Pázmány Law Review
II. 2014. • 191–194.

BOOK REVIEW

Emmanuel Gaillard: *A nemzetközi választottbíráskodás jogának elmélete*
[Legal Theory of International Arbitration].
Transl.: Korom Veronika és Metzinger Péter. Budapest, HVG-Orac, 2013.

Zoltán Csehi

The Hungarian edition of Emmanuel Gaillard's Legal Theory of International Arbitration (in French original: Aspects philosophique du droit de l'arbitrage international, both published in 2008) is a unique piece on the Hungarian market of legal books. The book has just been published together with two other legal books: the first comprehensive Hungarian book on arbitration in general[1] and the edition and Hungarian translation of the famous 16th century French humanist jurist's Brissonius's – also known as Barnabé Brisson – De formulis et solennibus populi Romani verbis (1583). Arbitration and humanism meet each other not only in the Hungarian book-market, but in the theory of professor Gaillard.

According to Gaillard's theory there are three basic concepts of international arbitration law: firstly the law of international arbitration is interpreted – and therefore reduced – as part of that given state's legal regime. The second concept (called the Westfalia theory) can be regarded as the opposite of the first claiming that the law of international arbitration is a result of the cooperation of states mutually willing to recognise and enforce an arbitrational award issued by another state (this equals to the concept of the New York Convention of 1958.) Finally, according to the third concept, the law of international arbitration is an independent law originating from the sui generis transnational case law operating above nations. It exists in the awards of the arbitrators and in the judgments of the state court that accept the independence and autonomy of those awards. According to this third concept this law is realized neither through the legal system of the state nor through the cooperation of states, but in the form of a special "commonwealth" – and especially the commercial and investment sphere of it –, thus it can be conceived as a special international civil or private law above nations.

The author provides the positive sides together with a critical interpretation supported by several objective and subjective theories in the first part of his book.

[1] Kecskés László – Lukácsi Józsefné (ed.): *Választottbírók könyve* [Book of Arbitrators]. Budapest, HVG-Orac, 2011.

Surprising it may be the German and English way of legal thinking seem to support each other stating that both the arbitration and international arbitration are part of the state's legal regime. This concept has been represented by respected solicitor-professor as F.A: Mann as well.

This first part of the book unfolds the third concept in detail. The natural-law foundations of the international arbitration legal system were laid down by René David and Bruno Oppetit, and such beautiful phrasing can be read as: "for its part, clearly manifests a desire for unity and universality, based on the common needs and interests of the international economic community. As such, it does not accord with a fragmentation of the international legal framework and encourages the use of unifying legal notions, such as *lex mercatoria,* general principles of law, or truly international public policy."

The individual international arbitration awards, all add something to the whole image of international arbitration:

"The decisions [rendered by arbitrators] gradually make up a body of case law which must be taken into account, as it reflects the consequences of economic reality and complies with the needs of international trade, which call for specific rules, also developed gradually, of international arbitration."(no. 52. – quotation from the ICC award no. 4131.) Even if this puzzle picture does not finally make up a complete picture with exact contours with a subject and the contents only to be guessed, its existence cannot be denied.

This point of view has been strengthened by the transnational positivist concept, but the third concept's real essence and its legitimacy is based on the case-law of the state courts and international arbitration bodies. The influence of the French legal literature and the French arbitration practice especially the cases decided by the Court d'Appeil de Paris and the Court de Cassation cannot be denied. The arbitrational case law evolved step by step with each award on the theoretical basis worked out by that time constructed on the basis of the shortcomings of the French state courts leading up to the third concept and the appearance of the international arbitration law.

This section of the book will on the one hand surely represent an approach new for Hungarian lawyers and will also make the reader more conscious as far as a special side of law – international law or transnational trade law – is regarded. This is a new concept of law compared with the law generally accepted by Hungarian lawyers.

What ideological drive may there be behind this new concept of international arbitration? May it be the special spirit of 21st century French legal thought firstly to be touched upon in international commerce as a challenge to transnational law rooted in Anglo-Saxon common law tradition? A tradition reflecting much more the common law or practice of medieval towns than 20th century commercial law? Can it be interpreted as a European answer to the Anglo-Saxon approach in international trade law?

The new concept of international arbitration, based on the interpretation of Gaillard, seems to regularly exceed scholarly theories recommended by the *Institut Droit de International*. What is more new directions seem to have been formulated even for scholars

The second part of the book is a collection of cases that represent and test how the three concepts mentioned above can be articulated in every day legal situations.

How can the *"anti-suit injunctions" or loi de police* (mandatory rules) be treated in case of arbitration realizing the first concept and how in the second two? Through concrete cases the author represents under what conditions the theories of *loi de police* (mandatory rules) and public policy can be realized in the law arbitration of state law, international and transnational law, respectively. According to some of his conclusions corruption, international embargo and some cases of environmental protection should be treated under transnational public policy. The three different concepts of arbitration give various answers to how the setting aside of arbitration award should be interpreted in terms of practice.

According to one of the theories setting aside arbitration award as such means that the award does not exist any longer, which means it may not be enforceable. The other concept claims every single state can decide-according to the spirit of the New York convention – whether or not to recognize the award attacked: a setting aside award of the state of the place of the international arbitration may not necessarily be binding. Last, but not least, according to the third concept setting aside the award does not have any binding force towards another state, which means the original arbitration award /may be executed. Certain North-American judgements examine the setting aside judgement of the state rather than the award of the arbitration itself in relation to the acceptance the validity of such an award.

The problem accentuated here is how the relation between arbitration and jurisdiction in private law could be more subtely approached especially in cases where one of the parties is a state enterprise or the state itself.

Survivals of state sovereignty pillars such as the les *lois de police (mandatory rules)* or the *public policy* are possible roots of national-international conflicts/ the book proves.

Each and every thought of the book touches upon acute and exciting questions.

Professor Gaillard shows the possible directions of 21st century autonomy of private law. Parties may not only decide about the substantive law, the judge, the procedure /but may even disregard the whole regulation of conflict of law as such.

The idea that international arbitration does not even have a seat/ to be determined by, that is, it does not actually exist *lex fori*, hence it is not bound by the legal system of any state including its conflict of law rules could itself be acceptable, but the essential question, on what basis arbitrators should decide which law is to be applied, is still not answered.

Let us add, that new magic terms like „*closest connection*", or „ *most appropriate rules*" and so on, are not more than the generalized versions of rules of private international law disguised.

Debates about the possible place of the arbitration may call attention to a new concept or concepts in the making concerning the question of new dimensions of space in law. Space shall mean «espace» or Raum – «espace de loi» .In European conflict of law *the seat* of commercial companies does not mean the location of the management, or even the physical place rather the place given in the deed of association. Unlike in European insolvency law in the so called COMI *seat* will designate a real, physical location whereas tax law is operated according to an even other practice, where the business is made or generated. Three different concepts of

the seat of the commercial companies at the same time – but which is the proper one? Or this is only a legal seat – a legal assumption

In contemporary physical space t*he seat* is more than a unique single physical location , a basic determinative of human existence: there are no physical boundaries any more.

As far as the international arbitration court is concerned *the seat* is basically decided by the arbitrators and is independent of both the state and of sovereignty of any state. In many cases the seat is not a physical place only a geographical name – a city name.

Competitive debates between state courts and international arbitration courts prove that even if no priority can be defined between state law and international arbitration law international arbitration procedures in themselves can be so threatening for the debtor even if it is a state owned entity or similar that sovereign state cannot demolish the power of international arbitration and its power, especially if the recognition of the award of such international arbitration states support them. With other words, the real word of the international arbitration is competing with the powers of sovereign state in various issues, *Lis pendends* – parallel procedures between national state court and arbitration Tribunals and similar issues. This is a clear evidence of the power of that international law

The law of international arbitration is on the one hand pure pragmatism and case-law practice whereas it is a collection of high theoretical problems of the private law – substantive and procedural law on the other: Is it possible to disregard the conflict of laws or les lois de police of the seat of arbitration or the place of the possible state of enforcement of award? Should the public rules be respected or disregarded by the international arbitration beyond the state sovereignty? These are everyday issues in the everyday practice of the international arbitration.

With these points we have arrived to the philosophical essences of the book. International arbitration law is not state law, especially because substantive law itself is only soft law. Be it the UNIDROIT principles, or *lex mercatoria*, or international loi uniform like Vienna sales law and its case law, or the Ottawa international factoring – arbitration law is being constructed by cases leaving only protective functions to the state. This is a new space –"espace" –, a new special dimension of law in this international, inter-related, globalized world.

In this excellent book the practical realm of law is elevated into theoretical realms through abstractions of facts, cases and court decisions determined by the contemporary interpretative order of private law.

Ce livre montre à l'audience hongroise la tradition noble de la culture juridique française; qui lève le monde pratique du droit – avec une approche philosophique – dans un moyen d'expression théorique et dans le monde scientifique. Pendant cette transformation les faits, la substance de cas, les décisions et jugements judiciaires résume dans l'ordre de nos jours en interprétant le droit civil.

Cette activité est semblable aux autres créations originales de notre âge, qu'il soit interprété et sont formulés les événements de notre monde, une nouvelle création est fondée par le biais de l'abstraction intellectuelle et notre monde est rendu celui qui peut être vu pour nous et celui que l'on peut comprendre avec cela.