

The Role of the *Lex Loci Arbitri* in International Commercial Arbitration

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THIS ARTICLE is concerned with the role of the *lex loci arbitri* in international commercial arbitration¹ and the extent to which judgments or orders made by a court of one state² should influence a foreign court of another state in which the arbitral award is sought to be enforced. Much has been written about the concept of international commercial arbitration as an autonomous, anational institution, the procedures of which are not subject to the constraints of national laws. If any excuse is needed for adding yet more to the literature on the subject, it is its relevance to the future development of international co-operation in cross-border dispute resolution.

I. INTRODUCTION

(a) *The Genesis of the Autonomy Concept*

The relationship between courts and private tribunals has not always been as benevolent as it is today. In England the central courts for centuries jealously guarded their domain, watchful of encroachments on their jurisdiction. Even among the courts themselves there were strenuous turf battles as each sought to enlarge its jurisdiction at the expense of others. One unfortunate victim of this rivalry was commercial law, which lost much of its international character as the common law courts gradually usurped the powers of those institutions most responsive to external influences, notably the ecclesiastical courts, the courts of Admiralty and the merchant courts. Similarly, arbitration was for a long time viewed with disfavour, being seen as a private dispute settlement mechanism

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¹ That is, the procedural law of the state where such an arbitration takes place.

² Hereafter 'the court of origin'.

designed to oust the jurisdiction of the courts and to substitute private adjudication for public decision-making. This hostility to the private process of arbitration was not confined to English courts but was a widespread phenomenon.

However, every action prompts reaction. The stricter the controls, the more vehement the demand for liberation. Ultimately, in England as elsewhere, pressures from the commercial community were not to be denied. Fierce judicial opposition to arbitration gradually gave way to a wary acceptance, but under the closest judicial scrutiny, and it is only in the last half of the twentieth century (and in England, only in the past two decades) that courts have finally come to terms with the fact that parties to arbitration agreements want privacy, confidentiality and finality in the settlement of their disputes, and view judicial intervention in the arbitral process or in the review of awards as a measure to be taken only in exceptional circumstances. Since the parties had entrusted the determination of their dispute to an arbitral tribunal it was the arbitrators and the parties rather than the courts who should control the procedure, and it was not the courts but the arbitral tribunal which in the first instance should decide such matters as the validity of the contract in dispute and the extent of the tribunal's jurisdiction. Now we have gone further. Not merely have we adopted the principle that the arbitration clause is to be considered separate from the rest of the contract, so that the invalidity of the contract does not deprive the arbitral tribunal of jurisdiction, but our Arbitration Act 1996 provides that the tribunal may even adjudicate on the validity of the agreement to arbitrate.³

Though the Arbitration Act does not distinguish domestic from international commercial arbitration, it is the latter which has forced the pace of change. It is now almost universally accepted that disputes involving parties and arbitrators from different countries cannot be constrained by the same rules as govern courts. So in this country, as elsewhere, we now recognize that arbitrators are not bound by rules of procedure and evidence applied by courts; that they need not apply the conflict of laws rules of the forum to determine the applicable law and, in the absence of party choice, may apply whatever conflict rules they consider appropriate; and that courts should intervene during the arbitral process, and arbitral awards should be set aside, only in exceptional circumstances.⁴ In these developments the UNCITRAL Model Law on International Commercial Arbitration has proved to have a much greater influence than at one time seemed likely, and the Arbitration Act 1996, unlike early versions of the draft Arbitration Bill prepared for the Departmental Advisory Committee on Arbitration, bears the strong impress of the Model Law.⁵

³ Arbitration Act 1996, s. 30(1).

⁴ The Arbitration Act 1996 recognizes three categories of case: want of jurisdiction, serious procedural irregularity and error of law. The right of appeal in a case within one of the first two categories is mandatory; an appeal against an award on the ground of error of law may be freely excluded by agreement and, even where it is not, is subject to fairly stringent additional criteria.

⁵ The Arbitration Act 1996 was drafted with a degree of clarity and user-friendliness unusual in modern parliamentary drafting. Indeed, this was so widely noted that at a major conference held at King's College

But these relaxations in judicial control in England and elsewhere came too late to stem the pent-up frustrations of certain leading international arbitrators, particularly French scholars, at what was rightly perceived to be an excessive judicial interference with party autonomy, which deprived parties to arbitration of the predictability, finality and confidentiality to which they attached so much importance. Hence the movement, developed in particular by leading French scholars⁶ and strongly supported by a number of other international authorities,⁷ to promote the idea of international arbitration as something variously described as 'anational', 'stateless', 'delocalized', 'detached'.⁸ By this was meant that in international commercial arbitration the arbitral procedure and any resulting award were autonomous, being unconnected to any national legal system and deriving their force solely from the agreement of the parties. Accordingly an arbitral award not only took effect from the time of its issue but from then on became the prospective beneficiary of the recognition laws of a putative foreign state of enforcement and was thus unaffected by any subsequent order made by the court of origin setting the award aside. In other words, at the very moment of its birth, produced by the consensual coupling of the parties in the arbitration process, the award took off and disappeared into the firmament, landing only in those places where enforcement was sought.

The rebellion against the constraints imposed by national law on the conduct of arbitration went hand in hand with a sustained assault on the conflict of laws and its central thesis that all disputes had to be determined in accordance with a national legal system which it was the function of the conflict rules to identify. Why, it was asked, should parties to an international contract be locked into a national law that in all probability was designed primarily for domestic transactions? Why should they not be free to have their substantive rights determined by customary commercial law (*lex mercatoria*) or by general principles of law or even by public international law? Why should they not be free to designate as the applicable law an international convention such as the Vienna Convention on Contracts for the International Sale of Goods 1980? Hence the drive for freedom of arbitral procedure from national laws was paralleled by a move towards resurrection in modern form of the medieval *lex mercatoria* as a supposedly free-floating, autonomous body of law which was neutral in character and obviated the need to

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London to examine the Act a compliment paid to the draftsman, Mr. Geoffrey Sellers, by one of the speakers attracted thunderous applause from the audience - a reaction surely unprecedented in the annals of parliamentary drafting!

⁶ Notably Professors René David, Berthold Goldman and Philippe Fouchard. However, the idea first appears to have been suggested by a Greek scholar, Professor Charambalos N. Fragistas. See F.A. Mann, 'Lex Facit Arbitrum', in *International Arbitration: Liber Amicorum for Martin Domke* (ed. Pieter Sanders), (The Hague, Martinus Nijhoff 1967) at p. 158.

⁷ Including in particular Jan Paulsson and Professors Pierre Lalive and Arthur von Mehren.

⁸ For an early example see Berthold Goldman, 'Les Conflits de Lois dans l'Arbitrage International de Droit Privé', (1963) 109 *Recueils des Cours* 351; and for a recent restatement Philippe Fouchard, 'La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine' (1997) *Rev. de l'Arb.* 329.

resort to national legal systems and, in consequence, rules of private international law.

The imagery of an autonomous *lex mercatoria* enforced by an anational arbitration procedure leading to a stateless award captured the Gallic imagination. As has so often happened in the history of ideas, it was the proponents of the new spirit of revolution who tended to make the running in arbitration literature, not simply because they expressed their ideas with elegance and force but because they were able to conjure up a picture of transnationality that seemed so much more exciting than the more down to earth approach of traditional scholars. And, as so often in the past, the attention given to these new doctrines has been in inverse proportion to their practical impact. Yet we owe a good deal to the advocates of the *lex mercatoria*, and to others involved in the development and formulation of international principles of contract, commercial law and arbitration procedure, for they have had considerable success in shifting the balance of decisional authority from the courts to the arbitrators and in freeing the hands of arbitral tribunals in international arbitration from constraints which parties and their lawyers undoubtedly found unduly irksome.

II. THE NEW YORK CONVENTION

Before we discuss the opposing concepts of territoriality and party autonomy it is necessary to say a few words about the United Nations Convention on the Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The purpose of the Convention is to facilitate the international enforcement of arbitral awards. The New York Convention has been astonishingly successful, no fewer than 123 states having become parties to it. The two articles with which we are particularly concerned are Articles V and VII.

Article V provides that recognition and enforcement of a foreign arbitral award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought proof of one of the matters listed in the ensuing paragraphs. Among these is the ground mentioned in paragraph (e), namely that the award 'has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that order was made'. It is clear that Article V is mandatory only in precluding refusal of enforcement on grounds other than those set out in it. Proof of the existence of one of those grounds entitles the courts of a Convention state to refuse recognition and enforcement but does not oblige them to do so. Refusal is discretionary.⁹

⁹ A great deal of ink has been spent on the significance of the word 'may' in the English text, as opposed to 'shall'. It is astonishing how many writers have concluded that the discretion to allow enforcement despite the existence of a ground for refusal in Article V exists because the word 'shall' was not used. This can only be ascribed to unfamiliarity with the nuances of the English language. The discretionary effect of Article V

Under Article VII the provisions of the Convention are not to affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States 'nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such an award is sought to be relied on'. One of the more remarkable features of the territoriality/party autonomy debate is that the protagonists on both sides invoke the New York Convention to support their position: the territorialists on the ground that numerous provisions of the Convention explicitly recognize the role of the *lex loci arbitri*;¹⁰ the advocates of party autonomy and the statelessness of awards, on the ground that Article VII plainly establishes the right of enforcement states to allow enforcement of a foreign award which complies with their domestic law, despite its annulment by the court of origin, where that annulment is not a ground under the domestic law for refusal of recognition of the award. One thing seems clear, and that is that the New York Convention recognizes the important role of the *lex loci arbitri*; and while Article VII allows the *lex loci arbitri* to be bypassed, it certainly provides no warrant for the concept of a stateless award. On the contrary, it is strongly arguable that a stateless award would be not enforceable under the Convention. In the words of a leading authority on the Convention:¹¹

It is not only the legislative history of the Convention which seems to be contrary to the Convention's applicability to the 'a-national' award. The system and text of the Convention too appear to be against such interpretation. The Convention applies to the enforcement of an award made in another State. Those who advocate the concept of the 'a-national' award, on the other hand, deny that such award is made in a particular country ('*sentence flottante*', '*sentence apatriée*'). How could such award then fit into the Convention's scope?

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would not have been changed one whit if the word 'shall' had been used, because it would have to be read not in isolation but in conjunction with 'only'. Thus the phrase would have become: 'Recognition and enforcement of the award shall be refused ... only if ...'. That means no more than that the courts of an enforcing state shall not/may not/cannot refuse enforcement unless one of the stated grounds for so doing exists. It does not imply that if such a ground does exist the court must not enforce the award. That construction would necessitate a phrase such as 'shall be refused if and only if'.

¹⁰ See in particular Article II(1) ('differences ... in respect of a defined legal relationship ... concerning a subject matter capable of settlement by arbitration', which is implicitly a reference to the *lex arbitri*); Article II(3) (which requires a court to refer a dispute to arbitration under the arbitration agreement 'unless it finds that the said agreement is null and void, inoperative or incapable of being performed' - again matters to be determined under the *lex arbitri*); Article V(1)(a) (enabling the court to refuse recognition if it finds that 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); Article V(1)(d) (composition of the arbitral tribunal not in accordance with the agreement of the parties or, failing such agreement, not in accordance with the law of the country where the arbitration took place); Article V(e), previously set out; Article VI (empowering the court of the state of enforcement to adjourn the enforcement proceedings if an application is pending before the competent authority of the country in which, or under the law of which, the award was made). The *lex loci arbitri* controls even if the *lex arbitri* is different. See *infra*, n. 25.

¹¹ Albert Jan van den Berg, *The New York Convention of 1958* (Deventer, Kluwer Law and Taxation Publishers 1981) at p. 37. After 18 years Professor van den Berg's book is still the seminal work on the New York Convention.

III. TERRITORIALITY VERSUS AUTONOMY

(a) *The Territoriality/Party Autonomy Spectrum*

The traditional theory of territoriality is based on the general principle of international law that a state is sovereign within its own borders and that its law and its courts have the exclusive right to determine the legal effect of acts done (and consequently of arbitral awards made) within those borders. The concept of party autonomy in arbitration predicates that the binding authority of an award derives solely from the agreement of the parties, not from national law. However, neither of these two approaches embodies a single, homogenous concept. The scope of the territoriality principle varies according to the degree of respect the courts of a particular state are willing to accord to the decisions of courts of other states of competent jurisdiction. Similarly, there is no single concept of party autonomy. In fact, territoriality and party autonomy do not represent a sharp dichotomy but together occupy a spectrum, along which we can identify at least six possible, and at least four actual, models, arranged in ascending order of delocalization.

In the first model the law of the enforcing state *requires* its courts, in the absence of specified conditions, to refuse recognition and enforcement of an arbitral award that has been set aside by a court of competent jurisdiction. In other words, such law adopts the substance of Article V(e) of the New York Convention but as a mandatory, not a discretionary provision. Examples of this model are the Italian Code of Civil Procedure and the Netherlands Private International Law Act. Article 840(5) of the former provides as follows:

The Court of Appeal shall refuse recognition or enforcement of the foreign award if in the opposition proceedings the party against whom the award is invoked proves any of the following circumstances:

...

- (5) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the State in which, or under the law of which, it was made.

Article 1076(1)(A)(e) of the Netherlands Private International Law Act is differently formulated but produces the same effect. Under this Article:

If no treaty concerning recognition and enforcement is applicable, or if an applicable treaty allows a party to rely on the law of the country in which recognition or enforcement is sought, an arbitral award made in a foreign State may be recognised in the Netherlands and its enforcement may be sought in the Netherlands ... unless:

...

- (e) the arbitral award has been set aside by a competent authority of the country in which the award is made.

Thus under both Italian and Dutch law the setting aside of the arbitral award in or under the law of the place where it was made makes it mandatory to refuse enforcement. These laws provide good examples of the strong form of territoriality.

In the second model it is recognized that within its own territory a state is sovereign and its courts have the exclusive right to adjudicate on the legality of acts

done within that territory. What is said, however, is that laws and court decisions made within the state are not entitled to recognition *erga omnes* - which is clearly correct - but that for policy reasons the decision of a foreign court of competent jurisdiction setting aside an award will usually be respected by courts of the state of enforcement, subject to rights of impeachment in cases such as procedural unfairness or the obtaining of a judgment by fraud. States following this model generally adopt provisions in their arbitration laws which follow those of Article V of the New York Convention, with or without modification, and, like Article V, allow a discretion to enforce notwithstanding the order annulling the award. Examples are the English Arbitration Act 1996,¹² the Mexican Commercial Code,¹³ the German Code of Civil Procedure,¹⁴ and the Swiss Private International Law Act 1987.¹⁵ The first two track the wording of Article V(1)(e); the German and Swiss legislation simply incorporates the provisions of the New York Convention by reference.

The third model is the same as the first except that under the laws of the enforcing state the grounds for refusal of recognition of a foreign arbitral award are more restricted than those of Article V and in particular do not include the setting aside of the award under the *lex loci arbitri*. The courts of such states are then permitted by Article VII of the New York Convention to recognize the right of the party obtaining the award to benefit from the more generous approach of the domestic law of the state of enforcement and, if the requirements of that law are met, to have the award enforced even though it has been annulled by the court of origin. Nevertheless, though the annulling order is not as such a ground for refusal of recognition, to the extent that it is based on grounds which have a counterpart in the domestic law of the enforcing state the courts of the state may be willing to hold that there is a conclusive, strong or at least *prima facie* presumption that such grounds have been established for the purposes of its domestic law. This approach reflects a traditional principle of the conflict of laws.

In the fourth model the law of the enforcing state, while still recognizing the concept of a *lex arbitri*, does not recognize an annulment order in the court of origin either as a ground in itself for refusing recognition of the award or as raising any kind of presumption that such an order establishes facts which would bring the case within an equivalent ground under the law of the enforcing state.

The fifth, and very intense, model is to be found in French legislation and in the jurisprudence of French courts, which have carried the delocalization principle to the point where an international award (by which is presumably meant an award in an international arbitration) is stateless and derives its force not from the *lex loci arbitri*, or indeed from any other national law, but solely from the will of the parties. This result, which needs a brief historical account, was reached only in

¹² See s. 103(2).

¹³ See art. 1462.

¹⁴ See s. 1061.

¹⁵ See art. 194.

stages. First came the decision in the *Götaverken* case,¹⁶ in which the Paris Court of Appeal declined jurisdiction to set aside an ICC award rendered in Paris on the ground that, while the arbitration had taken place in Paris, neither the parties nor the contracts had any connection with France and they had not designated French law – or, indeed, any law – as the procedural law apart from the procedural rules of the ICC, and that accordingly the award had no connection with the French legal order and was not a French award. Meanwhile the Swedish courts, asked to recognize the award at a time when the challenge to it was still pending in the French courts, held that the award was binding, not under French law but by the agreement of the parties to be bound, an agreement recognized and enforceable under Swedish law, so that the mere fact that the award was being challenged in France was not a ground for suspending the recognition proceedings in Sweden.

The judgment of the Paris Court of Appeal did not say in terms that arbitral awards in international arbitration were stateless, merely that on the facts there was no connection with the French legal order. But since courts of a state other than that of the seat of the arbitration are unlikely to take jurisdiction in the absence of agreement by the parties, the effect of the *Götaverken* decision, if it were to be applied universally, is that, unless the parties themselves agree to submit to the procedural law of a particular state, the arbitral proceedings are not reviewable by any court other than the court of a state in which enforcement is sought. The next stage came in a series of cases¹⁷ in which the Court of Cassation held that the setting aside or suspension of an award by a court did not deprive the party obtaining the award of his right to enforce it in France in the conditions permitted by French law. These decisions were plainly correct,¹⁸ since while Article V of the New York Convention gave a discretionary power to the court of enforcement to refuse to recognize an award that had been set aside¹⁹ by the competent authority

¹⁶ *General National Maritime Transport Co. v. Götaverken Arendal AB*, Court of Appeal, Paris, 21 February 1980, (1980) *Rev. de l'Arb.* 107, (1981) 6 *Y.B. Comm. Arb.* 221. For an excellent and balanced discussion, see Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 *ICLQ* 358; and for a response, William W. Park, 'The *Lex Loci Arbitri* and International Commercial Arbitration' (1983) 32 *ICLQ* 21.

¹⁷ *Pabalt Tikeret Sirketi v. Norsolor*, Cas. le civ. 9 October 1984, (1985) *Rev. de l'Arb.* 431; *Polish Ocean Line v. Jolasry*, Cas. le civ. 10 March 1993, (1993) *Rev. de l'Arb.* 255; *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation (OTV)* Cass. le civ., 23 March 1994, (1994) *Rev. de l'Arb.* 327, the last of these involving an extraordinary judicial saga in a number of countries; *Arab Republic of Egypt v. Chromalloy Air Services*, CA Paris, 14 January 1997, (1997) *Rev. de l'Arb.* 395.

¹⁸ The same cannot necessarily be said of that part of the reasoning of the Federal District Court for the District of Columbia in the American *Chromalloy* case denying *res judicata* effect to the decision of the Cairo Court of Appeal annulling an arbitral award rendered in Egypt. See *Chromalloy Air Services v. The Arab Republic of Egypt*, 939 F.Supp. 907 (1996), and the critical comment on this aspect of the case by Georgios Petrochilos (2000) *ICLQ* 856, and Eric Schwartz, 'A Comment on Chromalloy-Hilmarton à l'américaine' (1997) 14 *J. Int. Arb.* 125. For a recent review of these developments see Emmanuel Gaillard, 'Enforcement of Awards Nullified in the Country of Origin: The French Experience' in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ed. Albert Jan van den Berg), (ICCA Congress Series No. 9, Deventer, Kluwer 1999) at p. 505.

¹⁹ *Supra* n. 17.

of the state where it was rendered, Article VII expressly preserved the right of an interested party to rely on the more favourable provisions, if any, of that state's domestic law. The provisions of the French Code of Civil Procedure did not then, and the provisions of the New Code of Civil Procedure do not now, include as a ground for refusing enforcement of a foreign award the fact that it had been set aside by the court of origin. Accordingly up to this point, if criticism was to be made, it was of the restrictive approach of the French legislation rather than that of the French courts. Moreover, it seems that where the grounds for the foreign annulment are comparable to those contained in the French Code of Civil Procedure, French courts are nevertheless unwilling to recognize that they have any competence to treat the annulment order as raising a strong, or even *prima facie*, presumption that such grounds have been established for the purposes of French domestic law. The effect of the three decisions mentioned *supra* is thus that French courts will enforce an award which is enforceable under French domestic law even if it has been set aside or suspended under the *lex loci arbitri*.

Unfortunately, in *Hilmarton* the Court of Cassation, not content with relying on the provisions of its domestic law, appears to have gone out of its way to say, in effect, that judgments of the court of origin setting aside an arbitral award were of no significance whatsoever in France, for in an international commercial arbitration the award, though made in a particular state (in that case, Switzerland), was itself international and was thus 'not integrated into the legal system of that State'. Accordingly a decision of Switzerland's highest court annulling an award was entirely irrelevant to its enforceability in France. This has widely been seen as a regrettable and unnecessary (if surely unintended) affront to a foreign court of the highest standing. One commentator who is not unsympathetic to the internationalist approach has nevertheless observed:²⁰

Although consistent with a conception of international arbitration that has a noble and prestigious heritage in France, this presumption, I might timidly venture to ask, is nevertheless just a little bit presumptuous, is it not? For on what authority can a French court decide what does or does not form part of the Swiss legal order? I would have thought that this was a matter for Swiss legislators and courts, and not the French Court of Cassation, to decide.

A similar decision was by the Paris Court of Appeal in *Arab Republic of Egypt v. Chomalloy Air Services Ltd*:²¹

The award made in Egypt is by definition an international award which, by definition, is not integrated into the legal order of that State so that its existence remains established despite its being annulled and its enforcement in France is not in violation of international public policy.

To this one might add: is it not paradoxical that French law, while declining to

²⁰ Eric A. Schwartz (1997) 14 *J.Int.Arb.* 125, 131. The approach of the English courts has traditionally been rather different. 'For the English court to pronounce on the validity of the law of a foreign state within its own territory, so that the validity of that law became the *res* of the *res judicata* in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity. In my view this court has no jurisdiction to do so' (*Buck v. Attorney-General* [1965] Ch. 745, 770, *per* Diplock LJ).

²¹ 14 January 1997, (1997) *Rev. de l'Arb.* 395.

recognize the integration of a foreign award into the legal system of the *locus arbitri*, sees no difficulty in empowering French courts to set aside French awards in an international arbitration?

It been held that French courts will undertake the review of an award challenged before them by the losing party even if the court of origin had already dismissed a challenge on the same grounds.²² Hence the position now reached in France is, in effect, that Article V of the New York Convention will rarely be applied and can for all practical purposes be regarded as a dead letter.

Finally, we come to the most extreme delocalization model, adopted by the Belgian legislation, to the effect that no court in Belgium could set aside an award unless at least one of the parties was Belgian. As noted later, that law has been modified to allow the parties the choice whether to retain or to opt out of judicial review in Belgium. If they do, then the resulting award becomes truly stateless.

(b) *The Question to be Addressed*

It is clear that a judgment of a court at the seat of an arbitration setting aside the arbitral award has no effect in another state except to the extent that the law of that state is willing to give effect to it. In some jurisdictions such a judgment may be treated as grounding a plea of *res judicata*, precluding the party who obtained the award from relitigating the issue of its validity. In others, the judgment does not attract the principle of *res judicata* but will nevertheless be respected in the absence of exceptional circumstances. In yet other jurisdictions, notably France, the annulling judgment will be regarded as of no significance whatever, being rooted in a legal order to which the award is not subject. The question for consideration, then, is not whether the courts of an enforcing state *must* respect the foreign judgment - which plainly is not the case - but rather whether as a matter of policy they *should*. Adoption of the latter course is necessarily inconsistent with the theory of the stateless award. It will be contended: first, that the arguments are overwhelmingly against the concept of the stateless award, not only from the viewpoint of legal theory but also in terms of policy, practicality and the general legislative approach among states; secondly, that courts asked to enforce an award should, where permitted by their own law, defer to decisions of the court of origin under the *lex loci arbitri* in the absence of special circumstances; and, thirdly, that any legislative barriers to the adoption of such an approach should be removed. I hope to show that, apart from other considerations, the theory of the stateless award is riddled with inconsistencies. In particular, it is founded on party autonomy, yet the parties' choice of their procedural law is ignored; it is motivated by the desire to promote the concept of internationality in cross-border arbitration, yet its effect, at any rate under French law, is totally to ignore international considerations and to rely exclusively on national law; its proponents declare that

²² *Unichips Finanziara v. Gesnoux* (No. 3), Court of Appeal, Paris, 1st Chamber, 12 February 1993, (1993) *Rev. de l'Arb.* 255.

an award is not integrated into the legal system under which the arbitration takes place, or any legal system, yet they simultaneously insist that the award is integrated into the legal system of the state of enforcement, recognizing that there has to be some court somewhere able to protect the parties against gross procedural unfairness or the exercise by arbitrators of a jurisdiction they do not possess.

IV. THE CENTRAL ROLE OF THE *LEX LOCI ARBITRI*

(a) *No Contract Without Law*

One can begin with the simple proposition relating to substantive rights that a contract is not law, and no award can be binding simply by virtue of the parties' agreement to be bound. A contract depends for its force on recognition by law. The point was made by Dr Francis Mann in characteristically trenchant style in a passage from his seminal piece 'Lex Facit Arbitrum',²³ which has been cited on countless occasions but is worth repeating:

No one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. Similarly, every arbitration is necessarily subject to the law of a given State. No private person has the right or the power to act on any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called the *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri* or, in French, *la loi d'arbitrage*.

The same is true of usage, whether domestic or international.²⁴ A usage is not law; it is effective only so far as recognized by municipal law as having binding force. Even an international trade usage must be established. The only difference between litigation and international arbitration is that in the former the usage, if not already established by law, will need to be proved to the satisfaction of the judge, and to be accepted by the judge as conforming to the legal prerequisites of a binding usage, if it is to be enforceable, whereas in an international arbitration a tribunal may feel free to infer the existence of usage without the same degree of stringency in requiring evidence or in applying legal criteria, confident in the knowledge that nowadays the judicial review of arbitral awards is severely restricted.

Even the most ardent advocates of party autonomy appear to accept that arbitration must act within some system of law. Their case is that the only relevant

²³ *Supra*, n. 6, at pp. 157, 160. See to similar effect in a conflict of laws context Horacio A. Grigera Naon, *Choice-of-law Problems in International Commercial Arbitration* (Tübingen, JCB Mohr (Paul Siebeck) 1992) at pp. 84, 85.

²⁴ See generally Roy Goode, 'Usage and its Reception in Transnational Commercial Law', (1997) 46 *ICLQ* 1.

system is that of the state of enforcement. But this argument never gets off the ground, for it presupposes that the arbitral process works in a complete legal vacuum unless and until application is made to enforce the award as a foreign award. If that were so, then at the time of its rendering the award would have no legal underpinnings at all. It would undoubtedly be the product of the parties' agreement, under which they assented to be bound, but as stated earlier that assent is no more than an agreement, lacking any legal force unless accepted as binding by the relevant national law; and the only possible law is the *lex loci arbitri*.²⁵ Moreover, one may ask what, under the autonomy concept, is the status of the arbitral proceedings prior to the award. Do these too rest solely on the will of the parties? Such a contention has only to be stated for its absurdity to become obvious. A great many states around the world have now enacted arbitration statutes designed to accommodate international arbitration. Are these to count for nothing? Are they simply instruments writ in water? What does it mean to say that the arbitral proceedings are not constrained by national laws when all over the globe we find national laws which do exactly that?

Belgium, in the hope of attracting more international arbitration, introduced what it thought would be a popular provision into its law excluding the power of Belgian courts to entertain an application for annulment of an award unless at least one of the parties to the dispute was Belgian.²⁶ This ingenious measure back-fired as the arbitration community came to see that its effect was to leave parties who wanted judicial assistance or had good grounds for annulment with nowhere to go.²⁷ Faced with this criticism²⁸ Belgium followed the lead of the Swiss Private International Law Act,²⁹ and changed its law to give the parties the option to exclude judicial review by agreement. So also did Sweden.³⁰ However, it appears that in Swiss arbitrations most foreign parties, following the advice of leading commentators on the Swiss Private International Law Act, have not availed themselves of that exclusion option.³¹ This strongly suggests that most parties do not wish to take themselves wholly outside a legal framework in settling their disputes through arbitration.

²⁵ That is true even if the parties were unwisely to select as the curial law the law of a state other than that of the seat of the arbitration. The foreign curial law could be applied at the seat of the arbitration only so far as permitted by the *lex loci arbitri* and subject to the latter's own mandatory provisions.

²⁶ Judicial Code, art. 1717(4).

²⁷ It is an accepted principle that while an enforcing court may refuse to recognize a foreign award, only the court of origin has power to annul it.

²⁸ See, e.g., William W. Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration', (1989) 63 *Tulane L. Rev.* 647.

²⁹ Private International Law Act, art. 192(2).

³⁰ Arbitration Act 1999, s. 51.

³¹ Bruno Leurent, 'Reflections on the International Effectiveness of Arbitration Awards' (1996) 12 *Arbitration International* 269, 273.

(b) *Respect for Party Autonomy*

The theory of the stateless award is grounded on the notion that the will of the parties should be respected and that it is this, not a *lex arbitri*, which gives binding force to an award. It is worth reminding ourselves of the terms of the arbitration clauses in the cases referred to above. In *Götaverken* the arbitration clause provided that disputes were to be referred to arbitration and this was to take place in Paris under the ICC Rules. These stated that the rules governing the procedure were to be those resulting from the ICC Rules themselves, and, where they were silent, any rules which the parties (or failing them, the arbitrator) might settle, and whether or not reference was thereby made to a municipal procedural law to be applied to the arbitration. So in this case the effect of the arbitration clause was neutral; the ICC Rules contemplated that the parties or the arbitrator could, if they wished, resort to municipal law, but that they would not necessarily do so. In *Norsolor*³² the position was the same except that ICC Court fixed Vienna as the place of arbitration. By contrast in *Hilmarton*³³ the arbitration clause specifically provided that the arbitration 'shall take place in Geneva under the law of the Canton of Geneva'. If the theory of the stateless award is based on the overriding effects of party autonomy, how was the French Court of Cassation able to find that the *Hilmarton* award was not integrated into the Swiss legal system, to which the parties had expressly subjected the arbitral proceedings? In *Chromalloy*³⁴ the arbitration clause provided that 'both parties have irrevocably agreed to apply Egypt [sic] Laws and to choose Cairo as the seat of the court of arbitration'. We may note the use of the word 'seat' rather than 'place', emphasizing the intention to choose Egypt as the place with which the arbitration was to have its juridical link. Again, one may ask, on what basis could the Court of Cassation disregard the express choice of the parties and instead determine that the award was not integrated into the Egyptian legal system? It seems that the principle of party autonomy is being used with a high degree of selectivity. The award derives its force from the agreement of the parties, but their decision to select a stated national law to govern the proceedings leading to the award is to be ignored!³⁵

(c) *The Protection of Legitimate Expectations*

A fundamental purpose of the conflict of laws, and the reason why national courts are ready in appropriate cases to apply a foreign law to a dispute and to recognize and enforce judgments of foreign courts, is to protect the legitimate expectations of the parties to the dispute, who would suffer injustice if their reasonable reliance on the applicability of the law having the closest connection to the matters in issue

³² *Supra* n. 17.

³³ *Supra* n. 17.

³⁴ *Supra* n. 18.

³⁵ It should be observed that we are here speaking not merely of a choice of venue, and the implications to be drawn from this, which are examined *infra*, but explicit choice of the procedural law (in *Hilmarton*) or of the seat (*Chromalloy*).

were to be frustrated.³⁶ Where the parties have, expressly or by implication, selected a curial law, then to deny legal effect to that selection is not only to undermine the very principle of party autonomy on which the theory of the stateless award is based, but to frustrate their legitimate expectations. Of course, one of the tenets of the delocalization concept is that in international arbitration we should seek to dispense with reliance on conflict of laws rules altogether, since these are seen as merely perpetuating a national, rather than transnational, approach to the determination of disputes. Still, they have to face the question: what about party autonomy? Several answers have been propounded.

(i) The choice of seat is often a matter of mere convenience

This is a *canard* of long standing. It is doubtful whether it was ever true. Francis Mann, for example, wrote more than 30 years ago that choice of the seat 'is usually far from fortuitous, but made for good and well-understood reasons and purposes'.³⁷ More recently, it has been said that:

The seat is typically fixed in a place where neither party has a place of business, e.g. the shores of Lake Leman. That location is not selected for its hotel facilities or charming setting, but essentially because of the parties' confidence in the neutrality of the forum, the quality of the Swiss Private International Law (FSPIL) and the competence of Swiss jurists, arbitrators and judges (the same applies to Paris, London, Stockholm and other places).³⁸

(ii) The choice of seat is often determined not by the parties but by the arbitral institution they have selected

This is true but not to the point. Parties choose an arbitral institution because of their confidence in its ability to administer the arbitration and to make a sensible decision on the selection of the seat in the light of relevant factors, including the adequacy of the legal regime governing international commercial arbitration.

(iii) The choice of seat is often governed by the desire for neutrality

This is also true, but if anything reinforces the argument that the parties have given serious thought to the choice of seat. It is fanciful to suppose that they would be happy to select as the seat any place that happened to be convenient and neutral.

(iv) The role of the arbitral tribunal is transitory and the seat has no necessary connection with the dispute

This may be true but proves too much, for it fails to explain why as a matter of principle or policy the law of an enforcing state should necessarily have any greater claim to recognition than the *lex loci arbitri*. There may be at least as

³⁶ *Dicey and Morris on the Conflict of Laws* (2000, 13th ed.), para. 1-006.

³⁷ 'Lex facit arbitrum' (*supra* n. 6) at p. 163.

³⁸ Leurent, (1996) 12 *Arbitration International* 269, 272.

much contact with the forum state as with the enforcement state, which may have no link with the parties or the transaction whatsoever and is involved merely because of the fortuitous existence of assets of the respondent within its jurisdiction. Consider the following:

A German corporation and a French corporation enter into a contract under which the German corporation agrees to construct a plant in Milan for the French corporation. Any disputes are to be determined by an arbitral tribunal having its seat in Zurich and established in accordance with the arbitration rules of the Zurich Chamber of Commerce. The German corporation has its principal place of business in Berlin but other substantial places of business in Stockholm and Milan. It also has significant investments in New York but does not carry on any trading activity in the USA. The French corporation has its principal place of business in Paris but conducts substantial business activity in Milan and The Netherlands. It has no points of contact with the USA. The contract is made in Milan and is to be performed there. The French corporation, alleging that the plant did not comply with the contract specifications, invokes the arbitration clause. An award is made in favour of the French corporation but is set aside by the Swiss courts. The French corporation then applies to a US federal court in New York to enforce the award.

Of all the states connected to the dispute, the USA is the one whose link is the most tenuous. There are far more points of contact with the other states: France, Germany, Italy, Sweden and The Netherlands. For neutrality none of these is chosen; the parties consciously choose Switzerland, having confidence in the Swiss legal environment governing international commercial arbitration. On what basis can it be said that in terms of policy New York law has a stronger claim to consideration than Swiss law? But for the fact that the German company had assets in New York there would be no ground whatsoever for New York courts even to entertain jurisdiction. The reason why it has to be given jurisdiction is, of course, that if it were not the successful claimant would have no way of reaching the assets. But that is simply a consequence of state sovereignty and power and has little to do with the question what law should be applied by the New York court.

The delocalization theory undermines the concept of party autonomy in another sense. If, following annulment of the award, the parties engage in a fresh arbitration, appointing the same or a new panel of arbitrators, and pursue the proceedings to a second award, why should not the consensual basis of the new arbitration proceedings, and the implicit acceptance of the nullity of the original award, be respected?³⁹ Why should the will of the parties be disregarded? And if it is conceded that it should not be disregarded, we are left with the farcical position of two separate, and possibly conflicting, awards covering the same dispute, both of them having to be treated as valid under the theory of delocalization.

³⁹ This fact situation also raises the question of estoppel, discussed *infra*.

(d) *Finality*

Another fundamental purpose of the conflict of laws is to help bring finality to disputes involving an international element. That is why English courts have traditionally declined to re-examine the judgment of a foreign court of competent jurisdiction in the absence of special reasons for so doing. *Interest reipublicae ut sit finis litium*.⁴⁰ The territorial approach, in insisting that the validity of an arbitral award is governed by the *lex loci arbitri*, has the great merit of subjecting the question of validity to a single decision at the court of origin. By contrast, denial of the function of a *lex loci arbitri* may involve litigation in every country in which the respondent has assets, and even within a single country may entail the case being taken up through a two-tier or even three-tier hierarchical chain and then, where the highest court acts as a court of cassation, being sent back again to a new lower court for a fresh determination. One has only to look at the history of the litigation in some of the cases referred to *supra* to see the disastrous consequences of this. In *Hilmarton*⁴¹ the Swiss award was taken through the hierarchy of courts in Switzerland and France, where the absurd position was reached that an award which had been set aside in Switzerland was granted exequatur by the Court of Appeal of Versailles; a second award resulting from fresh arbitration proceedings produced a different result but was in turn granted exequatur by the Versailles Court of Appeal; and the Court of Cassation, which had to do its best to resolve the muddle, made a decision which necessarily upheld one award (the first) and rejected the other. Ultimately the case ended up in English litigation, after which it was settled. In *Chromalloy*⁴² the contract gave rise to proceedings in Egypt, France and the USA. So much for finality! As more than one commentator has pointed out, this is not delocalization, it is multilocalization.⁴³

(e) *Avoidance of Multiple Jeopardy*

Closely linked to the conflict of laws policy of promoting finality is its separate policy of avoiding double jeopardy. *Nemo debet vis vexari pro eadem causa*.⁴⁴ The effect of refusal to acknowledge any place for the *lex loci arbitri* is that the respondent against whom an award is made, having battled successfully through his own courts to have it set aside, is then faced with the prospect of having to relitigate the identical issues before the courts of every country in which he has assets. This can only be described as oppressive.

⁴⁰ *Dicey & Morris, supra n. 36, para. 14-110.*

⁴¹ *Supra n. 17.*

⁴² *Supra n. 18.*

⁴³ See, e.g., Pierre Mayer, 'The Trend Towards Delocalisation in the Last 100 Years', in *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (ed. Hunter, Marriott and Veeder), (London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff 1995) at p. 46.

⁴⁴ *Dicey and Morris, supra n. 36, para. 14-110.*

(f) *Economic Efficiency*

The exposure to a multiplicity of proceedings in a number of different countries also undermines what should be one of the purposes of international commercial arbitration, namely to promote economic efficiency in the handling of the dispute. A concept which provokes multiple lawsuits in different jurisdictions induces profligacy and the wasteful use of resources.

(g) *Estoppel*

It is a general principle of law that a contracting party who pursues a particular course of conduct on which the other party reasonably relies cannot subsequently be allowed to follow a course which is inconsistent with the position he previously took. This principle of estoppel (reflected in civil law jurisdictions in the maxim *non concedit venire contra factum proprium*) has many manifestations. For example, in litigation an English court will take as its starting point the fact that a foreign judgment against a party by a court of competent jurisdiction creates an estoppel *per rem judicatam* precluding that party from relitigating the issue in England except where there are strong grounds to impeach the judgment, e.g. that it was obtained by fraud. In arbitration a similar principle prevails. Thus it is widely accepted that a person who participates in arbitration proceedings and against whom an arbitral award is made cannot in general invoke a ground for attacking the validity of the arbitration agreement or the jurisdiction of the tribunal which he did not advance before the tribunal itself.⁴⁵

One of the problems with the concept of the stateless award is that it fails to respect this well-established principle of estoppel. A party against whom an award is made decides to challenge it in the courts of the seat of the arbitration. If he is unsuccessful, why should he be allowed a second – or a third or fourth – bite at the cherry in proceedings before a court or courts elsewhere? Why, having embarked on a challenge under the *lex loci arbitri*, should he not be required to accept the outcome? Let us take the argument a step further. An arbitral award is set aside at the court of the seat. Thereupon the claimant institutes fresh arbitration proceedings in the same place. Why, having done this, should he be allowed simultaneously to enforce the first award in a foreign country? Why does not his institution of the second arbitral proceedings constitute an acceptance of the invalidity of the earlier award and an election to pursue his claim through the new proceedings?

(h) *Inconsistency of Judgments of Foreign Courts*

A further consequence of the statelessness of an arbitral award is that it gives rise to the strong possibility of conflicting decisions of different foreign courts. This is

⁴⁵ For a recent English decision to this effect see *Westacre Investments Inc. v. Jugoimport-SDRP Holding Co. Ltd.* [1999] 3 All ER 864.

surely a strange way of promoting the internationality of arbitration. Take the case where, after the annulment of an award, the claimant institutes fresh arbitration proceedings and is again successful but this time secures an amount only half of that given in the first award. What happens then? Is he to have the option to go back to the first, annulled, award? The present position would seem to be that the claimant can enforce the larger award in France and countries which follow the approach of French law but is restricted to the smaller award in countries which do not follow the French line. This hardly seems the best way of promoting predictability or uniformity in international arbitration.

There is another problem which is potentially even more acute. In the legal systems of some countries (which included Germany until it amended its arbitration law) the effect of annulment of an award is not to leave the way open for a fresh arbitration but to restore the ordinary competence of the courts, so that a fresh proceeding by way of action rather than arbitration becomes admissible. That proceeding may lead to a judgment which is required to be recognized and enforced elsewhere under bilateral or regional conventions, such as the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters. So, for example, the annulment of an award in one such state will have no effect in France, the courts of which would apply its own arbitration law to enforce the award, while those same courts would at the same time be duty bound to recognize and enforce the judgment upholding the claim in the post-annulment litigation. Of course, a solution would have to be found, and would be found, but why create the problem in the first place?

(i) *The Privileged Status of Arbitration Agreements*

Another important factor overlooked by the protagonists of the stateless award is that a written arbitration agreement is not like an ordinary contract. Around the world it is given special, and highly prized, privileges. In the first place, a valid agreement to arbitrate invoked by a party against whom court proceedings are instituted effectively halts the proceedings. This is mandatory for the courts of states parties to the New York Convention⁴⁶ and is also specifically provided in the UNCITRAL Model Law.⁴⁷ Secondly, the parties and their arbitrator have much more freedom in the conduct of the arbitration than national judges. They need not follow rules of procedure or evidence prescribed for actions by the *lex fori*, nor are they required to apply the conflict rules of the *lex fori* in determining the applicable law in the absence of party choice. Thirdly, judicial review of an arbitral award is very much more restricted than an appeal against a judgment. Fourthly, an arbitral award can be enforced in the country of the award as if it were a judgment without the need for an action on the award. Finally, under the New York

⁴⁶ Article II(3).

⁴⁷ Article 8(1).

Convention and conventions with similar objectives⁴⁸ an award made in one state can be enforced in all other Contracting States⁴⁹ where the conditions set by the convention and any implementing legislation are satisfied. This is a hugely important privilege, which is much more extensive in geographical scope than that accorded to judgments of courts.

These privileges derive from national laws and international conventions, not from contract. How can parties to an arbitration claim the benefit of such laws and conventions and simultaneously ascribe the binding force of the arbitral award exclusively to their mutual will? If it is the case that the agreement to arbitrate is the sole source of the binding nature of the award, then let the parties be bound by the consequences attaching to any normal contract, namely that the sole method of enforcement is by an action on the award and that the resulting judgment will not enjoy the finality of an arbitral award or the benefit of the New York Convention.

(j) Comity and Co-operation

If the courts of other countries followed the example of the French courts it is clear that Article V of the New York Convention would become a dead letter. No court would have any regard for the decisions of foreign courts setting aside an award; all courts would take refuge in their own arbitration law. Such an approach is subversive of the very internationality which the theory of statelessness is proclaimed to advance. Moreover, it is incompatible with the mutual courtesy and respect which each state and its courts are expected to show to other states and their courts as regards laws and decisions made by the latter within their respective jurisdictions. The principle of comity embodying such notions of mutual courtesy and respect has had varying impact at different stages in its history. At one time it was thought to be the basic principle upon which the conflict of laws rested. Later it was downgraded to a more subsidiary role as state courts came to the view that comity as such did not provide a reliable basis for deciding when to exercise self-restraint in the face of proceedings and judgments in foreign courts. Yet there are now indications that the concept of comity is regaining ground. In England, for example, one reason why it is invoked is to avoid jurisdictional conflicts. That is why English courts, in granting worldwide *Mareva* injunctions (now 'freezing orders'), are careful to stipulate that enforcement abroad requires the approval of the requisite foreign court:

The jurisdiction to make such orders is now firmly established. It is exercised with caution and a sufficient case to justify its exercise must always be made out; but such orders are nowadays routinely made in cases of international fraud and the conditions necessary in order to preserve international comity and prevent conflicts of jurisdiction have become standardised.⁵⁰

⁴⁸ For example, the European (Geneva) Convention on International Commercial Arbitration 1961 and the Inter-American (Panama) Convention on Arbitration 1975.

⁴⁹ Assuming, in the case of the New York Convention, that the state of origin is a Contracting State or that the state of enforcement has not made a declaration under Article I(3) limiting its obligation to the enforcement of awards made in another Contracting State.

⁵⁰ *Crédit Suisse Fides Trust SA v. Cuoghi* [1998] QB 818, 824, per Millett LJ.

That is why also they have regard to considerations of comity in cross-border insolvency cases.⁵¹ But the case can be put even more strongly. We have now moved beyond the concept of self-restraint and towards active international co-operation in civil procedure. This has come about through a variety of means: legislation, of which again insolvency law provides an example;⁵² judicial activism, particularly in the field of cross-border insolvency, where independently of legislation judges of national courts sought ways to assist their counterparts in foreign countries; and the work of international organizations (such as UNCITRAL and the International Bar Association) in promoting cross-border collaboration in specific fields, such as cross-border insolvency,⁵³ and in civil proceedings generally.⁵⁴ For the world of international arbitration to revert to a system in which each state paid regard only to its own laws, and each court only to judicial decisions within its own jurisdiction, would severely impede the cause of international co-operation in dispute resolution. The internationalization of arbitration does not depend on, and is not promoted by, the concept of statelessness, which the courts of enforcing states adopting such a concept never see as applying to their own enforcement orders; on the contrary, all the concept achieves is a fragmentation of decision-making as each court focuses exclusively on its own powers and refuses to countenance a proper law for courts of the seat of the arbitration.

(k) Disappearance of the Raison d'Être for Disregard of the Curial Law

Finally, the main cause of the reluctance of courts of enforcement states to defer to rulings of courts of origin, namely the hostility of local courts in a number of jurisdictions to the concept of arbitration and their assertion of excessive jurisdiction over arbitral proceedings and awards, has largely (though not entirely) disappeared as state after state has departed from its traditional arbitration rules and enacted legislation along the lines of the UNCITRAL Model Law. As one authority has rightly commented, if Member States of the European Communities had sufficient confidence in each other's courts to ratify the Brussels and Lugano Conventions providing for the mutual recognition and enforcement of judgments, why should they not have the same confidence in judgments of courts of other states setting aside arbitral awards?⁵⁵

⁵¹ See e.g., *Re Paramount Airways Ltd.* [1993] Ch 223; *Jyske Bank (Gibraltar) Ltd. v. Spjeldnaes* [1999] 2 BCC 101.

⁵² Insolvency Act 1986, s. 426.

⁵³ See e.g., the UNCITRAL Model Law on Cross-Border Insolvency 1997.

⁵⁴ e.g. the American Law Institute Project on Transnational Rules of Civil Procedure, in which international organizations such as UNIDROIT have been invited to participate.

⁵⁵ J.-F. Poudret, 'Quelle solution pour en finir avec l'affaire Hilmarton? Réponse à Philippe Fouchard' [1998] *Rev. de l'Arb.* 7, 14-15. See also Klaus Peter Berger, *International Economic Arbitration: Studies in Transnational Economic Law*, vol. 9 (Deventer, Kluwer Law and Taxation, 1993) at pp. 96-7. See also William W. Park, 'Duty and Discretion in International Arbitration', (1999) 93 *AJIL* 805, 813.

V. CONCLUSION

The objections to the concept of the stateless award are overwhelming and should now be universally accepted. None of the arguments in favour of the stateless award has explained why, apart from *force majeure*, the courts of an enforcement state should be considered to have a prerogative denied to others. If, which is not suggested, there is to be a single court the judgments of which are in principle to have effect *erga omnes*, it should be the court of the seat. France is almost alone in its advocacy of the stateless award and is believed to be unique in not even allowing its courts to invoke the setting aside of an award in the court of origin as a ground for refusing recognition and enforcement in France. French scholars and French courts have over the years made an immense contribution to the liberalization of international commercial arbitration. Faced with widespread opposition to the concept of the stateless award they could perform a further and signal service to international arbitration by gracefully withdrawing from their present approach, which is seen in most countries as a step too far. This change of direction would itself be an act of leadership, not of defeat, and would help to restore the transnational character of international commercial arbitration.

The most appropriate solution is that based on fulfilling the twin objectives of satisfying legitimate expectations and fostering international co-operation among courts. Article VII of the New York Convention is here a stumbling block in that it encourages states to bypass Article V and invoke their own laws. That is damaging to the process of internationalization which the Convention itself has done so much to foster. A strong case can be made for amending Article VII of the Convention by restricting its scope to treaties entered into by the enforcing state – removing that part of Article VII which enables a party to invoke the more favourable provisions of the law of enforcement – and by leaving courts of enforcing states to rely on the discretion already available to them under Article V, a discretion which itself should be exercised with caution.⁵⁶ This should go hand in hand with a self-denying precept of legislatures and courts to the effect that, while the court of enforcement must inevitably have the last word to cater for exceptional cases, in principle judgments of courts of the seat enforcing, suspending or annulling an award should be respected, as should findings of fact by such courts. Obviously there will be such exceptional cases, e.g. fraud discovered only after the judgment, but adherence to the general principle is essential if we are to respect party choice, to avoid the cost, inconvenience and risk of inconsistent decisions resulting from a multiplicity of proceedings, and to foster rather than damage mutual respect and co-operation among courts of different states.

⁵⁶ Albert Jan van den Berg, 'Residual Discretion and the Validity of the Arbitration Agreement in the Enforcement of Arbitral Awards under the New York Convention of 1958' in *Current Legal Issues in International Commercial Arbitration* (ed. Chang *et al.*), (University of Singapore 1997) at pp. 335-6, noting that the discretion to allow enforcement despite a ground for refusal under Article V was designed to cater for two situations, namely minor procedural irregularity and failure to raise before the arbitral tribunal the objection to the tribunal's jurisdiction advanced as a challenge to the award before the court of enforcement.

