



## Symposium Essay: The Transnationality of International Commercial Arbitration Awards

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*'This essay will discuss whether or not an arbitral award in an international commercial arbitration can be considered to be transnational in the sense that it is not controlled by the law of the country where it was given (i.e. it is anational, that is, detached from any national legal system)'*

### Introduction

This essay will proceed by first discussing what is known as the delocalisation debate: whether an arbitral award in an international commercial arbitration is or is not controlled by the law of the country where it was given – in essence whether such an award is 'anational' (i.e. detached from any national legal system)<sup>1</sup> and can accordingly be considered to be purely transnational in its nature<sup>2</sup>. Following on from this general discussion of the nature of the award, the delocalisation debate will be discussed in the context of enforcement to determine whether such an award can ever be considered to be truly 'anational' (i.e. purely transnational) in practice. It will be argued that regardless of the conclusion reached in respect to the possible anational character of awards, the fact that an award which has been set aside by a court at the seat of the arbitration can be enforced in certain countries, and that such setting aside is not a mandatory ground for refusal of enforcement, undermines arguments which attempt to dismiss delocalisation outright. Accordingly, it will be submitted in conclusion that in today's world, the extent to which an international commercial arbitral award will be anational is largely determined by the State in which enforcement is sought and thus while this conclusion is broadly encouraging of transnationality in the international commercial arbitration

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<sup>†</sup> This paper is dedicated to my late Grandmother Lily who passed away during my time at Oxford University when I was first learning about delocalisation & transnational commercial law. I would like to thank Oxford University Professors Krebs & Vogenauer and Lowe QC for their truly enlightening courses on transnational commercial law and international dispute settlement respectively. I would also like to thank Professor Nottage of Sydney University for teaching me the fundamentals of transnational commercial law during my undergraduate studies and also Professor Wrbka of Kyushu University for his assistance with getting this article published. I would also like to thank my college classmates during my time at Oxford – Max, Jess & Jason for all the great memories and laughs both in and out of class.

<sup>1</sup> See generally Rensmann, T., 'Anational arbitral awards – legal phenomenon or academic phantom?' (1998) 15/2 *Journal of International Arbitration* 37.

<sup>2</sup> For discussion of the concept of transnational law in this context see Goode, R., 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17 *Arbitration Int* 19.

context, it does reflect the more fundamental problem of transnational law being dependent on State sanctioning / recognition for its validity<sup>3</sup>.

## The Delocalisation Debate

The question of whether an arbitral award in an international commercial arbitration is, or can ever be, anational (i.e. detached from any national legal system) and thus not controlled by the law of the country where it was given is commonly referred to as the 'delocalisation' debate. The idea of an anational award has found particular support in continental Europe which is largely where the majority of delocalisation proponents reside<sup>4</sup>. Early proponents of the theory argued that international commercial arbitration awards were entirely anational not only in terms of their creation and existence but in terms of their enforcement such that the courts of an enforcing State should not have had a say in respect to the validity of such awards<sup>5</sup>.

One State which initially maintained this view was Belgium. By its law of 27 March 1985, Belgium added a provision to Article 1717 of the *Belgian Code Judiciaire* which held that a losing party was not permitted to challenge in the Belgian courts an award made in an international arbitration held in Belgium, unless at least one of the parties had a place of business or other connection with Belgium (i.e. if the parties were both international then so too would be the award)<sup>6</sup>. This law unfortunately had the opposite effect of that desired in that international commercial arbitration avoided Belgium as the seat of arbitration. This example highlights that the majority of international parties that use arbitration to resolve their disputes prefer some form of judicial review and supervision grounded in the laws of the *lex arbitri* (the laws of the seat of arbitration), especially in terms of enforcement and in the form of providing 'legitimacy' to their award<sup>7</sup>.

Today, a more restrained version of delocalisation is touted by its proponents who argue that instead of a dual system of control, first by the *lex arbitri* and then by the courts of

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<sup>3</sup> A problem which is arguably reflected in other related areas, particularly the *lex mercatoria* for example. For an introduction to the concept of the *lex mercatoria* please see Mustill LJ, 'The New *Lex Mercatoria*: the First Twenty-five Years' (1987) 4 *Arb Intl* 86 before turning to Goode et al, *Transnational Commercial Law: Text, Cases & Materials* (2007) Oxford University Press, United Kingdom.

<sup>4</sup> Goode et al, *op. cit.*, 621-686.

<sup>5</sup> See Collier & Lowe, *The Settlement of Disputes in International Law* (New Ed, 2002) Oxford University Press, United Kingdom at 232-234 regarding the development of the delocalisation debate; Greenberg et al, *International Commercial Arbitration: An Asia-Pacific Perspective* (2011) Cambridge University Press, Australia at 68-70.

<sup>6</sup> Closer to home, Malaysia's former arbitration law had similar properties. As noted by Greenberg et al, prior to 2005, "where the seat of arbitration was in Malaysia and the parties had chosen to adopt the Arbitration Rules of the Kuala Lumpur Regional Centre for Arbitration, the law did not permit any recourse at all from arbitral awards" (Greenberg et al, *op. cit.*, 75). This Asia-Pacific form of delocalisation was replaced by the Arbitration Act of 2005 which adopted the Model Law. Further commentary as noted by Greenberg et al can be found in Arfazadeh, H., 'New Perspectives in South East Asia and Delocalised Arbitration in Kuala Lumpur' (1991) 8(4) *Journal of International Arbitration* 103.

<sup>7</sup> See generally Blackaby et al, *Redfern & Hunter International Commercial Arbitration* (5<sup>th</sup> Ed Student Version, 2009) Oxford University Press, London at 3.80.

the State where enforcement of the award is sought, there should be only one point of control – that of the place of enforcement<sup>8</sup> and accordingly that an international commercial arbitration award is anational (detached from its legal system of origin) in terms of its creation and existence; it is this view of delocalisation which will be adopted for the remainder of this discussion. The reference to ‘detachment from any national legal system’ is adopted here to refer to the creation and existence of the award, not its enforcement.

This view of delocalisation acknowledges the necessary role that State judiciaries play in the enforcement of awards and argues that such judicial interference is justifiable, provided the award itself is free from the shackles of its curial birthplace (and thus the anational character of the award is not in and of itself compromised). The emphasis in the delocalisation literature is accordingly very much focused on ‘the importance of the autonomy of the parties, the private, consensual nature of arbitration and the fact that arbitrators are not judges in State courts and, consequently, have greater flexibility and freedom than their judicial counterparts’<sup>9</sup>. A key reason for such detachment in the view of delocalisationists is that the seat of arbitration (the *lex arbitri*) is of little or no significance because it is chosen for reasons of ‘geographic appropriateness’ or for reasons of neutrality and not because its law was thought by the parties to be suitable for international commercial arbitrations<sup>10</sup>.

Despite the above, powerful arguments not only of principle but also of policy can be made against delocalisation<sup>11</sup>. It can be argued that ‘the freedom to settle disputes by arbitration is a concession, a derogation from the monopoly claimed by the State in the administration of justice; and the concession is made subject to such conditions, including the supervision and regulation of arbitral proceedings by the local law, as the State may choose’<sup>12</sup>. Furthermore, as noted by Goode, while it is doubtlessly true that considerations of neutrality and convenience feature prominently in the choice of the place of arbitration, it is difficult to believe that parties to international commercial arbitrations pay no regard at all to the quality of the law administered in the place in which the arbitration is to be held<sup>13</sup>. If this were different, there would be little need for the parties to be able to specify the curial law but still have arbitrations in another location (as is provided for in the *UNCITRAL Model Law on International Commercial Arbitration* 1985 at Article 20(2) for example). The example of the Belgian experience also serves to reinforce the point that parties to international commercial arbitration wish

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<sup>8</sup> See Greenberg et al, *op. cit.*, 68-70.

<sup>9</sup> Paulsson, J., ‘Delocalisation of International Commercial Arbitration: When and Why It Matters’ (1983) 32 *ICLQ* 53.

<sup>10</sup> A view which is in stark contrast to that possessed by traditionalists as explained by Ball who understand Arbitration as “not a separate, free-standing system of justice... [Arbitration] is a system established and regulated pursuant to law, and it necessarily bears a close relationship to a nation’s courts and judicial system” (Ball, M., ‘The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration’ (2006) 22 *Arbitration International* 73 – as cited in Greenberg et al, *op. cit.*, 67). See further Goode et al, *op. cit.*, 621-686.

<sup>11</sup> See McKendrick, E. (Ed), *Goode on Commercial Law* (4<sup>th</sup> Ed, 2010) Penguin Books, London at 1317-1320; see also Goode et al, *op. cit.*, 621-686.

<sup>12</sup> Collier & Lowe, *op. cit.*, 229-234.

<sup>13</sup> Goode et al, *op. cit.*, 621-686.

for the *lex arbitri* to play a role not only in validating the authenticity of their arbitration but also in being able to provide support for the arbitration (i.e. by design the parties do not wish for their arbitral award to be entirely ‘anational’ otherwise such procedures as interim injunctions available through the *lex arbitri* would not be available).

There are also strong policy reasons for disputing the existence of truly anational awards. Delocalisation not only hinders finality but also fails to avoid multiple-jeopardy (in that a party can be subject to the same enforcement dispute in multiple jurisdictions), which undermines what is considered to be the core of international commercial arbitration – economic efficiency. Delocalisation also fails to respect the well-established principle of estoppel and gives rise to the strong possibility of conflicting decisions of different foreign courts (as can be seen in the *Hilmarton*<sup>14</sup> and *Chromalloy*<sup>15</sup> cases – discussed further below). More generally, it has been argued by commentators such as Goode, that the main basis for delocalisation has disappeared in that the hostility formerly present in many local courts to arbitration and the excessive jurisdiction asserted over arbitrations in the past has disappeared as state after state has departed from its traditional arbitration rules and enacted legislation along the lines of the UNCITRAL Model Law which reserves a place for the *lex loci arbitri*<sup>16</sup>.

On the basis of the above, it may be argued that parties may not simply by their own agreement free themselves of the mandatory provisions of the *lex arbitri* and that an award cannot (or more rightly should not) ever be entirely anational. This is argued to be the case even at a fundamental level as for an award to even be recognised as ‘anational’ (delocalised) it requires the permission (recognition) of the law of the *lex arbitri*. The proper interpretation of the award then, it is argued, is that while an award can never be entirely anational, experience shows that the sphere of influence of the provisions contained in the *lex arbitri* are steadily diminishing in scope<sup>17</sup>. Despite this shrinking of influence however, the debate is likely to continue to rage as to the necessity for State recognition in order for transnational law to be valid (or considered to be law in the traditional sense). A debate which was reflected in the arguments between panellists at the 7<sup>th</sup> Annual Kyushu University International Law Conference<sup>18</sup>, where assertions for the validity of transnational law in and of itself swung back and forth from requiring the recognition of sovereign States for validity to being *sui generis* and entirely separate from State jurisdiction.

Despite this rather strict conclusion however, reality reveals a more convoluted picture. It is arguable that whether an award will be anational in practice is largely dependent on where the award is sought to be enforced. This point is most clearly highlighted by the fact that an award which has been set aside by a court of the seat of arbitration will not

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<sup>14</sup> *Hilmarton Ltd v Omnium de Traitement et de Valorisation* (1995) XX Ybk Comm Arb 663; XXI Ybk Comm Arb 524; (1997) XXII Ybk Comm Arb 696. See generally Blackaby et al, *op. cit.*, 11.92.

<sup>15</sup> *Arab Republic of Egypt v Chromalloy Air Services* (1997) XXII Ybk Comm Arb 691. See generally Blackaby et al, *op. cit.*, 3.86.

<sup>16</sup> Goode et al, *op. cit.*, 621-686.

<sup>17</sup> Collier & Lowe, *op. cit.*, 229-234.

<sup>18</sup> Kyushu University 7<sup>th</sup> Annual International Law Conference, *Regulatory Hybridization in the Transnational Sphere* (11 & 12 February 2012) Nishijin Plaza, Fukuoka, Japan.

necessarily be a ground for refusing to enforce the award in another country (i.e. some jurisdictions may choose to disregard the *lex loci arbitri*).

### Enforcement of an Annulled Award

One of the key sources which supports the restrained delocalisation argument discussed above is contained in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention')<sup>19</sup> (although this is not by design<sup>20</sup>). Article V(1)(a) allows a court in the Contracting State in which enforcement is sought to refuse enforcement if the award is set aside (annulled) under the law of the country where the award was made. The crucial word here is 'may', which allows a Contracting State's court the discretion of whether to enforce an award which has been set aside at the seat of the arbitration – some jurisdictions such as Italy and the Netherlands will refuse to enforce such an award (recognition of an annulled award is prohibited under their domestic law) whereas jurisdictions like France view awards as stateless and existing independently of the *lex arbitri* and pay no mind to annulment at the seat of arbitration<sup>21</sup>. This discretion supports the argument that an award may be anational (i.e. the award is not controlled by the law of the country where it was given) and that such a setting aside will not be a ground for refusing to enforce the annulled award. The French Courts are particularly known for this approach. A couple of French cases will serve to illustrate the point.

In the *Hilmarton* case, the Cour de Cassation essentially held that judgments of the court of origin setting aside an arbitral award were of no consequence in France as an international commercial arbitration award, though made in a particular state (in this case Switzerland), was not itself integrated into the legal system of that State. The Cour de Cassation on this basis found such awards to be truly 'international' and thus enforceable in France despite their annulment by the court in the State of the award's origin<sup>22</sup>. The Paris Court of Appeal in *Chromalloy* also held that "the award [in this case is]... by definition an international award... [and] is not integrated into the legal order of that State so that its existence remains established despite it being annulled"<sup>23</sup>. In the *Chromalloy* case, the French court was only prepared to refuse enforcement if the award went against international public policy (not the domestic public policy of France or the public policy of the seat of arbitration<sup>24</sup>). This refusal further highlights the French view of the 'anational' character of an international commercial arbitration award. This

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<sup>19</sup> This is especially so when it is considered that the vast majority of the world's major and minor countries are parties to the Convention. See further Greenberg et al, *op. cit.*, 72-78.

<sup>20</sup> Commentators such as Goode have strenuously argued that the New York Convention was not intended to be interpreted to support delocalisation (see McKendrick, M. (Ed), *op. cit.*, 1318-1319; Goode et al, *op. cit.*, 621-686).

<sup>21</sup> See Blackaby et al, *op. cit.*, 11.92 and onward; Greenberg et al, *op. cit.*, 72-78; McKendrick, M. (Ed), *op. cit.*, 1319.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Arab Republic of Egypt v Chromalloy Air Services*, *op. cit.*, 692-693. See generally Blackaby et al, *op. cit.*, 11.157.

<sup>24</sup> For further discussions on public policy in this context see Blackaby et al, *op. cit.*, 11.103-11.120.

judicial view is cemented in the newly amended Article 1514 of the *French Code of Civil Procedure* by Decree No. 2011-48 of 13 January 2011.

## Conclusion

In conclusion, it is submitted that despite the view of the rest of the world and regardless of the strength of the arguments against delocalisation (both in principle & practice and in terms of policy), if an international commercial arbitral award is sought to be enforced in France (or another jurisdiction adopting a similar position), it will be treated as being anational. Accordingly, it can arguably be said that depending on the State where enforcement is sought, an international commercial arbitration award may not be controlled by the law of the country where it was given but is indeed anational and detached from any national legal system which gives birth to its existence – an argument which is supported by the fact that an award which has been set aside by a court at the seat of arbitration is not a ground for refusing to enforce it in another country (as per the New York Convention). This does not however mean that the award is entirely separated from State jurisdiction however and is thus ‘purely’ transnational as the enforcement on the award will still depend on State recognition for its validity, which reflects the broader problem of transnational law being tied to sovereign States for its validity and recognition. As noted, this is a problem which was unable to be resolved at the 7<sup>th</sup> Annual Kyushu University International Law Conference and is likely to be a continued thorn in the side of the recognition of transnational law as being truly ‘anational’ not only in the context of international commercial arbitral awards but across all legal spheres where it exists<sup>25</sup>.

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<sup>25</sup> Regardless of whether awards will ever truly be ‘anational’, it is agreed with Greenberg et al that at least the delocalisation debate has had the positive effect of decreasing the level of court interference at the seat of arbitration thus ensuring the greater success and utilisation of international arbitration along with having the additional side benefit of reducing the application of otherwise irrelevant local mandatory laws (Greenberg et al, *op. cit.*, 79).