

## PROFESSOR EMMANUEL GAILLARD DELIVERS OPENING LECTURE

### FOR THE 2009/2010 GENEVA MASTERS IN INTERNATIONAL DISPUTE RESOLUTION<sup>1</sup>

On 28 September Professor Emmanuel Gaillard delivered a characteristically lucid and engaging lecture on “The Representations of International Arbitration” to inaugurate the second year of the prestigious Geneva Master in International Dispute Resolution Programme (MIDS).

The lecture presented the principal currents of Professor Gaillard’s 2008 book *Aspects philosophiques du droit de l’arbitrage international* (Philosophical Aspects of International Arbitration Law), which itself is derived from Gaillard’s July 2007 lecture of the same title at the Hague International Law Academy.

Professor Gaillard began by indicating what he meant by representations of international arbitration. In his words, “representations” are models or mental constructs by which we perceive international arbitration as a phenomenon.” He explained that elucidating a coherent system of thinking about international arbitration influences “answers to technical questions”.

For Gaillard there are three competing visions of international arbitration. The first he calls the traditional view. He says there are two versions of this traditional view, an objective and a subjective version. Upon the objective view, the arbitrator is equated to a national judge, rendering justice in conformity with the dictates of his forum, the location of the arbitration. Upon the subjective view, the arbitrator is as a national judge since that is what the parties intended. The second vision, Gaillard designates as “Westphalian”, that is, where a number of States each individually impinges upon an arbitration, that is, in particular, any State where the award might come for enforcement.

In the third vision, the transnational one, specific arbitration principles are synthesised from the collective approach of a variety of States yielding a distinct legal order, an international arbitration law order. Gaillard discerns two aspects within this third vision. First, there is what he calls the natural law trend. Secondly, there is a positivist trend. The positivist trend adverts to the existence of a specific arbitration approach of particular authority in the area, because it delivers solutions appropriate to the arbitration context.

Gaillard holds that none of the three visions is any more valid than the others. He states that each of the visions has a certain explanative power, a power to organise arbitration phenomena and make them coherent, so much so that, in Gaillard’s view, fundamental controversies in international arbitration thinking reduce to disputes among proponents of the various visions.

There are various falshpoints of tension between the three visions. A prominent one is the matter of the source of validity of an arbitration award, what Gaillard calls its “juridicity”. The traditionalists, operating upon the model of judicial decision-making, as they do, point to the law of the location of the arbitration. The Westphalians look to the law of the enforcement State, and hold, for instance, that an award annulled by the courts of the place of arbitration may still be enforced. The transnational vision espouses validating awards insofar as they are not incompatible with transnational values. For transnationalists therefore, one should not refuse to enforce simply because an award is against a trade embargo, but one should enquire as to whether the reasons behind the trade embargo are reasons enjoying sufficient acceptance around the world. So one might require an award to comply with a boycott of apartheid South Africa but not with a boycott of Cuba. Other casus belli between the three visions are the arbitrators’ authority and the conduct of the arbitration.

Gaillard points out that each of the visions has its own strengths, a quality he does not begrudge even the traditionalist vision. The strength of that vision is its attachment to the principle of territoriality. Gaillard points out that regard had to parties’ intentions can only occur where the law of some territory prescribes this.

According to Gaillard, the second vision gives arbitrators the greatest latitude in determining legal outcomes, since they can pick and choose between legal rules from various legal systems as candidates for applicability.

Despite treating these three visions each with scrupulous and detached respect, Gaillard readily admits that his preference is the transnationalist vision. This is because a heightened legitimacy is enjoyed by this vision, the fruit of its being a fusion of the arbitration law of a vast number of countries, and not that of a single State, with all its accidents and subjective preferences.

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<sup>1</sup> Phillip Landolt, Landolt & Koch ([phillip@landoltandkoch.com](mailto:phillip@landoltandkoch.com))

The robustness of Gaillard's system was tested by questioning after the lecture. Georges Abi-Saab pointed out the methodological similarities between the recognition of rules under the transnational vision and the recognition of customary international law. Gaillard agreed that there were parallels, although he cautioned that public international law as presently conceived in most quarters would not admit that transnational rules distilled in private matters could be matters of which public international law could take cognisance, even in respect of State contracts with private actors (redolently termed by Gaillard as contracts between "gods and heroes").

Doug Reichert enquired as to whether Gaillard's system was simply too tidy. He compared it to Caesar's reductionist gambit that "all of Gaul can be divided into three parts". Certain States, said Reichert, mentioning India in particular, seem to challenge all three visions. Gaillard indicated that the transnational vision contains the promise that more States can become safe locations of arbitrations, and not just those with modern arbitration laws comprising the usual canon of protections.

Albert Jan van den Berg sought Gaillard's view as to the vision into which the UNCITRAL Model Law fits. Gaillard responded that once adopted by a State the Model Law becomes part of that State's legal order, but that it is an instance of transnational consensus being developed. He expressed the view that the New York Convention and the Model Law contain conventional terminology, for instance their references to "foreign awards", but in their substance they express a remarkably understated regard for the location of the arbitration.

#### COMMENTARY

Gaillard's system is indeed a tidy one. But the reality is a great deal less distinct, and more inchoate. The first vision, that fixing upon the State of the location of the arbitration, in fact bleeds into the second, since in the second vision it is not just the potential States of enforcement which must be consulted, but also the State of the seat. Moreover, the source of much transnationality is in fact the arbitration law of enlightened States, paradigmatically that of France. One useful consequence of treating each of the three visions as a self-standing, fully fledged system is that this creates a self-fulfilling prophesy in favour of the full development of the transnational vision, which otherwise might be observed as uniquely episodic, a mere clutch of desultory instances. If an overarching grouping of such a property is thus ascertained, then the individual treatment of any specific arbitration question arising can be covered by and will be consistent with the authority of that property as ascertained.

Gaillard's system is also a particularly French one, tracing as it does the evolutionary process of French arbitration law. This is not meant as a criticism, since it is agreed all around that traditionally and today still, as embodied by Gaillard himself, French arbitration law is firmly the vanguard party, a beneficent model for many an aspiring arbitration system.

It is therefore noteworthy that Gaillard refuses to pronounce the transnational system the unrivalled best. It seems, for example, wholly uncontroversial to say that Berthold Goldman's manifesto that arbitrators have no forum marked a great leap forward for international arbitration. So did the French court's refusal to be held hostage to anti-arbitration peculiarities of the location of the arbitration, and to enforce awards in the teeth of these.

Gaillard acknowledges that he appreciates the competition between international arbitration systems to articulate arbitration principles of ever greater adaptedness to the service of international dispute resolution. The supposition lies that Gaillard must also value the development of the Westphalian and transnational visions of international arbitration as outcomes of a dialectic process. It is curious not to find Gaillard proclaiming the transnational vision the end of history.

Would it be so wrong to see in the transnational vision a culmination devoutly to be wished? One recent set of events would seem to exemplify the stark difference in practice that there can be between the second and third visions, and indeed the superiority of the third. In the recent Swiss Elektrim bankruptcy case, the Swiss Supreme Court refused to preserve arbitral jurisdiction on the basis that the Polish law of the bankrupt determined that it had lost its capacity to be a party to an arbitration. This would appear a pure expression of the Westphalian vision. Starkly contrasted to this, the French Cour de cassation in the Soerni case refused to accept that a party to an arbitration could be treated as lacking capacity as not having been validly represented, according to the dictates by foreign law, but rather assessed such capacity against transnational criteria such as the will of the parties, good faith, and the principle of confidence. At least as a matter of result, the French Cour de cassation's holding validating the arbitration award seems much the more preferable.

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