# ARBITRATION - SHOULD COURTS GET INVOLVED?

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## I. INTRODUCTION

The relationship between arbitral tribunals and courts is one that has generated intense debate around the world. Courts have a fourfold role in the arbitral process: to prevent a party who has agreed to arbitrate from pursuing his claim by litigation; to provide judicial assistance to arbitral tribunals and the parties in the course of a reference; to exercise powers of review of arbitral awards in defined conditions; and to provide the necessary machinery for the enforcement of awards. This paper is concerned solely with the third of these, the power of judicial review. I should like in particular to explore the differences in approach between the Irish Arbitration statutes, and in particular the Arbitration (International Commercial) Act, 1998 (referred to hereafter as the Arbitration Act, 1998), and the English Arbitration Act, 1996.[1] My paper is limited to commercial arbitration; consumer disputes raise distinct policy questions which I shall not address.

For a long time English courts, as well as courts overseas, were quite hostile to the arbitration process, seeing

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[1] Technically the Arbitration Act, 1996 is a UK statute (Scotland did not acquire a separate Parliament until after the enactment and implementation of the Scotland Act, 1998). However it does not apply to Scotland, for which separate legislation has been enacted adopting the UNCITRAL Model Law on International Commercial Arbitration. So to avoid confusion the 1996 Act is referred to hereafter as the English Act.

it as an attempt to oust their jurisdiction. In England in particular, right up to the enactment of the Arbitration Act, 1979, the powers of judicial intervention were both wide and extensively used. If a party ignored the arbitration agreement, brought proceedings and applied for summary judgment on the ground that there was no defence to the claim, the court could grant the application and disregard the arbitration clause on the ground that since there was no arguable defence there was no dispute to be arbitrated! Under the Arbitration Act, 1950 a party could at any time request the arbitrator to state a special case asking for a ruling on a point of law arising in the arbitration, a process causing a good deal of delay and expense, and it was not competent to the parties to exclude the case stated procedure by the terms of their agreement. The High Court had power, after an award, to remit to the reconsideration of the arbitrator any matters the subject of the reference or to set aside the award for "misconduct" by the arbitrator (a term far broader in meaning than its popular significance) or error of law on the face of the award.

The Arbitration Act, 1979 was the first serious response to the concern that the breadth of judicial intervention might be adversely affecting London's position as a leading centre for international commercial arbitration. The case stated procedure was abolished, appeals required leave of the High Court in the absence of consent by all the parties, and the parties were given power, with certain exceptions, to exclude appeals on a point of law. Yet this was not enough. First, the 1979 Act did not affect the court's power to displace the arbitration mechanism where it considered there was no arguable defence to the claim. Secondly, the Act was in my view fundamentally flawed because of its entirely open-ended statutory provision that the High Court was not to grant leave to appeal "unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could

substantially affect the rights of one or more parties to the arbitration agreement."[2]

Subsequently the House of Lords made valiant attempts, in *The Nema*[3] and *The Antaios*[4] to impose more meaningful restrictions by way of guidelines, but the factors that the guidelines required to be taken into account in considering whether leave should be granted were so numerous and so non-exclusive, and the meaning attached to them couched in so many different ways in later cases, that they utterly failed to halt the spate of litigation. Indeed, they became so subtle and complex that in the leading textbook on arbitration law[5] the authors found it necessary to devote no fewer than nine pages to their analysis, only to conclude that as the *Nema* criteria were only guidelines, not exclusive rules, other factors would occasionally have to be taken into account.[6] And none of the factors mentioned featured in the Arbitration Act - they were all entirely judge-made![7]

So despite the Arbitration Act, 1979 English arbitration law continued to find itself at odds with the

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[2] Arbitration Act, 1979, s. 1(4).

[3] *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd.* [1982] AC 724.

[4] *Antaios Compania Naviera S.A. v. Salen Redevierna A.B.* [1985] A.C. 191.

[5] Mustill and Boyd, *Commercial Arbitration* (2nd ed., 2000).

[6] See Goode, "The Adaptation of English Law to International Commercial Arbitration" (1992) 8(1) Arbitration International, I at pp. 8-9.

[7] Which provoked one respected Australian judge in the Appeal Division of the Victorian Supreme Court into saying that this was judicial legislation of the most objectionable kind and was based on the unspoken assumption that the court laying down the guidelines for all future cases was not merely wiser than any future exercisers of the discretion but also prescient and omniscient: per Fullagar J, in *Leighton Contractors Pty. Ltd. -v- Kilpatrick Green Pty. Ltd.*. [1992] 2 V.R. 505. However, other judges, though not willing in all respects to follow the *Nema* guidelines, have been more sympathetic to the problems created by the open-ended character of the legislation, which in Australia was also changed.

approach taken in other countries to limit judicial intervention. Then came the UNCITRAL Model Law on International Commercial Arbitration, which endorsed that approach and which restricts judicial review to a closed list of grounds falling well short of those then available in an English arbitration. I shall return to the Model Law a little later. Suffice it to say that, apart from the implementation in both countries of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[8] there are now striking differences between the English and the Irish arbitration legislation. Ireland followed Scotland in adopting the Model Law for international commercial arbitration in its Arbitration Act, 1998;[9] the English Arbitration Act, 1996 does not, though outside the area of judicial review it bears the imprint of many of the Convention's provisions. The Irish Arbitration Act, 1998, so far as it applies the Model Law, is confined to international commercial arbitration; domestic arbitration continues to be governed by the Arbitration Act, 1954, as amended, which largely follows the UK Arbitration Act, 1950. By contrast the English Arbitration Act, 1996, applies equally to international and domestic arbitration; those provisions regulating domestic arbitration are not intended to be brought into force for fear that they may infringe European Community law by differentiating between parties on the ground of nationality.

I shall begin with the UK arbitration legislation and then compare and contrast what I understand to be the position under the Irish Acts before turning to the central question: should courts become involved at all in the arbitration process?

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[8] In the United Kingdom by the Arbitration Act, 1975, repealed and re-enacted in ss. 100-104 of the Arbitration Act, 1996; in Ireland by the Arbitration Act, 1980, as amended by the Arbitration (International Commercial) Act, 1998.

[9] The Model Law was adopted in Scotland by the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1990, s. 66 and Sch. 7, and in Ireland by the Arbitration Act, 1998.

## II. Judicial Control Of Arbitration In England

Under section 9 of the Arbitration Act, 1996 a party to an arbitration agreement against whom legal proceedings are brought may apply for a stay of the proceedings and the court is required to grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. This wording follows that of the New York Convention[10] and the UNCITRAL Model Law[11]and its effect is that the court can no longer refuse a stay, or grant summary judgment, on the ground that there is no arguable defence to the claim.[12] The general power to set aside awards or remit them to the arbitrator for reconsideration has been replaced by more specific grounds which fall into one of three categories: want of substantive jurisdiction, serious irregularity and appeal on a point of law.

### *A. Substantive Jurisdiction*

The challenge under this head is that there was no valid arbitration agreement or that the tribunal was improperly constituted or ruled on matters not referred to it. The challenge may be made (a) during the arbitral proceedings to the tribunal if made promptly or to the court by way of a preliminary issue with the written agreement of all the other parties or with the permission of the tribunal if certain additional conditions are satisfied,[13] or (b) by way of challenge to the award.[14] I need not comment further on challenges to the substantive jurisdiction.

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[10] Art. II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

[11] Art. 8(1).

[12] *Halki Shipping Corp. -v- Sopex Oils Ltd.* [1998] 1 W.L.R. 726; [1998] 2 All E.R. 23.

[13] Arbitration Act, 1969, s. 32(1)(b).

[14] Arbitration Act, 1969, s. 67.

*B. Serious Irregularity*

This head, embodied in section 67 of the Act, covers serious irregularity affecting the tribunal, the proceedings or the award. "Serious irregularity" (replacing the term "misconduct" with its pejorative overtones) means irregularity of a kind listed in section 68(2) which the court considers has caused or will cause substantial injustice to the applicant. The list includes all the forms of irregularity listed in Article 34 of the Model Law and a number of others which the Model Law omits. It was this aspect of the Model Law that caused particular concern to the DAC and influenced its decision not to recommend wholesale adoption of the Model Law. I will return to this later in the context of the adoption of the Model Law by Ireland.

*C. Appeal on a Point of Law*

Section 69 of the Arbitration Act preserves appeals on points of law and embodies the Nema guidelines in statutory form, though with some additional constraints. In the absence of agreement by all the parties an appeal can only be made with leave of the High Court. Leave can only be given if:

a. the determination of the question will substantially affect the rights of one or more parties;

b. the question is one which the tribunal was asked to determine;

c. on the basis of the findings of fact in the award:

i. the decision of the tribunal on the question is obviously wrong, or

ii. the question is one of general public importance and the decision of the tribunal is at least open to serious doubt;

d. despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

It is, however, open to the parties to agree to exclude this right of appeal, either in their arbitration agreement or

subsequently, and they are taken to do so if they agree to dispense with reasons for the award. An exclusion agreement may be made directly or through the incorporation of the rules of an arbitral institution by which the parties waive recourse to the courts insofar as such waiver may be validly made.[15]

The DAC resisted responses urging that we come into line with the law in many other countries and abolish appeal on a point of law altogether. I have to say that, though I deferred to the greater knowledge and experience of my fellow committee members, I argued that to continue to allow appeals on a point of law in the absence of an exclusion agreement was wrong and I am even more convinced of this today. We have had cases going up to the House of Lords in which there was an acute division at the appellate stages even as to whether the question was one of law at all or only fact.[16] Assuming the issue is one of law, the first limb of appealability, which applies whether or not the question is one of general public importance,[17] is that the decision of the tribunal is obviously wrong. This is the test required for appeals on one-off contracts, as opposed to standard-term contracts.

Well, I can only say that what is obvious to one judge may be far from obvious to another. In *The Hill Harmony*,[18] a case governed by the Arbitration Act, 1979, the question to be decided by a panel of three arbitrators was whether the decision of the master of a vessel to sail by a longer route than that instructed by the charterers was an error of

[15] See, for example, the ICC Rules of Arbitration (1998), art, 28(6) and the LCIA Arbitration Rules (1998), art. 26(9).

[16] *Lafarge Redlands Aggregates Ltd. v. Shephard Hill Civil Engineering Ltd.* [2001] 1 W.L.R. 1621.

[17] But presumably this does not apply to appeals to the House of Lords, where it is a prerequisite of the right to appeal that the case is one of general public importance.

[18] *Whistler International Ltd. v. Kawasaki Kisen Kaisha Ltd.* [2001] 1 Lloyd's Rep. 147; [2000] Q.B. 241; [2001] 1 A.C. 638.

navigation, for which there was a statutory defence, or an issue of employment. Two of the arbitrators held that it was an issue of employment, the third an issue of navigation. The owners successfully appealed to Clarke J. in the High Court, who entertained no doubt that the question was one of error of navigation. That view was upheld by the Court of Appeal. The House of Lords unanimously restored the award of the majority arbitrators. Now consider the cost of this exercise: an application for leave to appeal, followed successively by an appeal to the High Court, the Court of Appeal, and the House of Lords. Consider also the delay. The award was given on 7th April 1997; the High Court decision on 20th February 1998; the Court of Appeal ruling on 20th May 1999; and the House of Lords decision on 7th December 2000. So the claimant, who succeeded at the very outset, was kept out of its money the best part of four years. Moreover, all confidentiality is utterly destroyed. In any event, even if the decision is obviously wrong, why should that be a ground for interference?

Where the case raises an issue of general public importance it is not necessary that the decision of the arbitral tribunal shall be obviously wrong; it suffices that it is open to serious doubt. This limb is most likely to apply in the case of standard-term contracts, such as commodity contracts. For these the argument is that without the benefit of authoritative judicial rulings inconsistent arbitral awards may be given, and in any event on important issues of law it is undesirable that two parallel bodies of commercial law should develop, one decided by arbitrators, the other by the courts. Moreover, public policy requires that the courts should be able to determine points of law arising from commercial disputes where this would add significantly to the clarity and certainty of English commercial law.

I find all these arguments remarkably unpersuasive. In the first place, the public policy argument is no longer tenable in view of the ability of the parties to exclude appeals.

Secondly, as I ventured to point out many years ago,[19] if the point at issue is so important to the commercial community, let them find two parties willing to take a test case. If no such parties can be found that suggests that the commercial world has no particular interest in having the point decided as a general principle of law. Thirdly, the objection against parallel systems of commercial law seems to me misconceived. Arbitral awards are not a source of law; indeed, because of confidentiality it is often extremely difficult to obtain sufficient details of the facts of an arbitration to evaluate the legal reasoning of an award. The plain fact is that an arbitral proceeding is for the benefit of the parties themselves and is of no concern to anyone else except in terms of the benefit of ideas to be gleaned from others. Finally, why should parties who choose arbitration in order to secure choice of tribunal, confidentiality, privacy, expedition and finality have all their expectations frustrated by being made cannon fodder for the enrichment of English jurisprudence for the benefit of *other* parties in *future* cases?

It is not in my view sufficient to say that the courts will in most cases refuse leave to appeal or that in most cases an appeal will be unsuccessful. The problem for the parties is that they have no reliable way of knowing in advance whether their case will be one of those in which leave will be given and the award set aside. The requirement in section 69(3)(d) that the court should be satisfied that it would be just for it to determine the question despite the agreement of the parties to resolve the matter by arbitration is a legislative signal that appears to have been honoured more in the breach than in the observance. One has the sense that in a number of cases all that is involved is an interesting point of law which the court feels it would like to decide. Mr. Stewart Shackleton has written[20] that in the year 2000 alone English

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[19] Goode, "The Adaptation of English Law to International Commercial Arbitration" (1992) 8 (1) *Arbitration International* 1 at p. 10.

[20] "Annual Review of English Judicial Decisions on Arbitation – 2000"

courts rendered more than 60 arbitration-related decisions, consisting of over 50 judgments at first instance, nine decisions by the Court of Appeal and four by the House of Lords. And this takes no account of the numerous additional unreported cases in which leave to appeal was refused. Recently the Court of Appeal has ruled[21] that in the light of section 6 of the Human Rights Act, 1998, which gives effect to the European Convention on Human Rights, a party is entitled to a fair and public hearing and that this requires at least that the applicant be told which of the required tests he has failed; and presumably in future decisions refusing leave will have to be given in open court rather than in chambers. So in every case the successful claimant in arbitral proceedings is at risk of the destruction of the confidentiality of his case.

If one wanted a final graphic illustration of what is still wrong with our arbitral process we have only to look at the decision of the House of Lords in *Alfred McAlpine Construction Ltd. v. Panatown Ltd.*[22] That case concerned admittedly important points of law as to whether the employer under a building contract for the construction of an office block and car park on land owned by another company in the same group could recover damages for breach of the contract when the loss was suffered not by the claimant but by the other company. In arbitration proceedings instituted by the employer the respondent contractor raised the preliminary issue that as the claimant had suffered no loss it was not entitled to substantive damages. The arbitrator made an interim upward upholding the entitlement to substantive damages. The High Court set this aside. This decision was reversed by the Court of Appeal, whose decision was in turn

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[2001] Int. A.L.R. 178.

[21] *North Range Shipping Ltd. v. Seatrans Shipping Corp,* [2002] EWCA Civ 405; [2002] 1 W.L.R. 2397; [2002] 2 All E.R. 193; [2002] 2 Lloyd's Rep. 1.

[22] [2001]AC 518.

reversed by the House of Lords by a majority of three to two. The claimant therefore lost although altogether there had been an award and five judgments in its favour compared with four judgments against. The speeches in the House of Lords traverse a huge range of decisions over a period of more than 200 years and occupy 78 pages of text. By the time the case was heard in the House of Lords more than seven years had elapsed since the initiation of the arbitration, and the parties had advanced no further than the trial of the preliminary issue,[23] leaving more years of litigation ahead on a separate, direct contract between the owner of the building and the contractor.[24]

## III. Judicial Control Of Arbitration In Ireland

The current situation in Ireland could hardly be more different from that prevailing in England. In the first place, while a LEXIS search records 195 cases on the English Arbitration Act, 1996[25] I have so far failed to find a single decision on the 1998 Irish Act, though no doubt there are some. One explanation for this striking difference between the two jurisdictions is that the Irish are a peaceable nation and will do anything to keep out of court. A second explanation is exactly the opposite, namely that Irish citizens are such keen fighters that the last thing they want is a quiet, hidden arbitration - so they litigate instead! But there is a

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[23] As it happened, the decision effectively ruled out further proceedings in the arbitration; but had it gone the other way there could then have been a substantive hearing on the merits and no doubt several years further delay.

[24] For a comprehensive analysis of this kind, including a detailed examination of the factual background, see "The Common Law at Work; The saga of *Panatown Ltd. v. Alfred McAlpine Construction Ltd*.", an as yet unpublished inaugural lecture delivered by Professor Ewan McKendrick at the University of Oxford on 4 March 2002.

[25] See the three-part survey by Stewart R. Shackleton, "Global Warming; Milder Still in England" [1999] Int. A.L.R. 53, 117, [2000] Int. A.L.R. 59 and "Annual Review of English Judicial Decisions on Arbitration – 2000" [2001] Int A.L.R. 178.

third explanation which seems more compelling than either of these, namely that the 1998 Act, by implementing the Model Law, is succeeding in its stated aim of promoting the finality of arbitral awards. So I now turn to the Model Law, which except in certain details not relevant for my purposes, applies to international commercial arbitration in Ireland.

The underlying injunction to courts in the Model Law is: "keep out!". Article 5 starkly provides as follows:

> "In matters governed by this Law, no court shall intervene except where so far provided in this Law."

And the grounds for setting aside an award contained in Article 34 of the Convention are limited indeed. Incapacity of a party, invalidity of the agreement to arbitrate, failure of a party to receive proper notice of the appointment of the arbitrator or of the proceedings or other inability to present his case, acting by the arbitrators outside their mandate, composition of the tribunal not in accordance with the parties' agreement, non-arbitrability of the dispute, and an award in conflict with the public policy of the State. There is no general provision for serious irregularity other than a party's being deprived of his ability to present his case. So the stated grounds for setting aside an award do not include any of the following:

- The fact that the tribunal failed to conduct the arbitration in accordance with the procedure agreed by the parties
- Failure of the award to state reasons or, indeed, to comply with any other requirements of Article 31 as to the form and content of awards
- The fact that the award was procured by fraud
- Bias or corruption on the part of an arbitrator
- Wilful disregard of the applicable law
- Failure of the tribunal to deal with all the issues referred to it

- Uncertainty or ambiguity in the award
- Fresh evidence not available at the hearing.

Some of these cases may be covered by the public policy ground of refusal, but recourse to public policy must be strictly limited to fundamental injustice if the constraints deliberately imposed by Article 34 are not to be undermined. By contrast, the English Arbitration Act, 1996 covers all these grounds of review except fresh evidence and wilful disregard of the law, though the latter is subsumed under the broader ground of error of law.

The question for Ireland is whether, in adopting Article 34 lock stock and barrel so as to enhance the finality of awards, the 1998 Act has not gone too far in the opposite direction. If an award is uncertain or ambiguous, how is to be enforced? If an important issue referred to the tribunal is not dealt with in the award, should not the aggrieved party have a remedy against the award? If the award fails to state reasons, should not the parties be entitled to complain to a court? I raise these as questions only, for as a foreigner unfamiliar with the background to Irish arbitration it would be presumptuous of me to come to any conclusion. But I do wonder whether some of the cases to which I have referred as being outside Article 34 are not going to cause problems in the future.

This brings me to the question of domestic arbitration. Irish law here is broadly the same as it was in England under the Arbitration Act, 1950. England, however, has abandoned that Act even for domestic arbitrations, reflecting widespread dissatisfaction with the opportunities given by the Act, and freely taken, for judicial intervention into the arbitration process. This is not to say that there is no case for distinguishing domestic from international arbitration. At least one of the parties to an international arbitration is likely to be a foreigner who cannot be expected to subject himself to the entire arbitration culture of any one national legal system. If a country seeks to attract international arbitration business it has to show itself responsive to differences in

legal traditions. And the New York Convention contains rules for international arbitration which do not apply to domestic arbitral disputes. Still, one has to ask: are parties in Ireland who engage in domestic arbitration happy with the relationship between arbitral tribunals and the courts? Has not the attitude of courts to arbitrators changed during the near- half century since the Arbitration Act, 1954 was enacted? Again, I ask these questions to provoke debate and to seek enlightenment, not to express any concluded view.

## IV. SHOULD THE COURTS KEEP OUT?

There is a view - albeit a fairly extreme view - that courts should not become involved in the arbitral process at all, particularly in international commercial arbitration. Several reasons are advanced for this contention:

1) Among the many reasons parties resort to arbitration are selection of the tribunal of their choice considered particularly suitable to determine their dispute; privacy; confidentiality; and finality. Every single one of these objectives is frustrated, wholly or in part, by recourse to the courts, which also entails additional expense.

2) Arbitration is the creature of contract, and by appointing an arbitrator the parties must be taken to have assumed the risk that their confidence in him or her will prove to be misplaced. At its most extreme (though I have never heard or read anyone bold enough to advance it in this form) this argument could be applied even to fraud or corruption on the part of the arbitrator or an award going beyond the arbitrator's remit.

3) In the case of international commercial arbitration, a theory has developed in one or two jurisdictions - and most notably by French courts - that an international arbitration is stateless, or anational, in that by virtue of its internationality it is not integrated into any national legal system, so that an award takes

> effect solely by virtue of its issue and the only law to be applied is that of the State of enforcement. It is on this basis that French courts consider that decisions by courts of the seat of the arbitration setting aside an award pursuant to the *lex arbitri* are of no relevance in French law.

Though some may consider the need for judicial control to be self-evident, the arguments against it have been advanced not by revolutionaries but by scholars of international repute and courts of international standing. They therefore deserve to be examined carefully and with respect. My own view is that they are a response to a correct perception of excessive judicial interference in the arbitral process and, like many counter-reactions, go too far the other way. But it is necessary to understand the concerns that have prompted them.

What is the case for judicial control of arbitration? I have already made clear my view that clarification of a point of law, even a point of general public importance, is not in itself a sufficient ground for interference with an arbitral award. Arbitration is essentially a private dispute mechanism to which the parties resort to resolve *their* dispute arising out of a transaction *they* have entered into. There is absolutely no reason why the clarification and development of our judge-made commercial law should not be left to the initiative of litigants, of whom there is no perceptible shortage. Again, the fact that in arbitrations concerning standard-term contracts a body of opinion is built up among arbitral tribunals favouring an approach to a legal issue which may be different from that adopted by courts does not cause me any concern. Since judges themselves frequently reach diametrically opposed conclusions on a point of law, why should arbitrators be expected to follow one view rather than another? And why should parties be faced with an appeal right up to the highest tribunal before they finally know where they stand? Is it not better to allow arbitrators, whether they are legally qualified or commercial or technical experts,

who are conscientiously seeking to apply the law to do so in a way which produces a commercially sensible result.

But there are compelling reasons why the resolution of arbitral disputes cannot simply be left to the arbitral tribunal. The argument that the process is contractual and that an award derives its force solely from the contract proves too much, because a contract is not law and depends for its force on legal recognition. Secondly, parties resorting to arbitration are given special privileges by law. A party against whom court proceedings are issued is entitled to a stay; judicial assistance of the arbitral proceedings is available in a variety of forms, including the taking and preservation of evidence, the preservation of property, and the granting of an injunction. All these things may, of course, be done by the arbitral tribunal itself, but it lacks coercive powers. Arbitrators have much greater freedom than judges over the forms of evidence they will receive and the determination of the applicable law in the absence of party choice, and are masters of their proceedings. The award itself is, with leave of the court, enforceable as a judgment; and in the case of an international commercial arbitration it is enforceable internationally in States which are parties to the New York Convention. These are substantial privileges for the availability of which states are entitled to require the observance of fundamental concepts of justice, including adherence of the tribunal to its mandate, fair treatment of the parties and the rendering of a timely and honest award.

As to the concept of arbitration as an autonomous, delocalised system of law existing independently of any national law other than that of the state of enforcement, I have set out elsewhere the reasons why I believe this is fundamentally misconceived.[26] Suffice it to say that the theory of the stateless award represents a disregard for principles of international comity, claims total respect for party autonomy while denying the effectiveness of decisions

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[26] Goode, "The Adaptation of English Law to International Commercial Arbitration" (1992) 8(1) *Arbitration International* 1.

under a *lex arbitri* by which the parties themselves have agreed to be bound, and promotes multiplicity of suits, the risk of divergent decisions and the fragmentation rather than the harmonisation of rules governing international arbitration. It is everywhere accepted that courts at the state of enforcement must have the last world. But those courts should start with a strong assumption in favour of upholding and applying decisions of courts of competent jurisdiction setting aside an award under the law of the jurisdiction concerned.

My conclusion is that it is essential to maintain a framework of law within which the privileges of arbitration are to be exercised and to retain the power of the courts to set aside or remit awards where the arbitral process, as opposed to the legal reasoning of the award, is vitiated by unfairness or want of jurisdiction. But appeals for error of law should be abolished except where the parties opt into them. I use the word "error" advisedly. Wilful disregard of the law is something quite different and involves an intentional departure from the arbitrator's mandate. That should certainly remain reviewable. Apart from this we should follow the many other legal systems that do not regard error of law as a ground for judicial review.

Finally, our Irish friends may wish to consider, in the light of their own experiences, whether domestic commercial arbitration is really so different in character from international commercial arbitration as to justify the attenuation of party autonomy, expedition, privacy, confidentiality and finality which have always been considered the *raison d'être* of the arbitral process.