Essay 17
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I confirm this is my own unaided work.

What are the differences between the French and English legal systems with respect to arbitration? Would you say that one or other of the systems is better?

A. Setting the Benchmark

Paris and London are two of the world's leading international commercial arbitration centres.[1] Despite this, or perhaps one of the reasons why this is the case, there are key differences between the two systems.[2]

The present analysis argues although English system has a better theoretical footing, this does not prevent the two systems from borrowing and learning from one another. However, in drawing these comparisons the present analysis rejects the idea of choosing which of the two *systems* is "better".[3] After all, what does one mean by "better"? Is the basis of comparison which of the two systems is more commercially attractive? Or is it which of the two is more theoretically coherent? Or are we to decide which is better on the basis it promotes values such as certainty and finality? Each of these questions offer important comparators yet would likely generate different answers. More importantly they reveal a more fundamental truth: in the context of international commercial arbitration, differences should be understood in two ways: the first is as a means of offering genuine choice to private parties[4] and the second is as offering a "free market of ideas" so each system may learn from one another.[5]

In reaching this conclusion, the present analysis is divided into three subsections: Section B shall explore the competing attitudes in respect of the existence, or otherwise, of an arbitral legal order. Section C sets out the debate relating to seat theory and delocalisation, which then frames a discussion about France and England's diverging approaches to the enforcement of awards set aside at the seat of the arbitration. Section D considers the purpose of comparative work in international commercial arbitration and offers some concluding thoughts.

B. Competing Philosophies

In his 2015 Freshfields lecture, Lord Mance posed the following questions:

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[1] See eg Queen Mary University of London and White & Case LLP, '2021 International Arbitration Survey: Choices in International Arbitration' (2021) 6, where London and Paris were ranked the first and fourth most popular seats respectively.

[2] This response focuses on international commercial arbitration.

[3] This of course recognises that a particular *feature* of a system, or a system's approach to a particular issue, can be better.

[4] Gary Bell, 'Arbitration and Comparative Law' in C.L. Lim (ed), The Cambridge Companion to International Arbitration (CUP, 2021) pp. 61-78, p 78.

[5] Klaus Peter Berger, 'Common Law vs. Civil Law in International Arbitration: The Beginning or the End?', in Maxi Scherer (ed), Journal of International Arbitration, Kluwer Law International 2019, Volume 36 Issue 3) pp. 295 - 314, P 313.

> Is international arbitration part of an autonomous legal order, not anchored in or attached to any state legal order? What does it mean to speak of an autonomous arbitral order? What would be the consequences if one existed and should we welcome them?[6]

Although Mance acknowledged the philosophical nature of these questions, he also emphasised these questions were of "practical significance" linking directly to questions relating to the role of the law and courts of the seat of an arbitration.[7] Nowhere is this better illustrated than when one compares France and England. Although it is true some differences between the two systems can be attributed to the common law/civil law divide[8] it is important not to overstate this[9] as doing so would ignore the serious theoretical differences between France and England as to the nature of international arbitration. In other words, it is their irreconcilable answers to the sorts of questions posed by Lord Mance which result in the *fundamental* differences between the two systems.

Arbitral Legal Order

It has been said that "the development of international arbitration owes a disproportionately large debt to French law and to the conceptual advances of French judges and scholars."[10] It was, for example, the exploration of the idea of *lex mercatoria* that contributed to the emergence of a full-fledged school of thought- the French school of international arbitration.[11] Notably, Goldman in 1963 delivered a course at The Hague Academy of International Law entitled "Conflicts of Laws in Private Law International Arbitration"[12] which posited the "inescapable need for an autonomous, non-national system."[13] The late Emmanuel Gaillard has said this course was "fundamental" since it "laid the foundation for the renewal of the vision of

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[6] Jonathan Mance, 'Arbitration: a Law unto itself?', in William W. Park (ed), *Arbitration International*, Oxford University Press 2016, Volume 32 Issue 2) pp. 223 - 241, also at https://www.supremecourt.uk/docs/speech-151104.pdf, p 1. References are to the online text.

[7] Ibid., 2. See also Emmanuel Gaillard, Theories of International Arbitration in Stefan Kroll, A. Bjorklund and F Ferrari (eds), Cambridge Comepndium of International Commercial and Investment Arbitration, vol 1, (CUP, 2023) p 28

[8] For example, the different meanings of "award" in the two systems has been attributed to the civil/common law distinction in 'Chapter 4: Contentious Awards', in Giacomo Marchisio, The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law, International Arbitration Law Library, Volume 44 (Kluwer Law International 2017) pp. 51 - 86

[9] See eg 'Chapter I: Introduction', in Piotr Wilinski , Excess of Powers in International Commercial Arbitration: Compliance with the Arbitral Tribunal's Mandate in a Comparative Perspective, (Eleven International Publishing 2021) pp. 3 - 12, at p 10.

[10] J. Paulsson, *The Idea of Arbitration* (OUP, 2013), p.44.

[11] M. Schinazi, *The Three Ages of International Commercial Arbitration* (CUP, 2021), p 203.

[12] Berthold Golman, "Les conflits de lois dans l'arbitrage international de droit prive", Collected Courses of the Hague Academy of International Law, 109 (1963) ¶ 78, at 480.

[13] Ibid., ¶ 14, at 380.

international arbitration."[14] Gaillard's role was equally fundamental in moving the discussion from *lex mercatoria* to the existence of an arbitral legal order.[15] So much so, it has been said that he was the scholar who "undoubtedly" gave the theory of the arbitral legal order "its most definitive features".[16]

For Gaillard, there are three representations of international arbitration: "monolocal", "multilocal" and "transnational" (arbitral legal order). Gaillard defines the term 'arbitral legal order' to mean "a system that autonomously accounts for the source of the juridicity of international arbitration… Without autonomy vis-à-vis each national legal order, there can be no arbitral legal order."[17] According to Gaillard, only this representation was capable of internal consistency and efficiency.[18] Gaillard's views have proved highly influential in France and continental Europe[19] and, as shall be discussed, the French Court of Cassation has endorsed his theory.[20]

However, the theory of an arbitral legal order has been much criticised by those in England and in the English-speaking world.[21] Most notably, Lord Mance has spoken about the "unfortunate difference in attitude" with regards to "the fundamental basis of arbitration."[22] Lord Mance offers six criticisms of the idea of an arbitral legal order[23] but space constraints means the present analysis shall focus on two of them.

The first is whilst party autonomy and consent are important they "do not amount to, and can exist quite independently of, the law."[24] That is to say, in practice, parties who agree to arbitrate do so because they are "look[ing] for the more solid theoretical underpinning provided by the available court assistance and enforcement."[25] Relatedly, Lord Mance accepts that arbitrators do not administer justice as an organ of the state but it does not follow that they administer justice

[14] E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010) p 1.
[15] Schinazi, supra note 11, p. 238.
[16] Ibid., 10.4.1.
[17] Gillard, supra note 14, p. 39.
[18] Ibid., ¶ 35.
[19] Some scholars in France have criticised the theory but they remain in the minority. See eg. Schinazi, supra note 11, pp. 266-269 and the references therein.
[20] See Section C.
[21] The theory also has its supporters in the English speaking world. See eg. Julian Lew, "Achieving the Dream: Autonomous Arbitration," *Arbitration International,* 22 (2006), 179-204.
[22] Mance, supra note 6, p. 24.
[23] Ibid., pp. 10-14.
[24] Ibid., p 10.
[25] Ibid., p 11.

as part of a separate legal system.[26] Indeed, Gaillard recognised that arbitration may not satisfy the criteria set out by Professor Hart as to the criteria of law and legal systems.[27]

Irrespective of which side of the debate one supports, the genius of Gaillard's methodology is that is helps explain important, divergent practices between the two systems.[28] This is illustrated in Section C's discussion of each system's attitude to enforcing awards set aside at the seat of the arbitration. In order to frame this analysis, it is necessary to first outline the seat theory and delocalisation debate.

C. Seat Theory vs. Delocalisation: Fate of Awards Set Aside at the Seat of the Arbitration

Seat Theory

The concept that arbitrations are governed by the law of the place in which they are held, i.e. the seat, or *locus arbitri*, of the arbitration is "well established in both the theory and practice of international arbitration."[29] The concept influenced the wording of The New York Convention (as well as its predecessor)[30] as shown by its references to 'the law of the country where the award is made'.[31] As *Redfern & Hunter* explains, this "continues the clear territorial link between the place of arbitration and the law governing the arbitration: the *lex arbitri*."[32]

On this view, the seat is not merely a place of geography; it is the "territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated."[33] This means when one says that London or Paris is the place of arbitration one actually "means that the arbitration is conducted within the framework of the law of arbitration of England [or] France."[34] The *lex arbitri* therefore governs both the 'internal' procedure of the arbitration as well as the 'external' oversight of national courts in the arbitral process.[35]

As *Redfern & Hunter* explains, the "strength of the seat theory is that it gives an established legal framework to an international arbitration."[36] On this view, just as the law of contracts ensures

[26] Ibid., p 12.
[27] Ibid., p 10.
[28] Schinazi, supra note 11, p. 262.
[29] Blackaby N and others, Redfern and Hunter on International Commercial Arbitration (7th edition [Student version], Oxford University Press 2022), at 3.63 and footnotes therein.
[30] Geneva Protocol of 1923.
[31] New York Convention, Article V(1)(a) and (e). Article V(1)(d) also contains similar wording.
[32] Redfern & Hunter, supra note 29, at 3.64.
[33] Ibid., at 3.67.
[34] Reymond, 'Where is an arbitral made?' (1992) 108, LQR 1, at 3.
[35] Collins (ed.), *Dicey, Morris & Collins on the Conflicts of Laws* (15th edn, Sweet & Maxwell, 2018) paras 16-009, 16-029.
[36] Redfern & Hunter, supra note 29, at 3.98.

contracts are in fact performed, the *lex arbitri* ensures the arbitral process works as it should. English law does not therefore recognise "arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law."[37] English law views any arbitration "as rooted in its seat"[38] which explains for example why English law, unlike many other systems, provides for the possibility of an appeal on a point of law unless the parties have agreed to the contrary.[39]

Delocalisation

An alternative to the 'seat' theory is one that delocalises arbitration from any national jurisdiction. At its highest, this would mean there is a universal *lex arbitri* in international arbitration.[40] However, as this idea is "as illusory as that of universal peace"[41] two separate developments have occurred.[42] The first is the courts adopting a supportive, not interventionist, role. The second is the delocalisation theory, i.e. to detach an international arbitration from control by the law of the place in which it is held. Instead, there is only one point of control: that of the place of enforcement. On this view, arbitrations are "floating" resulting in a "floating award".[43]

As the editors of *Redfern and Hunter* explain, the delocalisation theory relies on two main arguments.[44] The first is that international arbitration is self-regulating; for example, when the arbitration is being administered by an institution it largely replaces the state's regulatory functions.[45] Although there is some truth to this it is, for example, the *lex arbitri* which gives the award a nationality so that it is recognised and may benefit from international treaties.[46] As Weil points out, party autonomy "do[es] not float in space: a system of law is necessary to give them legal force and effect."[47] The second argument is that the *only* place of control should be at the

[37] *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, cited with approval by Simon J in *Yukos Capital SarL v OJSC Oil Co. Rosneft* [2014] EWHC 2188 (Comm), [2014] 2 Lloyd's Rep 435.
[38] Mance, supra note 6, p. 3.
[39] Arbitration Act 1996, s 69(1).
[40] Redfern & Hunter, supra note 29, at 3.86.
[41] Ibid., at 3.87.
[42] Ibid., at 3.88 - 3.89.
[43] Lew, supra note 21, at 202; Paulsson, 'Delocalisation of international commercial arbitration: When and why it matters' (1983) 32 ICLQ 53. See also references at Redfern & Hunter, supra note 29, at p 157, fn 129.
[44] Redfern & Hunter, supra note 29, 3.91 ff.
[45] Fouchard, *L'Arbitrage Commercial International* (Litec, 1965) pp. 22-27.
[46] Redfern & Hunter, supra note 29, 3.94.
[47] Weil, 'Problemes relatifs aux contrats passes entre un etat et un particulier' (1969) 128 Hague Recueil 95, at 181. Translation in Redfern & Hunter, supra note 29, at fn. 135, 3.94.

place of enforcement. However, this is contrary to the wording of the New York Convention[48] and the Model Law[49] which emphasise the necessary connection between the seat and its law.[50]

In practice the delocalisation of international commercial arbitration is only possible if the *lex arbitri* permits it.[51] Unsurprisingly, the best judicial manifestation of this theory is France. For example in 2007, using language that was near identical to that used in *Norsolor*[52] twenty seven years earlier[53], the French Court of Cassation held that:

> [A]n international arbitral award, **which does not belong to any state legal system**, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought.[54]

This representation was no doubt influenced by Galliard's idea "that the juridicity of arbitration is rooted in a distinct transnational legal order, that could be labelled as the arbitral legal order, and not in a national legal system […]"[55]

As shall be shown, this theoretical divide helps explain the diverging positions of France and England as to the issue of enforcing arbitral awards set aside in the country of the seat.

Awards Set Aside in the Country of the Seat

Can an award be enforced if it has been set aside by the courts in the country of the seat?[56] In light of the above analysis, it will come as no surprise that the French courts have consistently answered this question in the affirmative over the years: *Norsolar* (1984)[57]*, Polish Ocean Line* (1993)[58], *Hilmarton* (1994)[59]*, Chromalloy* (1997)[60]*, Putrabali* (2007)[61] and *Ryanair* (2015).[62] In

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[48] New York Convention, Art.V(1)(a) and (e).
[49] Model Law on International Commercial Arbitration, Art. 36(1)(a)(i) and (v).
[50] See Mance, supra note 6, p. 11.
[51] Redfern & Hunter, supra note 29, 3.97.
[52] Page 242, three ages, fn 44
[53] Thomas Clay and Philippe Pinsolle, "General Introduction: The Major Cases of the French Case Law on International Arbitration," in Thomas Clay and Philippe Pinsolle (eds.), *French International Arbitraton Law Reports* (Huntington: JurisNet, 2014), xxi.
[54] *Societe PT Putrabali Adyamulia v Societe Rena Holding et Societe Mnugotia Est Epices* [2007] Rev Arb 507, p. 514. Translation in Redfern, supra note 29, 3.90, emphasis added. Considered by the UKSC in *Dallah Real Estate and Tourism Holding Co. v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 4, at [15].
[55] Gaillard, supra note 14, p 35. Cf. Jan Palsson, "Arbitration in Three Dimensions," LSE Law, Society and Economy Working Papers 2/2010, 13.
[56] See e,g, Schinazi, supra note 11, 10.3 and references cited therein.
[57] Court of Cassation (France), First Civil Chamber, October 9, 1984, Societe Pabalk Ticaret Limited Sirketi v Norsolar S.A., Revue de l'arbitrage, 1985, 431.
[58] Court of Cassation (France), First Civil Chamber, March 10, 1993, Societe Polish Ocean Line v Societe Jolasry, Revue de l'arbitrage, 1993, 276.

Hilmarton, the French Court of Cassation went so far as to say "the award rendered in Switzerland is an international award which is not integrated into the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy."[63] These cases show how "throughout the past few decades, French courts have developed a strong stance in favour of a delocalization view of international arbitration."[64]

In sharp contrast, and equally unsurprising, the English approach is that "decisions of the court of the seat are decisions which the parties must, on the face of it, be taken to have accepted when that seat was chosen, and should in the ordinary case be treated as final and binding."[65] Support for this view is derived from the text of the New York Convention as well as one of its "founding fathers"[66] who was of the view that "Courts will… refuse the enforcement as there does no longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility […]"[67] It is worth noting, however, in exceptional circumstances English law will allow the enforcing court to recognise an award that has been set aside; where, for example, there is cogent evidence proving the foreign court decision was the outcome of political influence, fraud or corruption.[68] Crucially, however, this is justified on the basis of the permissive language of article V.1 and s 103(2)[69] rather than the English courts seeing the merits of the delocalisation theory.[70]

D. Comparative Work in International Commercial Arbitration and Concluding Thoughts

[59] Court of Cassation (France), First Civil Chamber, March 23, 1994, Societe Hilmarton Ltd. V Societe Omnium de traitement et de valorisation (OTV), *Journal du droit international,* 1994, 701.
[60] Paris Court of Appeal, January 14 1997, *Arab Republic of Egypt v Chromalloy Aero Services, Revue de l'arbitrage,* 1997, 395.
[61] Court of Cassation (France), First Civil Chamber, June 29, 2007, Societe PT Putrabali Adyamulia v Societe Rena Holding et Societe Moguntia Est Epices, Yearbook Commercial Arbitration (2007), 299.
[62] Court of Cassation (France), First Civil Chamber, July 8, 2015, *Societe Ryanair Ltd et Societe Airport Marketing Services Ltd v. Syndicat Mixte des Aeroports de Charente (SMAC), Revue de l'arbitrage,* 2015, 1131.
[63] Translation in Gaillard, supra note 14*,* 61.
[64] Gaillard, supra note 7, 28.
[65] Mance, supra note 6, 15.
[66] Schinazi, supra note 11, p 252.
[67] Pieter Sanders, "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards," *Netherlands International Law Review,* 6, no. 1 (1959), 55.
[68] Mance, supra note 19, p 19; *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya Naftogaz Ukrayiny* [2011] EWHC 1820 (Comm).
[69] Arbitration Act 1996.
[70] Mance, supra note 6, 17.

In one of his last writings, Gaillard stated his interest in arbitration legal theory was sparked by answering the question "Why do certain authors always seem to agree when discussing various technical and unrelated questions of arbitration, while others always seem to disagree?"[71] His answer was that "these authors' views diverge because they belong to different schools of thought and have different representations of international arbitration in mind."[72] The discussion in respect of the enforcement of awards set aside at the seat is a good illustration of this point. But the brilliance in Gaillard's methodology is it can explain divergent attitudes *across* the two systems: whether that is in respect of (i) the negative aspect of *Kompetenz-Kompetenz*[73]*;* (ii) anti-suit injunctions[74], (iii) public policy[75], (iv) degree of review[76], or even (v) each system's willingness to allow parties to choose a procedural law other than the law of the *locus arbitri.*[77] The list goes on.[78] In short, Gaillard's approach allows participants to not just see the differences between the two systems but to explain them. Or, to quote Bohr in *Oppenheimer*, "The important thing isn't can you read music, it's can you hear it. Can you hear the music?" Gaillard's method allows us to answer in the affirmative.

Equally, and just as importantly, both systems can and do still learn from one another. Gaillard's work is underpinned by a "comparative law methodology"[79] whilst the common law, and more specifically England, has no qualms in borrowing from France and the civil world more generally.[80] For example, it may well be that England decides it needs to have a policy shift to act more robustly against bribery and corruption; if so, its law on public policy may need to go through a similar shift as the one undergone in France.[81] As for which system is better, for both

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[71] Gaillard, supra note 7, pp 42 - 43.
[72] Ibid.
[73] John Barcelo III, The Competence-Competence Principle's Negative Effect, in Stefan Kroll, A. Bjorklund and F Ferrari (eds), Cambridge Comepndium of International Commercial and Investment Arbitration, vol 2, (CUP, 2023) p 807.
[74] Gaillard, supra note 14, p. 70 - 86.
[75] Monique Sasson, 'Public Policy in International Commercial Arbitration', in Maxi Scherer (ed), Journal of International Arbitration, (Kluwer Law International 2022, Volume 39 Issue 3) pp. 411 - 432.
[76] Chapter 26: Recognition and Enforcement of International Arbitral Awards (Updated September 2022)', in Gary B. Born , International Commercial Arbitration (Third Edition), 3rd edition (Kluwer Law International 2021).
[77] See e.g. Redfern & Hunter, supra note 29, at 3.78 and 3.81.
[78] See generally Stephan Balthasar (ed.), International Commercial Arbitration: A Handbook (Second Edition, 2021), Chapter H (International Commercial Arbitration in England) and Chapter I (International Commercial Arbitration in France).
[79] Gaillard, supra note 14, p. 77.
[80] See e.g. Sir David Foxton, "What have the French ever done for us? Historic and Prospective French Influences on English Private Law" available at https://www.judiciary.uk/wp-content/uploads/2022/03/Edmund-KIng-Memorial-Lecture-8.3.22.pdf Arguably the divide between England and France on the governing law of arbitration agreements contributed to the Law Commission's recent recommendations of reform: Law Commission, Review of the Arbitration Act 1996: Final Report and Bill (Law Com No 413, 2023) pp. 134 - 148.
[81] Rory V. Wheeler, 'Recent developments in the Paris Court of Appeal's approach to public policy', in João Bosco Lee and Flavia Mange (eds), Revista Brasileira de Arbitragem, (Kluwer Law International 2019, Volume XVI Issue 61) pp. 106 - 116; Granier, 'Betamax: Has the Privy Council Gone Too Far in Seeking to Ensure that the Second

commercial and intellectual reasons[82], comparative work in the field of international commercial arbitration should not be used as a means of saying whether one or other of the systems is *better*. To suggest otherwise truly makes comparison the thief of joy.

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[82] See section A and references therein.