

The Role of Law in International Commercial Arbitration

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I chose the topic of this paper because of the variety of perspectives from which the relationships between arbitration, the courts, and law can be viewed, both practically and theoretically. Further, some of those perspectives raise the important question of the nature of law. For now, I will proceed as if the phrase “the law” has a familiar meaning and usage.

There are at least three laws, or systems of law, that are easily recognisable, which bear upon an international commercial arbitration: the law governing the agreement to arbitrate; the law governing the arbitral tribunal and procedure – the *lex arbitri*; and the law governing the resolution of the substantive dispute – the applicable or governing or substantive law. Added to these may be the law concerned with a party’s capacity to enter into an arbitration agreement, and the law or laws concerned with challenges to and recognition and enforcement of awards. There may also be other applicable rules that the parties may agree upon that perhaps fall for consideration in the above categories.

There is also the woollier (and none the worse for that warmth) application of non-binding guidelines, approaches and recommendations in the form of so-called “soft law”, that may importantly affect the resolution of the dispute.

Let me say something briefly about these laws before turning to some aspects of the relationships between law, courts and arbitration that have been and continue to be the subject of contemporary discussion.

The law and the agreement to arbitrate¹

The now embedded notion of separability or severability of the arbitration agreement from the substantive contract to which it relates² makes unreliable any assumption that the law

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¹ See generally N Blackaby, C Partasides, A Redfern and M Hunter (eds), *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed, 2009) at 166-173.

² See *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170; 350 ALR 658.

governing the substantive contract will always be the law to govern the agreement to arbitrate. The choice may be different and deliberate – express or implied. See for example *Tamil Nadu Electricity Board*,³ where a contract for the supply of electricity was governed by the laws of India, but London arbitration in accordance with English law was chosen. Thus, the scope of the arbitration agreement fell to be decided according to English law.

If no precisely directed choice be made by the parties (expressly or impliedly), the available approaches appear to be between the substantive law (that is, the law governing the rest of the contract) or the law of the seat. If one gives proper weight to the underlying and fundamental notion of separability, the law of the seat can be seen to be a more appropriate approach than the law of the substantive contract. A contract to be governed by New York law, but subject to arbitration in London would see the arbitration agreement (and so such things as the scope of the clause) governed by English, not New York law.⁴ This approach seems to have broad support.⁵

An additional approach present in a number of French cases is to apply a non-national law chosen by the parties to govern the arbitration agreement.⁶

The law governing the arbitration⁷

The fact that this law (the *lex arbitri*) is, or is quite likely to be, different from the law governing the substantive contract and the dispute is a product of at least two considerations: the embedded notion of separability, and the entrenched perceived advantage of a seat that is neutral and so likely to be distant from the interests, commercial relationships and values of the parties that may tend towards a governing law more closely related to those relational features. The related questions of the *lex arbitri*, and the place and importance of the seat of the arbitration continue to be important in the conceptualisation of arbitration and the extent to which it can be seen to be delocalised. There are important questions of principle to be addressed in the application of any principle of delocalisation. For instance, the approach of

³ *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Limited* [2007] EWHC 1713 (Comm).

⁴ See *C v D* [2007] WHC 1542 (Comm).

⁵ See *Bulgarian Foreign Trade Bank Ltd v A.I. Trade Finance Inc* (2001) XXVI *Yearbook Commercial Arbitration* 291 (Swedish Supreme Court); *Matermaco SA v. PPMCrans Inc. et al* (2000) XXV *Yearbook Commercial Arbitration* 673 (Brussels Tribunal of Commerce).

⁶ *Municipalite de Khoms El Mergeb c/Ste Dalico*, Cass. Civ. 1ere, 20 December 1993, [1994] Rev Arb 116.

⁷ See generally Blackaby et al (eds), above n 1, at 173-193.

the French Cour de cassation in *Putrabali*⁸ in enforcing an award set aside at the seat may, on one view, tend to undermine the institution of arbitration by weakening the prudential control of the fairness of arbitrations by the seat court, deliberately chosen by the parties to control or supervise the conduct (including the fairness) of the arbitration. Thus, though delocalisation may stress the autonomy and independence of the parties, by the lessening or undermining of the authority of the seat court, there can be seen to be a weakening of the effect of the parties' choice of seat, and a weakening of the ability of the seat court to ensure the fairness and reliability of arbitration by reference to its own legal culture.

I accept that the correctness of this view is not self-evident. These are contentious issues, for discussion on another day.

The law applicable to the contract and the substance of the dispute

At the point that this question becomes relevant to discuss, we have an operational arbitration agreement covering a dispute in a reference governed by a procedural law. The dispute will require the resolution of contested facts by reference to or against some standard made up of operative legal rules and principles.

What are these rules and principles? What is this law? What questions about arbitration as an institution and a procedure arise from those considerations?

The discussion can perhaps be usefully introduced or framed by recognising at the outset certain matters.

First, whilst the proposition is capable of qualification by reference to the *lex arbitri* and immanent notions of public policy, as a procedure and an institution, arbitration is built on the free will and choice of autonomous actors in international commerce.

Secondly, not as a qualification to the first point, but as a manifestation or demonstration of it, arbitration is to be recognised as part of a world-wide legal order or system of dispute resolution – of a system of justice. It is part of a complex, integrated justice system that involves courts (national and international), arbitrators, and arbitral institutions, mediators, facilitators and legal advisers. This integrated justice system is the manifestation of a true international legal

⁸ *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices* (2007) *Revue de l'Arbitrage* 507.

order. The importance of that development in the 20th and 21st centuries should not be ignored or devalued. The recognition of the importance of this, and of the fragility and dynamism of any such system, should frame all serious discussion about it. It is from these two features – a respect for the autonomy of the individual and the place of arbitration as a fair way of vindicating the rule of law – that the institution draws its international support from nations, legislatures and judiciaries.

Thirdly, the parties are free to choose the governing law for themselves.⁹ There is now widespread acceptance that this choice is not restricted to the choice of a national law. There may be restrictions on this choice drawn from public policy,¹⁰ or from the *lex arbitri*.

This issue of non-national law is of particular interest and importance to Australia. As a federal system we suffer from the absence of a single law. Except for specific purposes, there is no such thing as “Australian law”. There is one Australian common law and there is the interplay between State, Territory and Commonwealth laws, mediated through the Constitution and the *Judiciary Act 1903* (Cth). There is no reason why, for instance, a model Australian commercial law could not be constructed upon the common law of Australian and selected statutes and international conventions. This would, perhaps, provide a framework for Australia as a seat more attractive (to a foreigner) than a choice of law of a State (after the complexities of federalism have been assimilated).

The choice of non-national law may take a number of forms. First, soft law instruments may now form the basis of chosen principles. Secondly, unstated, but discernible, international principles of commercial law. Thirdly, hybrid systems of law bound by the cement of overriding general principles. A well-known example was the mixture of French and English law and, where in conflict, international principles of commercial law exhibited by the clause in the *Channel Tunnel Case*.¹¹

The recognition of the legitimacy of this choice of non-national law highlights the necessary relationship created by the choice between the notion of the law to govern the dispute and the view of the person to decide the dispute. The dispute is not governed by the application of an

⁹ See e.g. UNCITRAL Rules, Art 33.1.

¹⁰ Such as a choice to avoid or evade mandatory public laws e.g. tax or competition laws.

¹¹ *Channel Tunnel Group Ltd v Balfour Beatty Constructions Ltd* [1993] AC 334; 2 WLR 262; 1 All ER 664.

external, abstracted standard set by the law-making organs of a nation state (whether or not correction or review is available by reference to that external standard), but by the application of the (bona fide and honest) views of the chosen tribunal as to standards, principles and rules that may be more fluid, open-textured and flexible than a national law. This close interrelationship between governing rule and principle, and tribunal and location, was well captured by Lord Mustill in the *Channel Tunnel Case*:¹²

The parties chose an indeterminate “law” to govern their substantive rights; an elaborate process for ascertaining those rights; and a location for that process outside the territories of the participants.

The development of transnational principles of law has been informed by a number of factors: the growth in international commercial arbitration; the desire not only for a neutral venue but also a neutral body of rules; the increasing availability and proliferation of soft law instruments upon which to choose a standard for fair and reasonable adjudication; and the necessity at a practical level and on a daily basis to reconcile and harmonise through convergence the competing demands and approaches of the civil law and the common law, not just in procedure, but in familiarity of principle. Perhaps the Uniform Customs and Practice for Documentary Credits (**UCP**), the International Rules for the Interpretation of Trade Terms (**Incoterms**), the UNIDROIT Principles of International Commercial Contracts, and, in the context of a non-national procedure law, the UNIDROIT/ALI principles of trans-national civil procedure are good examples of these kinds of convergences. They provide clarity, flexibility and command wide acceptance.

If one is disturbed by the proposition that law exists outside a positive system of legal command, one is perhaps only betraying an intellectual framework anchored in an assumption that law ultimately can only exist in a system of enforceable ultimate command. Such an assumption is false. If it were true, international law would not be law. An ultimate conception of law is not an abstraction alone. It is the product of a willingness of humans to accept and conform to standards. In any given “system” that may involve force and compulsion, but ultimately it depends on a form of consent.

Take maritime law. Its character is derived from its maritime, international and transnational informing characteristics. It is not the law reflecting a community’s values, it is the law

¹² Ibid, [1993] AC 334 at 368.

reflecting the shared values of those who have undertaken a body of transactions in a setting – a maritime and international setting – over millenia. Of course, each country has its rules and statutes. But the way to analyse those national laws is not to view them through the lens of comparative law, comparing the chosen rules of different communities. Rather, these national laws are all drawn from a well of common internationally recognised principles and rules properly called the general maritime law, from which common transnational source national laws are adopted and adapted. Reference to four United States Supreme Court decisions, over 130 years apart, eloquently illustrates this point.

In 1815, Story J sitting on circuit in *De Lovio v Boit* had said the following of the words “admiralty and maritime jurisdiction” in the Constitution:¹³

That maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, all over Europe; that jurisdiction, which under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all of the maritime states; that jurisdiction, in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse and the warfare of mankind.

In 1828, Chief Justice John Marshall said, in speaking of Art III section 2 of the United States Constitution and in reference to cases in Admiralty:¹⁴

A case in admiralty does not arise, in fact, under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is supplied by our Courts to the cases as they arise.

In 1874, in *The Lottawanna*,¹⁵ Bradley J expressed the subtle and sophisticated relationship between the non-national existing and historically derived general maritime law and the municipal maritime law, here of the United States. In a long passage, six propositions were made: first, the existence, separate from municipal maritime law, of the general maritime law; secondly, this separate existence of the general maritime law being owed to its internationality; thirdly, the necessity for the adoption of the general maritime law by relevant sovereign act for it to be an enforceable municipal law; fourthly, the adoption in the United States of the general maritime law by the sovereign act of the creation of a nation and a Constitution which in its

¹³ 7 F Cas 418 at 443 (1815).

¹⁴ *American Insurance Co v 356 Bales of Cotton*, 26 US 511 at 545-546 (1828).

¹⁵ 88 US 558 (1874).

terms recognised the existence of maritime law as US law; fifthly, the content of the general maritime law not being fixed or uniform, but being capable of local particular adoption and adaption; and sixthly, the general maritime law being the basis, or groundwork, of municipal maritime law.

In 1953, in *Lauritzen v Larsen*,¹⁶ dealing with the question of whether a United States seafarers compensation statute applied to a foreign seafarer injured while in the port of New York on board the foreign vessel on which he was serving, Justice Jackson said:

... courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. ...

The point of this is not merely to listen to the balance and melody of the cadences of great lawyers who understood that language was not just the vehicle of law, but part of law to enliven the cognisant emotion. It is also to recognise that international conduct has for millennia been based on rules, principles, customs and procedures that are not the domain (or at least the exclusive domain) of nation states, national legislatures or national courts. Law is not just command; it is as much the accepted approach to a problem as a defined rule by command.

The authority to apply non-national law depends on the agreement of the parties and applicable laws – whether the *lex arbitri* or law which otherwise governs. For instance, the Washington Convention (Art 42) provides that the tribunal will decide a dispute in accordance with such *rules of law* as may be agreed by the parties. Some national laws (as the *lex arbitri*) permit arbitrators to decide according to *rules of law*.¹⁷ The Model Law (Art 28) leaves it to the parties to make an express choice of such *rules of law* as they wish, but, if no such choice is made, requires the tribunal to go to conflict of law rules it considers applicable, thus requiring a reversion to national law, but as seen fit by the arbitrator.

¹⁶ 345 US 571 at 581-582 (1953).

¹⁷ See the Swiss and French provisions referred to by Blackaby et al, above n 1, at 227 fn 246.

Section 46 of the English *Arbitration Act 1996* (UK) similarly provides:

- (1) The arbitral tribunal shall decide the dispute—
 - (a) in accordance with *the law* chosen by the parties as applicable to the substance of the dispute, or
 - (b) if the parties so agree, in accordance with *such other considerations* as are agreed by them or determined by the tribunal.
- (2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.
- (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Section 46(1)(a) and the use of the phrase “the law” implies a system of law; national law. The phrase “such other considerations” in s 46(1)(b), on the other hand, includes non-national principles: see *Halpern v Halpern*.¹⁸ That said, in the same case, the Court required the *lex arbitri* to be (although at the choice of the parties) a law that would satisfy the task of governing how proceedings will be conducted. It is difficult for this to be other than a national law.

The ICC Rules permit the tribunal in the absence of agreement of the parties to apply *rules of law* that it determines to be appropriate.

Thus, even before one comes to the notion of equity and good conscience (*ex aequo et bono*) or decisions by *amiable compositeurs*, there is a significant latitude for the application of non-national principles from a wide variety of sources.

The parties may expressly agree to this approach of equity and good conscience wholly, or as a theme or feature of a reference, otherwise governed by chosen law or laws. Various approaches can be identified: the ignoring of formalism; the ignoring of rules that operate harshly or unfairly in the circumstances; the application only of general principles; and (although not widely accepted) decisions without regard to principles of law, but on the merits as they appear to the tribunal.

Different countries approach this matter differently. Some State laws assume the arbitrator will decide in equity unless required to decide at law, others assume at law unless stated in equity.¹⁹

¹⁸ [2007] EWCA Civ 291.

¹⁹ See Blackaby et al, above n 1, at 229 fn 256.

The UNCITRAL Rules require that, for such an “equity clause” to be effective, it be expressly agreed between the parties and authorised by the *lex arbitri*.

The point of the discussion so far is to illustrate the wide and deep latitude for non-national law in the fabric of an international system of dispute resolution. This is important to illuminate the lack of necessity for pre-existing abstracted defined standards drawn from national law for the process to work.

The health of law, courts and arbitration

In March 2016, the then Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, gave an important lecture on developing commercial law through the courts and called for a rebalancing of the relationship between the courts and arbitration.²⁰

In that lecture, his Lordship examined the role of the courts in the development of the law underpinning commerce, finance and industry. He saw the burgeoning of dispute resolution by arbitration as threatening the development of commercial law. His Lordship contextualised that state of affairs by reminding his audience of some of the delays and complexities that had dogged commercial litigation in an earlier era.

If there be a threat to the development of the sinews of the law by arbitration, it is partly by the lack of publication of the reasons for the resolution of disputes that bear upon law and its organic growth and change, and partly by the lack of authoritative curial declaration.

It is understandable that those concerned with the English legal system, who would wish as much commercial litigation as possible to be heard either in England or by reference to English law, would jealously guard the place of the English courts in stating the law of England. That is why, as a matter of English public policy, s 69 of the *Arbitration Act 1996* (UK) is in the form it is:

Appeal on point of law

- (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

²⁰ The Right Hon Lord Thomas of Cwmgiedd, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (Speech delivered at the Bailii Lecture 2016, London, 9 March 2016).

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

- (2) An appeal shall not be brought under this section except—
- (a) with the agreement of all the other parties to the proceedings, or
 - (b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

- (3) Leave to appeal shall be given only if the court is satisfied—
- (a) that the determination of the question will substantially affect the rights of one or more of the parties,
 - (b) that the question is one which the tribunal was asked to determine,
 - (c) that, on the basis of the findings of fact in the award—
 - (i) the decision of the tribunal on the question is obviously wrong, or
 - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
 - (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

...

As you will be aware, a significant body of cases in the London Commercial Court is comprised of s 69 appeals that concern insurance, shipping, commercial law and arbitration practice, though the number has hugely decreased from earlier generations.

Is the burgeoning of arbitration and a lessening of commercial court judgments (if there be such) a bad thing? I am not persuaded that it is. (That is not to say that there is not a legitimate policy question for England in the reinforcement of the position of English law as controlled by English courts. But that is a different question.) Until recent times, for instance, there were precious few cases on general average or reinsurance or salvage. Disputes are and have always been resolved by arbitration. Commerce is satisfied. English law has not eroded. Section 69 has allowed important principle to be litigated. There appears no clamour from the commercial community for rescue from the embrace of arbitration.

Further, the need for courts to be hearing more commercial cases for the law to develop may underestimate the capacity for arbitration to develop the law, in areas where relevant publication of important awards conforms with the needs of the parties and the commercial community.

The reality is, however, that there is a longstanding and important tradition of the development and maintenance of legal principle by arbitrators. Doug Jones, in a valuable recent paper this year,²¹ reminded us of the part arbitrators have played in the development of legal principle. I did not intend this paper to be a defence of the proposition that arbitrators influence the development of the law. I think it plain that they can and do. A passing familiarity with ICCA's *Yearbook of Commercial Arbitration* demonstrates as much. To the extent that this is seen as an important function, the editing and publication of important awards can be seen as part of the institutional responsibility of relevant arbitral bodies.

All that said, the better question is, if I may respectfully suggest, whether the courts can do more for the commercial community. The answer to that is yes, and they are.

In 2015, not long before Lord Thomas' lecture, I spoke in London at the Centenary Chartered Institute Conference. My speech was entitled "National Courts and Arbitration: Collaboration or Competition?" My answer was that the two complemented each other, as partners in a competitive collaboration. This is how the two parts of an integrated dispute resolution system should work. For all the theoretical debate there might be about the autonomous or delocalised nature of arbitral awards, they are mere paper without enforcement. And the system under the New York Convention and the Model Law is that they are enforced by the courts. The New York Convention and the Model Law provide the framework for efficient enforcement. But the conventions do no practical work, only the courts enforce. There is efficiency and skill in that process. An international outlook, commercial skill and competence, and a knowledge of and sympathy to arbitration are essential for courts to discharge their duties efficiently in this respect.

But the courts are not just handmaidens to the mistress of arbitral dispute resolution. Commercial courts must take their place in commercial dispute resolution for the health of the legal order to which I have referred. This is so, for a number of reasons. First, it is of benefit to the development of common and harmonised legal principles for a share of that development to be in the hands of publicly accountable commercial judges. The underlying premise of Lord Thomas' lecture that courts have an important place in the development of commercial law is

²¹ Doug Jones, 'Arbitrators as Law-Makers' (2018) 6 *Indian Journal of Arbitration Law* 18 and see the important discussion of the topic in the articles footnotes.

valid. Secondly, every system improves upon the presentation of real competition. Commercial courts are capable of delivering rapid and effective commercial justice. The enforcement mechanism of the Choice of Court Convention,²² similarly structured to enforcement under the New York Convention, for courts chosen by exclusive jurisdiction clauses, will, over time, overcome a significant perceived disadvantage of court resolution of disputes. Thirdly, commercial courts, as standing institutions, have the capacity to change and influence legal culture, which is vital to the health of dispute resolution both in courts and in arbitration.

Over the last few years, there have been two developments of importance in the area of commercial court dispute resolution. First, there has been the setting up of bespoke *international* commercial courts, such as those in Singapore, Dubai, Abu Dhabi and Qatar. These courts are unashamedly drawing on the intellectual capital of the commercial world in using serving and retired judges of great distinction.

Secondly, under the guidance, and with the inspiring energy of Lord Thomas, there has been established the Standing International Forum of Commercial Courts (**SIFoCC**). This body is comprised of judges from commercial courts from all over the world: of established commercial courts and developing commercial courts. Its aim is to develop and enhance the skill of commercial courts around the world and to harmonise and improve upon important features of their operation in practical working areas such as the enforcement of judgments, case management and cost reduction, technology in court, litigation funding, and, of course, arbitration issues. There have been two meetings: London in 2017, and recently in New York.

What can arbitration and arbitrators take from these developments? I do not think they should be a source of friction; rather, they reflect a healthy energy in a necessary partner for international commercial arbitration. Also, they remind those who arbitrate and those who are concerned with the institution of arbitration of the place of the courts and the law, and their importance in the principled and fair resolution of disputes.

I doubt whether English law is likely to lose its vitality and utility. There remains the enormous well of skill and expertise in London, and s 69 of the *Arbitration Act 1996* is well able to operate

²² Hague Convention on Choice of Court Agreements, 30 June 2005 (entered into force on 1 October 2018).

through a leave provision of maintaining the flow of important arbitration appeals to feed the development of English law.

An equally, or more, important question is whether the form of arbitration laws based on the Model Law in some way has the seeds of some wider disadvantage or ill, by its absence of curial correction for error of law. It is perhaps odd that that question even be posed in this first quarter of the 21st century. After all, it was the ready availability of curial review (or interference, depending on one's taste) that led to the rejection of curial oversight for error of law in the second half of the 20th century.

Let me, immediately then, give my answer: no. The reasons for my view are both practical and theoretical. Practically, greater scope for legal review by the courts will not work. It risks bringing back the difficulties and delays of a past era. Let skilled people exercise their contracted authority under the mandate of the parties' contract. Subject to the *lex arbitri* (usually) chosen by the parties, the choice of arbitration involved a deliberate choice to live with the mistakes, factual and legal, made by the tribunal. The tribunal has been armed with the authority to err. Further, it is not to be forgotten that the application of the chosen law will generally be a species of fact finding, involving evidence, even if it also involves legal reasoning. The nature and content of international commercial law is not the hegemonic domain of judges. Their task is shared by the academy, by arbitrators, by the profession, and by the drafters of conventions and model laws.

To give to judge-made law overwhelming importance in the development of commercial law undervalues the nature, character and importance of transnational principle.

The rule of law is not the law of rules. *C'est l'état du droit*. It is a state of affairs where principle, rule and value, not power, wealth and caprice or arbitrary acts, resolve disputes. The most important aspects of law generally cannot be defined. Principle, rule and value are conceptions shared by all those learned in the law.

What is essential is that arbitrators be entitled to fulfil, but at the same time be kept to, their fundamental tasks, such that a decision is made within the boundaries of the arbitration agreement. To the extent that this agreement identifies a system or rules of law, that law and those rules be honestly and bona fide applied; in a procedure which is fair and impartial, and in which the parties are treated equally and are given a full (in a reasonably practical sense) opportunity of presenting their case.

A faithfulness to the tasks involved in the contractual reference does require, however, in the resolution of the dispute, a relevant degree of obedience to the particular principles or rules of system of law chosen by the parties. An arbitrator who is charged with resolving a dispute under English law who decides to apply New York law, or who decides not to apply a recent and clear UK Supreme Court decision, may not just be making an error of law, but may be seen as deciding the dispute otherwise than in accordance with the contractual submission to arbitrate.

For Art V(1)(c) of the New York Convention and Arts 34(2)(a)(iii) and 36(1)(a)(iii) of the Model Law, proof that the award “contains decisions on matters beyond the scope of the submission to arbitration” can be a basis for setting aside or refusing to recognise or to enforce the award. Though an accidental overlooking of the Supreme Court decision, whether through lack of assistance or otherwise, may be seen as an error within authority, a deliberate refusal to apply it may be something more.

For Australian public lawyers, the faint chorus of jurisdictional error can begin to be heard with all the difficulty of conceptualisation as its sounds drift forward like the first time one hears Stravinsky’s *The Rite of Spring*. That is a correct response, because this is about jurisdiction – the authority to decide.

Let me illustrate what I mean by discussing briefly how the United States courts have approached a similar problem.

Since the 1985 *Mitsubishi Motors Corp Case*,²³ the United States Supreme Court has consistently enforced domestic arbitration agreements, including over areas that can be called mandatory law. Previously, in cases such as *Alexander v Gardner-Denver Co*,²⁴ the Court had not enforced arbitration of labour disputes. In 1953, in *Wilko v Swan*,²⁵ the Court held that securities claims were not arbitrable. All this changed with *Mitsubishi*. The Court has since consistently found so-called mandatory law claims (securities, anti-trust, employment, discrimination) to be arbitrable. For example, the Court said in *McMahon*, dealing with the

²³ 473 US 614 (1985).

²⁴ 415 US 36 (1974).

²⁵ 346 US 427 (1953).

*Securities Exchange Act 1934 (US) and the Racketeer Influenced and Corrupt Organisations Act 1970 (US) (RICO), that the Federal Arbitration Act:*²⁶

mandates enforcement of agreements to arbitrate statutory claims...[unless it can be shown] that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue...such an intent [being] deducible from [the statute's] text or legislative history ... or from an inherent conflict between arbitration and the statute's underlying purposes.

The *Federal Arbitration Act* has no provision for review of awards for error of law. Thus, many important domestic social issues were capable of being resolved outside the court system. But there came to be developed a form of review derived from the somewhat Delphic aside in *McMahon*²⁷ that “judicial scrutiny of arbitration awards ... is sufficient to ensure that arbitrators comply with the requirements of the statute.” This hint led to the judge-made development of review for manifest disregard of the law.

In 1987, in *Misco*,²⁸ the Court said that as long as the arbitrator is arguably construing or applying the contract and acting within the scope of his or her authority, even serious legal error will not overturn his or her decision.

The Federal Circuits, nonetheless, in cases such as *Cole v Burns International Security Services*,²⁹ found a basis for review of “manifest disregard of the law”. The content of this varied in the cases. Mere legal error was insufficient.³⁰ A manifest disregard, rather than mistake or misapplication, was key.³¹ This could be shown by irrationality.³² This development might have been ended by the Supreme Court decision in 2008 in *Hall Street Associates, LLC v Mattel, Inc.*³³ Nevertheless, manifest disregard of the law continued to be used,³⁴ as an illustration of an arbitrator exceeding power under s 10(a)(4) of the *Federal Arbitration Act*, where “power” brings in the concept of jurisdiction. The precise resolution of this issue for the

²⁶ *Shearson/American Express Inc v McMahon* 482 US 220 at 226-227 (1987).

²⁷ *Ibid*, 482 US 220 at 232.

²⁸ *Chartered Paperworkers International Union, AFL-CIO v Misco, Inc*, 484 US 29 at 38 (1987).

²⁹ 105 F 3d 465 (DC Cir. 1997).

³⁰ See e.g. *PR Tel Co v US Phone Mfg Corp*, 427 F 3d 21 at 32 (1st Cir. 2000); *T Co Metals, LLC v Dempsey Pipe & Supply, Inc*, 592 F 3d 329 at 339 (2d Cir. 2010); *Wallace v Buttar*, 378 F 3d 182 at 190 (2d Cir. 2004).

³¹ *Univ Commons-Urbana, Ltd v Universal Constructors Inc*, 304 F 2d 1331 at 1337 (11th Cir. 2002); *Wise v Wachovia Sec, LLC*, 450 F 3d 265 at 268-269 (7th Cir. 2006).

³² *Todd Shpyards Corp v Cunard Line*, 943 F 2d 1056 at 1060 (9th Cir. 1991).

³³ 552 US 57 (2008).

³⁴ See Stephen J Ware, ‘Vacating Legally-Erroneous Arbitration Awards’ (2014) 6 *Arbitration Law Review* 56 at 97 fn 159.

United States need not detain us.³⁵ It is sufficient that the discourse gives a clue as to the potential use of Art V of the New York Convention and Arts 34 and 36 of the Model Law to permit the review of awards that so depart from the mandate of the law that there has been a departure from the reference.

As I said earlier, this kind of approach has an echo with jurisdictional error. This concept has developed in recent years to encompass the recognition that whilst there are accepted categories of jurisdictional error, ultimately the question is whether what happened is a fulfilment of the statutory power of the decision-maker. Findings of fact, even credit findings, by administrators or administrative tribunals are not immune from review if they have been undertaken in a way that is not sufficient to reflect a reasonable exercise of the statutory power.

Returning to the Model Law, whilst error of law is not a ground to set aside or refuse to enforce the award, how the law is treated, or not, as the case may be, may be very important. The Canadian Courts have used the phrase “true jurisdictional error” in cases such as *United Mexican States v Cargill Inc.*³⁶ Article 34(2)(a)(ii) was dealt with using the language of jurisdiction. A warning was given, however, as to the narrowness of the conception. The Court³⁷ referred to the relevant enquiry as whether the tribunal dealt with a matter beyond the submission to arbitration, not how the tribunal decided issues within its jurisdiction.³⁸ In applying *Cargill*, the Court in *SMART Technologies* said that if the decision was made not by reference to the required standard identified in the reference, but *ex aequo et bono* it would have been beyond jurisdiction.³⁹

Thus, ascertainment as to whether the arbitrator kept to the fundamental task of deciding by reference to the rules and principles chosen by the parties may involve an examination of the treatment of legal questions. It is not, however, to assess whether there was error, but to see whether the dispute has been resolved by reference (with or without error) to the chosen law or standard. As with many dichotomies in law, this distinction may be more easily stated in the abstract than discerned in practical application.

³⁵ See the lack of clarity in *Stott-Nielson SA v Animalfeeds International Corp*, 559 US 662; 130 S Ct 1758 and *Oxford Health Plans LLC v Sutter*, 133 S Ct 2064 (2013).

³⁶ (2011) 107 OR (3d) 528.

³⁷ The Ontario Court of Appeal.

³⁸ (2011) 107 OR (3d) 528 at [66].

³⁹ *SMART Technologies ULC v. Electroboard Solutions Pty Ltd.* [2017] ABQB 559.

Law is not the preserve of judges, or of legislatures. It is principle, rule, value and a cast of mind of civil and civilised behaviour that belongs to the community it serves. A system of commercial justice requires a sufficient degree of stability and certainty to facilitate the fair and just resolution of disputes in a manner satisfying commercial demands of despatch and human demands of justice.

National law and national courts have their part to play in this process. The contextual legitimacy of non-national principle and flexible adjudication by a chosen arbitrator should, however, be fully recognised as a partner of the Courts, in the international legal order (or vice versa depending on your perspective).

Law and tribunal, and law and procedure, are inseparably linked. The content of law is in part determined by the identity of, and method of resolution by, the tribunal. Take the law of salvage. Its identifying principles are historical and drawn from thousands of years of maritime activity reduced to readily understandable language of daily practice as well as international conventions. The law is founded on equity and the fairness of the reward for the quality of, and the risks involved in, the successful response to danger. The tribunals that decide these matters are invariably people skilled and knowledgeable in seafaring and familiar with the salvage task. The cases are dealt with promptly and broadly, without technicality. There are few legal court cases in modern times. The law of salvage is none the worse for that. The law is to be felt and found in the responses of honest commercial people, by reference to principles discussed by text writers, arbitrators, ancient codes, modern conventions, judges, and professional and academic commentators. The law lives and breathes in the human activity and in its literature, in the academy, and in wisdom passed on.

The task we have as legal participants in the international legal order is to recognise the place of arbitration, courts, commentators, professors, and professionals in keeping honest, efficient and healthy an international legal order that serves the commercial community. The law is central to that. Not the law narrowly conceived, but a conception in the many featured forms that it takes.

Melbourne

15 October 2018