

Chartered Institute of Arbitrators Centenary Celebration, Hong Kong

Arbitration and the Rule of Law¹

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Introduction

1. It is an honour to have been invited to give a keynote speech at the centenary celebration of the Chartered Institute of Arbitrators. The provision of well-trained and competent arbitrators meets a need which was recognised with admirable foresight by the Institute's founders a century ago. The Institute's 1915 records show that they saw that "*the tendency of all commercial matters is in the direction of complexity*" and that "*beyond the most complete knowledge and experience in [the subject matter of the arbitration], special knowledge, training and experience, together with acquaintance with the laws of evidence, the rules for the construction of written documents, the principles of law and equity, and some degree of judicial capacity, are equally important.*"²
2. These observations are as true today as they were a century ago. A recently published survey suggests that three-quarters of parties to international commercial arbitration regard access to a pool of experienced arbitrators as a key factor in their choice of the venue for arbitration.³ The survey also shows that, across a range of industries, international arbitration is the dispute resolution mechanism of choice.⁴ In 1953, the Institute's former president, Lynden

¹ I am most grateful to Hugh Cumber for his considerable assistance in preparing this talk.

² 'Arbitration' (1915) *Arbitration* 2, 3.

³ BLP, 'International Arbitration: Research based report on choice of venue for international arbitration' (2014)

⁴ PwC, 'Corporate choices in International Arbitration: industry perspectives', (2013), 6

Macassey, speaking at a meeting of the institute made a further claim for the importance of arbitration for maintaining the rule of law:

*“To-day the case for independent arbitration is stronger than ever. The support it commands in the industrial and commercial world is greater than ever. The need for maintaining the Rule of Law was never more urgent.”*⁵

3. At the heart of this almost Utopian vision of what arbitration can achieve in a variety of disputes between private parties and between nations lies the rule of law. These days, I sometimes feel that the rule of law, rather like Magna Carta, is at risk of being discounted simply because it is so much talked about. My colleague Jonathan Sumption began a recent speech by saying: *“It is impossible to say anything new about Magna Carta, unless you say something mad. In fact, even if you say something mad, the likelihood is that it will have been said before, probably quite recently.”*⁶ It is understandable why Magna Carta is so much talked about: it was a dramatic event and it is 800 years old this year.

4. It is perhaps harder to understand why the rule of law has become such a popular topic over the past five years. To give but two examples, it has been the subject of many conferences - eg the 2011 Commonwealth Law Conference in Hyderabad and last month’s Global Law Summit in London. I think it may be a popular subject because there is an uneasy feeling at large that the rule of law is under threat. The threats are by-products of a number of factors - the need to combat physical terrorism and cyber attacks, the need to satisfy public concern about crime, IT-based intrusion into individual privacy, government cut-backs on the legal

⁵ ‘Luncheon Meeting Address’ 26 November 1953, (1953) *Arbitration* 101, 110

⁶ Lord Sumption, *Magna Carta then and now*; Address to the Friends of the British Library, 9 March 2015; <https://www.supremecourt.uk/docs/speech-150309.pdf>

system, increasing inequality and globalisation, and repressive regimes in some countries, to identify a few.

Arbitration and the rule of law

5. This brings me to my subject, arbitration and the rule of law. It is a topic on which I have big shoes to fill; it has recently been addressed in Hong Kong both by my colleague Chief Justice Ma and by my former colleague Lord Hoffmann.⁷ The rule of law is easy to pontificate about, but not so easy to define. Thus, the 2005 Constitutional Reform Act, which created the UK Supreme Court, refers to “*the existing constitutional principle of the rule of law*” without saying what it is. In its narrow sense, it simply means that things are done in accordance with the law, but says nothing about what the law actually is. In its wider sense, which is how it is normally meant nowadays and how I see it, the rule of law also involves addressing the contents of the law. That can inevitably lead to disputes as to what the content should be.

6. Another great judge, the late Lord Bingham, did a very convincing job of defining the basic contents of the rule of law in his excellent book on the topic⁸. He suggested that there were eight sub-rules or “strands” which, woven together, make up the rule of law. In summary terms, those strands are:
 - I. The law must be accessible, intelligible, clear and predictable;
 - II. Issues should be resolved by law, not discretion;
 - III. Laws should apply equally to all;

⁷ See ‘Lord Hoffmann’s rule of law musings’ 10 December 2014, *Global Arbitration Review*.

⁸ Tom Bingham *The Rule of Law* (2011)

- IV. The law must protect fundamental human rights;
- V. Disputes must be resolved economically and fast;
- VI. Public powers must be exercised reasonably, *bona fide*, and appropriately;
- VII. Adjudicative procedures provided by the state should be fair;
- VIII. The state must comply with its obligations in international law.

7. Some, such as Lord Hoffmann, consider that Lord Bingham's wider rule of law was not *apropos* in the context of international commercial arbitration. But I am not sure that I agree. Of course, arbitrators perform an essentially contract-based function for specific parties in private, whereas judges carry out a constitutional function for everyone in public, so the rule of law can be said to be central to the role of judges in a way that it is not for arbitrators. However, that does not mean that arbitrators have no part to play in the rule of law or that the rule of law has no part to play in arbitration. Far from it.

8. First, the nature of arbitration requires arbitrators to have many of the qualities of judges. In particular, they administer justice, and they must therefore act in accordance with the law and be seen to act in accordance with the law. And the law includes fundamental rights. It is true that human rights under the European Convention can be claimed against "public authorities" and arbitrators are "private authorities", but arbitrators' awards are enforced by courts and courts are public authorities. Secondly, a practical point: if an arbitrator acts inconsistently with fundamental rights, it is to be hoped that he will be out of a job. Thirdly, arbitrators resolve disputes between business people or national entities, and in both the commercial and the diplomatic worlds, the rule of law is essential. The great 18th century

political economist, Adam Smith, rightly emphasised how the rule of law was essential to business and a thriving economy. And, for many centuries, law has helped maintain peace between the nations. Fourthly, given that arbitration is the remedy of choice for many commercial parties, there is a powerful case for saying that arbitration should be held to the same high standard we hold the court process, and that must include its rule of law credentials. Fifthly, over the past forty years national legislation and international conventions have famously given arbitrators ever increasing freedom and power by restricting interference by the courts with arbitrators' procedures and awards. Any increase in freedom or power carries a concomitant increase in responsibility, and an increase in arbitral powers must be accompanied by an increased responsibility to observe fundamental rights.

9. Many of you may remember the Greek myth of Procrustes, and his seemingly miraculous iron bed which appeared to be a perfect fit for everyone. The truth behind the bed was more macabre. Those who were too short would be stretched until they fit, and those who were too tall would have their legs chopped off. Many people many suffered until Procrustes met his match in Theseus. All of you will remember Cinderella's ugly stepsisters, who tried all kinds of distortions in a doomed attempt to ensure that the famous glass slipper fitted their over-sized feet. I suppose that my central proposition for this morning is that arbitration fits very well within the Bingham framework for the rule of law, albeit that some people will no doubt argue that at least one or two of the strands require a little distortion. Nonetheless, I hope to be Theseus rather than Procrustes, Cinderella rather than the Ugly Sisters.

10. It is much easier to meander downhill than to struggle uphill. I therefore propose to take the eight Bingham strands out of order, and start with those which least obviously apply to arbitration.

(IV) Protection of fundamental human rights

11. The protection of fundamental human rights was said by Lord Hoffmann to be inappropriate in the arbitration context. It is indeed generally thought that arbitration could be used to circumvent the protection of individual rights offered by national law. Arbitration's perceived deficits in this area has led one politician in the UK to introduce a private members bill in Parliament to cure this alleged defect⁹. But, even without such legislation, there is the indirect opportunity for fundamental human rights to play a part in arbitration bearing in mind the fact that it is a Court which enforces an arbitral award and interprets arbitration legislation.
12. The importance of public policy in this connection is recognised in the New York Convention¹⁰, which permits refusal of recognition or enforcement of an award if the court considers that "*the recognition or enforcement of the award would be contrary to the public policy of that country.*" The NY Convention's *travaux préparatoires* view public policy as equivalent to "*fundamental notions and principles of justice*". The public policy exception under the NY Convention is substantially incorporated in section 103(3) of the UK's Arbitration Act 1996. This notion of public interest or policy is necessarily open-textured. One must balance the respect for party autonomy with the wider need to respect principles of human rights recognised internationally. Such considerations would prevent the enforcement of awards which would, as the Singapore Court of Appeal put it in one case, "*shock the conscience ... clearly be injurious to the public good, or ... violate the forum's most basic notion of morality and justice.*"¹¹

⁹ Arbitration and Mediation Services (Equality) Bill

¹⁰ Article V(2)(b)

¹¹ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR 197; [2006] SGCA 41

13. In England enforcement of a foreign arbitral award will not be permitted where the foreign arbitral or award somehow violates English principles of “*natural justice*”.¹² While such a carve-out for enforcement is essential, such an exception must be circumscribed carefully.

One Hong Kong judge astutely put the matter thus:

“Public policy is often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which have been (or ought to have been) determined in an arbitration.

*The public policy ground is thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory. The court must be vigilant that the public policy objection is not abused in order to obtain for the losing party a second chance at arguing a case. To allow that would be to undermine the efficacy of the parties’ agreement to pursue arbitration.”*¹³

14. Accordingly, when enforcing foreign arbitral awards any public policy exception should be construed narrowly. In the US such a narrow reading had been given to the public policy defence by the Court of Appeals for the Second Circuit which said that enforcement of foreign arbitral awards might be denied on the basis of that defence only where enforcement “*would violate the forum state’s most basic notions of morality and justice*”.¹⁴ Likewise, the English Court of Appeal said that there would have to be some element of illegality, or the enforcement of the award would have to be injurious to the public good or, possibly, offensive to the ordinary reasonable member of the public on whose behalf the powers of the state are exercised.¹⁵ A similar approach can be seen in Ontario¹⁶ and New Zealand.¹⁷

¹² *Adams v Cape Industries* [1990] Ch 433; *Cukurova Holding AS v Sonera Holding BV* [2014] UKPC 14.

¹³ *A v R* [2009] HKCFI 342 per Reyes J.

¹⁴ *Parsons & Whittemore Overseas Co Inc v Société Générale De L’Industrie Du Papier (RAKTA)* [1974] USCA2 836; 508 F 2d 969 (1974)

¹⁵ *Deutsche Schachtbau* [1990] 1 AC 295 at 316

¹⁶ *Boardwalk Regency Corp v Maalouf* (1999) 6 OR (3d) 737

¹⁷ *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] NZCA 17

15. An example of this exception lies in the Swiss Supreme Court's refusal, on the basis of a violation of substantive public policy, to enforce a disciplinary decision by CAS, the Court of Arbitration for Sport, against a Brazilian footballer, which amounted to a *de facto* open-ended ban on playing¹⁸. The Swiss Court held that the ban was a breach of a "fundamental" principle which, according to the prevailing view in Switzerland, should form part of *any* legal order. In another (Austrian) case, an award of interest at 107% per annum¹⁹ was held to be contrary to public policy. Indeed, in Saudi Arabia, any form of interest (called *riba*) is strictly prohibited; this prohibition is viewed as a part of public policy. As such, it is suggested that foreign awards providing for the payment of interest cannot be enforced.²⁰

16. The House of Lords decision in *Kuwait Airways v Iraqi Airways (No. 6)*²¹ contains an enlightening discussion of breaches of fundamental human rights which would cause an English court to conclude that enforcement of an award would be contrary to international public policy, and suggests that any such breach must be "grave". Despite this, it is easy to think of examples of human rights principles which may prove a bar to enforcement: the prohibition on piracy, on torture, on terrorism, on genocide, on slavery, on drugs or weapon trafficking.²² So, while the public policy exception is a defence of last resort, it is also a guarantee of fundamental rules of fair play, rules which are increasingly recognised on a transnational level.

17. It is worth pointing out that arbitration is totally dependent on the courts, and therefore on access to justice and the rule of law, for its efficacy. Without an effective court system to

¹⁸ *Matuzalem v FC Shakhtar Donetsk*

¹⁹ *OGH*, (2005) (Supreme Court, Austria).

²⁰ Naif Al-Shareef, *Enforcement of Foreign Arbitral awards in Saudi Arabia: Grounds for Refusal under Article V of the New York Convention* (Dundee: University of Dundee, 2000)

²¹ [2002] UKHL 19.

²² Adeline Chong 'Transnational public policy in civil and commercial matters' (2012) LQR 88

enforce their procedural directions and awards, arbitrators would be toothless. In other words, the success of arbitration rests entirely on the rule of law. And it is therefore obviously sensible for arbitration to return the compliment and do its not insignificant best to uphold and further the rule of law.

18. The discussion so far, based as it is on enforcement by the courts, may be seen in due course to have been too timid. The question whether human rights should be applicable between parties to arbitrations as part of the mandatory applicable law was the subject of a report of the International Law Association in 2002.²³ They noted that “*A consensus as to what constitutes a fundamental principle might be evidenced by international conventions*” giving the example of the European Convention.²⁴ The suggestion was that, once such a consensus had been achieved, it could then be enshrined in a convention or the like, which would then apply to arbitration.

19. Whether arbitration should take such a momentous step involves consideration of practicality as well as principle. I would not presume to discuss the notion’s practicality – particularly in the present highly experienced and expert company – save to acknowledge that certain aspects of what for instance Europeans regard as fundamental human rights are not apparently universal – consider eg the European and US/Chinese attitudes to capital punishment. But, so far as principle is concerned, I would make two points about the notion. First, if fundamental rights were to become part of arbitration’s mandatory law, it would reinforce the idea that fundamental rights are really universal, a view which many public and human rights lawyers have or at least wish for. Secondly, it would represent a real step up the national and international constitutional orders for arbitration: it would emphasise that arbitration really was up there with litigation, not merely as a dispute resolution system, but

²³ ILA ‘Final Report On Public Policy As A Bar To Enforcement Of International Arbitral Awards’ (2002)

²⁴ Ibid, [42].

as part of the rule of law in the wide, Bingham, sense.

(VII) Equal Treatment

20. What I have said about fundamental rights largely applies to equal treatment. In the UK, discrimination is precluded by article 14 of the European Convention and, more specifically, by the Equality Act 2010. Racial discrimination lies at the heart of the leading English case in this area, *Oppenheimer v Cattermole*²⁵, decided over forty years ago. Lord Cross declared Nazi law which stripped German Jews of their nationality constituted “*so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.*” It would be surprising if a different approach to such a fundamental human right were taken in the arbitration context. It is, to put it at its lowest, conceivable that the courts of England would refuse to enforce an arbitral award based on fundamentally racist principles as it refused to apply a foreign law in *Oppenheimer*. It is not a very great leap to see a similar principle applying to flagrant discrimination on the basis of gender or sexual orientation.

21. An interesting arbitration-related case on discrimination is a 2011 decision of the UK Supreme Court, *Jivraj v Hashwani*²⁶. In that case, a commercial contract between two Ismailis provided that any dispute was to be determined by three arbitrators, each whom were to be respected Ismailis. The English Court of Appeal held the clause void under EU-based anti-discrimination legislation²⁷. The Supreme Court reversed the decision on the basis that the regulations only applied to people who were “employed”, and, despite the wide definition of

²⁵ [1976] AC 249

²⁶ *Jivraj v Hashwani* [2011] UKSC 40, [2011] 1 WLR 1872

²⁷ Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), pursuant to Council Framework Directive 2000/78/EC of 27 November 2000 (OJ 2000 L303)

the word, it did not apply to an arbitrator. In that connection, arbitration is very different from judging when it comes to fundamental human rights, but that is because parties can choose their arbitrators but not their judges, just as they can agree their arbitral procedures, but are bound by the rules of court.

(III) Fair adjudicative procedure

22. The most obvious fundamental right engaged by arbitration is the right to a fair trial guaranteed by, for example, article 6 of European Convention and enshrined in article 10 of the Universal Declaration of Human Rights. Of course, one of the most important limbs of a fair trial is open justice, whereas arbitration almost always takes place in a private context. Open justice is essential because judges must be publicly accountable and independent of all outside influence, and justice must famously be seen to be done. Further, to invoke Justice Brandeis's dictum, "*sunlight is said to be the best of disinfectants*"²⁸. However, as I said in a recent case, "*sunlight is the best disinfectant, but it can also burn, and [in the circumstances of that case] it seems to me that the risk of burning outweighs the benefit of disinfectant*"²⁹. I suppose that it may be that too much openness will kill off arbitration, but unnecessary privacy is a real concern. This is a difficulty with arbitration as a dispute resolution process recently identified by Geoffrey Ma.³⁰ There have been intermittent calls for the publication of arbitral awards for decades.

23. The credibility of arbitration, and therefore the self-interest of all those involved in arbitration, seems to me to point firmly in favour of more transparency. First, particularly

²⁸ *Other People's Money—and How Bankers Use It* (1914).

²⁹ *Sugar v The British Broadcasting Commission* [2010] EWCA Civ 715, [2010] 1 WLR 2278, para 48

³⁰ See Douglas Thomson, 'Hong Kong Chief Justice calls on arbitrators to build public confidence', 15 October 2014, *Global Arbitration Review*.

these days, lack of openness is viewed with suspicion and concern by most sectors of society. Secondly, there is a real risk that, if there is no transparency, many arbitrators will feel relatively free to do what they want rather than to give effect to the law. This is a temptation which is particularly great now that it is so difficult to appeal an arbitration award. I would suggest that the four strongest external pressures on a judge to get the law right arise from the facts that (i) his decisions will be read, and therefore open to criticism, by anyone who wants to see them, and (ii) any decision which he makes can be appealed. The absence of (i) and the tiny risk of (ii) in the case of arbitrations could become a bit of a worry.

24. Public availability of awards is an important point for another reason. One of the disadvantages of an increase in awards and a concomitant decrease in judgments, particularly in the common law world, is that the law does not develop, that it becomes ossified. The sting from this criticism can easily be drawn if excellent awards by excellent arbitrators are published. Indeed, I understand that this is beginning to happen. Thus, a successful, if somewhat limited example is to be found in the publication of awards in the Yearbook of Commercial Arbitration.³¹ And many international investor dispute arbitrations are not merely the subject of published awards, but are routinely heard in public. Indeed, the increased involvement of states in arbitrations is another factor against privacy: it raises serious questions of accountability if large amounts of public money are to become payable pursuant to awards made by tribunals which hear evidence and arguments in secret and even whose decisions may be secret.

25. Of course, as with other aspects of arbitration, the consent of the parties has an important

³¹ See Mistelis 'Too much information', Kluwer Arbitration Blog (2015)

role to play, but the arbitration community cannot be afforded to be complacent about calls for greater openness. After all, we must ensure public confidence in the ability, integrity and independence of the arbitrators themselves.

26. By far the most common reason for refusing to enforce awards relate to the procedural fairness of arbitral proceedings themselves. Procedural unfairness comes in so many shapes and sizes that it is difficult to say much about it, but there are some rules for arbitrators, in addition to the common law rules of natural justice, *nemo iudex in causa sua* (nobody should be a judge in his own cause) and *audi alterem partem* (both parties have the right to be heard, and in each other's presence). Examples of those other rules include (i) don't depart from the terms of your appointment; (ii) don't depart from your directions; (iii) don't go outside the arguments or the evidence; (iv) listen to the arguments and the evidence, (v) don't get cross; (vi) don't send an email to the parties without letting it lie there for ten minutes. Apart from procedural unfairness, an award without reasons may be a violation of public policy.

27. One of the most fundamental and universally recognised rights is, as I have said, *audi alterem partem*, the right to be heard, and a violation of this right will render an award unenforceable as a matter of public policy. For example, a Dutch court refused to enforce an arbitration agreement in circumstances where one of the parties had made a written submission to the arbitrators and the other party was unaware of its existence: the subsequent award was held to be a serious violation of rules of fairness, and as such a violation of public policy.³²

³² Numerous other examples are given in Otto & Elwan, 'Article V(2)' in Kronke, Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) pp. 345 - 414

(VI) Exercising powers reasonably, in good faith, and for appropriate purposes

28. This “strand” of the rule of law reflects the traditional grounds for judicial review. In the context of arbitration it encompasses the scope of the arbitrators’ jurisdiction. It might be argued that arbitration faces difficulties in this area; after all, it is intrinsically difficult for courts to review fully the decisions of arbitrators. This is of course by design. Moreover, the success of arbitration as a dispute resolution mechanism depends to a great extent on the integrity and reputation of its arbitrators. As a consequence arbitrators are subject to a number of important duties and these duties are broadly the same worldwide.
29. Centrally, arbitrators have a duty to act fairly, to treat the parties before them equally, and give each party an opportunity to put its case. This is enshrined, for example, in Article 18 of the UNCITRAL Model Law, along with every modern arbitration statute. This has been termed “*the Magna Carta of Arbitration*”³³. (As I implied earlier, there’s no escaping Magna Carta this year.) The arbitrator’s duties include a duty to disclose conflicts of interest. This is an extension of the *nemo iudex* principle, and it often forms the basis of the “black art” of tactical bias challenges. Examples include the perceived conflict of interest where the arbitrator failed to disclose that his law firm acted for the parent company of one of the parties.³⁴ Similarly, a Swiss court held that in circumstances where the sole arbitrator had acted for one of the parties before being appointed arbitrator, this violated general notions of fairness and public policy.
30. One controversial example is the challenge to (self-employed) English barristers from the same chambers as the arbitrator on the grounds of bias. Rix J in *Laker Airways v FLS*

³³ Lew, Mistelis, Kroll, *Comparative International Commercial Arbitration*

³⁴ *HSMV Corp. v. ADI Ltd*, 72 F. Supp. 2d 1122

Aerospace ruled this out as ground for removing an arbitrator. However in *Hrvatska v Slovenia* (ICSID ARB/05/24), the claimant objected to the respondent briefing a London barrister who was of the same chambers as the president of the tribunal. The Arbitral tribunal held that, while the ICSID Convention had no express power to exclude counsel, and while parties should be able to use representatives of their own choice, there was an overriding principle that tribunal should be properly constituted such that a party cannot be allowed to alter their legal team after a tribunal has been constituted in such a way as to “*imperil the tribunal's status or legitimacy*”. Accordingly, in order to ensure the integrity of the proceedings, the tribunal disqualified the barrister from the respondent's legal team. Support for this conclusion was found in the Background Information on the IBA Guidelines, which noted that those unfamiliar with English barristers chambers might perceive that they were like a law firm. However, in a subsequent ICSID case, *Rompotrol v Romania*, the tribunal distinguished *Hrvatska* on the facts. Professor Waincymer has identified these case as an example where two “*fundamental rights of arbitration*” come into conflict, namely the right to counsel of choice and the right to an (apparently) independent and impartial tribunal.³⁵ Incidentally, on a similar sort of point, the English Court of Appeal has said that close relationships between the judiciary and the legal profession “*promote an atmosphere which is totally inimical to the existence of bias*”,³⁶ although there are certainly circumstances where barristers from the same chambers appearing can give rise to problems.³⁷

31. One of the factors which will play an important part in deciding upon the arbitrator will be their expertise, and this itself can generate tensions which would never be present in a judicial process. A US court highlighted this tension when it looked at the competing

³⁵ Waincymer ‘Reconciling Conflicting Rights in International Arbitration: The Right to Choice of Counsel and the Right to an Independent and Impartial Tribunal’ (2010) *Arbitration International* 597.

³⁶ *Taylor v Lawrence* [2002] EWCA Civ 90

³⁷ *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242 is a case in point.

interests inherent in the use of arbitration:

*“On the one hand, parties agree to arbitrate precisely because they prefer a tribunal with expertise regarding the particular subject matter of their dispute. ... Familiarity with a discipline often comes at the expense of complete impartiality. Some commercial fields are quite narrow, and a given expert may be expected to have formed strong views on certain topics, published articles in the field and so forth. Moreover, specific areas tend to breed tightly knit professional communities. Key members are known to one another, and in fact may work with, or for, one another, from time to time.”*³⁸

32. Of course, at the heart of English public law is the question of whether a decision maker has acted within his power. This finds its mirror in arbitration in the question of the arbitral tribunal’s ability to decide upon its own jurisdiction and what is inelegantly, but intriguingly referred to as “*kompetenz-kompetenz*”. The principle has been described as “*one of the most basic principles in international commercial arbitration*”³⁹ and has been described as “*one of the reasons why arbitration has flourished so greatly over the past decades*”.⁴⁰ It is appropriate to mention it in the present context as it is a strong example of the scope of the responsibility placed in the hands of the arbitrator, a responsibility which emphasises how important it is that he acts fairly and impartially.

33. It strikes me that the principle of *kompetenz-kompetenz* places a considerable responsibility on arbitrators in rule of law terms. That is not to say that the application of these principles is uniform. Some national legal systems provide for interim judicial consideration of

³⁸ *Morelite Construction Corporation v New York City District Council Carpenters Benefit Funds* 748 F.2d 83 (2d Cir., 1984), cited in Timmer ‘The quality, independence and impartiality of the arbitrator in international commercial arbitration’ (2012) *Arbitration* 348, 349

³⁹ *Final Award in ICC Case Nos. 6515 and 6516*, XXIVa Y.B. Comm. Arb. 80 (1999)

⁴⁰ Binder *International Commercial Arbitration and conciliation in UNCTRAL Model Law Jurisdictions* (2009), 4-006.

jurisdictional issues (eg England, the US, Sweden), and some do not (eg France, India).⁴¹

Moreover, in England and the US, agreements granting arbitrators authority finally to decide jurisdictional disputes without the possibility of judicial review will be given effect, rendering the exclusion of the courts almost total.⁴²

34. In Hong Kong, it was proposed that new Arbitration Ordinance adopt article 16 of UNCITRAL Model Law. Some responses in the Consultation to this provision (which became s.34 of the Ordinance), suggested that “*the [Ordinance] should provide for an appeal from an arbitrator’s negative ruling on jurisdiction*” and that “*a decision by an arbitral tribunal to the effect that it does not have jurisdiction should also be capable of an appeal.*” The consultees considered it wrong that a party who wishes to arbitrate in circumstances where an arbitral tribunal has erroneously decided that there is no jurisdiction should be left without access to its dispute resolution mechanism of choice. The Working Group responded to this argument in clear terms: “*there should be finality in arbitration. It would not be appropriate to force an arbitral tribunal to conduct an arbitration when it ruled that it had no jurisdiction.*”⁴³ I must confess to some difficulty with this view: it not infrequently happens that a judge declines jurisdiction and is then ordered by the Court of Appeal to continue with the case. In a recent English example⁴⁴ a Commercial Court Judge rather honourably held that he would be perceived to be biased and so recused himself: the Court of Appeal disagreed and said he should continue with the case. However, I accept that there is a sort of logic in saying that if the tribunal the parties agreed on decides that it is not competent, then that is a decision which party autonomy suggests should not be interfered with. However, as with most *kompetenz-kompetenz* arguments, this

⁴¹ This is discussed extensively in Born, *International Commercial Arbitration* (2nd ed.), 7.01 et seq.

⁴² *Ibid.*

⁴³ Summary of submissions and comments on the Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill (LC Paper No. CB(2)2469/08-09(03)): <http://www.legco.gov.hk/yr08-09/english/bc/bc59/papers/bc590916cb2-2469-3-e.pdf>

⁴⁴ *Otkritie International Investment Management v Urumov* [2014] EWCA Civ 1315

one has an element of circularity about it.

35. This tension arising from *kompetenz-kompetenz* is most problematic where there is a challenge to the existence or validity of the arbitration agreement. This is because in other circumstances the arbitral tribunal's authority to decide on its own jurisdiction derives from the agreement of the parties. As Born observes "*it is impossible to rest the exclusion of the national court authority on an 'agreement' to arbitrate whose existence or validity is challenged and which may ultimately prove to be non-existent or invalid.*" This would be to allow "negative" *kompetenz-kompetenz* to lift itself up by its own bootstraps.
36. In the case of UNCITRAL Model Law, a very large number of national courts have held that where the existence, validity or legality of the arbitration agreement itself is the subject of an interlocutory challenge, the court will permit full (rather than *prima facie*) judicial consideration of jurisdiction. According to Gary Born, whose expertise on the topic is formidable, these include Germany, New Zealand, Australia, England, Austria, Spain, Croatia, Mexico, Kenya and Uganda. Hong Kong authorities are divided on this point. For example in *Pacific Crown Engineering Ltd v Hyundai*, the Hong Kong Court of Appeal held that "*the proper test is [...] is there a prima facie or plainly arguable case that the parties were bound by an arbitration clause*". This standard of review is rationalised on the basis that the court should not usurp the function of the arbitrator.⁴⁵

(I & II) Accessible, clear, intelligible, predictable; rules of law not discretion

⁴⁵ *Private Co "Triple V" Inc v Start* [1995] 3 HKC 129, 132.

37. The predictability of arbitration on the international stage is one of its central merits as a dispute resolution process. Arbitration famously favours finality. As the proposers of the Arbitration Bill that became the UK Arbitration Act 1996 put it, there is a tension between “curtail[ing] the ability of the court to intervene in that private arbitral process except where the assistance of the court is clearly necessary to move the arbitration forward” and “uphold[ing] the integrity of the arbitral process by allowing access to courts where there has been or is likely to be a case of manifest injustice.”⁴⁶ Of course, as the same speech make clear, the clarity and accessibility is a matter of competition between states providing for arbitration under their domestic law:

“Law is not just for lawyers. If users are to be attracted to arbitration, they must be able to establish with the minimum of effort what the law entails. ... The business of arbitration is highly internationally mobile. A number of other jurisdictions have been trying to make their legislation more accessible, and we cannot afford to be left behind.”

38. This international ‘competition’ for a clear and accessible law of arbitration promotes high standards for the law globally. Take Hong Kong’s (relatively) recently reconfigured Arbitration Ordinance as an example, based on UNCITRAL Model Law (and it should be recorded that Hong Kong was one of the first jurisdictions to adopt the model law). The stated purpose of this new law was to make arbitration more user-friendly and to operate an arbitration regime which accords with accepted international practices.⁴⁷ This was for the express purpose of promoting Hong Kong as a centre for dispute resolution and attracting business parties to Hong Kong.⁴⁸

⁴⁶ Hansard, HC Vol.276, cols.1308-20 (May 2, 1996)

⁴⁷ Report of the Bills Committee on Arbitration Bill (LC Paper No. CB(2)83/10-11) <http://www.legco.gov.hk/yr10-11/english/hc/papers/hc1022cb2-83-e.pdf>

⁴⁸ Ibid.

39. A melancholy story in connection with the predictability of arbitration in an international context is to be found in *Dallah*⁴⁹. In that case, a contract had been concluded between a Saudi company, Dallah, and a Pakistani trust, established by an ordinance promulgated by the Pakistani Government. The Government of Pakistan then decided to put an end to the contract, and Dallah started an ICC arbitration in Paris against the Government of Pakistan. The Government of Pakistan denied the tribunal's jurisdiction on the basis that it was not a party to the contract and had not consented to the arbitration agreement. The UK Supreme Court determined that French law governed the arbitration agreement and applied French law to find that the parties lacked a subjective intention that the Government would be bound. So far so good. However, a few months later, the *Cour de Cassation* in Paris reached the opposite conclusion. This diametric difference in England and France has been attributed to the radically different legal cultures in England and France,⁵⁰ notwithstanding that both national courts were applying French law.

40. Despite such difficulties, I would cautiously suggest that in the international commercial context and in many national and inter-state contexts, arbitration succeeds in its object of providing a certain and dispute resolution mechanism which can be enforced around the world. The fact the different centres for arbitration are in active competition for "custom" serves to ensure best standards both nationally and internationally, and this is to the benefit of the rule of law.

(VIII) Compliance with international law

⁴⁹ *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763

⁵⁰ E.g. in Mayer, *op cit.*

41. This is a success story, and, like the newspapers, I don't want to spend too much time on undiluted good news. It is often remarked that the NY Convention is the most successful convention in the world in terms of adoption. Its achievements are particularly notable when compared with attempts in the last century to establish a global convention on the recognition and enforcement of foreign judgments. While the recently amended Brussels I convention whereby EU national courts recognise each other's judgments has been largely successful it has no global counterpart.

(V) Disputes must be resolvable without prohibitive cost or inordinate delay

42. This brings me to my final proposition, and one which I hope, is self-evidently present in the process of arbitration. To some extent this principle is *expanded* in the context of arbitration, involving as it does a high degree of party autonomy, and the very strong emphasis placed upon enforceability in the international context. In his 1622 tract on the law of commerce, Gerard de Malynes wrote that when merchants choose to arbitrate it is "voluntary and in their own power, and therefore called *Arbitrium*, or Free will, whence the name Arbitrator is derived".⁵¹ (In the same passage he details how the parties would choose arbitrators by numbering the list of suggestions and rolling dice). At the same time, this predictability works towards enforcing a global minimum standard of fair play.

Conclusion

43. In conclusion, it seems to me that arbitration is not simply compatible with the key features of the rule of law, but that it has an increasingly important role to play in upholding those

⁵¹ *Lex Mercatoria*, iii.305

key features, both nationally and internationally. A number of factors are working together to elevate arbitrators to a quasi-judicial status. Like judges, they have a duty to act judicially, and this very important duty is not merely owed to the parties; it is also, I would suggest, owed to the public. The 13,000 members of the Institute uphold the vital standards of independence and competence in 120 countries, and give effect to contractual rights in accordance with substantive and procedural legal principle, thereby helping to ensure the rule of law.

44. I referred earlier to judicial independence, and, while I was preparing this talk, it was reported that the Supreme Court of the PRC had questioned the western notion of “*judicial independence*”.⁵² I would not presume to say what is right for the Peoples’ Republic outside the HKAR. But from the international commercial perspective and for the two jurisdictions in which I have the privilege of serving as a Judge, the UK and HKAR, the independence of the judiciary is of fundamental importance. Indeed, I would not serve as Judge in a system which did not enjoy full and unqualified judicial independence, as it is a vital ingredient in the rule of law itself⁵³. I note that judicial independence has been recognised by the UN General Assembly since 1985.⁵⁴ Provided that arbitrators, like Judges, perform, and are seen to perform, their vital role honestly, competently, expeditiously, and above all independently and in accordance with the law, confidence in the rule of law around the world will be developed, established and maintained.

⁵² *China’s top court rejects judicial independence as ‘erroneous thought’*, 26 February 2015, *The Guardian*: <http://www.theguardian.com/world/2015/feb/26/chinas-top-court-rejects-judicial-independence-as-erroneous-thought> .

⁵³ This view is held for example by Professor Raz, *Ethics in the Public Domain, Essays on the Morality of Law and Politics* (1994).

⁵⁴ ‘Basic Principles on the Independence of the Judiciary’ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

45. As has often been observed, arbitration in one form or another has a long history; a very early example can be found in Book XVIII of Homer's *Iliad*⁵⁵, albeit that it is extraordinarily difficult to work out what was happening (even in the English translation), and in later classical sources. My esteemed friend and doyen of arbitration practice and history, Derek Roebuck, in his magisterial and fascinating books, has demonstrated what a rich, proud and substantial history arbitration has enjoyed internationally and in the UK. This reflects the fundamental importance of arbitration as a form of dispute resolution; with a long pedigree, arbitration continues to move from strength to strength, and in so doing, promotes and upholds the rule of law globally.

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Hong Kong, 20 March 2015

⁵⁵ *The Iliad* XVIII. 497-508 is cited in this connection.