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The Transient and the Permanent in Arbitration

William Park

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> He who would confine his thought to present time will not understand present reality. (Jules Michelet, 1798–1874)[1]

Several years ago, Jan Paulsson observed that Derek Roebuck might substitute for a time machine, providing a way for us to voyage backward with a guide to put everything in context.[2] Indeed, the great Derek Roebuck, to whom we dedicate this set of essays, gave much of his professional life to making sure that by receiving a glimpse of dispute resolution in earlier times, we might have an opportunity better to understand the reality of present-day arbitration.[3]

Arbitration's history reminds many observers of the primordial Greek sea god Proteus, who could alter his shape at will, notwithstanding that his divine substance remained the same. Proteus reinvented himself by

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1. 'Celui qui veut s'en tenir au présent, à l'actuel, ne comprendra pas l'actuel'. Introduction to Jules Michelet, *Le Peuple* (1846), at xvii. In his study of the French working class on the eve of the 1848 Revolution, Michelet recounts his own origins, assisting at his father's printing press. According to the author, his origins of 'The People' led to a deeper understanding of their present condition. On that personal note, Michelet continues with the general observations about our need to go beyond present time in order to understand present reality.

2. Jan Paulsson, Book Review of Derek Roebuck, 'The Golden Age of Arbitration: Dispute Resolution under Elizabeth I', (2015) 31 *Arbitration International* 519. Paulsson wrote, 'We do not have a time-traveling machine, but those of us who take an interest in the antecedents of modern arbitration have Derek Roebuck, and that is even better: not only a way to voyage back in time, but a guide who puts everything brilliantly in context.'

3. His studies include *The Charitable Arbitrator: How to Mediate and Arbitrate in Louis XIV's France* (2002); *Roman Arbitration*, with Bruno de Loynes de Fumichon (2004); *Early English Arbitration* (2008); *Ancient Greek Arbitration* (2010); *Disputes and Differences* (2010); *Mediation and Arbitration in the Middle Ages: England 1154 to 1558* (2013); *The Golden Age of Arbitration: Dispute Resolution Under Elizabeth I* (2015); *Arbitration and Mediation in Seventeenth-Century England*; *English Arbitration and Mediation in the Long Eighteenth Century*, with Francis Calvert Boorman and Rhiannon Markless (2019). (All published Oxford: HOLO Books: The Arbitration Press.)

adapting to new circumstances, while remaining unchanged in essence. Likewise arbitration's outward shape undergoes alterations when examined through the lens of the trappings of legal culture in each age.

The essence of arbitration has remained remarkably unchanged over the years. Parties consent to binding dispute resolution pursuant to agreements that waive jurisdiction of otherwise competent courts, in favour of adjudication by decision-makers chosen, directly or indirectly, by protagonists of the relevant controversy. National judicial power may be invoked to recognise an arbitral award, or in some instances, to annul an award for gross procedural defects. The merits of the parties' dispute, however, remain in the hands of the arbitrators.

This protean nature gives arbitration elements both transient and permanent,[4] as illustrated by a long-standing problem: how to treat arbitration awards annulled under national statutes, but presented for enforcement in another country. The difficulty arises in the context of the proverbial 'regretted choice' for merchants who agree to arbitrate but later (having lost their case) give way to second thoughts.

Decades of divergent reactions to this conundrum provide a miniature time machine that might have delighted Derek. To illustrate, one might take a cross-border sales agreement subject to an arbitration clause, with an award made in England but presented for enforcement in Paris or New York. Most agree that freely accepted obligations generally deserve respect. If a buyer in the United States promises to pay $100 for goods imported from France, the purchaser should make payment absent some good reason. Who is to determine whether a 'good reason' does in fact exist? The American buyer might say the merchandise was defective. The French seller maintains the product was perfect. Does the matter go to courts of the United States or to courts of France? Or to some transnational body, such as an arbitral tribunal in London?

In the search for a fair and certain forum, a common solution would be arbitration, at least for international transactions like the one above. To pursue matters further, let us assume the controversy goes to arbitration in London, as agreed to by both sides. The arbitral tribunal decides in favour of the French seller/exporter: the goods were indeed up to the contractually stipulated quality and the American buyer owes money for failing to pay. Let us posit further that, rightly or wrongly, an English court at the seat

4. The phrase 'transient and permanent' seems first to have appeared in a sermon by the New England preacher Theodore Parker, delivered at the ordination of Charles Shackford in the Hawes Place Church in Boston in May 1841. Theodore Parker, 'The Transient and Permanent in Christianity', in *The Transient and Permanent in Christianity* 447 (George Willis Cooke ed., 1908), 447. An early Unitarian, Parker unsettled much of his community by suggesting that the message of Jesus was valuable solely because of the truth it revealed, not due to any divine credentials of the one who delivered the revelation.

of the arbitration vacates the award due to violation of a provision of the English Arbitration Act.[5]

When the French winner under the award (now annulled) seeks to have the award enforced by attaching the American company's assets in New York and in Paris, those enforcement courts will need to decide whether to give effect to the arbitral award itself, which says that damages must be paid, or to the English court judgment setting aside the award, thus relieving the American buyer of its obligations pursuant to the arbitration.

What is to be done? Award enforcement implicates one of the most successful instruments of international law: the 1958 United Nations (or 'New York') Convention,[6] now signed by 166 States ranging from Afghanistan to Zimbabwe. The Convention provides for recognition of foreign arbitral awards, but with some significant caveats, in particular concerning awards annulled in their country of origin. These caveats have been applied differently by courts in France, the United Kingdom and the United States. Indeed, the Convention's language has been applied differently even within the United States, with divergence derived not from any perversity of judges but from good faith variants in perspectives on how to construe the treaty.

The battle plays itself out, in part, through Article V(1)(e) of the Convention, the application of which triggers different results depending on whether the word 'may' is read as conveying (a) permission, or (b) expectation, a matter that sometimes depends on the context of the case, or on which of the five official language versions gets consulted.[7]

The English version of that provision reads:

> Recognition and enforcement of the award *may* be refused [emphasis added], at the request of the party against whom it is invoked, only if that party furnishes proof that … the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[8]

5. The 1996 Arbitration Act might permit annulment, for example, due to a perceived procedural irregularity as enumerated in section 68 of that Act. Or, an award in some instances may be set aside following an appeal under section 69 on a point of law, in this context defined by section 82 to include the law of England and Wales.

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations Treaty Series, vol. 330, no. 4739.

7. Convention Art XVI(1) says that the treaty's Chinese, English, French, Russian, and Spanish texts are 'equally authentic'. On the comparison of treaty texts with different meanings, see Art 33(4) of the Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155, no. 18232, at 331, which provides for adoption of the 'meaning which best reconciles the texts, having regard to the object and purposes of the treaty'.

8. The careful reader will note that the permissive 'may' in the English text of the Convention ('recognition … may be refused') leaves open more than one meaning. The verb 'may' could

By contrast, the French text lends itself to a more forceful interpretation that could mandate deference to the annulment court decision:

> La reconnaissance et l'exécution de la sentence ne seront refusées, sur requête de la partie contre laquelle elle est invoquée *que si* [unless] cette partie fournit la preuve que la sentence … a été annulée ou suspendue par une autorité compétente du pays dans lequel ou d'après la loi duquel la sentence a été rendu.

The direct English translation of that French text would read as follows: 'Recognition and enforcement will not be refused … *unless* [*que si*] … the award was annulled or suspended by a competent authority of the country in which, or under the law of which, that award was made.'

Absent from the French text is a notion of discretion in the recognition forum, conveyed by 'may' in English. Rather, the 'unless' [*que si*] combined with the future indicative tense (recognition will not be refused) normally compels an expectation of non-recognition of the annulled award.[9]

Judges in the United States have taken a mixed approach, sometimes deferring to the judiciary at the arbitral seat, enforcing an annulled award,[10] while in other instances enforcing an award notwithstanding *vacatur* in

contemplate equally viable options, as in 'For dessert, you may choose vanilla ice cream or apple pie'. In the context of the Convention, however, the verb 'may' might hold a more forceful sense of expectation, as in 'You may worship according to your own conscience.' Indeed, the treaty context suggests an expectation of non-recognition if one considers the other listed items for which enforcement 'may' be refused as outlined in that Art V(1): refusal to recognise an award when there is no valid arbitration agreement, absent proper notice, if one side's right to present its case has been denied, when an award goes beyond the scope of the arbitration clause, or when the parties' agreement has been ignored in the composition of the arbitral tribunal. Would or should courts enforce awards not based on an agreement to arbitrate, or when one side was denied an opportunity to present its case? Reference to annulled awards sits squarely in the same coterie of grounds for non-recognition.

9. The mandatory (or expectation) tone in such a future indicative construction might be illustrated in a sentence such as, 'The scholarships will not be revoked unless ('la bourse ne sera révoquée que si…') the student is found guilty of cheating.' On the 'may' versus 'must' debate in relation to New York Convention Art. V, see, for example, Georgios Petrochilos, 'On the Mechanics and Rationale of Enforcing Awards Annulled in their State of Origin Under the New York Convention', (1999) 48 *Int'l & Comp. Law Q.* 858; Richard W Hulbert, 'Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone', 13 *ICSID Rev.* 124, 144 (Spring 1998); Jan Paulsson, 'May or Must Under the New York Convention: An Exercise in Syntax and Linguistics', (1998) 14 *Arb. Int'l* 227.

10. See, for example, the US federal court decisions in the following cases: *TermoRio S.A. v Electranta*, 487 F.3d 928 (D.C. Cir. 2007) (deferring to the annulment in Colombia of an award made in Bogotá); *Baker Marine v Chevron*, 191 F.3d 194 (2d Cir. 1999) (deferring to the Nigerian court *vacatur* of an arbitral award made in Lagos); *Thai-Lao Lignite (Thailand) Co. v Gov't of Lao People's Democratic Republic*, 864 F. 3d 172 (2d Cir.) (deferring to a Malaysian court judgment annulling an arbitral award made in Malaysia); *Bechtel v Dubai*, 300 F.Supp.2d 112 (D.D.C. 2004) and 360 F.Supp.2d 136 (D.D.C. 2005) (refusing to enforce an award annulled for failure to administer an oath invoking God Almighty as required by UAE law, at a time when the UAE had not signed the New York Convention).

its country of origin.[11] Much debate has focused on whether annulment should trigger universal effect, making an award unenforceable anywhere when presented for enforcement abroad where the losing side has assets, thus permitting a court at the place of arbitration to uproot an award once and for all.[12]

Notwithstanding the more forceful text in the French version of the New York Convention, jurists in France generally see the Convention as providing more leeway and discretion, with recognition of an annulled award proving the rule rather than the exception. French courts look to its Article VII, which provides that the treaty shall not deprive any interested party of a right to avail itself of an arbitral award in the manner allowed by the law where the award has been relied upon. The French judiciary thus gives effect to vacated awards under the national law of France, as enforcement forum.

Shifts of emphasis to notions of 'a-national' arbitration and 'international *lex mercatoria*' enter international disputes through national legal theory, espoused by French scholars such as Emmanuel Gaillard, Philippe Fouchard and Berthold Goldman.[13] The Gallic view received its most classic expression in the *Hilmarton* case.[14]

11. See *Corporación Mexicana De Mantenimiento Integral v Pemex–Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016). This *Pemex* decision recognised an award annulled at the seat in Mexico, pursuant to provisions of Mexican procedural law that had changed since the parties' initial agreement to arbitrate. In *Chromalloy v Egypt*, 939 F.Supp. 907 (D.D.C. 1996), an arbitral tribunal in Cairo gave damages to an American company for breach of a helicopter maintenance contract, in an award later vacated in Egypt for the tribunal's alleged failure to apply the correct law. In the United States, where the losing side had assets, the American court reasoned that error of law did not constitute a ground for *vacatur* in the United States, thus permitting award enforcement.

12. For some scholars, the New York Convention has been interpreted as containing an implicit understanding that the arbitral *situs* will monitor an arbitration's procedural integrity, in exchange for which other countries will recognise awards that pass muster where rendered. See W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration* 113–120 (1992). See also Albert Jan van den Berg, 'Annulment of Awards in International Arbitration', in R Lillich and C Brower, eds, *International Arbitration in the 21st Century* 133 (1994); W Laurence Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 *Tex. Int'l Law J.* 1.

13. See Philippe Fouchard, 'La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine', 1997 *Rev. Arb.* 329; Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *Traité de l'arbitrage commercial international* (Paris: Editions LITEC, 1996) ss. 270, 1595, 168789. For contrasting perspectives, see, for example, William W Park, 'Duty and Discretion in International Arbitration' (1999) 93 *Am. J. Int'l Law* 805; William W Park, 'Lex Loci Arbitri and International Commercial Arbitration', (1983) 32 *Int'l & Comp. LQ* 21; Jan Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why It Matters,' (1983) 32 *Int'l & Comp. LQ* 53; Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin', (1981) 30 *Int'l & Comp. LQ* 358; Emmanuel Gaillard, 'Enforcement of Awards Set Aside in the Country of Origin', (1999) 14 *ICSID Review (Foreign Investment Law J* 16.

14. *Hilmarton v OTV*, 1997 *Rev. Arb.* 376, note Ph. Fouchard; see, for example, Philippe

In the *Hilmarton* case, an arbitrator in Geneva had denied a claim for consulting fees to a consultant who had helped obtain a concession for drainage in Algiers, erroneously believing that the consultancy violated Switzerland's public policy. While there was no allegation of bribery, the consultant's activity purportedly offended an Algerian statute on commercial intermediaries. After a Swiss cantonal court vacated the award that had denied consultant's fees, on the basis that the arbitrator made a mistake in understanding that statute,[15] a new arbitral tribunal awarded damages to the consultant.

In France, both awards were recognised, each in a separate proceeding: first, the annulled award in favour of the defendant which resisted payment of the fees,[16] and then the award in the second arbitration in favour of the claimant consultant who won his fees.[17] Ultimately, the French *Cour de Cassation* held that the *res judicata* effect of the first judgment, recognising the annulled arbitral award, prevented recognition of the second award.[18] Given the different interpretations of the Convention, and the intricacies of national law, an arbitral award annulled in its country of origin could be presented for enforcement against assets in other countries with dramatically different results. Courts purporting to apply the very same treaty to the very same facts may come to diametrically opposed conclusions.[19]

Fouchard, 'La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine', 1997 *Rev. Arb*. 329; Jean-François Poudret, 'Quelle Solution Pour en Finir avec L'Affaire Hilmarton?' 1998 *Rev. Arb*. 7 (1998); Eric Schwartz, 'French Supreme Court Renders Final Judgment in the Hilmarton Case', 1997 *Int'l Arb. LR* 45; Georges Delaume, 'Enforcement Against a Foreign State of an Arbitral Award Annulled in the Foreign State', 1997 (No. 2) *Rev. droit des affaires int./Int'l Bus. LJ* 253; Jan Paulsson, 'Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment', 9 *ICC Bull*. (May 1998), at 14. For an earlier decision along these lines, see *Pabalk v Norsolor*, Cour de Cassation, 9 Oct. 1984, 1985 *Rev. Arb*. 431, note B. Goldman; (1985) 112 *J. Dr. Int'l* 679, note Ph. Kahn (award vacated in Austria enforceable in France).

15. The award was rendered in August 1988 and thus subject to challenge for 'arbitrariness' under Art 36 of the Intercantonal Arbitration Concordat. Upheld by the Swiss Tribunal fédéral, the Geneva court found that conflict with Algerian legislation did not constitute a violation of Swiss public policy. See 1993 *Rev. Arb*. 315 (Court de Justice du Canton de Genève, 17 Nov. 1989), 322 (Tribunal fédéral, 17 Apr. 1990). For awards rendered from 1989 onward, a different result would probably obtain under the Loi fédérale sur le droit internationale privé (LDIP).

16. Cour d'Appel de Paris, 1993 *Rev. Arb*. 300, relying on NCPC arts 1498, 1502, which do not include annulment where rendered as grounds for award non-recognition. The appellate court's judgment was upheld by the Cour de cassation, 1994 *Rev. Arb*. 327, with commentary by Charles Jarrosson; English translation in 9 *Mealey's Int'l Arb. Rep*., E-3 (May 1994); 20 *Y.B. Com. Arb*. 663. See, for example, Vincent Heuzé, 'La Morale, L'Arbitre et Le Juge', 1993 *Rev. Arb*. 179.

17. The Nanterre Tribunal de Grande Instance recognised the second award in a decision confirmed by the Versailles Cour d'Appel, 29 June 1995, 1995 *Rev. Arb*. 639.

18. 10 June 1997, 1997 *Rev. Arb*. 376.

19. For an interesting twist on competing views about the effect of arbitral awards rendered abroad, see *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Gov.*

Some observers might roll their eyes at the different results derived from nuances in wording and legal framework, including various connotations given to the verb 'may' in the English version of the New York Convention. Does justice and equity depend on such 'technicalities'? For better or for worse, it seems so, at least at present. For those in the thick of the action, the buyer and the seller in a commercial transaction, justice and equity depend on precisely such parsing of language. The seller who wins the arbitration will say, 'Where is the justice in denying the arbitrators' clear decision?' The buyer who has obtained annulment of the award will retort, 'Where is the equity in disregarding a ruling of the court?' Each seeks justification in a treaty which may allow more than one response.

General discussions of law take meaning only in concrete cases, some of which prove quite mundane, except to those whose welfare and fortunes remain in jeopardy. In the narrative set forth above, human rights include an entitlement to be paid (for the seller), just as State sovereignty (for the seller) implicates respect for the judicial decisions at the place of arbitration.

Looking forward, the transient aspects of arbitration can be expected to continue their evolution. Different parts of the world provide divergent legal frameworks for cross-border dispute resolution, whether in respect of statutory grounds for award *vacatur*, or for recognition of awards annulled pursuant to those statutes. The substance of arbitration, however, retains its core of permanence, resting on agreements that the merits of a dispute will be adjudicated by decision-makers chosen by the parties. This interaction of the permanent and the transient will enrich scholars and practitioners with challenges that Derek would have delighted to share.

of Pakistan [2011] 1 AC 763. The UK Supreme Court refused to enforce an ICC award made in Paris, in favour of a Saudi company, reasoning that under French law the Pakistani government was not bound by an arbitration agreement signed by a trust established by that government. A year later, however, a French court came to the opposite conclusion in rejecting an application to vacate the award in favour of the Saudi creditor, reasoning that the intervention in contract negotiations by officials of the Pakistani government meant that the State (not the trust) was in fact the true contracting party ('la véritable partie pakistanaise lors de l'opération économique'). See *Gouvernement du Pakistan contre Société Dallah*, Cour d'appel de Paris, 1ère Chambre, 17 février 2011, no. d'inscription 09/28533.