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Arbitral Precedent in England and Wales: Mission (Im)possible?

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The topic of precedent in international arbitration is not an idle one. It is widely accepted that the existence and use of precedent in any legal system leads to predictability, consistency and equality of treatment. Indeed, one of the eight *strands* that according to the late Lord Bingham (as summarised by Lord Neuberger) make up the rule of law is that "[…] the law must be accessible, intelligible, clear and predictable".[1)]

According to Fouchard, Gaillard and Goldman, for the existence of precedent in international arbitration it is crucial that "arbitral case law […] be autonomous and independent of domestic legal orders".[2)] Perret opines that that is not feasible, for instance, in cases where the Tribunal is called upon to decide about its own jurisdiction, as this issue can be brought before courts by means of a 'set-aside' application (*e.g.* Art. 67 English Arbitration Act). He goes on to say that the situation is different in respect to the merits, as appeals in fact and in law are excluded in international arbitration.[3)]

This post argues, however, that in commercial arbitrations governed by English law, the distinct features of the English system and the arbitrators' lack of role in the development of the law hampers the development of a stand-alone arbitral precedent, reducing its scope to fewer situations.

Black's Law Dictionary defines *precedent* as "a decided case that furnished the basis for determining later cases involving similar facts or issues". It is usually spoken of as either (i) the common law *stare decisis* doctrine, which requires a court to follow previous judicial decisions – whether rendered by the same or by a hierarchically higher court – when the same point arises again in litigation, or (ii) persuasive precedent which is a decision that is not binding but is entitled to respect and careful consideration; the latter being the concept applicable to international arbitration.[4)]

Formal Relationship between Arbitration and the Courts

The first hurdle for the emergence of an independent arbitral case law comes in the form of the intrinsic link between a London-seated tribunal and the High Court. There is arguably a *quasi* formal hierarchy between them since Section 69 of the English Arbitration Act (a non-mandatory

provision) allows for appeals to the High Court on questions of English law arising out of an award, and any decision on appeal from the latter would bind all arbitrators dealing with that point in the future. As the late Lord Donaldson stated in the *Oltenia*: "I say 'similar questions' rather than 'the same questions' because the cause of uniformity of arbitral decision may already have been sufficiently served by a decision of a High Court Judge, which will bind all arbitrators".[5] However, that is not limited to arbitration appeals since any decision of the High Court would bind all arbitrators deciding on a dispute under English law simply because that is the law of England and Wales.

How does this English law peculiarity sit with the development of an independent and autonomous arbitral case law? Let us assume a situation in which a contractual term is being consistently applied and refined by different arbitral tribunals in a similar fashion, and a later award on that same point is appealed in law. The High Court could think the meaning of that term ought to be interpreted differently, easily overthrowing an arbitral *jurisprudence constante.*

Arbitrators' Role in the Creation of Persuasive Precedents

Kauffmann-Kohler argues that the more developed a legal system is, the less important is the role of arbitrators in the creation of rules, and thus in achieving predictability and consistency through precedent.[6] She continues to argue that, in commercial arbitration, there is no need for the development of consistent rules through arbitral awards because the outcome revolves around a unique set of facts or upon the interpretation of a unique contract. That is indeed the reason why she argues that one hardly finds the use of precedents in commercial arbitration. Gaillard claims that a number of cases, albeit important to the parties in dispute, bears no importance whatsoever as precedent (*e.g*. because a claim had a 45-day delay).[7]

But plenty of English court decisions, too, deal with a unique set of facts or the interpretation of a unique contract (*e.g.*, decisions subject to the *facts of the case* or a tailored charter party or shareholders agreement). Indeed, *facts*, regardless of how trivial they might seem at first glance, are the necessary feedstock for the doctrine of precedent and can even be a trigger of a decision developing an important rule of law (*e.g.*, a 45-day delay can lead to an important question of English law related to prescription).

So, there should be another reason for the current absence of arbitral precedent. Of course, a lack of public access to arbitral awards is one, if not the main, reason. But the question is – assuming awards were made public – would they be inherently persuasive precedents to subsequent arbitral tribunals?

The first point is that arbitrators, perhaps akin to civil law judges, apply the facts to the law as it stands, with a focus on the parties, but they are not concerned about creating or refining rules of general application.

Arbitrators do not attempt to detach concrete facts of the dispute and place them in the framework of an abstract rule by, for instance, explaining why these new facts ought to lead to the creation or development of a new legal category, or fall under a new exemption to a rule already created by the English courts. For example, in determining whether an act or conduct of one party has been

unreasonable in the circumstances, applying the law as it stands – and their own logic and sense of reasonableness – they would reach a conclusion as to whether or not the facts of the case lead to a finding of unreasonableness. Still, arbitrators will not attempt to expand or modify the number of parameters that English courts have developed for a finding of unreasonableness that must be considered before reaching such determination. And this is so even if the facts of that particular arbitration, because of their novelty, bring a new question of English law unbeknown to judges at the point when they last refined that rule.

The result is that arbitrators, without detaching themselves from the unique features of the case before them so as to refine the applicable rule would find it hardly possible to render an award that will be inherently persuasive. That is because one key factor for a decision to be persuasive is not so much why the unique set of facts of that dispute shifted the balance towards one side or the other. Rather, arbitrators are keen on extracting from a previous case the more abstract rule that such new set of facts – undressed of its dispute-specifics – have created, and that they can easily adapt to fit their own distinct and unique facts.

One could, of course, argue that that is not the role of arbitrators. It is for the English courts to develop the law and strive for its consistency through precedent instead. However, if it is arbitrators and not judges who indeed receive, as it often happens, a new set of facts that ought to lead to a further refinement of the current law, then, if public access to arbitral awards became a reality, their detached interpretation on those facts and their link to a legal rule would undoubtedly lead to their awards becoming persuasive. It is only then that Lord Neuberger's assertion that the law would be greatly developed if "excellent awards by excellent arbitrators" were published, would become a reality.[8)] And, I would add, it is only then that international arbitration would truly be *international*, and not strictly dependent on a domestic law.

We are then left with a smaller scope of cases where arbitral awards could still contribute to the development of persuasive precedents. More precisely, this smaller scope relates to the interpretation of similar contractual terms or clauses which appear frequently in commercial contracts (*e.g.*, charter parties, stock purchase agreements or shareholders agreements).

In these cases, as argued by Costa e Silva in her post, such terms or clauses are subject to the same "rationalising elements" of both judges *and* arbitrators. Both are equally applying their reasoning to such terms within the framework of the same law and, therefore, awards, as equally as judicial decisions, are capable of becoming persuasive precedents.

Furthermore, the exegesis would also involve, to a certain extent, undressing the ambiguous term in dispute from the particulars of the dispute. Quite often, both arbitrator and judge would follow the same method of looking at textbooks and resorting to English dictionaries as well as interpreting the term in an objective commercially-sensible fashion.

A recent example of this is *Seatrade Group N.V v Hakan Agro D.M.C.C*, in which Justice Robin Knowles CBE, in interpreting whether a term in a voyage charter party warranting that a berth would be "always accessible" meant that the vessel was able not only to *enter* but also to *leave* the berth, expressly referred to a number of public awards which had dealt with a similar term in the past. Then, however, Knowles J made express reference to an award that dealt with the interpretation of the same term, the construction of which was now in dispute. Although Knowles J finally disagreed with the arbitrator's interpretation, he paid due consideration to the Tribunal's inherently persuasive decision, and he even justified why he was following a different approach in

law.[9)]

Concluding Remarks

Although the English system and the arbitrators' limited role in law creation pose certain hurdles to the development of precedent in an all-pervasive way, one should still not overlook a potential room for the development of persuasive precedents. This is especially so when it comes to the interpretation of contractual terms or clauses. However, there is also a potential for cross-pollination between arbitral awards and judicial decisions because judges as well depend on the modern and complex fact-feedstock which is often seized and interpreted by arbitrators.

References

[1] Lord Neuberger, “Arbitration and the Rule of Law,” *Chartered Institute of Arbitrators Centenary Celebration*, *Hong Kong*, 20 March 2015, para. 6.

[2] François Perret, “Is there a need for consistency in international commercial arbitration?” in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration IAI Series No. 5 (*Juris Publishing 2008*)* p 26.

[3] Ibid., 26-27.

[4] Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture.” *Arbitration International* 23, no. 3 (2007): 358.

[5] *See* Sir Michael J Mustill and Stewart C Boyd, *Commercial Arbitration* (2nd ed., Butterworths 1989), p.630. and *Babanaft International Co. S.A. v Avant Petroleum Inc* [1982] 1 W.L.R 871.

[6] Kaufmann-Kohler, *supra* note 4, 375.

[7] Emmanuel Gaillard “Comments and Discussions” in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration IAI Series No. 5* (Juris Publishing 2008) p. 89.

[8] Lord Neuberger, *supra* note 1, para. 24.

[9] [2018] EWHC 654 (Comm) [6]-[17].

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