



B. Judicial Supervision

1

QUIS CUSTODIET IPSOS CUSTODES?^{*1}

The genesis of the material in this section (B. Judicial Supervision) derives from a decades-old debate about the extent to which an arbitral award's validity should depend on the law of the country where the proceedings are held. The problem is complex not only because it implicates several legal systems, but also because the place of arbitration sometimes represents a legal fiction.² An "arbitral seat" is often designated (by the contract or the arbitral institution) to serve as the official venue at which the award is deemed made,³ notwithstanding that hearings and deliberations unfold elsewhere for the convenience of witnesses, counsel and arbitrators.⁴

During the 1960s, French scholars had begun to explore notions of "anational" arbitration autonomous from national law.⁵ In England and the Netherlands, more traditional perspectives continued to prevail, with eminent authors arguing that even awards rendered in cross-border disputes should remain subject to judicial review at the arbitral situs.⁶

* Adapted from "*Quis Custodiet Ipsos Custodes*" in *Arbitration of International Business Disputes* (1st edn, 2006).

¹ The context for this well-known line from Juvenal's Sixth Satire has been all but forgotten, perhaps wisely so. In suggesting that husbands lock up their wives to safeguard their chastity (seemingly a preoccupation in ancient Rome) Juvenal slyly adds: "But who will guard the guards themselves? Your wife is as cunning as you, and begins with them." "*Sed quis custodiet ipsos Custodes? Cauta est et ab illis incipit uxor.*" See Juvenal, *Satires VI* (The Ways of Women) 347.

² For a Swedish case rejecting the effect of an arbitral seat deemed a fiction, see *Titan v. Alcatel*, Svea Court of Appeal (29 March 2005), reproduced in 20 Int'l Arb. Rep A-1 (July 2005).

³ The arbitration seat is less a matter of real geography than a link to the legal order of the place whose mandatory curial law will govern the proceedings. See Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, 2004, with Nigel Blackaby and Constantine Partisides). See also Francis A. Mann, *Where Is An Award "Made"?*, 1 Arb. Int'l 107 (1985).

⁴ See e.g. Article 14(2) of the International Chamber of Commerce Arbitration Rules, providing that unless otherwise agreed by the parties, the arbitral tribunal may "conduct hearings and meetings at any location it considers appropriate." Article 14(3) goes further, and permits the tribunal to deliberate "at any location it considers appropriate" regardless of whether the parties agree.

⁵ See Berthold Goldman, *Les Conflits de lois dans l'arbitrage international de droit privé*, 109 II Recueil des cours 347, 379–80, 479–80 (1963).

⁶ See Francis Mann, "Lex Facit Arbitrum" in P. Sanders (ed.), *Liber Amicorum for Martin Domke* 157 (1967), reprinted in 2 Arb. Int'l 241 (1986).





Innovative case law spurred practicing lawyers to give further thought to applications of “delocalized” proceedings.⁷

The passage of new arbitration statutes in England (in 1979)⁸ and France (in 1982)⁹ provided occasions for dialogue. Some observers feared that cutting arbitration loose from the law of the arbitral situs would create more problems than it solved. What legal regime gives legitimacy to a “delocalized” award? In “anational” arbitration, would losers in unfair proceedings be forced to defend against recognition of the illegitimate award everywhere in the world they might have assets? Would no opportunity exist to have defective awards uprooted once and for all at the arbitral seat?

Much of the early dialogue underestimated the complexity of the problem, often conflating (in a provocative “simplify and exaggerate” style) analysis of three distinct yet intersecting questions. First, on what grounds should courts at the place of arbitration annul awards? Second, should award annulment in one country be recognized in another? And finally, what mechanisms should restrain arbitrators tempted to ignore the applicable substantive law and decide according to their own private notions of justice?

Mature reflection teaches us that the job of monitoring potential arbitral excess falls to both the place of arbitration and the country called to recognize the award. Annulment standards are matters for the place of arbitration, to be addressed in statutes interpreted by local judges. The effect of annulment lies within the province of both treaty and the law of the enforcement forum. The issue is not whether arbitrators should be subject to judicial supervision, but when and how such supervision should be exercised.

Many of us have seen our views become more tentative and nuanced. Once cast in black and white, many positions have taken on shades of gray with the passage of time. In this connection, one can only take some refuge in Emerson’s classic observation that “a foolish consistency is the hobgoblin of little minds.”¹⁰

⁷ See Jan Paulsson, *Arbitration Unbound: An Award Detached From the Law of the Country of Origin*, 30 *Int'l & Comp. L.Q.* 358 (1981); Jan Paulsson, *Delocalisation of International Commercial Arbitration*, 32 *Int'l & Comp. L.Q.* 53 (1983).

⁸ *Judicial Supervision of Transnational Commercial Arbitration*, 21 *Harv. Int'l L.J.* 87 (1980).

⁹ *French Codification of a Legal Framework for International Commercial Arbitration*, 13 *Georgetown J. Law & Pol. Int'l Bus.* 727 (1981).

¹⁰ Ralph Waldo Emerson, *Self Reliance*, reproduced in *Essays by Ralph Waldo Emerson* 39 (Leonard S. Davidow (ed.), 1936).

