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Andrea K. Bjorklund

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International Arbitration

Andrea K. Bjorklund[*]

In its ideal form, international arbitration is "a-national"; it is separate and apart from any national legal order and arbitrators can apply international norms that are themselves divorced from the control of any national legislature. Indeed, the fact that international arbitration operates at a remove from national systems explains its status as the preferred means of dispute settlement in complex commercial transactions and the increased frequency of recourse to investor-state arbitration under investment treaties. Notwithstanding this idealized picture, in its practical form an international arbitration is likely to involve the application of a bewildering array of national and international legal orders, which will interact with each other in multifaceted and unpredictable ways.

International arbitration is transsystemia on steroids. International commercial arbitration requires at a minimum the intersection of three "systems": the procedural law applicable to the arbitration, the procedural rules that govern the arbitration, and the substantive law or laws that govern the dispute. The laws of the places where an arbitral award might eventually be enforced can also be in issue, as might be the laws of places where key evidence might be located. Investment arbitration—arbitration between a foreign investor and the "host" state in which an investment is located and from which the dispute arises—adds a complicating twist in that the law applicable to the arbitration will in most cases be international law, yet the domestic law of the host state is certain to play one or more roles in the dispute.

The apparent dichotomy between the ideal and the practical is attributable to the continued presence of the state. Arbitration is usually described as a "creature of contract"; in the first instance, arbitrators gain their authority from the parties who agree to refer their dispute to them.

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* Professor, Associate Dean (Graduate Studies), and L. Yves Fortier Chair in International Arbitration and International Commercial Law, Faculty of Law, McGill University. The original version of this entry was adopted as part of the *McGill Companion to Law* at a meeting in January 2015.

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Some would argue that this is the only necessary source of arbitral authority. (Note that the initial authority is itself based on a contract that is binding because it is grounded in some legal order.) If the disputing parties in an arbitration are cooperative, an award is rendered, the losing party honours it without protest, and no national court system will be called upon to intersect with the arbitration. If, however, one or both parties are uncooperative, or arbitral authority needs to reach beyond the two parties before the arbitrators, the arbitrators' lack of coercive power becomes evident. In order to preserve the arbitration, a coercive authority belonging to a state or states will need to offer support.

To facilitate international arbitration, the international community has set up a remarkable transsystemic framework. The glue that holds the framework together is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention," which as of December 2020 was in force in 166 member states). The New York Convention provides that states party to the Convention will enforce an agreement to arbitrate in a New York Convention country and that they will enforce an award issued by an arbitral tribunal seated in a New York Convention country, subject to limited exceptions.

Note the reference to the "seat." International arbitrations have a "seat" or "place"—a jurisdiction that is frequently said to have primary authority over the arbitration. (Strong proponents of purely a-national arbitration do not necessarily accept the idea of the primacy of the seat.) An exception to this rule is arbitration under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention"), which establishes a more complete and discrete regime for qualifying investment disputes. The law of the place of arbitration (the *lex arbitri*) will control matters such as the provision of judicial assistance to an arbitration, including ordering provisional measures, ordering non-parties to the arbitration to provide evidence, and setting aside (also called vacating, annulling, or engaging in statutory review) the award on grounds provided in the *lex arbitri*, which tend to be limited and to focus on procedural errors. The question of primacy and exclusiveness comes into play particularly with respect to vacatur—only the court of the place of arbitration has the authority to set aside the award. The other two matters I noted above—the ordering of provisional measures and assistance with evidentiary matters—might also be sought in other jurisdictions whose ability and willingness to help will depend on that jurisdiction's law.

Once the arbitration is over and the victorious party has an award, it can enforce that award in any one of the 166 New York Convention countries. Thus, a judgment creditor can seek to locate and attach assets in dozens of jurisdictions, subject to the judgment debtor's ability to convince a court that enforcement should not be granted on one of the grounds con-

tained in the Convention. One of those grounds is that the award has been set aside in the place of arbitration. This requirement has been interpreted by some enforcing courts as mandatory, and by others as discretionary. Thus, even if an award has been set aside or denied enforcement in one jurisdiction, a judgment creditor could still seek enforcement in any other New York Convention State.

Those enforcement proceedings are subject to the procedural rules of the state in which enforcement is sought. Successfully seeking enforcement requires knowledge of the domestic law of the enforcement jurisdiction, which might interact with the New York Convention obligation in peculiar ways. For example, in the United States the majority of federal circuits require that the judgment debtor be subject to the personal jurisdiction of the court in which enforcement is sought even if the debtor has assets there—the presence of the assets alone is not enough to support the exercise of jurisdiction. Given the recent retrenchment in the adjudicatory jurisdictional laws of the United States, it might be hard to enforce an award in the United States. Other concerns, such as the execution immunity enjoyed by state assets (which is separate from any jurisdictional immunity the state enjoys but has likely been waived by participating in the arbitral process), also depend on municipal laws.

The laws and practices discussed above are generally classified as procedural. Yet the goal of arbitration is to enforce substantive law, and procedure and substance can interact in odd ways. For example, most agreements to arbitrate are found in contracts for the performance of some obligation. A cardinal principle of arbitration is the doctrine of severability—the arbitral clause can be severed from the performance ("container") contract, and can be enforceable even when the container contract itself is found to be unenforceable. This principle permits arbitrators to come to a binding conclusion that a contract (the contract from which their power derives) cannot provide a basis for recovery. It is also possible for different laws to apply to the agreement to arbitrate and the container contract.

Arbitrators apply substantive law to the merits of the dispute. Often that is the law chosen by the parties to the dispute, which is generally a municipal law, but which could be international law. One school of thought holds that international contract law is insufficiently developed to govern the resolution of any contractual disputes; another says that view is outdated. Thus, the governing law could be either municipal or international. If it is municipal law it could be civil law or common law.

If the parties have not selected the law applicable to the substance of the dispute, the arbitrators must choose based on the applicable choice-of-law rules. Which rules are those? Certain arbitral rules contain choice-of-law rules that permit a tribunal to take the *voie directe* to choose the law

it considers applicable. Others do not address the question, and there are competing theories about which jurisdiction's choice-of-law rules should govern, one of which is that it is the law of the seat of arbitration.

Investment arbitrations are generally governed by an investment agreement (either a bilateral investment treaty or another type of instrument that contains investment disciplines and offers arbitral dispute resolution). Many of them direct the tribunal to apply the treaty and "such rules of international law as may be applicable." Even with a directive that public international law governs, there is frequent *recourse* to municipal law to decide incidental issues—international law has no definition of property, for example, so the nature of an investor's property rights is normally decided based on the host state's law.

It is most appropriate to view the relationship of domestic and international law as two systems operating within the same harness and pulling in the same direction. Municipal law tends to play a supporting role in investment treaty arbitrations—or at least it has to date—with international law operating as the rule of decision, but with municipal law bearing on the answer to that question. Has a state violated its obligation to accord fair and equitable treatment? A state might defend itself on the ground that an investor has violated municipal law, and that defense might be fully or partially successful. Thus, factual determinations surrounding municipal law might reduce the amount of damages awarded, even if it doesn't obviate liability.

In disputes involving the European Union, the interplay between EU law and investment law is at issue—can compliance with EU law exculpate a member state from its international law obligations? Is EU law superior to other international law, including investment law? The European Commission has argued that it is, whilst public international law principles suggest that EU law is a part of international law, not separate from or superior to it.

There are more than 2,700 international investment agreements in force, most of which contain similar but not necessarily identical substantive obligations, and some of which contain quite deliberately different obligations. There is no system of precedent in international law, so the tribunals convened to hear each dispute might interpret similar rules in quite dissimilar ways. For certain obligations, there has been the development of at least some *jurisprudence constante*, whereas for others, interpretations are divergent and irreconcilable. There is thus no single "system" of international investment law.

The European Union has recently expressed an interest in resurrecting an idea first broached by the United States some seventeen years ago (and dismissed at that time by EU states as unnecessary and uninteresting)—the establishment of an appellate body for international arbitration.

This body, if established by a plurilateral agreement involving the twenty-seven member states of the European Union and another state or states, could provide a locus for unifying the divergent strands of substantive norm interpretation into something resembling a coherent corpus of governing law. If the appellate body were designed correctly, other states could refer disputes to it, thus contributing to the unifying effect. This would not remove the transsystemic nature of investment arbitration by any means, but it would remove one layer of uncertainty.

The potential creation of an appellate body illustrates the tension between the autonomous, party-driven nature of arbitration and the monopoly that states are attempting to maintain over the legal order. *Arbitral* tribunals whose decisions are subject to limited review illustrate a more capacious view of party autonomy—they have created a non-state order that is nonetheless facilitated by a state-created regime. Appellate bodies whose judges are named by states reinsert more state control into the process, yet it remains to be seen how (and if) an appellate body would operate in practice.

Practitioners and scholars in the area of arbitration must be comfortable operating within different systems and in the interstices between them, as well as with a lack of predictability and certainty. They must be prepared to make analogies between seemingly disparate legal orders and to create new ones. An incremental "common law" type approach is an apt analogy to explain how many arbitral laws and practices are created, yet the primacy of governing texts and statutes means that it would be premature and unwise to dispense with civil law's attention to code and text, and to morality and goodwill. And the arbitration community is influenced and sometimes directed by an overlay of customary norms. McGill students' transsystemic legal education suits them admirably for this world.

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