

## Gaillard on seven dirty tricks to disrupt an arbitration

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Emmanuel Gaillard

In a virtual lecture for the American University Washington College of Law, **Emmanuel Gaillard** of Shearman & Sterling described “seven dirty tricks” that parties use to disrupt arbitral proceedings and how arbitrators and courts should respond to prevent recalcitrant behaviour infecting the entire system.

The history of arbitration has been one of constant reaction against attempts by recalcitrant parties to disrupt proceedings to avoid being bound by an award rendered on the basis of an arbitration agreement they previously accepted. “This is not a new

phenomenon”, Gaillard said, and “the imagination of such recalcitrant parties seems to be unlimited”. He stressed that the incidents of obstruction are at the margins of the system, but these margins illustrate the ability of the system as a whole to cope with the most extreme conditions.

“The topic lends itself to many anecdotes and war stories. But it also illustrates the most fundamental methodological debate in contemporary arbitration law”, Gaillard said. When confronted with attempts to disrupt an ongoing arbitration, should arbitrators and courts seek to identify the law applicable to the issue through a traditional choice of law methodology or should they develop substantive rules specifically tailored for arbitration? As Gaillard pointed out, this debate correlates with another fundamental debate in arbitration, that of whether the phenomenon of arbitration has given rise to sufficient collective normative activity at a transnational level to be regarded as a genuine legal order or whether arbitration still has to be viewed exclusively through the lenses of individual state legal orders, and in particular, that of the seat of each arbitration. Gaillard explained that those who believe in the existence of a body of rules governing arbitration at a transnational level will naturally be attracted by a methodology that favors substantive rules; whereas those who think it acceptable to reduce arbitration to a domestic institution will be inclined to resort to a choice-of-law approach.

Gaillard described the first trick as “old and French”. The recalcitrant party may argue that the underlying contract is void and, as a result, the arbitration clause it contains is also void. Therefore, the argument goes, the tribunal has no jurisdiction and the parties must submit their dispute to national courts. The response to this trick is obvious today – it is the rule of autonomy of the arbitration agreement, according to which an arbitration agreement is legally independent from the main contract. The principle has been famously established in French law (with some precedents in Swiss law) in the decision of the Court of Cassation in the *Gosset* case in 1963. In England, the rule was recognised only 30 years after *Gosset*, in the *Harbour v Kansa* case, Gaillard noted.

“We can draw three lessons from this simple and accepted rule”, he said. First, the rule of autonomy is universally accepted today. Precisely because it is so accepted, it is valuable from the methodological standpoint. Second, it is not an “obvious rule”. On the contrary, the rule is a legal fiction which serves to enable arbitrators to proceed with the arbitration without any interference. Third, the rule is a substantive

rule, and it is effective precisely for this reason. The same will be true for more difficult rules discussed later on, he noted.

The second dirty trick builds upon the lessons of the first, Gaillard said. Discouraged by the substantive rule of autonomy of the arbitration agreement, the recalcitrant party may attempt to directly attack the existence, validity or scope of the arbitration agreement. The response to this trick is also well known – it is the positive effect of competence-competence. The rule enables the arbitrators to continue with the proceedings and to rule on their own jurisdiction even where the existence, validity or scope of the arbitration agreement has been challenged. The arbitrators may eventually find that they do not have jurisdiction – as was the case in a recent ICC award No. 17818 of 2019 – and there is nothing absurd in such a finding, he said. The source of the arbitrators' power is anchored in a substantive, objective rule of arbitration law and it does not depend on the consent of the parties. The rule "may be the most illogical rule in international arbitration", and yet it is a fundamental substantive rule of international arbitration, developed specifically to enable every arbitration to function properly and without interruptions.

The third dirty trick occurs when the recalcitrant party tries to disrupt an arbitration by asking a court to decide whether an arbitration agreement exists or is valid. The answer to this trick is the negative effect of competence-competence, Gaillard said. According to this rule, a court that is confronted with the question of the tribunal's jurisdiction – if there is at least a *prima facie* arbitration agreement – must refrain from deciding it until the arbitrators themselves have had an opportunity to do so. Gaillard stressed that this is a rule of priority, which means that national courts will have the chance to rule on the question of the tribunal's jurisdiction *after* an arbitral award is issued. As an eloquent expression of the rationale of the rule, Gaillard referred to the decision of the Singapore Court of Appeal in the ***Tomolugen*** case in 2015.

The negative effect of competence-competence has not been unanimously accepted. However, it has made "tremendous progress" in recent years, Gaillard observed. In fact, "the true test of a legal system's support for arbitration, is whether it recognises the negative effect of competence-competence". Lamenting the nuances in the Swiss approach to the negative effect of competence-competence and the complexity of the United States approach, Gaillard observed that today "modernity is sliding towards the East". He also noted that a number of states in Latin America and Africa

have good arbitration laws and judicial practice recognising the negative effect of competence-competence.

Gaillard described the fourth dirty trick as being, in its origins, “essentially Iranian”. “This is due to the fact that a vast majority of case law on this trick has been generated by article 139 of the 1979 Iranian Constitution”, he explained. In Iran and some countries such as Syria, Egypt or Venezuela, arbitration agreements entered into by the state or state-owned entities may be valid on condition that certain prior authorisations are obtained, either from Parliament or the relevant minister. Having signed an arbitration agreement, states or state-owned entities will attempt to rely on legislation of this kind to avoid having their disputes resolved by arbitration.

To respond to this trick, some jurisdictions such as Switzerland and Spain have developed a substantive rule according to which a public law entity cannot rely on its domestic law to evade an arbitration agreement it has freely accepted. The same rule has been established by courts in France and the Netherlands. “For those who love history”, Gaillard said, “the rule can be found at article 16(1) of the 1961 European Convention on International Commercial Arbitration – a solution that was very modern for its time”. Gaillard noted that, as with the autonomy of the arbitration agreement, the rule prohibiting a state and its co-contractors from relying on its own domestic law to challenge the validity of an arbitration agreement they have freely accepted is effective precisely because it is a substantive rule. The choice of law approach would certainly lead to the application of the restrictions in the given domestic law, he said. In France, this substantive rule has been absorbed by the substantive rule of the validity of the arbitration agreement, which – in his view – is even more favorable to arbitration, as recently confirmed in the decision of the Paris Court of Appeal in **Société Egyptian General Petroleum Corporation v. Société National Gas Company** of 21 May 2019.

The fifth dirty trick is “a bit more aggressive” Gaillard said. He noted that it has become increasingly frequent in international arbitration for a recalcitrant party to attempt to disrupt the arbitration by bringing the dispute covered by the arbitration agreement before national courts and seeking an anti-arbitration injunction from those courts. The appropriate answer to an anti-arbitration injunction is for the arbitrators “simply to ignore it and proceed”, Gaillard said. In this regard, he commended the approach of the tribunal operating under the Rules of the Inter-American Commission of Commercial Arbitration in **CIMSA v Grupo Cementos**

**Chihuahua.** In that case, the tribunal, relying on the “most highly respected international legal theory”, held that the arbitration may continue despite an anti-arbitration injunction issued by the Mexican courts. “If we have to have the proof that theory is practical, this would probably be the best example”, Gaillard observed.

The same approach should be taken if an anti-arbitration injunction is issued by the courts of the seat of the arbitration, he said – recalling that this was exactly what happened in the **Salini v Ethiopia** case. In that case, the tribunal composed of Gaillard as chair, the late **Piero Bernardini** and **Nael Bunni**, having a seat in Ethiopia, decided to ignore an anti-arbitration injunction issued by the Ethiopian courts and proceed with the arbitration. Gaillard said that it is “absolutely normal” that the arbitration is conducted around the globe, and not just in “Paris, Geneva or London”. At the same time, Gaillard said, this does not mean that arbitrators must blindly accept the local decisions which are rendered with the aim to interfere with the arbitration process.

The sixth dirty trick covers the situation in which a party to an arbitration agreement “enrols friends, shareholders, affiliated companies, parent companies and even employees” to disrupt an arbitration. The trick has been used with most success in the United States – by taking advantage of the US approach to non-signatories and a discretionary stay – and in Russia. “This trick is a sophisticated attempt to capitalise on the privity of the arbitration agreement, and to use related parties, rather than the party that is technically bound by the arbitration agreement, to torpedo the ongoing arbitration”.

In Russia, this tactic is facilitated by article 166(3) of the Russian Civil Code, pursuant to which a party that has “a legally protected interest” can file a claim to have a transaction containing an arbitration agreement nullified. Even if the tribunal has jurisdiction, this manoeuvre has a potential to create “a precedent on point”. It would be difficult for an arbitral tribunal applying Russian law to disregard a Russian court decision on the very same issue that is before the tribunal, he said. This is what makes this trick particularly dirty. As an example of this disruptive practice, Gaillard mentioned one of the ancillary Yukos cases, *Moravel v Yuganskneftegas*, in which Rosneft rushed to Russian courts to help one of its newly acquired subsidiaries who was bound by an arbitration agreement.

For Gaillard, the response of international arbitration law when confronted with this trick should be the adoption of a new substantive rule. Such a rule could be based on a set of criteria developed by the English courts when coping with allegations of collusion. Under English law, collusion exists if there is a commonality of interest or common control between the related parties; and there is “suspicious timing” – as a proxy for the proof of collusion. Gaillard commended this test and noted that it has already been endorsed in arbitral case law, including by sole arbitrator Doug Jones in an LCIA Award No. 142730 **rendered in 2017**.

The newest dirty trick, number seven, could become “a new danger for arbitration” in Switzerland if it is not addressed, Gaillard warned. Under Swiss contract law, an argument has been made that an arbitration agreement is a “duration contract”, and as a result, it could be terminated for just cause as any other duration contract. The Swiss Federal Tribunal has not generated any case law on this point. Unfortunately, Gaillard said, a broad body of Swiss authorities, inspired by German case law from the ‘80s and ‘90s, have argued that an arbitration agreement can be a duration contract, and accordingly be terminated for just cause.

“Of course, this is not something that will happen often” – Gaillard said. “But the fact that this trick will be rarely accepted by arbitrators and courts does not mean that it should be left unaddressed”. If not properly dealt with, the trick may be used to obstruct an arbitration at any stage, requiring the tribunal to spend considerable amount of time to decide whether a party has indeed a just cause to terminate the arbitration agreement. This would necessarily result in delays and increase of costs, irrespective of what the tribunal’s decision may be. In his view, this problem could be addressed by adding a provision in the Swiss Private International Law Statute which would make clear that the rule according to which duration contracts can be terminated for just cause does not apply to international arbitration. For him, the French substantive approach, according to which the courts only look at the consent of the parties and not at any applicable law or ordinary contract law – in accordance with the principle of validity of the arbitration agreement – is a superior one.

Gaillard delivered the American University Washington College of Law’s 15th annual international commercial arbitration lecture in a virtual setting on 24 September 2020. The event – attracting more than 1,000 registrants – was sponsored by Arnold & Porter and hosted by the Center on International Commercial Arbitration at the American University Washington College of Law. The lecture was introduced

by **Paolo Di Rosa**, head of Arnold & Porter's international arbitration group, and **Horacio Grigera Naón**, director of the Center, international arbitrator and a former secretary general of the ICC Court.

Grigera Naón highlighted the importance of Gaillard's contribution to the development of international arbitration as a practitioner and a recognised academic. He is the head of Shearman & Sterling's international arbitration and disputes groups, a professor of law in France, and serves as a visiting professor at Yale Law School and Harvard Law School, Grigera Naón said – and – is a part of the “great French tradition” which has been shaping international arbitration around the world for decades.

*Reporting by Marija Šobat, associate at Shearman & Sterling, and Elena Ritchie, JD candidate at American University Washington College of Law.*