

Professor Gaillard undertakes an intellectual *tour de force* which demonstrates that the law of international arbitration cannot properly be understood without reflection on its philosophical underpinnings and, *vice versa*, that different philosophical conceptions of the law of international arbitration are not without practical implications.<sup>1</sup> This is no small feat and, as Professor Lalive noted in his own review, while the epithet '*philosophiques*' in the title may scare more pragmatically-oriented readers away, Professor Gaillard's lectures, which have now been published in a handy pocket book format, are indeed 'indispensable' to a proper understanding of contemporary international arbitration.<sup>2</sup>

Professor Gaillard starts his investigation with an interesting thesis: the law of arbitration, even more so than private international law, lends itself to philosophical reflection. This is because the 'essentially philosophical' notions of free will and liberty lie at the very core of the discipline. At the same time, the exercise of these rights – the freedom of the parties to create a private tribunal to resolve their differences, to agree on a procedure that is most appropriate in the circumstances, and to choose the applicable law, and the corresponding liberty of the arbitrators to rule on their own competence, to regulate the arbitral process, and, in the absence of choice of law by the parties, to designate the applicable law – also raises questions of legitimacy. Even more fundamentally, it also raises questions of the source of the arbitrators' authority and the legal nature (*juridicité*) of the resulting decision. Last but not least, it raises the question of the 'sources' of the law of international arbitration – the ultimate criterion of academic

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The conventional wisdom is that the commercial man is more interested in things material than philosophical reflection. Professor Emmanuel Gaillard – a prominent commercial arbitration practitioner and professor of law – in his Hague Academy lectures of 2007 sets out to prove that the conventional wisdom is not entirely accurate. In the best French tradition of private international law scholarship,

<sup>1</sup> Prof. Gaillard himself refers, *inter alia*, to Henri Batiffol's classic *œuvre* '*Aspects philosophiques du droit international privé*' (1956) and Berthold Goldman's celebrated 1963 Hague lectures *Les conflits de lois dans l'arbitrage international de droit privé* (1956) as sources of his intellectual inspiration.

<sup>2</sup> P. Lalive, 'Book Review: Aspects Philosophiques du Droit de l'Arbitrage International', 26 *ASA Bull* (2008) 700.

relevance, in the view of many, of any legal theory.

However, while the law of international arbitration may indeed provide a fertile ground for philosophical reflection, Professor Gaillard notes that intellectual exchanges between philosophers of law and specialists in the law of arbitration have remained relatively limited. With few exceptions – again, these being found mainly in France, or at least in the francophone world<sup>3</sup> – arbitration scholars have focused on expounding on positive law rather than the philosophy of law. Whatever encounters there have been occurred mainly in the context of the grand *lex mercatoria* debate in the 1960s and 1970s. Since then, silence has prevailed, with the exception of another interesting debate, conducted mainly in the 1980s, about the ‘delocalization’ of international arbitration (which Professor Gaillard curiously hardly mentions, although it does appear to underlie the second of his three representations of the law of arbitration).

Professor Gaillard’s principal thesis can be summarized briefly: the various views of the philosophy of the law of international arbitration, which structure the thinking on the subject, can be captured in the form of three mental ‘representations’, which he terms the ‘monolocal’ or ‘monadic’ (*‘monolocalisatrice’*) approach, the ‘Westphalian’ (or ‘multilocal’ or ‘decentralized’) approach, and the ‘transnational’ approach. While Professor Gaillard recognizes that all three approaches make a valid point and have their supporters, he considers that only the third, transnational approach survives a rigorous philosophical criticism in terms of its coherence and effectiveness.

The first of the three representations – the ‘monolocal’ approach – seeks to reduce the law governing international arbitration to the

law of the seat, which, according to this view, constitutes the ‘forum’ of the arbitration. This approach incorporates both an ‘objectivist’ and a ‘subjectivist’ strand. The objectivist strand was formulated in the most compelling fashion by F.A. Mann in his celebrated ‘*Lex facit arbitrum*’ in 1967.<sup>4</sup> In the legal sense, according to Mann, ‘no international arbitration exists’.<sup>5</sup> Just as every system of private international law is a system of national law, ‘every arbitration is a national arbitration, that is to say, subject to a specific system of national law’.<sup>6</sup> In other words, the *lex arbitri* is the *lex loci arbitri*. As modern representatives of the ‘subjectivist’ strand of this representation, Professor Gaillard cites the authors of the leading Swiss treatise on international arbitration, Jean-François Poudret and Sebastian Besson. According to these authors, in choosing the seat of arbitration, the parties or, as the case may be, the arbitral institution or the arbitrators must be understood to have placed the arbitration under the exclusive jurisdiction of the law of the seat. Thus, unlike the objectivist strand, which draws the law governing the arbitration from a mere fact – the place of the seat – the subjectivist strand seeks to root the legitimacy of the primacy of the law of the seat in the free choice of the parties (or, as the case may be, the arbitral institution or the arbitrators). Professor Gaillard sees the philosophical underpinning of the monolocal approach in the statist version of legal positivism à la Hart and Kelsen: any legal activity, including arbitration, must derive its validity from a system of local law (or international law).

The second, ‘Westphalian’ approach sees the legal foundation of international arbitration in the plurality of local legal orders. Unlike the monolocal approach, the Westphalian approach is thus ‘multilocal’ or ‘polyadic’ (*‘multilocalisatrice’*). According to this philosophy,

<sup>3</sup> See, e.g., the works cited by Prof. Gaillard: B. Oppetit, *Théorie de l'arbitrage* (1998); S. Bollée, *Les méthodes du droit international privé à l'épreuve des sentences arbitrales* (2004); H. Arfazadeh, *Ordre public et arbitrage international à l'épreuve de la mondialisation* (2006).

<sup>4</sup> See Mann, ‘*Lex Facit Arbitrum*’, in P. Sanders (ed.), *International Arbitration Liber Amicorum for Martin Domke* (1967), at 157.

<sup>5</sup> *Ibid.*, at 159.

<sup>6</sup> *Ibid.*

every jurisdiction concerned which comes into contact with an arbitration has an equally valid claim to pronounce on the validity of the award, in particular in the context of execution. In other words, under the multilocal approach the validity of international arbitration is ultimately tested at the point of execution. The philosophical thinking of such a Westphalian, multilocal approach is rooted in a decentralized view of the law of arbitration. The arbitral process – and the arbitral award – is validated retroactively, at the stage of recognition and enforcement, and thus has no ‘centre’. Philosophically speaking, like the monolocal approach, the multilocal approach is based on a positivist view of the law of arbitration. The only difference is that the multilocal approach conceives of the relations between states according to a Westphalian model of sovereignty and inter-state relations. According to Professor Gaillard, the multilocal approach is embodied, in particular, in the New York Convention, which (unlike the earlier Geneva Protocol) severed the validity of the arbitral award for purposes of recognition and enforcement from its validity under the law of the seat.

The third, transnational representation is based on the idea that the legal nature or ‘legalness’ (*juridicité*) of arbitration may be derived, not from the legal order of a state, whether the law of the seat or the place(s) of execution of the arbitral award, but from a ‘third’ legal order – the legal order of arbitration (*l’ordre juridique arbitral*). While this approach builds on the earlier *lex mercatoria* debate, it goes beyond the applicable law concerns of this debate and raises the more fundamental question of the source of the authority of the arbitrators. According to Gaillard, this approach is *transnational* (rather than ‘a-national’) in that it does not conceive of states in isolation from each other, but is concerned with cross-border commercial activities *between* states – and thus shifts the conceptual focus from the ‘plural’ to the ‘collective’. It is this third approach, in Professor Gaillard’s view, that is the most appropriate representation of the reality of international arbitration as it exists today, and the one to which he lends his own support.

Professor Gaillard stresses that his three theories are ‘representations’ of ways of thinking and, as such, matters of belief, if not faith, rather than matters of scientific truth. Accordingly, they cannot be judged in terms of right or wrong but only in terms of their coherence or effectiveness. This does not mean that they are without practical implications, and, indeed, it is to these implications that Professor Gaillard devotes the second part of his book. It is also this part of the book – which covers matters such as anti-suit injunctions, litispence between state courts and arbitral tribunals, and identification of the rules of law governing the merits of the claim – that is of most immediate use for an arbitration practitioner.

Professor Gaillard’s book is a powerful defence of the ‘autonomy’ of the institution of international arbitration – autonomy not only in terms of the law governing the arbitral tribunal, but also in terms of procedure and substantive law. Professor Gaillard does not trust any theory which subordinates the institution of international arbitration to a local legal order – whether the law of the seat or the law of any other state where the enforcement of the arbitral award may be sought. Arbitration lawyers should not relax even if the number of arbitration-friendly jurisdictions has increased over the years and the non-interventionist stance has gained increasing acceptance. As Professor Gaillard puts it, a slave whose master has converted into a philosophical humanist is still a slave – he is free to come and go because his master allows him, not because he is truly free.

In developing a philosophical vision of the law of international arbitration which has important practical implications, Professor Gaillard manages to steer away from one of the common pitfalls of academic legal philosophy – practical irrelevance. Since just as much of the theory of public international law tends to collapse, all too easily, into one or another kind of political ‘realism’ – and thus trade the professional function and independence of the discipline for its (perceived) greater effectiveness – the theory of private international law often tends to draw its ultimate

justification from moral philosophy rather than from a conceptual analysis of its (all too) mundane professional function. Consequently, just as the move of public international law theory towards political realism tends to weaken rather than strengthen international law, the move of private international law theory to moral philosophy tends to undermine the field's intellectual independence – and, as a result, its practical relevance.

While practically consequential and as such standing out from the vast academic literature on legal philosophy, even those (like the present author) who share Professor Gaillard's concerns and his vision of a practically relevant legal philosophy may ask themselves whether it is indeed necessary, practically speaking, to go so far as to seek to create a legal fiction of a 'legal order of arbitration' – since in the end fiction it is, as recognized by Professor Gaillard himself, rather than a scientific truth. Is it not the case that the same goal – the functional independence of international arbitration from undue interference by local law and local courts – may be achieved by less heavy conceptual tools? Is it not the case that both the monolocal and the Westphalian approaches, although justly criticized by Professor Gaillard as exclusive representations of the institution of international arbitration, contain a kernel of truth about the reality of international arbitration?

As to the former, is it necessary, or indeed correct, to deny the practical relevance of the law of the seat in an international arbitration? Is it not true that, from the point of view of the arbitral tribunal (and, by implication, the parties), the law of the seat is an important consideration, since ultimately it is the courts of the seat that will determine, in case of a challenge, whether or not the arbitral award should be set aside, and that in this strictly legal (rather than philosophical) sense arbitral tribunals are indeed subordinated to the law of the seat? Is it not true that it is precisely for this reason that parties prefer to localize their arbitral tribunals in jurisdictions such as Paris, London, and Geneva – precisely because they know that the arbitration law of these jurisdictions is supportive of international arbitration, and

that the courts in such jurisdictions are competent and well versed in issues arising in the context of international arbitration – and thus less likely than courts in many other jurisdictions unduly to interfere with the arbitration?

Similarly, is it not the case that the Westphalian approach captures the essence of international arbitration from the point of view of its users: is it not true that, from their point of view, the real value of an international arbitral award lies in its enforceability in any jurisdiction in which the recalcitrant party may have assets, regardless of the seat of arbitration? More specifically, is it not true that, from the user's point of view, the more there are such jurisdictions – and accordingly, the more there are laws which apply to the execution of the award – the better? In other words, that the plurality of applicable laws is one of the most valuable assets of international arbitration rather than a conceptual problem?

While perhaps taking a step or two too far in the direction of academic philosophy, Professor Gaillard's concept of a transnational 'arbitral legal order' remains philosophically attractive, even seductive. It is certainly true that international arbitration practitioners tend to form a professional community which is not limited by national borders or bar membership, and that many, if not most, of the members of this community tend to share a common understanding of the methods of private international law, the relevant standards of international due process, and the broad transnational public policies that form the legal infrastructure of their profession. While these methods, standards, and policies have not been codified or endorsed by any legislature, they tend to form the conceptual, procedural, and policy basis on which international arbitration is practised. However, this does not necessarily mean that such methods, standards, and policies form, or should be considered to form, any kind of '*tiers droit*'. In practice, the daily business of international arbitration is conducted on the basis of private procedural rules and substantive laws chosen by the parties, and while conflicts between such rules and laws and the relevant transnational private international law rules,

due process standards, or public policies do occur, they are in practice rare – although admittedly, when they do arise, they tend to attract attention and stir debate among arbitration lawyers – which in itself may explain the prominent role played by exception in the law of international arbitration.

However, if it is indeed the case that most arbitration lawyers most of the time conduct most of their daily business without any such conflicts, is it practically speaking necessary or justified to conclude that, because conflicts between local laws and rules and transnational private international law rules, due process standards, and public policies may and do occur, the whole philosophy of the law of international arbitration should be founded on the possibility of such extraordinary incidents or circumstances? Is it not true that, while transnational rules, standards, and policies may have to be invoked in certain extraordinary circumstances, in order to avoid the application of an undue local rule or ruling of a local court, this does not necessarily mean that such instances should be considered the ordinary course of business in international arbitration? In other words, rather than having a conceptually dominating role, should one not see such rules, standards, and policies more as a conceptual *reservation*, applicable in certain circumstances, rather than as the rule of law itself? Even assuming that their role is wider, and that they apply not only in certain extraordinary circumstances where the local rule or ruling is found to be particularly undue, but also to fill in gaps or to clarify ambiguities in the otherwise applicable local laws or private arbitration rules (thereby allowing the arbitrators to presume that the content of the local law or procedural rule is the same as that of the corresponding transnational rule), is it not true that they can fulfil this role without being elevated to the level of a ‘legal order of arbitration’?

Apart from arguably not being strictly necessary from a practical point of view, the concept of ‘legal arbitral order’ also tends to convey a somewhat idealized picture of the law of international arbitration. Paraphrasing F.A. Mann, in a strict conceptual sense, there

is no law of international arbitration. This is to say, there is no coherent or unified law of international arbitration – there are only *laws* of international arbitration. It is hardly disputable that the law of international arbitration is marked by a certain systemic *dépeçage*: it is rare in international arbitration that only one law is applied; indeed, if this were the case, one would not be dealing with *international* arbitration. The arbitration agreement, the arbitral process, the arbitral tribunal, the merits of the claim, or the subject matter of the dispute, and the recognition and enforcement of the arbitral award are rarely, if ever, governed by the same law. In other words, instead of a coherent or unified *tiers droit*, the law, or the ‘legal order’, of international arbitration is marked by a certain systemic decoherence: rather than a natural or conceptually coherent order grounded in moral philosophy, the image of this law resembles more that of a Frankensteinian figure – a legal entity composed of body parts originating from different jurisdictions and imbued by life only after its creation. It might be conceptually more accurate to call such a figure a ‘mechanism’ or even a ‘machine’ rather than a legal ‘order’ or indeed a ‘system’. The self-image of such a mechanism may not always be pretty, in particular if measured by classical standards of conceptual coherence or integrity (rather than, say, a Picassian standard of composition), but it does tend to fit more accurately with the cubist reality that it reflects.

Such a fragmented (or, perhaps more accurately, fractured) image of the world of international arbitration should not come as a surprise. After all, what international arbitration is all about is differences – differences between parties hailing from different jurisdictions and subject to different laws, submitted to arbitration before an arbitral tribunal often sitting in a third country and composed of members of different nationalities, and resulting in an award which is in principle enforceable in almost any jurisdiction, almost anywhere. Assuming it is true that the ultimate criterion of academic relevance of any legal theory is the coherence of its doctrine of sources, then one must say that the law

of international arbitration is not academically relevant – or that the criteria of academic relevance are themselves practically irrelevant. In practice, the real ‘source’ of the law of international arbitration is not transnational rules of private international law, or international standards of due process, or transnational public policy. Its real ‘source’ is differences, that is, differences between different applicable laws, or conflicts of laws, and, ultimately, differences between different parties. Without such differences international arbitration would not exist, not at least as a professional practice. In this sense, the law of international arbitration is academically problematic: it lacks the sort of natural integrity or conceptual coherence that legal philosophy has traditionally required from a legal system. The law of international arbitration is not coherent or uniform. In reality, it leaks at the very source where the reality itself seeps in, in the form of differences between different parties. These differences, whether ultimately caused by changes in market circumstances or economic or political developments, or simply random contextual interference, tend to cause even the air-tightest cross-border commercial contract to leak and decohere, which in turn tends to lead to disputes between the parties and, ultimately, to international arbitrations.<sup>7</sup> It is perhaps not surprising if the law of arbitration itself tended to reflect this original decoherence.

Professor Gaillard’s book is an admirable inquiry into this complex web of differences that ultimately keep the law and practice of

international arbitration alive and going. While his work may be too practically oriented to attract the attention of more academic legal philosophers who tend to focus on more coherent or unified (albeit perhaps in reality non-existent) concepts of law, the loss would be exclusively of those who do not pay attention. Indeed, it would not be the first time that the legal academia was caught sleeping, looking at itself in the mirror, and believing that what it sees in front of itself is the image of the world.

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<sup>7</sup> Such a process of ‘decoherence’ of the law is not unlike the corresponding (but inverse) phenomenon in quantum physics (‘collapse’ of the wave function). If in physics the virtual phenomenon (i.e. the wave function), when interfered with, ‘leaks’ into the (classical) reality and thereby decoheres, in law it is the commercial or economic reality that tends to interfere with cross-border contracts, causing them (and, by extension, the law of international arbitration) to leak and decohere.