How much principles of equity colour M&A arbitration jurisprudence?
Between procedural and substantive justice

Panel Introduction

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Share Sale Agreement

Art. 1-34. […]

Art. 35. All disputes arising out of or in connection with the present Contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Art. 36. This Contract shall be governed by, construed, and interpreted in accordance with the Polish law.

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“Assessment whether the arbitral tribunal has duly ruled on the case in its factual and legal aspects is not allowed [...] in that it should be borne in mind that the arbitration court is not bound both by the rules of civil procedure(art. 1184 par. 2 of the Polish Code of Civil Procedure), and by substantive law”

Conclusions drawn from the parties' expectations

- Jeffrey M. Waincymer, Procedure and Evidence in International Arbitration

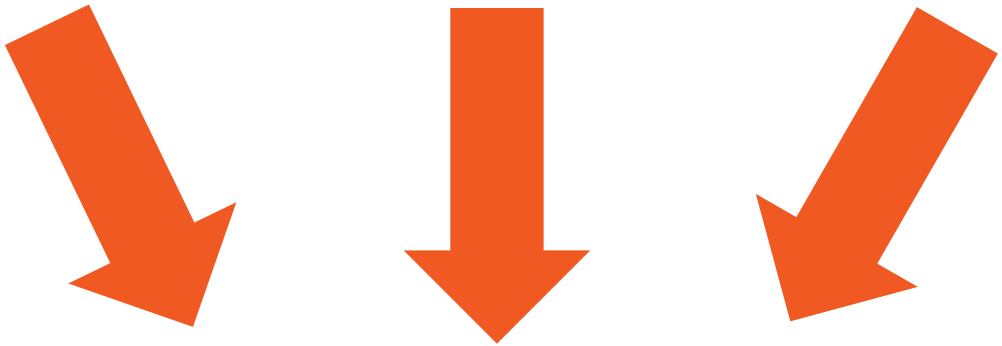
(i) *" Is the fairest outcome the one based on the technical application of law, or the most equitable solution, or the one that seems to conform more closely with the true intent or reasonable expectations of the parties? "*

or

(ii) should an outcome be considered *" in the context of the arbitral award alone, or in terms of the effect on the parties' business activities; a process that seeks to resolve a dispute in an acceptable manner and in the least disruptive fashion may not be that which is most conducive to accurate fact finding."*

or

(iii) should fairness of an outcome be considered in terms of *"being about peace-keeping, consensus building and preserving contractual relationships."*



each approach leads to different solutions

in adopting substantive law in the decision making process

Conclusions drawn from the procedural law

(3) Excess of powers

(1) Negative precept – public policy factor

- Art. 34.2.b.(ii) UNCITRAL Model Law
- Art. V.2.(b) New York Convention

Application of substantive law

procedural indications

(4) Positive precept

- Art. 28 UNCITRAL Model Law;
- Sec. 46 English Arbitration Act

(2) Negative precept – appeal on point of law

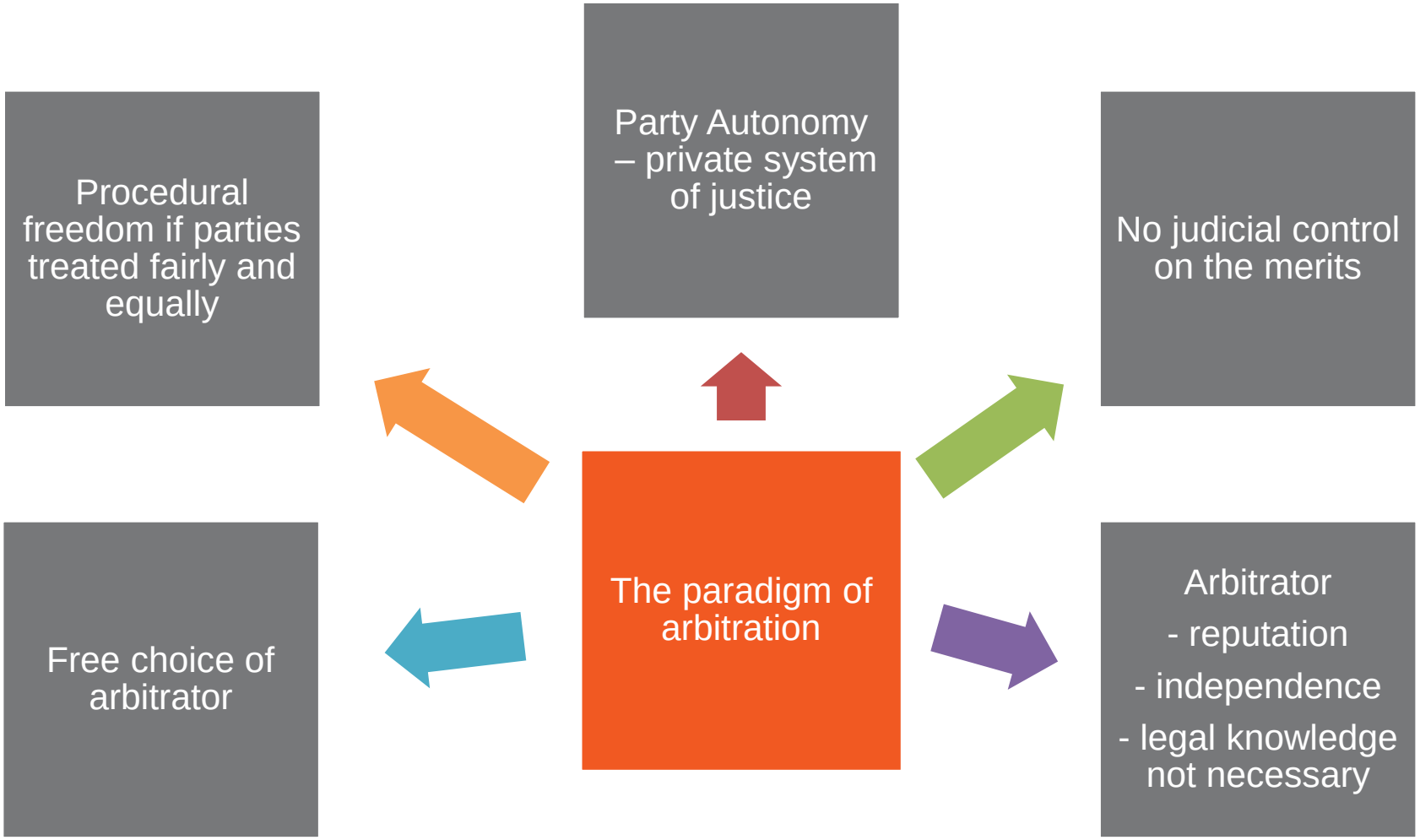
- Sec. 69 English Arbitration Act

Apparent error

- Colman J., Arbitration and Judges - how much interference should we tolerate? Master's Lecture, London, 14 March 2006.

  "What is obviously wrong? Is the obviousness something which one arrives at…on first reading over a good bottle of Chablis and some pleasant smoked salmon, or is 'obviously wrong' the conclusion one reaches at the twelfth reading of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter."

The paradigm of arbitration



The nature of substantive law

- H.L.A. Hart, The Concept of Law, Oxford 2012.

"Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange and even paradoxical ways as the question "What is law?". Even we confine our attention to the legal theory of the last 150 years and neglect classical and medieval speculation about " nature of law", we shall find a situation not paralleled in any other subject systematically studied as a separate academic discipline. No vast literature is dedicated to answering the questions "What is chemistry?" or "What is medicine?" as it is to the question " What is law?"

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