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WHY EGREGIOUS ERRORS OF LAW MAY YET JUSTIFY A REFUSAL OF ENFORCEMENT UNDER THE *NEW YORK CONVENTION*

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Parties on the losing side in international arbitration have long argued that an error of law is a defence to the enforcement of foreign awards. Citing article V(2)(b) of the *New York Convention*, such parties have argued that a manifest error of law is a violation of public policy. While national courts have generally paid little heed to this line of argument, this article seeks to raise the possibility that there may yet be the exceedingly rare instance in which a court *should* preclude enforcing an award marred by a hideous error of law. Limited review of an arbitrator's application of the law in international arbitrations should exist where enforcing the award would be contrary to the forum's most basic notions of justice. By way of case law, natural justice and general principles of arbitral law, this article argues that if indeed such egregious awards arise, they should be denied enforcement under the Convention.

I. INTRODUCTION

International arbitration is essentially a private, comparative and international mechanism. Its hallmark is that of respecting and advancing party autonomy; and it is able to do so since the laws of most countries by and large respect the right of parties to determine all aspects[1] of the arbitration. Not surprisingly, the assurance of party autonomy is therefore a major reason why arbitration has achieved truly global acceptance as the favoured mechanism for resolving disputes stemming from international commercial transactions.

Whilst it is true that the natural corollary to the dominant role that party autonomy plays in international arbitration is that "there are few determinative answers in arbitration",[2] this is not to say that party autonomy has become a law unto itself. In the first place, domestic legislation is a necessary prerequisite to respect for party

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1 Party autonomy in relation to the arbitration agreement typically includes the choice to arbitrate as a dispute resolution method, the choice of arbitrators, the choice of governing law which the tribunal will adopt to decide the merits of the case, the procedural rules that the tribunal should adopt, the seat of arbitration and the place of arbitration (which usually is, but need not be, the seat of arbitration).

2 Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) at v.

autonomy. Like any contract, an arbitration agreement must be situated in a legitimate legal system—an arbitration agreement cannot exist in a legal vacuum. The development of transnational rules and practices for international arbitration have however, been designed largely to accommodate and reinforce party autonomy.

II. The New York Convention

A principal factor outside party autonomy that has directly influenced international arbitration practice and law has been the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.[3] Whilst most, if not all, international treaties are intended to promote some kind of human development, *viz.*, by reducing greenhouse emissions,[4] ban cluster munitions,[5] enhance gender equality,[6] and the like, radically different views on morals, politics and religion have usurped many a draftsman's intent. Such differences have often been the reason for the failure of well-intentioned international initiatives[7] by member States of the United Nations ('UN').

Amongst international treaties therefore, the success of the *New York Convention* can hardly be overstated, for the Convention is the "backbone"[8] to the acceptance of international arbitration by the business world. Originally intended to replace the regime instituted by the *Geneva Protocol on Arbitration Clauses*[9] and the *Geneva Convention for the Execution of Foreign Awards*,[10] the *New York Convention* has far exceeded its predecessor instruments by creating a truly international arbitral framework. Currently[11] ratified by 144 States,[12] the *New York Convention* allows traders the freedom to nurture autonomous business relationships outside the boundaries of their own respective countries, by supporting a dispute resolution system divorced from domestic courts. This assures businessmen the highest possible degree of neutrality and understanding of the specific issues[13] in conflict.

International arbitration allows the parties near absolute autonomy to decide how and who should resolve their dispute. Party autonomy lies at the heart of the *New York Convention* for it insulates the Convention from the political, social

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3 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 38, 21 U.S.T. 2517, T.I.A.S. No. 6997 [*New York Convention*].

4 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, 37 I.L.M. 22 (1998).

5 *Convention on Cluster Munitions*, 3 December 2008.

6 *Convention on the Elimination of All Forms of Discrimination against Women*, 1 March 1980, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31, 19 I.L.M. 33 (entered into force 3 September 1981).

7 See Domenico Di Pietro & Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (London: Cameron May, 2001) at 11.

8 Lew, Mistelis & Kröll, *supra* note 2.

9 *Geneva Protocol on Arbitration Clauses*, 24 September 1923, 27 L.N.T.S. 157 (entered into force 28 July 1924).

10 *Geneva Convention for the Execution of Foreign Awards*, 26 September 1927, 92 L.N.T.S. 301 (entered into force 25 July 1929) [*Geneva Convention*].

11 Correct as of 20 February 2009.

12 Including all major trading nations, with the number of its member States steadily growing. For the full list of all State parties, *see* online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

13 Di Pietro & Platte, *supra* note 7.

and economic considerations that may inhibit other international conventions—the Convention itself providing for this internal flexibility, *i.e.*, the choice to choose. This is achieved in two ways. First, the Convention elevates the status of an otherwise mere contractual term (the arbitration clause) to a guarantee that arbitration will serve as the dispute resolution method; for a mandatory stay of court action applies in Convention jurisdictions. Further, whilst breach of other terms of the contract would generally only attract money damages, the arbitration agreement is held sacrosanct—being severable[14] even if the rest of the contract appears to fail. Second, party autonomy is further protected by providing very limited defences, whether procedural or substantive, to a party seeking to renege on the arbitration agreement or resist enforcement of the arbitral award. These twin principles of the Convention have no doubt greatly advanced the global stature of arbitration. Perhaps more importantly, the protection of party autonomy that the Convention provides guards against the potentially dangerous incursions of State action typically deemed to fall under the concepts of "sovereignty" or "national interests"[15] of individual member States.

Principally, the Convention mandates that courts must give effect to the agreement of parties to refer their disputes to arbitration in preference to adjudication before a national court. This is because the *New York Convention* is designed to further the interests of the world business community which traditionally prefers the relative flexibility, informality, privacy, low expense and speed of arbitration for the settlement of their disputes to the more cumbersome processes and, arguably, the greater uncertainty of judicial proceedings.[16] Thus, if one party commences court proceedings in defiance of a valid arbitration agreement, the national court should stay its proceedings and send the parties to arbitration. Further, the Convention also provides that a court may preclude enforcement *only if* basic notions of justice have been violated (article V(1)) or public policy reasons prevent enforcement (article V(2)). The protection that the *New York Convention* gives in keeping awards largely free from judicial molest has thus made arbitration "a very attractive alternative to traditional litigation".[17]

The strength of the Convention is thus the promotion of simplicity. The Convention's unambiguous drafting targets that which is of common interest to the vast majority of world governments, *viz.*, the flourishing of cross-border commercial activity. It is this common interest to boost the bottom-line[18] that transcends whatever

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[14] See Robert H. Smit, "Separability And Competence-Competence in International Arbitration: *Ex Nihilo Nihil Fit?* Or Can Something Indeed Come From Nothing?" (2002) 13 Am. Rev. Int'l Arb. 19.

[15] But see *New York Convention*, art. V(2)(b).

[16] See K.W. Patchett, *The New York Convention on the recognition and enforcement of Foreign Arbitral Awards: Explanatory Documentation prepared for Commonwealth Jurisdictions* (London: Commonwealth Secretariat, 1981) at 6.

[17] Di Pietro & Platte, *supra* note 7 at 17.

[18] See Roy Goode, *Commercial Law*, 3d ed. (London: Penguin Books, 2005) at 3, where Professor Goode remarked thus:

> One of the most powerful influences on human activity is the driving force of trade. Governments may be overthrown, wars may break out, large areas of a country may be devastated by natural disaster, but somehow traders find ways of establishing and continuing business relationships. The inventiveness of the scientist and the engineer in matters physical is matched by the ingenuity of the trader… to accommodate more efficiently the requirements of the commercial community, new methods of surmounting hurdles thrown up by the law or by the actions of government.

moral, political or religious difference that may otherwise exist between states. It seems money really makes the world go round.

A. *Effects of a Convention Award*

It may come to the surprise of some that a *mere* award issued by a potentially lay arbitrator often has greater international clout and hence currency, than that which a foreign judgment possesses, no matter the origin of the foreign judgment. Thus, where a judgment creditor has obtained judgment in one State, but is forced to pursue the recalcitrant judgment debtor in another jurisdiction where the assets lie, the critical issue of whether the judgment of the first State is rendered impotent or effectual is a question wholly at the mercy[19] of a judge sitting in the "paying state".[20] On the other hand, there is much less bureaucracy[21] to overcome when enforcing an award under the *New York Convention*. States party to the *New York Convention* are put under an obligation to ensure that foreign arbitral awards will not be discriminated against[22]—the idea is to render non-domestic awards capable of enforcement in their jurisdictions in the same way as awards actually made there. The narrow, enumerated grounds[23] for precluding the enforcement of an award also mean that national judges have scant discretion to deny the victor the fruits of his labours. These grounds also preclude concerns that the enforcing State which readily enforces arbitral awards may not enjoy reciprocity in other member States. The *New York Convention* thus provides a virtually clockwork, effectual mechanism to enforce awards and hence enhance commercial justice.

B. *Some Problems*

Like any synthetic instrument, the *New York Convention* cannot be perfect. Accordingly, murmurings have been detected that new technical as well as legal developments have put into question article II dealing with the writing requirement;[24] further, the growing need for enforceable interim measures[25] pursuant to the *New*

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19 This assertion presumes that there are no bilateral or multilateral treaties that provide for the reciprocal enforcement of foreign judgments. In Singapore, see the *Reciprocal Enforcement of Commonwealth Judgments Act* (Cap. 264, 1985 Rev. Ed. Sing.) and the *Reciprocal Enforcement of Foreign Judgments Act* (Cap. 265, 2001 Rev. Ed. Sing.).

20 Apart from potentially onerous procedural requirements that a foreign judgment creditor may have to fulfil, there is always a fear that an unscrupulous defender may seek to hide behind the *imperium* of a jingoistically motivated judge.

21 Pursuant to art. IV of the *New York Convention*, all that an applicant seeking enforcement of an award must do is to produce the original award, duly authenticated, and the original agreement or, in either case, a duly certified copy—where necessary with a certified translation. This is enough to establish a *prima facie* case—the burden of proving that the award should not be recognised and enforced then falls upon the other party.

22 Patchett, *supra* note 16 at 7.

23 Art. V, *New York Convention*.

24 Di Pietro & Platte, *supra* note 7 at 16.

25 Enforceable interim measures are not envisioned by the Convention. See David E. Wagoner, "Interim Relief in International Arbitration: Enforcement is a Substantial Problem" (1996) 51 Disp. Resol. J. 68 at 72.

York Convention also poses a legitimate concern. Fascinating as those problems may be however, they are beyond the scope of this article, which is to explore the possibility that a grave error of law by the tribunal during the decision-making process may preclude enforcement of the award by a national court.

At the outset, this author submits that denying enforcement under a legal doctrine such as 'error of law' that acts as a back door to lengthy court proceedings, particularly *de novo* review, threatens to undermine the foundations of the arbitral process. A denial of enforcement on the ground of error of law no matter how egregious may be tantamount to a breach of the *New York Convention* as well as the start of the slippery slope to the dilution of the Convention and its effectiveness. Nevertheless, common sense directs us to consider whether courts ought to have the discretion to preclude enforcing awards where arbitrators have deviated absolutely from legal norms, thereby waiving shocking illegalities. If this latter argument is to be given any merit, a delicate balancing exercise between maintaining the effectiveness of the Convention and its international gold-standard acceptance must be made with the law's goal to maintain conscionable justice. To this, it is submitted that national courts have *generally* been right to hold that manifest disregard of the law may not be invoked in actions opposing the enforcement of arbitrations which fall within the scope of the *New York Convention*.[26]

The general rule as understood by the working language of arbitrators and courts dealing with arbitral awards, that "there is to be no review of the merits" still certainly prevails. Notwithstanding, this article focuses on the exceptional rather than the typical. It is suggested that giving courts a *limited* right of review over an arbitrator's application of the law in international arbitrations is defensible. Indeed, this limited right of review is even necessary to meet the situation (albeit extremely rare) where an arbitrator crafts an award with complete disregard of legal norms; enforcing such an egregious award may be an affront to the public policy of the enforcing jurisdiction. Suggesting that enforcing courts under the *New York Convention* ought to retain a narrow right of judicial review, whilst seemingly radical, is certainly not arbitral heresy. Indeed, the idea has been mooted before.[27] For the moment, it is suffice to state that an egregious error of law qualifying as a Convention defence should both be extraordinarily grave in extent of *deviation from actual law* and in terms of *harmful effects* to the party adversely affected by the arbitrator's error. I will explain this concept more fully in Part VII.

Before moving on to explain (i) what is 'public policy' in the context of international arbitration, (ii) what is meant by an 'egregious error of law' and (iii) why an award marred by an egregious error of law may possibly not be enforced, it is first appropriate to make a differentiation between vacating an award at the arbitral seat and enforcing an award, typically in the forum where the assets lie.

C. *Vacation and Enforcement*

It is useful to note that the *New York Convention* distinguishes between proceedings to set aside an award in the supervisory jurisdiction (articles V(1)(e) and VI) and

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[26] *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp* 656 F. Supp. 160 (S.D.N.Y., 1987).

[27] Isabella de la Houssaye, "Manifest Disregard of the Law in International Commercial Arbitrations" (1990) 28 Colum. J. Transnat'l L. 449.

proceedings in the court of enforcement (article V(1)). Thus, jurisdictions which have adopted[28] the *UNCITRAL Model Law on International Commercial Arbitration*[29] may find that the grounds laid down by the *Model Law* for vacating an award are basically the same in both the setting-aside and the enforcement proceedings. Yet, the problems arising in each instance are different. As David points out, "the setting aside of the award is requested by the losing party; the enforcement of the award is requested by the winner in the arbitration procedure".[30]

Whatever merits there may be of uniformity and consistency in international arbitration, that *Model Law* (article 34) and *New York Convention* (article V) share virtually identical exclusionary grounds to nullify an award engenders its own set of problems. As awards may be set aside on the same grounds on which they may be refused enforcement, it follows that dual proceedings could take place at the setting aside and the enforcement stages.[31] The possibility of duplicate court review does not guarantee identical results, for an award which may not have been set aside for a certain ground may later be refused enforcement on the very same ground. Parallel proceedings could therefore lead to conflicting decisions[32] within the same country.

Notwithstanding, in comparing vacating and enforcing awards, a crucial difference between the two must be appreciated. Whilst a court in the arbitral *situs* may vacate the award under standards set out in its national arbitration law,[33] proceedings in the enforcing court are governed by the law of that forum, even if, *in substance*, both *Model Law* and the *New York Convention* spell out exactly the same grounds. They are still two distinct sources of law. Accordingly, annulment at the arbitral *situs* merely gives the loser strong grounds for resisting enforcement.

A final clarification pertains to jurisdictions that have not adopted the *Model Law*. A purview of the case law thus shows that judicial review of awards at the arbitral seat may include standards such as "manifest disregard of law"[34] and "evident violation of law".[35] This is an explicit incorporation of an 'error of law' defence at the annulment stage and may therefore not be conflated with the assertion that this gives enforcing courts the right to preclude enforcement for an 'error of law' under the *New York Convention*. The Convention addresses only the grounds on which a contracting state may decline to enforce an award and does not limit the grounds on which a court in the arbitral *situs* may vacate an award,[36] for its authority extends only to

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28 For example, Singapore is a *Model Law* (see *infra* note 29) jurisdiction, by virtue of the First Schedule to the *International Arbitration Act* (Cap. 143A, 2002 Rev. Ed. Sing.).

29 *UNCITRAL Model Law on International Commercial Arbitration*, 21 June 1985, 24 I.L.M. 1302 (1985) [*Model Law*].

30 Rene David, *Arbitration in International Trade* (Deventer: Kluwer Law and Taxation Publishers, 1985) at 362.

31 See Petar Šarèeviæ, "The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law" in Petar Šarèeviæ, ed., *Essays on International Commercial Arbitration* (London: Graham & Trotman/M. Nijhoff, 1989) 177 at 194.

32 Gerold Herrmann, "The Role of the Courts under the UNCITRAL Model Law Script", in Julian D.M. Lew, ed., *Contemporary Problems in International Arbitration* (Dordrecht: Martinus Nijhoff Publishers, 1987) 164 at 174.

33 Christopher R. Drahozal, "Enforcing Vacated International Arbitration Awards: An Economic Approach" (2000) 11 Am. Rev. Int'l. Arb. 451.

34 *Wilko v. Swan*, 346 U.S. 427 (1953).

35 Swiss *Concordat intercantonal sur l'arbitrage*, Art. 36(f).

36 Drahozal, *supra* note 33 at 455.

foreign awards. Naturally, the inverse is also true—refusal by a court of supervisory jurisdiction to set aside the award does not debar an unsuccessful applicant from resisting enforcement in the court of enforcement.[37]

Having pointed out the general differences between vacating and enforcing an award, we may depart from the former and turn to the grounds precluding enforcement.

III. Grounds for Refusal of Enforcement—Article V

Successful prosecution of the arbitration award may not be the last step for awards since the award can be subject to defences when the successful complainant seeks enforcement. Nevertheless, the vast majority of arbitral awards are executed freely by the parties themselves. For example, approximately 94% of arbitral awards[38] under the auspices of the International Chamber of Commerce ('ICC') are executed without enforcement proceedings.[39]

Several reasons have been advanced to explain this high percentage of self-executed arbitral awards. As privacy is usually a key concern for parties that have elected for arbitration, an award may be self-executed in order to avoid having it published;[40] in particular, the reputation of being a recalcitrant debtor is damming to one's professional and business image. Other sanctions include putting the party liable on a business association's[41] blacklist or even expelling the party from the association. Although such sanctions cannot guarantee execution in a legal sense, they appear to be nevertheless effective.[42]

Despite the array of commercial pressures which encourage compliance, there must also be legal means of guaranteeing the execution of arbitral awards. Through the *New York Convention*, this guarantee is established by means of the interaction between tribunal and court, the former as private bodies chosen by the parties to decide their dispute and the latter as state bodies having the authority and means to execute awards.[43]

The obligation on courts to recognise and enforce awards pursuant to article III of the *New York Convention* is not unfettered, being subject to certain, albeit limited exceptions. Thus, enforcement may be refused if the defender can show that either one of the exclusive grounds for refusal enumerated in article V(1) of the *New York Convention* has occurred or, pursuant to article V(2), that enforcement would violate the enforcing state's public policy. However, it is important to note that the permissive language in article V gives courts residual discretion to enforce a flawed award; thus

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37 *Firm P v. Firm F*, 2 Y.B. Comm. Arb. (1977) 241, Oberlandesgericht [Court of Appeal], Hamburg, 3 April 1975.

38 In the preface to W. Laurence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (Paris: ICC Pub S.A., 1984), Pierre Bellet states that only 6% of the awards rendered under the ICC Rules are contested before State jurisdiction, and only 0.5% set aside.

39 This includes the in-practice reality of post award negotiations, whereby the claimant accepts a portion of the sum awarded, in exchange for uncontested payment.

40 David, *supra* note 30 at 191.

41 Since trading in several commodities is reserved for members within that particular trade association.

42 Philippe Fouchard, *L'Arbitrage commercial international* (Paris: Librairie Balloz, 1965) at 471-83.

43 David, *supra* note 30 at 192.

a court *may* but is not obliged[44] to refuse enforcement, even if one of the exceptions is satisfied. Accordingly, whilst the *New York Convention*'s pro-enforcement bias may appear to encourage judicial indifference, this may be explained on the basis that a main objective of the *New York Convention* is to "…unify the standards by which agreements to arbitrate are observed and arbitral awards enforced".[45]

Would a sufficiently grave error of law in the award justify precluding enforcement under the *New York Convention*? At first glance, limbs a—e (*exhaustive*) of article V(I) of the *New York Convention* show that all of them contemplate some sort of 'error of law'. Summarily, these limbs consider: a) the legal capacity of parties, b) a limited due process defence, c) the boundaries of the tribunal's jurisdiction, d) the composition of the tribunal and e) binding/non-binding awards. While these limbs arguably constitute procedural 'errors of law' warranting possibly refusal of enforcement, it is submitted that for any meaningful discussion to flourish, the phrase 'error of law' must refer to a substantive mistake of law made by the tribunal in the course of writing the award.

Since article V(1) of the *New York Convention* enumerates an exhaustive list of grounds precluding enforcement of an award, it would appear that the enforcing court may not review the merits of the award because a mistake, either of fact or law by the arbitrator, is not included within such grounds. This suggests that once the tribunal is seised of jurisdiction, the correct procedures and formalities observed, the award—good, bad or indifferent—is final and binding on the parties.[46] If courts were constrained in their powers to preclude enforcement only by the procedural issues listed in article V(1), this leads to the conclusion that courts in *New York Convention* jurisdictions have no discretion *but to* enforce even wantonly wrong awards. Since article V(1) is *numerus clausus* and fails to encapsulate an 'error of law' defence, I will next consider whether substantive errors of law in the award may be given a second look at the enforcement stage, through the public policy exception of article V(2)(b).

IV. The Public Policy exception of Article V(2)(b)

In addition to a list of grounds for refusal of enforcement which the debtor may prove (article V(1)), the *New York Convention* also prescribes two grounds upon which the court may of its own motion refuse recognition: "subject matter non-arbitrability"[47] (article V(2)(a)) and "enforcement of the award being contrary to public policy"

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[44] This position has been judicially confirmed by the Hong Kong Supreme Court in *China Nanhai Oil Joint Service Corp v. Gee Tai Holdings Co Ltd*, (1995) XX YBCA 671 at 677, where the court held that, "*…the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing Court to achieve a just result in all the circumstances.*" *Contra*: It is notable to observe that this is *not* an internationally unanimous position, thus a German court has held that the word "may" in art. V be interpreted as "shall", leaving no discretion to the courts if one of the grounds to refuse enforcement exists (Germany, Bundesgerichtshof, 2 November 2000, ZIP 2270 (2000) 2271).

[45] *Imperial Ethiopian Government v. Baruch-Foster Corp.* 535 F.2d 334 at 335 (C.A. Tex. 1976) [*Imperial Ethiopian Government*].

[46] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3d ed. (London: Sweet & Maxwell, 1999) at 423.

[47] Typically, most jurisdictions do not allow criminal law, bankruptcy law, labour law and family law matters to be resolved by arbitration—the idea being that these areas of law lie at the heart of public interest and are heavily influenced by political policy considerations. Further, a country may, for policy reasons,

(article V(2)(b)). As a tribunal's error of law would not render the subject matter of an otherwise arbitrable dispute un-arbitrable, but for the error of law, article V(2)(a) of the *New York Convention* may for present purposes, be ignored. Thus, the only issue that is left to consider is whether an egregious error of law by the tribunal may suitably fall within the public policy exception of article V(2)(b).

A. *Public Policy as a Ground for Precluding Enforcement of Awards*

As all other grounds in article V, the public policy exception of article V(2)(b) must be construed narrowly to further the spirit of the Convention. It is worth noting however, that the power of courts to preclude the enforcement of an award based on reasons of public policy is an acknowledgment "of the right of the State and its courts to exercise ultimate control over the arbitral process".[48] Thus, the public policy exception may be successfully invoked where the award is so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection.[49]

Formulations abound on how the notion of public policy should be defined. The classical definition given by the House of Lords in *Egerton v. Brownlow* identifies the concept as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good".[50]

In the context of enforcing awards under the Convention however, the general rule is that the public policy defence would only be successfully invoked to preclude enforcement of an award where the award is "attended by such a grave departure from basic concepts of justice as applied by the court of enforcement"[51] that it should not be enforced. This prescription is however by no means exhaustive, for as the English Court of Appeal in *Deutsche Schachtbau-und Tiefbohrgesllscaft mbH v. Ras Al Khaimah National Oil Company* observed:

> Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. … It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.[52]

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carve out certain areas as law as being within the exclusive jurisdiction of courts of law. See *Audi-NSU Auto-Union AG (Germany) v. Adelin Petit & Cie (Belgium)* (1980) 5 Y.B. Comm. Arb. 257, where the Belgian Court of Cassation held that the dispute was not capable of settlement by arbitration, since the Belgian law concerning the "Unilateral Termination of Concessions for Exclusive Distributorships for an Indefinite Time" gave exclusive jurisdiction to the Belgian courts.

48 International Law Association ('ILA') Committee on International Commercial Arbitration, *Public Policy as a bar to the Enforcement of International Arbitral Awards*, London Conference Report (2000) at 2. See also Mistelis, "Keeping the Unruly Horse in Control or Public Policy as a Bar to the Enforcement of Foreign Arbitral Awards" (2000) 2(4) International Law FORUM du droit international 248.

49 *Hebei Import & Export Corporation v. Polytek Engineering*, FACV No. 10 of 1998 at 676 (H.K.C.F.A.).

50 (1853) 4 H.L.C. 1.

51 *Parsons Whittemore Overseas Co. Inc. v. Société Generale de l'Industrie du Papiér (RAKTA)* 508 F.2d 969 (2d Cir. 1974).

52 [1987] 2 Lloyd's Rep. 246 at 254.

In essence therefore, what may be said is that the enforcement of arbitral awards is firmly backed by the Convention on condition that they do not collide with the basic morals and legal principles of the place where such enforcement is sought.[53]

B. *Public Policy Clarified*

In endeavouring to grapple with the amorphous nature of 'public policy', one cannot help but recall the proverbial story of a group of blind men haplessly trying to describe an elephant. As each blind man was situated at a different part of the elephant, a somewhat pitiful parody naturally arose, for the descriptions given by each man could not better contradict the other.

Similarly, 'public policy' can mean different things to different jurisdictions, for what is considered in line with public morality and well-being may differ greatly across jurisdictions or even within the same jurisdiction, at different times. What can certainly be said however, is that any discussion of the public policy behemoth leads to several practical, as well as jurisprudential issues being brought to fore. What are 'basic concepts of justice'?[54] Should or do enforcing courts apply the same standard of public policy to foreign as well as local awards? Would widely differing standards of public policy leave a gaping lacuna in the otherwise tightly drafted *New York Convention*? Would this in turn, lead to forum shopping?

Whilst it is not the intent of this article to explore the aforementioned issues in totality, what may be said is that defining the concept of 'public policy' in the context of enforcing awards under the Convention is essentially an exercise in comparative law, for there are "as many shades of international public policy as there are national attitudes towards arbitration".[55] Whilst the text of the Convention is certainly identical in all contracting States, the interpretation of what constitutes 'public policy' is explicitly left with the court of enforcement. The comparative problem is two-fold: comparing public policy across jurisdictions, and comparing public policy within the same jurisdiction, but at different times of a state's development.

While it may be clear that different public policies concern different countries owing to varying socio-economic and political reasons, one may well imagine that variances to the public policy within one jurisdiction would be subtle and gradual. An example to show that the concept of public policy may indeed differ greatly within one jurisdiction over a short period of time is therefore apposite.

Two recent Malaysian High Court cases involved the enforcement of foreign judgments for gambling debts. In both cases, the errant debtor was trying to invoke Malaysian public policy to avoid payment. Notably, the fact that the defendant in the first case succeeded in thwarting the claim whilst the defendant in the second case was told to pay up shows that Malaysian public policy, had, within a short span of two years, undergone significant review. Thus, in *The Ritz Hotel Casino Ltd. v. Datuk Seri Osu Haji Sukam*,[56] the court categorically held that gambling was "injurious to the

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53 Di Pietro & Platte, *supra* note 7 at 180.

54 See *supra* note 50.

55 Lew, Mistelis & Kröll, *supra* note 2 at 720.

56 [2005] 6 M.L.J. 760 (Kota Kinabalu H.C.) [*Ritz Hotel Casino*].

public welfare". In referring to the *Rukun Negara*,[57] Chin J. precluded enforcement of the accrued debts on the basis that to entertain the gambling debt would be contrary to Malaysian public policy. In direct contrast however, the court in *Jupiters Ltd. v. Gan Kok Beng*[58] enforced the gambling loans accrued by the debtor. Ng J. differentiated *Ritz Hotel Casino* on the basis that it was consistent with Malaysian public policy to accord due recognition between the reciprocal enforcement agreement between Malaysia and Australia (which gave judgment to the creditor). What is striking is that such a reciprocal enforcement agreement also existed on the facts in *Ritz Hotel Casino*! Perhaps it is this mercurial property of public policy that prompted Borrough J., as early as 1824, to remark rather sceptically that public policy "is never argued at all but where other points fail".[59]

To reiterate, there are two uncertainties that arise in any meaningful discussion of public policy.

First, the comparative arbitration lawyer must cope with potentially as many versions of public policy as there are *fori*, as what constitutes 'public policy' invariably is an inherently ambulatory concept across jurisdictions. Second, because public policy tends to mirror the socio-economic and political environment of the day, the concept of public policy sways, as it were, with the vicissitudes of the life of a state. Thus, even within one jurisdiction, what courts perceive to be in line with the public policy of today could well be contrary to the public policy of yesteryear or tomorrow. This may be explained on the basis that "public policy has by its very nature, a dynamic character, so that any classification may crystallise public policy only at a certain period of time".[60]

V. International Public Policy

The previous sections have endeavoured to define in broad terms what 'public policy' is, and highlights some problems that the comparative arbitration lawyer faces. A further issue now arises: Does enforcement of arbitral awards require courts to adopt an abridged version of domestic public policy to advance the "pro-enforcement" bias of the Convention?

Whilst 'public policy' certainly refers to the enforcing state's understanding of it, some doubt still remains whether the public policy rules mentioned in article V(2)(b) of the Convention are intended to be all the national rules descending from the general principles of that country[61] or a much more limited version of those to be adopted in consideration to the peculiarities of international commercial arbitration.[62]

In the vast majority of jurisdictions, there has been a dichotomisation by courts differentiating international and domestic awards—*i.e.*, international and domestic

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57 The Malaysia National Philosophy. Interestingly, Chin J. also made explicit reference to the Quran, the Bible and Buddhist religious material, in coming to his judgment.

58 [2007] 7 M.L.J. 228 (Kuala Lumpur H.C.).

59 *Richardson v. Melish* (1824) 2 Bing 229 at 252.

60 Lew, Mistelis & Kröll, *supra* note 2 at 723.

61 *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.* 2003 SOL Case No. 175 (S.C. India) [*SAW Pipes*].

62 Di Pietro & Platte, *supra* note 7 at 180.

public policy, with many courts[63] purporting to prefer the narrower ambit of the former, where foreign elements are present. This means that where courts are faced with the question of whether a foreign arbitral award is offensive to that jurisdiction's public policy, they adopt a lower litmus standard *vis-à-vis* a domestic case, in order to facilitate enforcement. Consequently, not every infringement of the mandatory provisions of the *lex fori* constitutes a violation of international public policy.[64] Public policy in the international arena thus refers to that irreducible core of the enforcing forum's (domestic) public policy, which the forum deems inalienable, *even* where pertaining to a foreign suit. It must also be stressed that international public policy *does not* refer to some standard common to all civilised nations (since the *New York Convention* itself refers to the forum's public policy), but "those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters *but even to matters with a foreign element*… [emphasis mine]".[65] This distinction is supposedly based on "the need for international comity in an increasingly interdependent world".[66]

Thus, several jurisdictions, in applying the *New York Convention*, have held that foreign awards should be denied enforcement only when the asserted public policy "violates the State's most basic notions of morality and justice" (U.S.),[67] "contrast in an unbearable manner with our feeling of justice" (Swiss),[68] "suffers from a grave defect that touches the foundation of the State and economic functions" (German),[69] or "violate some deep rooted tradition of the forum" (Canadian).[70] Indeed, a broad interpretation of 'public policy' would arguably defeat a principal purpose of international arbitration—permitting business managers from different countries to secure some measure of neutral dispute resolution.[71]

Indeed, whilst differentiating between domestic and international public policy is not explicitly mandated by the *New York Convention*, that a narrow interpretation be adopted is indeed in accordance with its *travaux preparatoires*. The U.N. committee that prepared the draft of the *New York Convention* indicated in its report to the United Nations Convention its desire to limit the application of the public policy exception "to cases in which the recognition or enforcement of a foreign arbitral award would be distinctly contrary to the basic principles of the legal system of the country where the award is invoked".[72] Such an interpretation is also consistent when construing the words 'public policy' in accordance with the *Vienna Convention on the Law of Treaties*.[73] This is because the *Vienna Convention* requires treaties such as the *New*

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63 For a local example which differentiates between domestic and international public policy, see the court of appeal's judgment in *Liao Eng Kiat v. Burswood Nominees Ltd.* [2004] 4 S.L.R. 690 (C.A.).

64 *Oberlandesgericht* (1975) 2 Y.B. Comm. Arb. 241.

65 Redfern and Hunter, *supra* note 46.

66 *Bremen v. Zapata Offshore Co.* 407 U.S. 1 (1972).

67 *Supra* note 50.

68 *K.S A.G v. CC. SA* (1995) 20 Y.B. Comm. Arb. 762.

69 *Portuguese Company A v. Trustees in bankruptcy of Germany Company X* (1987) 12 Y.B. Comm. Arb. 496, Landgericht [Court of First Instance], Bremen, 20 January 1983.

70 Jean Gabriel Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at 172.

71 *Imperial Ethiopian Government*, *supra* note 45 at 430-32.

72 *Report of the Committee on the Enforcement of International Arbitral Awards*, U.N. ESCOR, 19th Sess., Annex 1, Agenda Item 14, U.N. Doc. E/2704, E/AC.42/4/Rev. 1 (1955) at 15.

73 *Vienna Convention on the Law of Treaties*, 29 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980) [*Vienna Convention*].

York Convention to be interpreted "in good faith and to regard the meaning of its terms in their context and in the light of the treaty's object and purpose".[74] In order to establish context and purpose, regard is to be had to the text of the treaty as a whole, including preamble and annexes.[75] Thus, as it is clear that the Convention's aim is to promote arbitration, adopting a narrower interpretation of 'public policy' is certainly welcomed.

Widely accepted examples of violations of international public policy include biased arbitrators, lack of reasons in the award, serious irregularities in the arbitration proceedings, allegations of illegality,[76] corruption or fraud,[77] the award of punitive damages[78] and the breach of competition law.[79] This list is not however, necessarily exhaustive. In theory at least, it is possible that a grave enough error of law by the tribunal may be so fundamentally offensive in nature that it should disqualify an award for enforcement, even offending the narrow understanding of international public policy. This is because a *serious enough* error of law may prove offensive to that common and irreducible part of what is considered 'public policy' in all civilised nations.

VI. An Egregious Error of Law May Violate International Public Policy

By 'error of law', it is meant that the tribunal has erred in its application of either the law governing the substance of the dispute or an erroneous application of conflict rules that the arbitrator has made to derive the *lex causae*. In the latter, if the arbitrator applies the wrong *lex causae*, albeit in its correct form, he would still have committed an 'error of law'. Hence, if the parties had chosen English law as the governing law and the arbitrator totally disregarded the concept of consideration in the formation of the contract, this would constitute an error of law. Again, if the arbitration clause is silent as to a choice of law clause, but all factors point to English law as the applicable law, the arbitrator would have erred if he arbitrarily [no pun intended] chose the laws of Yemen to apply.

This certainly does not suggest that *any* error of law results in arbitral awards being nullified. To maintain otherwise would make mockery of the entire arbitral proceedings. Remarkably, American jurisprudence captured the essence of this principle some 150 years ago:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission and contains the honest decision of the arbitrators, after a full and fair hearing of

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74 Art. 31(1), *Vienna Convention*.

75 See generally Paul Reuter, *Introduction to the Law of Treaties* (London: Kegan Paul International, 1995) at 96-97.

76 See *Soleimany v. Soleimany* [1998] Q.B. 785 (C.A.).

77 See *Westacre Investments Inc. v. Jugoimport-SPDR Holdings Co. Ltd.* [2000] Q.B. 288 (C.A.).

78 Japan, Supreme Court, 11 July 1997, 5(o) *Heisei* 1762, 51 *Minshu* 2573, 1624 *Hanrei Jiho* 90, 958 *Hanrei Times* 93.

79 See especially *Eco Swiss China Time Ltd. (Hong Kong) v. Benetton International NV (Netherlands)* Ned Jur 207 1059 (1998) C-126/97, 1 June 1999, (E.C.J.).

> the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties and would make an award the commencement, not the end, of litigation.[80]

An error of law is however, a matter of degree. As such, in considering whether a really bad error may prove contrary to a forum's public policy is ultimately a question only that forum can answer. Broadly speaking however, awards tainted with errors of law causing merely negligible or even moderate prejudice should certainly be enforced under the *New York Convention*, as this serves the overarching objectives of international arbitration.

A. *Forum Mandatory Laws and Peremptory Norms*

There is scant literature giving any general definition of what constitutes an 'egregious' error of law which could possibly justify precluding enforcement.[81] One factor that may prove decisive is therefore the nature of the law in question (which the award breached). Indeed, there is authority for the concept that courts are more sensitive to the disregard of some laws than they are to others.[82] Here, the highly uncommon situations where an arbitrator adjudicates over a case involving forum mandatory laws and peremptory norms are considered.

1. *Forum mandatory laws*

Forum mandatory laws are usually of public concern, and ensuring that they are observed is deemed essential to the political, social and economic organisation of the country.[83] If arbitrators were allowed to disregard such forum mandatory laws, arbitration may be seen as a means of escaping the legal system.[84] There is scant case law concerning an arbitrator's disregard of forum mandatory law. This paucity results, in part, from the fact that many issues of mandatory law are not arbitrable.[85]

Notwithstanding, a court would presumably be more willing to preclude enforcement of an award where a mandatory law has been violated, as compared to say, breach of a mere procedural regulation. Thus, if an employer makes a contract with an employee, the provision of which violates a workers' compensation statute, and an arbitrator enforces the contract, the award may tantamount to violation of a forum mandatory statute.[86] Whilst it is acknowledged that not every breach of

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80 *Burchell v. Marsh* 58 U.S. (17 How.) 344 at 349 (1854).

81 This article endeavours to address this lacuna in Part VII.

82 *Carte Blanche (Singapore) Pte. Ltd. v. Carte Blanche Int'l Ltd.*, 888 F.2d 260 at 269 (2d. Cir. 1989).

83 Yves Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration" in Pieter Sanders, ed., *Comparative Arbitration Practice and Public Policy in Arbitration* (Deventer: Kluwer Law and Taxation Publishers, 1987) 227 at 228.

84 Pierre Lalive, "Transnational (or truly International) Public Policy and International Arbitration", in Pieter Sanders, ed., *Comparative Arbitration Practice and Public Policy in Arbitration* (Deventer: Kluwer Law and Taxation Publishers, 1987) 260.

85 See Sterk, "Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defence" (1981) 2 Cardozo L. Rev. 481.

86 Example adopted from Houssaye, *supra* note 27 at 458.

a forum mandatory statute amounts to breach of international public policy[87] (for even within forum mandatory laws, some are deemed more important than others), disregard of the most important of such forum mandatory laws could possibly give counsel an arguable case that enforcing such an award is contrary to the forum's public policy.

2. *Peremptory norms*

A second type of law which courts must consider the preclusion of arbitral awards are breaches of *jus cogens* or peremptory norms. In fact, there is no discretion here, for a court must not enforce an award which is contrary to a recognised *jus cogens*, being of such fundamental importance that even nations may not circumvent them in the international context by treaty.[88] Commenting on the existence of these international norms, Jiménez de Aréchaga, a former President of the International Court of Justice, thus stated:

> The international community recognises certain principles which safeguard values of vital importance for humanity and correspond to fundamental moral principles: these principles are of concern to all States and protect interests which are not limited to a particular State or group of States, but belong to the community as a whole… The function of *jus cogens* is to protect States from contractual arrangements concluded in defiance of some general interest and values of the international community of States as a whole; to ensure respect for those general rules of law whose non-observance may affect the very essence of the legal system.[89]

Cases involving *jus cogens* principles are however, highly unlikely to reach an arbitrator because they are generally considered not arbitrable. Should they do arise in arbitration however, the international community has a stake in assuring that the arbitrator respects such peremptory norms. An arbitrator's failure to give effect to *jus cogens* would therefore constitute disregard of international mandatory law and hence violate the forum's international public policy. Thus, were an arbitrator to recognise as valid an international contract involving the bribing of government officials,[90] the enforcing state ought to refuse to enforce the award for egregious error of law amounting to violation of public policy (article V(2)(b), *New York Convention*).

B. *Would Grave Errors of Regular Laws Amount to a Breach of a Forum's International Public Policy?*

Thus far, we have considered the anomalous situation where an arbitrator is in breach of a forum mandatory statute, and the even more anomalous situation where an

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87 *Oberlandesgericht*, *supra* note 64.

88 Article 53, *Vienna Convention*.

89 Jiménez de Aréchaga, "Custom as a Source of International Law" (1978) 159 Rec. des Cours 9 at 64-67 reprinted in Louis Henkin *et al.*, *International Law: Cases and Materials* (West, 1986) 470.

90 Bribing government officials is considered a breach of *jus cogens* by virtue of wide, uniform and representative state acceptance. See *Measures against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved*, G.A. Res. 3514, 30 U.N. GAOR, 1975, Supp. No. 34, U.N. Doc. A/10034 (1975) at 69.

arbitrator is in breach of *jus cogens*. In the former, it has been suggested that breaches of the most important types of mandatory rules may preclude an award from being enforced, whilst in the latter, any and all breaches of *jus cogens* must certainly be denied enforcement.

Apart from forum mandatory laws and international norms however, the following considers, whether if at all, a breach of 'regular'[91] errors of law may be of such grievous nature that enforcing such awards may be contrary to the forum's understanding of international public policy. Henceforth, all reference to error of law will mean 'regular' errors of law (*i.e.*, not including breach of forum mandatory laws or *jus cogens*).

C. *Should Egregiously Erroneous Awards be Precluded Enforcement Under the New York Convention?*

> *Never say never, for if you live long enough, chances are you will not be able to abide by its restrictions. Never is a long, undependable time, and life is too full of rich possibilities to have restrictions placed upon it.*[92]

The idea behind the quotation is that there seems to be a danger in saying that no error of law, no matter how deviant it is from legal norms, could *ever* affront the international public policy of an enforcing court. Indeed, there is an almost irresistible attraction to the idea that surely, some really horrendous error of law made by the arbitral tribunal could justify curial intervention.

Mere attraction of logic however is insufficient. Thus, even if one accepts this theoretical possibility, how would such an exception be validated on principle? Accordingly, by considering 1) textual interpretation of the *New York Convention*, 2) case law, 3) general principles of arbitral law and 4) policy reasons, possible justifications of an egregious error of law being offensive to a forum's public policy are now explored.

1. *A textual reading of the New York Convention does not explicitly prohibit an error of law defence to be read into grounds of public policy under Article V(2)(b)*

As mentioned above, the *New York Convention* was intended to replace the *Geneva Convention*. Accordingly, a historical analysis of how both conventions deal with the issue of 'error of law' is important. Interestingly, article 1(e) of the *Geneva Convention* provides that enforcement could be resisted on grounds that it was contrary "to the principles of the law of the country in which it is sought to be relied upon". The literature observes that, in interpreting article 1(e), "receiving courts were prone to re-examine the award to determine whether it measured up to the requirements of the *lex fori*: the merits of the award could, in effect, be reconsidered".[93] In contradistinction however, article V(2)(b) of the *New York Convention*, (the provision

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91 Errors of law that are not forum mandatory statutes or breaches of *jus cogens*.

92 Gloria Swanson, American Actress (1899-1983).

93 Patchett, *supra* note 16 at 9.

considered *pari materia*, or at least, closest to article 1(e) of the *Geneva Convention*), omits the Article 1(e) provision, and sets out that the only permitted ground where the court may act *ex officio* is where enforcement of the award is offensive to public policy.

It would seem that this purposeful omission by the draftsmen is strongly suggestive that there is to be no re-opening of the award's merits, for, as it has been suggested, the principle of party autonomy implies that "the award should be final and there should be no judicial review on its merits".[94] Indeed, this position is also supported by jurists, who have largely maintained that courts cannot review an award for legal error under the guise of applying Convention defences.[95]

Notwithstanding, detractors would argue that courts of enforcement may yet be equipped with a residual discretion to preclude enforcement where a serious and blatant error of law had been committed by an arbitral tribunal. Whilst the *New York Convention* certainly does not provide for an error of law defence, neither does it explicitly state that an error of law may *never* engage an enforcing forum's public policy. Accordingly, the *silence* of the *New York Convention* does not rule out the *possibility* that article V(2)(b) may incorporate an error of law defence. This is because the Convention allows each country to decide for itself what is offensive to its public policy. Thus, whilst the prevailing view may well be that the Convention disallows non-enumerated grounds from precluding enforcement; it is palpably true that there is nothing in the text of the Convention which prevents a country from interpreting its own public policy to preclude enforcement, not on the basis that the error of law is a stand-alone defence, but that the error is so egregious that to enforce such an award would be contrary to that nation's public policy.

2. *Case-law in support of precluding enforcement of an egregious error of law*

Here, four reasons which may justify including a limited error of law defence within the public policy exception are considered.

(a) *An arbitral award, as opposed to a foreign judgment, should not possess the same degree of finality as regards to questions of law*: The position at common law is that a foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error, whether of fact or of law.[96] Thus, the English court in *Goddard* upheld a French court's purported application of English law, even though the French court made a mistake in its application of English law.[97] Notably, *Goddard* was adopted by the Singapore Court of Appeal in *Hong Pian Tee v. Les Placements Germain Gauthier Inc*.[98]

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94 Werner Melis, "Enforcement of Arbitral Awards in Eastern Europe" in Julian D.M. Lew, ed., *Contemporary Problems in International Arbitration* (Dordrecht: Martinus Nijhoff Publishers, 1987) 332. Clive M. Schmitthoff, "Finality of Arbitral Awards and Judicial Review" in Julian D.M. Lew, ed., *Contemporary Problems in International Arbitration* (Dordrecht: Martinus Nijhoff Publishers, 1987) 230.

95 *Baxter Int'l Inc. v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003).

96 *Goddard v. Grey* (1870) L.R. 6 Q.B. 139 at 150 [*Goddard*].

97 *Ibid.*

98 [2002] 2 S.L.R. 81 (C.A.).

At first blush, it seems only natural to argue that by analogy, foreign arbitral awards should also enjoy the same finality with regards to their application of law. Arbitral awards and foreign judgments can however, be differentiated.

Courts are always bound by their *lex fori* as they represent the judicial sovereignty of a State. Accordingly, application of a foreign *lex causae* by a national court is only tolerated because the forum's own conflict rules allow the application of the foreign law,[99] notwithstanding anything the parties may have contracted for. As such, when a national court purportedly applies foreign law, it does so not as a question of law, but as a question of fact. The French judge in *Goddard* was therefore hapless in his application of English law if the expert witnesses before him were inadequate. This would have been true *even if* the French judge had a correct understanding of English law. He would not be permitted to apply (his correct version of) English law without evidence of English law being adduced (in the same way regular facts are adduced). As a French judge sitting in a French court, only matters of French law are questions of law.

On the other hand, the same may not be said for an arbitral tribunal. Unlike courts, arbitrators are not an extension of State sovereignty, and as such, do not possess a '*lex fori*'. Indeed, the same arbitrator may be applying English law today and German law tomorrow, depending on the facts of the case. Unlike courts, there is no dichotomisation between foreign or local laws to arbitrators as the job of the arbitrator is to apply the governing law, whatever it may be. Thus, assuming the governing law is English law, it is *not* the arbitrators' understanding of English law that governs, but English law itself. This is because arbitrators' are unfettered by a '*lex fori*'; application of the governing law is therefore always a question of law and not of fact.

Accordingly, *Goddard* was a correct decision because it should not be open for a court to dispute the findings of fact made by a foreign court. At a conceptual level, if it would be ludicrous for an English court to dispute the dimensions of say, a loaf of bread established as a question of fact by a French court, equally it would be ludicrous for an English court to reject the French court's understanding (albeit erroneous) of English law, *as both are questions of fact* that the English court should not disturb.

While the finality of awards is of paramount importance in international arbitration and there are powerful international policies in favour of enforcing awards, it is submitted that there are fundamental conceptual differences derived from private international law which justify why a foreign judgment should possess *more* finality as opposed to an arbitral award, even where both are marred with errors of law. Thus, whilst there may be no room for review of a foreign court's error of law, there may yet be grounds justifying precluding enforcement of a *tribunal's* manifestly bad award.

(b) *Errors of law that go towards an arbitrator's jurisdiction should not be distinguished from errors of law with regard to the merits*: In *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*,[100] the Singapore *Court of Appeal* held that "errors of law or fact made in an arbitral decision, *per se*,[101] are final and binding on the

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[99] See generally Adrian Briggs, *The Conflict of Laws* (New York: Oxford University Press, 2002).

[100] [2007] 1 S.L.R. 597 at 621 (C.A.) [*Dexia Bank*].

[101] Whilst *Dexia Bank* appears to authoritatively hold that courts may not review the merits of an award for an error of law, closer scrutiny may suggest otherwise. One puzzling aspect of the judgment was Chan

parties and may not be appealed or set aside by a court" pursuant to *Model Law*, article 34(2)(b)(ii) (public policy) except when they can also be set aside under article 34(2)(a)(iii) (jurisdiction of tribunal) of the *Model Law*. The court held that the only types of 'errors of law' that could justify nullifying an award were such errors made by the tribunal that affected the tribunal's own jurisdiction. Notably, whilst the court was considering an award at the vacating stage and not at the enforcement stage, *Dexia Bank* is relevant because articles 34(2)(b)(ii) and 34(2)(a)(iii) of the *Model Law* are in *pari materia* to articles V(2)(b) (public policy) and V(1)(c) (jurisdiction of tribunal) of the *New York Convention* respectively.

It seems difficult however to accept why an error of law that goes towards an arbitrator's jurisdiction and an error of law on the merits should be treated differently. In *Pearlman v. Keepers & Governors of Harrow School*,[102] the English Court of Appeal held that the distinction between error of law on the face of the record and an error of jurisdiction should be abolished.[103] Lord Denning held that *certiorari* will lie in respect of misconstruction of statutory words amounting to an error in law by a county court judge, notwithstanding the fact that the county judge was vested with jurisdiction to make a "final and conclusive" (*the ouster clause*) determination. Notwithstanding the fact that *Pearlman* concerned an inferior judicial tribunal and not arbitration, a number of arguments advanced by Lord Denning in justifying substantive review for an error of law still apply, with near equal force to arbitral awards. In particular, Lord Denning opined that "no… tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction…"[104] *Mutatis mutandis*, it is submitted that this may be right even with regard to arbitral tribunals.

Whilst administrative law is certainly not indiscriminately transposable to principles of arbitration law, this does not mean that they can never coincide. A robust interpretation of *Pearlman* may therefore provide the requisite overlap as both arbitrators and adjudicators of inferior tribunals act in quasi-judicial functions; in both situations, public perception would legitimately expect that basic standards of justice would be upheld. Moreover, parties contracting for arbitration have the legitimate expectation that the arbitrator will decide according to the governing law, for parties have contracted for a *correct application of law* and certainly not for a wrong application of law.[105] Insofar that an egregious error of law usurps the legitimate expectation of the contracting parties, it is therefore antithetical to party autonomy.

C.J.'s use of the phrase "…errors of law… *per se*, are final and binding…"[Emphasis mine]. If the good Chief Justice had intended to take (as the rest of his judgment seems to suggest) the unequivocal stance that *all* errors of law in an award should be final and binding on parties to arbitration, the qualifying words "*per se*" are not needed. The natural interpretation of "*per se*" can be understood as 'by itself'. Thus, what Chan C.J. opined was that errors of law in an award are (by themselves) not capable of nullifying an award. This would suggest, or at least give room for counsel in the future to argue, that egregious errors of law leading to disastrous pecuniary or reputational outcomes may yet fall within the public policy exception. After all, in such a situation, the error of law would not be merely "*per se*".

102 [1979] Q.B. 56 (C.A.) [*Pearlman*]. Notably, *Pearlman* was followed by the House of Lords in *Customs and Excise Commissioners v. Viva Gas Appliances Ltd.* [1984] 1 All E.R. 112 (H.L.).

103 Contra *South East Asia Fire Bricks Sdn Bhd* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1981] A.C. 363 (P.C.)

104 *Pearlman, supra* note 102 at 70.

105 "[Parties]… detest and are horrified by decisions which are unexpected or devoid of any legal or rational basis…" Frederick A. Mann, "Private Arbitration and Public Policy" (1985) 4 C.J.Q. 257 at 259.

Further, an error of law going towards an arbitrator's jurisdiction is by no means necessarily more damning than a substantive mistake of law in the award, as the seriousness of each type of mistake must be considered on a case by case basis. On reflection, it seems that there is a certain attraction of supposed logic which explains why a tribunal's mistake as regard to its own competence is treated differently than an error of law in the award; that is the thinking of *ex nihilo nihil fit*—nothing comes from nothing.

Thus, it seems sensible for a court to nullify the award of an award written by an arbitrator who had no jurisdiction to speak of, but to nevertheless enforce a manifestly erroneous award of an arbitrator who purportedly acted within his jurisdiction, simply because party autonomy only extends to arbitral jurisdiction. Such reasoning may be seen by some, such as Lord Denning, as nothing but logical fallacy.

Whilst an award of an arbitrator acting beyond his jurisdiction may certainly be precluded enforcement under article V(1)(c), the argument that non-enforcement apply equally to awards labouring under a serious and substantive mistake of law does have some merit. If the rule 'no error on the merits' were absolute, one would reach the somewhat disturbing conclusion that the court of enforcement would require a tribunal to make *no mistake of law in determining its own competence* but thereafter, allow it to make as many grievous mistakes of law in the actual award making.

This distinction between "error of law within jurisdiction and without jurisdiction"[106] may therefore be seen by some as unprincipled.

(c) *Case law provides that serious enough errors of law preclude enforcement under the Convention*: There are also some jurisdictions which explicitly hold that serious enough errors of law in arbitral awards are contrary to their nation's public policy. Here, case-law from the Zimbabwean and Indian supreme courts are considered.

In *Zimbabwe Electricity Supply Authority v. Maposa*,[107] the Zimbabwean Supreme Court refused to enforce an arbitrator's decision, in failing to appreciate the effect of one company's 'code of conduct' concerning an employee's alleged misconduct. Whilst upholding the principle that 'public policy' must be construed narrowly, the Supreme Court held that:

> Where an award was based on *so fundamental an error*, [emphasis added mine] …that it constituted a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards that… the conception of justice in Zimbabwe would be intolerably hurt by the award, then it should be contrary to public policy to uphold it.

The Indian case of *SAW Pipes*[108] also held that a grave enough error of law contravenes public policy. There, the Supreme Court of India held that an arbitral award which was inconsistent with the provisions of the Indian *Arbitration and Conciliation Act*, and therefore wrong in law, was "patently illegal" and liable to be set aside on the

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[106] *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 M.L.J. 1 (F.C.).

[107] Judgment No. S.C. 114/99 (Unpublished) [*Maposa*].

[108] *Supra* note 61.

ground that it was in conflict with the public policy of India.[109] The test the Indian court purportedly laid down was whether the error was "so unfair and unreasonable that it shocks the conscience of the court",[110] and in particular, the error of law must go to the "roof of the matter", for an "illegality of trivial nature" cannot be deemed contrary to public policy.[111]

What is curious about *SAW Pipes* however is that M.B. Shah J., despite pronouncing that only "patently illegal" decisions would engage the public policy of India, went on to rule that the tribunal's failure to allow liquidated damages was in violation of the terms of the contract in question. He then proceeded to set aside the award as being contrary to 'public policy'. In doing so the Supreme Court clearly descended into the merits of the case and substituted its finding to that of the tribunal. Such an approach is probably not in line with judicial thinking in the main.[112] Perhaps one saving grace of *SAW Pipes* was that the court was dealing with the enforcement of a domestic, and not an international arbitral award.

It is therefore surmised that the Zimbabwean and Indian courts probably share the common philosophy that to "rubber-stamp" errors of law promotes injustice. Unsurprisingly, this new development is deemed exceptional, with critics lamenting that India has "refuse[d] to enforce awards on grounds not found in the *Convention*".[113] Such criticisms are certainly not without force, for judges must not *carte blanche* declare what offends 'public policy' (for the phrase must be ascertained by reference to laws and legal precedents and not from general considerations of supposed public interests),[114] as the Zimbabwean and Indian case-law considered seem to have done.

Respectfully therefore, it seems that enforcing courts should be slow to follow the *ratio* of *Maposa* and *SAW Pipes*, particularly considering the facts of each of these respective cases, and especially from the angle of *international* arbitration. This appears especially true of *Maposa* which hints of a certain degree of parochialism in attitude when dealing with foreign awards.

However, what may be gleaned from *Maposa* and *SAW Pipes* is that the *possibility* of an arbitral award being so manifestly wrong in law that enforcement would prove contrary to the forum's public policy should not be discounted.

(d) *Manifest errors of law may tantamount to a breach of natural justice*: In *Soh Beng Tee v. Fairmount Development Pte. Ltd.*,[115] the Singapore Court of Appeal considered an application to vacate an arbitral award on grounds of breach of natural justice. In endorsing the views of the New Zealand High Court in *Trustees of Rotoaira Forest Trust v. Attorney-General*,[116] Rajah J.A. held that irrational or capricious conduct during the arbitral process would justify nullifying an award. The court accepted that the test was whether a reasonable litigant in the complainant's shoes could not have foreseen the possibility of reasoning of the type revealed in the award. Accordingly,

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[109] In arriving at its decision, the Court departed from its earlier decision in *Renusagar Power Co Ltd. v. GEC* (2003) 20 Y.B. Comm. Arb. 681, thereby explicitly endorsing the 'broad view' of public policy in admitting 'patent errors of law' within the public policy exception.

[110] *SAW Pipes, supra* note 61 at para. 27.

[111] *Ibid.* at para. 36.

[112] *Supra* note 98.

[113] Rivkin, "International Arbitration and Dispute Resolution" (2004) 765 PLI. Comm 183 at 221.

[114] *United Paper v. Misco*, 484 U.S. 29 (1987).

[115] [2007] 3 S.L.R. 86 (C.A.) [*Soh Beng Tee*].

[116] [1999] 2 N.Z.L.R. 452 (N.Z.H.C.).

since breach of natural justice is equatable to contravention of the forum's public policy, it is submitted that, by analogy, a capricious or irrational application of governing law may render the award unenforceable for want of adherence to the rules of natural justice. An arbitrator's egregious error of law may therefore trigger the Convention's public policy limb.

Accordingly, it is suggested that the distilled jurisprudence from various jurisdictions is not at odds with reading, albeit a very narrow 'error of law' limb within the Convention's public policy exception.

3. *As a matter of arbitral principle, awards may not be precluded enforcement unless the 'error of law' proves truly offensive to party autonomy*

It is well accepted that arbitrators "shall act judiciously"[117] and apply "a fixed and recognisable system of law"[118] (except where the parties agree to arbitrate *ex aqueo et bono*). Accordingly, one argument for allowing the public policy exception to include an 'error of law' limb is that to do so would uphold this general good, for where an arbitrator makes an egregious error, he has not truly "act[ed] judiciously" or applied a "recognisable system" of law.

It may then further be argued that whilst the admonishment that a court should not re-open the merits of the award is often attractively packaged as reinforcing party autonomy (after all, the parties did agree to arbitration), few have considered that parties have equally elected a governing law, either expressly or implicitly. An egregious error of law by the tribunal is a betrayal of the parties' choice of governing law, for parties may have contracted for say, English law precisely for a particular rule, and ignoring that rule surely usurps party intent. This in turn leads to a bastardisation of party autonomy, the very concept which is deemed to justify 'no review of the merits'. Accordingly, some may argue, true recognition of party autonomy requires courts to respect the parties' intention to arbitrate, *as well as* the parties' choice of law. A rigid refusal to preclude enforcing egregiously erroneous awards surely does the latter injustice. *Error, qui non resistitur approbatur*—an error not resisted is approved. Taking the position that "…the 'cure' provided by litigation (with associated delays, expense and uncertainty) may be worse than the disease (possible breaches of natural justice)…"[119] is therefore advocating callous indifference. Hence, to reinforce the correctness of an egregiously bad award is to allow the claimant to reap the benefits of unlaboured fruit. Such preposterousness must surely outrage the forum's public policy.

While this author appreciates the merits of the preceding argument and acknowledges the important role that respect for the governing law plays in upholding party autonomy, it is recalled that parties had explicitly elected for arbitration and their choice of decision makers—the arbitrators. Choice of law is therefore but only one of three choices, related to the arbitration, that courts of law must seek to uphold. Further, in contrast to court litigation, arbitration must be explicitly contracted for, in

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[117] *The Maria* [1993] 2 LLR 168.

[118] *Orion Compania Esoanola v. Belfort Maatschappij* [1962] 2 Lloyd's Rep. 257.

[119] *Methanex Motunui Ltd. & Methanex Waitara Valley Ltd. v. Joseph Spellman* [2004] 1 N.Z.L.R. 95 at para. 104 (N.Z.C.A.).

writing.[120] Had the parties been silent in the contract on choice of dispute resolution, court litigation is the parties' default right. Parties electing for arbitration have therefore intentionally waived the right to litigate, and to a large degree, shown desire to do away with some measure of protection that courts may provide. Certain concessions may have been made by one party to secure arbitration as a dispute settlement method; it would therefore not do for courts to modify a freely negotiated bargain too easily. Accordingly, respect for the arbitration agreement is a truer understanding of *pacta sunt servanda* and also accords with international public policy.

The classical arguments why courts should generally never be allowed to review the merits of an award therefore prove largely persuasive. Courts may substitute their view for the tribunals' which in turn subverts party autonomy, privacy and finality, thus leading to endless litigation and a morass of uncertainty. It should not be open to the losing party to have a second bite of the cherry, for international practice advocates a policy of minimal curial intervention. The issue of law might have been argued before and disposed of by the arbitral tribunal in its award. Having opted for arbitration therefore, "parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts".[121] In short, what the enforcing court must seek to do is to ensure that party autonomy, as it is properly understood, is upheld.

General principles of arbitral law therefore support the submission that patent errors of law *may not* preclude the enforcement of an award under the *New York Convention*, *except* in the extraordinarily rare case where the enforcing court can say (by properly considering the choice of arbitration as dispute settlement method, the choice of arbitrators *and* the choice of law), that the error of law committed by the arbitrator was not, on balance, '*what the parties bargained for'.* Whilst rarely would such an error of law ever arise, its existence should not be deemed impossible.

4. *Arbitral policy reasons*[122] *may justify precluding the enforcement of an egregious error of law*

While international arbitration is no doubt highly regarded in most countries, this should not be taken for granted; arbitrators therefore have to consider the importance of preserving commercial arbitration as an instrument for the settling of international disputes. Indeed, this is the greater goal of the Convention. As such, arbitrators who commit egregious errors of law in their decision making process elicit disrepute to arbitration as a dispute resolution method. This is uncontroversial.

Accordingly, one argument that may be put forward is that national courts must therefore preclude the enforcement of manifestly bad awards in order to maintain minimum standards of justice and hence, uphold the reputation of arbitration as a credible alternative to dispute resolution by courts. This line of argument holds that arbitration can thrive only as long as it is supported by governments, and the business

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120 Art. II, *New York Convention*; Art. 7(2), *Model Law*.

121 *Soh Beng Tee, supra* note 115 at 118.

122 The use of 'policy' here does not pertain to the public policy of any nation, but rather, the goal of advancing the purposes of international arbitration.

world has an interest in keeping arbitration free of government intervention.[123] It is therefore the lesser of two evils, to have national courts nullifying egregious awards, as compared to having national governments losing faith in arbitration completely, thereby enacting laws which impede the further growth of arbitration.

For example, pursuant to articles 16 and 18 of the Chinese *Arbitration Act 1994*, only institutional arbitration (*e.g.* under China International Economic and Trade Arbitration Commission) is permitted in China;[124] arbitration agreements where parties purportedly agree to *ad-hoc* arbitration are therefore rendered void under Chinese law. This position has also been confirmed by Chinese case law.[125] To this, it is postulated that one of the reasons why China disallows *ad-hoc* arbitration is to ensure minimum arbitral standards, for the Chinese government possibly has more confidence in the quality of commercial justice that institutional arbitration can produce. It follows that greater belief in *ad-hoc* arbitration would be achieved if the Chinese courts preclude enforcing egregiously made awards, as this averts the fear that some *ad-hoc* arbitrators may act capriciously. This benefits arbitration as a whole, for the liberalisation of attitudes towards arbitration (be it institutional or *ad-hoc*) is surely healthy for sustained growth.

In response however, there seems to be convenient circularity in this argument, which suggests that curial intervention is needed to prevent greater governmental intervention. In any case, any such postulations are but mere speculation. Indeed, tangible countervailing policy reasons weigh against the forgoing line of argument. In recognising an 'error of law' defence to enforcement in cases arising under the *New York Convention*, the courts run the risk that parties may abuse the court's willingness to review international awards by pressing meritless appeals.[126] Such an abuse would frustrate the very purpose of arbitration and undermine the internationally accepted public policy favouring the recognition and enforcement of international arbitral awards. In any case, awards should not be scrutinised with the over critical eye which might be cast upon a first instance judgment by an appellate court, for where parties have chosen to resolve their disputes by arbitration, a reviewing court ought not to be too ready to draw their disputes into the litigation system, for this usurps legitimate party expectations.[127]

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[123] Ole Lando, "The Lex Mercatoria in International Commercial Arbitration" (1985) 34 I.C.L.Q. 747 at 766-767.

[124] This conclusion is derived by considering arts. 16 and 18 of the Chinese *Arbitration Act 1994*. These provisions state that the written arbitration agreement must designate an arbitration commission (art. 16); and further, that unless the parties can reach agreement on the arbitration commission, the arbitration agreement is void (art. 18).

[125] *Peoples Insurance Company of China, Guangzhou Branch v. Guangdong Guangzhe Power Co. Ltd.* [2003]. Note however that China will nevertheless recognise and enforce foreign *ad-hoc* arbitrations. Thus, the Chinese court in *Guangzhou Ocean Shipping Company v. Marships of Connecticut* [1990] recognised three arbitral awards made by an *ad-hoc* tribunal in London.

[126] See generally *Dreis & Krump Mfg. Co. v. International Ass'n of Machinists' & Aerospace Workers*, 802 F.2d 247 (7th Cir. 1986).

[127] *Isicob Pty. Ltd. v. Baulderstone Hornibrook (Qld) Pty. Ltd. (in liquidation)* [2001] Q.S.C. 64 at 66 (Qld S.C.).

VII. Comment

The foregoing analysis of the *New York Convention*'s text, arbitral case-law, general principles of arbitration and policy reasons in support of arbitration converge, pointing towards the same inexorable conclusion: the axiom that there should be no review of the merits by a court of enforcement is true—certainly in the vast majority of cases. Nevertheless, it seems possible, and apart from breaches of *jus cogens*, to envisage an error of law *so egregious* that national courts would find it detestable to enforce. Should such an obscure and atypical error of law exist, it seems justifiable to hold that it would be denied enforcement under the *New York Convention*, being contrary to the international public policy of *all* civilised nations.

Granted, the determination of what constitutes an error of law and whether the error is so egregious as to justify denial of enforcement is in itself subjective—being susceptible to different varying interpretations from national courts. This is especially true where the governing law is not that of the country in which enforcement is sought. Accordingly, is it possible to have international standards on what constitutes an egregious error of law?

American jurisprudence does not use 'egregious error', instead using the term 'manifest disregard of the law'. In *Mangan v. Owens Truckman Inc*., it was held that "'manifest disregard' may exist where the arbitrator understands and correctly states the law, but proceeds to ignore it none the less".[128] Further, according to the Second Circuit in *Merril Lynch, Pierce, Fenner & Smith v. Bobker*, "the error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator".[129] The *Bobker* court explained that "[t]he term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore it or pay no attention to it";[130] Meskill J. concluding his analysis by remarking that the governing law allegedly ignored by the arbitrators must be "well defined, explicit and clearly applicable".[131] With respect, it is submitted that the weakness of the 'manifest disregard' test lies in the fact that judicial review will depend heavily upon the wording of the arbitration award[132]—this is especially so because arbitrators are not required to explain their reasoning in rendering awards.[133] Accordingly, the 'egregious error of law' standard is to be preferred as it does away with the rather contrived element of having it necessary for the arbitrator to essentially admit that he is deviating from the law.

I therefore suggest the following in applying the 'egregious error' test in international arbitration. First, the court should presume that the arbitral tribunal made no error of law. The burden of proof thus falls on the resisting party (assuming foreign *lex causae* is chosen) to prove the content of the applicable law.[134] Second, the resisting party must show that the deviation from the law as it stands to the law as it was applied (allegedly wrongly) by the tribunal was manifest. Third, the defendant

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128 715 F.Supp. 436 at 443 (E.D.N.Y. 1989).
129 808 F.2d 930 at 933 (2d Cir. 1986).
130 *Ibid.*
131 *Ibid.* at 934.
132 Houssaye, *supra* note 27 at 455.
133 See *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211 (2d Cir. 1972).
134 See *New York Convention*, art. IV.

must also show that the practical effects of the error of law in the award are severely adverse to him. It is suggested that courts may be guided by the "but for" test. The defendant must therefore be able to show what the result of the award would have been "but for" the error of law. The essence of the rule thus requires the defendant to both show that the error *per se* was egregious *and* that the effects of the error to the defendant are unconscionable. This would mean that an error *simplicitur* resulting in grave hardship would not trigger the defence; similarly, a manifest error resulting in merely minor differences in the award would not be sufficient to resist enforcement. This reasoning is premised on the basis that only if the defendant can show that both substance (practical hardship) and form (egregious error *per se*) are met can it be said that he has done enough to show that international public policy has been breached. Thus, let us assume that the issue before the arbitrator is the sea-worthiness of a vessel; the Charter party explicitly (and validly) incorporating an internationally accepted definition of "sea-worthiness" via, for instance, the Hague-Visby Rules. Now supposing that liability turns on the issue of sea-worthiness alone, and the arbitrator somehow decides not to adopt the definition of sea-worthiness as defined by the Hague-Visby Rules but employs some other definition, it is submitted that this would be a striking example of an award that should be rejected—so long as the party toiling under the error can show that manifest practical injustice followed from the arbitrator's error, for instance if the arbitrator's wrong usage of "sea-worthiness" reversed liability.

The fear of commercial uncertainty from reading an error of law defence via article V(2)(b) is thus largely mitigated by the suggested "double-error" rule (that both the error of law itself must be grave and that its effects must be severe) as the requirements that the defendant must overcome are very stringent. At the same time, courts retain the power to prevent unconscionable injustice in the extremely anomalous situation where such an egregious error of law is made.

VIII. Conclusion

The *New York Convention* evidences a strong international public policy in favour of unifying rules for the recognition and enforcement of international arbitral awards. By acceding to that Convention, Singapore has expressed its willingness to promote international arbitration and the recognition and enforcement of international arbitral awards. Happily, Singapore has kept dear to this covenant. To this author's knowledge, no case in Singapore has ever been precluded enforcement under article V(2)(b) of the *New York Convention*. This demonstrated restraint should be lauded, for it promotes the *sine qua non* of international arbitration.

Notwithstanding, there is an inherent danger in absolutes; that is to say, enforcing courts ought to be slow in holding that they would *never* preclude the enforcement of a foreign award marred by an egregious error of law. Thus, whilst the rule that there should be 'no review of the merits' is certainly correct, there is still some leeway for exceptions to the rule. Accordingly, whilst courts must act with extreme caution and prudence when asked to identify egregious errors of law in arbitral awards, they should not discount the possibility of *ever* doing so, thus precluding enforcement under article V(2)(b) of the *New York Convention*.