

The Representations of International Arbitration

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In this article, Emmanuel Gaillard discusses the competing mental constructs that allow an understanding of international arbitration as a coherent phenomenon. The author identifies three such mental constructs, or representations, each of which sheds light on the entire law and practice of arbitration, and captures the underlying beliefs of the different schools of thought in the field. The three representations approach the fundamental question of the source of validity and legitimacy of the arbitral process through the prism, respectively, of the legal order of the seat of the arbitration, the different legal orders that are willing to recognize the award resulting from the arbitral process, or a distinct transnational legal order—which the author characterizes as the arbitral legal order. Each of these philosophies of international arbitration lead to distinct branding, imaging, vocabulary, and concrete conduct of all players in the field, be it practitioners, arbitrators or courts. With the study of these three representations and their consequences, as well as their foundation in cognitive sciences, Emmanuel Gaillard delivers one of the first general scientific accounts of international arbitration.

1. Introduction

The *Stanford Encyclopedia of Philosophy* defines a ‘mental representation’ as ‘in the first instance, a theoretical construct of cognitive science’ which, as such, ‘is a basic concept of the Computational Theory of Mind, according to which cognitive states and processes are constituted by the occurrence, transformation and storage (in the mind/brain) of information-bearing structures (representations) of one kind or another’.¹ If, for the sake of clarity, one factors in the definition of ‘Computational Theory of Mind’ as found in a more accessible source, according to which the ‘Computational Theory of Mind’ ‘is the view that the human mind is best conceived as an information processing system

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¹ See *Stanford Encyclopedia of Philosophy*, under ‘Mental Representation’ <<http://plato.stanford.edu/entries/mental-representation/>> accessed 19 July 2010.

and that thought is a form of computation', which 'requires representation because "input" into a computation comes in the form of symbols or representations of other objects',² one readily understands why international arbitration has so far not been subjected to this form of intellectual torture.

International arbitration is a dispute settlement mechanism. It has even become, according to many, the normal means of settlement of international disputes. It raises many interesting legal issues of both theoretical and practical nature. Why worry about 'representations'?

The reason is as follows. One can discuss at length thorny issues of a technical nature in international arbitration: who can appear as a witness before an arbitral tribunal? Should arbitrators apply mandatory rules other than those found in the law selected by the parties? And the most fascinating question of all: should post-hearing briefs be submitted and should they be consecutive or simultaneous? All of these issues can obviously be discussed in isolation, but the controversies they will raise and their underlying stakes are better understood in the broader context of international arbitration. At a certain level—that is often neglected—the answer that may be given to any of these and other questions of a similarly technical nature ultimately depends on the underlying vision one entertains of international arbitration. This is the level at which it may matter to apprehend international arbitration in terms of 'visions' or 'representations' of international arbitration.³ What I mean by 'representation' is simply the mental construct, the model pursuant to which we all conceive international arbitration as a phenomenon. Only an approach taking into account the representations of international arbitration will allow the exploration of the inter-relations between these apparently disconnected issues and the manner in which, in fact, they are part of a coherent system.

There is not a single representation, a single vision, of international arbitration. It is precisely because there are several visions, several competing representations of international arbitration, that the controversies on a number of apparently purely technical topics remain so vivid. Not surprisingly, certain authors always agree with one another no matter how different the issues at hand, while others will always disagree with the former on the same issues. This is because they belong to different schools of thought, because they embrace different visions of arbitration. The controversies are all the more intense that, in reality, what is at stake are not matters that may be disposed of by scientific demonstration, but rather matters that belong to the realm of belief, of faith. There is no such thing as a right or wrong representation of

² See *Wikipedia*, under 'Computational Theory of Mind' <http://en.wikipedia.org/wiki/Computational_theory_of_mind> accessed 19 July 2010.

³ On these issues, see Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, The Hague 2010). This work, which is based on a Course given at The Hague Academy of International Law in the Summer of 2007, was published first in French as *Aspects philosophiques du droit de l'arbitrage international* (Martinus Nijhoff Publishers, The Hague 2008). See also Emmanuel Gaillard, 'The Representations of International Arbitration', *New York Law Journal*, 4 October 2007.

international arbitration. As for every other vision or ideology, one may share it or not. It may be efficient or inefficient, but never right or wrong.⁴

In my opinion, there are three competing representations of international arbitration. I will describe each of these representations and how each captures the field of international arbitration, after having elaborated on the notion of representation as applied to international arbitration.

2. *The Notion of Representation as Applied to International Arbitration*

Not every controversy, not every argument regarding international arbitration can be characterized as a representation of international arbitration. There are many debates in the field of international arbitration. Each of these debates, however, cannot claim to the status of a representation. Only a vision that purports to encompass the entirety of the phenomenon can be deemed to be a representation of international arbitration. Another expected attribute of a representation as applied to international arbitration is its internal consistency. A representation containing inconsistent features would be akin to a logical fallacy. A further characteristic of a representation of international arbitration is that, as every other construct of the mind, it may be overt or implicit, be it as a matter of choice or by deference to an ideology, the consciousness of the process not being a defining feature of a representation. Each of these characteristics will be examined in turn.

A. *Completeness*

Only a representation that can provide an answer to all of the questions arising in international arbitration—including the most difficult issues of the legitimacy of the process and of the source of validity of the arbitration agreement and that of the ensuing award—can be properly characterized as a representation of international arbitration.

This is why *lex mercatoria* does not amount to a representation of international arbitration. The controversies on *lex mercatoria* focused essentially on the law applicable to the merits of a dispute or to the arbitral procedure. They included questions such as whether arbitrators can determine the applicable law by using choice of law rules other than those of the seat; whether they can apply rules other than those of a given State to the merits of the dispute and whether they can deviate from the procedure usually followed before the courts of the country of the seat. By exclusively focusing on such issues, the reflection on *lex mercatoria* overlooked the fundamental question

⁴ On the characteristics of an ideology, see Jean Baechler, *Qu'est-ce que l'idéologie?* (NRF coll Idées, Gallimard, Paris 1976).

regarding the source of the arbitrators' power to adjudicate, a question which only the proponents of the vision of arbitration that equates the seat of the arbitration with the forum of a national court had addressed squarely.⁵ This fundamental query cannot be resolved through the invocation, as a leitmotiv, of the notions of party autonomy or of the contractual origin of arbitration. These answers only shift the problem as they leave unresolved the more fundamental question of the origin and binding character of the principle of party autonomy.

By contrast, each of the three representations of international arbitration that will be examined below satisfies the characteristic of being capable of answering this fundamental query, along with all other questions arising in the field of international arbitration.

B. *Internal Consistency*

In the field of law, as in the field of logic, the cardinal sin is inconsistency. Thus, no doubt that in the assessment of the respective value of the competing representations of international arbitration, accusations of inconsistency will be used mercilessly.

The example of anti-suit injunctions provides a hard test for the consistency of a representation of international arbitration. The manner in which those who adhere to the monolocal representation of international arbitration—according to which the sole source of validity and legitimacy of the arbitration is to be found in the legal order of the place in which it unfolds⁶—deal with anti-suit injunctions issued by the courts of the seat of the arbitration is particularly worthy of note, especially in situations where such injunctions appear to be issued on frivolous grounds in order to improve the procedural position of the local party. For example, in the *Saipem v Petrobangla* matter, the local State-owned entity sought and obtained an anti-suit injunction from the Bangladeshi Courts, which revoked the Arbitral Tribunal's authority for having rejected certain trivial procedural requests made by the Bangladeshi party.⁷ In doing so, the International Chamber of Commerce (ICC) Tribunal was simply exercising its discretion to rule on procedural motions pertaining to the keeping in the record of the written testimony of a witness prevented from attending the hearing, to the request that all witnesses be present at the hearing at all times, to the admission of a new piece of evidence during the course of a cross-examination, and to the admission of certain other documents. How

⁵ For a description of the first representation of international arbitration, see below, Section 3.A.

⁶ See below, Section 3.A.

⁷ See ICC Case No 7934, unpublished, described in the Decision on jurisdiction and provisional measures rendered on 21 March 2007 in ICSID Case No ARB/05/07, *Saipem SpA v Bangladesh*, *International Arbitration Report*, April 2007, at B-1. See also the Award rendered on June 30, 2009 in ICSID Case No ARB/05/07, *Saipem SpA v Bangladesh*, available on the *Investment Claims* and *ITA – Investment Treaty Arbitration* websites <<http://www.investmentclaims.com>>; <<http://www.ita.law.uvic.ca/>> accessed 31 July 2010.

should arbitrators react to such circumstances, bearing in mind that Dhaka in Bangladesh was, in the case at hand, the seat of the arbitration? For its part, the Arbitral Tribunal (composed of Werner Melis, President, Ricardo Luzzatto and Ian Brownlie) rendered an award on the merits on 9 May 2003, finding Petrobangla liable and ordering it to pay to Saipem various amounts for the breach of its contractual obligations. Seized of an action to set aside the award, the Bangladeshi Courts found, on the other hand, that given that the Arbitral Tribunal's authority had been revoked, there was no award to set aside: '[a] non-existent award can neither be set aside nor can it be enforced'.⁸

Authors such as Professor Jean-François Poudret and Sébastien Besson, although embracing the philosophy according to which the source of validity of an arbitration is to be found in the legal order of the seat of the arbitration, which they refer to as the *lex arbitrii*, deal with such situations in the following manner:

We believe that the *lex arbitrii* constitutes the primary legal basis for the effectiveness of the arbitration agreement and that arbitrators do not have a discretionary power to disregard injunctions issued by the courts at the seat of the arbitration. To the contrary, they should obey such decisions, unless they are manifestly abusive.⁹

The entire reasoning seems consistent with the notion that the arbitration derives its source of validity from the legal order of the seat, except for the proviso according to which situations in which injunctions that are 'manifestly abusive' should be disregarded. Where is the binding nature of such proviso to be found? Obviously not in the legal order of the seat which, by definition, has expressed a view through its courts. One may wonder whether this is not the premise of a reasoning that is more transnational than the authors would readily admit.¹⁰

C. Consciousness

The works in the field of cognitive psychology, the purpose of which is to explore internal mental processes, show that representations are not necessarily conscious. It would be a mistake 'to consider that all representations are accessible to the consciousness of the subject'.¹¹ The same goes for the

⁸ Cited in *Saipem SpA v Bangladesh*, Decision on jurisdiction and provisional measures rendered on 21 March 2007, *ibid* para 36.

⁹ Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, London 2007) para 146a, at 117.

¹⁰ Interestingly, the proviso became the very basis of the reasoning of the ICSID Arbitral Tribunal holding Bangladesh liable, through the actions of its Courts, for an abuse of right consisting in the disruption of the arbitration: see Award rendered on 30 June 2009 in ICSID Case No ARB/05/07, *Saipem SpA v Bangladesh*, above n 7, paras 160–1.

¹¹ Jean-Marie Gallina, *Les représentations mentales* (Dunod, Paris 2006) 27 (author's translation).

representations of international arbitration. They may or may not be conscious to the subject, let alone expressed as such.

Even if the representations of international arbitration have not been in the foreground, they undeniably structure the field. It is thus natural for certain authors to always agree with some and disagree with others. Such federations of thought are not fortuitous. Their very existence is due to the underlying vision of the phenomenon. For example, on questions as fundamental as the determination of the law applicable to the merits, the acceptance of the concept of *lis pendens* between arbitral tribunals and national courts, or the recognition of awards set aside in the country of the seat, the solutions recommended by Jean-François Poudret and Sébastien Besson in their remarkable study on comparative law of international arbitration¹² will often diverge from those I have proposed in the treatise co-authored on international commercial arbitration.¹³ Although there always will—or should be—a scientific convergence on the description of positive law in a given national system or arbitral case law, there is room for divergence on the systematization of the discipline, the appreciation of solutions, or propositions as to the trend of the evolution in the field.¹⁴ Such divergence has no bearing on the intrinsic value of each representation. It merely illustrates the fact that, in each case, the thinking is structured around a given representation of international arbitration and that, fundamentally, this is the reason for the quasi-systematic difference of opinion between each group.

3. The Three Representations that Structure the Field of International Arbitration

For the purposes of a study on the representations of international arbitration, the identification of the three representations that, in my view, structure the field of international arbitration—which have been discussed more in depth in a previous work¹⁵—may be less significant than the description of the mental processes that they resort to and that make it possible to characterize each of them as a true representation.

¹² Poudret and Besson (n 9).

¹³ E Gaillard and J Savage (eds), *Fouchard Gaillard Goldman On International Commercial Arbitration* (Kluwer, The Hague 1999).

¹⁴ On the apposite nature of the notion of *lis pendens* in international arbitration, see, eg E Gaillard, 'La reconnaissance, en droit suisse, de la seconde moitié du principe d'effet négatif de la compétence-compétence' in G Aksen and others (eds), *Global Reflections on International Law, Commerce and Dispute Resolution. Liber Amicorum in honour of Robert Briner* (ICC Publishing, Paris 2005) 311, and J-F Poudret, 'Exception d'arbitrage et litispendance en droit suisse. Comment départager le juge et l'arbitre?' (2007) 25 ASA Bull 230.

¹⁵ See Gaillard (n 3). On the idea that there are four 'propositions' or 'theses', rather than three representations, but that the fourth 'proposition' 'ultimately merges with the second', see the study published by Jan Paulsson on the author's approach in 'Arbitration in Three Dimensions' (13 January 2010) LSE Legal Studies Working Paper No 2/2010, at 3.

A. Identification of the Representations of International Arbitration

The first and most traditional representation of international arbitration is the one equating the arbitrator with the local judge of the place of arbitration. In this representation, the sole source of the arbitrator's power is the legal order of the seat of the arbitration. The seat is viewed as the arbitrator's forum, just like national judges have a forum. The award has a nationality: it is either an 'English' or a 'Colombian' award, depending on whether the seat of the arbitration was in England or in Colombia. This representation has developed into two different iterations. In a first, objectivist, trend, the arbitrator is perceived as a species of local judge based on the notion that the law of the seat has an inherent right to regulate activities on its territory.¹⁶ In a second, subjectivist, vein, the arbitrator is equated with the local judge because this would reflect the assumed intention of the parties when choosing the seat of the arbitration or delegating that choice to the arbitral institutions or the arbitrators themselves.¹⁷

The second representation has operated what may be called a Copernician revolution *vis-à-vis* the first, in that it looks at the whole arbitral process through the end result, namely the fact that the award will be recognized in a number of countries if it meets the prescribed conditions of the recognition of arbitral awards in those countries. In that vision, the seat does not matter so much, the place or places of enforcement of the award do. In recognizing an award that meets certain criteria, the legal order of the place of enforcement legitimizes *a posteriori* the whole arbitral process.¹⁸ In this representation, the arbitrator has no *lex fori*. The arbitrator is not a species of local judge. The award no longer has a nationality; it is neither English nor Colombian.

¹⁶ This vision has been best expressed by FA Mann in his famous article 'Lex Facit Arbitrum' in *International Arbitration. Liber Amicorum for Martin Domke* (Martinus Nijhoff Publishers, The Hague 1967):

There is a pronounced similarity between the national judge and the arbitrator in that both of them are subject to the local sovereign. If, in contrast to the national judge, the arbitrator is in many respects, but by no means with uniformity, allowed and even ordered by municipal legislators to accept the commands of the parties, this is because, and to the extent that, the local sovereign so provides.

... Is not every activity occurring on the territory of a State necessarily subject to its jurisdiction? Is it not for such State to say whether and in what manner arbitrators are assimilated to judges and, like them, subject to the law? (p. 162)

¹⁷ This justification has for example been advocated by Professor Roy Goode in his 2001 article on 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17 *Arbitration International* 19–39.

¹⁸ This has been eloquently described by Arthur von Mehren in a lecture given in Tel Aviv in 1986. AT von Mehren, *Limitations on Party Choice of the Governing Law: Do They Exist for International Commercial Arbitration?* (The Mortimer and Raymond Sackler Institute of Advanced Studies, Tel Aviv University, Tel Aviv 1986). After insisting on the 'ambulatory' nature of international arbitration, he went on explaining:

No sovereign enjoys an exclusive right to deal with the award and one or more sovereigns' denial of recognition or enforcement does not deprive the award of its legitimacy nor necessarily renders it worthless. In the case of judicial proceedings, sovereignty is focused; in the case of international commercial arbitration, it is diffuse or distributed. As a result, unlike the judge, the arbitrator has no *lex fori*. (pp. 19–20)

The source of its legal force does not stem from a single legal order—that of the seat—but rather from the legal orders that are willing, under certain conditions, to recognize its effectiveness.

The third representation goes one step further in that it contemplates the States collectively, not individually. In that representation, it is the vast number of States prepared to recognize an award that meets certain criteria that gives to that award and the arbitration agreement on which it is based its validity and legitimacy. This representation corresponds to the international arbitrators' strong perception that they do not administer justice on behalf of any given State, but that they nonetheless play a judicial role for the benefit of the international community. The same arbitrator sitting one day in Mexico and the next in Singapore will not render justice any differently. Considering the widespread trend in favour of the recognition of international arbitration as the normal means of settling international disputes, the legitimacy of the arbitrators' performance of this function cannot be disputed. It is based on the consensus existing among States on this matter rather than on the will of any given sovereign to accept the existence of this private means of dispute resolution.

This representation, too, has developed into two different trends, the jusnaturalist and the positivist. The rare authors, such as René David¹⁹ and Bruno Oppetit,²⁰ who overtly advocate a natural law perspective have had no difficulty justifying the sources of arbitration in the higher values that are considered to result from the nature of things or society. The positivist model, on the other hand, grasps the phenomenon on the basis of the normative activity of the States taken collectively. The validity and legitimacy of the arbitral process and of the ensuing award, instead of being rooted in a single legal order, that of the seat, or, as in the second representation, in the individual legal order of each State that may ultimately recognize the award, is found in the body of rules on which a consensus has been reached by the collectivity of States. It is premised on the simple idea that the understanding of a vast number of States must be given greater weight than that of an isolated country, be it that of the seat of the arbitration.

B. The Cognitive Processes Associated with the Representations of International Arbitration

What makes the three 'visions' or 'philosophies' of international arbitration suitable for the label of 'representation', rather than that of the more restrictive notion of 'idea' or even 'theory', is their aptitude to immediately bring to the mind (re-present) the entirety of the phenomenon through the classic cognitive

¹⁹ R David, 'Droit naturel et arbitrage' in *Natural Law and World Law. Essays to Commemorate the Sixtieth Birthday of Kotaro Tanaka* (Yuhikaku, Tokyo 1954) 19.

²⁰ B Oppetit, *Philosophie du droit* (Dalloz, Paris 1999) para 94.

processes of branding, imaging, resorting to specific vocabulary, and determining the subject's conduct in relation to the field.

(i) *Branding*

Each of the three representations of international arbitration can be captured in its entirety in a single formula. The first is 'monolocal' in that it derives the source of validity of the arbitral process from a single legal order, that of the seat of the arbitration. The second may be labelled as 'multilocal' or 'Westphalian' because, like the world's legal order following the Treaty of Westphalia, it is a model based on a juxtaposition of sovereign powers and in which each State decides for itself the conditions under which it will consider an arbitral process to be legitimate and an award to be worthy of recognition. The third representation is neither monolocal nor multilocal, it is 'transnational'. This representation accepts the idea that the legally binding nature of arbitration is rooted in a distinct, trans-national legal order, that could be labelled as the 'arbitral legal order',²¹ and not in a national legal order, be it that of the country of the seat or that of the place or places of enforcement.

(ii) *Imaging*

Beyond labels, each of the three representations has developed mental images that assist in the process of capturing the nature of international arbitration. For the first representation, the arbitrator is a species of local judge. An arbitrator sitting in Doha is akin to a Qatari judge. His or her award itself bears a Qatari tag. In the second representation, the arbitration phenomenon is decentralized. In the words of Arthur von Mehren, as opposed to judicial proceedings, for which sovereignty is focused, in the case of international arbitration, it is diffuse or distributed.²² The award has no nationality, it is Stateless. Each of these words is associated with mental imagery and evokes an analogy. In the third representation, the arbitrator is analogized with an international judge. The award is viewed as a decision of international justice, just as would be a decision rendered by a permanent international court established by the international community. It is neither national nor Stateless; it is international.

(iii) *Specific vocabulary*

Because each of the three representations of international arbitration offers its own vision of the phenomenon, each comes with its own vocabulary. Terminology carries the underlying ideology. 'Arbitrators have no forum'. The award was rendered in 'the country of origin'. The arbitrators' powers derive from the '*lex arbitri*'. Arbitrators should ensure compliance with 'truly

²¹ For an elaboration on the notion of arbitral legal order, see Emmanuel Gaillard, 'L'ordre juridique arbitral: réalité, utilité et spécificité' (2010) 55 McGill L J (forthcoming).

²² von Mehren (n 18).

international public policy'. None of these formulas is neutral. One readily recognizes language that connotes the second, the first (twice) and the third representations, respectively.

Conversely, strong terminology has been used to castigate the philosophy of another camp. The third representation is sometimes caricatured as promoting the notion of awards that are 'floating in the transnational firmament'.²³ By contrast, the first representation may be portrayed as endorsing arbitration as 'a kind of annex, appendix or poor relation to court proceedings'.²⁴

All these formulas are designed to generate either a favourable or a negative perception of a given representation in the mind of the addressee. In that sense, they constitute combat terminology, a feature common to the field of rhetoric.

(iv) *Determining the conduct*

The representation one adheres to shapes the entirety of the life of an arbitration. This is true for counsel to the parties when they fashion the case's strategy or simply when they negotiate the drafting of terms of reference; this is true for arbitrators having to decide the matter; this is equally true for the national judge having to appoint an arbitrator or to review an arbitral award. In each case, the vision they embrace, overtly or implicitly, will determine their conduct and have major impact on the outcome of all these issues.

Those who equate the arbitrator with the local judge will mechanically abide by the decisions made by any judge in the country of the seat of the arbitration, will apply the procedural law of the seat and the choice of law rules of the seat when they need to identify the applicable law, and will consider that an award set aside in what they call 'the country of origin' simply no longer exists.

Those who embrace a Westphalian approach will not mechanically follow the decisions rendered by the courts of any jurisdiction, including that of the place of arbitration. They will accept that arbitrators may disregard an anti-arbitration injunction and render a decision which other legal systems may find perfectly reasonable and valid. They will recognize the arbitrators' freedom to choose the applicable procedural rules, the choice of law rules which they see fit to select the law applicable to the merits and, where appropriate, to apply or not to apply the mandatory rules of any given jurisdiction having connections with the dispute at hand. They will also

²³ See *Bank Mellat v Helliniki Techniki SA*, where Kerr LJ stated that: '[d]espite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law' [1984] 1 QB 291, 301.

²⁴ These are Lord Wilberforce's words, as recalled by Lord Steyn in *Lesotho Highlands* [2006] AC 221, s 18: 'I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law – yes, its substantive law. I have always hoped to see arbitration law moving in that direction. That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction and otherwise, and not really defining with any exactitude the relative positions of the arbitrators and the courts'.

recognize the freedom of any given legal system to make its own determination as to the validity and binding character of an arbitration agreement or of an award, irrespective of the determination made on the same issues in any other legal system.

Those who embrace the third representation and believe that, in a world of diversity, where the nationality of the parties, the place of the arbitration, the nationality of the arbitrators, and the applicable law are routinely different, and, as such, there is no compelling reason, other than a misplaced quest for an improbable harmony of solutions, to give any individual State, including that of the seat of the arbitration, the sole authority to regulate the arbitral process and the ensuing award, will not mechanically accept the impact of any anti-arbitration injunction. They will recognize the arbitrators' freedom to apply transnational procedural rules, transnational choice of law rules or even transnational substantive rules. They will disregard rules which offend transnational public policy, even where those rules have been selected by the parties or form part of the law of the seat of the arbitration. They also will, where appropriate, recognize an award that has been set aside at the seat of the arbitration for idiosyncratic reasons, which need not be given an absolute international effect.

The internal coherence of the solutions in each of these structuring representations of international arbitration shows that, when the proponents of the respective representations appear to converge or diverge on purely technical and unrelated issues—such as the ability of a party to testify in its own arbitration, or the fate of an award set aside at the seat of the arbitration—they converge or diverge, in fact, on the way international arbitration is immediately present to the mind or, in other words, on the very representation that underlies the entire phenomenon.