ICSID Review, Vol. 34, No. 3 (2019), pp. 553–568
doi:10.1093/icsidreview/siz034 Published Advance Access April 10, 2020

ARTICLE

2018 LALIVE LECTURE
The Myth of Harmony in International Arbitration

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I would like to thank Professor Vincent Chetail and Dr Michael Schneider for their kind words of introduction. I am delighted and honored by the invitation to deliver this year's Lalive Lecture at the Graduate Institute of International and Development Studies in Geneva. Professor Pierre Lalive, a friend and cherished colleague, was the most courageous arbitrator I ever met. Indeed, he was the epitome of '*le courage arbitral*', a subject on which he penned so eloquently.[2] I am hopeful that Professor Lalive would have enjoyed this lecture, as it takes certain views which I think he might have agreed with.

The title of this presentation—'The Myth of Harmony in International Arbitration'—is somewhat cryptic. By way of introduction, I wish to make a few preliminary remarks on the meaning of harmony, on the one hand, and chaos, as the antithesis of harmony, on the other.

I. INTRODUCTION

Harmony is a central tenet of Confucianism,[3] and a concept which lawyers are particularly fond of.[4] Lawyers are inherently conservative and therefore perceive positively values such as harmony, consistency and predictability.[5] When confronted with situations that do not fall squarely within a structured order, lawyers begin to feel ill at ease. This instinctive urge for order is a curious phenomenon as, in every system, a little bit of chaos, or absence of harmony, is necessary in order for the system to evolve.[6]

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[2] Pierre Lalive, 'Du Courage dans l'Arbitrage International' in François Bonhet and Pierre Wessner (eds), *Mélanges en l'Honneur de François Knoepfler* (Helbing & Lichtenhahn 2005) 157–60.

[3] See eg, Chenyang Li, 'The Confucian Ideal of Harmony' (2006) 56(4) Phil East and West 583, 586.

[4] See eg, *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para 67.

[5] See eg, Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29(2) ICSID Rev—FILJ 372, 376; Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 297, 297–8.

[6] For instance, in biology, 'contrary to our deepest intuitions, massively disordered systems can spontaneously "crystallize" a very high degree of order'. See Stuart A Kauffman, *The Origins of Order: Self-Organization and Selection in*

As early as 1908, Roscoe Pound criticized the concept of mechanical jurisprudence and the 'scientific' legal system.[7] Pound explained that the quest for mechanical harmony arises from the 'average man's [...] love of technicality as a manifestation of cleverness' and results in petrification of a legal system.[8] Similarly, the vision of a judge of superhuman skill, learning, patience and acumen (if I may borrow this metaphor from Ronald Dworkin),[9] applying an immutable law and achieving absolute consistency, is a fiction.[10] Perfect predictability will be achieved only when all decision makers (judges and arbitrators alike) are replaced by artificial intelligence—a scary prospect. Until then, a certain degree of chaos is necessary for evolution of a given system.

There have been prior attempts to achieve such mechanical harmony. For instance, the traditional objective of private international law was to re-create international harmony in a world that is divided amongst sovereign States, by co-ordinating the appropriate choice of law rules.[11] However, divergent national traditions and State policies made a worldwide consensus on choice of law rules virtually impossible. In the most simplistic of terms, different courts apply different private international law systems, and the application of different choice of law rules excludes the possibility of producing harmonious outcomes.[12]

In international arbitration, the complexity is even greater, and attempts at achieving harmony are even more illusory. Arbitrators have no forum and enjoy wide discretion to apply any private international law system that they deem appropriate. As a result, in international arbitration, a measure of chaos is inherent to the arbitrators' function.

This 20th-century view of the world has been strongly challenged in some quarters. In more recent times, legal scholarship has focused on the notion of 'global' law—a law that emerges from the globalization process, independently of the laws of sovereign States.[13] In such a globalized vision of the law, the focus is on the creation of universal rules and transnational legal principles, as opposed to the coordination of individual national legal systems.

There is no shortage of examples to illustrate how the world has changed and how actors other than sovereign States have gained a great deal of power, allowing these

Evolution (OUP 1993) 173. Not all chaotic systems are actually chaotic. On the science of complexity, see Melanie Mitchell, *Complexity: A Guided Tour* (OUP 2009) 34.

[7] Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8(8) Colum L Rev 605, 607, 622.

[8] ibid 607.

[9] Ronald Dworkin, 'Hard Cases' (1975) 88(6) Harv L Rev 1057, 1083.

[10] Cass R Sunstein, 'Rules and Rulelessness' (1994) Coase-Sandor Institute for Law and Economics Working Paper No 27, 16 <https://chicagounbound.uchicago.edu/law_and_economics/435/> accessed 1 October 2019. For Sunstein, 'unstable law and inconsistent law—are part of the fabric of the modern regulatory state'.

[11] See Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (CUP 2009) 16.

[12] Friedrich Juenger, 'What's Wrong with Forum Shopping?' (1994) 16(5) Syd L Rev 5, 7 (observing that '[c]haracterisation problems caused by differences in the classification of substantive rules, and *renvoi* caused by differences in connecting factors, highlight the illusory nature of Savigny's hope for a worldwide agreement on choice-of-law rules. Thus, the evolution of positive conflicts law around the world has exposed the quixotic notion of the traditional system's quest for uniformity'). See also Hessel Yntema, 'The Objectives of Private International Law' (1957) 35 Can B Rev 721, 736.

[13] See eg, Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth 1997) 3, 3–4; Joshua Karton, 'Global Law: The Spontaneous, Gradual Emergence of a New Legal Order' in Shavana Musa and Eefje de Volder (eds), *Reflections on Global Law* (Brill 2013) 144, 145; Giuliana Ziccardi Capaldo, *The Pillars of Global Law* (Routledge 2016) 3–6; Jean-Baptiste Racine, 'Approches de Droit Global' [2019] 3 JDI 665.

actors to steer the law-making process in any desired direction. Two recent examples provide a perfect illustration in the field of investment arbitration.

The first example is the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration,[14] which, contrary to what some may think, is not a product of coordinated State-led effort. The real driving forces behind the Convention were certain non-governmental organizations (NGOs), who had been the loudest proponents of transparency in investment arbitration. After enlisting support from a limited number of States, including Canada[15] and Australia,[16] these NGOs went on to create a set of rules[17] and an international convention on transparency in a timespan of six years.[18] During this process, the position of certain States, such as France, evolved from not wanting enhanced transparency to accepting it, solely in order to avoid the rebuke of the international community.

The second example is the *Achmea* decision,[19] a bombshell that destroyed, overnight, 200 intra-EU investment treaties and set in motion a chain of yet-to-be-fully appreciated chaotic repercussions.[20] In essence, the Court of Justice of the European Union held that articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU):

> [M]ust be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the [treaty in question], under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[21]

The justifications for such a decision advanced by the Court are obviously driven by policy considerations. The Court first observed that arbitral tribunals 'may be called on'[22] to interpret and apply EU law in intra-EU situations. The Court also noted that arbitral tribunals' unscrutinized rulings on EU-related questions would threaten the consistency or 'autonomy' of the EU legal system, considering that arbitral

[14] The Convention on Transparency in Treaty-based Investor-State Arbitration, adopted on 10 December 2014 by Resolution 69/116 during the Sixty-ninth Session of the General Assembly of the United Nations (opened for signature 17 March 2015, entered into force 18 October 2017).

[15] United Nations Commission on International Trade Law (UNCITRAL), Revision of the UNCITRAL Arbitration Rules, Observations by the Government of Canada (Forty-first session, June 2008) A/CN.9/662 para 20.

[16] UNCITRAL, Working Group II, Transparency in Treaty-based Investor-State Arbitration: Compilation of Comments by Governments (Fifty-third session, October 2010) A/CN.9/WG.II/WP.159 7.

[17] UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration (adopted 9 July 2013, entered into force 1 April 2014).

[18] See Report of the United Nations Commission on International Trade Law, Official General Assembly, Official Records, Supplement No 17 (Forty-first session, 16 June–3 July 2008) A/63/17 para 314 (reporting that '[a]s to timing, the Commission agreed that the topic of transparency in treaty based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority'). See also UNCITRAL YB, vol XLIV (2013) A/CN.9/SER.A/2013 para 13.

[19] *Slowakische Republik (Slovak Republic) v Achmea BV*, Case C 284/16, Judgment (6 March 2018). See also Emmanuel Gaillard, 'L'Affaire *Achmea* ou les Conflits de Logiques (CJUE 6 mars 2018, aff. C-284/16)' (2018) Rev Critique de Droit International Privé 616.

[20] *Achmea*'s impact has been amplified by the Court's subsequent opinion on the Comprehensive Economic and Trade Agreement (CETA), which, while accepting CETA's compatibility with EU law, goes further than *Achmea* by introducing more stringent conditions on compatibility of virtually all existing investment protection treaties with EU law. See Opinion 1/17 of the Court of Justice of the European Union (30 April 2019) para 245 (holding that 'Section F [Resolution of investment disputes between investors and states] of Chapter Eight [Investment] of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, is compatible with EU primary law'). On this opinion, see Emmanuel Gaillard [2019] 3 JDI 845 (note).

[21] *Slowakische Republik (Slovak Republic) v Achmea BV* (n 19) para 60.

[22] ibid para 42.

tribunals are not permitted to submit questions of EU law to the Court for preliminary rulings.[23] This line of reasoning relies, problematically, on an eventuality: that of arbitral tribunals having to interpret or apply EU law. In practice, however, questions of EU law are not commonly raised before arbitral tribunals. The *Achmea* dispute itself did not concern EU law in any way. Therefore, while the Court relied on the need to protect a harmonious application of EU law to justify its decision, 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. It is difficult to believe that such a radical decision was not the result of a campaign led by the same NGOs that have been vehemently criticizing the investment arbitration system for the last 10 years.[24] The Court could have found other ways to deal with the issue before it, had it not succumbed to this lobbying.

Both of these examples show that the law today is not necessarily created by a single legislator in a given State, or even by a number of legislators coordinating their views through international conventions. What we are witnessing is a diversification of the sources, as well as the players, with self-appointed NGOs and other private initiatives such as the International Bar Association (IBA) or the United Nations Institute for the Unification of Private Law (UNIDROIT), to name but a few, playing an important role.

With these preliminary remarks on harmony, I will proceed to discuss three examples of how harmony can be manipulated in order to promote certain results (Section II). I will then analyze the ways that traditionally have been used to achieve harmony (Section III). Finally, I will offer some closing observations (Section IV).

II. MANIPULATION OF HARMONY TO PROMOTE CERTAIN OUTCOMES: THREE EXAMPLES

Lawyers are often tempted to manipulate the value of harmony in order to reach a certain outcome or promote a certain ideology. Three examples of such manipulation in international arbitration, which I examine below, are the international reach of a decision setting aside an arbitral award at the seat of the arbitration (Subsection II.A), the *Dallah* case (Subsection II.B), and the lack of consistency in investment arbitration (Subsection II.C).

A. *The International Reach of a Decision Setting Aside an Arbitral Award at the Seat of the Arbitration*

It should go without saying that national courts are not always neutral when deciding the fate of awards rendered against their own nationals, especially State-owned entities.[25] Similarly, it is hardly surprising that such bias results at times in the setting

[23] ibid paras 58–9.

[24] See eg, Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fueling an Investment Arbitration Boom' (*The Transnational Institute (TNI)*, 27 November 2012) <www.tni.org/en/briefing/profiting-injustice> accessed 1 October 2019.

[25] See eg, *Corporación Mexicana de Mantenimiento Integral, S de RL de CV v Pemex-Exploración y Producción*, 832 F3d 92 (2d Cir 2016); *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA (Civ) 855, [2014] QB 458. See also Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) 14(1) ICSID Rev–FILJ 16.

aside of a perfectly valid arbitral award, merely because the award is unfavorable to an important national player.

Yet, certain lawyers argue—in the name of harmony—that if an award has been set aside at the seat of the arbitration, such an award can no longer be enforced elsewhere because it no longer 'exists', as if legal existence were a biological condition. Paradoxically, these same lawyers posit that if an award has not been set aside at the seat of the arbitration, the courts of the place of recognition and enforcement may nonetheless refuse enforcement of such an award.

In this inconsistent logic, the international reach of a decision depends on the outcome of the setting-aside proceedings. If the award is set aside by the national courts of the seat of the arbitration, the decision setting aside the award would have an absolute international effect. If the award is not set aside, the decision refusing to set aside the award would have no international effect, and the award would be scrutinized again at the place or places of enforcement. Such reasoning is not only anomalous, but it also represents a striking example of placing harmony or order above justice *in defavorem arbitrandum* (ie, contrary to the interest of arbitration).

B. *The* Dallah *Case*

For many, the *Dallah* case is an archetype of inharmonious or inconsistent outcome.[26] In this case, Dallah Real Estate and Tourism Holding Company, a Saudi real estate company, entered into a contract with a trust established by the Government of Pakistan. The contract contained an arbitration agreement referring to International Chamber of Commerce (ICC) arbitration in Paris, which Dallah invoked against Pakistan when disputes arose over the contract, and after the trust had ceased to exist. The Arbitral Tribunal found that Pakistan was bound by the arbitration agreement as it had been involved in the negotiation, implementation and termination of the contract.[27] Dallah sought enforcement of the final award in England. Pakistan challenged enforcement of the award on the basis that, as a non-signatory, it was not bound by the arbitration agreement.

The English courts, including the UK Supreme Court, held that Pakistan, as a non-signatory, was not bound by the arbitration agreement, and denied enforcement of the award. The Supreme Court arrived at this conclusion by applying the choice of law method set forth in article V(1)(a) of the New York Convention and holding that French law, as the law of the seat of the arbitration, applied to the issue of the existence, validity and scope of the arbitration agreement. The Court, however, misapplied French law, referring to the outdated *SPP v Egypt* decision,[28] rather than a series of more recent cases pursuant to which a party participating in the negotiation and performance of the substantive contract that contains an arbitration clause is bound by the contract and the arbitration clause contained therein.

Shortly thereafter, the Paris Court of Appeal rejected Pakistan's application to set aside the award, finding that under French law Pakistan was bound by the arbitration

[26] See *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763; Cour d'appel de Paris Pôle 01 ch. 01 17 février 2011 N° 09/28533.

[27] *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*, ICC Case No 9987, Partial Award (26 June 2001); *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*, ICC Case No 9987, Final Award (23 June 2006).

[28] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 [45].

agreement despite being a non-signatory. This outcome was embarrassing for the English courts, considering that their decision was meant to be based on French law: not only was their conclusion at odds with French law's liberal stance, but it was also contradicted by a French court applying its own law.

A number of esteemed English jurists (and in particular Lord Neuberger, the former President of the UK Supreme Court) have argued that, in hindsight, the English courts could have avoided this 'melancholy story' had they waited for the French courts to 'opine' first.[29] I respectfully disagree with this suggestion. Under the New York Convention, the losing party has no obligation to attack the award at the seat of the arbitration before seeking its enforcement elsewhere. Similarly, courts in the State of enforcement have no obligation to stay a proceeding pending the outcome of a matter before the court of the seat of the arbitration. Worse, imposing such an obligation on the courts of the place of enforcement would amount to reinstating the *double exequatur* requirement that was repealed by the New York Convention.[30] Such backward thinking, which runs directly counter to the New York Convention, cannot be right.

What was most problematic in *Dallah* was the pretense—in the name of harmony—of applying French law to the issues of the existence, validity and scope of the arbitration agreement, but in reality upholding the English bias against the extension of an arbitration agreement to non-signatories (even when the non-signatories were instrumental in the negotiation and performance of the contract containing the arbitration agreement). Harmony would have been better served by a more honest approach acknowledging that, in England, courts are reluctant to extend the scope of the arbitration agreement to non-signatories.[31]

Within the limits of the New York Convention, it is for the court seised of the enforcement action to apply its own national standards to the enforcement of awards. In particular, it is for the courts of the place of enforcement to determine whether an award meets the standards of recognition in that particular national legal system and the existence, validity and scope of the arbitration agreement, irrespective of the standards applied in other jurisdictions. Inevitably, courts in different jurisdictions may come to different conclusions, as they are entitled to do. This approach would not only be consistent with the New York Convention—it would also be less chaotic, and certainly more honest.

C. *The Lack of Consistency in Investment Arbitration*

Investment arbitration offers another example of the manner in which lawyers manipulate harmony as a value in order to arrive at a certain outcome. Here, the values of harmony, predictability and consistency are used as weapons against the system of investment arbitration.

[29] Alison Ross, 'A Nobel Prize for the New York Convention?' *Global Arbitration Review* (11 May 2018) <https://globalarbitrationreview.com/article/1169361/a-nobel-prize-for-the-new-york-convention> accessed 1 October 2019. See also Lord Neuberger, 'Arbitration and the Rule of Law' (Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015) para 39.

[30] On the intent of the drafters of the New York Convention to repeal the *double exequatur* requirement, see Pieter Sanders, 'Reflections on the New York Convention' (*UN Audiovisual Library of International Law*, 1 January 2007) <http://webtv.un.org/watch/reflections-on-the-new-york-convention-pieter-sanders/2579532768001> accessed 1 October 2019. See also *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)* (Emmanuel Gaillard and George Bermann (eds), UN 2016) 95, 97–8.

[31] See eg, *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and another (No 2)* [2006] EWCA Civ 1529, [2007] QB 886, [81], [90].

The loudest opponents of the system have scrutinized the investment arbitration case law through magnifying glasses and expressed disbelief in observing inconsistent case law. And yet, if one takes a bird's-eye view of the case law in its totality, it is, in fact, remarkably consistent for a body of case law that has been created in a decentralized manner.[32]

The examples given by critics of the system are not particularly convincing. For instance, different holdings on the umbrella clause in *SGS v Pakistan*[33] and *SGS v Philippines*[34] are usually taken as a prime example of a broken system. The reasoning here is based on the premise that the system does not work because it is not achieving consistent outcomes and therefore cannot guarantee perfect predictability. Such reasoning is misguided. Absolute consistency would demand that the first decision be binding, irrespective of whether its outcome was correct, with all subsequent decisions being required to follow the decision rendered in the first case. It is essential to look at a case law in a more dynamic way, rather than taking snapshots at a single point in time. As in the Darwinian theory of natural selection, over time, the best decisions become '*jurisprudence constante*', while the worst ones are considered as isolated mishaps that will not be followed.[35]

David Caron has explained, in his excellent article on the subject, that the criticism leveled at the system of investment arbitration is nothing more than a wild manifestation of hostility towards globalization and should not, as a result, be taken at face value.[36] This is only properly understood when the criticism is looked at through the prism of certain ideologies influencing the debate over the supposed lack of consistency. Lack of consistency is presented by certain NGOs as evidence of a broken system in a way that serves their agenda of challenging the system and globalization as a whole. In other words, the criticism of investment arbitration is a proxy for the criticism of globalization. Accordingly, there is no manner of (or point in) fixing the perceived shortcomings of the system—either by establishing an appeal mechanism, enhancing transparency or otherwise—because the criticism lies at a fundamentally different level.

Thus, considering that investment arbitration case law has been developed and elaborated in a decentralized manner, a purely objective observer can only remark on its extraordinary level of consistency.[37] Unsurprisingly, the case law in domestic legal systems is not perfectly consistent, either. The US Supreme Court, for instance, does not even attempt to eliminate all inconsistencies in US federal law. If a domestic legal

[32] See eg, Yas Banifatemi, 'Consistency in the Interpretation of Substantive Investment Rules: Is It Achievable?' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (CUP 2013) 200, 210ff.

[33] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction (6 August 2003) paras 163–74.

[34] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction (29 January 2004) paras 113–29.

[35] Mark Roe, 'Chaos and Evolution in Law and Economics' (1996) 109 Harv L Rev 641, 642 (discussing the paradigm of a 'Darwinian survival of the fittest in law and economics'). See also Banifatemi (n 32) 200, 227; Andrea K Bjorklund, 'Investment Treaty Arbitral Decisions as *Jurisprudence Constante*' in Colin B Picker, Isabella D Bunn and Douglas W Arner (eds), *International Economic Law: the State and Future of the Discipline* (Hart 2008) 265, 276.

[36] David Caron and Esmé Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing*? (OUP 2018) 159.

[37] See eg, David Gaukrodger, Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency (2013), 2013/3 OECD Working Papers on International Investment (discussing the case law on the general acceptance of derivative shareholders' claims); Yas Banifatemi, 'Taking Into Account Control Under Denial of Benefits Clauses' in Emmanuel Gaillard and Yas Banifatemi (eds), *Jurisdiction in Investment Treaty Arbitration*, 8 IAI Series on International Arbitration (Juris 2018) 233 (discussing the case law on denial of benefits).

system can entertain a certain level of inconsistency, why would the same not hold true in investment arbitration?[38]

III. ACHIEVING HARMONY

In the most classic private international law thinking, harmony can be achieved in two ways. The first entails co-ordination of choice of jurisdiction rules. Creating harmony in this manner requires a decision of a single competent court to be respected by courts in all other jurisdictions. The second method entails co-ordination of choice of law rules. Harmony is achieved in this way when different national courts apply the same choice of law rules.

Keeping in mind the two ideas discussed above—the tension between harmony and evolution, and the manipulation of harmony to promote certain outcomes or ideologies—I will now explore these two methods of achieving harmony, and discuss in turn the myth of harmony in relation to decisions regarding international arbitration (Subsection III.A) and the rules regarding international arbitration (Subsection III.B).

A. *The Myth of Harmony and Decisions Regarding International Arbitration*

In international arbitration, the issue of consistency may arise not only before arbitral tribunals (Subsection III. A.i) but also before national courts reviewing arbitral awards (Subsection III.A.ii).

(i) *Issues of consistency before tribunals*

An arbitral tribunal may render a number of awards in the course of the same proceedings, and consistency between these awards may be an issue. One of the tools available to arbitral tribunals when resolving such issues is the principle of *res judicata*.[39] Arbitral tribunals have a great deal of discretion in deciding whether a previous matter has been resolved with *res judicata* effect. Usually, the decision on *res judicata*, as a decision on merits, is not reviewed by national courts at the stage of recognition and enforcement of the award.[40]

Similarly, arbitral tribunals may be confronted with arguments that certain issues cannot be reopened because they have already been decided with *res judicata* effect by a prior arbitral tribunal in a previous award. This is not uncommon in today's complex world, where litigants dissatisfied with one award may attempt to secure a different outcome by starting one or more arbitration proceedings based on the same or

[38] See Frank H Easterbrook, 'Ways of Criticizing the Court' (1982) 95 Harv L Rev 802, 813 (observing that 'inconsistency is inevitable, in the strong sense of that word, no matter how much the Justices may disregard their own preferences, no matter how carefully they may approach their tasks, no matter how skilled they may be'). See also *Atanasovski v The Former Yugoslav Republic of Macedonia* App no 36815/03 (ECtHR, 14 January 2010) para 38 (holding that 'case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement').

[39] On the principle of *res judicata* as a tool for ensuring coordination among various legal orders, see Emmanuel Gaillard, 'Coordination or Chaos: Do The Principles of Comity, *Lis Pendens*, and *Res Judicata* Apply to International Arbitration?'(2018) 29(3) Am Rev of Intl Arb 205.

[40] In some countries, such as Switzerland and China, issues of *res judicata* are reviewed as matters of public policy. For Switzerland, see Federal Supreme Court, 4A_633/2014, Judgment (29 May 2014). For China, see Taizhou Court, Case Docket No [2015] Tai Zhong Shang Zhong Shen Zi, No 00004, *Taizhou Haopu Invest Co v Wicor Holding AG* (2 June 2016).

related arbitration agreements. Although the principle of *res judicata* (or issue estoppel, depending on the applicable law) is a useful harmonization tool in such cases, we will see later the difficulty in choosing the appropriate choice of law rule applicable to *res judicata*, and why a resort to general principles of law therefore offers a better and more practical solution.[41]

In addition to *res judicata*, an arbitrator's toolbox contains the tool of 'discretionary stay'.[42] Increasingly, the same or similar parties commence related arbitration proceedings simultaneously before more than one arbitral tribunal. In that situation, an arbitral tribunal having jurisdiction over a matter may conclude that another tribunal having jurisdiction over the same matter is in a better position to decide it. A discretionary stay thus assumes that the two tribunals are equally competent to hear the dispute. This in turn requires an arbitral tribunal deciding whether to stay the proceedings to assess not only its own jurisdiction, but also the jurisdiction of another arbitral tribunal, which may not yet have decided the question of its jurisdiction. Of course, if the other tribunal does not have jurisdiction over the matter, the issue of stay does not even arise.

(ii) *Issues of consistency before national courts*

The issue of consistency also arises in connection with court decisions ancillary to the award. I will first discuss decisions setting aside or refusing to set aside an arbitral award, to which I have briefly alluded earlier.[43] I will then discuss decisions regarding enforcement of arbitral awards.

As explained previously, the logic that purports to give an international reach to a decision setting aside an award at the seat of the arbitration is that it fails to explain why a decision *refusing* to set aside an award at the seat does not have the same effect. This result, which would systematically disfavor the enforcement of arbitral awards by giving an international effect only to court decisions invalidating arbitral awards, would be paradoxical, considering that the New York Convention was designed to promote and facilitate, and not to obstruct, the circulation of international arbitral awards.

A number of practical, perverse consequences also flow from this view. First, allowing the courts at the seat of the arbitration to dictate the fate of the award on a global basis (be it a setting aside or a refusal to set aside) would mean that the courts of the place of enforcement are required to wait for the courts at the seat of the arbitration to have rendered their decision first. Second, the losing party would be required to bring an action to set the award aside at the seat of the arbitration, or otherwise be precluded from arguing against the award at the place of enforcement. Finally, if we carry this logic further, any enforcement decision rendered prior to a decision of the courts at the seat of the arbitration would be subject to reversal in order to conform to a conflicting decision of the courts at the seat. Unfortunately, this is precisely the logic that the US courts followed in the 2011 case of *Thai-Lao Lignite*.[44]

[41] See Subsection III.B.i.

[42] *Atlas Power Ltd v National Transmission & Dispatch Co*, LCIA Case No 142730, Ruling on Stay Application (8 July 2016) (unpublished); *Egyptian General Petroleum Corp v E Mediterranean Gas SAE*, CRCICA Case No 829/2012, Partial Award on Jurisdiction and Procedural Ruling on Stay Application (11 November 2013) (unpublished).

[43] See Subsection II.A.

[44] *Thai-Lao Lignite (Thailand) Co. v Government of Lao People's Democratic Republic*, 864 F3d 172, 186 (2d Cir 2017).

In that case, the United States District Court for the Southern District of New York enforced an award that was rendered in Malaysia against the Government of Laos. The Second Circuit Court of Appeals affirmed the District Court's decision. The Malaysian High Court subsequently set aside the award, and the Government of Laos requested the District Court to annul the enforcement decision. The District Court reversed its decision on enforcement and the Second Circuit confirmed the reversal.[45] This outcome is unwarranted, both in terms of procedural economy and justice. What this decision suggests is that a successful party should not invest any efforts into enforcing an award in the United States before having prevailed before the highest jurisdiction in the country of the seat of the arbitration.

Even more troubling is the current trend in certain jurisdictions where enforcement is sought to shift attention away from the award and to focus instead on court decisions regarding the enforcement of such award.[46]

An unfortunate example is *Belmont Partners, LLC v Mina Mar Group, Inc.*[47] That case involved an arbitration in Virginia. The award was first recognized in Canada, despite allegations that it had been procured by corruption, fraud and undue means. When the same allegations were raised in subsequent setting-aside proceedings in Virginia, the United States District Court for the Western District of Virginia determined that the Ontario Superior Court decision had *res judicata* effect, and that the District Court was therefore precluded from deciding whether to 'modify or vacate the Award'.[48] Thus, instead of applying its own national standards to the question of the award's enforcement, the District Court decided to apply the Canadian ones. This shows the courts at the seat of the arbitration abdicating their own view on the validity of the award in favor of that of the courts of a place of enforcement.

A similar logic was followed by the English Court of Appeal in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)*.[49] In that case, Yukos Capital sought to rely on a finding by the Amsterdam Court of Appeal in the course of enforcing an arbitral award which had been set aside in Russia that the setting-aside proceedings were 'not impartial and independent but [...] instructed by the executive'.[50] The Dutch court held that the setting-aside proceedings were against Dutch public policy, and enforced the award. Rather than make a determination on the award itself based on English public policy, the English Court of Appeal engaged in a long discussion over whether the Dutch decision on the impartiality of the Russian court proceedings gave rise to issue estoppel. Eventually, the English Court of Appeal held that the Dutch decision was not preclusive, since it relied on a determination about whether the Russian setting-aside proceedings were consistent with Dutch public policy, whereas the issue in the English proceedings was whether the proceedings were consistent with English public policy. This decision suggests that an English court could, however, give effect to an enforcement decision rendered in a country other than the seat of the arbitration on matters other than arbitrability and public policy.

[45] On the US approach to enforcement of awards that have been set aside at their seat, see Emmanuel Gaillard, 'La Vision Américaine des Sentences Annulées au Siege (Observations sur les Arrêts *Pemex* et *Thai-Lao Lignite* de la Cour d'Appel Fédérale du 2e Circuit des 2 août 2016 et 20 juillet 2017 [2017] 4 Rev Arb 1147.

[46] See eg, Maxi Scherer, 'The Effect of Foreign National Court Judgments Relating to the Arbitral Award: An Emerging Conceptual Framework?' in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series 19 (ICCA and Kluwer Law International 2017).

[47] *Belmont Partners, LLC v Mina Mar Group, Inc.*, 741 F Supp 2d 743 (WD Va 2010).

[48] ibid 753.

[49] *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* (n 25).

[50] ibid [471].

The approach focusing on the preclusive effect of court decisions ancillary to the award, as opposed to scrutiny of the award itself, creates an opening for opportunistic parties to manipulate the system. In particular, it invites parties to race to the court expected to be most sympathetic to their position, in the hope of securing a favorable judgment, which can then be exported to other countries.

In my view, harmony is better fostered by going back to the logic of the New York Convention, namely that national courts at the place (or places) of enforcement should independently assess the arbitral process and the ensuing award, irrespective of the assessment by the courts of any other country. In fact, the State of enforcement of the award has a strong interest in ensuring that the award meets the standards of what *it* considers to be a decision worthy of recognition, according to the rules applicable to enforcement in *that* country.[51]

B. *The Myth of Harmony and the Rules Regarding International Arbitration*

Another way to achieve harmony is for the arbitral tribunal or the national court to apply the same rules when confronted with the same issues. Here, I will discuss the competing methodologies in selecting the law applicable to the merits (Subsection III.B.i) and the challenges facing the transnational rules approach (Subsection III.B.ii). I will then discuss the circumstances in which the overriding mandatory rules (*lois de police*) and truly international or transnational public policy (*ordre public réellement international*) can set limits to the parties' choice of governing law and override the rules selected by the parties (Subsection III.B.iii).

(i) *The competing methodologies in selecting the law applicable to the merits*

There are two traditionally competing methodologies with respect to the rules of law applicable to the merits of any given dispute submitted to arbitration, both of which aspire to foster harmony and predictability: the choice of law approach and the transnational rules methodology. In my view, in the field of international arbitration, the transnational rules methodology better serves the objectives of harmony and predictability than the classic choice of law approach.

Parties are free to select the applicable rules of law (including transnational rules) that will govern the merits of their dispute. The arbitrators are bound to comply with the choice of applicable law expressed by the parties, subject only to the application of mandatory rules and international public policy.[52] The debate between the two competing methodologies therefore only arises where the parties have not selected the applicable law or the applicable rules of law.

In national legal systems, in the absence of a choice of law by the parties, domestic courts will apply the conflict of law rules of the forum to determine the applicable law. Unlike domestic courts, international tribunals generally enjoy wide freedom to determine the applicable law or rules of law. For instance, arbitrators can follow the method set out in the UNCITRAL Model Law, which allows the arbitral tribunal to 'apply the law determined by the conflict of laws rules which it considers

[51] Gaillard (n 25) 45.
[52] See Subsection III.B.iii.

applicable'.[53] This approach gives the arbitrators absolute freedom over the choice of law rule that they will apply. Specifically, arbitral tribunals applying this method can select between the choice of law rules of the seat of the arbitration[54] and the choice of law rules of all legal systems connected with the dispute, to the extent that these point to the same substantive law,[55] or alternatively can engage in a comparative law analysis to identify 'general conflict of law rules'.[56] So much for harmony and predictability.

There are many examples of the uncertainty generated by the choice of law approach, some of which include the issues of interest,[57] statute of limitations,[58] capacity[59] and *res judicata*.[60] Not to mention that the choice of law process itself is inherently unpredictable. As we know, the process involves three steps: (*i*) the relevant issue must be characterized; (*ii*) the connecting factor must be identified; and (*iii*) the rule so identified must be applied.[61]

In international arbitration, even the characterization of the matter in dispute is unpredictable.[62] Take, for instance, the principle of *res judicata*. What law or rules of law will an arbitral tribunal apply to determine whether *res judicata* is procedural or substantive? Depending on the characterization of *res judicata* as procedural or substantive, what law will the arbitrators apply: is it the law of the seat of the arbitration, or the law of the place where the award is alleged to produce a *res judicata* effect, or both of those laws? Or is it, rather, the law applicable to the substance of the contract which the first award applied?[63]

Recognizing the multiplicity of equally plausible connecting factors, some authors, despite their general preference for the choice of law approach, have recognized that in certain situations, including those involving *res judicata*, the transnational rules methodology produces more predictable outcomes.[64]

[53] See UNCITRAL Model Law (2006) art 28(2). Most modern arbitration rules have eliminated any reference to choice of law rules at the seat of the arbitration. See eg, ICC Arbitration Rules (1 March 2017) art 21; Recent case law also reflects this approach. See eg, ICC Case No 17507, Final Award (excerpt) (2016) para 128; ICC Case No 12193, Final Award (excerpt) (2008) paras 21–2.

[54] See eg, ICC Case No 11024, Final Award (excerpt) (2011).

[55] See eg, ICC Case No 12193 (n 53) para 23.

[56] See eg, ICC Case No 6149, Interim Award (excerpt) (1990) paras 24–37.

[57] See eg, ICC Case No 10274, Final Award (1999) para 68 (applying the conflict of law rules of the seat of the arbitration); ICC Case No 3193, Final Award (2013) para 81 (applying an interest rate that the tribunal considered to be 'reasonable and appropriate' without reference to any domestic law); ICC Case No 17020, Final Award (2015) para 116 (applying the law applicable to the substantive contract).

[58] See eg, ICC Case No 16247, Final Award (excerpt) (2016) (discussing whether prescription is a substantive or procedural category and the impact of such characterization on the resulting applicable law).

[59] See eg, ICC Case No 9893, Interim Award (excerpt) (2008) (applying a transnational conflict of law rule); ICC Case No 10329 (2000) (applying the conflict of law rules of the seat of the arbitration).

[60] See eg, CRCICA Case No 829/2012, Partial Final Award (7 April 2017) (unpublished) paras 953, 1320–32 (applying the cumulative method); *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID Case No ARB(AF)/12/1, Award (25 August 2014) paras 7.36–7.37 (applying 'NAFTA Article 1131(1), the rules of international law and the UNCITRAL Arbitration Rules'); ICC Case No 12923/E.C, Final Award (2007) (applying 'principles of law generally recognized in this regard'); ICC Case No 13507, Final Award (2007) (applying the procedural law of the seat).

[61] See eg, Otto Kahn-Freund, *General Problems of Private International Law*, Collected Courses of the Hague Academy of International Law (Brill 1974) vol 143, 368.

[62] See eg, ICC Case No 16247 (n 58) para 36.

[63] See Dominique Hascher, 'L'Autorité de la Chose Jugée des Sentences Arbitrales' in *Comité Français de Droit International Privé: Travaux du Comité Français de Droit International Privé* (15th edn, Pedone 2004) 17; Pierre Mayer, 'Litispendance, Connexité et Chose Jugée dans l'Arbitrage International' in *Liber Amicorum Claude Reymond Autour de l'Arbitrage* (LexisNexis 2004) 185; Luca G Radicati di Brozolo, '*Res Judicata*' in Pierre Tercier (ed), *Post Award Issues: ASA Special Series No 38* (2011) 127; Kaj Hobér, *Res Judicata and Lis Pendens in International Arbitration*, Collected Courses of the Hague Academy of International Law (Brill 2014) vol 366, 258.

[64] Mayer, 'Litispendance, Connexité et Chose Jugée dans l'Arbitrage International' (n 63); Pierre Mayer, 'The Effects of Awards Rendered in Multiparty-Multicontract Situations' in Bernard Hanotiau and Eric A Schwartz (eds), *Multiparty Arbitration* (International Chamber of Commerce 2010) 222, 230.

This is why many modern arbitration laws have abandoned the traditional choice of law approach and instead allow either the application of the law 'with which the case has the closest connection'[65] or the application of the rules of law (including transnational principles) considered to be most appropriate for the resolution of the dispute, without reference to any choice of law rules (*voie directe*).[66]

I have always been of the mindset that, in the absence of a choice of law by the parties, the transnational rules approach leads to more predictable results.[67] The transnational rules approach is also more progressive. It avoids the random application of a domestic law somewhat connected to the dispute but containing idiosyncratic rules of law that run against the international consensus on a specific point. In this way, the transnational rules methodology tends to erase outdated law.

(ii) *The challenges facing the transnational rules approach*

Despite being more predictable and more progressive than the choice of law approach, the transnational rules methodology faces its own challenges. The main challenge today is not the perceived paucity of sources and difficulty in finding general principles of law, which was a late 20th-century criticism of the transnational rules approach.[68] It is, rather, the abundance of sources. The problem with having too many sources is that, in some cases, they may clash and when that occurs, arbitrators must select the most appropriate rule.

A prime example of this conflict concerns contracts procured by corruption and, in particular, the question of whether a party that has procured a contact by corruption may recover the value of that part of the contract which has been performed.[69] There is a broad consensus that a finding that a contract was procured by corruption results in the contract being held invalid or unenforceable. The consequences of such nullity or unenforceability, however, are less easy to ascertain.

The traditional approach to this issue, which continues to be followed in most domestic legal systems, is that a party to an illicit or immoral contract cannot receive either future payments under the contract or the restitution of any amounts already paid in performing the contract. Thus, if a party has procured a contract to construct a plant in a State by bribing government officials of that State, a newly elected government that obtains an arbitral award finding the nullity of the contract will both keep the plant and not be required to make any payments to the other party. This principle is enshrined in the maxim *in pari causa turpitudinis cessat repetitio.* The policy behind this principle is to create uncertainty concerning the execution of illicit or immoral contracts so as to deter the parties from entering into them.

The 2010 UNIDROIT Principles of International Commercial Contracts have adopted a more relaxed standard according to which the parties to a partially performed contract that infringes a 'mandatory rule' may recover the object of their performance of the contract 'where this would be reasonable in the circumstances'.[70]

[65] See Swiss Private International Law Act 1987 art 187.

[66] See French Code of Civil Procedure, Decree No 2011-48 of 13 January 2011 art 1511.

[67] Emmanuel Gaillard, 'Use of General Principles of International Law in International Long-Term Contracts' (1999) Intl Business Lawyer 214.

[68] See eg, Lord Mustill, 'The New *Lex Mercatoria*: The First Twenty-five Years' (1988) 4(2) Arb Intl 86.

[69] See Emmanuel Gaillard, 'The Emergence of Transnational Responses to Corruption in International Arbitration' (2019) 35(1) Arb Intl 1.

[70] See UNIDROIT Principles of International Commercial Contracts (2010) arts 3.3.2(1) and 3.3.1(2). See also *Patel v Mirza* [2016] UKSC 42 [101], [2017] AC 467 (Lord Toulson) (holding that 'the *in pari causa* rule "is not a matter which can be determined mechanistically"').

The drafters of the UNIDROIT Principles therefore aimed to protect the value of what has been performed pursuant to a void contract. This approach does not dissuade, as forcefully as the traditional rule, the parties from entering into contracts procured by corruption, given that the party procuring a contract through illicit conduct may expect to receive restitution at a minimum.

Arbitrators may therefore face the situation of a conflict between the rule set out in the UNIDROIT Principles and the *in pari causa turpitudinis cessat repititio* principle that is still followed in many legal systems.

In my view, in cases of conflict between a broad comparative law analysis and a ready-made compilation (even one as prestigious as the UNIDROIT Principles), arbitrators seeking to apply transnational rules should choose the former over the latter—unless, of course, the parties have specifically chosen a given set of principles to govern their relationship.

(iii) *Overriding mandatory rules* (lois de police) *versus transnational public policy* (ordre public réellement international)

The last question I wish to address is the type of mandatory rules that may override the choice of governing law made by the parties. While arbitrators must respect the parties' choice of governing law and apply the *lois de police* that belong to the *lex contractus*, the relevance of *lois de police* other than those of the *lex contractus* has been hotly debated.

Proponents of the traditional choice of law methodology tend to accept that the *lois de police* of any State having a close connection with the dispute may override the parties' choice of applicable law.[71] This approach suggests that arbitrators should follow the rule set out, for example, in article 9(3) of the Rome I Regulation that applies to judges in EU Member States,[72] or article 19(1) of the Swiss Federal Act on Private International Law that applies to Swiss judges.[73]

Proponents of the transnational rules approach—including Pierre Lalive—consider that the *lex contractus*, especially when it has been chosen by the parties, can only be overridden by truly international or transnational public policy (*ordre public réellement international*).[74] Like Pierre Lalive, I am very much in favor of the latter approach, which better serves the interests of harmony and predictability of the outcome. *Lois de police* are often nothing more than isolated views of a particular jurisdiction, which could include any boycott, embargo or counter-embargo on a neighboring State, irrespective of the underlying reasons for imposing such a measure. To allow arbitrators to apply *lois de police* each time they have a connection with the case (even when that connection is the place of performance), and in light of the

[71] In favor of this approach, see eg, François Knoepfler, 'L'Article 19 LDIP Est-il Adapté à l'Arbitrage International?' in Christian Dominicé, Robert Patry and Claude Reymond (eds), *Etudes de Droit International en l'Honneur de Pierre Lalive* (Helbing & Lichtenhahn 1993) 531.

[72] European Parliament and Council Regulation (EC) 593/2008 of 17 June 2009 on the Law Applicable to Contractual Obligations (Rome I) OJ L177 art 9(3) ('Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application').

[73] Swiss Private International Law Act 1987 art 19(1) *('Lorsque des intérêts légitimes et manifestement prépondérants au regard de la conception suisse du droit l'exigent, une disposition impérative d'un droit autre que celui désigné par la présente loi peut être prise en considération, si la situation visée présente un lien étroit avec ce droit')*.

[74] Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series* vol 3 (ICCA and Kluwer Law International 1987) 258.

consequences of their application or non-application,[75] would generate serious unpredictability.

Transnational public policy, on the other hand, reflects values that are not only of the utmost importance, but also widely accepted. Prime examples of such values include the prohibition of corruption, anti-competitive agreements or any kind of discrimination. Such values are often enshrined in international instruments, such as, for example, the 2004 UN Convention against Corruption, which binds 186 State parties. The generally accepted nature of the values underlying these instruments makes their application perfectly predictable.

The transnational rules approach empowers arbitrators to disregard the law chosen by the parties only in those situations where that law contravenes a fundamental rule of transnational public policy, as opposed to a mere *loi de police*. Two recent French cases have embraced this distinction and made clear that French courts will not review a *loi de police* when scrutinizing an award in an action to set aside or enforce such award. In *The Democratic Republic of Congo v Customs and Tax Consultancy LLC* case,[76] the State requested that an award be set aside on the grounds that the parties' investment contract, governed by French law, was awarded without any tender process, contrary to a mandatory rule of Congolese law on public procurement. Rejecting this argument, the Paris Court of Appeal held that, contrary to the prohibition of corruption, the Congolese *loi de police* did not reflect a sufficiently important value to be characterized as an international public policy requirement. At best, a breach of a tender requirement can be used, together with other compelling elements, as evidence of the existence of actual corruption.

The Paris Court of Appeal followed the same approach in its 16 January 2018 decision in *MK Group v Onix*.[77] MK Group requested that the Court set aside the award on the grounds that Onix had obtained the award on the basis of a fraudulent approval of its investment, in violation of a Laotian *loi de police*. The Court reasoned that a foreign *loi de police* could only be relevant to a request to set aside an award to the extent that it reflected the French understanding of international public policy, and that it was irrelevant in that case that the Laotian courts had refused enforcement of the award for violation of local *lois de police*. The Court held that the acquisition of legal title through fraudulently obtaining an investment authorization required by domestic law violated not only a Laotian *loi de police*, but also the transnationally accepted general consensus reflected in the 1962 UN General Assembly Resolution on Permanent Sovereignty over Natural Resources, which forms an integral part of truly international public policy. As a result, the Court set aside the award, holding that the award violated international public policy in a 'manifest, effective, and material' manner.

[75] In the absence of the parties' express choice of the governing law, the question of the application of *lois de police* is moot given the flexibility enjoyed by the arbitrators in selecting the applicable rules of law.

[76] Cour d'appel de Paris N°15/17442 16 mai 2017, *République démocratique du Congo c/ société Customs and Tax Consultancy LLC*; [2017] 3 Rev Arb 1066; Emmanuel Gaillard, 'La Corruption Saisie par les Arbitres du Commerce International' [2017] 3 Rev Arb 805; Emmanuel Gaillard [2017] 4 JDI 1361 (note); Denis Bensaude, 'Marchés Publics et Ordre Public International' (2017) 27 Gazette du Palais 34; Jean-Baptiste Racine, 'Le Contrôle de la Sentence par le Juge de l'Annulation en Matière de Corruption, note sous Paris, Pôle 1—Ch 1, 16 mai 2017' [2018] 1 Rev Arb 254.

[77] Cour d'appel de Paris N° 15/21703 16 janvier 2018, *MK Group c/ SARL Onix*; Mathias Audit, 'L'Annulation d'une Sentence Arbitrale sur le Fondement d'une Loi de Police Étrangère' (2018) 18 Recueil Dalloz 1635; Sophie Lemaire [2018] 2 Rev Arb 401 (note); Sylvain Bollé [2018] 3 JDI 883 (note); Emmanuel Gaillard [2018] 3 JDI 898 (note).

As the broad acceptance of the values at hand is at the heart of the transnational public policy methodology, it should come as no surprise to anyone when arbitrators and judges alike give teeth to such values. In that sense, predictability—and thus harmony—is the essence of the transnational public policy methodology.

IV. CONCLUSION

As Roscoe Pound lucidly noted more than a century ago, the law 'must be judged by the results it achieves, not by the niceties of its internal structure [or] by the beauty of its logical processes'.[78] This observation is particularly relevant today, as lawyers and NGOs hostile to globalization often manipulate the notion of harmony in order to achieve certain results or promote certain ideologies in the field of international arbitration. In this construct, harmony is placed above justice, *in defavorem arbitrandum* and, paradoxically, its mechanical application produces inharmonious results. This can be avoided by understanding that achieving harmony in this mechanical way is not the best possible option for international arbitration and that the lack of a mechanical harmony should not be lamented, as a little bit of chaos, as in any other system, is necessary for its evolution.

[78] Pound (n 7) 605.