Must Arbitrators Apply the Law?

Sir Bernard Eder*

Arbitral tribunals; Arbitration agreements; Arbitration appeals; Arbitrators' powers and duties; Comparative law; Finality; International arbitration; Jurisdiction; Precedent; Right of appeal

Abstract

The following is an amended version of a speech given in November 2023 at The International Congress of Maritime Arbitrators XXII (Dubai). It explores questions as to whether arbitrators must apply the law, what is meant by "must", what constitutes the "law", the applicability of precedent in international arbitration and, in particular, whether an arbitral tribunal is "bound" to follow decisions of the Courts. It develops themes considered previously by Andrew Baker (now Sir Andrew Baker) in an earlier paper delivered at The International Congress of Maritime Arbitrators XVIII (Vancouver), a copy of which is attached as an Appendix.

Introduction

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.

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.

So, I turn to my topic today: *must arbitrators apply the law*?

The authorities

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 Ltd v Roth Schmidt & Co*:

* International Arbitrator.

> "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]

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

> "There must be no Alsatia where the King 's Writ does not run…."[2]

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]

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.

The question bubbles to the surface from time to time. *Mustill & Boyd on Commercial Arbitration*[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. 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]

More recently, the question was considered in a brilliant paper by Andrew Baker (now Andrew Baker J sitting as a judge in the Commercial Court in London) at a previous ICMA Conference in Vancouver in 2012.[6] Andrew Baker J has kindly allowed his paper to be published as an Appendix. His conclusion was that arbitrators are not bound 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.

My interest in this question has recently been sparked by two particular things. 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 United Kingdom (UK), United States (US) and Brazilian Law and Practice as to whether arbitrators are bound by previous decisions of the court.

[1] *Czarnikow Ltd v Roth Schmidt & Co* [1922] 2 K.B. 478; (1922) 12 Ll. L. Rep. 195 CA.
[2] *Czarnikow Ltd v Roth Schmidt & Co* [1922] 2 K.B. 478 at 488.
[3] B.J. Cornick; Q.L.R.C. No.4 at 12; (1982) 12 Q.L.S.J. 219.
[4] M.J. Mustill and S.C. Boyd, *Commercial Arbitration*, 2nd edn (LexisNexis Butterworths, 1989), Ch.37.
[5] Michael Marks Cohen, "Maritime arbitrators are not required to apply stare decisis to decisions of trial courts" (2007) 13 J.M.L. 258.
[6] Andrew W. Baker QC, *Arbitrators under English Law: Inferior Tribunals or a Law unto Themselves* (March 2012).
[7] Guilherme Rizzo Amaral, *Judicial Precedent and Arbitration: Are Arbitrators Bound by Judicial Precedent? A Comparative Study of UK, US and Brazilian Law & Practice*, 2nd edn (Wildy, Simmonds & Hill Publishing, 2018).

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 from the 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?

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."

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

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.

The significance of the issue

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.

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]

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.

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

[8] Mustill and Boyd, *Commercial Arbitration*, 2nd edn (1989), p.70.

of an error of 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]

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.[11]

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.

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? Thankfully, this problem does not happen often.

But take, for example, *Damon Compania Naviera SA v Hapag-Lloyd International SA (The Blankenstein)*[12] 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 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. Or take *Chiswell Shipping and Liberian Jaguar Transports Inc v National Iranian Tanker Co (The World Symphony and World Renown)*,[13] 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. 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.

Or, more recently, take *Kuwait Rocks Co v AMN Bulk Carriers Inc (The Astra)*,[14] where the court held that the obligation to make punctual payment of hire in the

[9] See, for example, *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724; [1981] 3 W.L.R. 292 HL ,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 *Compagnie Generale Maritime v Diakan Spirit SA (The Ymnos) (No.2)* [1982] 2 Lloyd's Rep. 574; [1982] Com. L.R. 228 QBD, 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 *Finelvet AG v Vinava Shipping Co Ltd (The Chrysalis)* [1983] 1 W.L.R. 1469; [1983] 1 Lloyd's Rep. 503 QBD; *Benhaim (UK) Ltd v Davies Middleton & Davies Ltd (No.2)* [2005] EWHC 1370 (TCC); 102 Con. L.R. 1.

[10] See, for example, *Petroleo Brasiliero SA v Kriti Akti Shipping Co* [2004] EWCA Civ 116; [2004] 1 Lloyd's Rep. 712 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] Lord Thomas, *Developing Commercial Law Through the Courts: Rebalancing the Relationship between the Courts and Arbitration*, the BAILLI Lecture (9 March 2016), *https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf*.

[12] *Damon Compania Naviera SA v Hapag-Lloyd International SA (The Blankenstein)* [1985] 1 W.L.R. 435; [1985] 1 Lloyd's Rep. 93 CA.

[13] *Chiswell Shipping and Liberian Jaguar Transports Inc v National Iranian Tanker Co (The World Symphony and World Renown* [1992] 2 Lloyd's Rep. 115 CA.

[14] *Kuwait Rocks Co v AMN Bulk Carriers Inc (The Astra)* [2013] EWHC 865 (Comm); [2013] 2 Lloyd's Rep. 69.

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 SA v Grand China Logistics Holding (Group) Ltd*[15] and reversed by the Court of Appeal[16] 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*.

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 *K Line PTE Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss)*,[17] 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*. This was reversed by the Court of Appeal,[18] the court holding that, in the absence of any contrary indication 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?

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.

The answer?

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.

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

[15] *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm); [2015] 2 Lloyd's Rep. 407.

[16] *Spar Shipping SA v Grand China Logistics Holding (Group) Ltd* [2016] EWCA Civ 982; [2017] Bus. L.R. 663.

[17] *K Line PTE Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss)* [2020] EWHC 2373 (Comm); [2021] Bus. L.R. 213.

[18] *K Line PTE Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss)* [2021] EWCA Civ 1712; [2022] Bus. L.R. 67.

in large part on the UNCITRAL Model Law on International Commercial Arbitration.[19] My understanding[20] is that the UAE does not have a system of precedent, the default position being that an arbitrator would not be bound by UAE judgments. While UAE law does require judges and arbitrators to consider and abide by "custom", the 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,[21] 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.[22] 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.

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.[23] As is well known, art.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 art.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.

In relation to the Model Law, the position was summarised by Sir John 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 Corp*:

> "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 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."[24]

In such circumstances, it seems to me quite impossible to say 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

[19] UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (Vienna: United Nations, 2008), *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf*.

[20] I am grateful to Mohammed Abbas of Hadef & Partners for his input—although any errors are my own.

[21] 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".

[22] *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).

[23] United Nations, "Status: UNCITRAL Model Law on International Commercial Arbitration" (1985), with amendments as adopted in 2006, *https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status*.

[24] *Betamax Ltd v State Trading Corp* [2021] UKPC 14; [2021] Bus. L.R. 1253 at [48].

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.[25]

The position in the US is, of course, different because it has not adopted the Model Law—although it has been adopted at least in part in some states.[26] As discussed in considerable detail in Mr Amaral's book,[27] 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[28] 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—or at least should be—that an award will be set aside where the arbitrators consciously disregard binding precedent.[29]

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.

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.

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

[25] See postscript.

[26] Including California and Florida.

[27] Amaral, *Judicial Precedent and Arbitration: Are Arbitrators Bound by Judicial Precedent*, 2nd edn (2018), Ch.2B, pp.93–111.

[28] *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).

[29] Amaral, *Judicial Precedent and Arbitration: Are Arbitrators Bound by Judicial Precedent*, 2nd edn (2018), Pt 2C, pp.134–144.

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 which…may contain a valid exclusion agreement."[30]

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*.

The main argument in favour of an arbitrator's duty to apply the law is that it promotes certainty and predictability of result.[31] 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. 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.[32]

As referred to in *Mustill & Boyd*[33] 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[34]. But if such duty is said to exist, the main question is: what is the nature and source of such obligation?

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

[30] Mustill and Boyd, *Commercial Arbitration*, 2nd edn (1989), pp.70–71.

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

[32] 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 art.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".

[33] Mustill and Boyd, *Commercial Arbitration*, 2nd edn (1989), pp.69–70. See, in particular, the cases cited at fn.6 and also *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft mbH & Co KG* [2006] EWHC 483 (Comm); [2006] 2 Lloyd's Rep. 66 as to whether the previous decision of the court in *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd (The Imvros)* [1999] 1 Lloyd's Rep. 848; [1999] C.L.C. 928 QBD was "binding precedent".

[34] Mustill and Boyd, *Commercial Arbitration*, 2nd edn (1989), 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.

at least deliberately refuses to apply the law agreed by the parties acts outside his/her mandate and therefore outwith his/her jurisdiction.

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.[35] 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.[36] 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 the second edition *Mustill & Boyd* in 1989; and, so far as I am aware, nothing has occurred since that date to suggest that the position might be otherwise.

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 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.

Putting on one side the mechanism for an appeal under s.69 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?

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 s.34 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.

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.[37] However, so far as I am

[35] Mustill and Boyd, *Commercial Arbitration*, 2nd edn (1989), p.641.

[36] *K/S A/S Bill Biakh v Hyundai Corp* [1988] 1 Lloyd's Rep. 187 QBD; *Bank Mellat v GAA Development and Construction Co Ltd* [1988] 2 Lloyd's Rep. 44 QBD at 52–53.

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

aware, there 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.

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.[38]

So far as the courts are concerned, the relevant principles were summarised by David Foxton QC (sitting as a deputy High Court judge and now Foxton J) in *Coral Reef Ltd v Silverboard Enterprises Ltd* 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.
>
> 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.
>
> 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).
>
> 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."[39]

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".[40]

[38] See, generally, Charles W. Collier, "Precedent and legal authority: a critical history" (1988) Wis. L. Rev. 771; David Vong, *Binding precedent and English judicial law-making*, *https://www.law.kuleuven.be/apps/jura/public/art/21n3/vong.pdf*; Lord Carnworth, *Judicial Precedent—Taming the Common Law*, NMLR Annual Lecture Series (2012); Sebastian Lewis, "Precedent and the rule of law" (2021) 41(4) *Oxford Journal of Legal Studies* 873.

[39] *Coral Reef Ltd v Silverboard Enterprises Ltd* [2016] EWHC 3844 (Ch); [2018] 4 W.L.R. 104.

[40] The passage is quoted in the Judgment of David Foxton KC at para.54.

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[41] 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.

In this context, it is potentially relevant to consider the jurisprudential theory that courts simply declare what the law is—and always has been.[42] 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".[43] 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 but to determine the dispute in accordance with what the arbitrator *himself/herself* considers is English law?

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.[44] 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.

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?

[41] Baker, *Arbitrators under English Law: Inferior Tribunals or a Law unto Themselves* (2012), below, p.424.

[42] See, for example, Jack Beatson, *The Rule of Law and the Separation of Powers, Hart's Key Ideas in Law Series* (Hart Publishing, 2021), in particular at pp.41–49.

[43] *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39; [2019] A.C. 929 at [63].

[44] Baker, *Arbitrators under English Law: Inferior Tribunals or a Law unto Themselves* (2012), below, pp.428–429, referring to *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349; [1998] 3 W.L.R. 1095 HL.

Conclusion

In summary, my conclusions[45] are as follows:

1. 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 seem that there is no remedy for breach of such duty.
2. In the US 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.
3. 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.

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.

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

[45] See postscript.

by any authority and none of my critics was able to identify any case, textbook or article which might lend support to such views.

Appendix

Arbitrators under English law: Inferior Tribunals or a Law unto Themselves?[46]

Andrew W Baker QC[47]

Introduction

Do we say, and if so what does it mean to say, in an English arbitration,[48] that the arbitrators[49] are bound to decide the dispute in accordance with the law? What should they do, on a point governed by English law, if an English judicial precedent is cited to them that they conclude was wrongly decided? What should a party do when there is English case law against their case on a point governed by English law? The first question, if it stood alone, would be somewhat academic. But the further, practical, questions need to be addressed by reference to the theoretical foundations.

My interest in this topic was first sparked at ICMA XV (London) in 2004, on hearing a number of full members of the LMAA express the view that they were bound to follow decisions of the English High Court on points of law, a view repeated in 2009 at ICMA XVII (Hamburg), despite (by then) Michael Marks Cohen's paper to ICMA XVI (Singapore) in 2007[50] arguing, to the contrary, that arbitrators were not bound by rulings on points of law by *puisne* judges. An invitation to deliver a lecture at Nordisk in Oslo in January of this year gave me an opportunity, for which I am very grateful, to consider the issues in greater depth, and I thank the Topics & Agenda Committee for accepting my proposal to submit this paper on the point for ICMA XVIII (Vancouver).

For the reasons explained below, I find there to be difficulties with the view that arbitrators are subject to the doctrine of *stare decisis* under English law, so as to be bound to follow prior judicial decisions;[51] but at the same time, justifying a claim that they are not so bound is complex in the absence of a full "declaratory theory" of English common law. The question whether arbitrators are entitled not to follow current English case law on a question governed by English law is

[46] "To release real and effective control over commercial arbitrations is to allow the arbitrator … to be a law unto himself …, to give him … a free hand to decide according to the law or not according to the law as he … think fit, in other words to be outside the law", *Czarnikow Ltd v Roth Schmidt & Co* [1922] 2 K.B. 478 CA at 484, per Bankes LJ. As we shall see, the "real and effective control" to which Bankes LJ referred, which was extreme in nature, was removed by Parliament over 30 years ago. Did Parliament thereby sanction arbitrators to be a law unto themselves or "outside the law"?

[47] This is the text of a paper delivered in Vancouver in 2012. I am greatly indebted to Edward Ho, barrister, who visited Nordisk in January 2012 with me to lecture on this topic and who has contributed greatly to the thinking in, and research underlying, this paper; I also thank Nordisk for the engaging discussion of the issues on that occasion. The views expressed in this paper, though, and any errors, are entirely my own.

[48] By which I mean an arbitration with English seat, thereby governed by Pt I of the Arbitration Act 1996.

[49] Or a sole arbitrator or an umpire—I shall refer to arbitrators throughout.

[50] "Maritime arbitrators are not required to apply stare decisis to decisions of trial courts" now at (2007) 13 J.I.M.L. 258.

[51] For the avoidance of doubt, my discussion of whether arbitrators are bound by prior judicial decisions focuses solely on the precedential effect (if any) of such decisions. I am not dealing at all with questions of *res judicata* or issue estoppel arising out of decisions in prior litigation or arbitration between the same parties.

ultimately a question of policy, to which existing jurisprudence does not provide an answer. On analysis, it throws up some fundamental issues about the nature of arbitration and of arbitrators' decision-making function.

I propose a solution that is, I believe, analytically robust, satisfactory from a practical point of view, and supported or confirmed by the 1996 Act, under which:

(1) if arbitrators are faced with a prior judicial decision they think was wrongly decided, they should not follow it, explaining in the reasons for their award why they think it unsound, so the award they issue is one they believe to be correct;

(2) if a party finds that a prior judicial decision is against their case, they must either accept that the rule of law is as stated by the precedent and move on from there, or dispute that rule of law *before the arbitrators*, explaining why they say it is wrongly decided and asking the arbitrators not to follow it;

(3) that approach is not confined to prior first-instance decisions—the higher the authority, the more reluctant arbitrators may be to regard it as wrong, but, I propose, that does not mean they are bound to follow it if persuaded, despite such reluctance, that it is bad law.

Case law

Despite the circularity of asking whether there is judicial precedent on the question whether, as a matter of precedent, judicial decisions bind arbitrators that is where I start, since old habits die hard and one of the oldest habits of an English lawyer is to "look for authority" on the point, whether or not it will be determinative.

So far as I am aware, these issues have not been addressed under the 1996 Act. In *Island Tug and Barge Ltd v Owners of the Makedonia*,[52] Pilcher J said[53] that the appeal arbitrator in that case had "held himself bound by" a decision of Wilmer J's which could not be distinguished. But there is nothing to indicate that there was any consideration of whether the arbitrator was correct to take that view, as opposed to whether the previous decision was itself good law so that the award was ultimately correct; and of course this is a case from before the 1979 Act, never mind the 1996 Act, when the attitude and policy were very different (see below).

Under the 1979 Act, Lord Denning MR in *International Sea Tankers Inc of Liberia v Hemisphere Shipping Co of Hong Kong (The Wenjiang)*,[54] expressed the view,[55] citing words of Lord Diplock in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)*[56] that where many disputes had been referred to arbitration arising out of the same or similar facts,[57] the legal question arising should be regarded as not "one off", and leave to appeal should be granted, so that a decision might be reached on appeal that would provide "guidance binding upon the

[52] *Island Tug and Barge Ltd v Owners of the Makedonia* [1958] 1 Q.B. 365; [1958] 2 W.L.R. 256 QBD.

[53] *Island Tug and Barge Ltd v Owners of the Makedonia* [1958] 1 Q.B. 365 at 377.

[54] *International Sea Tankers Inc of Liberia v Hemisphere Shipping Co of Hong Kong (The Wenjiang)* [1982] 1 Lloyd's Rep. 128; [1982] Com. L.R. 7 CA.

[55] *Island Tug and Barge Ltd v Owners of the Makedonia* [1982] 1 Lloyd's Rep. 128 at 130.

[56] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724 at 744F; [1981] 3 W.L.R. 292 HL.

[57] In that case, the trapping of vessels due to hostilities between Iran and Iraq, giving rise to claims that charterparties had been frustrated.

arbitrators in other arbitrations arising out of the same event".[58] Whether guidance as to the law provided by a court decision on similar facts is strictly binding on arbitrators hearing other cases, or only guidance from a persuasive source, was not necessary to the decision either in *The Wenjiang* or in *The Nema*, does not appear to have been the subject of any argument in either case, and is not given any reasoned consideration by either Lord Denning MR or Lord Diplock. In any event, I do not believe a court today, considering the matter under modern conditions and some 15 years into the life of the 1996 Act, would be bound to see things as they were seen under the 1979 Act.

I therefore take the view, and proceed on the basis, that the questions I have stated are open for debate de novo.

The doctrine of precedent

It is logical to start with a summary of the doctrine of precedent (stare decisis) in English law, as it stands today. It is made up of "rules of practice, called 'rules of precedent', which are designed to give effect to the far more fundamental rule that English law is to a large extent based on case-law".[59] The "more fundamental rule" will feature below ("A Common Law 'Cloud'?"). The upshot of the rules of precedent under English law is, "that it is more difficult to get rid of an awkward decision in England than almost anywhere else in the world".[60]

The basic rule of precedent derives from the hierarchical nature of the English court system, and is that each lower tier is bound by the decisions of any higher tier(s).[61] Thus, on a point he finds necessary to the decision before him, a judge sitting in the High Court must follow a prior ruling by the House of Lords (since October 2009, the Supreme Court) or the Court of Appeal; on a point they find necessary to the decision before them, judges sitting in the Court of Appeal must follow a prior ruling by the House of Lords/Supreme Court. So far so simple. More complex are the rules on whether a given tier is formally bound by its own prior decisions.

The general rule is that a judge sitting in the High Court is *not* bound by a prior decision of the High Court. There is said to be an exception to the general rule, that where there are conflicting decisions at first instance and "the earlier decision has been fully considered, but not followed, in a later one", the point is to be regarded as settled law at first instance, and the later decision is to be followed, leaving it to the Court of Appeal (if there is an appeal) to say whether that settled first-instance view of the law is correct.[62] There is then said to be an exception to that exception, "in the case, which must be rare, where the third judge is convinced

[58] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724 at 744.
[59] *Cross & Harris, Precedent in English Law*, 4th edn (1990, reprinted 2004), p.3.
[60] *Cross & Harris, Precedent in English Law*, 4th edn (1990, reprinted 2004), p.24.
[61] Only the *ratio decidendi* (the legal reason for deciding the prior case) creates a binding precedent; an *obiter dictum* (an opinion on a point of law not necessary to the decision made in the prior case) does not.
[62] *Fulham Football Club (1987) Ltd v Richards* [2010] EWHC 3111 (Ch); [2011] Ch. 208 (Vos J), quoting Nourse J in *Colchester Estates (Cardiff) v Carlton Industries Plc* [1986] Ch. 80 at 85F–G; [1984] 3 W.L.R. 693 ChD; see also *Re AE Farr Ltd* [1992] B.C.C. 150; [1992] B.C.L.C. 333 ChD (Ferris J); *Bishopsgate Investment Management Ltd v Maxwell* [1992] B.C.C. 214; [1992] B.C.L.C. 470 ChD (Hoffmann J); *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch. 1; [1992] 2 W.L.R. 991CA; *Re Taylor (A Bankrupt)* [2006] EWHC 3029 (Ch); [2007] Ch. 150 (Judge Kershaw QC).

that the second was wrong in not following the first [for example] where some binding or persuasive authority has not been cited in either of the first two cases".[63]

The Court of Appeal, by contrast is as a general rule bound by its own previous decisions. There are three exceptions or apparent exceptions, settled by *Young v Bristol Aeroplane Co Ltd*,[64] namely that:

> "(1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*."[65]

The modern rule of practice was set out in and adopted by a Practice Statement issued by the House of Lords, now the Supreme Court, on 26 July 1966,[66] stating that "while treating former decisions of this House as normally binding", the practice would be

> "to depart from a previous decision when it appears right to do so [bearing in mind] the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law."[67]

The Supreme Court has not re-issued the 1966 Practice Statement but has stated that it is "part of the established jurisprudence relating to the conduct of appeals" and so "has as much effect in [the Supreme] Court as it did before the Appellate Committee in the House of Lords".[68]

I do not dwell here on the detail of the position for the Divisional Court, the Crown Court and "inferior courts" (e.g. magistrates and county court judges), save to note a general pattern that a court properly regarded as "inferior", within the hierarchical court system, is said to be bound to follow the decisions of courts "superior" to it in that hierarchy; and that complexity can arise where it is not straightforward to define the place of a particular court or tribunal in those hierarchical terms.[69]

The established rules of precedent are thus rules of practice that reflect and enforce, more or less rigidly for different courts, the hierarchical structure of the English court system. As a result, they serve, and at least in part are justified by, the interests of certainty in the law pronounced and applied by that system. They do not, in and of themselves, say anything at all about the place of arbitrators in

[63] *Colchester Estates (Cardiff) v Carlton Industries Plc* [1986] Ch. 80 at 85G–H.

[64] *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718 CA at 729–730.

[65] A decision *per incuriam* is one in which the deciding court overlooks a statutory provision or binding authority that would either compel it or surely persuade it to a different result. Although this is sometimes forgotten, the *per incuriam* rule only allows a court to decline to follow one of its own prior decisions, and does not entitle a lower court to refuse to follow the prior decision of a higher court: see *Cross & Harris, Precedent in English Law*, 4th edn (1990, reprinted 2004), p.158.

[66] *Practice Statement (HL: Judicial Precedent)* [1966] 1 W.L.R. 1234; [1966] 2 Lloyd's Rep. 151.

[67] *Practice Statement (HL: Judicial Precedent)* [1966] 1 W.L.R. 1234.

[68] *Austin v Southwark LBC* [2010] UKSC 28; [2011] 1 A.C. 355 at [24]–[25].

[69] *Cross & Harris, Precedent in English Law*, 4th edn (1990, reprinted 2004), pp.119–121 and 123–124 and Manchester & Slater, *The Dynamics of Precedent and Statutory Interpretation*, 4th edn (2011), paras 1-019, 1-039, 2-007–2-010.

the scheme of things. Accordingly, they do not themselves give an answer to any of the questions I have posed.

Arbitrators

It follows, and is true in any event, that a consideration of what, if any, rule of precedent should apply to arbitrators under English law must start with a consideration of the nature of arbitration and the relationship between arbitrators and the courts. Do arbitrators form part of the hierarchical structure of the English court system at all? If so, where or how do they fit into that structure, and what does that say about how the doctrine of *stare decisis* ought to apply to them? If they are outside the hierarchical structure of the court system, does that mean that stare decisis cannot or should not apply to them, or should apply in some particular or modified way?

Arbitration is a contractual means of resolving a dispute, in which the parties choose how and by whom the dispute is to be determined. The power of arbitrators to determine a dispute, so as to bind the parties to a certain view of their rights and obligations and/or to grant relief to enforce them, is created by a binding agreement between the parties to refer disputes, or a particular dispute, to arbitration. Nothing more is required, and nothing less is sufficient. The arbitrator's power to decide a dispute and bind the parties to the result is confirmed and supported by, and may be enforced under, statute, these days the Arbitration Act 1996; but it is originally and ultimately contractual. The existence, nature and scope of any duty to decide the dispute in accordance with the law must likewise be a function of the contract to arbitrate, supplemented by, or interpreted in the light of, the Act.

Arbitration agreements are, at least as importantly, contracts as to how and by whom the parties' dispute is not to be resolved. By agreeing to refer their dispute to arbitrators for final resolution by them, the parties express their joint will that the dispute *not* be resolved in court.

These twin aspects of parties' freedom of contract are recognised as paramount principles at the outset of the Act. Section 1 states as two of the three foundations of the Act 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" (s.1(b)) and "the court should not intervene except as provided by [the Act]" (s.1(c)). In the early years of the Arbitration Act 1979, commenting on the freedom it gave parties to contract out of appeals to the High Court on points of law, Leggatt J rightly said that "In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency".[70] The (generally) paramount public policy had become, as it remains today, to uphold the finality of arbitral awards and the parties' choice that arbitrators, and not the courts, resolve their dispute. The effective, final and fair resolution of a dispute does not require "legal accuracy".

As Leggatt J also noted,[71] this was a significant change of policy. The former policy involved the court in assuming a jurisdiction, that could not be ousted by agreement, to ensure "the proper administration of the law by [arbitrators as] inferior tribunals",[72] which meant in substance that any question of English law

[70] *Arab African Energy Corp v Olie Produkten Nederland BV* [1983] 2 Lloyd's Rep. 419 QBD at 423.
[71] *Arab African Energy Corp v Olie Produkten Nederland BV* [1983] 2 Lloyd's Rep. 419 at 423.
[72] *Czarnikow v Roth Schmidt & Co* [1922] 2 K.B. 478 at 488, per Scrutton LJ.

raised in an English arbitration was for the English court, not the arbitrators, to resolve, so long as either party took the award to the court for review.[73] Put another way, the arbitrators' function was in reality limited to finding the facts on the basis of which the court would (if asked) resolve the dispute. Under such a policy, with arbitrators merely "inferior tribunals", finders of fact, in a court system for the resolution of disputes, it might have been contended with some force that, like other such tribunals, arbitrators were strictly bound, on any view by decisions of the appellate courts, but also indeed by decisions of the High Court.

However, it is surely not now possible to take the view that arbitrators are but "inferior tribunals" under a single English dispute resolution system. Under the modern law, reflected and given effect to by s.1 of the 1996 Act, the concept is that arbitration is a thing apart, and that arbitrators sit structurally outside, and are independent of, *any* court system. If the courts become involved at all, because a jurisdiction under the 1996 Act is invoked, it is to carry out a specific judicial task sanctioned and defined by the Act, nothing more and nothing less. They sit not in the exercise of their ordinary jurisdiction as the courts of the land, but in the exercise of a specific jurisdiction conferred by the Act, for the purposes of the Act.

I therefore conclude that there cannot be and should not be, *as a rule of precedent*, a rule that arbitrators are bound to follow the prior decisions of the courts. The logic, moreover, is not confined to decisions of the High Court. This is not a conclusion, addressing only the impact in arbitration of first instance authorities, proceeding from some analogy[74] between arbitrators and the High Court as "tribunals of first instance" in a tiered structure. It is, rather, the identification of a consequence of the nature of arbitration, namely that, sitting apart from any court system and not as an inferior tribunal within a court system, the internal rules of the English courts (as one particular court system) do not apply to arbitrators; if I am right to identify that as a consequence, it is good for *all* of the rules of precedent summarised in the previous section of this paper, not just for a conclusion that the rulings of *puisne* judges are not binding.

How, then, to define the arbitrators' duty, if any, as regards applying, or deciding in accordance with, the law?

The Act states in its very first provision that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense" (s.1(a)). There is nothing there about getting the law right, whatever we might mean by that anyway, let alone a duty to arrive at the same result as would have been reached by any particular English court.

Consistently, the Act defines the duty of arbitrators as being to "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 to "adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined" (s.33(1)(a)/(b)). Again, there is nothing there about a duty to get "the right answer", whether as to fact or as to law, let alone a duty to get to the answer that would have been given by any particular English court.

[73] That was the *substance* of the matter, albeit there was this procedural or practical limitation upon the court's interference, namely that the court had to detect error of law from the award itself, to deal with which there developed the award by way of a special case stated for consideration by the court.

[74] Which would be very imperfect in any event.

It is possible to propose, as some perhaps do, that arbitrators' sole duty, having acted with procedural fairness, is to provide *a decision*,[75] and to take that to the extreme that arbitrators should not regard themselves as bound to apply the rules of law they find or believe to exist under the system of law that governs the dispute.[76] As it seems to me, that would go too far.

The classic textbook view, with which in general terms I would agree, is this:

> "If the matter is approached in terms of the contractual relationships between the two parties and the arbitrator, there can be little doubt that [an award ought in principle to comply with English law]. By their contract, the parties have agreed that their substantive rights shall be governed by English law. By their arbitration agreement, they have agreed that a dispute about these rights shall be determined by arbitration. By the mandate to the arbitrator, they have instructed him to decide upon their rights. Logically, it must follow that his task is to ascertain those rights in accordance with English law."[77]

In my view, however, this idea and reasoning is not peculiar to cases where the law governing the merits is English law; nor is it a reflection that questions of English law have some unique status or importance in an arbitration (as compared to questions of law that arise on merits issues governed by some other system of law). I therefore have the temerity to re-state the passage from *Mustill & Boyd* as follows:

> "If the matter is approached in terms of the contractual relationships between the two parties and the arbitrator, there can be little doubt that an award ought in principle to comply with rules of law to be determined by the arbitrator if they are not agreed. It is a basic characteristic of a contract that the parties' substantive rights in relation to it are governed by a system of law (although which system of law will itself need to be determined by the arbitrator, if it is not agreed). By their arbitration agreement, the parties have agreed that a dispute about their substantive rights shall be determined by arbitration. By the mandate to the arbitrator, they have instructed him to decide upon their rights. Logically, it must follow that his task is to ascertain those rights in accordance with the rules of law that the parties agree exist, or that he determines after argument if they do not agree."

Thus, arbitrators are charged with finding the facts, determining legal rules by which, on the facts found, a result is to be derived, and applying those legal rules to those facts so as to reach their award. But no distinction will be drawn between arbitrators who conclude that the legal rule is to a certain effect, and apply it correctly to derive a certain result, and arbitrators who conclude, on the same facts, that the legal rule is to opposite effect, but who, by misapplying it or ignoring it completely, manage to derive the same result as the other arbitrators. Neither tribunal will have exceeded their jurisdiction or been guilty of serious irregularity under s.68 of the Act. The award will bind the parties unless and until an appeal against it succeeds under s.69 of the Act (which will only be relevant if the question

[75] Whether right or wrong if judged against an external norm, including that of "the law".

[76] Klaus Peter Berger comes quite close to this in his article "The International Arbitrators' Application of Precedent" (1992) 9(4) J. Int'l Arb. 5.

[77] Mustill and Boyd, *Commercial Arbitration*, 2nd edn (1989), p.69.

of law was one of English law). On appeal (if there is one), the awards will be equally upheld, or overturned, by reference to the correctness or otherwise under English law, in the view of the English court, of the result reached. The outcome on appeal will not differ according to the different routes by which the two tribunals reached the same result.

What, then, *does* it mean to say, where it is agreed or the arbitrators decide that the parties' rights are governed by English law, that the arbitrators' task is to ascertain the parties' rights in accordance with English law? If arbitration is rightly seen as a system apart from the English court system for resolving disputes, so that arbitrators are not bound by the rules of precedent as such, how then are we to define the "English law" in accordance with which arbitrators are to act, in connection in particular with cases said to be "bad law"?

Common law "cloud"?

The "declaratory theory" of judicial decision asserts that the common law of England was conceived to exist independently of the collective corpus of judicial decisions handed down from time to time.[78] The rules of the common law, for every situation conceived, conceivable or otherwise, were thus fully formed, waiting to be discovered, and the decisions of courts merely declared what they were thought to be. In this view of the law, it hung like a benevolent cloud above all that the courts did, rules of law for novel situations were fetched down from the cloud, and if (where the rules of precedent allowed) a previous decision was overruled or not followed, it was because the later court had seen that the earlier court had not discerned the shape of the cloud correctly. The law had always been as the later court now declared it to be (assuming it was not itself in error!); the earlier court's declaration had been a misstatement of the law.

Were such a full declaratory theory of English common law the accepted theory, it would be straightforward to reconcile the idea that arbitrators should decline to follow a judicial precedent they viewed as bad law, with the idea that they should determine the dispute before them in accordance with the law. *Ex hypothesi*, the arbitrators would have found that the law was not as the judicial precedent had declared it to be; their decision would therefore accord with English law, as they found it to be, looking for themselves into the cloud to find it.

However, such a full declaratory theory has not held sway. In *Kleinwort Benson Ltd v Lincoln City Council*[79] the House of Lords held, by a majority, that in principle restitution was available under English law for payments made under a mistake of law, and not only for payments made under a mistake of fact. The case concerned payments which, on the state of the authorities at the time they were made, would have been understood to be due and payable but which a later House of Lords decision said were payments that were not required, because the contracts in question were void. The status or nature of the declaratory theory lay at the heart of the case in the House of Lords. The minority reasoned that, *since the declaratory theory of the law was to be rejected*, there was no operative mistake. The payments were made in accordance with an accurate understanding of the law as it stood at

[78] *Cross & Harris, Precedent in English Law*, 4th edn (1990, reprinted 2004), pp.27–36.
[79] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349; [1998] 3 W.L.R. 1095 HL.

the time of the payments. The later change in the law was indeed a change in the law, not a declaration as to what the law had been all along. Whilst it meant that it had now been decided that the payments could lawfully have been declined, that did not mean there was a mistake of law at the time they were made.

The majority *agreed that a full declaratory theory was to be rejected*, but disagreed that in consequence there was no mistake. The law was changed, not merely discovered, by the House of Lords decision on the validity of interest rate swaps such as those at issue in the case. But that did not mean there was no mistake of law when payments were made prior to that decision. The change, being a change in the common law, operated prospectively, in one sense, namely that of course only cases coming before the courts after the change in the law would be decided under the new legal rule. But it was by nature retrospective, in the sense that the new legal rule would apply, and so would be taken to be and to have always been the law, in any case now coming before the courts, whenever the facts of that case had occurred. In principle, therefore, the claim of mistake of law could be made out: the claimant would need to plead and prove his understanding of the law on the basis of which his payments were in fact made; the court determining his claim would say that the payments were made under a void contract and so were not legally due; if that was not the legal basis upon which the claimant acted at the time, he could say he acted on a mistaken view of the law. As was said by Lord Goff:

> "The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of payment, he was not bound to pay it. Plainly, therefore, he paid the money under a mistake of law …."[80]

It was thus their Lordships' unanimous view that a full declaratory theory was wrong. As Lord Goff put it:

> "… what [a judge] states to be the law will, generally speaking, be applicable not only to the case before him but, as part of the common law, to other comparable cases which come before the courts, whenever the events which are the subject of those cases in fact occurred. It is in this context that we have to reinterpret the declaratory theory of judicial decision. We can see that, in fact, it does not presume the existence of an ideal system of the common law, which judges from time to time reveal in their decisions. The historical theory of judicial decision, though it may in the past have served its purpose, was indeed a fiction. But it does mean that, when the judges state what the law is, their decisions do, in the sense I have described, have a retrospective effect. That is, I believe, inevitable. It is inevitable in relation to the particular case before the court, in which the events must have occurred some time, perhaps some years, before the judge's decision is made. But it is also inevitable in relation to other cases in which the law as so stated will in future fall to be applied. I must confess that I cannot imagine how a common law system, or indeed any legal system, can operate otherwise if the law is to be applied equally to all and yet be capable of organic change."[81]

[80] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349 at 379G–H.
[81] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349 at 378G–379A.

On a matter governed by the common law, where a rule has been stated by a current decision, i.e. a decision that has not been overruled or departed from by a court entitled to overrule or not follow it, the declaratory theory thus cannot be used to contend that the rule is not (currently) English law on the point. Rather, it must be recognised that the rule *is* currently English law on the point, and that it will remain so unless and until the decision in question is overruled or departed from by a subsequent court. This is true whatever the level (in the court hierarchy) of the current decision: the level of decision will be relevant when asking whether a later court is entitled to overrule or not follow it; but does not affect its nature as the law on the point *pro tem*. At the same time, the "retrospective effect" described by Lord Goff means that if and when a decision is overruled or departed from, English law will be regarded as being, *and having always been*, as stated in the new authority.

That English judicial decisions constitute, i.e. define the content of, the rules of the common law, is a "more fundamental" rule.[82] If it means that arbitrators are bound to follow current court precedent, it would indeed follow that they were bound by High Court decisions, as they have precedential effect in this substantive, or "*more fundamental*", sense of defining *pro tem* the content of the law, even if they are not authoritative precedents in the procedural sense of having to be followed by other courts.

That, to my mind, is a problem in itself, for those that might contend that arbitrators should be bound to follow High Court decisions. It seems to me an odd idea that choosing to have a dispute decided away from the courts should mean having to accept what a trial judge in another case has said about the law, being something which a judge hearing the parties' case would not have had to accept. Three points should be made.

First, although indeed much of English law, and certainly much of the law that will be of interest in a commercial arbitration, is judge-made common law, there are many important exceptions. Take, as but a few examples, the Sale of Goods Act 1979, the Carriage of Goods by Sea Act 1992, the Unfair Contract Terms Act 1977 and the Misrepresentation Act 1967. Any statute is, by nature, a source of law superior to that of any English court. A judicial precedent interpreting the meaning or effect of a statute necessarily operates in a declaratory manner and, if overruled, the later decision is not retrospective merely in the sense discussed by Lord Goff in the *Kleinwort Benson* case. The overrule is a decision that the statute always meant something different and never meant what the overruled court held; the overruled court misstated its meaning.[83] Accordingly, if the validity or invalidity of a declaratory theory of judicial decision is to be the basis for deciding whether we hold arbitrators bound to follow judicial precedents, we should conclude that they are so bound on matters governed by the common law but not on matters governed by statute. That seems unsatisfactory and, I would argue, unlikely to be the intention of contracting parties.

[82] *Cross & Harris, Precedent in English Law*, 4th edn (1990, reprinted 2004).

[83] At the risk of complicating things further, there is of course a body of judge-made rules of statutory interpretation that form part of the common law of England. On analysis, the issue between particular parties might be as to the rule of interpretation to be applied, or the content of that rule, in which case their argument would be as to the content of the common law, albeit so as to determine, ultimately, the meaning or effect of a rule of law laid down by Parliament.

Secondly, within our modern theory of the common law, and even though the declaratory theory of judicial decision has been rejected/reinterpreted, we are nonetheless comfortable with the notion of current decisions being "good law" or "bad law". When a higher court overrules a lower court's decision on a point of law, it does so because the earlier decision was "wrongly decided", not because it was rightly decided but the overruling court wants to reinvent the wheel. Thus, to propose that, on a merits question governed by English law, the rules of English law in accordance with which arbitrators should seek to decide the dispute are, for common law matters, English law *as it currently stands*, is to impose a duty to follow case law "rightly or wrongly decided". I think, again, that is unsatisfactory and unlikely to be the intention of commercial parties, who should be taken to be properly informed about the nature of English law and therefore aware that current case law is not immutable and may be "bad law".

Thirdly, in one circumstance "English law" for these purposes *cannot* mean the law as it currently stands on the authorities: where there is no authority in point, arbitrators must necessarily take a view for themselves as to what the common law rule would be. In that circumstance, they will need, in effect, to put themselves in the position of the highest appellate court and take a view on what it would say was the applicable rule. There seems to me no reason to confine arbitrators' perspective in other circumstances, i.e. when there is prior case law on the point.

Expanding on the second point, would the intention of reasonable commercial parties, in agreeing to arbitrate a dispute governed by English law, really be that arbitrators should decide it in accordance with wrongly decided case law, i.e. case law that would be overruled or departed from if the point came before an appropriately senior court? Would they not say they expected the arbitrators to (try to) get the law right? I suggest that reasonable commercial parties, aware that the common law of England was a set of judge-made rules based upon precedent, would not expect their disputes to be decided in accordance with a High Court decision which the Court of Appeal, if asked, would overrule; or in accordance with a Court of Appeal decision which the Supreme Court, if asked, would overrule; or for that matter with a House of Lords or Supreme Court decision from which, if asked, the Supreme Court would now depart. Especially so—and I return to this point below—if they were informed that the effect of any future overrule will be that the law today is not as stated by the overruled decision.

Further, I would argue that as a matter of principle, if it is part of one party's case to contend that some prior authority is wrongly decided, it ought to be for the arbitrators, as the parties' chosen tribunal, to consider and rule on that contention, as it is for any other; that requires them to look at the authority critically and to decide the dispute according to the conclusion they come to about it. As dispute resolvers outside the precedent structure, they should be entitled to ask, in the round, what that structure (as law-making machinery) would produce on the point, rather than be bound by what that structure, or some particular part of it, has produced on the point to date.

This all leads me to contemplate a rule that arbitrators should decide the dispute before them, where the merits are governed by English law, in accordance with applicable legislation (if any), case law (if any) that they are not persuaded was wrongly decided, and, in the absence of either, the common law as they predict it

would be.[84] To adopt such a rule is only to equate, in principle, the case where a point has been wrongly decided by some current authority with the case where there is as yet no authority, and so is not to ask of arbitrators that they undertake a task otherwise regarded as beyond them or not for them. It also, as I now turn to consider, only equates the arbitrators' task, on a disputed question as to the content of English law, on a merits issue governed by English law, with their task on a disputed question as to the content of some other system of law, on a merits issue governed thereby.

Where a merits issue is governed by a system of law other than English law, I take it to be clear that any English court or English arbitration tribunal would be entitled and bound to adopt the approach identified above. They would need to be informed as to the law by some reasonable means that was procedurally fair to the parties. In an English court, relatively rigidly,[85] that would mean identifying during case management any matters of foreign law that had to be proved, and providing for expert evidence of foreign law to be adduced and tested at trial accordingly. That same process will often be adopted in an English arbitration, and in maritime cases in my experience typically so. But that is more by default than conscious design, as arbitrators, led by parties who are led by English lawyers with ingrained habits, too readily assume that their procedure should ape that of the English court, or allow it to do so. In truth, arbitrators have much greater flexibility, their obligation being to provide a reasonable process under which the parties are given a fair opportunity to educate the arbitrators in the relevant system of law. That need not involve expert evidence and cross-examination; and there should be no presumption in favour of that process.

Whatever the process by which arbitrators decide to be informed as to matters of law under a non-English governing system, they will view that system from the outside, and must be entitled to ask, in the round, what the law-making machinery of that system would say on the point, if allowed to operate in full, whatever that may mean for the particular system in question. If arbitrators concluded, on the material provided to them about the law-making apparatus of the governing system, that (i) rulings on points of law by some particular court, e.g. a highest court of appeal or supreme court, were definitive, immutable, statements of the applicable law, and (ii) that court had ruled on the point at issue, then no doubt they should find that the rule of law on the point was that so stated. But, I suggest, that is the only logically defensible argument for saying that arbitrators might be in some sense "bound to follow" a prior judicial ruling on a point of law by a court of the relevant jurisdiction; and in that case, the sense in which arbitrators would be "bound to follow" definitive case law, if there were any, would be quite different to the point I am testing in this paper. They would be "bound" to find that the law was as stated in the definitive judicial precedent only in the sense that such would be the logical consequence of analytically prior findings they had made. They would not have been bound *a priori* to follow the judicial precedent, without engaging in their own inquiry into the matter.

[84] I say "predict it would be" rather than "discern it", because if the common law is made, not merely revealed, by the courts, then the decision-maker outside that law-making machinery who is confronted by a novel point is engaged in an exercise of predicting what that law-making machinery would produce if the point were put through it.

[85] Although things have now moved on: see Commercial Court Guide, 11th edn (2023), s.H.3, redrafted in the light of *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45; [2022] A.C. 995.

Just as arbitrators need not adopt English court procedure for considering disputed questions as to the content of a non-English system of law, so they need not adopt English court procedure for disputed questions as to the content of English law. The need, and duty, is the same: to be informed as to the law by some reasonable means that is procedurally fair to the parties, i.e. a reasonable process under which the parties are given a fair opportunity to educate the arbitrators in the law. At the risk of one radical thought too many, but bearing in mind that an English seat of arbitration does not require the arbitrators, the parties or the parties' legal representatives to be qualified English lawyers or otherwise knowledgeable as to English law, or that the proceedings be conducted in English or even in England, it could be entirely proper, for example and depending on the circumstances, for an English arbitration tribunal to conclude that a dispute between the parties as to the content of English law on a point arising in the reference should be resolved not by argument but by calling for expert evidence as to English law.

Thus, since any arbitrators, accurately informed as to how English law works, should find that no current judicial authority is definitive and immutable, so therefore they should not be "bound" to follow any such authority.

The Arbitration Act 1996

My reasons thus far, for the view that arbitrators under English law are not bound, on merits issues governed by English law, to follow English judicial precedents, are not negatived by the fact, without more, that the arbitrators' conclusions can be overruled by the English court on appeal under s.69 of the Act (unless the parties have agreed to exclude the right of appeal thereunder, which they are free to do). I do not accept the view that if a court is entitled to overrule a decision, the decision-maker was bound to follow the prior case law of that court. An appellate structure neither depends on nor necessitates any doctrine of precedent.

That said, if on a closer examination of the statutory appeal jurisdiction, the Act could be said to have provided that arbitrators are so bound, then I would have to yield to that. So the Act does need to be considered.

That brings me to *Mustill & Boyd*'s suggestion that there is circularity in asking whether arbitrators have a duty, or what is the nature of arbitrators' duty, to issue an award that conforms with the law:

> "If one starts with the idea that an award ought to conform with the law, then some means should be devised to ensure that it does so. If on the other hand attention is paid first to the remedy, and it is found that none exists, then the proposition that the award should be in accordance with the law is devoid of any practical meaning."[86]

I prefer not to rest upon that rather negative analysis.[87] For any that would adopt *Mustill & Boyd*'s reasoning in full: (1) it would follow that arbitrators are not bound by precedent in cases where the right of appeal has been excluded, as of course it can be; (2) unless they were happy to say that the existence and nature of any duty to decide in accordance with law should vary according to whether

[86] Mustill and Boyd, *Commercial Arbitration*, 2nd edn (1989), pp.68–69.

[87] And I do not suggest that Mustill and Boyd stop there either, although they do not perhaps take the analysis on as I do here.

the right of appeal is excluded (something that may or may not be known to the arbitrators), which I would think unacceptable, it should follow that arbitrators are thus not bound by precedent ever. Whilst that is ultimately my conclusion also, I do not get there by this, arguably simpler, but more hard-line, reasoning. It does not seem to me that we would recognise arbitrators as owing no duty to find the facts merely because their findings of fact cannot be challenged; nor in consequence would we say that they owed no duty to find and give effect to the applicable rules of a non-English governing law, although their findings and conclusions in that regard are likewise findings of fact that cannot be challenged. Thus, I would not necessarily accept *Mustill & Boyd*'s argument, though it has a logic to it, for the case where there is no remedy.

However, for the case where there *is* a remedy, the idea of a reflective connection between duty and remedy may have some value in identifying the nature of the duty. Here, i.e. for questions of English law arising in an English arbitration, the remedy is the limited right of appeal under s.69 (if it has not been excluded). Thus, the notion is that it may be possible to infer something about the content of the duty, as defined by or implicit in the Act, from the content and workings of that limited remedy.

I take those, i.e. the content and workings of s.69 of the Act, to be familiar, and proceed directly to some key illustrations. In each case, an authority is cited to arbitrators that, if followed, would lead on the facts found to Result A, but if not followed would either lead to, or allow, Result B. This can be illustrated with four scenarios.

First, the arbitrators are invited to adopt Result B and are persuaded that the authority is unsound. They decline to follow it and so adopt Result B. Their view is upheld on appeal.[88] The court will therefore "confirm the award" (s.69(7)(a)); leave to appeal can only have been granted because a provisional[89] view was taken that on the abitrators' findings of fact, Result B was either "obviously wrong" in law or "at least open to serious doubt" in law on a question of general public importance. In the contemplation of the statute, the decision on appeal is surely that Result B was correct in law after all, *and the arbitrators were guilty of no error*. That suggests they were not strictly bound by the prior authority; had they been bound, they were guilty of an error of law in refusing to follow the authority. My conclusion is confirmed or reinforced, I suggest, by the retrospective effect analysis in the *Kleinwort Benson* case above. Since a payment made on an understanding of the law derived from then-current, but later-overruled, case law, is made under a mistake of law, it would have been a mistake of law, in my example, for the arbitrators to have adopted Result A. Logically, then, it was not only their right, but their duty, to adopt Result B, i.e. it was their duty not to follow the then-current, but now-overruled, precedent.

Secondly, suppose that instead the arbitrators follow the authority, and so adopt Result A. Leave to appeal is sought and the authority binds the High Court according to the rules of precedent. The judge therefore knows that any appeal is bound to be dismissed at first instance. It cannot have been the intention to render

[88] Which, because of the rules of precedent that apply within the court system, may of course require the case to get to the Court of Appeal or Supreme Court, depending on the level of the authority the arbitrators have refused to follow.

[89] In the sense that it is not a final decision creating any issue estoppel on the correctness of the award.

all such appeals incapable of success. It is therefore inherent that when judging whether the arbitrators are or may be guilty of an error of law within the meaning of the Act (so as to be able to decide whether to give leave to appeal), the judge is expected and required not to be bound by the rules of precedent, or to put it perhaps more positively he is expected and required to look beyond them. Thus, compliance with any duty to decide in accordance with the law is not determined by applying the rules of precedent. In my view, it follows that the duty was not defined or confined by those rules in the first place.

Thirdly, suppose that in the second case, sleave to appeal is granted. On appeal, the prior authority is overruled as wrongly decided and the award is varied so as to adopt Result B. The arbitrators will be told their award was wrong in law; they erred in law. But that seems most unsatisfactory if they were bound to follow the now-overruled authority. They could fairly complain that it is no error to adopt the only result open to you, and not to adopt a result that is not open to you. The point on the *Kleinwort Benson* case in (1) above may be repeated here too.

Finally, go back again to the arbitration. If the law is that arbitrators must follow the prior authority and adopt Result A, how is the party adversely affected to avoid that outcome? If he tries to do so before the arbitrators, he will rightly be met with the blunt answer that they are bound. If he accepts that-as indeed he ought to, in this hypothesis—the point becomes common ground before the arbitrators and he cannot challenge it on appeal.[90]

Proposed solution

My conclusion, then, is that on a question governed by English law, arising in a reference governed by the 1996 Act, the rule that accords best with the nature of arbitration, properly analysed, and with the presumed intentions of commercial parties when contracting for arbitration, and which is also the rule assumed by or implicit in the Act itself, is that arbitrators should decide the dispute in accordance with applicable legislation (if any), case law in point (if any) that they are not persuaded was wrongly decided, and, in the absence of either, the common law as they predict it would be.

Under that rule, arbitrators are *not* bound, as a rule of precedent, to follow any prior judicial decisions; their qualified duty to decide in accordance with case law (if any) that they are shown derives from the lack of any challenge to it or (if it be challenged) from being persuaded that it is correct, not from any rule of precedent or other duty blindly to follow it.

Further, under that rule, arbitrators are entitled—indeed, I would say bound—to decide for themselves what the correct rule of law is where there is no case law on the point or where they conclude, after argument, that any case law on the point is wrongly decided.

[90] Section 69(3)(b) of the Act makes it a pre-condition for leave to appeal that the question of law on which it is proposed to appeal was a question the arbitrators were asked to determine. The practice sometimes encountered of "reserving the right to argue elsewhere" that some precedent is wrongly decided is meaningful in litigation; but in arbitration it involves an agreement before the arbitrators as to the rule of law they must apply and precludes the possibility of arguing about it in court.

Practical consequences

I close by drawing attention to certain consequences for arbitrators and parties[91] that flow from my proposed solution and that are also (I suggest) inherently more satisfactory than the alternatives, suggesting in turn that my proposed solution is sound.

First, arbitrators should ensure that they are clear, which means asking the parties to be clear in their submissions, whether any authority cited by either party is challenged by the other party as wrongly decided. If not, then (if they find the point to be relevant to their final reasoning) they should record as common ground in their award the law as stated in the authorities cited to them. They are the parties' chosen tribunal; each party's entire case should be put to them, not held back in part to be argued (if at all) before a court whose only, limited, jurisdiction (so far as material) is to correct errors of law in matters that *were* put to the arbitrators and on which the arbitrators have therefore made a decision.

Secondly, if arbitrators are told, by the parties' submissions, that authority cited by one is challenged by the other as wrongly decided, then it is their right and duty to consider that argument on its merits, come to their own view on it *and proceed to an award that gives effect to that view*. Again, they are the parties' chosen tribunal; if it is part of one party's case that a certain authority is bad law, both parties are entitled to the arbitrators' decision on that point; and in many cases, whether the arbitrators' view accords with or differs from the prior authority, any court considering an appeal will wish to have the arbitrators' own views on the point, not a refusal on their part to entertain the argument.

Thirdly, turning to the parties, the key point has come out already. If a party's case involves, or logically ought to involve, challenging the correctness of some judicial precedent, they should squarely advance that challenge before the arbitrators. The practice of "reserving the right" to argue on appeal that case law was wrongly decided is analytically unsound, since there is no such right, tactically dangerous, since there is a risk that any future appeal will be rendered incompetent,[92] and generally unsatisfactory, since it deprives the parties, in the first instance, and the court, if an appeal is attempted, of the views of the parties' chosen tribunal.

My title for this paper asked whether arbitrators under English law, i.e. where the seat of the arbitration is England, are "inferior tribunals or a law unto themselves". My answer is that they are neither. Arbitration panels are not inferior tribunals within the English court system. But that does not make them a law unto themselves, owing no duty to recognise and seek to apply any external system of rules of law in determining the parties' dispute. The English court system is not just a system for resolving the disputes that come before it from time to time, as it were *de novo* each time; it is also law-making machinery. But arbitrators, not being part of that machinery, sit outside it, and independently of it;[93] as such, they are entitled and obliged—if directed to do so by the parties' submissions—to consider in the round what that law-making machinery would produce on any issue before them; they are not bound to follow what some particular court within that

[91] And their legal advisors.

[92] Because of s.69(3)(b) of the Act.

[93] There is thus indeed a sense in which they are "superior tribunals", but perhaps an audience of maritime arbitrators did not need to be told that!

machinery—whatever its seniority—may have said on that issue to date. Arbitrators under English law, in short, are not bound by any doctrine of precedent.