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Review of International Arbitral Awards**

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# Wrong Answers to Wrong Questions? A New Approach to Judicial Review of International Arbitral Awards

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**ABSTRACT:** Debating the highly complex issue of error in the interpretation and application of domestic law by the arbitrator, the article proposes the comparative study of multiple possible manifestations of the field of arbitration, including US and English arbitration, Common and Civil Law, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards the role of the state court judge and an historical analyses of the issue, in order to fully discern how the current mindset approaches the issue. Central to the question is the interpretation of each of the studied systems of law and how each has traditionally faced the issue of wrongful application of national law in an arbitration procedure would go against the parties' agreement to arbitrate.

**RESUMO:** Debatendo o altamente complexo cenário de erro de interpretação e aplicação da lei doméstica pelo árbitro, o artigo propõe o estudo comparativo das múltiplas manifestações possíveis no campo da arbitragem, incluindo nos EUA e na arbitragem inglesa, assim como em ordenamentos jurídicos de *Common e Civil Law*, a Convenção das Nações Unidas sobre o Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras, o papel do juiz estatal e uma análise histórica do assunto, com o objetivo de compreender como o entendimento majoritário aborda a questão. Central a discussão é a interpretação de cada ordenamento jurídico estudado e como cada um tem tradicionalmente enfrentado a questão de se a aplicação errônea da lei nacional em um procedimento de arbitral iria contra a convenção de arbitragem pactuada entre as partes.

**SUMÁRIO:** I – Problem; II – Article V of the New York Convention; III – Historical Background; IV – State Courts as Higher Instance Courts for the arbitral tribunal?; 1 English Arbitration Act 1950; 2 US – Concept of manifest Disregard of Law; 3 Systematic differences: Common Law v. Civil Law?; 4 Universal Convergence towards Civil Law Concept since 1958; V – Agreement to Arbitrate and Choice of Law; VI – Interpretation of Arbitration Clause; 1 General; 2 Meaning of the Arbitration Clause; 3 Special elements of interpreting the Choice of Law Clause in Arbitration; 4 Human Rights; VII – Consequences: Reasons of the Award and Non-Recognition; 1 Reservations; 2 Principle of Fair Trial demands understandable Reasons; 3 Law as it really is; 4 Errors in Law; 5 Errors of Law in System Law (civil law); 6 Case law (common law); VIII – Conclusion; IX – Practical Advice; X – Result.

## I – PROBLEM

This article discusses the question: “can recognition and enforcement of an international arbitral award be denied under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) on the ground that the arbitrator<sup>1</sup> erred in the interpretation of the substantive law applicable to the merits of the case?

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1 Unless otherwise indicated the singular comprises the plural.

Conventional wisdom says no. The grounds, for which an international award can be set aside by a national court of a contracting state of the New York Convention are exclusively listed in art. V of that convention, and errors in law are not in this list. The author of this article feels, however, that pertaining questions have been wrongly put and consequently the answers are flawed. The author proposes a different approach, which leads him to the conclusion that to a certain extent mistakes by the arbitrator in the application of the substantive law can indeed lead to the annulment of an international arbitral award under Art. V. of the Convention.

## II – ARTICLE V OF THE NEW YORK CONVENTION

Art. V reads – as far as this question is concerned – as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, *only* if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [...]

(d) [...] *the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or [...].* (emphasis added)

Under subsection 2. (b) The recognition or enforcement of the award can also be denied, if this would be contrary to *the public policy of the country, where these are sought.*

Given the very broad acceptance of this convention, which includes virtually all states and territories engaged in international trade, this can be seen as a uniform world law, cf. also e.g. Art. 36 of UNCITRAL Model Law on International Arbitration (hereinafter referred to as: “MAL”). For domestic arbitration, many national arbitration laws still retain different rules of law.

Brazil acceded to the New York convention on 7th June 2002. Art. 34 of the *Lei Brasileira de Arbitragem* consequently provides that a foreign arbitral award will be recognized and enforced according to international treaties, but before this the award must be recognized by the Supreme Court (Art. 35) (more recently, the Superior Court of Justice). Recognition can only be denied according to Art. 38, which simply repeats the wording of Art. 5 New York Convention: “Somente poderá ser negada a homologação para o reconhecimento ou execução de sentença arbitral estrangeira, quando o réu demonstrar que: [...] V – a instituição da arbitragem não está de acordo com o compromisso arbitral ou cláusula compromissória”.

Mistakes in the application of law can therefore only result in denial of recognition and enforcement if it can be shown to the national court that such mistakes would result in being not in accordance with the agreement of the parties. In rare cases, the parties may even attempt to argue that the mistakes

made by the arbitrator are so grave that recognition and enforcement of such an award would be against public policy.

### III – HISTORICAL BACKGROUND

It is necessary to have a closer look at the role of state courts with respect to arbitration. The objective of state judiciary is twofold. First: to bring justice to the parties in an individual case. Second: to produce what is called in German “*Rechtssicherheit*”, that is predictability of law or the stability of the legal structure of the state in which these courts function. In an ideal society, both objectives will coincide, but in real life they not always do, if ever. Legal history in Western countries is a history of the ascendancy of state law over regional laws and the monopoly of state courts in all matters criminal and private. It was, and to certain extent still is, a cherished part of the sovereignty of states, that their courts apply the law of their land and not something like local or tribal customs or good or bad habits practiced by landlords over their dependents. Development of international private law/conflicts of law shows the cumbersome way until State A would allow his courts to apply the law of state B. A thumb rule, which can be verified with a look at the legal history of the United States, would be: the younger and prouder the state, the more reluctant it is to allow foreign law into his judicial system. It is therefore of a rather recent date that commercial people can freely choose the applicable law for their transactions. Until only some decades ago commercial people could this only if they could show a good reason to do so. This has changed in most countries.

Legislators in national states have learned that the law of international trade is emancipating from national law. This has consequences on how national courts like to supervise arbitrators. The national courts realized that they are not a higher instance to a different jurisdictional layer called arbitration. National courts and pertaining legislation realized that is not their business, to review arbitral awards in the same way as is done with state court judgements. The state Supreme Court is not to be considered as the Supreme Court of arbitrators. The task of the national law and the state courts, as far as arbitration is concerned, is not to preserve predictability of law and stability of the legislative structure of the state. It is now seems to be universally accepted that the competence of state judiciary has been reduced to give effect to the parties’ agreement<sup>2</sup>. So the mission of state courts with respect to arbitration is not to oversee whether the arbitrator decides a dispute upon the correct understanding of the law as lined out by the respective Supreme Court or courts of appeal, etc. The only

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2 Nigeria may be a good African reference for today’s world wide understanding of commercial and arbitration law. cf. therefore: OLATAWURA, Ola O. Constitutional foundations of commercial and investment arbitration in Nigerian law and practice *Commonwealth Law Bulletin*, v. 40, nº 4, p. 657 ss., Dec. 2014.

legitimate question, which can be put by a state court with respect to an arbitral award is: “is this in line with what the parties agreed?”.

But, as recognition and enforcement is a sovereign prerogative, the state must uphold public policy by denying recognition and enforcement, if the awards runs counter. This, however, has nothing to do with arbitration as such. It follows from the respective constitutional law of the states and it is moreover a universally accepted principle that the state will not give effect to immoral or otherwise illegal private agreements or judgements.

#### IV – STATE COURTS AS HIGHER INSTANCE COURTS FOR THE ARBITRAL TRIBUNAL?

##### 1 ENGLISH ARBITRATION ACT 1950

What has been said under above no. III. can be exemplified with a look at the English law of arbitration. Under the English Arbitration Act of 1950 the state courts had to supervise the arbitrator in order to safeguard that he decided not upon his home-made law but upon *the King's law*<sup>3</sup>. The courts were, not formally, but practically put in the position of a higher instance to the jurisdiction of arbitral tribunals. Before the passing of the present Arbitration Act of 1996, the right of a party to challenge a ruling of the arbitral tribunal was founded largely on common law<sup>4</sup>. The act made several provisions to this end. The most important was Sect. 21: “An [...] Arbitrator [...] shall if so directed by the High Court, state a) any question of law arising [...] or b) an award in the form of a special case for the decision of the High Court<sup>5</sup>.” In a decision of the House of Lords it was even said, that arbitration is *of no strict obligation* for the state courts<sup>6</sup>. This implied that the state court would not honour an arbitration clause, if the state court judge was of the opinion, that what the arbitrator was about to decide was against the law of the land.

This competence of judicial review has been changed with Arbitration Act of 1996. But even now an award may be challenged on a point of law, if the parties so agree or if the state court grants a leave to appeal. This the courts would do only if the tribunal is obviously wrong on the point of law or if the question is of general public importance. Moreover, the point of law can only be challenged if this concerns English law<sup>7</sup>.

3 Czarnikow v. Roth 1922, 2, KB 484.

4 cf. Lloyds Commercial Law Library (Loose Leaf) – Arbitration Law Issue Nr. 18 7th August 1997.

5 cf. Aden, M. Zur materiellen Kontrolle über den Schiedsrichter durch das englische staatliche Gericht (= Review of arbitral awards through the English state courts). Zeitschrift für das Konkurs – Treuhand – und Schiedsgerichtswesen (KTS) 1971, 1 ff.

6 Heyman v. Darwins 1942, AC, 2. 388.

7 MOSES, Margaret. International Commercial Arbitration. 2. ed. Cambridge: Cambridge University Press, 2012. p. 207.

## 2 US – CONCEPT OF MANIFEST DISREGARD OF LAW

Some US American courts accepted a non-statutory ground of manifest disregard of law for annulment of the award *and have ruled that an arbitral decision may be vacated when an arbitrator has exhibited a manifest disregard of law*<sup>8</sup>. This question came up in *Brandeis Intsel Limited v. Calabrian Chemicals Corp.*<sup>9</sup>. The judge said:

Based on an US Supreme Court in *Wilko v. Swan* (1953 – i.e. before 1958 and the New York convention) generations of losing parties in arbitration have relied upon the manifest disregard phrase in efforts to vacate domestic arbitration awards. [...] Various circuit courts of appeal recognize the existence of “manifest disregard” of law as a ground for vacating an award [...] However, those decisions defined the phrase in the narrowest possible terms, and invariably conclude that the phrase, so defined, does not meet the effects of the particular case. [...]

Although the “manifest disregard defense” seems to have had little practical value, it signals the concept of common law, that the state courts in principle retain the competence to supervise the correct interpretation of the law by the arbitrator.

## 3 SYSTEMATIC DIFFERENCES: COMMON LAW v. CIVIL LAW?

It appears from the foregoing that traditionally common law had seen the state judiciary in the role of a born supervisor of arbitral tribunals, the state Supreme Court being – so to speak – also the Supreme Court for arbitral tribunals. The common law apparently postulated that there is in the national arbitration law an unwritten (as is normal in common law) cogent rule, which therefore cannot be changed by agreement of the parties, whereby the arbitrator must stay in line with the law of the land.

Civil Law countries, as they are called in Common Law, to the contrary do not have such a rule and need not to have one<sup>10</sup>. Arbitration is purely private, and the law to be applied by the arbitrator is not determined by some cogent statute, but by the parties’ agreement or failing such an agreement by the applicable law on conflicts of laws. The question whether an award is legal and should be given effect is therefore systematically identical with the every day question, whether a contract has legal effect and how this should be construed – namely according to what the parties agreed. So in “system law countries”, it has always been held that “*Das Gericht hat zwar die formelle*

8 *Jock v. Sterling Jewelers*. 2nd Circuit July 1, 2011; taken from: MOSES, *Op. cit.*, p. 208 (FN 9).

9 US District Court, Southern District of New York, 1987 656 F. Suppl.160; here cited from: VARADY et.al. *International Commercial Arbitration – A Transnational Perspective*. 2. ed., p. 826, 2003.

10 Author prefers to call them “System Law Countries”. These comprise today the larger part of the word legal culture. South American countries follow to various degrees the French law, while the German law, arguably the most systematic of all, which influenced or was even copied in China, Japan, Korea already before World War I, exerted a heavy influence on the new codes in former communist countries after the collapse of the Soviet Union after 1990.

*Rechtsbeständigkeit, nicht aber die materielle Richtigkeit des Schiedsspruchs zu prüfen* – The state court will review the formal correctness of the award, but it will not review whether the substantive law was correctly applied<sup>11</sup>. French law on this question was and is the same. So is Swiss law<sup>12</sup>.

Apparently this has something to do with legal history. In the 5th century England became populated by peoples invading mainly from North Germany. England retained many Germanic traditions, so in the law<sup>13</sup>. Germany and France, however, followed to differing degrees the Roman law. In Roman law there is a very clear distinction between public and private law, a distinction which is not so sharply made in English common law. Courts are public law; arbitration is private. Therefore, under the system – law concept state courts and arbitration tribunals have nothing to do with each other. State courts, therefore, are not posed to review what a private person called arbitrator finds is right or wrong. State courts simply had only to look, whether the arbitrator did, what the parties agreed.

The consequences of these differing concepts may be exemplified as follows. If parties agree that the arbitrator shall decide (just for example's sake) according to the Codex Hammurabi, *ex aequo et bono* or something of that sort, this would have been regarded under the English Arbitration Act 1950 as impossible, because all this is not law. Consequently, the state court must intervene, in order to let the law of the land take effect. "System law" concept, however, would say: "As long it is not illegal or against public policy – Be it so!" The state courts would upon challenge of the award by the aggrieved party have to interpret parties' intentions and to find out, what exactly they meant by referring to Codex Hammurabi or *ex aequo et bono* and then, whether the arbitrator acted and decided in accordance therewith.

This difference in approach could also have consequences in what is more and more becoming a legal issue, namely whether religious prescriptions like the Sharia can be characterized as "law" in the meaning of choice of law rule<sup>14</sup>. This question may still be a problem for state courts, but it would not be one in arbitration, because the parties decide, on what basis the arbitrator has to find his verdict<sup>15</sup>.

11 DERNBURG, H. Pandekten, 1896, p. 394; § 866 ss. German Civilprozessordnung (Civil Procedure Act) of 1877.

12 A review of the tribunal's application of the law is an inadmissible review of the merits of the award Swiss Supreme Court decisions 4A\_188/2013 of 15 July 2013, para 3.2.2, 31 ASA Bulletin (2013) 853, 858-859; 4P.196/2003 of 7 January 2004, para 4.1 *in fine*, 22 ASA Bulletin (2004) 592, 599; 4P.202/2003 of 24 November 2003, para 2.2 and references in 22 ASA Bulletin (2004) 766).

13 In some aspect England therefore remained more German than Germany herself. Important historical example: Old Germanic law allowed females to succeed in the father's estate and even to the throne. With the adoption of Roman law in the Frankish Empire of Charlemagne this was suppressed. This was why Victoria, a German princess, could inherit the British throne as Queen Victoria, but not the throne of the kingdom of Hannover. cf. ADEN, M. *Deutsche Fürsten auf fremden Thronen*, 2013.

14 Shamil Bank of Bahrain v. Beximco, engl. Court of Appeal dd 28. 1. 2004 EW CA Civ. 19; see also: Aden, M. *Internationales Privates Wirtschaftsrecht (German)*. 2nd ed. 2009, p. 92 ss.

15 cf. OLATAWURA, fn 3, p. 678 with respect of a plurireligious federal state.

#### 4 UNIVERSAL CONVERGENCE TOWARDS CIVIL LAW CONCEPT SINCE 1958

During the time of the British Empire, the English common law had almost a monopoly in international commercial law. The common law approach in international commercial law in many ways was taken as an example, e.g. the law of letters of credit, of bank guarantee on first demand, bills of lading, etc. In the development of international commercial arbitration the dividing line seems to be the New York Convention of 1958. This changed the understanding of what international commercial arbitration is about. The convention heavily influenced national laws on arbitration both with respect with international as to domestic arbitration in the sense of the systematic approach as described above. By giving an exhaustive list of the denial grounds, Art. V of New York Convention implicitly suppressed any rule the common law might have to the effect that disregard by the arbitrator of the law could be ground not to recognize the award.

But Art. V did *not* say or imply, that disregard of the parties' agreement on their choice of law should have no consequence. So, the question whether there is a judicial review under Art. V New York convention is the wrong question. No, there is none. The right question to Art. V would be: "is the arbitrator obliged to apply the chosen law in the way how the parties want it to be applied?" To this the answer is: Yes.

#### V – AGREEMENT TO ARBITRATE AND CHOICE OF LAW

The nature of the arbitration clause today is more or less undisputed. The arbitration clause, which is usually attached to the main contract as one of the last articles, would typically read as follows:

All disputes arising out of this contract shall be decided by arbitration according to the laws of NN (e.g. Switzerland, Brazil, New York etc.).

This clause technically contains two different agreements. First, an agreement to arbitrate. Second, an agreement by which the parties a) agree on a designated substantive law for the decision of their potential dispute and b) the parties already now agree to give a joint order to the future arbitrator to apply that law.

Agreement to arbitrate: It is generally accepted that the arbitration clause is a "normal" contract. Under the doctrine of separability, which is practically world wide accepted, this contract must be interpreted separately from the main contract. To this end, the applicable law for this arbitration clause must be identified – either from an express designation by the parties, what is seldom if ever done, or from the applicable choice of law rules. These are usually the ones of the *lex fori*, of the (legal) seat of the arbitration. The law thus identified

decides on the validity of the arbitration clause, the rights and obligations derived therefrom and how this clause is to be understood in the circumstances.

Agreement on the choice of law: What has been said about the arbitration clause is also true for choice of law clause. Whether this can again follow another law than the arbitration clause may be left open here, because this would be theorizing without practical value<sup>16</sup>. Both agreements are the arbitration clause. In as far the parties agree on the law applicable to the substance of the main contract, their agreement implies that in case the arbitration clause becomes operable, because one of the parties goes for arbitration, both parties already now commit themselves to appoint the arbitrator and, in the service contract with him, to oblige him/ to order him to apply that law.

## VI – INTERPRETATION OF ARBITRATION CLAUSE

### 1 GENERAL

In arbitration everything depends on the agreement of the parties, so the overarching question must always be: “what did the parties agree?” Or, in other words: A manifest disregard of the law by the arbitrator is irrelevant, if this disregard was covered by the parties’ agreement; and likewise: a slight slip will be harmful if this ran counter to the arbitrator’s mandate. To find out what the parties agreed, their agreement must be interpreted.

It is accepted that it is a ground for annulment of the award if the arbitrator applies a law other than that chosen by the parties<sup>17</sup>. So it follows that the parties, when choosing a certain law must be presumed to mean it. Each national law has certain rules how to interpret statutes and contracts. In the context of this article, the question is: “what did the parties mean, when they said: the dispute shall be decided according to the laws of NN (eg Switzerland, which will hereinafter be taken as example )”?

First, it is important to state what the parties did not say: “the arbitrator can freely choose the applicable law”; or: “the arbitrator shall decide *ex aequo et bono*”; or: “he shall use *lex mercatoria*”, etc. Secondly, it should be stated exactly what they said, namely two things: a) law and b) Swiss. This means: a) parties did not want paralegal systems or structures, they wanted a national law, and b) they did not want the law of any, but of a clearly designated State.

Parties are presumed to mean what they say and for certain reasons. Presumably, parties prefer the national law of Switzerland because of its

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16 The possibility that parties want the arbitrator to decide without reference to a national law (eg. *lex mercatoria*, *ex aequo and bono*) will not be discussed here.

17 Cour d’appel Paris 10. mars 1988 Rev. Arb. 1989, 269; Germany: *Die Anwendung materiellen Rechtes durch den Schiedsrichter* – RIW 84, 934.

“swissness”, which they for some reason perceive as being different from frenchness, germanness, etc. If parties prefer “swissness” to e.g. “frenchness”, there is no reason to assume that parties did not really care about how the arbitrator will apply this law. The parties were free to choose the law of – say – Iceland. This is also a good country with good laws. But it lacks courts experienced to try sophisticated cases. And this is what Switzerland is presumed to have. Swiss law has a reputation of well reasoned verdicts based on a long and steady tradition and assisted by renowned legal scholars. This is what parties chose when they agreed on Swiss law or – *mutatis mutandis* – on the law of New York, Germany or Korea. The arbitrator has either to comply with this or decline his appointment.

## 2 MEANING OF THE ARBITRATION CLAUSE

The arbitration clause substitutes the state court judge by a private judge called arbitrator. Nothing more. Neither national arbitration laws nor the arbitration clause say anything as to how the arbitrator shall apply the law. National arbitration laws, as they are today mostly fixed in Arbitration Acts, and parties obviously never mean to allow the arbitrator to interpret the law in a different way than in the “normal” way, namely as state court judges do it. *Scire leges non hoc est verba earum tenere, sed vim ac potestatem*<sup>18</sup> which would translate into our understanding: “It is not enough to know the words of the law, but the judge must ascertain what the words and the law mean under the given circumstances in real life”. For state judges, it is therefore beyond doubt that they have to mind precedents set by the Supreme Court or other courts and in case of doubt they will consult legal scholars and even the social environment.

The difference between state judge and arbitrator in this context is only that in the state judiciary there is second and third instance (Court of Appeal, Supreme Court). The judgment will be altered or voided, if the upper instance finds that the judge erred in the application of law, while in arbitration there is normally no appeal. But this doesn’t change anything. The law is binding as it is – on the judge and the arbitrator without a regime of appeal on stand-by. Thus, there can be no real difference in this point between judge and arbitrator. Consequently, Art. 1496 French Code of Procedure Civil says: “*L’arbitre tranche le litige conformément aux règles de droit que les parties ont choisie. The arbitrator decides the case according to the rules law chosen by the parties*”. This is exactly the same position as in German and apparently in other “System laws”.

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18 Dig 1, III, 17.

### 3 SPECIAL ELEMENTS OF INTERPRETING THE CHOICE OF LAW CLAUSE IN ARBITRATION

Art. 8. UNCITRAL – Model Law (MAL) on International Commercial Arbitration says: “A court before which an action is brought in a matter which is subject of an arbitration agreement shall, if a party so requests [...] refer the parties to arbitration [...]”. As MAL has gained almost world wide acceptance this can be seen as the law of the world. But also in countries where this MAL has not been implemented this principle would be applicable.

The right of every human to have access to state courts to protect his rights is one of the major achievements of world civilization<sup>19</sup>. This right may not always and everywhere be put into practice, but there is no place in the world, where it is not recognized as a principle. It is therefore no small thing to deny access to national courts, because the parties waived it by a private contract (= arbitration clause). It is no small thing that a private instrument (= arbitration award) can be enforced like a state court judgement. MAL Art. 8 and national laws, to the same effect, must therefore be seen as extraordinary exceptions to the fundamental rule that nobody may ever be denied access to state court protection. It would then follow from general legal principles, that MAL Art. 8 and national laws to the same effect, must be interpreted in the narrowest and strictest way. That is: denial of access to state courts can only be justified, if the arbitration procedure and the award were in strict accordance with the agreement of the parties.

### 4 HUMAN RIGHTS

The same follows from Art. 5 New York Convention. As an international convention, this must be interpreted in accordance the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), to which Brazil acceded in 2009. Art. 31 of this Convention (General rule of interpretation) reads *i.a.*:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose [...]

3. There shall be taken into account, together with the context:

[...]

(c) any relevant rules of international law applicable in the relations between the parties.

Section 1 may be clear; subsection 3 c, however, invokes the *rules of international law*. In the hierarchy of international law the Universal Declaration of Humans Rights of 1948 (UDHR) ranks highest. Art. V of the New York

<sup>19</sup> Art. 8 of the Universal Declaration of Humans Rights dd 10. 12. 1948: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Convention (“in accordance with the agreement of the parties”) must therefore be interpreted also in the light of Art. 8 of UDHR, that is to say: If access to national courts can be denied upon a private agreement (= arbitration clause), it must be safeguarded that the result of this (= arbitration award) is strictly in line with what both parties intended.

## VII – CONSEQUENCES: REASONS OF THE AWARD AND NON-RECOGNITION

### 1 RESERVATIONS

As has been said, the objectives of state laws and state court jurisdiction is twofold. Justice *inter partes* in a given case and *Rechtssicherheit* (= predictability) for the general public. Only the first applies to arbitration. The parties of arbitration do not aim at public policy issues, they only want a just and equitable decision of their case. In arbitration the choice of law clause should therefore be interpreted as meaning: Parties want the law to be applied as it is done by state courts. All rules must be applied in the way as they are applied in e.g. Switzerland, but considerations of a public policy and statutes or interpretation thereof which aim at political objectives of Switzerland or other entities shall be disregarded.

### 2 PRINCIPLE OF FAIR TRIAL DEMANDS UNDERSTANDABLE REASONS

Not only must Justice be done; it must also be seen to be done<sup>20</sup>. This often quoted phrase from an English law case would mean in the context of the foregoing: Not only must the arbitrator do what the parties mandated him to do, but it must be seen that he did. The arbitrator therefore must show this in the reasons of the award. If not, the award should be set aside and/or refused to be recognition and enforcement should be denied. Lack of or insufficient reasons of the award can, according to the New York Convention, affect recognition and enforcement of the of the award under two legal aspects.

National arbitration laws generally oblige the arbitrator to give reasoned award. MAL Art. 31 II says: “The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given [...]”. Failure to state reasons can therefore be a ground to set aside an award under the national law under which the award was made<sup>21</sup>. If the award was set aside under that law, *this* – not the lack of reasons as such – would under Art. IV 1 e of the New York Convention be a ground to refuse recognition and enforcement.

Lack of reasons is not listed in Art. V New York Convention. This does, however, not affect the scope of Art. V 1 “(d) ...the arbitral procedure was not

20 *R v. Sussex Justices* ([1924] 1 KB 256, [1923] All ER Rep 233).

21 *Unictrinal Digest* p. 127 with references.

in accordance with the agreement of the parties”. Giving reasons is part of the procedure on which the parties agreed. It is a ground for refusal, if the reasons of the award are not as the parties agreed them to be. To know whether this is the case or not, the arbitration agreement must be interpreted. It follows from the universal principle of fair trial, that the parties must be able to understand the verdict. For arbitral proceedings, this would mean that they must also be able to understand two things: First: Why the arbitrator reaches at his conclusion and Second: Whether this was done in accordance with their agreement.

If the reasons fall short of one these two points, the arbitral procedure was not in accordance with the agreement of the parties, and the award should not be recognized and enforced under the New York Convention.

### 3 LAW AS IT REALLY IS

Everything points to the conclusion that the parties must be presumed as having agreed that the chosen law must be applied by the arbitrator in the same way as state court judge would do. If he does not – this must have consequence under Art. V. New York Convention and/or national arbitration laws.

If the Parties chose Swiss law, this means that not only the statutes, but also the Swiss jurisprudence and, in case of controversy, legal writings must be consulted. If parties want a decision based just on the blank wording, they would have said so or they would have chosen, e.g the Law of Ethiopia, which as such is quite good, but lacks almost totally jurisprudence to elucidate the words of the law. If the arbitrator in preparing his decision does not proceed as a Swiss judge would, then the “arbitral procedure was not in accordance with the agreement of the parties” and the award should be set aside the respective national law and/ or recognition should be denied under Art. V. New York Convention.

### 4 ERRORS IN LAW

Mistakes occur always and everywhere, particularly where a decision is open to discretion, as is often the case in legal disputes. The interpretation of the arbitration clause would therefore normally mean that the parties would condone minor slips and even outright mistakes in the application of law as being within the human range of fallibility. This will particularly be the case, if the parties deliberately chose a technical or other expert as arbitrator instead of a trained lawyer<sup>22</sup>. Series of mistakes or open blunders would, however, give rise to the presumption that the arbitrator did not know the law he undertook to

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22 Superior Court of Quebec 16. April 1987, quoted in: Aden, *Internationale Handelsschiedsgerichtsbarkeit*, München, 2<sup>nd</sup> ed. 2003, p. 362: *Arbitrators cannot be criticized for expressing themselves as commercial men and not as lawyers.*

apply when accepting his mandate and therefore did not apply the law chosen by the parties or did not care what they ordered him to do, what would amount to the same. Errors in law can thus to a certain extent be accepted. It must be clear, however, that the arbitrator committed these within the framework of chosen, here, the Swiss law. It would be contrary to parties agreement, if he filled a gap in his knowledge of Swiss law with some legal ideas he gathered from elsewhere<sup>23</sup>.

## 5 ERRORS OF LAW IN SYSTEM LAW (CIVIL LAW)

System laws like in Germany, France etc. are characterized by statutes. If the parties have chosen a system – law, the statutes must be read and the reason must show that they have understood in the light of the pertaining jurisprudence and in their systematic context. The award shall be set aside, if this is not done. The arbitrator is presumed to have been given by the parties the same judicial freedom as the state courts of that system of law. A procedural error is also in a clear legal error in the meaning of Art. V. New York Convention (*erreur manifeste de droit*) will only be there, if his the interpretation is simply not tenable. So the arbitrator would not be bound by a supreme court ruling, provided however, that he took cognizance of this and he shows in his reasons, why he did not follow that line.

## 6 CASE LAW (COMMON LAW)

In the Anglo-Saxon of Common Law it can be more difficult to find out, what the real law is, as this is traditionally built precedents, which should (but not necessarily: must) be followed under the principle of *stare decisis*. When choose a law from the Common Law family, the mandate to the arbitrator must be understood as meaning he makes himself acquainted with the relevant cases and decisions.

## VIII – CONCLUSION

Author is well aware that some of his findings run counter to prevailing practice of arbitration. It should however be kept in mind what kind of financial and other interests are involved in the practice of international commercial arbitration on the side of arbitrators and arbitration institutions. The tendency there is very clearly to emancipate arbitration from state law. The following quotation very aptly sums it up: “Arbitration is often run like a business, which attracts large fees. It has even led to a monopolisation tendency among a small

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23 Contra: UNCITRAL Digest 2012, Art. 36, p. 181 with further references.

group of practitioners, which raise issues of credibility, legitimacy, openness and accountability<sup>24</sup>.”

In an article “Confidentiality of arbitral proceedings – An infringement on fundamental procedural rights?”, the present author has proposed that in certain big cases arbitrators and their proceedings should be put under some sort of supervision of the state courts<sup>25</sup>. This is very similar to what the Dalhuisen proposes in his letter to Financial Times:

There should be an international commercial court to supervise this activity. It would not mean a full appeal [...] but supervision of the appointment and behaviours of arbitrators. Such a court could also take the lead in the challenges and enforcement of the awards. Importantly, arbitrators should be able to ask preliminary opinions from this court [...].

## IX – PRACTICAL ADVICE

Author ventures to add a practical advice. If parties want to safeguard that the arbitrator really does what they want him to do in terms of applying the substantive law, they should be precise in the wording of their arbitration clause, for example as follows:

The arbitrator shall decide upon Swiss law. He shall be obliged to apply this law in the same way as a state court judge. The award must therefore clearly show, that the arbitrator was fully aware of the state of Swiss law at the time of making the award. In case of a clear legal mistake the award shall be challengeable.

As a further encouragement for the arbitrator to strictly comply with the parties wishes, parties should consider to insert a clause in the contract with the arbitrator somehow as follows:

If the award has been successfully be challenged for non compliance with parties agreement the costs and fees, which will follow from a new whether arbitral or state court procedure, shall be borne by the arbitrator.

To put it short: Parties should be more careful and circumspect when negotiating an arbitration clause.

## X – RESULT

It follows that the arbitrator must comply with the parties’ agreement as strictly as possible. This means:

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24 Financial Times dd. 7th May 2015: Letter to the editor from: Jan Dalhuisen, Professor, Dickson Poon School of Law, King’s College London, WC 2, UK.

25 *Die Nichtöffentlichkeit des Schiedsverfahrens – Verstoß gegen ein prozessuales Grundrecht* Deutsche Zeitschrift für Wirtschaftsrecht – DZWIR 12, 363.

The arbitrator must (with the restrictions as set out herein) apply the substantive law in the same as the state court judge of that jurisdiction would do.

In the reasons of the award the arbitrator must show that he did this.

If the arbitrator does not do this, the arbitral procedure was not in accordance with the agreement of the parties, and recognition and enforcement of the award shall upon the request of the aggrieved party shall be denied according to Art. V of the New York Convention.