

> THE COURT: So I'm a cardholder, I owe Chase Manhattan Bank $20,000, I go to Mr. Morgan, I pay him $170, and I get a piece of paper that says, I don't owe them any money anymore and they owe me $20,000 plus $170? Right?
>
> MS. TROUTWINE: Yes.

[179] MCI Telecommunications Corp. v. Exalon Indus., Inc., 138 F.3d 426, 429 (1st Cir. 1998).

[180] American legislation thus "allows an objecting party to seek judicial determination of the scope of consent either before, during or after an arbitration," Grad v. Wetherholt Gallieries, 660 A.2d 903, 908 (D.C. App. 1995)(Uniform Arbitration Act); see also Bensadoun v. Jobe-Riat, 316 F.3d 171 (2nd Cir. 2003)(district court found that a brokerage customer's allegations were sufficient "to support sending the matter to arbitration (without prejudice to any subsequent determination the arbitrators may make, on a fuller record, as to their jurisdiction)"; *held*, reversed; the court was instead "required to render a final decision on [the broker's] claim that the investors had no right to arbitrate their claims against him" so that their NASD arbitration should be enjoined).

So I find rather puzzling the suggestion that recent Supreme Court jurisprudence "must be understood" as holding that if challenges are made *both* to the underlying contract and to the arbitration agreement---challenges which might therefore impeach the arbitration agreement itself---then such a

And what of "the familiar, cruel dilemma faced by a respondent against whom an arbitration has been initiated, but who believes that he is not in fact subject to any arbitration agreement"?[181] Here, too, a court---once it is convinced that no valid consent had ever in fact been given---might think it natural to issue an immediate injunction at the respondent's request against any further arbitration proceedings. (To say that "there is no valid consent to arbitrate" may be equivalent to saying, in the consecrated formula, that any agreement to arbitrate "is null and void, inoperative or incapable of being performed."). Otherwise a party claiming not to be bound must either "be forced to spend significant time and resources litigating this issue before a body lacking authority to decide that issue"[182]---or in the alternative, must simply boycott the proceedings, at the risk of losing any chance to contest the claim on the merits.[183]

---

challenge must "preliminarily" and "in the first instance" be resolved by the arbitrators, and only subsequently addressed in vacatur proceedings. See1 Born, supra n.10 at 942-43, 958 (a result ironically "very similar" to the "*prima facie* standard applied in France and elsewhere"). However desirable as a normative matter, U.S. courts have never in fact done anything remotely like this, see Alan Scott Rau, Separability in the United States Supreme Court, 2006:1 Stockholm International Arbitration Review 1 (2006)---nor is it easy to grasp how any such notion of an "interim allocation" could be thought consistent with the mandate of FAA § 4 that a court first actually be "satisfied" that an agreement to arbitrate not be "in issue." (A contractual "delegation" of such matters to the arbitrators, by contrast, would necessarily imply that any arbitral determination is final---that is, that it would command the same deference as that paid to any award, e.g., Rent-A-Center, West, Inc. v. Jackson, 2010 WL 2471058. (S. Ct.)).

In some courts, admittedly, the ability of a *claimant* to obtain an initial judicial determination of the duty to arbitrate under § 4 can be somewhat problematical. See, e.g., Waterspring, S.A. v. Trans Marketing Houston Inc., 717 F. Supp. 181 (S.D.N.Y. 1989). Here the court held that---since the arbitration clause allowed the claimant to proceed ex parte---the claimant was simply not a party "aggrieved" within the meaning of § 4 by respondent's refusal to arbitrate. Now it is obvious that at a later stage, after an award is rendered, the respondent might successfully challenge the existence of a binding arbitration agreement---and equally obvious that in such a case, the claimant would find that the entire proceeding "was in fact a useless gesture" and that it had been "put to unnecessary expense." However, this prospect did not seem to trouble the court unduly: For the claimant "is hardly in a position to complain if its unfounded assertion leads to that result"; "[h]aving designed [its] own remedy for recalcitrance [claimant] cannot, over respondent's objection, ignore that remedy and pursue another." But cf. Daye Nonferrous Metals Co. v. Trafigura Beheer B.V., 1997 WL 375680 (S.D.N.Y.)(in cases arising under the New York Convention, there is no requirement that plaintiff be "aggrieved" before a court can compel arbitration).

[181] Alan Scott Rau, "The Arbitrability Question Itself," 10 Am. Rev. Int'l Arb. 287, 296 (1999).

[182] In the Matter of the Application of Lakah, 602 F.Supp.2d 497, 499 (S.D.N.Y. 2009).

See also UBS Securities LLC v. Voegeli, 2010 WL 289302 (S.D.N.Y.)("irreparable harm would result" if respondents were compelled to arbitrate claims "without having agreed to arbitration"; "a party necessarily suffers irreparable harm if forced to expend time and resources arbitrating an issue that is not arbitrable, and for which any award would not be enforceable"); Duthie v. Matria Healthcare, Inc., 535 F.Supp.2d 909 (N.D. Ill.), aff'd, 540 F.3d 533 (7th Cir. 2008)(claimants initiated a AAA proceeding against former corporate officers alleging fraud, but the conclusion is "compelled" that the merger agreement does not require arbitration of any such claims against them individually; forcing them to arbitrate would therefore "deprive them of their Constitutional right to a jury trial," and "it is clear that they have no adequate remedy at law and will suffer irreparable harm if an injunction is not granted"); McLaughlin Gormley King Co. v. Terminix Int'l Co., 105 F.3d 1192 (8th Cir. 1997) ("If a court has concluded that a dispute is *non*-arbitrable, prior cases uniformly hold that the party urging arbitration may be enjoined from

Similar considerations may make it appropriate to issue an injunction against arbitration merely so that the ultimate judicial determination may be preserved---that is, pending any adjudication by the court of the issue of the duty to arbitrate.[184] Nevertheless the standard for deciding to issue a preliminary injunction against an arbitration---in that respect quite unlike a decision on a stay under § 3, or a motion to compel under § 4 or § 206---will traditionally require at least some nod in the direction of

---

pursuing what would now be a futile arbitration, even if the threatened irreparable injury to the other party is only the cost of defending the arbitration and having the court set aside any unfavorable award").

The scheme of England's arbitration legislation is complex. See Arbitration Act 1996 § 1 (c) (essentially identical to UNCITRAL Model Law art. 5), § 30 ("competence of tribunal to rule on its own jurisdiction"), § 32 (but court may "determine any question as to the substantive jurisdiction of the tribunal" if an appropriate application is made with the agreement of all the other parties or with the permission of the tribunal itself), § 72(1)(a person "alleged to be a party to arbitral proceedings but who takes no part in the proceedings" may ask for an injunction to determine whether he is bound to arbitrate). Nevertheless---and leaving all of that aside---an English court also "retains a residual jurisdiction" "to intervene by injunction where "it appears . . . just and convenient to do so," Kazakhstan v Istil Group Inc., [2008] 1 Lloyd's Rep. 382, 383 (QBD (Comm.)).

So for a recent case decided under this scheme, granting an injunction against a local arbitration on familiar grounds, see id. at 395. Although a final award had been set aside on the ground that "there is no basis upon which the arbitrators have been invested with jurisdiction to determine the dispute between [these] parties," the claimants sought to continue the proceedings by relying on the tribunal's earlier, unchallenged, partial award on jurisdiction. The court held that "further pursuit of those arbitration proceedings . . . would at the very least be oppressive, vexatious and in consequence unconscionable," and would "condemn [respondent] to the expenditure of yet further costs which they may have grave difficulty in recovering." And in any event the continuation of proceedings would be futile, since if the arbitrators were to proceed to an award on the merits in favor of the claimant, the court would "be bound to accede to an application to set aside any such award."

[183] But cf. Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1111 (11th Cir. 2004)(district court "abused its discretion" in enjoining arbitration of claims which it had already expressly ruled to be "nonarbitrable"; after all the movants would "not have to participate" in the arbitration proceedings," and even if the defendants should obtain a default award against them, "they would be unable to have it enforced," so "it is unclear how [the movants] would suffer any injury at all, much less irreparable injury").

But imposing such a choice amounts in most cases to inflicting an exquisite form of torture on respondents---indeed, everything the Supreme Court said in *First Options* can be understood as an attempt to mitigate it: Recall that the trial court there had built its entire holding on the fact that the respondent had appeared and argued the jurisdictional objection before the arbitral tribunal---finding that this amounted to a "waiver" of any jurisdictional objections, a "submission" of the issue, "a clear acceptance of the arbitration panel's authority" to rule on "the arbitrability question" with the same degree of finality usually accorded arbitral awards. This conclusion was rejected by the Supreme Court---which at the same time equally rebuffed as appalling the claimant's contention that in these circumstances, the respondent's *only possible* means of avoiding his dilemma was to seek a judicial stay of the arbitration. See Rau, supra n. 181 at 297-300; see also Oral Argument in First Options of Chicago, Inc. v. Kaplan, March 22, 1995, 1995 WL 242250 at *27-*28 ("The essence of your argument, I take it, is that everything must be made a Federal case by the person who says, I never agreed to arbitrate .... You make litigation in Federal court necessary for everyone who says, I didn't agree to submit myself to arbitration").

[184] See *In the Matter of the Application of Lakah*, supra n.182 (petitioners were either non- signatories to the applicable arbitration agreements or claimed not to have signed in their personal capacity; held, "respondents are enjoined from participating in any arbitration proceeding on the question of whether [petitioners] are bound by the arbitration agreements . . . until I have determined" the issue); *McLaughlin Gormley King Co*., supra n.182 at 1194 ("the order the court issued here, briefly freezing the parties' dispute resolution activities until it determines arbitrability, is surely appropriate").

"balancing the equities," and in particular some sort of finding as to the likelihood of the movant's success on the merits:[185] If so, that should allow a court to address directly and explicitly---to focus precisely on---some of the efficiency considerations that must underlie any choice to give chronological priority either to the court or to the arbitrator.[186]

---

[185] For one recent case in which a court issued a preliminary injunction after a skeptical and jaundiced assessment of the claimant's case for arbitration, see Interactive Brokers, LLC v. Duran, 2009 WL 393827 (N.D. Ill.). Here investors claimed to have been defrauded by Enterprise, a customer of an online brokerage firm (Interactive), and initiated a FINRA arbitration against Interactive. The customers had "not come forward with any basis from which to conclude that they were "intended third party beneficiaries of the arbitration agreement" between Interactive and its customer Enterprise, or that, as mere "customers of Interactive's customer, [they] may compel arbitration under the FINRA rules." So a "preliminary view" on the "forum issue"---arbitration or court?---supported the grant of an injunction. And so did a traditional exercise in the balancing of the equities---since the only harm to the customers from the issuance of an erroneous injunction would be a "delay in the arbitration proceedings while this Court determines whether Interactive can be forced to arbitrate," while by contrast the harm suffered by Interactive if an injunction were erroneously denied would be "irreparable,"" as it would have been "compelled to arbitrate a dispute that it did not agree to arbitrate." But cf. Citigroup Global Markets, Inc. v. VCG Special Opportunities Market Fund Ltd., 2010 WL 786584 (2nd Cir.)(it is enough simply that a "serious question" exists as to whether the respondent had a duty to arbitrate, making this a "fair ground for trial"; even though the respondent had "failed to make a showing of probable success on the merits," still the "balance of hardships tipped decidedly" in its favor---because "an injunction would simply freeze the arbitration without destroying" the claimant's ability to continue it if he could first show that there was in fact a "customer relationship" between the parties).

See also Fiona Trust and Holding Corp. v. Privalov [2006] EWHC 2583 (Comm.), where an injunction was issued under § 72 of the English Act to avoid "a considerable waste of resources"; "on balance" "the arguments on behalf of the [movants] are likely to be right" and they have "a better than evens chance of establishing their case . . . that the arbitration clause does not bite." ("This is a far cry from a case where the court considers it more likely than not" that the agreement will be held to exist---let alone the only situation where the matter should clearly be decided by an arbitrator, the case in which "it is virtually certain that there is an arbitration agreement"). Unfortunately, though, it turned out that the lower court's favorable evaluation of the movant's "likelihood of success" rested on a flawed and now-outdated notion of the doctrine of "separability"---and so the Court of Appeal necessarily reversed. See [2007] 1 All. E.R. (Comm.) 891, 904 (C.A.) (since the arbitrators did in fact have jurisdiction to decide whether the contract had been procured by bribery, an injunction against the arbitration "is likely to be a potential breach of the [U.K.'s] international obligations" under the New York Convention), *aff'd*, [2007] UIKHL 40.

[186] On the usual cost/ benefit analysis driving this decision, *see* text accompanying nn. 196-206 infra. See, e.g., Centocor, Inc. v. The Kennedy Institute of Rheumatology, 2008 WL 4726036 (S.D.N.Y.). Here the Kennedy Institute had granted an exclusive license to Centocor to exploit certain of its patents; a sublicense from Centocor to Abbott---the only agreement containing an arbitration clause---required Abbott to pay royalties directly to the Institute. The Institute attempted to invoke this arbitration clause for its claim that the royalty payments were deficient, and Centocor's motion for a preliminary injunction was denied: Even though the Institute was a non-signatory to the arbitration agreement, "it is difficult to imagine a claim that is more integrally related to the contract containing the arbitration clause"; most notably, since Centocur was in fact concurrently involved in an arbitration proceeding with Abbott arising out of the same facts, "it would be more efficient if the parties [addressed] the claim in one arbitration rather than in different proceedings."

One immediately hears the objection that such an injunction would infringe on the hallowed principle of *compétence/compétence*[187]—as indeed it would.[188] But that

---

[187] *See e.g*., Emmanuel Gaillard, Il est interdit d'interdire: reflexions sur l'utilisation des anti-suit injunctions dans l'arbitrage commercial international, [2004] Rev. Arb. 47, 60–61 (antisuit injunctions "ignore the principle, very generally recognized in Comparative Law," that gives arbitrators the power to determine their own jurisdiction and that requires parties, "at least initially, to submit any grounds for the invalidity of the arbitration clause to the arbitrators themselves"); Sandrine Clavel, *Anti-Suit Injunctions* et arbitrage, [2001] Rev. Arb. 669, 701-02 (although enjoining arbitrations may cause no "interference" with the powers of foreign courts, nevertheless, "at least in certain circumstances," they "flout important principles in the law of international arbitration," interfering with "the normally-recognized powers of the arbitrator"); see also Marco Stacher, 'You Don't Want to Go There: Antisuit Injunctions in International Commercial Arbitration' in [2005] 23(4) ASA Bull. 640, 653 (anti-arbitration injunctions "tamper with the principle of *Kompetenz-kompetenz*" and "should therefore ... be avoided").

[188] See CPC art. 1458 ("If a dispute has not yet been brought before an arbitral tribunal," a French court "must declare itself without jurisdiction unless the arbitration agreement is clearly void [*manifestement nulle*]").

The choice made by this well-known French model is admittedly a feature, in one form or another, of legislation in other states as well. A parliamentary initiative apparently now pending in Switzerland would amend the PILA so that "in international matters, and regardless of the seat of arbitration," a Swiss court will "only render a decision once the arbitral tribunal has decided on its own jurisdiction, unless a prima facie examination shows that there is no arbitration agreement between the parties." See http://kluwerarbitrationblog.com/blog/2010/02/05/possible-reinforcement-of-the-negative-effect-of-the-%e2%80%9ccompetence-competence%e2%80%9d-principle-in-swiss-legislation/. (Feb. 5, 2010). That has already been true for some time in cases where the arbitral seat is in Switzerland, see Zina Abdulla, "The Arbitration Agreement," *in* Kaufmann-Kohler & Stucki, supra n.148 at 15 fn.2; see also Jean-François Poudret, Exception d'arbitrage et litispendance en droit Suisse, [2007] 25 (2) ASA Bull. 230, 235 ("a summary inquiry into the prima facie existence of an arbitration agreement, so as not to prejudge the arbitral tribunal's decision on its own jurisdiction"). See also the European Convention on International Commercial Arbitration, art. VI(3), which provides that---at least where a party has first initiated arbitration proceedings---a court shall "stay [its] ruling on the arbitrator's jurisdiction" until an award is rendered, unless it has "good and substantial reasons to the contrary": This limitation seems to swim in the same current of thought as that which underlies the notion of a *prima facie* examination, *see* Emmanuel Gaillard, La reconnaissance, en droit suisse, de la second moitié du principe d'effet négative de la compétence-compétence, *in* Gerald Aksen (ed.), Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner 311, 325 fn.40 (2005).

Similarly, a strong body of scholarly work asserts that the UNCITRAL Model Law should be read in the same way---that is, that art.8(1) of the Law must also be construed as "calling for [only] *prima* facie control of arbitral jurisdiction," see Frédéric Bachand, Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?, 22 Arb. Int'l 463, 473 (2006)(this is necessary to reconcile art. 8 with art. 16, for "otherwise, the internal coherence of the Model Law would be seriously imperiled); cf. Dell Computer Corp. v. Union des Consommateurs, [2007] SCC 34 (Sup. Ct. Can.) ¶¶ 77, 84-86("as a general rule" "a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator," and a court should depart from this "rule of systematic referral" only where the challenge is "based solely on a question of law" and only where it is "satisfied" that the challenge "is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding'; "the *prima facie* analysis test is gaining acceptance and has the support of many authors"). In any event the legislative history of the Law is clear that whatever the adjudicative jurisdiction of the court, it may not, in light of arts. 5 and 8(2), enjoin parallel arbitral proceedings, see Holtzmann & Neuhaus, supra n.14 at 306.

Quaere: How likely is it that this Model Law learning will ever affect the behaviorof those charged with enforcing the version of the Law now on the books in California? Or in Texas? Or in Florida? Or even rise to the level of their consciousness? See Rau, *Federal Common Law and Arbitral Power*, supra n.22

after all is not in any sense an argument it is mere tautology. If it *is* truly intended as argument, the hidden, lurking premise---the unexpressed middle term of the syllogism---must be that the French procedural regime of *compétence/compétence* is somehow an Immutable Rule of Natural Law. That may in fact be a quite common assumption in the very highest arbitration circles[189]---but, of course, it is very far from true, isn't it?[190]

---

at 179-92 ("aping our betters"; "the local boosterism, the poignant self-aggrandizement, that led to the adoption in a number of [U.S.] jurisdictions" of the Model Law).

[189] *See* Pierre Lalive, Transnational (or Truly International) Public Policy and International Arbitration, *in* Pieter Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series No. 3,) 257, 300–301 (1987) ("the question may arise whether the so-called principle of *compétence-compétenc*e of the arbitrator has not become (notwithstanding a certain reluctance of some national systems, influenced by the Anglo-American tradition) a fundamental principle of transnational public policy, especially now that it has been recognized by various international instruments"); Serge Lazareff, Mandatory Extraterritorial Application of National Law, 11 Arb. Int'l 137, 139(1995) ('international public policy refers to the "hard core" of internationally recognized principles (*i.e.* the autonomy of the arbitration clause, *Kompetenz Kompetenz*, good faith, fraud, equal treatment of the parties...)").

So in consequence*, see* Julian D.M. Lew, Control of Jurisdiction by Injunctions Issued by National Courts, *in International Arbitration 2006: Back to Basics?,* supra n.52 at 185, 215 (anti-arbitration injunctions "are contrary to fundamental principles of international arbitration law, including the doctrines of competence-competence, separability, and party autonomy"); Julian D.M. Lew, Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings, *in* Gaillard (ed.), *Anti-Suit Injunctions in International Arbitration*, supra n.46 at 25, 30, 38, 39 (the principle of *compétence/compétence* is "nowadays fundamental ... to the mechanism of international arbitration", and so "I find it difficult to imagine circumstances in which there would be a justification for a court to intervene in an arbitration, to stop the arbitration"). (But then compare Lew, *Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings,* supra at 32 (a court order might nevertheless be justified "where there is no arbitration agreement or in a case where a party could go to court to argue that a claim is time-barred")).. Matthias Scherer & Teresa Giovannini, Anti-Arbitration and Anti-Suit Injunctions in International Arbitration, [2005] (3) Stockholm Int'l L. Rev. 201,205 ("most arbitration practitioners will undoubtedly share" this view, since an anti-arbitration injunction "would clearly violate the internationally recognized principle of *Kompetenz-Kompetenz").*

Obviously where an arbitration proceeding is challenged on the ground of lack of consent, the supposed principle of "party autonomy" can by itself have no possible purchase: See generally text accompanying nn. 278-82 infra.

[190] It cannot be asserted with a straight face that arbitrators are somehow obligated to pack up their papers and turn out the lights, as soon as one of the putative parties sends them a note objecting to their jurisdiction. *Cf.* MBNA Am. Bank, N.A. v. Credit, 132 P.3d 898, 900-01 (Kan. 2006) (when the existence of an arbitration agreement is challenged, "the issue must be settled by a court before the arbitration may proceed"; the arbitrator was not "simply free to go forward with the arbitration as though [the respondent] had not challenged the existence of an agreement"). Can it be seriously argued that--even *where the court ultimately finds that the parties had indeed agreed to arbitrate*--an award rendered prior to such a finding would still have to be vacated? See Rau, *Federal Common Law and Arbitral Power*, supra n.22 at 200-01 ("Of course not"). Nevertheless---for a demonstration of the humbling proposition that if error is even remotely possible, it is inevitable---see MBNA America Bank, N.A. v. Kay, 888 N.E.2d 288 (Ind. App. 2008)(the award "was not properly obtained," since under the FAA, upon the respondent's objection to the arbitration, the claimant "was required to petition a federal court for a determination regarding the validity of the arbitration agreement"; since this was not done---but "instead," the NAF "attempted to rule on the validity of the arbitration agreement"—then, "as a result," the award the claimant sought to confirm was void.). Perhaps at bottom this is nothing more than "NAF jurisprudence," a transitory and disappearing phenomenon.

Once put into play, though, the logic of the French regime is characteristically relentless. As has often been pointed out, even a claimant who does not believe that he is bound by an arbitration agreement must first institute an arbitral proceeding---and participate in the selection of the tribunal---all for the sole purpose of asking the arbitrators to declare that they may not hear the case.[191] In addition, it is perfectly consistent with the logical premises of the system for a French court to consider that it is barred from adjudicating a matter even where the courts of the agreed seat---say, New York---have already held the arbitration clause to be invalid under New York law.[192] (*Quaere* whether such a result could possibly be justified in cases where the courts of New York had not only refused to compel arbitration, but ---as is their right---had gone further and also *enjoined the parties from continuing the arbitration there?).*[193] And then, what of the chosen arbitrators themselves? It should be particularly easy for them to ignore an injunction issued by the courts of the seat, if they are in any event intellectually committed to the notion that annulment there---a likely consequence of their choosing to go forward---will equally be meaningless.[194]

Even accepting this "positive" aspect of *compétence/competence,* though*,* surely it is not an inevitable corollary that courts must stay their hands *even if they are convinced that it would be abusive for the arbitrators to proceed to adjudicate the question*? But cf. Gaillard, supra n.188 at 313-16 (2005)(any authority that arbitrators may have to pass on the validity and scope of the arbitration clause "is only real," can "only have any true impact," if, pending their decision, state courts are obliged to "abstain from undertaking an in-depth inquiry into the same questions"; "general acceptance" of the first proposition "should logically lead" to this conclusion").

[191] E.g., Peter Schlosser, The Competence of Arbitrators and of Courts, 8 Arb. Int'l 189, 201, 204 (1992).

[192] Cf. Copropriété Maritime Jules Verne v. American Bureau of Shipping, [2006] Rev. Arb. 945 (Cour de Cassation, June 7, 2006)(New York arbitration; held, French courts may not review the arbitration clause "in a substantive and in-depth manner, whatever the place or seat of the arbitral tribunal," until the time an award has been rendered); *compare* Legal Department du Ministère de la Justice de la République d'Irak v. Sociétés Fincantieri Cantieri Navali Italiani, [2007] Rev. de l'Arb. 87 (Cour d'Appel de Paris, 2006) (French arbitration; held, Italian court ruling to the effect that an arbitration clause was "inoperative" by virtue of a U.N. embargo "cannot be honored and enforced in France," since a state court "must decline jurisdiction unless a summary examination justifies the conclusion that the arbitration clause was manifestly void or inapplicable"); see also id. at 90, 93 (note Sylvain Bollée; the purpose of art. 1458 of the CPC "is not so much to silence the French judge as to give the first word to the arbitrator," and this can only be accomplished if we make sure that motions to a court, "in any country whatever," cannot "serve to torpedo the priority that must be accorded the arbitrators").

In the case given, French "deference" to a New York arbitral proceeding would presumably envisage that the arbitration go forward there. The courts in New York would presumably go on to annul any resulting award---but, as we have seen, that fact too would be equally irrelevant in Paris.

[193] Cf. Dominique Hascher, "Injunctions in Favor of and Against Arbitration," ¶ 7 (paper presented at Symposium, "Arbitration and National Courts: Conflict and Cooperation," and forthcoming, 2010)(where a lawsuit is brought on the underlying cause of action in France, "an American injunction against an arbitration situated in the U.S." would "not be effective because the [*American Bureau of Shipping* case, supra n.192] made it clear that the priority rule [giving priority to the arbitrators] applies regardless of the seat of the arbitral tribunal").

[194] See *Salini Costruttori S.p.a.,* supra n.46. Here it was common ground that the "place" of the arbitration was to be Ethiopia. Although the respondent Government disputed the claimant's assertion that the parties had agreed to ICC (rather than ad hoc) arbitration, an ICC arbitration was set in motion, and in a preliminary ruling the arbitrators "for the sake of convenience" decided to hold at least the first meeting in

Now it would surely be vulgarly reductionist to make too much of the fact---generally understood but rarely acknowledged--that the French regime happens to be closely congruent with the self-interest of *arbitrati,* to the point indeed that it can be viewed as a sort of guild legislation suitable for a net importer of arbitrations. Jobs for

---

Paris. Pointing to this as "evidence of a lack of impartiality"---supposedly the tribunal "had improperly and abusively had regard to its own convenience and the convenience of the Claimant and its witnesses"---the respondent challenged the continued service of the arbitrators; after the challenge was rejected by the ICC, the respondent obtained from the courts of Ethiopia an injunction "suspending the arbitration" and enjoining the claimant from proceeding until the courts could resolve the challenge and finally determine the ICC's jurisdiction. But the tribunal went ahead anyway, "in the fulfillment of [its] larger duty to the parties": "An international arbitral tribunal is not an organ of the state in which it has its seat in the same way that a court of the seat would be," and an agreement to arbitrate "is not anchored exclusively in the legal order of the seat," but is "validated by a range of international sources and norms extending beyond the domestic seat itself." Id. at ¶¶ 128-29. If a court decision would "conflict fundamentally with the tribunal's understanding of its duty to the parties," then the tribunal "must follow its own judgment," lest the courts of the seat convert an international arbitration agreement "into a dead letter." Id. at ¶¶ 142-43.

The Ethiopian injunction had been issued on the basis that the court alone was competent to determine the tribunal's jurisdiction. But under the ICC Rules, the arbitrators stressed, decisions by the ICC with respect to challenges to arbitral impartiality are to be "final"; equally under the Rules, decisions with respect to the jurisdiction of the arbitrators are to be made in the first instance "by the Arbitral Tribunal itself," and it "would be a clear breach of the fundamental principle of competence-competence if an international arbitral tribunal were obliged to stay its proceedings in deference to a court proceeding which had specifically been instituted to determine the question of the tribunal's jurisdiction." Id. at ¶¶ 152-53.

Perhaps it is not necessary to add that the chairman of the tribunal was Professor Gaillard. Cf. Emmanuel Gaillard, L'interférence des jurisdictions du siege dans le déroulement de l'arbitrage, *in* Liber Amicorum Claude Reymond: autour de l'arbitrage 84, 86 (2004)(this question is "intimately linked to"---"is upstream from"---the more familiar, classical, question of the fate of an award set aside at the seat); Gaillard, supra n.7 at 116, 126 (only by accepting the model of an independent "arbitral legal order" can an arbitrator carry out the mission entrusted him, in the face of an injunction at the seat which he deems "illegitimate in light of the generally admitted principles of international arbitration"). Cf. Eric A. Schwartz, Do International Arbitrators Have a Duty to Obey the Orders of Courts at the Place of the Arbitration?, *in* Aksen (ed.), supra 191 at 795, 802 (is the explanation of the tribunal's approach "simply the arbitrators' well-intentioned desire to proceed with an arbitration"?).

By contrast Jan Paulsson's rationale for a similar result in the *Himpurna* arbitration was dependent neither on

- the supposedly autonomous legal existence of an international arbitral process, nor on
- the supposedly sacrosanct and universal nature of the *compétence/compétence* principle –

and thus seems infinitely more satisfactory. See n.51 supra; see Himpurna California Energy Ltd. v. Republic of Indonesia, Interim Award of Sept. 26, 1999, [2000] XXV Yearbook Comm. Arb'n ¶¶ 105-06 ("this case does not . . . require general pronouncements on the relative allocation of authority between courts and arbitrators"); ¶¶ 148-53, 184 (more "conventionally," for a state to prevent a foreign party "from pursuing its remedies before a forum to the authority of which the state consented, and on the availability of which the foreigner relied in making investments explicitly envisaged by that state," is a "denial of justice" in violation of international law).

the boys is certainly a happy side effect of this model, but it can't be the engine driving the machine---can it?[195]

At bottom I should think the choice between various procedural regimes comes down to nothing more than the usual prudential questions imposed by a cost/benefit analysis:[196] Is it best (as we have tended to assume in the United States) that the question of arbitral jurisdiction be resolved with finality as soon as possible, thereby obviating an extended procedure that might turn out in the end to have been simply pointless? For the moving party, a judicial imprimatur along the lines of FAA § 4 will foreclose post-award assertions by the respondent that the arbitration was a nullity; by the same token, early judicial resolution may relieve the *resisting* party of the need to put on any defense on the merits---and eliminate the risk, if he chooses instead to stay out, that any such defense will be deemed waived.[197] (The force of this point is strongest where---as is quite often the case---the legal systems most willing to entertain motions to enjoin abusive arbitrations happen, at the same time, to be among those

---

[195] Cf. Symposium, "La clause compromissoire," *in* Perspectives d'évolution du droit francais de l'arbitrage, [1992] Rev. de l'Arb. 285 (discussion; intervention of Pierre Bellet): "What interests us, is not the financial advantages that arbitration can have for arbitrators, but the advantages that the development of arbitration can have for France."

[196] Both French law and the European Convention distinguish in their own way between cases where no arbitration has begun at all (and where a court's review will be summary and exceptional), and cases where an arbitration proceeding has in fact been initiated (and where a court must stay its hand entirely). *Compare* CPC art. 1458, *with* European Convention, art. V((3), both supra n.188. But none of this is in any event anything more than a matter of a prudential choice with respect to chronological priority---with the final word always retained by state courts (except to the extent that the state has permitted the parties to delegate definitive decisionmaking authority to the arbitral tribunal itself). And given that point, the corollary must be that considerations of *lis pendens* are strictly speaking irrelevant (or at most, to be generous, an element guiding the judicial exercise of equitable discretion).

Although I fear we agree on little else, Professor Gaillard and I certainly join company on this narrow point. As he says, to allocate decisionmaking authority solely to the forum where the case was first filed, would make sense only if the two jurisdictions in question ""have equal legitimacy," "have an equal claim," to decide the dispute. (The "dispute," of course, not being one over the underlying merits, but over the obligation to submit them to arbitration.). Gaillard, supra n.7 at 129; Gaillard, supra n.188 at 317. Here, though, we agree that they don't (but alas for contradictory reasons). See id. at 318 (the overriding policy favoring arbitration and which lies at the heart of *compétence/compétence* "is the exact opposite of the neutrality which characterizes the notion of lis pendens"). As usual, Professor Mayer hits the nail right on the head: Any priority in filing "can't be taken into account" once "it is quite clear that the only decision with respect to arbitral jurisdiction that counts" is that of the state judge. Pierre Mayer, Litispendance, connexité et chose jugée dans l'arbitrage international, *in Liber Amicorum Claude Reymond*, supra n.194 at 185, 192 fn.19.

[197] See Schlosser, supra n. 191 at 193 (it is "deplorable" that parties must often "invest large amounts of money and time-consuming, cumbersome work in the arbitration before they are allowed in the forthcoming challenge or enforcement proceeding to seek the court's review as to the legality of the arbitration proceedings'); cf. Adam Samuel, Jurisdictional Problems in International Commercial Arbitration 190 (1989)("a court system geared towards encouraging arbitration will ensure that pre-arbitration jurisdictional applications are given a reasonably high priority," and "once the court has disposed of the application, the arbitration can proceed smoothly and without interruption to what will usually be an unchallengeable award on the merits").

most willing to move the motion to the head of the queue, and to provide a summary method of disposition.)[198]

Or alternatively, might it perhaps be preferable (as French law provides) to allow the arbitration to proceed, honoring the parties' original bargain to get in and out of arbitration in the most expeditious manner?

As an empirical matter, one has to be somewhat agnostic. It's pretty clear, though, where the relevant considerations lie:

- A robust rule of *compétence/compétence* may well reflect a suspicion (unverifiable, of course, but commonly an article of faith in the arbitration establishment) that "more often than not" a challenge to arbitral jurisdiction is frivolous---nothing but a delaying and obstructive tactic by the recalcitrant party, who "is in bad faith and only trying to gain time."[199]

- This choice does after all permit--- indeed encourage---the tribunal itself to render a preliminary award on the jurisdictional issue alone--- something it is likely to do in the normal course of events, and which can expedite matters by making the question ripe for immediate review.[200]

---

[198] See FAA § 6; Michael J. Mustill & Stewart C. Boyd, The Law and Practice of Commercial Arbitration in England 782 (2nd ed. 1989)(if a party tells the arbitrator that "he is about to apply for declaratory relief," the arbitrator should "suspend the reference until the court has arrived at a decision"; if he feels that this will involve undue delay, "there is no reason why he should not say so, in which case the Court will no doubt take his remarks into account when fixing a date for the hearing of the declaratory action"). See also Samuel, supra n.197 at 213 (in England and the U.S., "there are no complaints that the current position gives rise to delays and obstruction; nor is there any pressure for a change in the law in this area").

[199] *See e.g.*, Antonias Dimolitsa, Autonomie et *"Kompetenz-Kompetenz."* [1998] Rev. Arb. 305, 325. See also Gaillard, supra n. 188 at 322; Emmanuel Gaillard, Note [to Soc. Coprodag v. Bohin (Cour de Cassation, May 10, 1995)], [1995] Rev. Arb. 618, 620-21 (situations where the claim of a lack of arbitral jurisdiction is well-founded will be "statistically rare," and so the rule is necessary to discourage litigants from schemes aimed at "destabilizing" or disturbing the orderly conduct of an arbitration).

[200] See Gaillard & Savage, supra n.31 at 739 (an arbitral decision on jurisdiction "is a final decision on one aspect of the dispute" and "should therefore be considered as an award, against which an immediate action to set aside can be brought"); John J. Barceló, Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective, 36 Vand. J. Transnat'l L. 1115, 1125-26 (2003)("Thus, in the vast majority of cases, the arbitral process will go forward, but parties with a legitimate basis for objecting to the arbitrators' jurisdiction will have an opportunity, after only moderate delay, to make their case to a judge"). This will not be true of course where the arbitrator has refused to formalize his decision on jurisdiction before rendering a final award---whether in the interest of prolonging his mandate, or in the interest of forestalling a challenge he deems abusive; see Samuel, supra n.197 at 212-24.

Immediate review should equally be available in cases---not, I concede an everyday occurrence---where the arbitrator has ruled (incorrectly) that he *lacks* jurisdiction to resolve the dispute. It may be embarrassingly difficult to squeeze such a case into the architecture of the relevant statute; nevertheless as a practical matter most everyone readily recognizes the need for an immediate and definitive judicial declaration that the dispute is indeed "arbitrable." Doubtless the same arbitrator cannot be compelled to take up the task that he has already declined: *see* Sigvard Jarvin, Note [to Uzinexportimport Romanian

- Nor can one be blind to the fact that where (by contrast) the arbitration does proceed to a final award, in a good percentage of cases the respondent will prevail anyway---making any question of arbitral jurisdiction entirely moot. (Where there is risk neutrality and a relatively equal access to information, this should in fact be true roughly half the time).[201] And in the last resort (that is, even where on review a "second look" at jurisdiction proves necessary), a national court should be able to learn something from an initial reasoned award---perhaps from a tribunal with the comparative advantage of having been instructed in the facts, or possessing some particular insight into an applicable foreign law.[202]

Still, for a long time my own reading of the French literature had made me intensely skeptical as to whether the game being played there could in fact be worth the candle: I had always assumed that the statutory exception for "manifestly" void or inapplicable clauses would as a practical matter lead to the impossibility of cabining any preliminary inquiry---thereby inevitably, fatally, muddling whatever practical benefits the

---

Co. v. Attock Cement Co., Cour d'Appel de Paris, July 7, 1994], [1995] REV. ARB. 115, 119 ("You can't make a bird sing"). Still, a substitute can always be named: and this time there must be no more provisional decisions, no *compétence/compétence*, no more shopping around; *basta*. See generally Pierre Mayer, "L'autonomie de l'arbitre international dans l'appréciation de sa proper compétence," *in* 1989-V *Recueil des Cours de l'Académie de Droit International* 319, 354; Dimolitsa, *supra* note 199 at 325–328.

[201] The seminal piece here is George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 4-5, 19 (1984)("where the gains or losses from litigation are equal to the parties, the individual maximizing decisions of the parties will create a strong bias toward a rate of success for plaintiffs at trial . . . of 50 % regardless of the substantive standard of law"; "as the parties' error [in estimating the outcome] diminishes, the 50% proportion of victories will be approached more closely"). See also Kevin M. Clermont, Litigation Realities Redux, 84 Notre Dame L. Rev. 1919, 1965 (2009)("the set of adjudged cases" is "a universe dominated by close cases," and these unsettled close cases will "fall more or less equally on either side" of the applicable decisional criterion).

[202] I am grateful to Gary Born for suggesting this point to me in a private communication. See also Azov Shipping Co v Baltic Shipping Co (No.1), [1999] 1 Lloyd's Rep. 68 (QBD (Comm.))("I can quite see that there is an interest in encouraging parties to put their arguments on jurisdiction before the arbitrator himself," for "in many cases, and perhaps in the ordinary and normal case of such a challenge, where, for instance, there is simply an issue as to the width of an arbitration clause and no issue as to whether a party is bound to the relevant contract in the first place, the arbitrator's view may be accepted").

A presumption in U.S. law deeming the arbitrators themselves empowered to make final decisions with respect to their own jurisdiction---a presumption of increasing strength---may, paradoxically, be moving us in the direction of achieving some of these same goals, without the accompanying risk that the proceedings may ultimately turn out to be futile. See generally Rau, *Arbitral Jurisdiction and the Dimensions of "Consent,"* supra n.19 at 212. This in turn is thought in Continental legal systems to be sheer heresy; see Rau, *The Culture of American Arbitration and the Lessons of ADR,* supra n. 30 at 464; Gaillard & Savage, supra n.31 at 400 (empowering the arbitrators to be the sole judges of their own jurisdiction "would be neither logical nor acceptable"); Gaillard, supra n.199 at 621 (such a result is accepted "nowhere").

doctrine seeks to attain.[203] In retrospect, though, that attitude may have reflected nothing more than the mentality of someone trained in the common law: It honestly had not occurred to me that the French legislative scheme was designed to function instead as the subtlest of Cartesian traps: For not only is "voidness" or "inapplicability" impossible to demonstrate---but the more the resisting party tries to do so, apparently, the more he's fatally caught up in the web, all his struggles telling against him.[204]

Although the social interest in the reduction of systemic costs is critical,[205] in this case the result of any balancing process must be somewhat indeterminate.[206] There is

---

[203] It should not be surprising in the least that the statutory question (whether a clause is "manifestly null") will shade readily into a related inquiry, asking whether it is "manifestly inapplicable"--- thereby posing not only the issues of existence and formation, but also those going to the scope of the clause, whether the clause still exists, whether a third party can be bound by or take advantage of the clause, and so forth and so on. *See* François-Xavier Train, Note [to Soc. Champion supermarché France (CSF) v. soc. Recape (Cour de Cassation, July 4, 2006)], [2006] Rev. Arb. 961 ("if he limited himself solely to the manifest 'invalidity' of the clause, a judge could catch only a tiny fraction of all the cases where the clause is inoperative"; for example, when a clause linking a bankrupt debtor to his franchisor is asserted against a trustee acting in the collective interest of creditors, its inapplicability is "obvious"); Yves Derains, Note, [1992] Rev. Arb. 62, 65 ("It is hard to imagine that merely invoking an arbitration clause in Contract A can be enough to justify a stay of litigation in a dispute involving Contract B"). See also Olivier Cachard, Le contrôle de la nullité ou de l'inapplicabilité manifeste de la clause compromissoire, [2006] Rev. Arb. 894, 904 (litigants show "every evidence of intending to exploit this opportunity whenever possible, to expand this breach in the priority normally accorded to arbitrators").

Nor is it likely that we will really be able to demarcate with any exactitude the precise line between what is—on the one hand—supposed to be a mere *prima facie* examination, intended merely to allow the arbitration to proceed, and—on the other—an in-depth scrutiny; see Poudret & Besson, supra n.47 at 477 ("a prima facie examination will not always be clearly distinguishable from a plenary review of the validity of the arbitration clause"); Ibrahim Fadlallah, Priorité à l'arbitrage: entre quelles parties*?*, *LES CAHIERS DE L'ARBITRAGE* ¶13 (Gaz. Pal. 2002/1) (do judicial decisions dealing with the extension of arbitration clauses to third parties "simply represent the chronological priority due to provisional arbitral decisions, or do they resolve once and for all [*trancher dans le vif*] the very question of arbitral jurisdiction?"). "Can we—in short—have any particular confidence in the ability of non-Gallic tribunals to thread their way along such shadowy paths with any dexterity?" Rau, *Arbitral Jurisdiction and the Dimensions of "Consent,"* supra n.19 at 208 fn.33.

[204] See, e.g., Francois-Xavier Train, Note [to Soc. Laviosa Chimica Mineraria v. soc. Afitex (Cour de Cassation, Feb. 11, 2009)], [2009] Rev. Arb. 156, 157: When you think you are demonstrating that an arbitration clause is void, you are instead---and necessarily---proving "one thing and one thing only---that it is not *manifestly* void, for what is 'manifest' has no need to be proven, only to be noticed [*constaté]." (*And as for the judge, "even to look into the argument [*entrer en matière*] means that he has already stepped over the line").

[205] Cf. Stavros Brekoulakis, The Negative Effect of Competence-Competence: The Verdict Has to be Negative, [2009] Austrian Arbitration Yearbook 238-258, Queen Mary School of Law Legal Studies Research Paper No. 22/2009; http://ssrn.com/abstract=1414325. This paper (whose title neatly summarizes its thesis) argues that to "confer *exclusive* jurisdiction on a forum whose validity is at stake, defies not only logic but also any principle of legitimacy," for parties "cannot" be obliged "to exclusively submit to arbitration proceedings [merely] on the basis of *prima facie* evidence."

By contrast, I had always supposed that legal rules exist only to serve some instrumental function---and thus that there can be no "logical" a priori "impossibilities." If there are deemed to be systemic advantages from making litigants jump through certain hoops before they are allowed to present their arguments before a state court, why, then, this seems perfectly legitimate as long as their ultimate

more, though: Every “rule” derives meaning and legitimacy from the context in which it operates; for example, the French structure of judicial enforcement and supervision of arbitral awards is harnessed to certain contingent preferences with respect to the organization of that state's judiciary: In particular, it rests on a preference that the functions of “ review” and “enforcement” of arbitral awards be concentrated in the courts of appeal---primarily, as a practical matter, the Cour d'Appel de Paris. This “centralizing spirit” of French law reflects its characteristic striving for “Coherence” and “Rationality”;[207] allocating exclusive jurisdiction to the courts of appeal is thought essential to avoid any “unhealthy competition” with other judges who might otherwise be approached for purely tactical reasons ---litigants should hardly be free to approach “any judge whatever.”[208]

The consequences of this preference reverberate throughout the entire legal regime.[209] It is of course a reasonable and even an enviable choice: It makes possible,

---

“day in court” is not unduly burdened. One illustration: In many American jurisdictions, courts may not hear a case *at all* unless the parties first go through a non-binding ADR process---perhaps mediation, but in many cases, a form of "court-annexed" or "non-binding" arbitration. Now in such cases, of course, there is no evidence of “consent” or “agreement,” *prima facie* or otherwise, on the part of the litigants *at all*---that is deemed quite irrelevant and the question is not even asked. But the preliminary hurdle is imposed as a condition to the court’s willingness to hear the case, in the expectation that this will increase the chances of settlement and reduce the judicial workload; if the arbitrators' decision is rejected by either party, then the court will hear the case *de novo*. See generally Rau et al., supra n.48 at 534-43, 571-86; cf. id. at 649-50 (required “medical review panels” in malpractice cases). No more than with the French model, no sustained argument here can plausibly invoke lack of "due process" or "legitimacy.”

[206] Throughout the litigation in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), it was taken for granted that a court injunction against arbitration would be available to a party who was claiming that he was not bound. See n.183 supra. In that case, however, the respondent had chosen instead to argue *to the arbitrators* that they had no jurisdiction---and the claimant asserted that if he were permitted to do that “without being bound by the result,” this would encourage “delay and waste in the resolution of disputes.” Justice Breyer, however, found this point “inconclusive”---“for factual circumstances vary too greatly to permit a confident conclusion about whether allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination would, in general, slow down the dispute resolution process. “ Id. at 946-47.

[207] See Emmanuel Gaillard, L'effet négatif de la compétence-compétence, *in* Jacques Haldy et al. (eds.), ETUDES DE PROCEDURE ET D'ARBITRAGE EN L'HONNEUR DE JEAN-FRANCOIS POUDRET 387, 400 (1999)(“*le génie centralisateur*”); Gaillard, supra n.199 at 620-21 ("a keystone of the recent reforms of French arbitration law ... has been to rationalize the means of challenging awards by unifying all litigation on the subject in the courts of appeal"); Gaillard, supra n.188 at 318 (evoking, in the case of both France and Switzerland, a concern for the ”coherence” of the state’s judicial structure)..

[208] Gaillard, supra n.188 at 318 (“chaos” would result if a party could file a case in any court which would have jurisdiction over the substantive dispute in the absence of an arbitration clause---“or even worse, before any judge whatever [“*un juge quelconque*”]). See also Sophie Crépin, Le contrôle des sentences arbitrales par la cour d'appel de Paris depuis les réformes de 1980 et 1981, [1991] Rev. Arb. 521, 528 ("motivated at all times by the desire to clarify and simplify the mechanisms for challenging arbitral awards, the legislature decided to entrust all of the litigation on this subject to a single jurisdiction, the court of appeal").

[209] For example, it is seems to be taken quite for granted under French law that the parties have no power to contract for review of arbitral “errors of law.” And “review” of awards in the usual fashion is restricted to the courts of appeal---while of course, in the absence of any arbitration agreement at all, the

for example, a bench of arbitration mavens, fully at home with the interrelated pieces of the system, mindful of what is necessary to further the interests of users, and committed to doing so. The plausible corollary of their profound familiarity with the needs of the system is that other magistrates must be barred from anything other than perfunctory glance at any arbitration question. But that choice does not happen to be ours. Where, for example, a federal district court or even a state court has plenary power both to compel arbitration, to vacate awards, and to adjudicate the underlying cause of action---none of the learning developed to buttress the French system can have much purchase.[210]

b. *Injunctions by States of "Secondary Jurisdiction"*

Rien ne marque tant le jugement solide d'un homme que de savoir choisir entre les grands inconvenients.[211]

'Injudicious'? Why, it strikes at the root of the whole fairy system."[212]

Recent years have brought a sharply increased awareness to international litigators, of the possibilities inherent in injunctive relief in state courts---whether the measure is aimed at promoting arbitration, or blocking it: Anti-suit and anti-arbitration injunctions have thus become "a tool of their trade," part of their professional "jargon."[213] It is common enough that the courts of the "seat" might wish to enjoin parallel litigation elsewhere in the interest of lending support to a local arbitration proceeding: This is, after all, a remedy that can simply be framed as an alternative form of specific performance of the arbitration agreement itself---complementary to an affirmative order directing the parties to arbitration.[214] A protective injunction may equally be "regarded as

---

merits of any contract claim would be heard in the usual court of first instance. Given this architecture--which necessarily imposes the strictest of separations between, on the one hand, the work of "review" for arbitral error, and on the other, the work of retail adjudication--conceptual purity in fitting cases into the pigeonholes of "arbitration" and "review" and "vacatur" is absolutely critical. But under the FAA, by contrast, "review" of arbitral awards is carried out by the very same district courts that would in the first instance proceed to adjudicate disputes where (or to the extent that) the parties had made them "non arbitrable"---or that would, to the extent an award has been understood to be non-binding, proceed to adjudicate the entire case de novo. So "on this side of the Atlantic, it shouldn't matter very much what you call it---nor how you pronounce it." See generally Rau, *Fear of Freedom*, supra n.30 at 477-78.

[210] "At the end of the day nothing obligates us to find the European terminology particularly relevant to American procedure." Rau, *supra* n. 181 at 307 fn. 55.

[211] J. A. Gere & John Sparrow (eds.), Geoffrey Madan's Notebooks: A Selection 106 (1981)(attributed to the Cardinal de Retz).

[212] Gilbert & Sullivan, *Iolanthe*, Act I.

[213] Scherer & Giovannini, supra n.189 at 201-02.

[214] A mere claim for damages for breach of the agreement to arbitrate is self-evidently an ineffective remedy. See Daniel Tan, Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers, 47 Va. J. Int'l L. 545, 561 (2007)("prohibitory injunctions to ensure that a

one of the advantages which the chosen seat of arbitration has to offer," in its continuing effort to "attract arbitration business."[215] And the remedy becomes routine to the extent the local courts have already taken steps in the exercise of their "supervisory" authority over the arbitration---thus enabling them to make a claim to be protecting their own judgments.[216] Nor is there any reason to limit this principle of specific enforcement to the courts of the seat: In a Convention case, the power to compel arbitration anywhere in the world[217] should bring with it the power to enjoin inconsistent litigation even in a

---

party abides by his negative covenant not to pursue court proceedings"); John J. Barceló III, Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements, Cornell Legal Studies Research Paper No. 07-024 (2007), http://ssrn.com/abstract=1030403 ("the enjoined party, if it invokes judicial proceedings in F2, does something that it promised not to do"; "an F1 anti-suit injunction could be seen as enforcing not only the parties' agreement to arbitrate in F1, but also their implicit agreement to resolve ordinary arbitrability questions in F1 as well"); XL Ins. Ltd. v. Owens Corning, [2001] C.L.C. 914, 925 (QBD (Comm.))("if the English court is satisfied that litigation in another country would be a breach of contract to arbitrate the dispute in London, the grant of an injunction involves no disrespect or unfriendliness towards the foreign court, but merely an insistence on parties respecting their own contractual obligations').

[215] West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor), [2007] 1 Lloyd's L. Rep. 391 ¶¶ 22-23 (H.L.)(Lord Hoffmann).

[216] See George A. Bermann, The Use of Anti-Suit Injunctions in International Litigation, 28 Colum. J. Transnat'l L. 589 (1990). The author distinguishes between "convenience-based anti-suit injunctions," id. at 609 (e.g., injunctions issued to advance "judicial orderliness and efficiency," perhaps by preventing a party who has been unsuccessful in litigation from "relitigating the same dispute in a foreign court"); "obligation-based anti-suit injunctions," id. at 620; and "policy-based anti-suit injunctions," id. at 623-29 (e.g., injunctions aimed at preventing "interference with the local court's own prescriptive and adjudicative jurisdiction," or the "frustration of American law or policy"): All these concerns tend to be cumulative and mutually reinforcing in the case of the "pro-arbitration injunctions" discussed in the text.

See, e.g., Paramedics Electromedicina Comercial, Ltda v. GE Medical Systems Information Technologies, Inc., 369 F.3d 645 (2nd Cir. 2004)(district court issued an order compelling arbitration and then directed the respondent to dismiss the suit it had filed in Brazil, which was merely "a tactic to evade arbitration"; "the federal policy favoring the liberal enforcement of arbitration clauses applies with particular force in international disputes," and "where one court has already reached a judgment---on the same issues, involving the same parties---considerations of comity have diminished force"); SG Avipro Finance Ltd. v. Cameroon Airlines, 2005 WL 1353955 (S.D.N.Y.)("the enjoining forum's strong public policy in favor of arbitration, particularly in international disputes, would be threatened if [respondent] were permitted to continue to pursue the Cameroon Action, particularly in light of the Court's decision herein granting [claimant's] motion to compel arbitration;" "the more lenient standard may be applied here because the Court has already decided the merits"); Affymax, Inc. v. Johnson & Johnson, 420 F.Supp.2d 876 (N.D. Ill. 2006)(this court "has already ruled that the German dispute is subject to arbitration," and the case for an anti-suit injunction "is most compelling" where, as here, "a party seeks to both enforce a judgment and avoid duplicate litigation"); cf. LAIF X SPRL v. Axtel, S.A. de C.V., 390 F.3d 194 (2nd Cir. 2004)(motion to compel had been denied on the ground that since both parties were already participating in the arbitration, there had been no "refusal" to arbitrate).

For an application of the identical principles in the converse situation---that is, where a court was willing to enjoin a foreign *arbitration* equally in order to "protect its own jurisdiction" and to avoid "increased expense and inconvenience to the parties if they are required to re-litigate the same issues"---see Mastercard Int'l Inc. v. Féderation Internationale de Football Ass'n, 2007 WL 631312 (S.D.N.Y.) at *6-*8.

[217] See FAA § 206 (court "may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States").

third country.[218] (English courts have if anything been even more assertive than their American counterparts in exercising this power[219]---but at least for the moment, and at least within the Brussels regime, their repertoire has been sharply curtailed by *West*

---

[218] Ibeto Petrochemical Industries Ltd. v. M/T Beffen, 475 F.3d 56 (2nd Cir. 2007). Here the trial court had compelled arbitration in London, and at the same time enjoined pending litigation in Nigeria: Permitting the litigation to continue, in its view, would "frustrate the general policy of promoting arbitration." The court of appeal found the injunction "fully justified": The terms of the charter party, which included an arbitration clause, had been incorporated by reference in the bill of lading directing delivery to the plaintiff in Lagos, and were therefore binding on him; "although the District Court's direction to proceed with arbitration in London is not appealable . . . we here note our agreement with the District Court's direction in light of [the plaintiff's] challenge to arbitration as a basis for the anti-foreign suit injunction"). See also IPOC Int'l Growth Fund Ltd. v. OAO "CT-Mobile" LV Finance Group, [2007] CA (Bermuda) 2 Civ. ¶¶ 35, 43 (Bermuda court granted an injunction requiring respondent to discontinue litigation in Russia, in favor of arbitration proceedings pending in Switzerland and Sweden; "an exclusive jurisdiction or arbitration clause contains an implied negative obligation not to litigate in any other forum," and the courts at the seat "are not the only courts that can prevent a party breaking his contract to arbitrate"; *in personam* jurisdiction may be conferred on local courts by a clause providing for arbitration in the forum, but it can equally "arise from the presence" or domicile of the defendant).

[219] See 1 Born, supra n.10 at 1036-39; *Shashoua v. Sharma*, supra n.43 (agreement was governed by Indian law but provided for ICC arbitration with a "venue" in London; an injunction was issued against proceedings in India aimed at setting aside the tribunal's interim award on costs, and preventing the claimants from executing a charging order issued by an English court on the respondent's London house; "the defendant is seeking to outflank the agreed supervisory jurisdiction of this court").

C. v. D., supra n.20, is another English case in which an injunction was issued, not against parallel litigation on the merits, but against illegitimate attempts *to challenge in another state* an award rendered in England. The respondent had "intimated its intention to apply to a Federal Court applying US Federal Arbitration law" in New York to seek vacatur of an English partial award, on the ground that it had been rendered in "manifest disregard of the law." He was enjoined, first, "from initiating proceedings on the Partial Award in New York." I suppose that it might, perhaps, have been enough simply to ignore any later purported vacatur in New York---as a U.S. court did in the celebrated *Karaha Bodas* case with respect to the purported Indonesian annulment of a Swiss award; cf. *Karaha Bodas, Co., L.L.C.,* supra n.174; Alan Scott Rau, Provisional Relief in Arbitration: How Things Stand in the United States," 22(1) J. Int'l Arb. 1, 43 fn. 194 (2005)(when it overturned the antisuit injunction against the Indonesian proceedings, "the Fifth Circuit surely knew -- it did not have to look very far ahead--that Swiss procedural law would ultimately be held to govern the arbitration," since "the true *lex arbitri* was in any event not the law of Indonesia"). But here, by contrast, vacatur in New York might just possibly have been a live option, to the extent the courts of New York---however eccentrically---were likely to deem the award not to fall within the Convention at all. Cf. n.31 supra; *C. v. D*., [2007] 1 C.L.C. 1038, 1048 (QBD (Comm. Ct.))(if this is indeed held to be a "non-Convention award," then "the USA has not, at least to English eyes, properly fulfilled its treaty obligations").

Strikingly, the English court in *C. v. D.* went even further than this---it also enjoined the respondent even "from relying on the law of New York in any application [that might be made *by the claimant*] to enforce the Partial Award." Presumably, this was an injunction that would bar the respondent from invoking any non-Convention grounds---like "manifest disregard"---in the course of resisting *recognition or enforcement* of the award in New York. Carefully framed, such an injunction may be just barely this side of the permissible (although it may also be, in Jane Austen's phrase, "the outside of enough"): If American courts can't quite manage to read the Convention correctly, then I suppose one possible remedy is for the *English* judiciary to control, by injunction, the arguments that litigants are allowed to make before them.

Tankers---leaving them locked into playing one single doomed and repetitive game, *le jeu de la confiance mutuelle.).*[220]

Our previous discussion has already touched on the converse case---the willingness of courts, within a single legal system, not only to decline to stay their proceedings when they are unable to identify any duty to arbitrate, but to enjoin local arbitral proceedings found to be illicit. That the arbitration may happen to fall within the Convention or be otherwise "international," is irrelevant.[221]

---

[220] Allianz SpA v. West Tankers Inc. (The "Front Comor"), [2009] 1 Lloyd's Rep. 413 (ECJ (Grand Chamber))(where an objection of lack of jurisdiction was raised before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, "including the question of the validity of that agreement," it is "exclusively for that court to rule on that objection and on its jurisdiction"; an English anti-suit injunction would "run counter to the trust which the member states accord to one another's legal systems and judicial institutions").

In practice, this is indeed what we might call a "confidence game." Cf. Gaillard, supra n.188 at 325; see also DHL GBS (UK) Ltd. v Fallimento Finmatica SpA, [2009] 1 C.L.C. 827 (QBD (Comm.)). Here, despite a London arbitration clause, an Italian court held that it had jurisdiction to hear the case on the merits, and that the plaintiff's bankruptcy receiver was not bound to arbitrate. The English court declined to stay registration of the Italian judgment: It "will be difficult" for the English respondent to argue that the Italian judgment falls within the Brussels regime's exception for "arbitration"; it was common ground that an appeal in the Italian courts would not be decided before two or three years, while "the appeal to this court could be accommodated within the next few months"---but in any event "a decision of a court of a member state as to the applicability of an exclusive jurisdiction agreement must not be reviewed." Cf. Jan Paulsson, International Arbitration Is Not Arbitration, [2008] (2) Stockholm Int'l Arb. Rev. 1, 3 (" all a clever and resourceful defendant needs to do is to file a suit in, for example, Italy, and it can be fairly certain nothing will happen for a decade"). *Compare Legal Department du Ministère de la Justice de la République d'Irak*, supra n.192.

By contrast the "Heidelberg Report" represents an attempt to devise an alternative European structure---one which aspires to be almost "as effective as an English anti-suit injunction" for the purpose of discouraging what it has become conventional to call "the Italian torpedo"---or more urbanely, as effective for the purpose of "discouraging obstructing and frustrating litigation." See generally Burkhard Hess et al., Report on the Application of Regulation Brussels I in the Member States (Sept. 2007), ¶¶ 123-136. The thrust of this much-discussed and highly-controversial Report is that courts of all member states should be expected immediately to stay their proceedings,

- once their jurisdiction is challenged in favor of arbitration, and once
- the courts of the single state that has been "designated" as the seat of the arbitration has been "seized for declaratory relief" with respect to the existence or validity of the arbitration agreement---that state alone is to be exclusively competent.

[221] See Satcom Int'l Group PLC v. Orbcomm Int'l Partners, L.P., 49 F.Supp.2d 331 (S.D.N.Y.), *aff'd*, 205 F.3d 1324 (2nd Cir. 1999**)**(waiver of right to arbitrate through engaging in "protracted litigation"; since in a Convention case § 206 "unequivocally directs the court to order arbitration where appropriate," it should "follow . . . that the court should have a concomitant power to enjoin arbitration where arbitration is inappropriate," and a failure to do so would create "delay and increased expense as the parties litigated in both fora"). See also Republic of Ecuador v. ChevronTexaco Corp., 499 F. Supp.2d 452 (S.D.N.Y. 2007)(order permanently enjoining New York arbitration granted at the request of the non-signatory respondent); Masefield AG v. Colonial Oil Industries, Inc., 2005 WL 911770 (S.D.N.Y.,2005)(preliminary injunction against New York arbitration requested by non-signatory/respondent; "irreparable harm results from arbitrating a dispute involving a party who is not covered by the arbitration agreement").

Of course, within the arbitration community, the most unseemly, the most objectionable, exercise of a court's equitable powers must be the attempt to enjoin arbitration proceedings held in *another* state—that is, in what we have learned to call the state of "primary jurisdiction."[222] But all the usual considerations do continue to have some purchase here. (For example, if the arbitrators in fact lack jurisdiction to adjudicate, at the very least "it will be an economy of time and cost to find out now.").[223] The "source of the national court's jurisdiction" is precisely the power it may exert personally over the parties; the "legal basis for granting anti-arbitration injunctions" rests on the perception that illegitimate and oppressive arbitral proceedings, initiated in the absence of any consent to the process, may call out for judicial intervention in the form of equitable relief.[224]

Still, given that the court will not merely be withholding its support from the arbitral process---will not, for example, merely be declining to stay its proceedings or to compel arbitration---but will be going further, to "unilaterally" "preempt" the decision of other, co-equal national legal orders[225]--- this is self-evidently a much more delicate matter. Here the prospect of jurisdictional conflict may naturally justify a certain wariness, a certain caution---may justify placing a thumb (labeled "comity") on the scales.

An injunction by the courts of state A attempting to foreclose arbitral determination at the seat---say, in state B----will not necessarily require the cooperation of the local courts in coercive measures. (The need for this will be considerably less pressing where both parties are in any event subject to the personal jurisdiction of the courts in state A). Where cooperation is indispensable, though, we can expect as a general matter that it is not likely to be on the cards.[226]

---

[222] If one strives to act as the architect, or the enlightened guardian, of a self-contained institution of public international law---of which the Convention is the Constitution---and if one thinks it necessary to adjudicate on the basis of what seems to best serve the interests of this regime---then one is particularly likely to find this unacceptable. Cf. *Saipem, S.p.a.,* supra n.163, Final Award at ¶ 167 ("it is generally acknowledged that the issuance of an anti-arbitration injunction can amount to a violation of the principle embedded in art. II"). For my part I cannot find anything like an absolute bar in the Convention, nor do I thik, imperialism for imperialism, that it would be self-evidently preferable to do so.

[223] *Black Clawson Int'l Ltd.,* supra n.73 at 457.

[224] Cf. Lew, *Control of Jurisdiction by Injunctions Issued by National Courts,* supra n.189 at 187 ("What is the source of the national court's jurisdiction over foreign arbitration proceedings, i.e., what is the legal basis for granting anti-arbitration injunctions?").

[225] Cf. 1 Born, supra n.10 at 1053 fns. 244, 248.

[226] See, e.g., Air (PTY) Ltd v. International Air Transport Ass'n, (2005) 23(4) *ASA Bull*. 728 (Trib. de première instance, Geneva, 2 May 2005). Although the parties' contract had not specified the arbitral seat, they had agreed to proceed under the Rules of IATA, a trade association incorporated in Canada with an "executive office" in Geneva. The respondent obtained an order from a Namibian court staying the arbitration, and made application to a Swiss court for equivalent injunctive relief---asserting that the claimant's continuation of the arbitral proceedings constituted a "gross violation" of the Namibian order. But the Swiss court refused what was in effect a request for enforcement of the Namibian judgment---despite being sought in Switzerland under the rubric of "interim relief": An injunction was unavailable because "the Swiss legal order . . . embraces to the fullest extent the principle of

Even outside France it will frequently be suggested that a generalized acceptance of a robust form of *compétence/compétence* will carry with it virtues other than that of mere efficiency---will have above all the merit of ensuring that final decisions with respect to arbitral jurisdiction will be made, at the time of a motion to vacate, by judges at the arbitral seat. These are, after all, the parties' "natural judges."[227] One should hardly be surprised to find this position taken, and vigorously defended, above all in arbitration-importing states. There is the usual amount of question-begging going on here,[228] and we can do better.

Not that we have been doing noticeably better so far. It's easy enough in the conventional categories of cases for courts to spell out the respective roles of the states of "primary" and "secondary" jurisdiction---this is, after all, what most of this article has been about so far. The problem---this is the ancient jape about the young boy who adamantly claimed that he really did know how to spell "Mississippi"---the problem is, that they also have to know when to stop.

i. The *Solidere* case

That observation takes us directly to the *Solidere* case.[229] A French arbitration had been initiated against both a signatory to the agreement, and against its parent, a non-signatory Delaware corporation. The parent asked the federal district court in Delaware for a "declaration" to the effect that it had never "agreed to arbitrate" and---

---

compétence/compétence, both in its positive and its negative forms," and as a consequence "does not recognize any 'supervisory power' [*pouvoir de tutelle*] on the part of state courts over arbitral tribunals." "When we conduct the balancing test necessary before ordering any provisisonal relief, any harm that the respondent might suffer cannot outweigh the interest of the Swiss legal system in ensuring that the arbitral tribunal itself is given the task of ruling on its own jurisdiction."

In fact a legal regime rigidly attached to notions of *compétence/compétence* is unlikely to honor *any* prior judicial judgment, with whatever intended effect, and wherever issued; see *Legal Department du Ministère de la Justice de la République d'Irak*, supra n.192; cf. *Mastercard Int'l Inc.,* supra n.216 (after a federal district court held that a dispute was not subject to arbitration, a Zurich tribunal in a later-filed arbitration went ahead anyway, noting that "the question simply is, which of the two [fora] *rightly* has final jurisdiction")*;* Matthias Scherer & Werner Jahnel, Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective, [2009] Int'l Arb. L. R. 66, 69-70 ("the arbitral tribunal's position will most likely not strike the average arbitration practitioner as being wrong, since the parties agreed to submit their disputes to arbitration, and the merits should only be decided in this agreed forum").

[227] *See* Poudret & Besson, *supra* n.47 at 477 (this is apparently "the most serious argument in favor of the negative form of *compétence/compétence*"). See also id. at 478-79 (the "foreign judge" may tend, erroneously, to apply only his own law and not the arbitration law of the seat, "or at the very least is likely to be less competent in applying correctly this body of law with which he's not familiar").

[228] Apparently not realizing the extent to which this assertion completely begs the underlying question of party "consent," see id. at 478 (the judges of the state of the seat have after all "the virtue of having in most cases been chosen by the parties for their neutrality and reliability").

[229] URS Corp. v. Lebanese Co. for Development and Reconstruction of Beirut Central District SAL ("Solidere"), 512 F.Supp.2d 199 (D Del. 2007).

"based on its claim that no agreement to arbitrate exists"---for a preliminary injunction against the pending arbitration. This was refused: Since 'the French courts have primary jurisdiction over the pending arbitration," the court declined "to extend its jurisdiction over those extraterritorial waters by enjoining the ongoing arbitration in France." [230] In any event, the ICC had already determined under its rules that it was "prima facie satisfied" with respect to the existence of an arbitration agreement binding the parent company, and the parent had "failed to demonstrate that an order by this court on the issue of arbitrability" prior to a decision by the ICC tribunal itself will "adhere to the purposes of the New York Convention." [231] So, in sum---whatever power a U.S. court might have under Chapter One of the FAA to enjoin a "local" arbitration---it was thus "inconsistent with the purpose of the New York Convention" to enjoin arbitral proceedings in a state of "secondary jurisdiction."[232]

Now right away, if we look beneath all this conventional, well-worn, arbitration-speak, all we find is troubling confusion: As we have seen, the distinction between states of "primary" and of "secondary" jurisdiction is indeed abundantly familiar as an attempt to capture the proper allocation of powers among different national courts---primarily with respect to the annulment and enforcement of awards; it thus finds its primary justification in the architecture of art. V of the Convention. But even if we attribute a broader significance to the "supervisory powers" of the courts at the seat, this has no obvious implications for our present concern, after all, for all we have here---for the moment---is a threatened arbitral proceeding, with no more necessary validity than a kangaroo court convened by officious intermeddlers.

Apparently some commentators find it axiomatic that anti-arbitration injunctions---merely by virtue of being issued by courts of a state of "secondary jurisdiction"---must inevitably be "deprived of any legal effect on the arbitration." This strikes me, however, as little more than *a priori* bluster, incomprehensible even on its own terms.[233] In the converse case, where a court, after hearing the evidence, is finally convinced that a valid arbitration agreement exists---and then, as a result, compels arbitral proceedings to take place elsewhere [234]---my impression is that considerations of "comity" would

---

[230] Id. at 209.
[231] Id. at 208.
[232] Id. at 210.
[233] See Michael E. Schneider, Court Actions in Defense Against Anti-Suit Injunctions, *in* Gaillard (ed.), supra n.46 at 41, 60. The author goes on to concede that "at the most they may have some practical or psychological effect, for instance on an arbitrator with links [with] that jurisdiction who might then be in contempt of court."

I find this contrast between the "practical effect" (through coercion exercised on the respondents), and the abstract "legal effect" (nil), of an injunction to be rather endearing. And in reality, of course, the injunction will be issued not (or not only) against the arbitrators, but against disputing parties over whom the court has the right to assert personal jurisdiction.

[234] Cf. Rau, supra n.176 at 110-111, which distinguishes "between two kinds of possible judicial decisions":

- "a flat holding" to the effect that the merits of the dispute were indeed "entrusted by the parties to the arbitrator for resolution," and

quite properly play a very marginal role. But surely no Convention or "pro-arbitration" policy can possibly justify putting one's thumb on the scales *until we are first truly satisfied* that such an agreement can be found.

Similarly, a party who claims never to have consented to an arbitration clause, cannot be bound to anything at all merely by an administrative determination of the ICC bureaucracy---nor, for that matter, by a determination of the arbitral tribunal that the ICC has put into place: The "notion of an arbitration clause that can be entirely self-validating--the product, apparently, of some curious process of autogenesis--is completely alien to our jurisprudence."[235]

So throughout the district court's decision in *Solidere* we find this confused conflation of the ICC Rules, on the one hand, and on the other, the Convention's exclusive allocation of "supervisory power" to the state of "primary jurisdiction"---in this case, poignantly, France. Given such an unpromising beginning, what are we to make of the opinion? The underlying premise of the decision must be that the Convention imposes, on the courts of all contracting states, the obligation to stay their hands in favor of the arbitral tribunal---as the primary decisionmaker with respect to its own jurisdiction---subject only to after-the-fact review by the courts of the seat.[236] If this is the

---

- a holding to the effect that "the very question whether the matters in dispute are subject to arbitration is left for resolution to the arbitrators themselves--that is, whether an arbitral decision on the merits was contemplated by the parties, and was within the scope of the arbitration clause, is itself a matter for arbitration."

In either case, an award will follow. The former finding should "conclusively resolve the question of arbitral jurisdiction," although different states may vary in their willingness to give preclusive effect to such determinations.

[235] Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, supra n.176 at 5. See also Alan Scott Rau, "Arbitration as Contract: One More Word About First Options v. Kaplan,"12 Mealey's Int'l Arb. Rep. 1 (1997)("The ICC's practice of referring cases to arbitration once a 'prima facie agreement' is found may well be a useful administrative line for an institution's bureaucracy, but such a standard in itself says nothing about the true presence of consent.").

[236] "It is apparent that making a judicial determination of arbitrability, prior to an action seeking recognition or enforcement of an award, is inconsistent with the purposes of the FAA and the New York Convention." *Solidere,* supra n. 229*,* 512 F.Supp.2d at 208.

This would also explain the court's lengthy discussion of the teachings of *First Options*, see id. at 207-08. And while that seminal case was indeed concerned about the allocation of power between courts and arbitrators, it says nothing whatever (unlike CPC art. 1458) about the timing or chronological priority of any decisions---which is why it operates neither to forbid nor require the relief sought by the plaintiff here. Still, the underlying premise of *First Options* is that the question of arbitral jurisdiction is ultimately a matter for the court (except perhaps in those cases where the parties have definitively agreed to entrust this task instead to the tribunal, see n.285 infra); why should anyone assume that the decisionmaking process must vary depending on whether URS is a) asking the court to determine the merits, or b) asking the court to prevent the *arbitrators* from determining the merits?

See also Textile Unlimited, Inc. v. A.BMH & Co., Inc., 240 F.3d 781, 786 (9th Cir. 2001)(agreement provided for arbitration in Georgia and for "any court action . . .to enforce the provisions of this agreement" also to be brought in Georgia; held, district court in California may enjoin the arbitration; venue was proper because *the very "question of whether [the venue clause, "like the arbitration clause,"] " is a part of the contract between the parties is at issue*"). With respect to *First Options*, see generally William Park, The Arbitrability Dicta in *First Options v. Kaplan:* What Sort of

claim being made, the court seems to be eerily channeling the French regime of c*ompétence/compétence*--- but not even the most fervent adherents of that doctrine would presume to claim that it is internationally mandatory.[237]

ii. "Subject-Matter Jurisdiction"

And yet there is still another aspect to the judgment in *Solidere* that---hard as it may be to credit---seems even less defensible. As a technical matter the parent company's request for relief was refused--- not on the basis of anything that has been discussed so far---and certainly not because the court was declining to exercise its equitable discretion on the plaintiff's behalf---but---*sua sponte*—on the sweeping ground that the court lacked "subject matter jurisdiction" over the claim. This seems to be the precise "holding" of the case: Federal courts are given original jurisdiction only over "an action or proceeding falling under the Convention";[238] the implementing legislation for the Convention only "provides for two types of claims"---a motion to compel, and a motion to confirm an award; since neither party was actually seeking to compel arbitration, and since there had not yet been any award, the "plain language" of the statute---the "limitation" it imposes---required dismissal of the plaintiff's claims.[239]

Now it is always ill-advised to frame and answer arbitration questions in terms of 'subject matter jurisdiction": It is after all exceedingly common, and exceedingly easy, to confuse the questions

- whether a tribunal has "jurisdiction to adjudicate," and
- whether it has legitimately exercised its adjudicatory power.[240]

Occasionally a negative finding with respect to the former is intended as merely a shorthand for a negative finding with respect to the latter, and---formulaic and formalistic

---

Kompetenz-Kompetenz Has Crossed the Atlantic?, 12 ARB. INT'L 137, 150-51(1996); Rau, supra n.181 at 289-301 ("There May Be Less Here Than Meets the Eye").

[237] See Gaillard & Savage, supra n.31 at 397 (the New York Convention "does not cover the competence-competence principle").

Gary Born claims that "the basic structure of the international legal regime for arbitration" rests on the proposition that the arbitral "tribunal has the right, and the obligation, to reach decisions regarding its jurisdiction," and that in consequence "national courts . . . are not ordinarily free to prevent the arbitration from proceeding or the arbitrators from fulfilling their mandate." See 2 Born, supra n.10 at 2943-46, It seems to me, though, that such a free-standing arbitral "right"---which can apparently be invoked even *though it is still for the moment unclear whether the contracting parties had initially agreed to anything at all*----is rather the distinctive feature---not of any "international legal regime"---but instead of the particular cost-benefit analysis reflected in French legislation; see text accompanying nn. 196-206 supra.

[238] FAA § 203.

[239] *Solidere,* supra n.229*,* 512 F.Supp.2d at 207-08.

[240] "The distinction between the two is plain. One goes to the power, the other only to the duty, of the court," Fauntleroy v. Lum, 210 U.S. 230, 235 (1908)(Holmes, J.). "Jurisdiction is the power to decide the case either way," The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913)(Holmes, J.).

as this may be---I suppose it does no great harm, as long as everyone knows what is going on. Quite often, though, they don't.[241] And where the ability of a tribunal, whether federal court or arbitral panel, to adjudicate is closely cabined and monitored, to characterize a question in terms of "jurisdiction" can be deeply misleading. [242]

Turning then to this precise question, can it really be asserted with confidence that the federal courts simply "lack jurisdiction" to enjoin a foreign arbitration?[243] This at bottom is just a matter of the construction of the implementing legislation[244]: What is "an

---

[241] So, for example, it has been argued that when the parties to an arbitration agreement write a clause providing for "expanded review by the courts of arbitral errors of law," they are in effect impermissibly attempting to grant the courts "jurisdiction" to review the award on the merits. Cf. Alan Scott Rau, Contracting Out of the Arbitration Act, 8 Amer. Rev. Int'l Arb. 225, 117-30 (1997):

> [But] talking in terms of "jurisdiction" will, I think, get us precisely nowhere. To be fair, I suppose that this unfortunate and misleading formulation may occasionally be serving simply as a rhetorical surrogate, in comfortably familiar language, for a somewhat different set of assertions---for example, the assertion that the parties can't "dictate to the courts what legal rules to apply, nor how the courts should go about conducting their business," nor can they "specify the duties of the federal courts" or "alter the judicial process" by "modify[ing] the scope of judicial review." . . . . At this level of generality, we are still very much in the domain of slogans rather than that of useful argument.

For an even more alarming example, see Redman Home Builders Co. v. Lewis, 513 F.Supp.2d 1299 (S.D. Ala. 2007) (the question of whether class arbitration was allowable was "a matter for resolution by the arbitrator, not the court"; it therefore seemed to follow that the court was "without jurisdiction to consider whether the arbitration agreement permits class arbitration"; this in turn meant that there "exists no case or controversy at all," so that the court "need not resolve the issue" whether the requisite amount in controversy was present for purposes of diversity jurisdiction').

[242] So, for example, starting from the undoubted premise that the power of an arbitrator ""derives from contract," contractual limits on a permissible award may be thought (wrongly) to condition or to call into question the original assent of the parties----and thus the very basis of an arbitrator's jurisdiction. See generally Rau, *Arbitral Jurisdiction and the Dimensions of "Consent*," supra n.19 ("even an otherwise unexceptional arbitration agreement can be cabined about with limitations and conditions that may well be thought to go 'to the power of the arbitrator to act'"; "surely it is possible to characterize *every* objection to arbitration as implicating the jurisdiction of the arbitrators, in the sense that it potentially calls into question the presence of consent to submit to the process?")..

[243] Federal courts have regularly asserted the power to grant injunctions against arbitrations with a seat within the United States, see nn. 180-86, 221 supra and text accompanying n.221 supra. The court in *Solidere* distinguished these cases away on the ground that "the fact that the arbitrations took place on United States soil vested the district courts with primary jurisdiction over those proceedings," 512 F.Supp.2d at 209. (And considerations of "comity" can have no possible purchase here). But nevertheless the court's primary rationale---that under "the plain language of the FAA and the New York Convention" there can be federal subject-matter jurisdiction *only* over actions

- to compel arbitration or
- to enforce an arbitral award---

would seem to apply equally both to foreign arbitrations, and to "non-domestic" arbitrations, held in the U.S. but within the Convention by virtue of § 202. It is evident that coherence is not an overriding concern here.

[244] That is why the recent *Vaden* case seems to have little or no bearing on the problem here. In "domestic" arbitration cases a litigant who would like to be in federal court has to point to some independent source of federal jurisdiction, such as diversity of citizenship or a "federal question." With respect to the latter, courts may now "look through" a motion made under the FAA---- to see whether, in

action or proceeding falling under the Convention" within the meaning of § 203? (Note that we already know what it means for an *agreement or award* to "fall under the Convention"---since § 202 tells us this explicitly, and uses precisely that language.)[245] If we look over the implementing legislation, we do indeed see that only a few kinds of judicial "orders"---an "order to compel arbitration" or to "appoint arbitrators,"[246] and "an order confirming the award" [247]---are expressly referred to. Are we really required to wheel out, once again, the tired canons of construction, and to conclude that federal courts are given no jurisdiction when *any relief other than this* has been requested?[248]

Would this most blinkered and literal of readings equally suggest that a federal court is completely without jurisdiction to grant a request for interim relief in aid of a Convention award?[249] Or to grant a motion to modify or vacate an American "non-

---

the absence of any arbitration agreement, "the entire, actual controversy between the parties, as they have framed it," could be deemed to "arise under" federal law and thus be litigated in federal court, Vaden v. Discover Bank, 129 S. Ct. 1262, 1275 (2009). True, jurisdiction still has to be established on the face of the plaintiff's "well-pleaded complaint"---that is, on the face of his "statement of his own cause of action"; it is not enough that he alleges some "anticipated defense" to his claim which he then asserts is invalided by some provision of federal law; nor can federal jurisdiction rest upon an actual or anticipated counterclaim---"it does not suffice to show that a federal question lurks somewhere inside the parties' controversy," id. at 1272, 1278. But this search for the underlying body of law (state or federal) which governs the "controversy as they have framed it," or the inquiry into whether the federal courts "would have" jurisdiction absent any arbitration clause, doesn't have much purchse where---as in Chapter Two--there is already a specific grant of jurisdiction that we have to construe. The plaintiff in *Solidere* was not "anticipating a defense" based on the Convention, but was raising a question as to the breadth of the grant of jurisdiction in the implementing legislation.

[245] See generally Rau, *The New York Convention in American Courts*, supra n.22 at 229-34 .

[246] FAA § 206

[247] FAA § 207.

[248] See Ghassabian v. Hematian, 2008 WL 3982885 (S.D.N.Y.)(petition to stay arbitration; defendants' motion to dismiss granted). The court in *Ghassabian* perpetrates the perfect non-sequitur-----"the New York Convention makes no mentions of actions to restrain a pending or ongoing arbitration. [Nor, by the way, does Chapter One.]. Therefore [sic], "the New York Convention does not create a cause of action to stay arbitration." And that conclusion is buttressed by little more than the current canon of choice:

> Given this enumerated list of judicial powers, according to the canon of statutory interpretation *expressio unius est exclusio alterius* . . . it is unreasonable to infer the existence of further remedies.

[249] But see, e.g., Venconsul N.V. v. Tim Int'l N.V., 2003 W 21804833 (S.D.N.Y.)(movant sought a preliminary injunction to preclude consummation of a "capital reintegration" during the pendency of an ICC arbitration; it is undisputed "that the Agreement falls within the scope of the Convention"; the defendant's argument that subject matter jurisdiction was lacking in the absence of a motion to compel arbitration or to enforce an award is nonsense, since under this theory "a party could deprive federal courts of the power to entertain requests for interim relief . . . by simply appearing in an arbitration proceeding, thereby obviating the need to compel"); Borden, Inc. v. Meiji Milk Prods. Co., Ltd., 919 F.2d 822 (2nd Cir. 1990)("entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to § 206," noting, however, that in this case, "far from trying to bypass arbitration, [the movant] sought to have the court *compel* arbitration").

domestic" Convention award?[250] Or to grant a motion to remove an arbitral tribunal as improperly constituted?[251] Or to enforce a foreign court judgment that itself confirmed a foreign arbitral award?[252] While many cases have been inclined to find federal jurisdiction over such actions---in a straightforward way, on the basis of a simple finding that the "dispute falls under the Convention under § 202"[253]---it has to be conceded that here, too, there is authority to the contrary. Such cases certainly win no prizes for judicial craftsmanship: They do not link in any satisfactory way---indeed do not even attempt to link---the jurisdictional question to the precise text of the implementing statute.[254] Worse, there is the persistent, muddled failure to perceive any difference

---

[250] But see, e.g., LaPine v. Kyocera Corp., 2008 WL 2168914 (N.D. Cal.)("the arbitration agreement and arbitral award fall under the Convention pursuant to [§ 202], and the court has jurisdiction over the award pursuant to [§ 203]"); Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH**,** 41 F.3d 1434 (11th Cir. 1998)(arbitral award "falls within the purview of the New York Convention and is thus governed by Chapter 2"; "we thus hold federal subject-matter jurisdiction"). Cf. Productos Mercantiles e Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41 (2nd Cir. 1994)(prevailing party moved for modification and then confirmation as modified of a "non-domestic" award; court "had subject matter jurisdiction over the arbitration award pursuant to the Inter-American Convention" and "had authority, pursuant to § 11, to modify the award").

[251] But see York Hannover Holding A.G. v. Amer. Arb. Ass'n, 794 F.Supp. 118 (S.D.N.Y. 1992)(motion to remand to state court denied; the agreement "falls under the Convention" under § 202, and a state court petition directing the AAA to remove the tribunal and seeking a stay of arbitration pending a hearing on the petition, "relates to" the arbitration agreement since the "appointment process as directed by the [AAA] rules forms an integral part of" the agreement).

[252] Cf. Seetransport Wiking Trader v. Navimpex Centrala Navala, 989 F.2d 572 (2nd Cir. 1993). Here jurisdiction was founded, not on the Convention, but on the fact that the respondent---an "agency or instrumentality" of the Romanian state---had "impliedly waived any sovereign immunity defense" by agreeing to arbitrate and by participating in an ICC arbitration. See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330(a), 1605(a)(1). The claim for enforcement of the arbitral award itself was dismissed as time- barred---but the court concluded that subject matter jurisdiction also existed "with respect to the alternative cause of action seeking enforcement of the decision of the Court of Appeals of Paris," which had confirmed the award. See n.174 supra. Here is the link to the present discussion: The cause of action to enforce the foreign judgment was "within the scope of [the respondent's] implied waiver of sovereign immunity, *precisely because it "is so closely related to the claim for enforcement of the arbitral award"*; it followed that this cause of action also "arises under federal law." "It is the FSIA itself, rather than pendent [or supplemental] jurisdiction, that provides jurisdiction over the state law claim to enforce the Paris Court's judgment."

[253] Jacada (Europe) Ltd. v. Int'l Marketing Strategies, Inc., 401 F.3d 701 (6th Cir. 2005)(action to vacate was originally filed in state court, and defendant sought to remove; "the Convention applies to this case," and "because this dispute falls under the Convention, [defendant] properly removed the case to federal court"); Amer. Life Ins. Co. v. Parra, 25 F.Supp.2d 467 (D. Del. 1998)(action to enjoin claimants from proceeding with arbitration on the ground that plaintiff "has no obligation to arbitrate those claims"; "district courts of the U.S. have original jurisdiction" over proceedings "falling under the Inter-American Convention"). See also the cases in nn. 249-251 supra.

[254] E.g., *HSMV Corp.,* supra n.88 at 1127 fn. 8 ("HSMV's petition to vacate could not have been initiated under [Chapter Two, since] the Convention contains no provision that expressly permits a losing party to initiate suit to vacate an award that would otherwise fall under the scope of the Convention"); Int'l Shipping Co., S.A. v. Hydra Offshore, Inc., 675 F.Supp. 146, 153 (S.D.N.Y. 1987), aff'd, 875 F.2d 388 (2nd Cir. 1989)(preliminary injunction in aid of English arbitration; "because this case involved neither an action to compel arbitration nor enforcement of an arbitral award, the Court found that it did not have subject matter jurisdiction pursuant to the Convention"); cf. Gerling Global Reinsurance Corp. v. Sompo Japan

between the threshold question of federal jurisdiction, and the substantive question of the court's power or authority to grant relief----so that it is left unclear whether, say, vacatur or an injunction could be ordered even if diversity of citizenship provided an independent source of federal jurisdiction.[255] And above all, they uncannily bear

---

Ins. Co., 348 F.Supp.2d 102 (S.D.N.Y. 2004)(five years after district court confirmed an arbitral award, the movant sought a "declaration" that "in accordance with the Court's decision," the respondent was required to post letters of credit in specified amounts; held, no subject matter jurisdiction because the movant "does not request that this Court confirm the underlying arbitral award" nor does it "seek to compel arbitration over the disputed amount").

[255] Here are two striking and instructive illustrations: You will need to look at these in some detail in order to fully appreciate the lack of arbitration understanding on the part of so many U.S. courts. The shallowness here runs very deep indeed.

In *Ghassabian*, supra n.248, the respondent had asked that an arbitration be enjoined. The claimant moved to dismiss the petition, on the grounds both (a) of lack of subject matter jurisdiction, and (b) of failure to state a claim, and his motion was granted---apparently for the latter reason, but without the slightest nod in the direction of making any distinction between these two discrete challenges. "The New York Convention does not create a cause of action to stay arbitration." Not even § 208 would be of any help, because "here too the FAA does not provide for petitions brought by the party seeking to stay arbitration." Id. at *2. To similar effect is Tesoro Petroleum Corp. v. Asamera (South Sumatra) Ltd., 798 F.Supp. 400 (W.D. Tex. 1992)("the language [of the Convention and our implementing legislation] does not appear . . . to authorize a suit to be initiated for the purpose of vacating an arbitral award"; motion to dismiss granted on the basis of lack of subject-matter jurisdiction).

But look: It has never, to my knowledge, been seriously argued---not under Chapter One, and not under Chapter Two---that the FAA itself "*creates a cause of action*" that would entitle a movant to a stay of arbitration. This is just a red herring; recall the text accompanying nn. 176-186, 221-222 supra. If we are in Chapter One alone, then an independent source of subject-matter jurisdiction is required in any event: But if this can be found, the failure to expressly mention injunctions anywhere in the Act should hardly operate to strip courts of their inherent power---once again, this is a power that does not rest at all on the statute itself; see also Maronian v. American Communications Network, Inc., 2008 WL 141753 (W.D.N.Y.)(of its own force "FAA § 4 does not apply to motions to stay arbitration," but neither does it prohibit a district court from staying an arbitration pursuant to state law).

Similarly, in Virginia Surety Co., Inc. v. Certain Underwriters at Lloyd's, London, 671 F.Supp. 2d 996 (N.D. Ill. 2009), an action was brought in state court to vacate an Illinois award, and the respondent sought to remove. The court ordered that the case be remanded: "Any express judicial power to entertain a vacatur of the award at issue here is conspicuously absent from the Convention," and "indeed, many commentators. . . . have concluded that an action to set aside an award can be brought *only* under the domestic law of the arbitral forum, and can never be made under the Convention." Id. at 998.

But look: Just what is it supposed to mean, anyway, to inquire whether a motion is being made "under Chapter One" or instead "under the Convention"? In this case of a "non-domestic" U.S. Convention award, the losing party may invoke the standards of § 10 to seek to vacate it. That's reasonably clear; see the discussion at text accompanying nn. 21-28 supra. But this does not depend on the writ system, nor on the forms of action, nor upon any pleading choices with respect to the governing law made by the moving party: The simplest explanation is that the U.S. is the country "in which" the "award was made" within the meaning of art.V(1)(e), and that it is, therefore, deemed under the Convention to have authority to vacate in accordance with its own law: And given what art.I(1) tells us about the coverage of the Convention generally, this need not be incompatible with the award being subject to the Convention for other purposes. The point is that Chapters One and Two are not watertight compartments---but that both are instead part of an overall structure dealing with the regulation of arbitral agreements and awards. (This is an impression confirmed not only by § 208 but also by § 207, which instructs a court to confirm an award "unless it finds one of the grounds for refusal . . . specified in the said Convention"---which "grounds" presumably include a denial of enforcement envisaged by art.

witness to the same creeping "plain meaning" paralysis, the same inability to read purposefully and functionally, that seems to have affected federal courts with respect to so many other arbitration questions---just as

- the "plain meaning" of § 10 apparently makes it impossible for parties to stipulate for expanded judicial review on the ground of error of law,[256] and just as

- the "plain meaning of § 7 makes it impossible for arbitrators to order a third party to produce relevant documents prior to the hearing.[257]

One finds throughout, and here again,

- the same impatient, unimaginative, and impoverished view of the capacity of language, and

- the same inexplicable attachment to the overbroad and the prophylactic---to the meat cleaver of "lack of jurisdiction" in preference to a focused inquiry into the propriety of its exercise in a given case---the same fearful anxiety about engaging in marginal, incremental thinking.

V(1)(e)---that is, in which denial of enforcement piggybacks upon a vacatur in U.S. courts on the basis of U.S. law). So it is not internally contradictory for the Convention to specifically contemplate that a state may choose to bring "local " awards within its scope, and at the same time, that a state's courts may vacate such "local" awards---and so, it is hardly self-evident that the motion to vacate made in *Virginia Surety* is in any way impermissible under the Convention regime.

The fact that a U.S. court should have no power or authority to vacate a *foreign* award means nothing with respect to *U.S.* awards---even those brought within the Convention by § 202. The "commentators" in question [actually this happens to be mostly me, see *Virginia Surety Company Inc.'s Submission Regarding Subject Matter Jurisdiction,* 2009 WL 5453901 (N.D. Ill.)] are merely referring to the well-understood truism that a motion to vacate may be made only to the courts of the seat, and nowhere else, and that the Convention does not purport to limit the power of these courts to monitor the award. (In *Virginia Surety*, these are the courts of the U.S.). All that is not addresed to, and thus has nothing whatever to do with, the question raised in *Virginia Surety*.

[256] See Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008); see generally Alan Scott Rau, Fear of Freedom, 17 Amer. Rev. Int'l Arb. 469 (2006). Cf. Jonathan R. Siegel, The Inexorable Radicalization of Textualism, 158 U. Pa. L. Rev. 117, 157 (2009)(describing cases---not including *Hall Street*---in which, despite "ambiguous statutory text of the kind that might have taken meaning form purpose," the Supreme Court "determined which possible meaning of the text was best from a purely textual perspective, with hardly any consideration of purpose at all").

[257] Apparently to summon someone "as a witness" with instructions to bring any documents "with him" can mean *only one thing:* that for the subpoena power to be properly exercised,

- the individual must himself personally come "with" the documents---it would be utterly unthinkable, for example, for a subpoena to contemplate that the documents could instead be sent by Federal Express; and what is more,
- the individual can be asked to come---with the documents in hand--- only where---only if---and only at the same time---that he comes to give testimonial evidence as a witness.

See Rau, *Evidence and Discovery in American Arbitration*, supra n.14 at 9-16 ("the persistent fallacy of 'plain meaning'").

A party (Solidere) defending against a motion to enjoin---a party who is asking that an arbitration be allowed to continue unimpeded--- is not exactly asking that arbitration be "compelled"[258]: But really, the difficulty is only apparent to someone who is anxious to find it, and it is hardly a distinction that the legislator is likely to have averted to.

Whatever was said about subject-matter jurisdiction in *Solidere* can only be fully addressed---and then fairly dismissed---after we look at the overall federal scheme for the Convention, including its provisions governing removal. At first glance, the formula of § 205---permitting removal whenever the "subject matter" of an action pending in state court "relates to an arbitration agreement or award falling under the Convention"---certainly seems expansive, considerably broader than the definition of original jurisdiction in § 203 (which alone was in issue in *Solidere).*[259] But just what we are to make of this variation in drafting remains unclear.

- Perhaps we are supposed to read § 205 as being strictly circumscribed by § 203? (That is, the possibility of removal, too, would be confined to cases where an action brought in state court could be considered somehow analogous to an action "falling under the Convention.") Such a reading would indeed be consistent with the notion that removal statutes do not as a general matter confer jurisdiction in themselves, but are parasitical on some grant of original jurisdiction

---

[258] It seems quite uncontroversial that whenever a defendant *has actually moved to compel arbitration*, a federal court could (if asked to do so) assume subject-matter jurisdiction over the entire case---this is true even if the defendant's motion were made in response to a state-court motion to enjoin, and then asserted as the basis for removal. For even under the most rigid view of federal jurisdiction an action to compel "falls within the Convention," and § 205 is distinctive in providing that "the grounds for removal" of an "action or proceeding" "need not appear on the face of the complaint but may be shown in the petition for removal." Cf. Banco de Santander Central Hispano, S.A. v. Consalvi Int'l Inc., 425 F.Supp.2d 421, 433 (S.D.N.Y. 2006). Here the losing party moved in state court to vacate an award, and the defendant first sought to remove, and later filed a "cross petition" to confirm; the court noted that while "subject matter jurisdiction would be more readily established had [defendant first asserted its] federal defenses in the state-court action and then removed [plaintiff's] vacatur action," still, to grant plaintiff's motion to remand "at this juncture" would "seem unduly formalistic." As both § 205 and *Banco de Santander* suggest---and to be abundantly clear---in that case the entire action, including the motion for vacatur, would now necessarily be in federal court; cf. Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 1996 WL 728646 (S.D.N.Y.)(the reverse situation where the prevailing party moved to confirm, and the respondent moved to vacate; held, the court had original "subject matter jurisdiction" pursuant to § 203, and "it may and does exercise supplemental jurisdiction over respondents' FAA challenge to the award").

Solidere as it happens was somewhat atypical in that there was simply no need for the defendant to move to compel---nor would any such motion have been likely to be successful, if only because an arbitration was already "currently underway," the ICC having set in motion a proceeding between it and the parent of the other signatory. Cf. *LAIF X SPRL*, supra n.216 at 196 ("Since Telinor is currently submitting to arbitration with LAIF X, the district court did not err in refusing to issue an order compelling Telinor to arbitrate, *i.e.,* to do what it was doing").

[259] See Beiser v. Weyler, 284 F.3d 665, 669 (5th Cir. 2002 ("the phrase 'relates to' generally conveys a sense of breadth"); *York Hannover Holding A.G.,* supra n. 252 at 12 ("if Congress had intended to limit removal to state court proceedings to compel arbitration or confirm or vacate an award, it could easily have said so"; such a "narrow" construction would be "inconsistent with the plain language of the statute").

as to which a court must independently be satisfied. That is presumably what one overwrought federal judge was getting at recently when he asserted that if an action to vacate a "non-domestic" U.S. award could not be brought into his court "in the first instance," then it certainly could not be "shoehorned" onto his court's calendar "via removal"----since Congress could never have contemplated "such a devious approach."[260]

This alternative would of course still leave open the fraught question of just what it means, anyway, for an action to "fall under" the Convention---but in any event it seems an undesirable reading, at odds both with the thrust of the positive law and with a fair reading of the statutory text.[261]

- Or perhaps, are we expected to treat these two statutory provisions as if they were two separate grants of federal jurisdiction---one for cases "originally" brought in federal court, and one for cases of removal?[262]

  But such a reading of the statutory scheme would be clumsy, unstable, and impossible to rationalize. We all know that the "removal" right of § 205 is, in a number of ways, far more favorable to defendants than are the rights granted under the removal statutes generally .[263] But this is attributable to a deliberate Congressional preference to channel all Convention cases, to the extent possible, into federal courts---thereby enabling contracting parties to "escape the uncertainty of the laws of the fifty states for the comparative uniformity of federal law."[264] By contrast there seems no reason why the "removal" right of § 205

---

[260] *Virginia Surety Co., Inc.,* supra n. 255 at 998. See also *HSMV Corp.,* supra n.88 at 1127 fn. 8 ("Because the Court finds that HSMV could not have initiated this action [to vacate a California award] under the Convention, the Court cannot assert removal jurisdiction on this basis").

[261] In *Beiser v. Weyler*, supra n. 259, the Fifth Circuit took it as a given that § 205 independently "confers a form of federal question jurisdiction," 284 F.3d at 670. Here the plaintiff had brought suit in state court alleging a number of state-law tort claims; the defendant sought to remove (and also, by the way, moved to compel arbitration); remand was denied, the court writing:

> [W]henever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff's' case, the agreement "relates to" the plaintiff's suit. Thus, the district court will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense, [as] long as the defendant's assertion is not completely absurd or impossible . . . That is all that is required to meet the low bar of "relates to."

Id. at 669.

In addition to the breadth of this language, note that § 205 itself later refers to "the ground for removal provided in this section."

[262] *See Banco de Santander Central Hispano, S.A.,* supra n.258 at 425 fn.2 (seeming to accept that "district courts do not have original jurisdiction over" actions to vacate an arbitral award), with *id. at* 430 (but nevertheless, "§ 205 removal [is not] limited to only state-court actions seeking to compel arbitration or confirm an arbitration award").

[263] See the discussion in Rau, *Provisional Relief in Arbitration*, supra n.219 at 19 & fn. 87.

[264] Caringal v. Karteria Shipping, Ltd. 108 F.Supp.2d 651, 654 (E.D.La.,2000); see also McDermott Intern., Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1209-10 (5th Cir. 1991)("If we

should be any more liberal *than the scope of original jurisdiction "under the Convention*": For precisely this same policy suggests that in both cases, the jurisdictional reach of the statute should be equivalent. [265] I have tried to imagine some plausible reason why a rational legislature might have intended otherwise---that is, I have tried to conjure up some intelligible purpose that would be served by leaving the final choice of forum in these Convention cases entirely in the hands of defendants---thereby requiring a vacatur or injunction action to remain in state court unless the defendant wishes to remove. But I just can't do it.[266]

To be fair, one does stumble occasionally upon some half-hearted feints in the direction of rationalizing the distinction: It might be suggested that where a plaintiff is seeking to stay arbitration, his action is negatively aimed at "bypassing" or "avoiding" the process----whereas by contrast, a defendant who is invoking federal jurisdiction through removal should be treated more generously, for he happens after all to be the party who is "seeking to allow arbitration to continue." Supposedly a broader scope for removal jurisdiction would be more "consistent" with the other "pro-arbitration" grants of authority in Chapter Two, in that respect following the logic of those cases permitting injunctions "in aid of arbitration."[267] But of course---once again---the problem is that it seems inappropriate to put one's thumbs on the scale prematurely---privileging what is most "favorable to arbitration"---unless and until we are truly convinced that both parties have in fact agreed to submit themselves to this alternative process.

---

held that a party could be deemed to have waived its Convention Act removal rights by any legal standard less stringent than our express waiver rule, state courts would rule on more Convention issues"; "although a majority of states have abandoned the common law hostility to arbitration, we are not certain that all states have done so or will not revert to the common law view of arbitration in the future"); Suter v. Munich Reinsurance Co., 223 F.3d 150, 158 (3rd Cir. 2000)("the policy and structure of the Convention Act establish the federal courts as a preferred forum for resolving disputes under the [Act]").

[265] This conclusion is also in line with a general systemic assumption that original and removal jurisdiction are to the extent possible to be "coextensive." See Georgene Vairo, 16-107 Moore's Federal Practice-Civil: Federal Courts & Jurisdiction § 107.04 (3d. ed. 2009); see also Charles Alan Wright et al., 14B Fed. Prac. & Proc. Juris. § 3722 (4th ed. 2009) at 282-82 (federal jurisprudence aims to minimize any "discrepancy in practice between jurisdiction over cases commenced in federal court and those removed to federal court").

[266] One can indeed imagine stray cases where the forum option ought appropriately to rest with the defendant; see, e.g., Mesa v. California, 489 U.S. 121 (1989)(a federal statute permits removal of a civil or criminal case against "any officer of the United States. . . for any act under color of such office," but "it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action . . . arises for Art. IIII purposes"; in this case, state criminal complaints charged postal employees with traffic violations, and removal was held improper in the absence of some allegation of a colorable federal defense). But the fact that one can do so, on occasion, suggests no reason why the same option should be thought appropriate here. It isn't.

[267] Republic of Ecuador v. ChevronTexaco Corp., 376 F.Supp.2d 334, 348-50 (S.D.N.Y. 2005)(respondent brought suit in state court seeking to stay arbitration, and claimants sought to remove; held, district court had subject-matter jurisdiction over the action under FAA § 205).

- And then, perhaps, there is one final alternative---one that seems particularly helpful if we are to properly understand the problem in *Solidere*: It requires no great blaze of insight to see that if we really want to insist on a complete correspondence of original and removal jurisdiction in Convention cases, there are, logically, two ways of doing it: One can assume *a priori* that no original jurisdiction exists over state court actions to enjoin arbitrations (or vacate awards)---this is *Solidere*---and then conclude that removal jurisdiction must necessarily be absent as well.[268] Or we can conclude that this is going about things precisely backwards---and that as an interpretive strategy, it would be at least as satisfactory to reason in the opposite direction.

  That is, § 205 can *itself* be made to inform a proper reading of the (hardly self-defining) formulation of § 203. (Because it precisely tracks the language of § 202---and thus incorporates the elaborate definitions of that section--- § 205 is by far the least ambiguous provision of the two.). To make this move is to appreciate all of the jurisdictional provisions of Chapter Two as integral parts of a "comprehensive scheme" of overriding federal interest[269]---there are in fact no federalism issues at all that I can discern lurking in any of these cases.[270] Both statutory provisions can then be read together to privilege federal courts---more likely to be sensitive to the concerns of uniformity and comity driving any international arbitration regime---as the proper guardians of the meaning of the Convention.

It's a pretty safe bet that if you are able to identify only "one meaning" for a text, it's because you haven't been looking very carefully. So, to sum up: The grant of original jurisdiction in § 203 could mean, then---as *Solidere* supposes---a grant of jurisdiction over,

- "an action specifically provided for in Chapter Two, or
- "an action arising under or brought under the Convention," or

---

[268] E.g., *Virginia Surety Co., Inc.* , supra n.255 at 998:

> That result operates on the premise that Congress knew what it was doing-that having deliberately limited original federal court jurisdiction in Section 207 [sic; § 203?], it would not have left to a heavily-inference-dependent approach the possibility of removal to the federal courts of cases that do not come within such original jurisdiction.

[269] See *Banco de Santander Central Hispano, S.A.,* supra n. 258 at 431-33 ("the legislative history suggests the intention of a distinct federal role in the enforcement of Convention awards and agreements").

[270] Cf. Note, The Jurisdictional Label: Use and Misuse, 58 Stan. L. Rev. 1457, 1481 (2006)("federal subject matter jurisdiction" "ought to refer to the collection of policy decisions that separate the federal judiciary from state judiciaries," the "bundle of . . . policy decisions" balancing "the need for a national arbitrator when states cannot be trusted to do justice, and concerns for how to distribute limited judicial resources").

- "an action asserting a right granted by the Convention."[271]

But the language of § 203 is considerably "looser,"[272] and could, instead, just as easily confer original jurisdiction over,

- "an action or proceeding [which relates to the validity or enforceability of an arbitral agreement or award itself] falling under the Convention [as defined by § 202]," or
- "an action or proceeding asking the court to determine whether a duty to arbitrate under the Convention has been triggered."

That seems an extremely low threshold indeed, one that the plaintiff in *Solidere* should have no difficulty stepping over.[273]

Note, finally, that in *Solidere* it was undisputed that the district court had jurisdiction on the basis of diversity.[274] The problem in the case (quite fortuitously) was the lack of personal jurisdiction over the defendant in the absence of any contacts *specifically with the state of Delaware*:[275] If the plaintiff had been able to point to such contacts, then the court would have had both subject matter jurisdiction to hear the case, and personal jurisdiction to adjudicate the rights of the parties.[276] Would it then have been able to enjoin the arbitration? One strongly suspects---the U.S. was not, after all, the state of "primary jurisdiction"--- that the result here would in any event be the same. Still, one can't be sure that the case doesn't ultimately hinge on the trivial factoid that the defendant just didn't happen to be doing business in Delaware.

---

[271] Or even, perhaps, an action "analogous" or "equivalent" or a "counterpart" to any of these---even though the plaintiff may be nominally advancing his suit on grounds other than those "under" the Convention; cf. *Restatement*, supra n.25, § 5-18 Reporters' Notes Note g.(ii)("a confirmation action under FAA Chapter One may nevertheless be removable, since the Conventions do have counterparts to Chapter One confirmation actions (namely, enforcement actions")).

[272] Cf. id. at p. 206.

[273] See, e.g., Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., 887 F.2d 1357, 1362 (9th Cir. 1989)(only "three basic requirements exist for jurisdiction to be conferred upon the district court": An award must arise out of a legal relationship, which is commercial in nature, and which "is not entirely domestic in scope"); *Beiser v. Weyler*, supra n. 259 at 672 fn. 7("resolving the question of whether the agreement falls under the Convention will ordinarily prove quick and easy").

[274] *Solidere,* supra n.229, 512 F.Supp.2d at 205 n.2.

[275] See *id*. at 215-17.

[276] If the case had been deemed to "fall under the Convention," then here too, the court would have had---not only subject matter jurisdiction under § 203---but personal jurisdiction as well: The defendant's undoubted "nationwide" "aggregate contacts with the United States as a whole" would suffice for personal jurisdiction, but only where the case "arises under federal law"---that is, only if this had been considered a Convention case within the meaning of Chapter Two. Fed. R Civ. R. 4(k)(2).

iii. "All things are lawful; but not all things are expedient."

It is one thing to be deliberate, and even hesitant, in enjoining foreign arbitrations---to shrink from the necessity of doing so in the course of an open, articulated, exercise of discretion. Courts would then have to develop a jurisprudence aimed at identifying the limited circumstances in which an injunction might not seem imprudent. By contrast, invoking the lack of "subject matter jurisdiction" seems a crude and clumsy and overbroad and irresponsible way of answering the question (to which the extent of the defendant's contacts with *Delaware* does not seem functionally related). Invoking a putative lack of "power" based upon absolute prohibitions that supposedly emanate from the Convention, is subject to precisely the same criticism.

Questions of "jurisdiction" and "power" are profoundly uninteresting here. Instead the text for the remaining discussion should instead be drawn from St. Paul---the lesson that "all things are lawful; but not all things are expedient. All things are lawful; but not all things edify."[277] Or perhaps, for judges who may be novice drivers trying to navigate in unfamiliar terrain, the appropriate traffic signal is the flashing warning light of danger rather than the barrier of "no entry."

To begin with, there are cases at the consensual "core": These are cases where a court must first assure itself that the parties have agreed to arbitrate *something*---and where, until this has happened, there exists as yet no reason to defer to the supervisory power of *any* alternative regime of dubious legitimacy.[278]

For example, take the case where one of the parties asserts that "his signature" to the agreement has been forged; he asks the court to prevent any arbitration from being initiated---at the very least until this issue has been resolved. It is perfectly consonant with the premises of Anglo-American law that a court here may (and indeed, should) do so---and, where continuation of a foreign arbitration would be "unconscionable and a needless expense," any question of deference to a putative "arbitral tribunal," or to a supposed court of "primary jurisdiction," or to the structure of the Convention, will simply not arise.[279] Indeed, when we are faced with such a case,

---

[277] 1 Corinthians, 10:23.

[278] See generally Rau, *Arbitral Jurisdiction and the Dimensions of "Consent*," supra n.19 at 204-05 ("Did I Validly Agree to Arbitrate *Anything at All*?"; "justifiable doubts about consent to arbitrate (and by necessary implication, about arbitral jurisdiction)" are raised, for example, by the classroom hypotheticals of "offer and acceptance" that suggest "a lack of adequate manifestation of mutual assent").

[279] See, e.g., Albon v. Naza Motor Trading, [2008] 1 Lloyd's Rep. 2. (C.A.). An injunction had been deemed appropriate by the trial judge on the ground that if the claimant were to "allow the arbitrators to proceed" pending determination of the issue of forgery, it would result in a "duplication" of proceedings that "must be oppressive and unconscionable." And more functionally, with respect to the interests of the competing fora, it noted that "the period of added delay" entailed by a judicial determination "should be short, and indeed would be very short indeed" if the claimant "did not continue to maintain its objection to this court resolving as a matter of urgency (as it has offered to do so) the issue of authenticity." Albon (t/a NA Carriage Co.) v. Naza Motor Trading Sdn Bhd, [2007] 2 Lloyd's Rep. 420 (Ch.).

what could it possibly mean to assert that an anti-arbitration injunction would "curtail" the "basic human right" to the effect that "every person should have access to justice"?[280] Not much, I should think---for that claim elides the only real question---that is, "*who* is the ultimate decisionmaker to be?" (and perhaps, "just how many interim decisionmakers are we willing to tolerate?").[281]

The same principle may extend to other cases: For example, assume that after a reading of the overall agreement, a court is convinced that it would be most congruent with the overall intentions of the parties that the arbitration---which after all has to be held *somewhere*--- should take place locally---which also happens on balance to be the parties' "natural forum." It may then reasonably conclude that arbitral proceedings threatened elsewhere ought to be enjoined.[282]

At the same time, by contrast, no responsible court could now make the mistake of thinking an injunction justified merely because the validity of the overall "container" contract itself has been challenged---on the ground that here too, the requisite consent to submit to arbitration had equally been called into question: The notion of

---

Cf. Graham Dunning, Stop—Or Go? Injunctions and Arbitration, [2008] 74 Arbitration 254, 259 (Aug. 2008), who asks, "Why did the Court not leave it to the arbitral tribunal to determine the validity of the arbitration agreement and whether or not it had been forged? To have done so would have been consistent with the recent decision of the house of Lords in *Fiona Trust v. Privalov*." Of course, any reference to arbitration, in these circumstances, would necessarily have been provisional, that is, subject to de novo review---as the reference to *Fiona Trust* does not seem to recognize. But the simple and obvious answer to the question posed has already been given; see text accompanying n. 235 supra (the "notion of an arbitration clause that can be entirely self-validating . . . is completely alien to our jurisprudence").

Easily as clear a case for an injunction, on the same ground, is Raytheon Engineers & Constructors, Inc. v. SMS Schloemann-Siemag Akiengesellschaft, 2000 WL 420866 (N.D. Ill.)(injunction granted against ICC arbitration; the arbitration clause was "permissive," and thus the defendant "had no unilateral right to compel arbitration"; any supposed "policy in favor of arbitration" can hardly "create an agreement to arbitrate out of whole cloth").

[280] Pierre Karrer, Anti-arbitration Injunctions: Theory and Practice, *in International Arbitration 2006: Back to Basics?,* supra n.52 at 228, 230.

[281] Cf. Dependable Highway Express, Inc. v. Navigators Ins. Co., 498 F.3d 1059 (9th Cir. 2007). Here an English court had issued an injunction against U.S. litigation on the ground that the parties' agreement "designated English arbitration as the means for resolving disputes." Nevertheless the Ninth Circuit held that a stay of the federal litigation was inappropriate: "*If* the record were clear that the parties agreed to foreign arbitration, or if the district court made such a determination, we would have very little trouble upholding the stay"----but on the contrary, the parties' disagreement over that issue was "central to the dispute before us": Therefore the district court was required first to "develop the record in order to determine whether" there was an agreement to arbitrate, and thus to "answer threshold issues of arbitrability"). Id. at 1069-70.

[282] See *Tonicstar Ltd*., supra n.17, see also n.53 supra. In *Tonicstar* the respondent was actually enjoined from pursuing an action in a federal court in New York seeking to compel arbitration---but it was clear that in the absence of party agreement, any arbitration ordered by a U.S. court would have to have its seat in New York. (See the discussion in n.17 supra). However, "having chosen to contract in the Lloyd's market on the Lloyd's slip policy form it is to be inferred that the parties intended these provisions to be determined by English law" and that "the proper law of the whole contract is English law": Therefore the "center of gravity of the dispute " lay in England, which was the parties' "natural forum."

"separability" should by now be sufficiently well-understood to make a result like this simply impossible. [283] Equally ill-advised, and for similar reasons, was a well-known injunction issued by a Quebec court barring the respondent from asserting a counterclaim in a pending New York arbitration:[284] The injunction was apparently deemed justified based on what reads like a quintessential laundry list of the inappropriate and the improper---among other things, it was issued on the ground that

- the parties by their pleadings in local courts had "mutually renounced" the arbitration clause, [285] and because,

---

[283] Cf. Lew, *Control of Jurisdiction by Injunctions Issued by National Courts*, supra n. 189 at 216 ("The granting of an anti-arbitration injunction may violate the principle of separability, because not infrequently, such injunctions are granted in response to a claim of the invalidity of the main contract").

[284] See Lac d'Amiante du Canada Itée v. Lac d'Amiante du Québec Itée, 1999 CarswellQue 2752 (Cour sup. du Québec), aff'd, 1999 CarswellQue 3688 (Cour d'appel).

[285] Different national schemes will necessarily allocate power between courts and arbitrators in different ways. But in many cases, the particular issue of whether there is any "duty to arbitrate"---typically, perhaps,

- the question whether the dispute falls within the intended scope or coverage of the arbitration clause, or
- the question whether an agreement to arbitrate has over time somehow "lapsed, or expired, or been rescinded"—

will have been entrusted to the arbitrators themselves for a "final" determination, whether

- by express contractual provision, or
- by incorporation of institutional rules, or
- by an increasingly common gap-filling default rule or presumption.

See generally Rau, *Arbitral Jurisdiction and the Dimensions of "Consent,"* supra n.19 at 212; Rau, "*The Arbitrability Question Itself*," supra n.181 at 319. Then a court would be expected to defer, not only after the award—but prospectively as well---to the arbitrator's exercise of his authority. And in no event may any injunction interfere with a contractual allocation of this prerogative to the arbitral tribunal.

In particular, assertions that a delay or a misstep in asserting a claim have caused the dispute to be no longer "arbitrable"---assertions of abandonment or "waiver"---assertions that time limits have passed, or that necessary procedures have not been followed, or that delay in asserting a claim, or action inconsistent with the intention to pursue arbitration, have been prejudicial to the other party---all are matters that are routinely entrusted to the arbitral tribunal itself. What all these cases seem to have in common is that there was originally an agreement in which arbitrators have been selected and entrusted with the power to do *something*. And to the extent that defenses like "waiver" are presumptively treated as within the contractual jurisdiction of the arbitrators, there is of course no argument for deferring on the issue to the courts of any legal system. See Boateng v. General Dynamics Corp., 473 F.Supp.2d 241 (D Mass. 2007)(assertion that the employer had "waived" its right to arbitrate and was estopped from enforcing the agreement, was an issue for the arbitrator; "determination of this issue involves questions of fact ... and contract interpretation" and "arbitrators are well suited to answer such questions"); see also Elektrim SA v. Vivendi Universal SA, [2007] EWHC 571 (QBD (Comm.))(respondent sought an action to restrain the claimant from pursuing a LCIA arbitration until the completion of an ICC arbitration in Geneva, which had been initiated under an agreement purporting to "settle" all "existing proceedings"; held, application denied; the "real aim" of the requested injunction appeared to be "case management" of the two arbitrations---but the LCIA arbitration itself "results from an admittedly valid arbitration clause," and the Arbitration Act contemplates that *the tribunal itself* "will consider and decide such matters" as the appropriateness of an adjournment or a stay of the arbitral proceedings").

To be fair, the picture is considerably more muddled when it comes to claims of "waiver" that are "predicated solely upon participation in the lawsuit by the party seeking arbitration"; here the desirability of

- the local courts were the most "appropriate forum under the circumstances to decide all of the claims"---since they had alone had jurisdiction over both defendants, and control over all relevant files and documents, and what is more,
- the counterclaim "had no legal basis," for the defendant-counterclaimant had at least as of that moment not "suffered any quantifiable financial loss,"

That all this seems deeply troubling to us, reflects the fact that the grant of an injunction in these circumstances would seem to involve paying little or no deference to arbitration's prime values of private autonomy---paying, that is, little or no attention to what the parties could reasonably have expected to be within the authority of "their" chosen decisionmakers. (In that respect the result in this case should be strikingly different from the forgery example we began with.). The scope of contractual intention is, as always, a useful heuristic helping to dispose of many cases where anti-arbitration injunctions are sought [286] At the same time, one should bear in mind that our disapproval has nothing whatever to do with any supposedly superior claim of the state of "primary jurisdiction."

---

retaining judicial control over "litigation related activity" may make any default rule to the contrary a disfavored contention. See Marie v. Allied Home Mortgage Corp., 402 F.3d 1 (1st Cir. 2005) (allowing courts to decide waiver issues arising out of litigation-related activity "furthers a key purpose of the FAA: to permit speedy resolution of disputes"; "comparative expertise" also argues for judges to decide this issue as they are "well-trained to recognize abusive forum shopping." The final proviso of § 3 of the FAA has in fact been thought to constitute a "statutory command" that courts, at least in these circumstances, are to decide the waiver issue themselves, see County of Middlesex v. Gevyn Constr. Corp., 450 F.2d 53, 56 n. 2 (1st Cir. 1971) ("the pursuit of legal remedy inconsistent with arbitration" is "the 'default' situation contemplated in § 3").

[286] See, for example, Cobra North America, LLC v. Cold Cut Systems Svenska AB, 639 F.Supp.2d 1217 (D. Colo. 2008). Here an arbitration was under way in Sweden between a Licensor and its Licensee, in which the latter claimed that its license had been wrongfully terminated; pending the result of that arbitration, the court stayed U.S. litigation brought against the Licensor *by a Sublicensee*. The plaintiff-Sublicensee had asked for an injunction against the Licensor's marketing and selling the licensed product within the United States. It also requested an injunction *against the arbitration itself*---and this was easily denied, partly on the ground that the plaintiff wasn't even a party to the ongoing arbitral proceedings---and more importantly, on the ground that the immediate Licensee, (although one of the parties to the arbitration) was not a party to the action before the court.

One striking feature of the litigation was that the Plaintiff-Sublicensee was apparently a wholly-owned subsidiary of the Licensee, and that its claims in the U.S. litigation "stem from," "flow from, and are derivative of," the Licensee's own rights under the license---and indeed, that both the license agreement and the plaintiff's own sublicensing agreement provided in identical terms for any disputes to be settled by arbitration in Sweden. All this suggests that the Sublicensee might plausibly have been joined in the Swedish arbitration in the first place: And this, of course, would have made an injunction *even less* appropriate. (The Sublicensee had in fact originally claimed the status of a third-party beneficiary---but withdrew this claim apparently as a tactical measure to avoid being forced into arbitration in Sweden.). Inevitably, when the Licensee later prevailed in the Swedish arbitration, the Sublicensee immediately asked that the Licensee be joined as a plaintiff in the stayed litigation, "so that [it] may apply to the Court for confirmation of the award pursuant to the Convention"---alleging that the Award after all "decides the primary issues in controversy here." See 2009 WL 2416356, 2009 WL 4506404 (D. Colo.).

The parties were apparently in federal court on the basis of diversity; quite properly, neither the Convention, nor any respect supposedly owed to the legal order of Sweden as the state of "primary jurisdiction," played any part whatever in the court's sensible decision to withhold an injunction.

Nor should a local public policy barring the arbitration of certain types of disputes justify an injunction against arbitration elsewhere. (Although it may of course justify the forum's refusal to stay litigation or compel arbitral proceedings, or its refusal to enforce the ultimate award). This category of "non-arbitrable" disputes is, as we know, in the United States virtually a null set--- but in any event there can be little that could possibly render legitimate the forcible exportation of local notions of "non-arbitrability" to control foreign proceedings.[287] It is perfectly possible after all that an award rendered at the seat could be enforced there---or indeed in any other state where deference to the mandatory law of the enjoining court would be considered somewhat less important than attention to party autonomy.[288] In addition, the full dimensions of what is entailed by compliance with "public policy" may not be apparent until after an award has been rendered: There is usually plenty of room for judicial dialogue on this point with arbitral tribunals; it is commonplace to find that their informed appreciation of situation and context, and their creativity in interpretation, may help to provide a fruitful first look at the problem.[289]

---

[287] Cf. Murphy Oil USA, Inc. v. SR Int'l Business Ins. Co. Ltd., 2007 WL 2752366 (W.D. Ark.), which held that "Arkansas public policy" prohibiting arbitration clauses in insurance policies could not justify an injunction against an English arbitration. While the opinion is written so as to rest on the proposition that "the New York Convention supersedes" and renders irrelevant conflicting state law, this seems a dangerous ground---since it is, surprisingly, a murky matter that has given rise to a curious and contested jurisprudence; cf. Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009)(since the Convention is a treaty, it cannot therefore be an "Act of Congress" within the "usual, commonly understood meaning" of the term as used in the McCarran-Ferguson Act, which exempts state insurance regulation from federal preemption based on congressional legislation). It might be better simply to say that in a court's requisite exercise of "balancing of interests" to determine whether to grant or to withhold a preliminary injunction, the factor of the "public interest" should itself be understood to include sustained attention to the "principles of international comity," *Murphy Oil* at *5.

[288] A Quebec court justified its injunction against the assertion of a counterclaim in a New York arbitration, on the ground that since any decision by the arbitrators on the merits would ultimately be "futile," the award would "not be capable of being enforced in Quebec." See *Lac d'Amiante du Canada Itée*, supra n.284 and text accompanying nn. 284-86 supra. But I see no reason to assume that any New York award issued under these circumstances would not be enforceable there or elsewhere.

See also Northrop Corp. v. Triad Int'l Marketing S.A., 811 F.2d 1265 (9th Cir.1987). The government of Saudi Arabia had issued a decree, "formulated specifically with the Northrop-Triad agency relationship in mind," which prohibited the payment of commissions in connection with armaments contracts; after Northrop ceased paying commissions, however, California arbitrators awarded Triad over $31 million. The district court refused to confirm the award, holding that it was "contrary to law and public policy," but the Ninth Circuit quite properly reversed: No conflict of laws principle that might call for the application of Saudi law could possibly be of "sufficient standing" "to overcome the strong policy consideration" favoring choice-of-law provisions as "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."

[289] One of my favorite examples of this point is a recent, very suggestive decision by the Court of Appeal of Ghent. Apparently, under a Belgian decree of great antiquity, non-competition agreements are void unless they are for a limited, reasonable period---and courts are not permitted to "blue pencil" or reform provisions that fail to meet that test, but are instead expected to strike them out completely. Faced with such a clause, an arbitrator concluded---after "interpreting" the agreement "on the basis of the joint goals of the parties"---that it was "implicitly" limited to a period of five years; once he had made that move, he

It is well-known that states outside the mainstream of the international arbitration system have been particularly inclined to issue injunctions on grounds like these: The unhappy fact that in a heterogeneous world, other judicial systems, captive of different legal traditions, may demonstrate a certain lack of independence---or solipsism, over-protectiveness, or simple venality---certainly makes for interesting anecdotes.[290] Such

---

was then in a position to enforce the provision on the ground that its limits on competition now did extend only for a specified, reasonable time period. The award was upheld: “”The interpretation given by the arbitrator to the non-compete clause belongs to his judicial capacity,” and “the result of that judgment cannot be in conflict with public policy.” Since divining contractual intention is within the sovereign appreciation of the arbitrators---a task entrusted to them by the parties----and since the problem was framed by the arbitrator as a matter of construction, rather than as one of reformation-- the clause was now exempt from challenge. J.-P. V. v. V.D.C. Verzekeringen, (Gent 7ième Chambre bis, Dec. 3, 2007), P. & B./R.D.J.P. 2008, at 131; discussed also by Arne Gutermann & Joeri Vananroye, Developments in Belgian Arbitration Law, *in* The Baker & McKenzie International Arbitration Yearbook: 2008, at pp. 106, 110-11.

The *Northrop* case, supra n.288, equally seems to exemplify this point. The arbitrators did not after all go about their job as if they were expected to apply the Saudi decree as regulatory law *ex proprio vigore*--rather they were asked merely to “take it into account” in order to judge the nature of the defendant's promised performance--determining whether the *lex contractus*, as properly understood, imposed liability for the defendant's conduct. Here, then, we are smack in the middle of the domain of interpretation and of context: That is, the decisionmaker would be asked to assess what would be a "just allocation of risk" in terms of the implicit, underlying assumptions of the contracting parties--a task familiar across differing legal systems, calling for an exercise of judgment with respect to

- what "commercial practice" tells us about which party would be expected to insure against or prevent the risk;
- whether the risk of supervening illegality was foreseeable at the time of contracting,
- what were the respective responsibilities of the parties to obtain necessary governmental permits or authorizations; and
- whether--whatever the possible effect of illegality on executory portions of the agreement--the plaintiff could possibly have been thought to have assumed the risk of nonpayment for performance that he had already completed.

Such inquiries are of course quintessentially matters for the arbitrators, and it is something about which the law of California, the law the parties had chosen to govern contract performance, undoubtedly had much to say. Rau, *The Arbitrator and “Mandatory Rules of Law*,” supra n.30 at 71-73; see also id. at 77-78 fn.90; MGM Productions Group, Inc. v. Aeroflot Russian Airlines, 91 Fed. Appx. 716 (2nd Cir. 2004)(the arbitrators found that since the agreement provided only for transactions between the claimant and the respondent, it did not contravene the Iranian Transactions Regulations adopted by the Treasury Department; “we accord great deference to the arbitrators’ factual findings and contractual construction”).

[290]Cf. Telenor Mobile Communications AS v. Storm LLC, 524 F.Supp.2d 332 (S.D.N.Y. 2007), aff’d, 584 F.3d 396 (2nd Cir. 2009). A dispute arose out of an agreement between shareholders in a Ukrainian telecommunications venture---a Norwegian company (the claimant) and a Ukrainian company (the respondent); the claimant, “wary of the Ukrainian legal system,” had insisted on an arbitration clause calling for arbitration in New York. At the request of the respondent’s parent company, a Ukrainian court held the arbitration agreement to be “null and void,” and enjoined both parties from participating in the arbitration; this Ukrainian decision was issued without any notice whatever to the claimant, and after only perfunctory oral opposition from an individual who was apparently an officer of the ultimate parent company of both the respondent and the plaintiff (sic). The arbitration nevertheless continued in the absence of the respondent---and the award was confirmed by a U.S. court, which found that the respondent had made “repeated efforts to renege on its agreement and to torpedo the proceeding by collusive and vexatious litigation.”

cases provide plenty of raw material for speculation as to just what we might have in mind when we use the phrase "rule of law." And in addition, they provide plenty of data for the necessary risk calculus useful to market actors in making investment decisions. But they don't seem to be of much help in formulating generally applicable rules of international arbitration for American courts, and the relevance for our present problem is slight: For the lesson of such cautionary tales is certainly not that we must tie our own hands, to prevent us from ever issuing injunctive relief against arbitrations where such a measure seems called for: That is not what "comity" or "internationalism" can possibly mean. And I cannot believe that the Convention regime is intended to place us right in the midst of some sort of iterated "Prisoners' Dilemma," in which cooperative moves on our part are called for solely in order to elicit similar behavior from the states in question. In short, the power has to be reserved, however circumscribed and circumspect the exercise.[291]

The request for an injunction in *Solidere* was, as we have seen, an attempt to short circuit both the rules of the ICC, and the arbitral regime of the state of "primary jurisdiction."[292] All of this, however, could only be thought significant in the event that the claimant had indeed assented to those rules, or to the supervisory authority of those

---

See generally Lew, supra n.189 at 207-12 (cases from Indonesia and Pakistan; injunctions "used primarily as a tactical tool" to "undermine, destabilize, delay or avoid an arbitration"); Peter Cornell & Arwen Handley, "*Himpurna* and *Hub:* International Arbitration in Developing Countries," 15 (9) Mealey's Int'l Arb. Rep. at p. 39 (Sept. 2000)(same; cases "illustrate the ways in which a state party may be able to invoke the assistance of its local courts to avoid its contractual obligations""). See also *Venture Global Engineering,* supra n.65 at ¶¶ 13, 19 (Indian courts enjoined a transfer of shares, which had been ordered by a London tribunal but which would allegedly violate Indian law; Indian public policy includes "the interests of India," and should not be "bypassed by taking the award to a foreign country for enforcement"); Amaprop Ltd. v. Indiabulls Financial Services Ltd., 2010 WL 1050988 (S.D.N.Y.)(courts of Mumbai issued an ex parte order against pursuing a New York arbitration, even though it was completely undisputed that the "current dispute falls within the Agreement's arbitration clause"). That final resolution in Mumbai would be likely to take "longer than 15 to 20 years," not counting "additional years spent on appeal," undoubtedly played some part in a federal court's decision to direct the respondent not to pursue any action there that would be "designed to interfere with" the arbitration; the respondent's argument that it was "under a legal requirement to obtain the permission" of the Bank of India before it could perform its buy -back obligations under the agreement" was properly held to be "an argument for the arbitrator, and not this Court."

Recent legislation in Belize is in the same vein: The Supreme Court of Judicature (Amendment) Act allows the courts there to issue injunctions against arbitrations, or against enforcement proceedings, if they are deemed "oppressive, vexatious, inequitable," or if they would "constitute an abuse of the legal or arbitral process"; parties who do not comply with such orders---regardless of where the offense takes place---are subject to fine or "a minimum term of imprisonment for 5 to 10 years." Kyriaki Karadelis, "Belize legislates against arbitration," April 12, 2010, http://www.globalarbitrationreview.com/news/article/28264.

[291] Recall that a U.S. court which *has abstained* from enjoining a foreign arbitration may find itself in the position of later being expected to honor *as a judgment* a decision by the courts of the seat confirming the award. See text accompanying n. 172 and n.172 supra; see also *Seetransport Wiking Trader*, supra n.174.

[292] See text accompanying nn. 233-35 supra.

Cf. *Masefield AG,* supra n.221 at *2 fn.2 (invocation of the ICC Rules can only be "founded upon the unproven assumption that the arbitration provision reflects plaintiffs' intent").

courts---but that, in turn, was the very issue in contention, and as yet unresolved. So in such cases the inquiry into "consent" must be rigorous and *de novo*; nor can it be left to the law or the courts of the seat without courting circularity. Perhaps indeed in international cases "the most minimal indication of the parties' intent to arbitrate" may suffice,[293] but in no event should a party be exposed to arbitration proceedings without some assurance that such an intention is present.[294]

This is the principle that seems to drive many cases, including the Second Circuit's curiously controversial recent decision in *Sarhank*.[295] The simple premise of

---

[293] Cf. Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991)(although the district court found that the arbitration clause's "lack of specificity" "mitigated against its enforcement," " the clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes").

For the proposition that the scope of this inquiry into "core consent" should be a very narrow one indeed---with the surprising corollary that even "the defense of unconscionability" "is *not*---and indeed *cannot* be---a recognized defense to the enforceability of arbitration agreements" falling under the Convention, see Khan v. Parsons Global Services, Ltd., 480 F.Supp.2d 327, 340 (D.C. D.C. 1007), *rev'd on other grounds*, 521 F.3d 421 (D.C. Cir. 2008) ("appeals to a court's discretion outside of the letter of the law" "are contrary to [the need for] certainty")(italics in original). In *Khan*, though, the precise nature of the "unconscionability" claim was never addressed or explained, and the court obviously didn't want to be bothered: As applied to the "separable" arbitration agreement itself, it could in any event safely be assumed to be an attempt of dubious merit to derail the process; see Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss,, 2003 WL 24252640 **(**D.D.C.) **(**arbitration clause "imposes an absurdly short (and non-mutual) 30-day statute of limitations for claims"; "requires the employee to split arbitration costs," "offers little or no opportunity for discovery"; and " poses a real risk that plaintiffs will be unable to recover punitive damages in a case where such damages must be available").

[294] At least for the moment, then, there is no real support for a further, and very adventuresome, step in social engineering---the proposition that the taken-for-granted nature of arbitration agreements in international transactions should actually shift the burden of proof to the objecting party, creating a working presumption in favor of the premise that such an agreement does in fact exist. Cf. 1 Born, supra n.10 at 653 ("because international arbitration is the natural and preferred means of resolving international business disputes, and because arbitration typically produces efficient, expert resolution of [such] disputes," "there are very serious reasons to presume . . . that commercial parties are predisposed to enter into international arbitration agreements"). To the extent that this suggestion rests on the usual function of a default rule---the desire to most closely mimic the hypothetical bargain that the parties themselves would have chosen in a completely spelled-out agreement----a recent empirical study of contracts (contained as exhibits to Form 8-K filings with the SEC during 2002) is striking: See Theodore Eisenberg & Geoffrey P. Miller, The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies, 56 DePaul L. Rev. 335, 351-52 (2007)(while arbitration clauses do indeed appear more frequently in international contracts than in domestic ones---"clauses appear at about twice the domestic rate when the contract includes a non-U.S. party"---nevertheless, "the international contracts, like the domestic contracts, contain a low absolute rate of arbitration clauses: only about 20% of international contracts contain them"). By contrast, the claim that it is one virtue of an altered default-rule model that it would cause arbitration to "lose its contractual foundation" altogether, displays considerable analytical confusion; cf. Giles Cuniberti, Beyond Contract: The Case for Default Arbitration in International Commercial Disputes, 32 Fordham Int'l LJ. 417 (2009).

[295] An agreement was entered into between Sarhank (an Egyptian company), and Systems (a Cypriot company); the agreement was to be performed within Egypt and provided for arbitration under Egyptian law. Sarhank later initiated an arbitration against Systems and also against Oracle, its Delaware parent; although Oracle protested that it had not signed the agreement and had not in any other way "consented

these cases is that deference to party "choice"---whether a choice of the seat of the arbitration, or a choice of any possible body of substantive law---can only follow upon some true expression of assent. So, assume that a contract purports to bind a New

---

to arbitration," the arbitrators found both defendants liable. The district court enforced the award against Oracle, but the Second Circuit reversed---because the lower court had "failed to determine independently whether Oracle had consented to arbitration": "An American nonsignatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or agency law." Sarhank Group v. Oracle Corp., 404 F.3d 657, 662-63 (2nd Cir. 2005).

Now the principle seems simple enough that a court should be able to intervene if is not satisfied at some point that there was indeed "an assent to arbitration"---that is, either

(a) that the arbitrators did in fact have "'jurisdiction," or alternatively,
(b) as a higher-level matter, that the parties had entrusted the arbitrators themselves with the power to make a binding determination with respect to their own jurisdiction. See, e.g., n.285 supra.

Sarhank has nevertheless been vigorously criticized, *e.g.*, Bernard Hanotiau, "Multiple Parties and Multiple Contracts in International Arbitration," *in* Multiple Party Actions in International Arbitration 35, 60-62 (Permanent Court of Arbitration ed. 2009). For Prof. Hanotiau "the decision is wrong," "undoubtedly an erroneous decision," "based on an erroneous interpretation of the 'arbitrability' concept referred to in Article V(2) of the New York Convention"; see also Barry H. Garfinkel and David Iherlihy, "Looking for Law in All the Wrong Places," *in* 20(6) Mealey's Int'l Arb. Rep. 12 (2005) ("a mistaken application of Article V(2)(a)"; "the Court took the wrong route to get to its ultimate outcome").

It does appear that the court's refusal to confirm the Egyptian award was based on art. V(2). Nevertheless the court *did not distinguish at all* between art.V(2)(a) ("not capable of settlement by arbitration") and art. V(2)(b) ("contrary to public policy"). And it is in any event clear that the court never said anything *even remotely suggesting* that the dispute was not "arbitrable." (Its occasional references to "arbitrability" were nothing more than clumsy attempts to capture the supposed teachings of *First Options,* with respect to the contractual allocation of decision-making responsibility between courts and arbitrators---that is, the term only came up in the midst of a discussion of point (b) above.) But cf. 1 Born, supra n.10 at 497 fn. 411 (*Sarhank* might "conceivabl[y]" be "defended on the grounds of public policy," "although the court did not invoke public policy in its opinion."). But all right, never mind, the court's precise rationale does seem rather off the mark: I suppose it might have been preferable to rely directly on art. V(1)(a) ("agreement is not valid") or art. V(1)(c) ("matters beyond the scope of the submission to arbitration"). In the case of a U.S. arbitration, it would have been easy enough to speak the language of FAA § 10(a)(4) ("the arbitrators exceeded their powers"). But as long as we know what's really going on—as long as the ultimate result is defensible—why on earth should we be exercised by incorrect terminology?

Well, here is one reason: As the court may have suspected, any talk of "lack of agreement" would inevitably raise the question of *what law* governs such a determination; and the choice-of-law provisions of art. V(1)(a) seems to point, not only to the formal requirements of Art. II, but also *to Egyptian law*. Reliance on Art. V(2) by contrast conveniently allowed the court to restrict itself to U.S. law. See Rau, *Arbitral Jurisdiction and the Dimensions of "Consent,"* supra n.19 at 235-36. For that reason, as John Townsend shrewdly notes, the most plausible problem with *Sarhank* may simply be that the decision is "an example of overreaching extraterritoriality," see John M. Townsend, "Non-Signatories in International Arbitration: an American Perspective," *in International Arbitration 2006: Back to Basics?,* supra n.52 at 359, 364 fn. 28. See also *Restatement,* supra n.25 at, § 5-8 Reporters' Notes note *b.* (by applying art. V(2) the court in *Sarhank* "improperly circumvents the choice-of-law rules of art. V(1)(a)"); 1 Born, supra n.10 at 497 (*Sarhank* "reflects a parochial insistence on applying local U.S. law, notwithstanding. . . a choice of law clause selecting foreign law"); Aloe Vera of America, Inc. v. Asianic Food Pte. Ltd., [2006] SGHC 78) ¶ 38 (Sing. High Ct. 2006)(*Sarhank* demonstrates "an insular attitude" since it pays insufficient "regard to the fact [sic] that the American parties had chosen to do business in a foreign jurisdiction and to make their agreements subject to foreign law and foreign arbitration"). Nevertheless, even this marginally more sophisticated criticism fails to convince me that the court in *Sarhank* was in any way on the wrong track; see the further discussion in the text and note that follows**.**

York individual to arbitration in Egypt: He claims, however, that he has never agreed to anything at all---perhaps the signature on the agreement was forged, or was made without authority; or the arbitration agreement was contained in a "counteroffer" sent in the course of a battle of the forms. Or assume that he is not even mentioned in the document---that he is the parent of an undoubted signatory, but that his parenthood is his only connection with the dispute or the arbitration. The arbitration proceeds in his absence, and it is held that the "existence" of his consent to arbitrate---and thus whether he is bound to the award---is to be determined by the principles of Egyptian law. But---notwithstanding art. V(1)(a) of the Convention---what can possibly bind someone who claims to be a complete stranger to the proceedings to this alien body of law?[296]

Various high-level attempts have been made to struggle against this paradox, with varying degrees of sophistication and success. Whatever their defects, they all at least have the merit of recognizing the problem, and the proposed solutions often run parallel to the approach taken here.[297]

---

[296] This was precisely the situation in *Sarhank* (and for that matter, in *Solidere* as well). Nevertheless it was clear---and this was conceded by the claimant---that "the arbitrators' conclusion that Oracle is bound to arbitrate as a non-signatory was based solely upon Egyptian law," *Sarhank,* supra n.295, 404 F.3d at 662. Nevertheless in the eyes of the district court, the fact that a U.S. court would not have held Oracle to be bound under these circumstances was somehow nothing but a "misplaced" "quibble," 2002 WL 31268635 at *7. (S.D.N.Y.).

But cf. *Aloe Vera of America*, supra n.295 at ¶ 61 (respondent was claiming that he was not a party to the agreement, but "the arbitration agreement was subject to the law of Arizona and therefore [respondent] bore the burden of establishing that . . . under the law of Arizona the clauses of the agreement could not have any application to him"; "it would not be correct" for a Singapore court to construe the agreement "in the same way as [it] would be able to if [the agreement] were subject to Singapore law in order to establish whether there was a valid arbitration agreement" binding the respondent).

[297] For example, the current draft of the Restatement provides (in the context of the recognition and enforcement of foreign awards) that

- the "validity" of the arbitration agreement "is determined by the law to which the parties have subjected it" or, in the absence of any such law, "by the law of the seat"; *Restatement*, supra n.25 at § 5-8(b), by contrast, however,
- whether the arbitration agreement even "exists" (as well as whether a party "lacked capacity") is determined "by the law applicable to that issue under the choice-of law rules of the forum" where enforcement is sought. Id. at § 5-8(c) .

The distinction is apparently this: Questions of "*existence*" raise "basic questions of contract formation," while "*validity*" depends on "whether the agreement is rendered unenforceable by standard defenses to contract enforcement," id. at *cmt*.b. This time-honored dichotomy is regularly trotted out to resolve any number of different problems in the law of contracts---and so it would be bad form indeed for me simply to dismiss all this learning out of hand as "sterile and purely verbal," "metaphysical"---or even worse, "Continental." But see Rau, *Separability in the United States Supreme Court*, supra n.180 at 17-27. At the very least, though, the categories are "slippery," and there are troublesome cases on the margins: Where an attack is made on the "container" agreement, the very "existence" of this agreement is, I suppose, called into question whenever there is a challenge based on indefiniteness, or mutual mistake---a claim that there is no "consensus ad idem"---or on the failure of a "condition precedent to the formation of a contract." Yet the parties might nevertheless plausibly have chosen to have such issues resolved in arbitration, under certain rules and subject to review at the chosen seat. In all these cases a claim that an enforceable agreement "was never concluded" need not prevent "the inference that the

Now it is one thing simply to abdicate all supervisory power over an arbitration in favor of the supposed state of "primary jurisdiction": That, as we have seen, is the route taken by cases like *Solidere*---and only a puppyish eagerness to avoid any stigma of the "parochial" could possibly be thought to justify it. But rather than doing this, an American court asked to compel---and particularly to enjoin---an arbitration, might appropriately proceed otherwise:

Starting with a "federal common law"[298] should hardly prevent an American court from deploying its usual choice-of-law analysis in order to refer to legal systems that might claim a more significant relationship to the dispute: One obvious example is the use of foreign law as data---for example, a reference to foreign law in order to make

---

parties would have wanted to entrust that very determination to arbitrators chosen by them." Id. at 25. The *Restatement* seems to incorporate this insight in § 5-8(d)(a court does not review the tribunal's determination of "the validity of the main contract," but the court *does* determine de novo "the existence of the main contract"---"unless the nonexistence of the main contract does not imply the nonexistence of the arbitration agreement").

The EU's Rome I Regulation is quite similar, although perhaps marginally more energetic in trying to struggle out of this conceptual morass. See Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (J. E.U. 4.7.2008). The Regulation does not of course apply to arbitration agreements (see art. 1(2)(e)), but its provisions are nevertheless suggestive. Art. 10(1) stipulates that *both "the existence and validity*" of any term of a contract---and this includes *a term by which the parties have chosen the applicable law*, see art. 3(5)---will be determined "by the law which would govern it" if the term "were valid": This in turn, sends us (as does § 5-8(b) of the Restatement) to the "law chosen by the parties" under art. 3 (that is, this would deem the challenge to be irrelevant with respect to the choice of law). But the self-referential effect of the chosen law is nevertheless qualified where a party wishes "*to establish that he did not consent*" at all---here he may have an "out," regardless of how the challenge is characterized, if he seeks the protection of the law of the state of his "habitual residence"; he may invoke that law to establish his lack of "consent" if "it appears from the circumstances that it would not be reasonable to determine the effect of his conduct" in accordance with the putatively chosen law. Art. 10(2).

To the extent we find here a notion of true "consent" posited as the critical element, logically prior to and overshadowing any theoretical determination with respect to whether the contract "came into existence," this is extremely attractive. Cf. Mainschiffahrts Genossenschaft eG v. Les Gravières Rhenanes Sarl, [1997] E.C.R. I-911 (before enforcing an agreement with respect to jurisdiction under the Brussels Convention on Jurisdiction, a court must "ensure that there is real consent on the part of the persons concerned," "which must be clearly and precisely demonstrated"); Richard Plender & Michael Wilderspin, The European Private International Law of Obligations 425 (3rd ed. 2009)(but art. 10(2) "relates only to the existence and not to the validity of consent," and so it has no bearing, for example, on provisions of national law that allow one party to "withdraw" from a contract originally entered into). While under the Regulation "habitual residence" is generally in any event a rigid connecting factor--- a strong choice-of-law presumption determining the law applicable in the absence of any agreement at all---this general choice-of-law rule obviously will not always point to the habitual residence of the party seeking to avoid the contract; see arts. 4(1)(2), and art. 6..

[298] When federal courts resort to state contract law in arbitration cases, the only aim obviously is to avoid "the burden of fashioning a newly-minted federal common law of private agreement"; "even here state law may not apply *ex proprio vigore*--as it has no regulatory force of its own--it is chosen, in Justice Holmes' typically quotable phrase, only as a 'benevolent gratuity,'" Southern Pac. Co. v. Jensen, 244 U.S. 205, 220 (1917). See Rau, *The Culture of American Arbitration and the Lessons of ADR*, supra n. 30 at 490 fn. 164. But cf. *Republic of Ecuador*, supra n.267, 376 F.Supp.2d at 352-53.

meaningful---to fill with content---a fact-intensive application of a commonplace principle such as estoppel.[299] More fundamentally, the court might take on the work of identifying certain transnational standards of agreement---standards which are widely shared and intuitively understood: These may be found in national law, but should be at a sufficiently high level of generality that they can "be applied neutrally on an international scale";[300] decisions of "a wide range of national courts and arbitral proceedings" help to establish some consensus as to what is mandated by "common sense notions of contract."[301] This recourse to "transnational standards of consent" will permit a fruitful conceptual muddiness, making it largely unnecessary to nail down just what law is being applied. None of this in any sense suggests a developed Code, but rather a winnowing device ---a set of limiting principles (at a very high level of generality) enlisted to do the essential---which is to identify and exclude at an early stage those cases

---

[299] See, e.g., *Republic of Ecuador*, supra n. 221, 499 F. Supp.2d at 458, 465, 469. Here a state-owned oil company sought to stay a New York arbitration proceeding brought against it by Chevron. Chevron argued that the non-signatory/respondent was estopped from denying that it had an obligation to arbitrate. But this estoppel argument turned on whether the claimant had "reasonably relied" on a joint-venture agreement still being in effect after the respondent took over the interest of the claimant's original partner in the venture. And this, in turn, depended on Ecuadorian law: "It is impossible to properly analyze an estoppel claim in American law without reference to the underlying Ecuadorian law because estoppel, particularly when sought against a governmental entity or the government itself, can only lie where there is reasonable reliance"; it would be "unreasonable for Chevron to assume" the continued existence of the agreement, and impossible for it to estop the respondent from denying an obligation to arbitrate, if, for example, "the laws of Ecuador precluded contracting with the state without certain formalities." Since it appeared that "an Ecuadorian court would find no reasonable expectation on Chevron's part" that the joint-venture agreement would continue to bind the respondent, the federal court enjoined the arbitration.

See also Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, [2008] EWHC 1901 (QBD (Comm.)) ¶ 79, aff'd, [2009] C.L.C. 84 (CA)(the inquiry into "whether a party is bound by an arbitration clause" "can extend to the consideration of issues of foreign law in specific circumstances"; for example, where the question is "whether a state entity is bound," "a state's activities and its intentions in doing various things must be viewed against the background of the legislation of that state and any other applicable laws").

[300] Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982)(Puerto Rico statute protecting distributors does not render agreement providing for arbitration in Italy "null and void"); cf. Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazoni v. Lauro, 712 F.2d 50 (3rd Cir. 1983)(litigation stayed in the U.S. despite the argument that the agreement, providing for arbitration in Italy, was not enforceable under Italian law; an arbitration agreement should be deemed "null and void" only "when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or when it contravenes fundamental policies of the forum state"); Paul D. Friedland & Robert N. Hornick, The Relevance of International Standards in the Enforcement of Arbitration Agreements Under the New York Convention, 6 AM. REV. INT'L ARB. 149, 162 (1995)("while the Third Circuit does not say where courts are to look to identify 'internationally recognized defenses,' the answer must be in the various available sources of transnational law, including other treaties, reported decisions of public and private international arbitral tribunals, and writings by international legal scholars").

While French jurisprudence naturally goes much further than this, the link to the discussion here is the common claim that this question of "core consent" "should be examined solely by reference to the fundamental notions generally recognized in civilized legal systems." Gaillard & Savage, supra n.31 at 233; see also text accompanying n.38 supra

[301] See William W. Park, "Non-Signatories and International Contracts: An Arbitrator's Dilemma," *in Multiple Party Actions in International Arbitration*, supra n.293 at ¶¶ 139, 142; see also id. at ¶ 148 ("estoppel"); see also text accompanying nn. 298-300 supra. .

where 'the totality of the evidence" simply does not support any "objective intention to agree to arbitrate."[302] Despite all its unguarded language with respect to "American federal arbitration law"[303]---a bright red flag to the international arbitration community---I'm not sure that cases like *Sarhank* amount to much more than this; and any of this could justify the decision if it had been drafted in that sense.[304]

Once, though, the parties have indeed chosen to submit future disputes to arbitration, then the situation becomes quite different: Here is the true realm of application of art. V(1)(a)---that is, here the implications of their choice, the legal consequences of their actions, can fairly be left to their chosen law. Most of the cases, I think, arise in this context; the distinction between (on the one hand) a core "consent" and (on the other) the scope, implications, or "legality" of that consent, is one that I have developed for other purposes but to which I revert here:[305] Where we do not simply defer outright and definitively to the arbitrators, then in this vast middle ground, circumspection on the part of a court asked to rule (whether by injunction or a motion to

---

[302] *Sarhank Group*, supra n.295 at 662.

Cf. Ronald A. Brand, Consent, Validity, and Choice of Forum Agreements in International Contracts, *in* I. Boone et al. (eds.), Liber Amicorum Hubert Bockern 541, 544 (2009)("While different rules on the formal or substantive validity of choice of forum agreements and contacts in general may be justified, it is much more difficult to justify different rules on the element of consent necessary to result in a legally binding obligation').

[303] *Sarhank Group*, supra n.295 at 662.

[304] All that happened in *Sarhank,* after all, was that the case was remanded. The precise (and in light of the above, quite unobjectionable) holding was that the district court had committed error by thinking that the "conclusions" of the "arbitrators" in Egypt--- their "construction of the Agreement' or their "conclusions of law," rendered under the law of Egypt---were sufficient in and of themselves to bind Oracle; see n.295 supra, 2002 WL 31268635 at *4. The trial court was instructed instead to go about the logically prior inquiry---to "find as a fact whether Oracle [had] agreed to arbitrate," at all, by "its actions or inaction" or by reason of having cloaked its subsidiary "with apparent or actual authority to consent to arbitration " on its behalf," 404 F.3d at 662-63.

[305] Despite a facile tendency in Continental writing to conflate the two, there seems a critical difference between

- attempts to bind a non-signatory to an arbitration agreement, and
- attempts to impose, on a *signatory* to an agreement, the obligation to arbitrate with other, unnamed parties.

Where the former always should require some threshold finding of assent, the latter suggests instead "a strong analogy to the problem of determining the *scope, the coverage*, of an undoubted agreement to arbitrate": In these cases, the proper inquiry is, "what are we to make of your undoubted, broad, generic, sweeping commitment to arbitrate disputes?" Rau, *Arbitral Jurisdiction and the Dimensions of "Consent,"* supra n.19 at 231-254.

The *Sarhank* case, supra n.295, involved the former category---and so the court quite properly insisted on a prior judicial finding of consent without regard to the putative chosen law or the law of the putative seat. By contrast most cases that choose to assess the validity of an arbitration agreement by relying instead on the parties' chosen law fall neatly into the latter category. See Rau, supra at 244 ("it is more foreseeable, and thus more reasonable, that a party who has actually agreed in writing to arbitrate claims with *someone* might be compelled to *broaden the scope* of his agreement to include others"); cf. *Republic of Ecuador*, supra n. 267 at 354-55(in addition, a non-signatory seeking arbitration "must implicitly accept that the contract under which arbitration is sought is valid and binding on it"). I guess this is *depeçage*.

compel) on a duty to arbitrate, seems called for. Still, hesitation before interfering with a threatened arbitration unfolding in another state--- before a court is tempted to indulge in "legal imperialism"[306]--- could usefully be expressed, not as deference to individuals pretending to act as "arbitrators," but rather through:

1. A conventional decision to assess the validity of the arbitration agreement exclusively by reference to the law of the seat (at least when such a course is not foreclosed by the Convention).[307]

This of course recalls our much earlier discussion of the selection of the place of arbitration, viewed as an exercise of autonomy---as a presumptive choice of that state's "body of arbitration law";[308] it also reflects the widely-accepted fact that the legitimacy of any presumptive arbitration proceeding will be determined, perhaps conclusively, in the courts of that state.[309] It is thus a plausible candidate,[310] and in fact considerably more

---

[306] Cf. Gaillard & Savage, supra n.31 at 231.

[307] The assumption that the obligations of the Convention should be read as congruent for both agreements and awards---that is, that the choice-of-law analysis mandated for *awards* by Art. V(1)(a) equally governs the enforceability of arbitration *agreements*—is I think warranted; see Poudret & Besson, supra n.47 at 270–273; 1 Born, supra n.10 at 430, 462-64 (that an arbitration agreement could be found valid or invalid at one stage, "and then treated in the opposite manner at a later stage," would be "a "highly undesirable result"). (To the contrary, however, relying on the "logical consequences" of "plain meaning," is Friedland & Hornick, supra n.300 at 155 ("art. II's silence on choice-of-law means, as a theoretical matter, that the enforceability of an arbitration agreement can be determined under one legal regime at the commencement stage of an arbitration and by another regime at the award enforcement stage"; "while this result may seem anomalous, it is the logical consequence of the delegates' deliberate refusal to link" arts. II and V)).

At the same time, a number of recent cases remind us that Art. V(1)(a) (as well as Art. IV(1)(a)) refer back to, and incorporate, the formal "writing" requirements of Art. II; see e.g., Czarina, LLC v. W.F. Poe Syndicate, 358 F.3d 1286 (11th Cir. 2004) (English award; "the party seeking confirmation of an award falling under the Convention must meet Article IV's prerequisites to establish the district court's subject matter jurisdiction to confirm the award"; action dismissed for failure to satisfy the "agreement-in-writing prerequisite"). *Cf.* China Minmetals Materials Import and Export Co., Ltd v. Chi Mei Corp., 334 F.3d 274, 292–93 (3rd Cir. 2003) (Alito J, concurring) (Chinese award; "a party seeking enforcement of an award under Art. IV must supply the court with an 'agreement in writing' within the meaning of Art. II"; this means that he must provide "either a duly signed written contract containing an arbitration clause or an agreement to arbitrate that is evidenced by an exchange of letters or telegrams"). It is indeed usually assumed that "the law applicable to the arbitration agreement" for purposes of determining its validity under Art. V(1)(a) "*does not include* the questions regarding the formal validity of the arbitration agreement." Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 196 (1981).

[308] See text accompanying nn. 42-43 supra.

[309] See text accompanying nn. 82-91 supra.

[310] Marc Blessing has in fact identified "nine theories"--- all of which have "been advocated (and indeed practiced)" in attempts to determine the law governing the arbitration clause. Marc Blessing, "The Law Applicable to the Arbitration Clause and Arbitrability," *in Improving the Efficiency of Arbitration Agreements and Award*s, supra n.65 at 168, 169.

The courts of England perhaps more than of any other state have devoted careful attention to this question; they tend to conclude that the law determining the validity of the arbitration agreement is in fact likely to be congruent with the "curial" law governing the arbitration generally. See, e.g., *Black Clawson*

plausible than its many competitors.[311] It also seems to explain the many cases in which challenges to the arbitration clause implicate the "consent" of the contracting parties in

---

Int'l Ltd., supra n.73 at 453, 456 ("it is by no means uncommon for the proper law of the substantive contract to be different from the lex fori ["the law of the place where the reference is conducted"]; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the lex fori"; "whatever the proper law of the sale contract, the parties had by their inclusion of Zurich as an invariable locus for the arbitration indicated a sufficient intention that the law governing the continuous agreement to arbitrate should, throughout the life of the contract, be the law of Zurich")(Mr. Justice Mustill); *C. v. D.,* supra n. 20 at ¶ 22 ("if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection . . . is more likely to be the law of the seat of arbitration than the law of the underlying contract"); *Shashoua v. Sharma*, supra n.43 at ¶ 29 ("recent decisions, where the focus has been on the seat of the arbitration and the agreement to arbitrate, establish that it is much more likely that the law of the arbitration agreement will coincide with the curial law");) Halpern v Halpern, 2006 WL 1020561 (QBD (Comm.))("it would be unusual, but by no means impossible," for **"**the law applicable to the *agreement to arbitrate* the dispute," and " the law applicable to *the arbitration itself* , sometimes called the curial law or the lex arbitri," "to differ").

Consequently it is thought to follow that if an "apparent agreement" between the parties provides for their "substantive rights" to be governed by the law of New York---but also contains a "putative" London arbitration clause---then the fact that the clause may not be "recognized or enforced" in New York is largely irrelevant: "English law is the proper law of the arbitration agreement" and governs its validity; the Arbitration Act "contains various provisions which could not readily be separated into boxes labeled substantive arbitration law or procedural law, because that would be an artificial division"). *XL Ins. Ltd*., supra n.214 at 923. See generally Adam Samuel, The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate, 8 Arb. Int'l 257, 268 (1992) ("on this side of the Atlantic, since express choices of a law to govern the arbitral agreement different from the seat of arbitration are almost unknown, in practice the seat of arbitration will, in almost all cases, be applicable"). Decisions like Peterson Farms Inc. v. C & M Farming Ltd, 2004 WL 229138 (QBD (Comm.)) are not to the contrary; that case merely turned on whether the claimant/signatory could recover damages for losses sustained by its affiliated companies in addition to its own losses ---rather clearly a matter of the governing "substantive" law (in that case, Arkansas), and therefore something the arbitrators (even though they were sitting in London) had no right to ignore. But cf. 1 Born, supra n.10 at 475 fn. 311.

[311] By contrast, the current Restatement draft presumes, in the usual absence of anything more explicit, that "the law to which the parties have subjected" their agreement to arbitrate within the meaning of art. V(1)(a) is the contract's general substantive choice-of-law clause. *Restatement,* supra n.25 at § 5-8, *cmt. c*. ("provided that such an interpretation does not circumvent federal preemption of state arbitration law"). Only where "the parties have neither selected any law to govern the arbitration agreement, nor included in the contract a general choice-of-law clause," does the law of the seat of arbitration "govern the issue." *Id*. (This last sentence presumably refers solely to challenges to the "validity" (as opposed to the "existence") of the arbitration agreement). I wonder whether such a primary default takes adequate account of the usual abstraction of the arbitral process from the actual place of performance of the underlying transaction---an intended distinction that helps to explain the venerable notion of the "separability" of the arbitration agreement---and also whether it takes account of the obvious need to read art. V(1)(a) as congruent with the consecrated readings of art. V(1)(e). See generally n.65 supra.

See also Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A. (02-23249-Civ., S.D. Fla. Sept. 22, 2005), aff'd, 533 F.3d 1349 (11th Cir. 2008) (Miami arbitration but general choice-of-law clause called for application of Venezuelan law; "where the arbitration agreement does not specify the law to which the parties have subjected it, art. V(1)(a) requires that the law of the arbitral situs, in this case the [U.S.], be applied;" "the determination of invalidity of the arbitration agreement by the Venezuelan court is irrelevant"); 1 Born, supra n.10 at 455 (""the reasons that led the parties to select a particular legal system for their underlying contract have little or no application to their arbitration agreement"). Cf. Gaillard & Savage, supra n.31 at 222-26 ("when the traditional choice of law method is used, the principle

only the most tenuous way---so that the law of the seat appropriately serves to determine how the challenge should be dealt with. That is the situation, for example, where it is sought to bind an individual---who is an undoubted party to an arbitration agreement---to submit to arbitration with a non-signatory; [312] it should equally be the

---

of the autonomy of the arbitration agreement from the main contract requires each to be treated separately when determining the applicable law").

Now the lesson of cases like *Mastrobuono* is not, I think, that there is some supposed, and highly unwieldy, "federalism exception," cf. *Restatement*, supra, Reporters' Notes, Note *c*. Such cases instead exemplify our understanding that a generic choice-of-law clause shouldn't have much to do with this issue *at all*: Unless the parties should happen to be unusually explicit, a contractual choice of state law is irrelevant: This is partly of course on the simple ground that the law of New York does after all include the dictates of federal law. But more fundamentally, it is explained by our usual, and sensible, presumption that a stipulation of the substantive "rules of decision governing the merits of the dispute" should not be construed as a selection of the law to validate or invalidate a dispute resolution procedure, or "the State's allocation of power between alternative tribunals." See generally the discussion at Alan Scott Rau, The UNCITRAL Model Law in State and Federal Courts: The Case of "Waiver," 6 Amer. Rev. Int'l Arb. 223, 247-61 (1995); see also Pierre Mayer, Note [to *Comité populaire de la municipalité de Khoms v. Soc. Dalico Contractors]*, [1994] Rev. Crit. Droit Int'l Privé 664, 670 (it is by no means necessary to apply to the arbitration agreement the law that governs the overall contract, for the "procedural nature" of the arbitration clause "differentiates it radically" from the substantive terms that spell out what the purpose of the contract was); Westbrook Int'l, LLC v. Westbrook Technologies, Inc., 17 F.Supp.2d 681, 684 (E.D. Mich. 1998)(the court "will not infer that International intended to have Ontario law govern the arbitrability of its claims simply because the agreement contained a choice-of-law provision" in favor of Ontario law).

[312] See, e.g., Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2nd Cir. 2004)(agreement between the plaintiff and Turkish corporations provided that it would be governed by the "internal laws of Switzerland," and that arbitration would take place in Zurich; the district court denied a motion by the defendants, who were the principals of the Turkish corporations but nonsignatories, to compel arbitration, and also enjoined them from pursuing Swiss arbitration; *held*, affirmed, "Swiss law strictly enforces privity of contract and generally prohibits nonparties from seeking to invoke contractual terms," and the district court was not "required to refer questions of arbitrability to a Swiss arbitrator"); Felman Production Inc. v. Bannai, 476 F.Supp.2d 585 (S.D. W. Va. 2007) (agreement for the sale of ore provided that it was to be governed by English law and called for arbitration in London; the court denied a motion by the defendant---a principal for the seller but a nonsignatory---to compel arbitration; "English law would not allow a non-signatory to compel arbitration" and under the Arbitration Act 1996 "it is a general principle of arbitration law that the agreement only binds the parties to the agreement to arbitration").

The alert reader will immediately have noticed two critical points about both cases:

- In both cases the question was whether an undoubted *signatory* to an arbitration agreement could be obligated to arbitrate with other, unnamed parties; see n. 305 supra; and
- In both cases the choice of the "seat" and a general choice-of-law clause pointed to precisely the same body of law: The applicable law question was thus overdetermined, but it was not satisfactorily clear which ought to be dispositive. See n. 311 supra.

See also Gaillard & Savage, supra n.31 at 223 ("where the parties have not only subjected their main contract to the law of a particular country, but have also chosen that country as that seat of the arbitration," "it would be possible to subject the arbitration agreement to the law of that country, either by giving effect to the parties' presumed intentions, or by making an objective assessment that the connecting factors provided by the law governing the main contract and the seat of the arbitration are the same").

But cf. Sea Bowld Marine Group, LDC v. Oceanfast Pty, Ltd., 432 F.Supp.2d 1305, 1311-12 (S.D. Fla. 2006). Here the agreement was to be governed by the law of Australia and the arbitration was to take place there; the plaintiff, a signatory, argued that since three of the defendants named in its

case where, for example, the legal challenge involves the scope[313] or formal validity of the arbitration agreement,[314] the qualifications of the arbitrators,[315] or, of course, where it merely calls into question the enforceability of the overall agreement.[316]

---

complaint had not signed the agreement, Australian law in those circumstances would not allow them to compel arbitration and "would disallow arbitration of this dispute." Nevertheless the court issued a stay and "refer[red] the case for arbitration in Western Australia." Since the parties themselves had "failed to specify the law that governs the arbitrability of claims"---for some entirely unexplained reason the designation of the seat was apparently insufficient---"federal law ruled supreme." Supposedly the teaching of *Mastrobuono* was that "when the parties "fail to contract out of the FAA," "a return to the default of federal law" is necessary. Now where (as in *Mastrobuono*) the arbitration is to take place within the U.S., federalism concerns may indeed support a default rule of federal law—*as opposed, that is, to state law*; for the essential irrelevance of *Mastrobuono* in the present context, however, see n.311 supra. Since the party resisting arbitration in *Sea Bowld*---unlike in *Sarhank*---was already a signatory to the agreement, the case does not fit at all satisfactorily into the taxonomy I am trying to establish, and so I have little alternative but to claim that it is "wrongly decided." We can be pretty sure that at some point---either before or after the arbitration proceedings---we will find the plaintiff once again making precisely the same arguments; this time, though, before a local court Down Under.

[313] See, e.g., Yavuz v. 61 MM Ltd, 465 F.3d 418, 428 (10th Cir. 2006)(Swiss choice-of-law clause and "place of courts is Fribourg," but "it is hardly obvious what claims, against what parties, are governed by the clause"; "the words may take on different meanings depending on the law used to interpret them," and so "a court can effectuate the parties' agreement concerning the forum only if it interprets the forum clause under the chosen law"); *contra,* Chloe Z Fishing Co., Inc . v. Odyssey Re (London) Ltd., 109 F.Supp.2d 1236, 1252 (S.D. Cal. 2000)(but "there is a colorable argument" that either the choice-of-law provision governing the P & I policies or the reference of disputes to 'arbitration in London' in the arbitral clauses themselves, subject the scope of the arbitration clause to English law"); Doe v. Princess Cruise Lines, Ltd., 2010 WL 1027814 (S.D. Fla.)("Bermuda law does not govern the scope of the arbitration provisions," and defendant "cites no law for [the contrary] proposition").

See also Mastercard Int'l Inc. v. Féderation Internationale de Football Ass'n, 2007 WL 631312 (S.D.N.Y.). Here, after "examin[ing] the Swiss law presented by both sides," and finding that the plaintiff's request for injunctive relief did not "fit within the broad language of the parties' arbitration provision," the court denied respondent's motion to compel arbitration. The respondent nevertheless pursued an arbitration in Zurich, and---after the tribunal held in a preliminary ruling that it was "not bound to recognize the views of the district court," which supposedly contained "numerous deficiencies"---the federal court enjoined the respondent from proceeding with the arbitration. On this aspect of the case, see text accompanying n.216 & n.216 supra.

[314] Cf. *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazoni*, supra n.300 (court ordered stay pending arbitration in Italy despite plaintiff's argument that "in Italy an arbitration clause calling for an even number of arbitrators is null and void"); Apple and Eve, LLC v. Yantai North Andre Juice Co. Ltd, 499 F.Supp.2d 245 (E.D.N.Y. 2007)(court granted defendant's motion to compel arbitration in China despite plaintiff's argument that under Chinese law the agreement, because it failed to designate an "arbitration commission," was "null and void").

Notwithstanding a choice-of-law clause and an implicit incorporation of the arbitration law of the seat, an American court should naturally be reluctant to conclude that the parties had simultaneously intended a) to elect to arbitrate, and yet b) to submit themselves to a body of law that would, in all cases and from the very outset, render their election a nullity. A desire to avoid such an implausible result might alone explain the choice made in these cases not to examine and possibly invalidate the arbitration agreement under the chosen law; see Rau, *The UNCITRAL Model Law in State and Federal Courts*, supra n.311 at 249-50 (American cases have held that a contractual choice to arbitrate "pursuant to the laws of the State of Texas" will incorporate a Texas rule invalidating all arbitration clauses that are not "typed in underlined capital letters" or otherwise "prominent"; "if you can believe that, as the Duke of Wellington was supposed to have remarked in another context, you can believe anything"); 1 Born, supra

2. Hesitation before interfering with a threatened arbitration unfolding in another state might also usefully be expressed, not as deference to individuals pretending to act as "arbitrators," but rather through a prudential *forum non conveniens* decision simply to defer judgment altogether.[317] One first takes account of all the concerns

---

n.10 at 438, 456-57, 497-503 ("the parties' putative choice of a law that would invalidate their agreement to arbitrate . . . does not constitute a genuine indication of the parties' intentions").

[315] See, e.g., A. v. B., [2007] 1 Lloyd's L. Rep. 237 (QBD (Comm.)). This was a request to enjoin a Swiss arbitration. Prior to his appointment, the sole arbitrator (an English solicitor) had been "occupying a hybrid role" as a business advisor and "independent honest broker" in order to "facilitate the settlement "of "fraternal warfare" between the disputants. One party sought an injunction directly against the arbitrator himself to "prevent him from continuing to take any steps as arbitrator" or otherwise to "hold himself out as having or exercising any jurisdiction" to hear the dispute; the ground was that the agreement to arbitrate was "illegal and unconscionable," since the arbitrator "was not independent from the parties" and thus could not "validly act as arbitrator." The court refused relief: "Once the existence of an arbitration agreement has been established," deference to Swiss law, which "governed the relationship established by the arbitration agreement," was necessary, id. at ¶¶ 70, 125. And under Swiss arbitration law "the *Kompetenz–Kompetenz* principle" would leave such matters to the tribunal in the first instance; "since the parties expressly agreed that this dispute resolution regime should apply," the plaintiff should not be "permitted to go back on this agreement." Id. at ¶¶ 114, 115. Further on Swiss law in this respect, see n.188 supra. Note that the basis of the plaintiff's case was *not* "that [he] had never entered into [an arbitration] agreement, for it is quite obvious that he did so." *Id.* at ¶ 108.

Similarly, a charitable reading of Grynberg v. BP, 596 F.Supp.2d 74 (D.D.C. 2009) would be to the effect that an American court should not purport to determine the scope of an arbitration clause, where there has undoubtedly been consent to arbitrate *something*, and where under the law of the chosen seat local courts would be expected to stay their hand. See id. at 79 (the court compelled arbitration of a RICO claim in Alberta; the parties' "agreement incorporated the [UNCITRAL] Model Law," whatever that means).

[316] See, e.g., Overseas Cosmos, Inc. v. NR Vessel Corp., 1997 WL 757041 (S.D. N.Y.)(respondent opposed confirmation of London award on the ground that the Memorandum of Agreement between the parties was never signed by the *petitioner*---the opposing party---and thus that "the underlying agreement" was unenforceable; held, respondent has failed to demonstrate "that the underlying agreement between the parties is unenforceable under English law" "there is no dispute that the *respondent* . . . signed it").

[317] See *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazoni*, supra n.300; see also n.314 supra. The refusal in cases like *Rhone Mediterranee* to be governed by the law of the seat has been termed "quixotic" and "amazing," Samuel, supra n.310 at 268–269. But Gary Born suggests that the reluctance to hold the agreement invalid under Italian law may simply reflect a recognition that "Italian courts are much better placed than U.S. courts to apply Italian arbitration statutes, and ought to be given the opportunity to do so." Gary Born, International Commercial Arbitration in the United States 166 (2nd ed. 2001); see *Rhone Mediterranee*, supra n.300 at 54 ("The defendants insist that even in Italy this procedural rule on arbitration is waivable and a resulting award will be enforced"). Viewed in this way, *Rhone Mediterranee* may represent little more than the announcement of a limiting principle (at a very high level of generality) serving merely to winnow out or eliminate extreme cases at an early stage. For a more recent decision that seems rather explicitly to adopt a *forum non conveniens* rationale, see *Apple and Eve, LLC,* supra n.314 at 252 ("because the alleged defects in the Arbitration Clause is curable under PRC law, this Court declines to hold that the Arbitration Clause is incapable of being performed art this time"; "[g]iven the factual and legal variables required for the agreement to be declared invalid in the PRC, the Court cannot determine as a matter of law that the Arbitration Clause is incapable of being performed in China"). See also *A. v. B*., supra n.315 at ¶ 114 (in which the judge suggested that he would "have reached the same conclusion on *forum non conveniens* grounds," in order to avoid "this court having to apply Swiss law to a jurisdiction issue where the parties have agreed that the seat of the arbitration and the source of judicial regulation will be Geneva").

that properly inform the doctrine---the comparative advantage of foreign courts, particularly in light of the complexity of the legal issues presented; [318] the relatively advanced status of proceedings in parallel fora; the extent of possible conflict with other sovereign legal systems;[319]; the extent of the movant's interest in an American forum and the "bona fide connection" of the parties or the dispute to the United States.[320] And what we are left with---what all this comes down to, at the end, once the critical issue of core consent posed by cases like *Solidere* has been dealt with--- is a reasonable surrogate for whatever policies the "primary"/"secondary jurisdiction" dichotomy is thought to embody.

IV. "Collateral Attacks"

A Texas subsidiary of a Texas oil field services company (the claimant) and Nigeria's state-owned oil company (the respondent) were parties to a joint venture, set up for the purpose of salvaging "slop oil." In a Swiss arbitration, the tribunal first rendered a "partial award" holding first, that the claimant had standing, and then, that the respondent had failed to contribute its required share of capital to the joint venture. But in a later, "final award," it concluded that claimant "lacked capacity to maintain its claims" after all---for it had, apparently, only been incorporated after execution of the joint venture agreement and the demand for arbitration. The claimant's attempt to

---

[318] Cf. *Pepsico Inc*., supra n.61 (since the agreement "contemplates that matters subject to determination by a court, such as threshold disputes over arbitrability, will be governed by Venezuelan law," the court denied for the moment a motion to compel arbitration so that a Venezuelan court could first "be afforded the initial opportunity to determine this threshold question of Venezuelan law before a non-Venezuelan court is called upon to do so"; proceedings were stayed for 60 days "to afford the Venezuelan court the opportunity to determine, if it chooses," the question of "arbitrability").

[319] On both these points, see General Electric Co. v. Deutz AG, 270 F.3d 144 (3rd Cir. 2001). Here the trial court had submitted to a jury the question whether the defendant (the parent of a signatory) was entitled to invoke the arbitration clause, and the jury answered in the negative. Meanwhile an ICC arbitration was proceeding in London--- and so the lower court enjoined the defendant from "appealing the forthcoming jurisdictional order of the Arbitral Tribunal to the English courts or from taking any other action in furtherance of its prosecution of the ICC arbitration." The Third Circuit held this to be in error.

In practice, I suppose that

- *enjoining an English arbitration* on the ground that the plaintiff is not bound to arbitrate with the defendant; and
- enjoining the defendant from *seeking in English courts to annul* an arbitral ruling to the effect that the plaintiff is not bound to arbitrate,

amount to much the same thing. But the latter might be thought to tread rather too heavily on the prerogatives of the supervisory court, see id. at 160 ("the proper exercise of comity demonstrates confidence in the foreign court's ability to adjudicate a dispute fairly and efficiently").

At the time the lower court issued its injunction, "the parties had purportedly completed their submissions to the arbitration panel, and nothing remained but the issuance of a decision." And by the time the Third Circuit came to reverse, the tribunal had issued its jurisdictional ruling agreeing with the federal jury that the case was "not arbitrable"---an "interesting" twist that, the court conceded, "colors our ruling." Id. at 155, 162.

[320] Cf. *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazoni*, supra n.300 at 52 ("All the parties to the time charter agreement and the lawsuit are Italian").

challenge this final award in the Swiss courts was unsuccessful. And so was its attempt to seek U.S. confirmation of the initial, partial award.[321] Nothing daunted, the claimant then filed a suit in federal court---this time, not only against the respondents, but also against the three arbitrators---seeking relief under the RICO statute on the ground that the final award had been "procured by fraud, bribery, and corruption."[322] The trial court dismissed the suit on the ground that "it lacked subject matter jurisdiction" (for the claim was nothing but an impermissible "collateral attack on a foreign arbitral award")[323]--and the Fifth Circuit agreed: The underlying premise of the plaintiff's case was that the misconduct of the arbitrators had rendered the final award itself "invalid"; the damages they sought were damages that they would "only be entitled to if the final award were vacated." But Switzerland was the state of "primary jurisdiction": A U.S. court "sitting in secondary jurisdiction" "accordingly" lacked jurisdiction "over claims seeking to vacate" a foreign arbitral award; "under the framework of the New York Convention, the proper method of obtaining this relief is by moving to set aside or modify the award in a court of primary jurisdiction." [324]

Now the outpouring of praise for this decision from the arbitration establishment---praise that must strike any observer as complacent and largely self-congratulatory---has been remarkable.[325] Yes, the challenge to the arbitral award does seem quite without merit---a conclusion easier to reach as it was premised on a rather reckless indictment of the integrity of well-known and respected arbitrators, all clearly belonging

---

[321] Whether or not the partial award was enforceable following the final award was necessarily an issue that had been addressed by the Swiss courts, when they "disallowed any recovery under the partial award" and upheld the arbitral finding that the plaintiff lacked capacity to maintain its claims. But by seeking confirmation of the partial award in the U.S., the claimant "was effectively requesting that the Final Award be set aside or modified"---and this was an action that the court was "precluded from taking," both by the Convention and (on the basis of "the doctrines of *res judicata* and international comity") by the courts of Switzerland, who alone had authority to do so. See Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp., 288 F.Supp.2d 783, 792-94 (N.D. Tex. 2003), aff'd per curiam, 115 Fed. Appx. 201 (5th Cir. 2004).

[322] To the RICO claim were joined counts for violation of the Texas Deceptive Trade Practices Act, and for common law fraud and civil conspiracy. Allegedly the respondent had made a payment of $25 million which "was to be shared by the three arbitrators in return for delivery of a favorable award"; two of the arbitrators were also supposed to have "engaged in a variety of undisclosed dealings and ex parte communications" with the respondent "that cast doubt on their impartiality as arbitrators," Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp., 512 F.3d 742, 745 (5th Cir. 2008).

[323] Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp., Case 1:05-cv-00619-RC (E.D. Tex. March 15, 2006)("This court is not going to revisit the resulting decision of the arbitration panel, nor the decision by the Swiss Court"), aff'd, 512 F.3d 742 (5th Cir. 2008). "In the alternative," the court held that it also lacked subject matter jurisdiction "because no exception to sovereign immunity exists."

[324] Id. at 747, 750.

[325] See, e.g., Thomas W. Walsh, Collateral Attacks and Secondary Jurisdiction in International Arbitration, 25 Arb. Int'l 133, 141 (2009)("this result confirms the autonomy of international arbitration and the purpose of the New York Convention to enforce arbitral awards in foreign jurisdictions," and thus "is legally sound, logical, and altogether critical to the effective use of arbitration"); Jane Wessel et al., Note, 11 (2) Int. Arb. L. Rev. at N-17, N-19 (2008)(the Fifth Circuit "made plan the broad dictates of the [Convention's] prohibition on attacking the validity of an award in a court of secondary jurisdiction").

to "our crowd."[326] And yes, the plaintiff's behavior might fairly be characterized as going from one forum to another peddling a repeated repackaging of essentially identical claims. But the defects in understanding and craftsmanship revealed by the Fifth Circuit's opinion---the conscripting of notions of "primary jurisdiction" to somehow support a lack of "subject matter jurisdiction" in federal courts--- should, after everything that has gone before, be troublingly familiar. Here too the power of the courts has to be reserved, however wary the exercise.

The demonstration of this will necessarily be abbreviated; "most other readers are already tired, and I am not writing only to philosophers."[327] But the essential point is quite straightforward: What we see in *Gulf Petro* is, once again, a mindless misapplication of the familiar dichotomy that bids us to distinguish between the role of the courts of the "seat" and the role of courts in other jurisdictions. The Continental learning on which Judge King purports to rely is ill-digested,[328] and indeed, it can be said that she proceeds in exactly the same way as did the district court in S*olidere*--- beginning with an *a priori* deference to the "law of the situs" and then somehow erecting on top of that an inappropriate bright-line "jurisdictional" barrier.

In fact the misunderstanding here is even more striking, because here---unlike in *Solidere*---there is not even a perfunctory nod in the direction of a conventional statutory analysis of federal jurisdiction. Recall that the plaintiff (an American corporation) sought redress for alleged violations of the federal RICO statute: This is a point which alone should dispose of any objection grounded in the limited jurisdiction of federal courts; the extraterritorial reach of the statute in these circumstances should be clear enough but in any event was never addressed.[329] What we have instead, once again, is a common, if

---

[326] The tribunal consisted of Andrew Berkeley (who seems to have been the primary target of the challenge), as well as Ian Meakin and Hans van Houtte.

[327] Samuel Johnson, supra n.74 at 31.

[328] See *Gulf Petro Trading Co., Inc.,* supra n.323, 512 F.3d at 746 (citing the Fouchard treatise), 747 citing van den Berg on the New York Convention).

[329] "It follows that it would be error--or at the very least, would be clumsy and inaccurate--for a tribunal to conflate the actual extraterritorial reach of a regulatory statute with the very different question of its own 'subject matter jurisdiction' to proceed." Rau, *The Arbitrator and "Mandatory Rules of Law,"* supra n.126 at 56-58 & fn.26; see also id. at 65 ("Courts with jurisdiction over the parties necessarily have to decide everything in dispute between them (or at any rate, everything that the plaintiff asks them to decide)"); text accompanying nn. 240-42 supra. Cf. Poulos v. Caesars World, Inc., 379 F.3d 654 (9th Cir. 2004)("we need not delve too deeply into the question of extraterritoriality as a jurisdictional matter; rather, we need only assure ourselves that a cause of action under our law was asserted here"; "whether the cause of action turns out to be 'well founded in law and fact' ... is beyond the scope of our threshold jurisdictional review").

Just this term the Supreme Court has again reminded us of this proposition---reprimanding a lower court which had dismissed a "foreign cubed" securities class action for lack of "subject matter jurisdiction," having concluded that § 10(b) of the Securities and Exchange Act of 1934 was not intended to apply extraterritorially to reach such cases. But "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case." Morrison v. Nat'l Australia Bank Ltd., 2010 WL 2518523 at *4

misleading, trope in which "lack of jurisdiction" is simply made to stand in for, "we're really not supposed to do this."[330]

And why not, precisely?

1. The starting point is simple enough. Assume that a lawsuit is brought on an underlying cause of action that happens to be identical to a claim already resolved in arbitration; assume also that everything is taking place within a single legal system, say the United States. In such a case of course immediate dismissal on the ground of *res judicata* would be proper.

2. If the plaintiff's suit is not on the "original merits"---but, say, is premised on misconduct in or around the arbitration committed by the prevailing party or the arbitrators---"wrongdoing" which has allegedly "tainted the arbitration proceedings" and caused an illicit award to be rendered[331]---then dismissal is equally appropriate. This is not strictly speaking a matter of *res judicata*,[332] but we are here on the familiar ground of impermissible "collateral attack": These are the domestic American arbitration cases, exemplified by the venerable decision in *Corey,* on which so much of the Fifth Circuit's analysis rests.[333]

(nevertheless "nothing in the analysis of the courts below turned on the mistake"; held, dismissal affirmed on the ground that the plaintiff had failed in any event to state a claim under Rule 12(b)(6)).

[330] See generally text accompanying nn. 240-42 supra.

[331] *Gulf Petro Trading Co., Inc.,* supra n.323, 512 F.3d at 750.

[332] See id. at 752: "There is simply more at work here than res judicata," since plaintiff's claim that respondent had "suborned the corruption of the panel, though certainly arising out of the arbitration proceedings, is not a matter that was decided in those proceedings").

[333] E.g., Corey v. New York Stock Exchange, 691 F.2d 1205 (6th Cir. 1982). Here an unsuccessful arbitrant sought to hold the NYSE liable for the conduct both of the arbitrators and of the NYSE's arbitration director; plaintiff challenged the selection of the tribunal as violative of the NYSE rules and asserted procedural irregularities preventing him from submitting evidence and causing hearings to be postponed over his objection. Summary judgment was rendered against him both on the grounds of arbitral immunity ("to the extent [the] complaint may be construed to allege wrongdoing by the arbitrators for which the NYSE is liable"), and on grounds that § 10 of the FAA "provides the exclusive remedy for challenging acts that taint an arbitration award" (to the extent the complaint may also be construed as alleging wrongdoing, "compromis[ing] the arbitration award thereby causing him mental anguish and physical problems," by the arbitration director for which the NYSE is liable). "The issues raised by [plaintiff's] complaint could have been resolved by timely pursuit of a remedy under" § 10; the three-month notice requirement in § 12 "is meaningless if a party to the arbitration proceedings may bring an independent direct action asserting such claims outside of the statutory time period."

See also Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 205 F.3d 906 (6th Cir.2000)(lawsuit was filed by the claimant in the original arbitration against the respondent, seeking damages for "tortious interference with contract" and alleging that the respondent had "improperly interfered with the arbitration when one of its wholly owned subsidiaries hired the chairperson of the arbitration panel to act as a closing agent for various real estate transactions"; held, motion to granted; because the plaintiff " chose to attack collaterally the arbitration award in violation of the FAA, she fails to state a claim upon which relief may be granted").

3. Now in both of these cases, the FAA provides a single mechanism by which the legitimacy (that is, both the validity, and the claim to recognition) of awards can be challenged---the motion to vacate; it therefore makes some sense to hold that the statutory scheme may not be circumvented by collateral litigation raising claims that could have been heard in a § 10 action. Indeed there is authority to the effect that after the § 12 three-month period for seeking vacatur has run, a party may no longer even oppose confirmation of the award, despite the fact that a legitimate ground for denial of confirmation might otherwise exist.[334]

4. Now let's consider the---very different---situation in which the interests of "co-archical" legal systems are implicated: Here we are talking about the transnational cases which are the subject of this paper. As we have seen throughout, the architecture of the Convention presupposes that supervisory authority over the legitimacy of foreign awards is to be *shared*: So, for example, where an award has been rendered in the state of "primary jurisdiction," the losing party may not of course seek to have it vacated elsewhere[335]---but he may naturally resist enforcement in all other states on art. V grounds. No one will claim with a straight face that by doing so, the respondent is engaging in any sort of impermissible "collateral attack" on the award[336]---no one could argue that "it would seriously undermine the functioning of the Convention if the fact that the opportunity for judicial review of an award in the primary jurisdiction has passed could open the door to otherwise impermissible review in a secondary jurisdiction."[337] It follows that---in total contrast to the cases we started with—in "secondary jurisdictions," the failure of the aggrieved party to obtain vacatur at the seat may be interesting, but can hardly be conclusive.

5. In *Gulf Petro* itself there was apparently no occasion for the prevailing party---who was after all the respondent---to seek execution in the U.S.: But suppose the

---

[334] See, e.g., *Florasynth, Inc.,* supra n.29 ("the role of arbitration as a mechanism for speedy dispute resolution disfavors delayed challenges to the validity of an award"; after the three month limitations period has run "the successful party has a right to assume the award is valid and untainted, and to obtain its confirmation in a summary proceeding**");** see also Romero v. Citibank USA, Nat. Ass'n, 551 F.Supp.2d 1010 (E.D.Cal.,2008). By contrast the Restatement quite sensibly takes the position that "because the differences in statutes of limitation for vacatur and confirmation can create confusion and lay a trap for the unwary," a party may, despite *Florasynth,* resist confirmation on FAA Chapter One grounds of Convention awards made in the U.S., even if the time for affirmatively seeking vacatur has passed, at least where confirmation of the award was sought "under FAA Chapter One and within a year of its making." *Restatement,* supra n.25, § 5-3, Reporters' Notes, note c.

[335] See text accompanying n.20 & n.20 supra; see also n. 321 supra.

[336] Cf. Fifth Working Group Report (A/CN.9/246, March 6, 1984), *in* Holtzmann & Neuhaus, supra n.14 at 948 ¶130 (art. 34(1) of the UNCITRAL Model Law, "by presenting the application for setting aside as exclusive recourse against awards, appeared to disregard the right of a party under article 36 to raise objections against the recognition and enforcement of an award"; although "that right was exercised in reply to an initiative by the other party, the Working Group was agreed that for the sake of clarity, [art. 34] should make reference to that other type of recourse").

[337] Cf. *Gulf Petro Trading Co., Inc.,* supra n.323, 512 F.3d at 752.

respondent had sought, under § 207, abstract confirmation of the award in its favor? (Or suppose the parties had been reversed, or suppose there had been cross claims exposing the claimant also to liability?). In such cases, then, I should think the claimant's allegations of wrongdoing would constitute facially plausible grounds for the refusal of recognition, and would bring the challenge comfortably within the protection of art. V.

Suggestions to the contrary advanced on behalf of the respondent are incomprehensible.[338] Nor could it be seriously said in such circumstances that the claimant's exclusive recourse---in order to "rectify the alleged harm" it suffered---was instead to move to vacate the award in Switzerland.[339] As we have seen, any requirement that an aggrieved party must--- before challenging an award in a state of "secondary jurisdiction"---first exhaust his remedies by seeking annulment where the award was rendered, would simply be untenable.[340]

It is commonplace to observe that by contrast to the "universal" vocation of an order of annulment,[341] the effects of such a refusal of recognition under art. V would be purely local.[342] Nevertheless the fact remains that within any legal system where an

---

[338] Cf. Brief of Amici Curiae American Arbitration Ass'n and Swiss Arbitration Ass'n in Support of Defendants-Appellees, 2007 WL 5111115 at *8 (plaintiff's claims are "attempts to make an end-run around" the Convention; plaintiff's "tort suit is a tacit admission that the explicitly enumerated reasons for non-enforcement of arbitral awards under the New York Convention cannot be met in this instance"). But substantiated claims of bribery or even of "undisclosed dealings and ex parte communications" on the part of the arbitrators "casting doubt on their impartiality," would presumably justify non-recognition or non-enforcement under arts. V(1)(b), V(1)(d), or V(2)(b); see generally 2 Born, supra n.10 at 2803-04.

[339] Cf. *Gulf Petro Trading Co., Inc.,* supra n.323, 512 F.3d at 748 (discussing *Corey* and *Decker*, supra n.332; "this objective should have been pursued by filing a motion to vacate under the FAA"), 750 (similarly, under the Convention, "the proper method of obtaining this relief is by moving to set aside or modify the award in a court of primary jurisdiction").

[340] See n. 34 supra (as it would be both "anachronistic" and "burdensome").

Of course the plaintiff had indeed unsuccessfully sought to have the award annulled in Switzerland. Cf. *Gulf Petro Trading Co., Inc.,* supra n.323, 512 F.3d at 752 ("Gulf Petro has already had one opportunity to set aside the award in Switzerland, and now seeks a second opportunity"). But concededly, its current claims of bribery, and improper non-disclosure and ex parte contacts on the part of the arbitrators, had never been presented to a Swiss court--- and further review on such grounds might no longer be available there (apparently "a prerequisite to obtaining reconsideration" of the earlier Swiss judgment of confirmation was the initiation of "criminal proceedings against the arbitrators")---but never mind, too bad; for after all, "in the interest of finality, every primary jurisdiction undoubtedly will foreclose review of an award at some point." Id.

And what would be the situation if in their original arbitration agreement, the Texas and Nigerian parties had *waived any possibility of annulment proceedings in Switzerland altogether*? See generally n.21 supra. My impression is that (ironically) nothing whatever would have changed in the Fifth Circuit's decision; cf. *Gulf Petro Trading Co., Inc.,* supra n.323, 512 F.3d at 752 (the proposition "that the absence of *any* possibility of setting aside an award in the primary jurisdiction justifies removing the protection of the Convention from an award" is a view "almost unanimously rejected").

[341] See text accompanying nn. 34-41 supra.

[342] See 2 Born, supra n.10 at 2673-74 (except perhaps where a decision of non-recognition in one "secondary jurisdiction"---at least where it is based on the grounds set forth in art. V(1), applying "equally

award has been refused "recognition," all bets are now off: That means that the award---once set aside as a bar---cannot, at the very least, be interposed to prevent an entirely new arbitral proceeding; it also presumably means that if non-recognition was grounded, say, in the absence of any valid agreement to arbitrate---or where the option of new proceedings has been lost through lapse of time---there can be no obstacle to de novo judicial proceedings on the underlying cause of action.[343]

6. Now let's move to this hypothetical situation, which will bring us ever closer to the facts of *Gulf Petro* itself. Assume that the unsuccessful arbitrant, rather than passively waiting for the prevailing party to come after him, wishes to take the initiative: He may, perhaps, wish to assert his own claim for affirmative relief that had been unsuccessfully advanced in the course of the arbitration---in which case, when he brings suit on the claim in a state of "secondary jurisdiction," he is necessarily asserting that the award against him may not legitimately be raised as a bar.

   Take this rather striking example: A distributor's claim for premature termination has been arbitrated in Ontario under Ontario law: When the distributor later brings suit (say, in Belgium or the U.K.) seeking compensation under regulatory legislation that protects commercial agents, the respondent/licensor will obviously have an interest in using an award in his favor to defeat the claim---his case will be "that if the Distributor wished to challenge the Award then it should have done so" by moving to have it set aside "in the courts of Canada."[344] Nevertheless, implicit in the distributor's suit was the unimpeachable proposition that if the award indeed "offended a mandatory rule," it would "have to be refused recognition" and thus ignored by the courts of the forum.[345] Whatever the ultimate decision on the merits--

---

in all Contracting States"---may, under local law, have *res judicata* or collateral estoppel effect barring recognition in other "secondary jurisdictions").

[343] See Redfern & Hunter, supra n.54 at 438.

[344] This will I trust sound familiar; it is precisely what was said in *Gulf Petro,* see text accompanying n.324 supra.. The actual case referred to, though, is Accentuate Ltd. v. Asigra Inc., [2009] EWHC 2655 (QB) ¶ 7; the plaintiff's claim for compensation was brought under the Commercial Agents (Council Directive) Regulations 1993. On the similar Belgian legislation, see Rau, *The Arbitrator and "Mandatory Rules of Law,"* supra n.30 at 83-86.

[345] Accordingly, the precise holding in *Accentuate* was that since the distributor had made a "sufficiently arguable case" to that effect, then the stay of the distributor's suit should be lifted: If the mandatory regulations did indeed apply to the claim, then "the licensor will not be entitled to rely on the [award] as a defence to these proceedings." And for the moment at least "it has yet to be determined" that there exists an award which "can be recognized by this court" *Accentuate Ltd.,* supra n.344 at ¶¶ 95, 102.

Note that the grounds for the refusal of recognition implicit in the plaintiff's lawsuit fell neatly within art. V of the Convention---just as they did in *Gulf Petro* itself. Compare Slaney v. Int'l Amateur Athletic Fed., 244 F.3d 580 (7th Cir. 2001): Here, following an adverse arbitral award under IAAF auspices, a suspended athlete brought state law and RICO claims against the IAAF. The award was treated as having been "rendered" in Monaco; dismissal was affirmed---but only after an in-depth examination of the grounds contained in art. V convinced the court that it was "required to acknowledge the foreign arbitration decision." The contention that the plaintiff had been "denied the opportunity to present her

-and indeed, whatever the extent of deference owed to arbitral competence in the interpretation of contracts[346]---the notion of a jurisdictional bar erected solely to prevent some impermissible "collateral attack" on the award has no purchase here either.[347]

7. Nevertheless the *Gulf Petro* case is not---not quite---identical to the case hypothesized in ¶ 6 above. Concededly, the plaintiff's federal suit had sought to recover---not just the costs and expenses of a supposedly wasted arbitration----but also, notably, the *profits it "would have been awarded* had the panel rendered a fair

---

case" was addressed, but ultimately found to have "no merit" as this defense "need not apply when a panel employs a burden-shifting test in a fair manner." Id. at 593.

[346] See text accompanying n.289 & n.289 supra.

[347]The ability of a court in a state of "secondary jurisdiction" to entertain such actions, finds an obvious corollary---in the *inability* of a court at the seat *to enjoin challenges to recognition and enforcement* elsewhere. At the very least this would create an intolerable tension with the structure of art. V. Cf. *Shashoua v. Sharma*, supra n.43 at ¶¶ 40, 56: The precise terms of the injunction here prevented the defendant from bringing "any proceedings outside the jurisdiction that challenge, impugn or have as their object or effect the prevention or delay in enforcement by the claimants of an interim arbitration award." The court noted that it was of course "rightly accepted by the claimants that it is not open to this court to prevent the defendant from objecting to the recognition or enforcement of the [award] in a country where such recognition or enforcement is sought, on the limited grounds permitted by the [Convention]"; however, "I am not prepared to insert a general proviso to the injunction for fear that it would give rise to further arguments as to whether or not any application did truly fall within the ambit of Article V." Through what appears to be an excess of caution, leave to appeal this decision has been given---limited to the question whether an injunction is indeed "entitled to extend" to the point of preventing an aggrieved party from "defending in India or elsewhere under the provisions of [art. V] the enforcement or recognition of awards entered against him." [2010] EWCA Civ. 15 (C.A.) at ¶ 9..

Shashoua v. Sharma represents an admirably nuanced view of the question; cf. also *C.v. D.,* discussed at n.219 supra. By contrast, where Convention grounds for non-recognition have not been advanced---and where art. V is therefore not facially involved at all---common-law courts have been known to enjoin an unsuccessful arbitrant from relitigating the same dispute on the merits in a foreign jurisdiction. See text accompanying n.216 & n.216 supra; see also Karaha Bodas Co., L.L.C . v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111 (2nd Cir. 2007). Here a dispute arising out of a joint venture for the exploration and development of geothermal energy resources in Indonesia had given rise to a Swiss arbitral award against the Indonesian respondent; the award was confirmed in federal district court over the respondent's argument that the "resource and development estimates" which had been prepared by the claimant at the project's inception had been "fraudulent" and that this fraud was "such as to vitiate" the award." The respondent later filed suit in the Cayman Islands---a suit also "based on the theory that the Award was procured by fraud." An injunction against the Cayman Islands suit was thought justified: The claims raised in that action "have *actually been* litigated" in federal district courts in the U.S., which "finally resolved all the issues presented to them," and even if the suit had been brought in federal court it would not have been treated as an 'independent" action but instead as "a continuation" of the earlier federal proceedings. Id. at 122 fn.13, 123 fn.15, 126. To the same effect is Suchodolski Associates, Inc. v. Cardell Financial Corp., 2006 WL 10886 (S.D.N.Y.), aff'd, 261 Fed. Appx. 324 (2nd Cir. 2008)(plaintiffs' claim that lender had "abused its *de facto* control" of borrower in order to prevent it from making payments under loan agreement, was rejected by tribunal, and "this Court confirmed the award, including the panel's ruling on abuse of control"; held, an injunction to prevent plaintiffs from asserting the same abuse of control claim in Brazilian courts was necessary "to protect this Court's jurisdiction over the award and to prevent the frustration of policies favoring the arbitration of disputes").

award." But even if it could be demonstrated that the respondent was guilty of misconduct in procuring an illicit award, this would in no immediate sense be the appropriate measure of damages: Such a claim must strike us as overreaching because it impermissibly skips over any number of intermediate steps; obviously, what remained open---and what was not argued or addressed---was *the proper forum* for the adjudication of liability and damages even in the event the award should be set aside as a bar.[348] The case was in any event not argued on the basis that the claimant was seeking a *de novo* determination of the merits, and we certainly need not go so far in order to understand it.

It is possible, however, to treat the plaintiff's RICO claim somewhat differently---as an implicit challenge to the legitimacy of the arbitral process---that is, as if the plaintiff had sought, preemptively, to ask the court on art. V grounds merely to declare that the award was not worthy of recognition. The utility of such a remedy seems clear:[349] This is of course particularly true for a losing respondent, who is particularly vulnerable to the continuing effects of an unchallenged award hanging over him like a "sword of Damocles"[350] ---but even a losing claimant may have a

---

[348] See text accompanying nn. 342-43 supra.

In addition to its attempt to replicate in federal court the "proper" result from an "untainted" arbitration, the plaintiff had also sought damages for "reputational injury" and "lost business opportunities" that it supposedly suffered "as a consequence of not prevailing in the arbitration," *Gulf Petro Trading Co., Inc.,* supra n.323, 512 F.3d at 749. This of course is far too speculative and unforeseeable to be recoverable on any theory that can readily be imagined.

[349] See *Restatement,* supra n.25 at § 5-18, Reporters' Notes, note h ("the losing party may well have an interest in knowing, in advance of an enforcement action by the prevailing party, that the award is not deserving of recognition or enforcement"); Eric Loquin, "Perspectives pour une reforme des voies de recours," *in Perspectives d'évolution du droit francais de l'arbitrage,* supra n. 195 at 321, 328, 332 (the ability of a losing party to act on a precautionary or preventative basis, without waiting for attempts to enforce the foreign award against him, "is favored by many commentators, both practitioners and academics").

[350] See Bertrand Moreau, Note [to Soc. Acteurs auteurs associés (AAA) v. Soc. Herndale Film Corp., Trib. de grande instance de Paris, Nov. 22, 1989], [1990] Rev. de l'Arb. 693, 696, 698 (the losing party remains exposed to possible action, such as attachment, on the part of its "apparent creditor").

The "sword of Damocles" is an extremely common trope likely to appear also in American cases where a court has been asked to enforce the Declaratory Judgment Act, 28 U.S.C. § 2201; e.g., Japan Gas Lighter Ass'n v. Ronson Corp., 257 F.Supp. 219, 237 (D.N.J. 1966)(statute was "designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure - or never," permitting parties to sue for a declaratory judgment "once the adverse positions have crystallized and the conflict of interests is real and immediate"); cf. Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 433 F.3d 1199, 1218 (9th Cir. 2006)("Yahoo! contends that the threat of a monetary penalty hangs like the sword of Damocles. However, it is exceedingly unlikely that the sword will ever fall").

However, there is absolutely nothing in the *Gulf Petro* opinion to suggest that the court would have reached a result that was in the slightest degree different in the event the plaintiff there had been, not the losing claimant in the arbitration, but the losing *respondent*, against whom enforcement proceedings had not (yet) been initiated.

legitimate interest in clarifying legal uncertainty and in clearing away, in the forum, the barrier of an award that can be demonstrated to fall outside the Convention.[351]

8. Whether a plaintiff is entitled to seek this relief in the form of a declaratory judgment has not satisfactorily been tested.[352] At the very least, though, one can say this: Whenever his ability to do so is actually denied, the reasons seem contingent and uninteresting[353] ---and more often than not simply irrelevant.[354] To claim that art. V

---

[351] Cf. Volvo Construction Equipment North America, Inc. v. CLM Equipment Co., Inc., 386 F.3d 581 (4th Cir. 2004)(after terminating certain dealerships, Volvo asked for a declaration to the effect that it was not liable for breach of contract or for violation of any state statute, and also for "a declaration pursuant to the Lanham Act of trademark infringement, unfair competition and dilution," on the ground that it was "in objective apprehension of the improper use" of its trademark "or its ability to control its trademark")..

[352] See Rau, *The New York Convention in American Courts*, supra n.22 at 234, 241 fn. 116; cf. Indocomex Fibres Pte., Ltd. v. Cotton Co. Int'l, Inc., 916 F. Supp. 721 (W.D. Tenn. 1996)(English award; successful party moved to confirm and losing party filed "Motion To Vacate, Or In The Alternative To Prevent Enforcement" of award; court held it had jurisdiction to confirm the award and found no reason not to do so).

[353] Cf. Loquin, supra n.349 at 330 (what is most "delicate" is to determine, under the scheme of French procedural law, the appropriate tribunal to hear any such challenge: Should it be the Tribunal de Grande Instance? Or, more properly, the Cour d'Appel, which alone is charged with monitoring the validity of awards?); see also id. at 353 (discussion; intervention of Charles Jarrosson)(adding one further remedy would "multiply" the available mechanisms for challenging an award and thus would involve "dismantling the overall coherent structure" carefully designed by French legislation).

On the extent to which such contingent choices with respect to judicial organization may often drive national arbitration doctrine, cf. text accompanying nn. 207-210 supra.

[354] In Gerling-Konzern General Ins. Co.--U.K. Branch v. Noble Assur. Co., 2006 WL 3251491 (D.Vt.), the losing party had requested that an English award be vacated, an action that was clearly---and concededly--- beyond the power of the federal court. The movant was then obliged to suggest that the court view this request "as merely invoking [the court's] authority to decline to enforce or recognize the arbitral award." But the court declined the invitation on the ground that the Convention "does not confer jurisdiction upon this Court to decline to enforce or recognize an award in the absence of a proceeding either to compel arbitration or to enforce an arbitral award." That the prevailing party "seeks to fend off [the movant's] challenge to the validity of the arbitral award by invoking the [Convention's] provisions does not transform this proceeding into one to enforce an arbitral award. Id. at *4 fn. 5.

As I have written earlier, to the extent that a proposition like this purports to rest on the "plain language" of § 203, it represents an unnecessarily restrictive view of the jurisdictional reach of that section. (This is a subject we have already canvassed at excessive length in our discussion of *Solidere*, see text accompanying nn. 238 ff. supra). But it should in any event be irrelevant once we are satisfied that an independent source of federal jurisdiction in fact exists.

Now the *Gulf Petro* court did acknowledge the "possibility" that the plaintiff's claim might be "evaluated" on an alternative ground---and suggested one scenario that in fact comes rather close to what is posited in the text. Recall that in reality, the prevailing party in the arbitration saw no need to actually seek confirmation of the award in the U.S. at all: But suppose that one chose to recharacterize the parties' respective claims, and suppose that one chose to imagine that the defendant had in fact moved to have the award recognized under the Convention---"in which case" the plaintiff would, in turn, be allowed to "assert the specific defenses to recognition found in art. V." This, apparently, might have enabled the complaint to survive a motion based on lack of subject matter jurisdiction. It is all fictional, of course, and still seems unnecessarily tied to the notion of art. V as being nothing but a "shield," purely defensive and reactive. But what is striking is that the court, in a highly curious passage, refused even to take a step down this path: For the plaintiff's claims "related first and foremost to the alleged tainting of

may only come into play defensively---that is, only in circumstances where the prevailing party has actually attempted to enforce the award---is certainly not a view mandated by the language of the Convention[355]; allocation of power on the mere basis of a metaphor (for example, that of the "sword" and "shield") is rarely functional.[356]

It may seem somewhat extravagant to reconceptualize the *Gulf Petro* litigation in this way as nothing more than a request for a declaratory judgment. But going down that path would have at least one virtue: It would call on the court to engage in a fact-intensive and delicate exercise of judgment; it would call on it to weigh the prospect of hardship to the plaintiff (to the extent he is denied some sort of immediate remedy) against the value of avoiding premature decisions (to the extent the factual record may be sketchy, and where things may not have yet progressed to the point that the judge can know concretely what is at stake)---all this with a view to arriving at some sort of conclusion concerning the "prudential ripeness" of declaratory action.[357] Such a process might well have counseled that the plaintiff be allowed the usual opportunity, however ultimately ill-fated, to go forward with its allegations, however trivial. But that's hardly the point, is it? How comforting it would be to know that we are at least asking the right questions; on this playing field, the notion of a

---

the arbitration proceedings rather than the underlying contract dispute itself"; since that was the case, there is "more at work here than *res judicata*." Id. at 751-52; see n. 332 supra. I cannot begin to make the slightest sense of this: Yes, doubtless a request for recognition and enforcement under art. V will commonly encompass a claim that the award was a final determination of litigated matters (that is, is *res judicata* properly speaking). But at the same time it may go far beyond that; art. V more broadly is concerned with the extent of the preclusive effect to be given to illegitimate awards—and that is *precisely the challenge* posed by the plaintiff in *Gulf Petro.*

[355] Art. V(1) does provide that "recognition and enforcement of the award may be refused*, at the request of the party against whom it is invoked*, only if" that party demonstrates the presence of one of the grounds for refusal specified in that section. But surely too much weight cannot be borne by the word "invoked"? Note also that Art. V(2) does not contain the italicized language at all: The apparent intention is presumably to draw a distinction between grounds (under art. V(1)) that must be raised by the movant, and grounds (under art. V(2) that the court may raise sua sponte—there is no apparent intention to regulate the permissible timing of the objection. Cf. also *Soc. Acteurs auteurs associés (AAA),* supra n.350 (art. V is not a barrier to declaratory relief, since art. III makes it clear that the Convention does not purport in any way to interfere with the usual internal rules of procedure of the state where the award is relied on).

[356] French courts have held that an action claiming merely that the court "lacks jurisdiction" is not admissible [*recevable*]; a plaintiff may not bring a suit solely for the purpose of challenging the territorial jurisdiction of the court to which he has submtited his case. Apparently this is thought not to be "formalistic" in the slightest---for after all, "there are actions and [then there are] defenses." Emmanuel Jeuland, *Flashairlines* and Declaratory Relief Under French Law, http://conflictoflaws.net/2008/flashairlines-and-declarartory-relief-under-french -law (April 1, 2008).

[357] See *Yahoo! Inc.,* supra n.350 at 1205. Here the plaintiff sought a declaratory judgment to the effect that "interim" orders of French courts, requiring Yahoo! France to remove certain links and to post certain warnings, "are not recognizable or enforceable in the United States." The court held that the suit was not "ripe." Note that in the curious alignment of the parties here, the *plaintiff* was insisting that it "continues to be in serious violation" of the French orders, while the defendants---at whose request the French orders had been issued---were insisting that Yahoo! was fact "substantially complying" with those orders.

"jurisdictional" bar---the notion of some imagined inability to interfere with the prerogatives of the state of "primary jurisdiction"---must seem very faint and distant indeed.

V. Conclusion

This last point returns us to the main theme of the present paper---and so, a conclusion should only be necessary here for the benefit of the terminally inattentive. We have canvassed the various fact patterns in which the traditional allocation of international competence on the basis of "primary" and "secondary" jurisdiction might possibly be deemed useful: For example as we have seen, it appears to be the heuristic of choice to test the extraterritorial effect of an award, in circumstances where the agreement of the parties has subjected the arbitral process to a particular legal system whose own courts have found it lacking in legitimacy. All this is much controverted, but generally well understood.

But on occasion an American court may be asked to deploy familiar procedural devices---a preliminary injunction, say, or a declaratory judgment---in aid of its nationals; in these cases, it may be claimed, some safety valve may be necessary for the exceptional situation where the plaintiff thinks he can demonstrate the absence of true assent, or the misconduct of a tainted tribunal. And at this point the courts begin to be curiously mesmerized by a rhetoric invented for quite different purposes. What began as merely a tentative organizing principle for the allocation of power becomes a shibboleth. What purports in cases like *Solidere* and *Gulf Petro* to be a commendable solicitude for the needs of the institution of international arbitration, takes the form---in apparent dread of any sense of nuance---of an abdication of any decision making power whatever, in favor of the arbitral tribunal and the courts of the seat.

It is not as if federal courts entirely lacked alternative weapons in their arsenal to dispose at preliminary stages of frivolous litigation: Why then the perceived need, whatever the merits, to erect a "jurisdictional bar" to "choke off post-arbitration litigation at the earliest posssible moment"?[358] Even a legal system quite committed, for example, to the proposition that attempts to evade the arbitral process are likely to be quite without merit---or for that matter to the proposition that international neutrals cannot possibly be corrupt---need not shrink, on the prophylactic grounds of lack of power, from testing any challenges.

[358] *Gulf Petro Trading Co., Inc.,* supra n.323, 512 F.3d at 753.