# Editorial

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One of the recurring questions that arise in connection with international arbitration is the extent to which the award of an arbitral tribunal should be subject to subsequent control, either by a court of law or some other method.

Wherever it is sought to enforce an award there must be some control by the court of the country where enforcement is to be carried out. Such control among the contracting states of the New York Convention is now restricted to the matters set out in Article V. In addition there is customarily some means by which supervision is exercised domestically over the arbitral award, and this in the modern legislation on international arbitration tends to follow the provisions of the New York Convention.

This control in general falls within three main areas. The first, and essential one, concerns the jurisdiction of the arbitral tribunal to make the award in question. This requires a strict examination to ensure that there has been a valid submission to arbitration; that the arbitrators have been properly appointed; and that the award is within their mandate. The second area concerns the national authorities, which are at pains to see that the difference between the parties is one which is arbitrable and that the award falls within the national rules on public policy *(ordre public)*.

The third, and perhaps most interesting area, is to what extent the authorities will look at the way the proceedings have been conducted. In the case of the New York Convention, enforcement may be refused on the ground that the losing party "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". Under the ICSID Convention, where the award must be automatically enforced in the contracting states, there is provision for the annulment of the award by a tribunal of three arbitrators on the grounds (in addition to lack of jurisdiction) that there was corruption on the part of a member of the tribunal, that there had been a serious departure from a fundamental rule of procedure, or that the award has failed to state the reasons on which it is based.

While these rules deal with the question of a fair trial, they do not refer at all to any possibility of a revision of the substantive law which is applied by the arbitral tribunal, and this is followed by the modern legislation. In the United States it is

said that an award may be set aside for a "manifest disregard of the law". This appears to go beyond mere misinterpretation, but in any case does not seem ever to have been applied. In England the Arbitration Act 1979 has also made it possible to contract out of an appeal on a question of law.

It is perhaps somewhat strange that the substantive law to be applied should not be regarded as of the highest importance in international arbitration. In this respect international arbitration differs from an action in court where the judges apply the law strictly. That is why they are there, and one of their main concerns is that their decision should fall logically within the systematic enunciation of the law which they are applying. No such necessity lies with international arbitrators who are in the main making an award which will remain private and will not be published.

A second reason may be that in international arbitrations, particularly those involving states or state bodies, it is sometimes very difficult to find a strictly legal solution. As one eminent authority has stated, in dealing with a recent award, "The general impression conveyed by the award is that, as so often in arbitrations, strictly legal considerations may have been allowed to be pushed aside for the sake of achieving unanimity among the arbitrators and giving something to both parties".[1] If this be so it would seem that the role played by the law is to provide a method by which the dispute can be resolved rather than a determination of the precise legal rights of the parties. To some lawyers this may appear shocking, but it must also be remembered that there can be very often more than one view of the law, and very often the only criterion of its correctness depends ultimately on the view of the judicial majority for the time being in the supreme courts.

[1] F. A. Mann, "The *Aminoil* Arbitration", *British Yearbook of International Law* (1983) p. 213.