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Three Philosophies of International Arbitration

Emmanuel Gaillard

Professor of Law, Paris XII University

Head of the International Arbitration Group, Shearman & Sterling LLP

Paris, France

It may seem counterintuitive to combine in the same title the notion of philosophy and that of international arbitration. International arbitration is about settling disputes between businesses, occasionally between businesses and States or State entities. International arbitration itself is a business, possibly too much so. Arbitration is often about money. Philosophy, on the other hand, purports to offer an understanding of the world; in the field of law, an understanding of the origin and nature of the norms, and the manner in which they interact within a legal system. It connotes the disinterested nature of a purely contemplative activity. How can one possibly talk about philosophy when dealing with international arbitration?

The reason is the following. 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 is 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 philosophy and international arbitration are not antagonistic. To the contrary, only an approach in terms of philosophy—or legal theory—of international arbitration will allow the exploration of the relationships between these apparently disconnected issues and the manner in which, in fact, they are part of a coherent system.¹

¹ On this question generally, see Emmanuel Gaillard, *Aspects philosophiques*

Is that to say that there is one single philosophy, one single vision, of international arbitration? The answer is in the negative. It is precisely because there are several visions, several competing philosophies 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 philosophies of arbitration. The controversies are all the more intense in that, in reality, what is at stake here 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 philosophy of arbitration. As for every other philosophy, one may share it or not. It may be overt or implicit. It may be efficient or inefficient, internally consistent or inconsistent. But it is never right or wrong.

Not every controversy, not every argument regarding international arbitration can be characterized as a philosophy of international arbitration. Only a representation that purports to offer an explanation of the entirety of the phenomenon, including the most difficult issue of the source of validity and legitimacy of the arbitration agreement and the ensuing award, can be properly characterized as a philosophy of international arbitration.

In my opinion, there are three competing philosophies, three representations of international arbitration.²

- The first is the one equating the arbitrator with the local judge of the place of arbitration: I am an arbitrator sitting in London, I must act like an English judge. In this representation, the sole source of the arbitrator's power is the legal order of the seat of the arbitration. In that, it is a "mono-localization" theory.
- The second representation has operated 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 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

du droit de l'arbitrage international (2008); Emmanuel Gaillard, *Legal Theory of International Arbitration* (2010).

² These three philosophies are represented in the left column of the table that appears in the appendix to this article. The right column features the consequences deriving from the adoption of one of those philosophies.

legitimizes, *a posteriori*, the whole arbitral process. Arthur von Mehren has eloquently described in a lecture given in Tel Aviv in 1986 the ambulatory nature of arbitration and the fact that, unlike a judge, the arbitrator has no *lex fori*.³ I have called this representation “Westphalian,” because it is based on a model 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 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 vision is truly transnational. Another way of presenting it is to recognize that we are today witnessing the emergence of a transnational arbitral legal order that meets the criteria of a genuine legal order, independent of, but based on, national legal orders.

The first and the third philosophies can each be divided into two secondary trends. In the mono-localization approach, one may believe that an arbitrator is a species of a local judge, either because the law of the seat has an inherent right to regulate activities on its territory (that is the premise of F.A. Mann’s vision of arbitration),⁴ or because the parties to the arbitration agreement are deemed to have chosen to have their arbitration governed by the law of the country of the seat (as argued by Roy Goode⁵ or Jean-François Poudret,⁶ for example). In the transnational approach, one may believe that each time the law of the place of arbitration takes a dated or idiosyncratic view, other countries or the arbitrators themselves are not bound to follow that view. That is either because natural law so prescribes (as argued by René David in the 1950s),⁷ or because, in terms of the validity and legitimacy of the arbitral process and of the ensuing award, the understanding of a vast

³ Arthur T. 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, 1986).

⁴ F.A. Mann, “*Lex Facit Arbitrum*,” in *International Arbitration: Liber Amicorum for Martin Domke* 157 (Pieter Sanders ed., 1967), reprinted in 2 *Arb. Int’l* 241 (1986).

⁵ Roy Goode, “The Role of the *Lex Loci Arbitri* in International Commercial Arbitration,” 17 *Arb. Int’l* 19 (2001).

⁶ Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (Stephen V. Berti & Annette Ponti trans., 2d ed. 2007).

⁷ René David, “*Droit naturel et arbitrage*,” in *Natural Law and World Law: Essays to Commemorate the Sixtieth Birthday of Kotaro Tanaka* 19 (1954).

number of States must be given a greater weight than that of an isolated country, be it that of the seat of the arbitration.

Because each of these three main representations provides a coherent vision of the entirety of the arbitral process, important practical consequences flow from their adoption by a given author or, for that matter, arbitrator.

- 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, 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 those of the place of arbitration. They will accept that arbitrators may disregard an anti-arbitration injunction and render a decision that 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 that they see fit to select the law applicable to the merits and, where appropriate, to apply or decline to apply the mandatory rules of any given jurisdiction having connections with the dispute at hand.

They will also 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 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 all 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 an 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 that 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 will also, where appropriate, recognize an award that has been set aside in the so-called country of origin for idiosyncratic reasons, through a judgment that need not be given an absolute international effect.

As no doubt you will have gathered, my own preference goes to this truly transnational approach, which best corresponds to our globalized world. This, however, is irrelevant. What matters is the recognition that there are several competing visions, several competing philosophies of international arbitration that are equally capable of explaining the entire phenomenon.

APPENDIX: THREE PHILOSOPHIES OF INTERNATIONAL ARBITRATION

Representations		Consequences				
Main Representation	Secondary Trend	Arbitral Tribunal's Authority	Arbitral Proceedings			Award
			Procedure	Applicable Law	Lois de police	
MONO-LOCALIZATION	OBJECTIVIST (F.A. Mann)	Mechanically accepts anti-arbitration injunctions rendered by the courts of the seat	Procedural law of the seat	Choice of law rules of the seat	Lois de police of the seat and those applicable according to the private international law of the seat	Set aside in "country of origin" = nonexistent
	SUBJECTIVIST (J.-F. Poudret)		Possibly procedural law specific to international arbitration	Possibly choice of law rules specific to international arbitration	Possibly specific rules governing the application of lois de police by the arbitrators	
WESTPHALIAN	(A.T. von Mehren)	Doesn't necessarily accept anti-arbitration injunctions	Freedom to choose applicable procedural rules	Freedom to apply the choice of law rules that arbitrators see fit	Freedom to apply the lois de police that arbitrators see fit	Setting aside in country of seat not necessarily binding
TRANS-NATIONAL (ARBITRAL LEGAL ORDER)	JUSNATURALIST (R. David)	Doesn't necessarily accept anti-arbitration injunctions	Freedom to apply transnational procedural rules	Transnational choice of law rules or Transnational substantive rules	Transnational public policy	Setting aside in country of seat irrelevant
	POSITIVIST (E. Gaillard)					