Volume 13 • Issue 5
www.globalarbitrationreview.com

The international journal of
commercial and treaty arbitration

GAILLARD'S CHAOS THEORY

IS HARMONY IN INTERNATIONAL ARBITRATION OVERRATED?

The "new NAFTA" | The ICSID rules revamped | Tributes to Francisco Orrego Vicuña

GAILLARD'S CHAOS THEORY

THE LACK OF "HARMONY" IN INTERNATIONAL ARBITRATION SHOULD NOT BE LAMENTED, EMMANUEL GAILLARD ARGUED IN THIS YEAR'S LALIVE LECTURE – AS A LITTLE BIT OF CHAOS IS NECESSARY FOR THE EVOLUTION OF THE FIELD. LALIVE ASSOCIATES LAURA AZARIA AND NHU-HOANG TRAN THANG, AND GAR EDITOR ALISON ROSS REPORT.

Speaking in Geneva at this year's Lalive lecture, Gaillard said that harmony is seen by lawyers as a positive value, and when confronted by situations that do not fall within an ordered structure they may "freak out (US-style), or start to feel ill at ease (British style)".

However, he said the vision of a perfect judge, applying an immutable and permanent law, is naive and an illusion – impossible except in the "scary" scenario that we are all replaced by artificial intelligence.

The notion of harmony is often manipulated, Gaillard continued. For instance, the lack of consistency in the case law of investor–state dispute settlement is presented by certain NGOs as evidence of a broken system in a way that serves their agenda of challenging the system and globalisation as a whole.

He quoted the late US arbitrator David Caron, saying that such criticism cannot be taken at face value. An honest observer of investment arbitration case law in its dynamic globality – as opposed to snapshots taken at a single point in time – can only acknowledge its extraordinary level of consistency, considering that it was developed and elaborated in a decentralised manner.

As in the Darwinian theory of natural selection, the best decisions become "jurisprudence constante", while the worst ones are remembered as isolated mishaps, he said.

Alongside this evolution of arbitration case law, Gaillard said we are witnessing "a diversification of the sources and players" that influence it, and in particular the ever-increasing contribution of private players to the law-making process. NGOs have gained a great deal of power, bringing about change to the system such as the 2014 Mauritius Convention on Transparency.

The decision of the Court of Justice of the European Union in the *Achmea* case in March this year is another example of their influence, Gaillard said. "It is hardly credible that such a decision was not influenced by NGOs after they vehemently criticised the investor–state dispute settlement system in place for the last decade. The court would have found other ways to deal with the issue before it if it had not been for their lobbying."

While the court used the need to protect a harmonious application of EU law to justify its radical decision, Gaillard said one has to wonder whether harmony and consistency of EU law were truly its primary concerns. Indeed, the decision is understood not to extend to commercial arbitration, although commercial arbitrators routinely interpret and apply EU law.

Like the *Achmea* decision, the excessive importance given to the fate of awards at the seat of arbitration sheds light on the use of the myth of harmony to promote inharmonious results, Gaillard said, now touching on his famous theory of the transnational nature of international arbitration.

All courts are not absolutely neutral when deciding on the fate of awards against their nationals, especially state-owned entities, he

PHOTO: ISTOCK.COM/BANKSPHOTOS

HARMONY OR ORDER BEING CONTRARY TO THE INTE

Above: Emmanuel Gaillard

PHOTO COURTESY OF AMÉLIE DEBRAY

argued. Nevertheless, a large proportion of lawyers argue in the name of harmony that if an award has been set aside at the seat of arbitration, it cannot be enforced elsewhere.

These same lawyers see no issue in refusing to enforce an award that was challenged unsuccessfully at the seat. Following this logic, the international reach of a judgment on whether an award should be set aside differs depending on the outcome of such recourse. If the courts of the seat set it aside, it has a worldwide impact. If the award remains intact, the judgment bears little value on the international plane and the award will be scrutinised again at the place or places of enforcement.

This is a striking example of harmony or order being placed above justice contrary to the interests of arbitration, Gaillard said.

Another example of an unsatisfactory consequence arising from the excessive importance given to rulings at the seat is courts undoing their enforcement decisions many years afterwards because the award has finally been set aside by the courts of the seat. This was the effect of the decision rendered by the US Second Circuit Court of Appeals in July 2017 in the case of *Thai-Lao Lignite v Laos*, Gaillard said.

The *Dallah v Pakistan* saga further illustrates the mystification of the value of harmony, he argued. If one were to follow the English courts' reasoning in this case, it would amount to reinstating the double exequatur requirement for enforcement that was repealed by the 1958 New York Convention.

In Gaillard's view, such backward thinking, 60 years after the New York Convention came into existence, cannot be right. The assessment of the scope and validity of an arbitration agreement must be made by a judge in each country in which enforcement is sought, he argued. For the English courts, a more honest approach would have been not to pretend to apply French law – "indeed, to butcher it" – but to acknowledge that, unlike the French courts, they are reluctant to widen the scope of the arbitration agreement to encompass non-signatories even in circumstances in which they have negotiated and performed the contract.

The current movement refocusing attention away from awards themselves and on to ancillary state court decisions has generated even worse consequences, Gaillard said. Some enforcement courts now look to recognition or enforcement proceedings in other countries and seek to give effect to those decisions, as well as decisions at the seat.

Gaillard referred as an example to the *Belmont Partners v Mina Mar Group* case, in which the US District Court for the Western District of Virginia ruled in 2010 that claim preclusion prevented it from deciding whether to modify or vacate an award rendered in Virginia since a Canadian court, the Ontario Superior Court, had confirmed the award.

Gaillard called this trend "extremely troubling", noting that the English Court of Appeal has followed a similar logic, for instance, in the case of *Yukos v Rosneft*. In his view, such reasoning creates a race to the most favourable or least arbitration-friendly court depending on which side one is on, with the hope of subsequently exporting its decision to other countries.

For some, choice of law helps to ensure the predictability of arbitration outcomes, Gaillard said. For others, including himself and the late Pierre Lalive (one of Lalive's founders after whom the lecture is named), harmony is best served by the application of

G PLACED ABOVE JUSTICE IS

RESTS OF ARBITRATION

transnational rules, which are developing on the basis of a comparative law approach and generally lead to predictable outcomes.

Traditional criticism of transnational rules is rooted in the perceived difficulty of identifying the content of such rules, he said. Today, however, the problem is no longer a scarcity of sources from which to derive transnational principles but an overabundance of sources.

Although the excessive amount of codification may result in conflicting rules, using transnational rules will enable arbitrators to find, at any point in time, the most generally accepted rule to be applied in the circumstances, he said.

Gaillard also addressed *lois de police* (rules of immediate application) and other mandatory rules that supersede all others. Recognising Pierre Lalive's contribution to this topic, he argued that arbitrators can displace the law of the contract when such law is contrary to generally accepted public policy principles (*ordre public réellement international*), but not because of the purported application of *lois de police*.

For arbitrators to do so enhances predictability, as the various genuinely international public policies worldwide should embody the same globally accepted values, Gaillard said. French case law has embraced this theory, notably in the decision of the Paris Court of Appeal in May 2017 in *Customs and Tax Consultancy LLC v the Democratic Republic of the Congo* or the same court's decision in January 2018 in *MK Group v Onix*.

In the latter case, the award was held to be in violation not only of a mandatory rule in the East Asian state of Laos, but also global consensus as reflected in the 1962 UN General Assembly Resolution on Permanent Sovereignty over Natural Resources, Gaillard said. This forms an integral part of genuinely international public policy.

The Lalive lecture, now in its 12th year, was held on 5 July at the Graduate Institute of International and Development Studies in Geneva. Gaillard's title was "The Myth of Harmony in International Arbitration".

The lecture was introduced by Vincent Chetail, an international law professor at the institute, and Michael Schneider, another of Lalive's founding partners. Schneider highlighted the importance of Gaillard's contribution to the international arbitration field through achievements such as co-authoring the UNCITRAL Secretariat Guide on the New York Convention and collaborating with UNCITRAL to create a website of more than 2,500 decisions on the convention.

He is also behind widely influential works such as to the go-to treatise *Fouchard Gaillard Goldman on International Commercial Arbitration* and a landmark volume on the legal theory of international arbitration, Schneider said – and teaches at the law schools at Yale, Harvard, the University of Geneva and Sciences Po in Paris.

Gaillard himself spoke fondly of Pierre Lalive, referring to him as "the most courageous arbitrator I ever met" and commenting that "he would have liked this lecture's topic".

READ MORE

ECJ Rules against Intra-EU BITs
https://bit.ly/2yMi48f

Mauritius Convention ushers in new era
https://bit.ly/2Ag0prB

UK Supreme Court rules on Dallah v Pakistan
https://bit.ly/2q1HwCx

US appeal court upholds award "de-enforcement"
https://bit.ly/2OvxbgV