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Understanding (and Misunderstanding) "Primary Jurisdiction"

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

Any private mechanism of dispute resolution--- wherever it falls on the spectrum running from consensual settlement all the way through binding arbitration---depends in the last resort on public sanctions and the public monopoly of force. It is in this sense at the very least that we can speak of a hierarchical, or vertical, relationship between courts and arbitral tribunals. But in our world of comparative advantage, of global ventures, and connected markets, transactions---and disputes---will routinely flow over national boundaries; they will inescapably involve parties of different nationalities---

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

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

Because arbitrators do not at least for the moment have armed marshals at their personal disposition, we must at some point look to those that do---that is, to a state court charged with assessing whether to lend, or to withhold, its support to the arbitration process (or, if need be, to interpose itself between private individuals and mere officious interlopers without a plausible claim to power over them). We may (at least some of us may) cherish the vision of a mechanism for mercantile self-government entirely self-contained---even autarkic, one independent of local peculiarities, and with a claim to universal recognition. But (thank goodness) for the moment such an ideal lacks any organized, permanent, hierarchical structure, any supranational standing bureaucracy, that could make it a concrete reality.[3]

I. "The Seat"

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

We are I think obligated to enter into this subject through the gate of the well known and generally accepted---to start off together on ground that seems common and familiar enough, and only slowly head towards contested territory. At the outset then (to alter the metaphor) I will---at least to the extent I am able---be painting with a pretty

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

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

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

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

broad brush, in the interest of sparing you a tedious pointillist reconstruction of received wisdom and traditional learning.[5]

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

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

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

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[5] This is what the Chinese would call *zou ma guan hua*, "glimpsing flowers from horseback."

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

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

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

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

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