Must Arbitrators Apply the Law?

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1. I think it was Isaac Newton who said that if he had seen further, it was by standing on the shoulders of giants. Cedric Barclay was such a giant. And it is for that reason that I am delighted to stand here today to deliver this lecture named in his honour. I am also grateful to the organisers for this invitation and, in particular, Richard Briggs for his support and assistance.

2. As a young barrister in the late 1970s and 1980s, I spent much time in front of Cedric arguing shipping cases. He was a complete Master at handling hearings – and people. He brought to every case a unique blend of wisdom and charm. As I spluttered between submissions, I often watched in awe. I say nothing about the chocolate bars and biscuits that he used to proffer when things got rather hot; nor the lunches at the Baltic. These are well known to many of you. For me what is important was that I never came away from a hearing thinking that I had not had a fair shot – even when I lost.

3. So, I turn to my topic today: *must Arbitrators apply the law*?

4. I recognise that some of you may think that there can only be one answer; and that the mere suggestion that the question might be answered in the negative is quite ludicrous. That would, I think, have been the general view when I started practice almost 50 years ago in 1975. And even more so some 100 years ago when Bankes LJ said in *Czarnikow v Roth Schmidt*[1]*:*

> *"To release real and effective control over commercial arbitrators is to allow the arbitrator to be a rule unto himself…to give him…a free hand to decide according to the law or not according to the law as he…thinks fit. In other words, to be outside the law…"*

[1] [1922] 2 K.B. 478

That was not a prospect which the Court of Appeal was then prepared to entertain leading Scrutton LJ to make his famous statement[2] in that same case:

"… There must be no Alsatia where the King 's Writ does not run…"

For those who may not know, Alsatia was the name given to an area around Whitefriars in London in the 17th century which was a sanctuary for criminals and debtors – in other words an area which operated outside the law. Although said in a procedural context, this graphic metaphor has done a great deal to enshrine the notion that arbitrators must strictly apply the law[3].

5. So, there is no doubt that the question whether arbitrators are bound strictly to apply the law is not new. However, what is relatively new is the notion that contrary to what these great Judges said in 1922, arbitrators are not bound by the law.

6. The question bubbles to the surface from time to time. *Mustill & Boyd*[4] devotes an entire chapter to the topic of possible recourse against unappealable errors of law kicking off with an imagined example of an arbitrator who produces an award saying that the law on the particular topic was *"unfair nonsense"* and deciding to give effect to his own opinion ignoring all legal precedent.

7. There is also a very interesting paper by an old colleague, Michael Marks Cohen under the title: *Maritime arbitrators are not required to apply stare decisis to decisions of trial courts*[5].

8. More recently, the question was considered in a brilliant paper by Andrew Baker (now Baker J sitting as a Judge in the Commercial Court in London) at a previous ICMA Conference in Vancouver in 2012[6]. His conclusion was that arbitrators are not bound

[2] at p488
[3] B.J. Cornick; Q.L.R.C. No. 4 at 12; (1982) 12 Q.L.S.J. 219
[4] *Commercial Arbitration*, Mustill & Boyd, 2nd Edition Chapter 37.
[5] (2007) 13 JML 258
[6] *"Arbitrators under English Law: Inferior Tribunals or a Law unto Themselves"* Andrew W. Baker QC (March 2012)

by any doctrine of precedent. Given the importance of the topic and encouraged by a number of colleagues, I make no apology for returning to the topic.

9. My interest in this question has recently been sparked by two particular things.

10. The first is the publication of a book by Guilherme Amaral called: *Judicial Precedent and Arbitration: Are Arbitrators bound by Judicial Precedent?*[7] I confess that although the first edition of the book was published a few years ago, I only became aware of it last year. But it is a scholarly work being (as its sub-title indicates) a comparative study of UK, US and Brazilian Law and Practice as to whether arbitrators are bound by previous decisions of the Court.

11. The second is the fact that in a number of arbitrations that I have done in recent years, the arbitrators have been referred to dozens and in some cases hundreds of legal authorities. But as I read the parties' submissions as to the propositions said to be derived by these authorities, I sometimes asked myself: Am I bound by them? And, if I am not, why does it matter what the cases may – or may not – say?

12. In an attempt to find a definitive answer, I thought I would first ask the current guru on all subjects: ChatGPT. The answer I received was as follows:

> *"… Arbitrators are not bound by judicial precedent in the same way that judges in a court of law are. Arbitration is a private and consensual process, and the rules and procedures can vary depending on the parties' agreement and the specific arbitration rules they choose to follow through. While arbitrators may consider legal principles, prior court decisions, and legal precedent as persuasive authority, they are not strictly obligated to follow them."*

13. Some may think that a surprising answer. And it would, I think, shock both Bankes and Scrutton LJJ. But at least it is clear!

[7] *Judicial Precedent and Arbitration: Are Arbitrators Bound by Judicial Precedemt? A Comparative Study of UK, US and Brazilian Law & Practice* (2nd Edition) Guilherme Rizzo Amaral (2018, Wildy, Simmonds & Hill Publishing) (*"Amaral").*

14. In a further attempt to find the definitive answer, I invited a number of arbitrators, practitioners and academics earlier this year to a soirée in London to discuss the topic and to pick their brains. Perhaps unsurprisingly, there was no consensus. However, although I promised anonymity, I readily acknowledge with gratitude their input.

15. In truth, although the question whether arbitrators must apply the law is important, it is relatively narrow. In most cases, the authorities are clear and, as a matter of principle or logic (or both), there is little doubt as to the legal principle which they establish. And if there is doubt (for example, where there are conflicting authorities), the Tribunal will no doubt do its best to arrive at a conclusion which it considers is just and appropriate. To be clear, I am not concerned with that situation.

16. Nor am I concerned with matters concerning legal rules of procedure that may apply in a Court. Here, there seems no doubt (at least as a matter of English law) that such legal rules are generally inapplicable in an arbitration[8].

17. Equally, I am not concerned with a situation where a party seeks to rely upon a point which is not part of the *ratio* of the Court's judgment but which is only *obiter*. In that situation, it is plain that the arbitrators are not bound but may follow their own course. Nor am I concerned with the situation where it may be possible to distinguish previous authority whether on the law or on the facts; nor with the situation where the Tribunal has to consider a question of foreign law.

18. I also put on one side cases where the parties may agree that the arbitrator acts as an "amiable compositeur"; or special "equity" type arbitration clauses. And I am not interested in whether decisions are regarded as "persuasive"; nor whether and if so what weight is to be given to a particular Court decision; nor whether (for example, in cases involving a mixed question of law and fact) there is no question of an error of

[8] *Mustill & Boyd*, p70.

law where there is a permissible range of solutions[9] or the question turns on the proper construction of particular wording in a contract[10].

19. Nor am I interested in the separate question (as to which there is much on the internet including the speech/paper by Lord Thomas) as to the restrictive effect of s.69 of the Arbitration Act 1996 and the suggested "damage" to the development of the common law.

20. Rather, my focus is the situation which arises occasionally – very occasionally – where the arbitrators are confronted with a decision of the Court on a substantive point of law which clearly forms part of the *ratio* and is bang on point - what, I am told, the US lawyers call a "cow case" although why that is so, I do not know.

21. What do the arbitrators do in such a situation – when they are of the view – indeed sure in their own minds - that the Court's decision is wrong in law? Are the arbitrators bound by judicial precedent? Do they clench their teeth and produce an award that they know in their heart of hearts is wrong? Or do they break free? What would you do? And, in the present context, what "must" you do? And what does "must" mean?

22. Thankfully, this problem does not happen often.

23. But take, for example, *The Blankenstein*[11] where a majority of the Court of Appeal decided in the context of a sale of a vessel under the then Norwegian Saleform that the seller was entitled to recover the amount of the deposit as damages even though

[9] See, for example, *The Nema* [1982] A.C. 724 where Lord Diplock indicated that leave to appeal should never have been given - in particular because the question of frustration in that case was "one-off" and the only question was whether the arbitrator had misdirected himself (which he had not) or reached a decision which no reasonable arbitrator could reach (which he also had not) and *The Ymnos* [1982] 2 Lloyd's Rep 574 as to whether the decision of the tribunal on the question of repudiation/renunciation could properly be challenged in Court. See also other authorities cited by Amaral including *The Chrysalis* [1983] 1 WLR 1469; *Benhaim (UK) Ltd v Davies Middleton & Davies Ltd* 2005] EWHC 1370

[10] See, for example, *The Kriti Akti* [2004] EWCA Civ 116 where Moore-Bick LJ stated that "… *[A]ny contractual clause must be construed in context, and great caution is necessary about treating as binding precedent brief statements made in the context of significantly different contractual clauses…"*

[11] [1985] 1 WLR 435

the deposit had never been paid and the seller's actual loss was substantially less than the amount of the deposit. The important point is that Robert Goff LJ dissented in a powerful Judgment that would surely have been adopted by the House of Lords.

24. Or take *The World Symphony*[12] where the Court of Appeal reached a conclusion that was obviously wrong in failing to hold that the charterers were in breach of charterparty for late redelivery at the end of the charter period.

25. For the sake of full transparency, I should disclose that these are both cases which I lost (wrongly) as Counsel in the Court of Appeal.

26. Or, more recently, take *The Astra* [2013] EWHC 865 (Comm) where the Court held that the obligation to make punctual payment of hire in the charterparty in that case was a condition of the contract, breach of which entitled the owners not only to withdraw the vessel but also to claim damages for loss of bargain. My own view – and I think the view of many others – was that the decision in *The Astra* was plainly wrong. The Judgment was delivered on 18 April 2013. But it stood as a statement of English law until it was eventually not followed by Popplewell J in *Spar Shipping*[13] and reversed by the Court of Appeal[14] on 7 October 2016. There were numerous arbitration cases in the intervening period when arbitrators were faced with the problem of deciding whether or not to follow *The Astra*.

27. The position is more nuanced when arbitrators are faced with a decision of the Court which is pending an appeal. In that context, a good example is another recent case of *The Eternal Bliss* where the Court decided at first instance that demurrage was not the exclusive remedy for delay beyond the laydays and that a shipowner may be entitled to recover damages caused by delay *in addition to demurrage*[15]. This was reversed by the Court of Appeal[16], the Court holding that, in the absence of any contrary indication

[12] [1992] 2 Lloyd's Rep 115
[13] [2015] EWHC 718 (Comm)
[14] [2016] EWCA Civ 982
[15] [2020] EWHC 2373 (Comm)
[16] [2021] EWCA Civ 1712

in a particular charterparty, demurrage liquidates the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them; and that accordingly, if a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation. There are two main problems which face arbitrators here. The first is that many think that the decision of the Court of Appeal is wrong. The second is that the Supreme Court gave leave to appeal and that, on that basis, one might suppose that there is, at least, a respectable argument that the Court of Appeal was wrong. However, I understand that the case settled before the hearing in the Supreme Court. So – are arbitrators bound to follow the Court of Appeal? Or are they free to follow the first instance decision?

28. There are a number of other cases which I could cite. But that is sufficient for present purposes to highlight the problem facing arbitrators in certain circumstances.

29. With these examples in mind, it is convenient now to focus on the question I have posed: *must arbitrators apply the law*? I will try my best to answer that question as a matter of English law shortly but it is convenient to consider briefly the position in some different jurisdictions around the world. In so doing, I should make an important caveat – I have no qualifications other than as an English lawyer and therefore anything I say may not be accurate. But it is based upon my own researches (as best I can) and input from colleagues around the world for which I am most grateful.

30. It is convenient to start here in the Middle East including Dubai, Egypt, Jordan, Saudi Arabia, Bahrain and Qatar where the laws concerning arbitration are based in large part on the UNCITRAL Model Law on International Commercial Arbitration[17]. My understanding[18] is that the U.A.E does not have a system of precedent, the default position being that an arbitrator would not be bound by U.A.E. Judgments. While U.A.E law does require judges and arbitrators to consider and abide by “custom”, the

[17] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf
[18] I am grateful to Mohammed Abbas of Hadef & Partners for his input – although any errors are my own.

definition of what constitutes "custom" arguably does not include court judgments; and although the failure to apply the substantive law chosen by the parties forms one of the bases for annulment under UAE law[19], the case law in the UAE apparently points heavily to the Courts not relying on such provisions to annul an arbitration award on the basis that an arbitrator has misapplied or misinterpreted the law[20]. Therefore, in practice, even if arbitrators are, in theory, bound by court judgments, which is (as I understand) a questionable proposition, their failure to abide by those court judgments is unlikely to have practical consequence except in cases a matter of public policy.

31. Looking more widely around the world, the position is that legislation based on or influenced by the UNCITRAL Model Law (the "Model Law") has been adopted in some 88 states in a total of 121 jurisdictions – including Singapore[21]. As is well known, Article 28 provides: *The arbitral tribunal shall decide the dispute in accordance with the rules of law as are chosen by the parties as applicable to the substance of the dispute." So far, so good.* However, what is important is that although Article 34 provides for the possibility of recourse against an award in certain limited circumstances a failure – or even a refusal - by the arbitrators to apply the law is not stated to be a basis for challenge.

32. In relation to the Model Law, the position was summarised by Lord Thomas giving the Judgment in a recent decision in the Privy Council on appeal from the Supreme Court of Mauritius in *Betamax Ltd v State Trading Corporation*[22]:

> *"The Model Law is premised on the principle that where a matter has been submitted to an arbitral tribunal and is within the jurisdiction of the arbitral*

[19] Article 53(1)(e) of the Arbitration Law which provides a basis to seek annulment of an award before the Courts "…*if the arbitral award fails to apply the law agreed upon by the parties to govern the subject matter of the dispute".*

[20] *Ras Al Khaimah Court of Cassation Case No 12 of 2021* (arbitration tribunal misinterpreting or misapplying law does was not a ground giving rise to annulment); *Dubai Court of Cassation Court No.34 of 2020* (failure by arbitral tribunal to take into account contractual terms does not constitute a failure to apply the law agreed upon by the parties to govern the subject matter of the dispute); Dubai Court of Cassation Case No.372 of 2019 (failure by arbitral tribunal to apply UAE laws relating to set-off not a ground for annulment)

[21] https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

[22] [2021] Bus LR 1253 [48]

tribunal, the arbitral tribunal's decision is final whether the issue is one of law or fact. The parties have so agreed in their contract to submit the dispute to arbitration. It is therefore the policy of modern international arbitration law to uphold the finality of the arbitral tribunal's decision on the contract made within the arbitral tribunal's jurisdiction, whether right or wrong in fact or in law, absent the specified vitiating factors."

33. In such circumstances, it seems to me quite impossible to say – in any meaningful sense - that arbitrators must apply the law. If there is no remedy in circumstances where arbitrators refuse to apply or even simply misapply the law, on what basis can there be said to be any duty to apply the law? We are all familiar with the latin phrase *"Ubi ius, ubi remedium"* meaning - for every wrong, the law provides a remedy. But, in truth, turning that around, if there is no remedy, it is difficult, if not impossible, to understand on what basis it might be said that there is any duty for arbitrators to apply the law[23].

34. The position in the USA is, of course, different because it has not adopted the Model Law – although it has been adopted at least in part in some states[24]. As discussed in considerable detail in Mr Amaral's book[25], the position is complicated because of the different stances adopted, at least, initially by the different circuits. However, it appears that, subject to some exceptions, there is broad consensus that an arbitral award can be set aside where arbitrators act in *manifest disregard* of the law[26] although it is important to note that the US Supreme Court has (at least as at 2018) never actually reviewed an award based on that standard. It is also important to note that the *"manifest disregard"* test seemingly operates within a narrow compass applying only in cases where an arbitral tribunal consciously or deliberately decides not to follow the law. As I understand, it does not apply where the arbitral tribunal simply makes an error of law or an error in the application of the law. It appears that the position in Brazil is less clear cut – although Mr Amaral suggests that the test is –

[23] See Postscript
[24] Including California and Florida
[25] Chapter 2B pp93-111.
[26] *Wilko v Swan,* 346 U.S. 427 (1953); *Fahnestock & Co., Inc., v Waltman,* 935 F.2d 512, 519 (1991); *Williams v Cigna Fin. Advisors, Inc.,* 197 F.3rd 752 (1999); *First Options of Chicago v Kaplan,* 514 U.S. 938 (2005).

or at least should be – that an award will be set aside where the arbitrators consciously disregard binding precedent[27].

35. I turn then to my own home country – England. The starting point here is to recognise at the outset that England has not adopted the Model Law. Moreover, as is well known, s.69 of the Arbitration Act 1996 expressly provides a mechanism to challenge an award by way of an appeal on a question of law in certain circumstances. It is worth emphasising that such a mechanism is, I think, quite unique. So far as I am aware, no other country in the world allows an appeal from an arbitration award on a question of law at least in a non-domestic arbitration. I do not propose to consider why England decided to adopt this position - nor the advantages or disadvantages of such an appeal mechanism as to which much has been written.

36. For present purposes, the important point is that s.69 provides a route to challenge an award if the arbitrators do not apply the law. Although what I have just stated is correct, it is important to note that the basis of the mechanism to appeal against an award as provided by s.69 is not that the arbitral tribunal has breached any duty to apply the law nor that it has committed any "error" of law but simply that there is a question of law which arises out of the award.

37. In some sense, the existence of the mechanism provided by s.69 to appeal against an award on a question of law might be said to answer the question as a matter of English law as to whether arbitrators must apply the law: if the law provides a mechanism to challenge an award which fails to apply the law, surely there must be a duty to apply the law? But, in my view, that is, at best, oversimplistic because it fails to grapple with the essential issue. The position can be tested by considering the fact that, under English law, parties are entitled to exclude the right of appeal. As stated by *Mustill & Boyd*: *"It would seem an absurd consequence to say that the absence or presence of a duty to follow the law depends upon whether the substantive contract is or is not one*

[27] *Amaral* Part 2C, pp 134-144

which…may contain a valid exclusion agreement"[28]*.* As formulated, I am not sure that I would necessarily agree with that. Where parties have expressly excluded the right of appeal, it seems to me that there at least some argument that, in so doing, they are giving the arbitrators *carte blanche.*

38. The main argument in favour of an arbitrator's duty to apply the law is that it promotes certainty and predictability of result[29]. However, where the parties have expressly excluded the right of appeal, it can, I think, be strongly argued that the parties have thereby given up such certainty in favour of finality.

39. It is, I think, fair to say that the right to appeal is not excluded by the parties in most shipping arbitrations. But the right to appeal is excluded under most of the institutional rules[30].

40. As referred to in *Mustill & Boyd*[31] one can find scattered over the decades a few isolated statements to the effect that the arbitrator is indeed obliged to apply the law; and it would seem that the contrary has never seriously been doubted in any of the authorities[32].

41. But if such duty is said to exist, the main question is: what is the nature and source of such obligation?

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[28] *Mustill & Boyd.* pp 70-71

[29] See generally, the Oxford Shrieval Lecture by Lord Mance: *Should the Law be certain?* (2011)

[30] See, for example: LCIA and DIFC-LCIA Rules: Art 26.8: *"Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law."*; ICC Arbitration Rules Article 35: *"Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."*; SIAC Arbitration Rule Art 32.11: "*Subject to Rule 33 and Schedule 1, by agreeing to arbitration under these Rules, the parties agree that any Award shall be final and binding on the parties from the date it is made, and undertake to carry out the Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made."*

[31] *Mustill & Boyd* pp 69-70. See, in particular, the cases cited at footnote 6 and also *Compania Sud Amerian Vapores v Hamburg &Anor* [2006] EWHC 483 (Comm) as to whether the previous decision of the Court in *The Imvros* [1999] 1 Lloyd's Rep 848 was *"binding precedent"*.

[32] *Mustill & Boyd* refers to various decisions before the end of the 19th century to the effect that an arbitrator need not apply the law where it produces a harsh result but this line of authority was never followed up.

42. The most obvious candidate for the source of an obligation that arbitrators must apply the law is, of course, the parties' arbitration agreement – and, in that context, I bear well in mind the terms of s.1(b) of the Act which provides, under the heading *"General Principles",* that *"…the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."* Where, for example, parties agree that any dispute between them be referred to arbitration governed by English law, there would, at the very least, seem to be a strong argument that the arbitrator's duty is to comply with such agreement: it is the basis of the arbitrator's authority. Indeed, it could surely be said that an arbitrator who fails to apply the law in accordance with the parties' agreement or at least deliberately refuses to apply the law agreed by the parties acts outside his/her mandate and therefore outwith his/her jurisdiction.

43. Indeed, *Mustill & Boyd* expresses the view that if it were possible to make a fresh start with the law of arbitration, an argument of considerable logical force could be constructed to the effect that an award made in deliberate disregard of the governing law would be void for want of jurisdiction[33]. In support of that possible argument, reference is made to certain authorities in the administrative law field. However, there appears to be no authority to support such an analysis and at least two authorities to the contrary[34]. The conclusion reached by *Mustill & Boyd* is that it is *"inconceivable"* that the courts would give effect to a course of reasoning which, however sound in point of logic, would open the way to a whole new field of judicial intervention. That was the position as at the date of publication of *Mustill & Boyd (1989)*; and, so far as I am aware, nothing has occurred since that date to suggest that the position might be otherwise.

44. I suppose a possible variation of the same theme might be to suggest that arbitrators who deliberately disregard the governing law agreed by the parties would be guilty of

[33] *Mustill & Boyd* p641.
[34] *K/S A/S Bill Blakh v Hyundai Corpn* [1988] 1 Lloyd's Rep 187; *Bank Mellat v GAA Development and Construction Co* [1988] 2 Lloyd's Rep 44, 52-53.

a *"serious irregularity"* of a kind falling within s.68 of the 1996 Act – for example, the tribunal exceeding its powers (s.68(2)(b)) or a failure to conduct the proceedings in accordance with the procedure agreed by the parties (s.68(2)(c). However, so far as I am aware, there is no authority in favour of such an argument; and it seems highly unlikely, if not inconceivable, that the English courts would adopt such an approach if only because, once again, it would open the way to a whole new field of judicial intervention.

45. Putting on one side the mechanism for an appeal under s69 of the 1996 Act, I ask rhetorically again: if there is no remedy in circumstances where arbitrators refuse to apply or even simply misapply the law, on what basis can there be said to be any duty to apply the law?

46. In trying to identify the source of a duty that arbitrators must apply the law, the other obvious starting point is the Arbitration Act 1996. In that context, one notes the terms of s34 of that Act which, under the heading *"General Duty of the tribunal"* provides: *"The tribunal shall— (a)act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b)adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."* However, there is nothing in the rest of that section which provides that arbitrators must apply the law.

47. Looking elsewhere in the 1996 Act, one finds a provision similar (albeit not identical) to Art 28 of the Model Law viz. s.46(1) which provides in relevant part under the heading "Rules applicable to substance of dispute": "*The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute".* That would indeed seem to create an express statutory duty for arbitrators to apply the law[35]. However, so far as I am aware, there

[35] I am grateful to James Turner KC for drawing attention to this potentially important provision which, I regret, I had long forgotten.

is no suggestion in any of the cases that there is any remedy for breach of that duty as such other than the mechanism provided by s.69 of the Act.

48. There is another important potential issue concerning any duty that arbitrators must apply the law whether pursuant to the parties' agreement or s.46 of the 1996 Act viz. what is meant by English law? What does one mean when one asks whether arbitrators must apply the law? In particular, does it mean that arbitrators must apply the law as determined by a decision of a High Court Judge? Or Court of Appeal or Supreme Court? That raises the question whether arbitrators are subject to the doctrine of judicial precedent[36].

49. So far as the Courts are concerned, the relevant principles were summarised by David Foxton KC (sitting as a deputy High Court Judge) in *Coral Reef v Silverboard*[37] as follows*:*

> *"There are a number of uncontroversial principles which I can briefly summarise. First, all courts below the Supreme Court are bound by its decisions and all courts below the Court of Appeal are bound by the Court of Appeal's decisions. If authority is needed for such obvious statements, it can be found summarised in Halsbury's Laws, Vol 11 2015 at paragraphs 29 to 30.*
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> *Second, a High Court judge is not bound by decisions of other High Court judges. The modern practice is that such a judge should follow such a judgment unless convinced it is wrong. By way of example, in Lornamead Acquisitions Ltd v Kaupthing Bank HF [2011] EWHC 2611 (Comm) at 53, Gloster J cited a passage from Halsbury's Laws to that effect and proceeded to apply that principle.*
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> *Third, for the purpose of this second rule, a divisional court sitting with two High Court judges has the same status as a High Court judge sitting alone, because in each case the courts are simply a court constituted for the purpose of transacting the business of the High Court as performed by High Court judges (Regina v Greater Manchester Coroner ex parte Tal [1985] QB 67 at 82-81).*

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[36] See, generally, *Precedent and Legal Authority: A Critical History*, Charles W Collier, 1988, Wis. L. Rev 771 (1988); *Binding Precedent and English judicial law-making,* David Vong, https://www.law.kuleuven.be/apps/jura/public/art/21n3/vong.pdf; *Judicial Precedent – Taming the Common Law,* Lord Carnworth (NMLR Annual Lecture Series – 2012); *Precedent and the Rule of Law*, Sebastian Lewis, Oxford Journal of Legal Studies, (2021) pp873-898.

[37] *Coral Reef Ltd v Silverboard Enterprises Ltd & Anor* [2016] EWHC 3844 Ch

And finally, decisions of High Court judges are binding on county court judges (Howard De Walden Estates Ltd & Anr v Les Aggio & Ors [2007] EWCA Civ 499."

50. As stated by David Foxton, these principles are uncontroversial. He then went on in his Judgment to consider more closely the *Howard de Walden* case and, in particular, the effect of decisions of the High Court on Masters or district judges. As to that, he said that this was not dealt with in any of the authorities other than a decision of a Master in *Randall v Randall* (2014) where the conclusion reached was that *"…the relationship between decisions of High Court judges and masters was governed by the rule of practice operating between judges of coordinate jurisdiction rather than by the doctrine of precedent."*

51. Thus, there is an important issue as to whether arbitrators are, in effect, to be regarded as "inferior tribunals" standing in a similar position to county courts and therefore subject to the doctrine of judicial precedent. That is a topic discussed by Andrew Baker in his paper which I do not propose to repeat. For present purposes, it is sufficient to state that his conclusion[38] is that it is surely not now possible to take the view that arbitrators are but "inferior tribunals"; that under the modern law, the concept of arbitration is a thing apart and that arbitrators sit structurally outside and are independent of any court system; and that there is no rule of precedent that arbitrators are bound to follow the prior decisions of the courts.

52. In this context, it is potentially relevant to consider the jurisprudential theory that Courts simply declare what the law is – and always has been[39]. For example, under the declaratory theory of adjudication *"…the law as altered by a decision is deemed always to have applied, and the previously settled understanding of the law was treated as a mistake*"[40]. If that is right, can it be argued that the arbitrator's mandate – and therefore obligation - is not to follow what the Courts may have decided previously

[38] Paras [26]-[27].
[39] See, for example, "The Rule of Law and the Separation of Powers" (Hart's Key Ideas in Law Series 2021) in particular at pp 41-49.]
[40] *Prudential Assurance v Revenue and Customs* [2018] UKSC 39 at [63]

but to determine the dispute in accordance with what the arbitrator *himself/herself* considers is English law?

53. Again, this is a topic covered at some length by Andrew Baker in his paper. As he points out, there are difficulties with that argument because the full declaratory theory has not held sway[41]. Notwithstanding, I agree with him that there are powerful reasons to support the argument that there is no duty as such for arbitrators to apply the law as decided in previous cases. It is unnecessary to repeat what he has said in that regard.

54. However, I would add one further perspective. Take a case where the question that the arbitrators have to determine is a matter of foreign law. There may well be authority in the form of case law decided by the Courts in that foreign country which, as a matter of the jurisprudence in that country, is binding as a matter of judicial precedent in the courts of that country and even inferior tribunals. However, it is generally accepted that a question of foreign law is a matter of fact and generally to be proven by evidence. Let it be assumed that the evidence before the arbitrators is that the existing case law is wrong as a matter of that foreign law – and that, on a balance of probability, the higher courts of that country will one day overrule that case law and reach a different conclusion. In such circumstances, in reaching their conclusion as to what is, as a matter of fact, foreign law, I see no difficulty in the arbitrators deciding not to follow the existing case law but rather deciding the instant case on the basis of what they consider the higher courts would determine the foreign law to be. Put on one side, for a moment, that foreign law is a question of fact, I ask rhetorically: why should arbitrators not be similarly free to determine what English law is?

55. In summary, my conclusions[42] are as follows:

    a. Under the Model Law, although Art 28 provides in terms for the arbitral tribunal to decide the dispute in accordance with the governing law, it would

[41] At [38] referring to *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349.
[42] See Postscript

seem that there is no remedy for breach of such duty – and, to that extent, it seems difficult to say – in any meaningful sense – that arbitrators must apply the law.

b. In the USA and perhaps other countries, it may be possible to challenge an award in cases where the arbitrators manifestly disregard the law in the limited sense I have indicated.

c. As a matter of English law, the position is similar to the Model Law in the sense that s.46 of the 1996 Act provides in terms for the arbitral tribunal to decide the dispute in accordance with the governing law. However, again, there appears to be no specific remedy for breach of such duty save that English law provides a mechanism in certain limited circumstances to appeal against an arbitration award on a question of law arising out of an award under s.69 of the Arbitration Act 1996. In truth, it seems that that is the only remedy available to an aggrieved party in circumstances where arbitrators fail to apply or even deliberately disregard the law. Needless to say, that is an important and powerful potential remedy – but it is inapplicable if the parties have chosen to exclude the right of appeal – as they are, of course, perfectly entitled to do. In such circumstances, there is no remedy; and absent a remedy, it is difficult to say that arbitrators must apply the law – notwithstanding the terms of s.46 of the 1996 Act.

56. I am not sure whether Cedric Barclay would agree with my conclusions – but, at the very least, I hope I have given you food for thought during what I am sure will be a very successful conference.

Thank you.

Bernard Eder
November 2023

POSTSCRIPT

It is right to record that following delivery of my speech, I received forceful criticisms from a number of individuals disagreeing with my conclusions to the effect that where an arbitrator deliberately decides not to apply the substantive governing law of a contract agreed by the parties (for example, where an arbitrator decides to apply a foreign law instead of the law agreed by the parties), the aggrieved party would (must?) surely have a remedy by way of a challenge to the Court whether under the Model Law (in particular pursuant to Art 34(2)(a)(iv) on the basis that the arbitral procedure was not in accordance with the agreement of the parties) or (where English law applies) under s.68 of the Arbitration Act 1996. (For present purposes, I assume that the parties have agreed to exclude the possibility of appeal under s.69 of the 1996 Act.) If correct, the result would, in effect, be to import the concept of manifest disregard of the law as a relevant discrete basis of challenge. As I have already indicated in this paper, there are considerable difficulties with such views. So far as I am aware, they are unsupported by any authority and none of my critics was able to identify any case, textbook or article which might lend support to such views. BE