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The American University in Cairo

School of Global Affairs and Public Policy

**COMMERCIAL ARBITRATION AND THE RIGHT TO A FAIR
TRIAL: THE RELATION THAT NEVER WORKED OUT**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for
the LL.M. Degree in International and Comparative Law**

By

Ramy Magued Adly Bassily

June 2013

The American University in Cairo

School of Global Affairs and Public Policy

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School of Global Affairs and Public Policy
Department of Law

COMMERCIAL ARBITRATION AND THE RIGHT TO A FAIR
TRIAL

Ramy Bassily

Supervised by Professor Hani Sayed

ABSTRACT

Commercial Arbitration continues to be the most preferable dispute resolution mechanism for business owners and companies. That does not mean, however, that the mechanism is free of defects, as while the legislatures and scholars were working on enhancing the mechanism, they disregarded the basic principle of the rule of law. This thesis points to emphasize the imbalance between the advantages of the arbitration mechanism and the respect of the principles of law. It typifies the effects of this imbalance on the mechanism as a whole. It also suggests some solutions that do not diminish the advantages of the mechanism, but enhance congruence between the mechanism and the legal principles. The thesis, by focusing on a new problem that began to appear, aims to encourage legislatures and scholars to reconsider their liberal approaches with regard to arbitration rules amendments.

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I. Introduction

In the past two decades, the study of international arbitration has flowered remarkably. Despite the fuzziness and complexity of the field, scholars have had a notable role in explaining, analyzing, and amending rules of arbitration.¹ Due to its advantages compared to state-court adjudication, such as expedited proceedings,² confidentiality,³ and avoidance of difficulties that often accompany the enforcement of foreign courts' decisions, international arbitration has become one of the most popular alternative dispute resolution methods in commercial matters.⁴ For companies, the arbitration mechanism solved all the problems they were facing in national courts. However, from a legal point of view, the arbitration mechanism while solving the disadvantages of the litigation mechanism in terms of commercial disputes, neglected the essence of any regime: the law. The finality of the arbitral awards collides with the notion of the *right to a fair trial*, especially that the limited grounds to vacate arbitral awards do not include the situations of the *error of law* or *the disregard of a rule of law*.

By virtue of human rights international treaties, everyone is entitled to have a fair trial. This right is not respected in arbitration, as the parties to the arbitration are obliged to execute arbitral awards even if such awards are unlawful. Unfortunately, no scholar has written about the *error of law* or the *disregard of a rule of law* from a human rights approach; most of the scholars were discussing the issue from the arbitration mechanism's point of view. They believe that the adoption of the latter standards within the grounds for which arbitral awards could be vacated will affect negatively the mechanism by affecting some of its important advantages: rapidity and informality. However, this situation raises an important question: How the right to fair trial could be ensured without affecting negatively the arbitration mechanism?

¹ MAURO RUBINO-SAMMATANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE (2nd ed.), at. 5.

² EARL S. WOLAVER, THE HISTORICAL BACKGROUND OF COMMERCIAL ARBITRATION, UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTRE, Vol. 83, No. 2 (Dec., 1934), at 137.

³ *Id.* at 144.

⁴ M.I.M. ABOL ENEIN, ARBITRATION UNDER THE AUSPICES OF THE CAIRO REGIONAL CENTER FOR COMMERCIAL ARBITRATION, CAIRO CENTRE OF ARBITRATION, at 256.

Since the 1950's, many unlawful arbitral awards were pronounced. Parties, against whom unfair awards were pronounced, had no path to evade from the execution of these faulty awards. Although it is an adopted standard, not only in international human rights treaties, but also in constitutions, judges in many cases ensured that the manifest disregard of a rule of law is not a reason for which an arbitral award could be vacated. Accordingly, the unlawful arbitral award is to be executed. Executing faulty awards did not derive from judges' ignorance of law, but from the general policies of countries that want to gain reputation for their liberal arbitration atmosphere.⁵ However, those policies did not take into consideration that this excessive liberalism, as advocated by some scholars, should not be encouraged.⁶ On the contrary, some countries like Saudi Arabia adopt many legal rules in their law that limit the enforcement of foreign arbitral awards even after signing the New York Convention of the recognition and enforcement of foreign arbitral awards. Jan Paulsson, the pre-eminent scholar, once suggested the adoption of common rules to de-localize international commercial arbitration from being supervised by national courts, in order to establish equilibrium between different legal systems.⁷ However, he also thought about solutions that not only serve the arbitration mechanism, but also the international mechanism, disregarding national arbitration and any principles of law.

These events emphasized the weakness of the arbitration laws, and menace remarkably the mechanism as a whole, especially when the one against whom an unjust award was pronounced and executed loses confidence in the mechanism and does not refer future disputes to arbitral bodies.

This thesis criticizes the arbitration mechanism from a purely legal perspective aiming to preserve the reputation of the mechanism and limit the risks that may affect it negatively in the future. It moreover suggests solutions for the defects accompanying the mechanism. The thesis will be treating the issue from a dual

⁵ E.g. France.

⁶ Hamid G. Gharavi, *Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention*, J. Transnat'l L. & Pol'y 93 (1996-1997), at. 107.

⁷ Jan Paulsson, *Delocalization of International Commercial Arbitration: Why and When It Matters*, 32 INT'L & COMP. L.Q. 53,54-61 (1983).

approach: nationally and internationally including a comparative study between litigation and arbitration in light of different national laws.

The first chapter of this thesis will compare between the ways of challenging judgments in both litigation and arbitration mechanisms. Going through the laws of Egypt, France, The United Kingdom, and The United States of America, the chapter seeks to highlight the deficiencies of the arbitration mechanism by highlighting the certainty guaranteed by in-court litigation. The second chapter aims to discuss those defects from a purely legal approach. On the one hand, the chapter will provide a legal analysis to scholars' claims and defenses; on the other hand, a new approach will be discussed according to human rights principles, specifically the right to a fair trial. Chapter three will focus on the possible solutions, whether actual or suggested solutions. Criticizing each solution, the chapter ends with the most appropriate solutions, according to the author's point of view.

II. Challenging Court Decisions Remains Better

Even though the arbitration mechanism solved many disadvantages that are in litigation through the efficiency of its mechanism, in doing so it sacrificed some of the guarantees of traditional litigation. The arbitration mechanism focused mainly on the disadvantages the merchants were facing in commercial cases when they present their case before a national court. These disadvantages could be presented in delay in pronouncing an award, judges who have not enough expertise about the subject matter and its customs, lack of confidentiality, or difficulties in enforcing the judgments in a foreign country.⁸ Unlike litigation, arbitration gives the parties the right to select arbitrators who are aware with the subject matter of the conflict, ensures confidentiality, facilitates the enforcement of the award in foreign countries,⁹ and renders a judgment within a reasonable period.¹⁰ However, in my view, the arbitration mechanism while considering the merchants' interests disregarded essential principals of law.

Having an overview on the arbitration mechanism as stated in different arbitration acts, we can easily note that the mechanism is not "*free of defects.*" Moreover, unlike litigation, arbitration mistakes are not easily corrected.¹¹ In litigation if a judge commits a mistake or pronounces a bad judgment, there is always a way to correct this mistake, whether by an appellate body, or by the judge himself, if he has not yet pronounced a final judgment.¹² However, due to the *functus officio* doctrine, the arbitral panel cannot correct itself the mistakes it commits as it is considered, by pronouncing an award, lacking competence because the duties and functions of the original commission have been fully accomplished.¹³ The reason for which the *functus officio* affects arbitral panels and do not allow them to recover their mistakes arises from the nature of the arbitration mechanism generally, as arbitration

⁸ RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION PRACTICE AND PLANNING (4th ed.) Carolina Academic Press.

⁹ *Supra* note 6 at. 93.

¹⁰ *Id.*

¹¹ See Cecilia M. Di Cio, *Dealing with Mistakes Contained in Arbitral Awards*, 12 Am. Rev. Int'l Arb. 121 (2001).

¹² Hans Smit, *Arbitral & Judicial Decision: Another Judicial Misstep in Correcting an Arbitral Award*, 12 Am. Rev. Int'l Arb. 435 (2001), at. 2.

¹³ Black's Law Dictionary (8th ed. 2004), at. 1982.

is an alternative dispute resolution mechanism¹⁴ that cannot be applied without the consent of the parties to the conflict.¹⁵ Consequently, arbitrators fulfill their duties within the limits of the arbitration agreement, and finish their job once they pronounce an award. In order to review or correct a mistake, they must get the approval of both parties by a new arbitration agreement.¹⁶ Therefore, parties do not have alternatives other than challenging the award before national courts in cases where the parties did not give their consent to an arbitral panel to review the award. Yet, national courts, unlike litigation, review arbitral awards in very limited situations stated under exhaustive rules. These exhaustive rules omit serious situations that are not hardly expected in an arbitral award.

This chapter will present the problems which may arise from the omission of the situations mentioned above. Keeping in mind that arbitral awards remain an exception to litigation, and therefore “judgments,” I preferred to highlight the arbitral problems by analyzing the ways of challenging court decisions, as they are the principal, and compare both according to the purpose of each mechanism.

A. Challenging Court Decisions

According to Dr. Albert Bordas, the purpose of reviewing judgments arises from the nature of the judges, who are still humans and can pronounce wrong judgments, unintentionally or intentionally.¹⁷ Also, the person against whom the judgment was pronounced always has the feeling of “innocence” or “distrust.” For these reasons, the legislature wanted to provide a way to boost conformity with the judgments, so people respect court decisions and trust that they are just.¹⁸ In the same context Dr. Youssef Abu Zeid states that reviewing judgments leads to two advantages. Firstly, a curative advantage, as it cures the mistakes and errors, if any, contained in the first judgment. Secondly, a precautionary advantage, as the judge knows that his decision will be reviewed, he will pay more attention in order to reach

¹⁴ An exception to the principal: National Courts.

¹⁵ However, in some countries like the United States there are some exceptions to this rule (*e.g.* fraudulent transfer and de facto merger)

¹⁶ *Supra* note 11, at. 3; see also *supra* note 12.

¹⁷ ALBERT BORDAS, DES JUGEMENTS SUSCEPTIBLE D’APPEL, Paris (1904), at. 1.

¹⁸ *Id.* at. 1-2.

a right decision.¹⁹ In other words, we can say that “reviewing judgments” will be a “guarantee of justice.”²⁰

The legislatures adopted a lot of methods by which the parties to the dispute can challenge court decisions, but I will only focus on the principal methods in Civil Law and Common Law Countries.

1) Civil Law Countries

Countries that adopt a Civil Law System have many methods in order to challenge a court decision. The Appeal and the *Cassation* courts are the most famous and principal methods under a Civil Law System. However, both methods are not similar in nature, as it will be presented hereinafter.²¹

- **Appeal**

The *Appeal* is generally defined as a “*proceeding undertaken to have a decision reconsidered by a higher authority*”²² Some people may find the definition vague as it did not state any condition for which an *appeal* could be raised. Though, this is not true. Trying to fulfill the purpose of the double degree of jurisdiction, most of the Civil Law countries did not state - almost - any conditions in order to challenge a court decision before an appellate body.

In the same context came Article 543 of the French Procedural law, which stated explicitly that the right to appeal judgments of first instance is opened to all materials, even graceful; opening the accessibility of the *appeal* to all cases, as a general rule. French Law, which defined the *appeal* as a resort to cancel or re-form the judgments taken by a court of first degree,²³ understood the importance of the double degree of jurisdiction in ensuring justice. For that reason, French law stated flexible rules for people who are seeking an appellate body to review decisions of the first instance courts.

¹⁹ YOUSSEF ABU ZEID, LESSONS IN THE RULES OF PROVISIONS, at. 55.

²⁰ GERARD COUCHEZ, PROCEDURES CIVILES (14th ed. 2006), at. 421.

²¹ SAYED A. MAHMOUD, LITIGATION WITH OR WITHOUT A CASE IN CIVIL AND COMMERCIAL MATTERS, at. 433.

²² *Supra* note 13, at. 301.

²³ Civil Procedural Code, Art. 542 (France).

Similarly to French Law, the Egyptian Procedural Law requires no specific conditions for the person who is seeking an appellate body to review the judgment. According to Article 219 (1) of the Egyptian Procedural Law, the opponents have the right to appeal court decisions, pronounced by courts of first instance, unless explicitly exempted by a rule of law. Dr. Ahmed Miligy acknowledged that this article opens the door to the opponents to appeal all court decisions unless the decision concerns a case that is explicitly exonerated by other law provisions.²⁴ The Egyptian Court of Cassation explained that this flexibility arises from the core belief of the legislature in the importance of the double degree of jurisdiction, and that the appeal of court decisions must be allowed with very limited exceptions.²⁵

From the previous examples, we can note that countries took into consideration that judges could commit errors or mistakes while judging a case. For these reasons, they did not require almost any conditions for the judgments to be reviewed. It is true that the law puts some restrictions on some decisions and prevents them from being appealed, however, this prevention is not based on the denial of the double degree of jurisdiction standard. On the contrary, the legislature admits that the procedures of the *appeal* are expensive, that in some cases the procedures will cost as much as the execution of the wrong decision.²⁶ None of the civil law countries denied the importance of reviewing the court decisions as a guarantee of justice. This was proved by a French slogan, which reads, “*justice is a double degree of jurisdiction.*”²⁷

- **Cassation**

The *Cassation* is the final resort for any judgment in a Civil Law Country. Unlike the *appeal*, *cassation* can be sought only for certain reasons and under defined conditions. The *cassation* is not a course of re-form, so the court of cassation does not examine the set of matters and facts in question, but only the questions of law raised by the appeal.²⁸ The Court of Cassation then can only affirm or annul the decision of

²⁴ AHMED MILIGY, COMMENTARY ON THE PROCEDURAL LAW, Part 4 (2007), at. 503.

²⁵ Cassation 12/29/1983, Recourse No. 158, 50 Judicial Year; Cassation 5/24/1962, Year 13, p. 702.

²⁶ AHMED ABU EL-WAFFA, CIVIL AND COMMERCIAL PROCEDURAL LAW (1952), at. 590.

²⁷ Justice 1996, no. 4

²⁸ J.-L. AUBERT, LA DISTINCTION DU FAIT ET DU DROIT DANS LE PURVOI EN CASSATION EN MATIERE CIVILE, D. 2005, at. 1115.

the Court of Appeal.²⁹ The cassation was defined in article 604 of the French Civil Procedural law (decree no. 79-941 of the 7th of Nov. 1979) as a “*resort to censure by the judgments that are not in conformity to the rule of law.*” The meaning of the non-conformity to the rule of law was not given. Scholars worked on breaking down the non-conformity to the rules of law into definite situations; the existence of any allows the opponents to seek the review of the Court of Cassation. These situations could be listed as follows:

1. The violation of the law: The violation of law is not a strict term. It covers any misinterpretation of the rule of law. It also includes any error of law or disregard of a rule of law.³⁰
2. Incompetence: The law states some rules for judicial competence. Any disregard to such rules permits the cassation of the award; however, the Court of Cassation, unlike the lower courts, cannot decide on this matter unless the opponents raise such claim.³¹
3. The excess of power: The court may not exceed its power in deciding the subject matter. Its role, as defined by the law, is to pronounce a sentence according to the presented facts and consistent to the rule of law. The extension of power to legislative or executive power justifies the cassation of the lower court’s decision. In addition, the courts may not restrict the rights of the parties that are stated as fundamental rights in the procedural law.³²
4. The contradictions of judgments: The contradiction of judgments protects the *authority of res judicata* standard, which prevents the parties from raising cases that have been already decided by other courts. The Court of Cassation should annul any decision that conflicts with this standard, so if a court decided on an issue that has been decided by another court, the Court of Cassation should annul the second court’s decision.³³
5. The disregard of the form: The disregard of the form nullifies the judgment and renders it void, and also allows the party to resort before the Court of Cassation. These forms concern not only procedural matters, but also forms

²⁹ *Supra* note 20, at. 463.

³⁰ *Id.* at. 466.

³¹ *Id.*

³² *Lexique des Termes Juridiques* (14th ed. 2003), at. 260.

³³ *Supra* note 20, at. 467; *see also supra* note 23, Art. 617-618.

attached to the regularity of judgments. For example, the judgments should be motivated and the absence of or insufficient motivation allows the Cassation of the decision of the lower court.³⁴

6. The lack of judicial grounds: The lack of judicial grounds means the decision must be in conformity of the law until the day of the execution of the award. So if a judgment was in accordance with the law, but a new law was adopted before the execution of the decision, and this new law changed the articles on which the court grounded its decision, the parties could seek the annulment of the decision before the Court of Cassation.³⁵

Unlike French Law, Egyptian Law was more definitive when it dealt with the Cassation mechanism. Article 248 of the Egyptian Procedural Law set forth all the conditions that must be fulfilled in order to resort the Court of Cassation for review of a decision pronounced by the Court of Appeal. Absent these conditions the request would not be taken into consideration.³⁶ According to the latter article, the opponents have the right to challenge the judgments of Courts of Appeal before the Court of Cassation if the contested judgment was based on a violation of law, error in the application, or interpretation, or there was an invalidity in the judgment itself or invalidity in the proceedings and impacted the judgment.

The entitled conditions, stated the Egyptian Law, are similar to the situations presented by French scholars for the cases where the Court of Cassation is accessible.³⁷ As it is apparent, the Cassation is not a resort that reviews the judgment itself, as it makes sure that the judge did not deviate from the proper application of the law when deciding on the subject matter. At the same time, it ensures that the judge, when judging the case, respected the set of procedures required by the law including the non-extension of power.

2) Common Law System

Although the common law system is different than the civil law system, the ways of challenging court decisions remain close to each other. Taking the United

³⁴ *Id.* at. 468.

³⁵ *Id.* at. 468.

³⁶ *Supra* note 24, Part 5 (2007), at. 92.

³⁷ *Id.* at. 113-121.

States of America as an example of the most complicated judicial systems,³⁸ the one can note that, regardless the dualism of the judicial system, a court decision can be challenged before a Court of Appeal and before the Supreme Court.³⁹ However, the U.S. Circuit Court of Appeal does not have the same role as in civil law countries. Similarly to the court of appeal in civil law countries, the American law required almost no conditions limiting the dissatisfied party to seek recourse the court of appeal. However dissimilar to civil law countries, the court of appeal in the United States does not review the facts of a case. It only reviews the proper application of the law, similarly to the role of the Court of Cassation in civil law countries.⁴⁰ The U.S. Supreme Court is the court the one should seek in case of non-satisfaction with the decision made by the U.S. Circuit Court of Appeal. However, the U.S. Supreme Court is not easily accessible. Out of more than 7,000 cases every year the court hears between 100-150 cases only. A party who wants to challenge a court decision pronounced by the U.S. Circuit Court of Appeal should go through a legal procedure called *Petition for a Writ of Certiorari*, and it is up to the U.S. Supreme Court whether to accept or reject the case.⁴¹

The judicial system in the United Kingdom is generally not very different than that of the United States of America, although it is more complicated due to the numerous courts in the British courts' hierarchy. For example, the Supreme Court does not review any judgment without hearing appeals on arguable points of law of general public importance, and concentrates on cases of the greatest public and constitutional importance, which maintains and develops the role of the highest court in the United Kingdom as a leader in the common law world.⁴²

³⁸ Due to its duality, which arises from the federalism of the system.

³⁹ Available at,

<http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/StructureOfFederalCourts.aspx>.

⁴⁰ Available at,

<http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx>.

⁴¹ *Id.*

⁴² THE UNITED KINGDOM CONSTITUTIONAL REFORM ACT 2005, available at <http://www.legislation.gov.uk/ukpga/2005/4/contents>.

B. Challenging Arbitral Decisions

Generally, arbitral awards are final and binding⁴³ unless the parties state explicitly that the award will be subject to appeal.⁴⁴ Otherwise, there is almost no way to review the awards except through the “vacation” mechanism. The vacation mechanism is adopted in almost all countries regardless of legal system. According to Black’s Dictionary, vacation is the “act of annulling or setting aside.”⁴⁵ So vacation itself is not a resort to re-form the award, but it is an “act” of annulling the award. Consequently, it is logical that the law provides defined cases or conditions in order to set aside an arbitral award. The most important conditions were stated in article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which could be read as follows:

” 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent

⁴³ KLEIN (F.E), AUTONOMIE DE LA VOLONTÉE ET ARBITRAGE, *Revue Critique De Droit International Privé* (1958), at. 280.

⁴⁴ See Decree No. 2011-48 of January 13, 2011 to Reform Arbitration (France), Art. 1489: The award is not appealable unless otherwise agreed by the parties.

⁴⁵ *Supra* note 13, at. 4807

authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

With 146 members of the convention⁴⁶ it is not surprising that such a large number of countries have adopted the same criteria in order to vacate national arbitral awards. So, if we look at the same four examples stated in litigation we will find that in the second section of Chapter 6 of the Decree No. 2011-48 of January 13, 2011, of French law, highlighted the challenges for which an arbitral award could be challenged. According to article 1492 of the latter Decree, the vacation of the arbitral awards could not be sought unless:

1. The arbitral tribunal wrongly accepted or declined jurisdiction;
2. The arbitral tribunal was irregularly constituted;
3. The arbitral tribunal ruling did not comply with the mission entrusted to it;
4. The principle of contradiction has not been respected;
5. The decision is contrary to public order; or
6. The sentence is not motivated, or does not indicate the date on which it was made, or the name of the arbitrator who issued the order or award, or does not contain the required signatures, or was not decided by a majority of votes.

Actually, France adopted the same criteria set forth in the New York Convention; however, it added an extra criterion by which it required a specific form for the award, the absence of such form justifies the vacation of the award. The philosophy of the extra condition is inspired from the formal condition required for court's judgments, without which the judgment will be void.

Moving to the example of Egypt, one may find that the challenging arbitral awards is not as obvious as it seems. It is true that the cases for which the arbitral award could be vacated are specified in article 53 of the Egyptian Arbitration Act. However, the latter article is vague in its paragraph (h), which allows the vacation of an arbitral award if a nullity occurs in the arbitral award, or if the arbitral proceedings are tainted by nullity affecting the award. The law did not define the meaning or the

⁴⁶ <http://www.newyorkconvention.org/new-york-convention-countries>

situations of the occurrence of a nullity in either arbitral awards or arbitral proceedings. Nevertheless, the same condition was adopted in article 248 (2) of the Egyptian procedural law as a ground of seeking the Court of Cassation. Scholars aimed to find concrete definitions for the broad terms; they relied on the procedural law and the internal laws of the Egyptian judicial bodies in order to list those cases of nullity.⁴⁷ They reached a conclusion that the nullity of the arbitral award applies every time the court does not respect the law in terms of the constitution of the court or the conclusion of the award.⁴⁸ On the other hand, the nullity of the procedures is pronounced when during the hearings the court disregarded a wrongful proceeding made by one of the parties, although the other party complained.⁴⁹ Applying those rules on the arbitration mechanism, we will find that the vacation of the arbitral awards is allowed every time the arbitral panel disregards any provisions of the Arbitral Proceeding,⁵⁰ the Arbitral Award, or the Termination of Proceedings sections.⁵¹

The United States of America, in neither the Federal Arbitration Act (FAA) nor the Revised Uniform Arbitration Act (RUAA), deviated from the essential principles of arbitral awards' vacatur adopted by the New York Convention. However, going through the conditions of arbitral vacation stated under section 10 of the FAA, or section 23 of the RUAA, which are similar, one can note the United States gave a special consideration to the cases procured by corruption. Unlike the New York Convention, the United States added an extra ground of arbitral awards' vacatur to protect the parties against partiality, corruption, and/or the misconduct of the arbitrator.⁵² Other than the corruption provision, all the conditions of arbitral vacatur are inspired by the conditions stated in article V of the New York Convention.⁵³

The grounds of arbitral vacation are very definitive under the United Kingdom

⁴⁷ EZZ EL-DIN EL-DANASORY & HAMED AKAZ, COMMENTARY ON THE LAW OF PROCEDURE, Part 3, at. 635.

⁴⁸ *Id.* Part 5 (2007), at 119; *see also* 5/18/1972, year 23, The Egyptian Court of Cassation, at. 959, which quoted "The nullity occurs in the arbitral award concerns a defect that is directly linked the award itself."

⁴⁹ *Id.* Part 5 (2007), at. 119-20.

⁵⁰ *See* Law 27 of 1994 (Arbitration Act), Art. 25-38 (Egypt).

⁵¹ *Id.* Art. 39-51.

⁵² Section 23 (2) of the RUAA, Section 10 (2-3) of the FAA.

⁵³ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Art. 5 (1-a,b,c).

laws. Section 68 of the United Kingdom Arbitration Act of 1996 allowed the vacation of arbitral award for only serious irregularity. In subsection 2 of the same article, the legislature defined the cases “*serious irregularity*.” Analyzing the cases of “*serious irregularity*”, as per the British legislature, the one can note that the cases for which the arbitral award could be vacated under the United Kingdom laws are covering those mentioned in most of the previously mentioned acts collectively. For example, similar to United States laws, subsection 2 (a), which refers to respect of section 33, the legislature stated explicitly the partiality of the judge as a ground of arbitral awards’ vacatur. Also, in subsection 2 (h), similarly to French law, the legislature allowed the vacation if the arbitrator failed to meet the requirements of the form of the award.⁵⁴

From the latter presentation of the grounds of arbitral awards’ vacatur in various arbitration acts and international conventions, one may note that legislatures were concerned about the arbitration proceeding rather than the proper application of the law. It is strange that the legislatures did not take into consideration that litigation puts a lot of safeguards in order to ensure the proper application of the law even though it is more formal than the arbitration mechanism. The informality of the arbitration mechanism requires even more control in terms of reaching just decisions that are in consistency with the rule of law.

C. The Disregard of a Rule of Law

As it is apparent, losing parties have more chances to challenge a decision pronounced by a court than by an arbitral panel. It can be argued that the more the methods of challenges increase, the more justice can be guaranteed. However, due to

⁵⁴ See S. 68 applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, Sch. para. 163(1) (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, art. 3 (subject to art. 8))

C12

S. 68 applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, Sch. para. 114 (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C13

S. 68 applied (with modifications) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, Sch. para. 194EW

C14

S. 68 applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, Sch. para. 145EW (with art. 6)

C15

S. 68 applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, Sch. para. 114

the nature of the arbitration mechanism, the more the arbitral awards are controlled, the more the arbitration mechanism loses some of its advantages. However, legislatures, and even scholars, failed to balance and find equilibrium between the advantages of the arbitration mechanism and the insurance of justice.

In my view, the vacatur mechanism is very similar to the cassation mechanism in civil law countries. Both mechanisms review the judgment in very limited situations and for definite grounds. However, while the main purpose of the court of cassation is to ensure the proper application of the law, most of the arbitration acts, and international conventions, do not consider *the error of law or the disregard of a rule of law* as grounds for arbitral awards' vacatur.⁵⁵ The non-inclusion of the disregard of a rule of law within the grounds of the arbitral award's vacatur sparked many debates between scholars as well as legislatures;⁵⁶ especially as cases where the arbitrators are found to have given wrong decisions increases each day.⁵⁷

It is true that the positive reputation the arbitration mechanism has gained arises from its expedited proceedings and informality, which helps the parties retain their business operations;⁵⁸ However, this informality has to be regulated in areas that affect negatively the legal quality or certainty.⁵⁹ Mindful Judge Posner's quote that "*arbitrators are no more infallible than judges. They make mistakes and overlook contingencies and leave much to implication and assumption,*"⁶⁰ countries should control the excessive liberalism of their arbitration act. Otherwise the arbitration mechanism may discontinue to be the preferred mechanism in settling commercial disputes.⁶¹

One of the countries, which adopted a liberal statute, especially in terms of recognition and enforcement of foreign arbitral awards, is France. They believe that

⁵⁵ See *supra* note 11, at. 2.

⁵⁶ For example, the state of Georgia and its counterpart in USA.

⁵⁷ E.g. *Wilko v. Swan* 346 U.S. 427 (1953); *DiRussa v. Dean Witter Reynolds Inc.* 121 F.3d 818, 821 (2d Cir.1997); *Halligan v. Piper Jaffray, Inc.* 148 F.3d 197 (2d Cir. 1998).

⁵⁸ *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265,280 (1995).

⁵⁹ *Supra* note 6, at. 107.

⁶⁰ *Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995), per Judge Posner.

⁶¹ *Supra* not 6, at. 108

the more the law was flexible, the more the local arbitration attracts more people.⁶² However, in my view, France has reached its peak of arbitral proceedings and numbers will soon begin to fall. This is evidenced by critiques scholars directed to French judgments.⁶³ The more the law is not respected, the more people lose confidence that justice will be assured. This may explain why the General Assembly of the U.S. state of Georgia voted that disregard of a rule of law was ground of arbitral awards' vacatur, declaring it to be "a common sense approach."⁶⁴

⁶² *Id.*

⁶³ *Id.* at. 104

⁶⁴ Jonathan Ringel, *Arbitrators May Lose Right To Ignore Law*, FULTON COUNTY DAILY REP., Mar. 28, 2003, at 1.

III. The Disregard of A Rule of Law: A Critical Perspective Framework

As previously mentioned, most of the arbitration acts do not consider *the error of law* or *the disregard of a rule of law* as grounds of arbitral awards' vacatur. They rely on one main justification: the free will of the parties. As the parties agree that arbitral decisions will be final and binding, they withdrew their right in appealing or challenging the arbitral decision for whatever reason. However, this justification is not accurate. This chapter will discuss the scholars' justification from two different perspectives. On the one hand, it will link *the disregard of a rule of law* to *the right to a fair trial notion*, examining whether the parties to the arbitration have the ability to withdraw their right in appealing arbitral decisions or not. On the other hand, it will argue the scholars' justification: *the free will of the parties*, from a purely contract law perspective.

A. The Right to A Fair Trial

Human Rights are generally adopted by constitutions and international conventions, which means that they are above all the legal norms according to the hierarchy of legal sources.⁶⁵ Their placement in not only international conventions, but also constitutions, derives from their nature, which makes the people believe that those rights are fundamental to any human being. These core beliefs made society care about enacting those rights into legal rules that are prior and superior to all other rules.⁶⁶ However, those rights are not absolute. They are not applicable and protected in every single case. For example, they are not absolutely protected when the interest or the right, even if it is a fundamental right, is colliding with the fundamental rights of another person.⁶⁷

Historically, the formal concept of human rights was firstly raised in ancient Greece and Rome. At that time, it was called "*natural rights*." The term changed periodically; they called it sometimes "*inborn rights*," other times they called it

⁶⁵ Eva Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Human Rights Quarterly 27 (2005), The John Hopkins University Press, at. 300.

⁶⁶ *Id.*

⁶⁷ *Id.*

“individual fundamental freedoms,” and finally it was called “fundamental human rights.”⁶⁸

It is true that all the terms refer to the same concept, however, in my view, “natural rights” is the most meaningful term. This term highlights the fact that those rights are universal, inalienable, egalitarian, and inherent.⁶⁹ They are above all positive laws and their nature will remain the same as they are directly tied to the nature of the human being.⁷⁰ Regardless of the terms, they all emphasize the fact that among the general rights that people enjoy in different societies, there are some rights that are fundamental for any living person regardless his culture or beliefs.⁷¹ And the inclusion of those rights in codified laws was not more than a confirmation that those rights are sacred and protected against any infringement.⁷²

Nevertheless, it is important to note that there are a lot of rights that may seem to belong to human rights while in fact they do not. Many French scholars worked on highlighting the difference between these rights.⁷³ They acknowledged that there is a difference between the rights that fall under the human rights category, that are fundamental by nature, and what they call in France “*libertes publiques*” or public liberties. In French scholars’ view, public liberties are the privileges that belong to human rights and have been defined and protected juridically.⁷⁴ In other words, one can say that the public liberties are given by the state to its citizens in order to ensure their security against any external threats.⁷⁵ Public liberties could be classified under three categories. Firstly, individual rights, which guarantee a certain privacy in terms of physical activities like the right to the inviolability of the domicile, spiritual and intellectual activities like the right to freedom of thoughts and conscience, and

⁶⁸ Mircea Damaschin, *The Juridical Nature of the Right to a Fair Trial*, LESIJ NR. XVIII, VOL. 2/2011, at. 23.

⁶⁹ Corneliu Liviu Popescu, *Solutions Modernes de Consécration et de Garantie des Droits de l’Homme par les Normes du Droit International Public et de Leur Réception Dans l’Ordre Juridique Interne des Etats*, Revista Analele Universitatii din Bucuresti (1995), at. 59.

⁷⁰ *Supra* note 68, at. 24.

⁷¹ Tudor Drăganu, *Human Rights Declarations and Their Repercussions in Public International Law Level*, Bucharest: Lumina Lex, (1998), at. 21.

⁷² *Supra* note 68, at. 24.

⁷³ JEAN RIVERO, *LES LIBERTES PUBLIQUES*, Paris: Presses Universitaires de France (6th ed. 1991), p. 16-18; see also JEAN MORANGE, *LIBERTES PUBLIQUES*, Paris: Presses Universitaires de France (1986), at. 10.

⁷⁴ *Supra* note 32, at. 352.

⁷⁵ *Supra* note 68, at. 24.

economic activities like the right to protection of property. Secondly, political rights that permit the people to vote or even oppose the policy of the government. Thirdly, social and economic rights that which engage the government to ensure certain rights to their citizens like the right to work.⁷⁶

Therefore, public liberties are theoretically different than human rights as the latter belong to the natural law school and rely on philosophical assertions, while the public liberties belong to the positive law school, which relies more on the man-made laws.⁷⁷ But practically, they are the same.

As per Drăganu, a Romanian scholar, “*fundamental rights are like planets around which all the other rights gravitate as satellites.*”⁷⁸ This quotation shows that fundamental rights do not just enjoy superiority to all others legal rules,⁷⁹ but also remain the core of any constitution.

The right of every person to a fair trial is one of those fundamental rights; it is adopted in almost all countries’ constitutions, even dictatorships. However, I would prefer to treat the issue in light of international conventions as they are applied on a wider scale than constitutions.

The Universal Declaration of Human Rights (UDHR), and its treaty companions, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), is the most famous and important Human Rights instrument.⁸⁰

The right to a fair trial was treated in Article 10 of the UDHR, which reads, “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*” From the article, it is apparent that ensuring a fair trial is guaranteed by some conditions that must be respected during the process. These conditions could be broken down into equality between the parties, a fair and public

⁷⁶ *Supra* note 32, at. 352.

⁷⁷ *Supra* note 68, at. 24.

⁷⁸ TUDOR DRAGANU, CONSTITUTIONAL LAW AND POLITICAL INSTITUTION: BASIC TREATY, Bucureşti: Lumina Lex (Vol.1 1998), at. 152.

⁷⁹ *Supra* note 68, at. 26.

⁸⁰ <http://www.ohchr.org/en/udhr/pages/introduction.aspx>

hearing, and the independence and the impartiality of the judges.

It is true that the conditions stated in article 10 of the UDHR are unclear enough to confuse the reader between whether the conditions of the fair trial only concern criminal matters, or also civil matters. Most scholars agree that this guarantee applies in both criminal and civil matters. Studying article 10 narrowly, one notices that the scope of application of article 10 covers two main areas, on the one hand, determining the rights and obligations of the person, and, on the other hand, determining any criminal charge against him. It is known that the term “rights and obligations” belongs mainly to the civil law.⁸¹ The European Convention of Human Rights (ECHR), which adopts the same conditions as the UDHR,⁸² removed any confusion regarding the scope of application of the conditions of the fair trial, so in its article 6 it stated explicitly that the conditions apply on “civil” rights and obligations, and any criminal charge.

Article 6(1), which reads,

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

is, for me, one of the best articles that dealt with the notion of the right to a fair trial. It is as general as the situation needs, and definite to the extent of eliminating question about the scope of its application. Article 6(1) of the ECHR stated explicitly that the scope of application covers both civil and criminal proceedings; it also did not list rigid conditions to define the “right to fair trial.”⁸³ This statement was ensured by the European Court when adopting new characteristics other than those

⁸¹ *Supra* note 13, at. 2821.

⁸² *See also*, The African Charter on Human and Peoples' Rights (ACHPR) and the American Convention on Human Rights.

⁸³ Unlike article 8 of the American Convention on Human Rights.

explicitly stated in article 6 of the ECHR⁸⁴ confirming that such adoption protects the notion from being “theoretical and illusionary.”⁸⁵

The adoption of new characteristics, however, ensures that none of the international conventions was defining the notion of the right to a fair trial, but describing it, or mentioning its characteristics. According to Greek’s ancient philosophers, a proper definition must only predicate and counterpredicate what it defines.⁸⁶ Applying this explanation to the right to a fair trial in international conventions, or even Black’s Dictionary,⁸⁷ one can note that the definition lacks the essential principles of the universal prediction⁸⁸ and the traditional square of opposition.⁸⁹ Without getting into more details about philosophical and logical perspectives, none of the different present definitions to the right to a fair trial reflects really the meaning, scope, nature, or description of the notion.

In order to reach a proper definition to the right to fair trial, one should first look for the purpose of respecting the notion and whether the given definition satisfies the purpose or not. From the given definitions, or even the title of the notion, it is easily concluded that the notion aims to ensure the equality between the opponents of the case in pursuance of reaching a nondiscriminatory decision. By analogy, taking article 6(1) of the ECHR as an example, a public hearing within a reasonable timeframe by an independent and impartial tribunal should pronounce nondiscriminatory decisions. Nevertheless, scholars and legislatures omitted the principles of honesty and impartiality on the judicial decision. In other words, independence, for example, covers the lack of connection between the judge and one of the opponents in the case. On the one hand, suppose that the judge did not disclose his relation to such opponent, and pronounced a judgment favoring this party. Consequently, no one can accuse the judge unless his judgment was unfair. But, if the

⁸⁴ See, ECHR, *Golder v. United Kingdom*, 21 Feb. 1975, Publications of the Court, Series A, no. 18, I 40; see also ECHR, *Hornsby v. Greece*, 19 Mar. 1997, Reports of Judgments and Decisions, 1997-II.

⁸⁵ *Supra* note 65, at. 298.

⁸⁶ Smith, Robin, *Aristotle’s Logic*, The Stanford Encyclopedia of Philosophy (Spring 2012 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2012/entries/aristotle-logic/>.

⁸⁷ “A trial by an impartial and disinterested tribunal in accordance with regular procedures.” at. 1792.

⁸⁸ *Id.*

⁸⁹ Parsons, Terence, *The Traditional Square of Opposition*, The Stanford Encyclopedia of Philosophy (Fall 2012 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/fall2012/entries/square/>.

judgment was in accordance to the rule of law, the losing party will lack the grounds, or maybe the evidence that the judge was biased. On the other hand, imagine a decision taken by an independent and impartial judge after public hearings within a reasonable time, but due to the lack of experience of the judge in the field of the subject matter, the judge pronounced a decision that is not in consistency with the rule of law; similar decisions are without doubt discriminatory from the losing party's view.

The analyses prove that the definition given to the right to a fair trial is narrower than fulfilling the purpose of the notion itself. A fair trial certainly satisfies the conditions stated in international conventions, though the satisfaction of those conditions is not enough in itself to guarantee a fair trial. Judge Danny J. Boggest ensured the ambiguity of the notion in the analyses of two cases that were raised in front of the 8th circuit in USA, *Gold- stein v United States and Sunderland v United States*; he concluded,

*"The term "fair trial" is often used, but not often defined [a truism, as you will find]. It is of broad scope. While we shall not undertake to give a formal definition of the term, yet it may not be amiss to mention, in part at least, its content.... It means a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm.... Being impartial means being indifferent as between the parties."*⁹⁰

In my view, the definition of Judge Boggest, that the fair trial is "*a search for the truth*"⁹¹ remains the best despite its theoretical aspect. Pragmatically, the fair trial is the trial, which leads to decisions that are in consistency with the rule of law. The rights the person enjoys in constitutions and procedural laws like the right of presenting a defense or be represented by a lawyer, in addition to the characteristics of the fair trial in international conventions lead to one purpose: ensuring the proper application of the rule of law.

- **The Nature of the Right to a Fair Trail**

In defining the right to a fair trial, it was accordingly important to know its

⁹⁰ See *Goldstein*, 63 F2d at 613 (8th Cir 1933).; and *Sunderland*, 19 F2d at 216 (8th Cir 1927).

⁹¹ Danny J. Boggs, *The Right to a Fair Trail*, U. Chi. Legal F. 1 (1998), at. 4.

nature. Law provisions are generally divided into complimentary provisions and mandatory provisions. On the one side, the complimentary provisions are provisions that apply by default whether because the parties did not agree on specific provisions, or the law did not require a certain form for such provisions.⁹² In other words, the parties are not bound by the complimentary provisions mentioned in the law if they stated explicitly in their contract a contradiction with those provisions. For example, article 19 (1) of the Egyptian civil code states the rules that handle the conflict of laws in contractual matters. However, the legislature gives the parties the right to deviate from those rules and choose any law they prefer. On the other side, the mandatory provisions are provisions that are obligatory and binding to the parties even if their will wanted to adopt any other terms and conditions.⁹³ For example, the Egyptian law mandatorily treats agency agreements under the Egyptian Commercial law, even if the parties wanted to refer the agreement to any other law.⁹⁴ The mandatory rules are treated in practice like the public order notion, however they do not enjoy a public interest perception. The belongingness of the right to a fair trial to any of the latter categories will not only define the nature of the notion, but will also give answers on whether the right to a fair trial is a right that the person can, at his own discretion, withdraw or it is a sacred notion that may not be voluntarily waived. Back to the definition of the fair trial, “a trial, which leads to decisions that are in consistency with the rule of law,” we will find that the term rule of law is general and does not specify which *rules*. According to the Secretary-General of the United Nations, the rule of law is

“A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and

⁹²*Supra* note 32, at. 551.

⁹³ *Supra* note 32, at. 307.

⁹⁴ See Art. 165 of the Egyptian Commercial Law.

procedural and legal transparency."⁹⁵

From the first sight, it can be apparent that the right to a fair trial is an "off market right," meaning that no one can voluntarily elect to waive this right. It is not only a mandatory rule, but also a public order rule. The fair trial must be respected in order to praise the rule of law, which comprises all kinds of rules whether administrative decisions, laws, or constitution. Accordingly, it comprises complementary, mandatory, and public order rules. By analogy, one, by withdrawing his right in having a fair trial, is allowing the arbitral panel to disregard the rule of law, which is not a right he owns. In other words, the rule of law could be considered as the borders which limit some rights and enforce some obligations, without which people would have an absolute freedom and power.⁹⁶ However, in a narrower scale, a person can withdraw some legal rules that are totally adopted for his interests: complementary rules.

Focusing on commercial arbitration issues, it is not debatable that the mechanism itself was established solely for the interests of individuals, and correspondingly the parties enjoy the right to agree, unless in limited situations, on whatever rule they find more beneficial for them. Accordingly, they can agree that the decision will not be appealable - this is one of the arguments scholars use in order to justify the finality of the arbitral awards. However, they disregarded some important principles. It is true that the double degree of jurisdiction guarantees justice, but the appeal process is a process that was adopted solely for the interests of the losing party. Upon these beliefs, some countries allowed the opponents to a conflict to withdraw their rights in appealing court decisions.⁹⁷ It is important to note that the opponents enjoy the right to appeal court decisions as long as they did not withdraw their right in appealing the decisions, which means that the withdrawal will not have effect unless the opponents give their consent to the finality of the award. In addition, the countries that allow opponents to withdraw their right in appeal did not allow them correspondingly to withdraw their right in cassation. The prohibition of negotiating the cassation process proves that the parties are free to accept judgments

⁹⁵ <http://www.un.org/en/ruleoflaw/index.shtml>.

⁹⁶ Lord Bingham, *The Rule of Law*, 66 Cambridge L.J. 67 (2007), at. 84.

⁹⁷ *E.g.* Art. 219 of the Egyptian Civil and Commercial Procedural Law, Law No. 13 of 1986, (Amended by Act No. 81 of 1996).

where the reasoning of the judges were not accurate, but they must be in all events protected against the wrongful or incorrect application of the law. Applying these justifications on the arbitration mechanism, as the arbitrators play the same role as judges when hearing an arbitration case,⁹⁸ one can note that, for example, Article 12 of the UNCITRAL Model Law reads,

“(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.”⁹⁹

The article highlights the distinct importance of the satisfaction of the impartiality and independence requirement within the process of the arbitration. Because while the model law does not allow the parties to challenge the arbitrator unless he does not satisfy certain qualifications the parties agreed upon, it allowed them to challenge in case of justifiable suspicions about the arbitrator's impartiality or the independence. Extending the grounds of challenging arbitrators to cover a ground that was not based on the will of the parties show to what extent the legislature praised the fulfillment of the fair trial conditions.

Aware that some readers may argue that the parties, by giving their consent to the arbitration clause, gave their consent on withdrawing their rights in appealing the award, section two of this chapter will examine at length the meaning of “consent” according to contract laws.

⁹⁸ See Chapter 1

⁹⁹ See also Art. 18(1) of the Egyptian Arbitration Act, which reads: *An arbitrator may not be reused unless circumstances arise to cast serious doubts on his neutrality or independence.*

B. The Consent

- **The Free Will of The Parties in Contract Laws**

As defined by most the legal systems, arbitration cannot be applied as an alternative dispute resolution mechanism unless chosen by the disputing parties.¹⁰⁰ In the same context came the explanation of the Egyptian Constitutional Court when stated, *in any event, the arbitration cannot be forced to the parties (...) it is an exceptional mechanism that should not be applied unless by the free will of the parties.*¹⁰¹ Accordingly, the arbitration mechanism is applied, only, when it is justified by an arbitration agreement/contract. Correspondingly, like any agreement/contract, some conditions must be respected in order to validate such agreement/contract. Generally, in order to have a valid agreement/contract, one should make sure that four essential conditions are fulfilled. These conditions could be listed as follows: *consent, legal capacity, a licit object of the agreement/contract, and a licit cause.*¹⁰² That is the reason upon which the arbitration agreement/contract, generally, cannot extend to a third party who was not a party to the arbitration agreement/contract.¹⁰³¹⁰⁴ Keeping in mind that the agreement/contract is the law of the parties, the parties must include all the provisions that they want to apply as long as these provisions are not contrary to the public policy, and are not stated in the law whether as complimentary or mandatory provisions.

Before getting into details, however, it is important to unify the terms of “*agreement*” and “*contract*” so that the one avoids any confusion.

¹⁰⁰ E.g. the Egyptian Arbitration Act no. 27 of the year 1994, Art. 4(1) and 13; French Arbitration Act 2011, Art. 1442(2) and 1448(1).

¹⁰¹ The Egyptian Constitutional Court, Case no. 380 for the year 23 judicial, 5/11/2003.

¹⁰² ABD EL RAZAK EL SANHURY, EXPLANATION OF THE CIVIL LAW THE NOTION OF OBLIGATION: A GENERAL PROSPECTIVE THE SOURCE OF OBLIGATION, Part 1, at. 170; *see also* FRANCOIS TERRE, PHILIPPE SIMLER, YVES LEQUETTE, DROIT CIVIL: LES OBLIGATIONS, 6th ed., Dalloz.

¹⁰³ In some countries like USA, and in certain circumstances, the arbitration agreement may extend to third parties (de facto merger, fraudulent transfer... etc)

¹⁰⁴ The latter situation relies on whether lack of consent, or capacity. Additionally, the finality of the arbitral award derives from the agreement on a licit object, for a licit cause; article 152 of the Egyptian Civil Law

- **Unification of Terms**

Unlike, common law countries, in civil law countries *the contract* and *the agreement* are practically synonyms. Taking French law as an example, one may find that the *contract* relies in the first place on "the meeting of two or more wills."¹⁰⁵ This definition is not the same in common law systems. In common law systems the *contract* has different definition than the *agreement*. While the *agreement* covers any mutual understandings between the parties in terms of their rights and duties,¹⁰⁶ the *contract* is defined generally as an agreement that is enforceable by the law. This *agreement* must be an illustration to a promise for a consideration to each other. That means that in common law system, every *contract* is an *agreement*, but not every *agreement* is a *contract*. In other words, the term "*contract*" in civil law system is wider than its counterpart in common law system; it is, almost, a synonym to agreements in common law system. However, the conditions of validity are the same in both systems, so I will use the term contract in its wide meaning as synonym to agreement in order to analyze the arbitration agreement.

- **Agreements' Conditions of Validity**

As mentioned above, there are essential conditions any contract should fulfill in order to be valid. These conditions could be entitled as follows, consent, legal capacity, licit object, licit cause, and, in some cases, a specific form.¹⁰⁷

Some readers may take my explanation as a proof that the parties to the arbitration withdrew their rights in appealing the arbitration award, and gave their consent that *the error of law* or *the disregard of a rule of law* would not be accepted grounds for arbitral awards' vacatur. They build their justification on general principles like "the contract is the law of the parties," or "the conditions of validity were respected." Sometimes they even elaborate more and discuss the issue from the point of view of the "*nemo legem ignorare censetur*"¹⁰⁸ recognized rule; the parties chose the arbitration mechanism knowing that *the error of law* or *the disregard of a*

¹⁰⁵ ABD EL RAZAK EL SANHURY, EXPLANATION OF THE CIVIL LAW THE NOTION OF OBLIGATION: A GENERAL PROSPECTIVE THE SOURCE OF OBLIGATION, Part 1, at. 80.

¹⁰⁶ *Supra* note 13, at. 209.

¹⁰⁷ *E.g.* arbitration agreements must be written according to most of arbitration acts.

¹⁰⁸ Which could be translated as "There is no excuse to ignore of the law."

rule of law will not be accepted arguments for arbitral awards' vacatur. Therefore, not mentioning these situations as reasons of arbitral awards' vacatur in the arbitral agreement could be considered as a tacit acceptance of the award even if it is not in accordance to the rule of law.¹⁰⁹ However, this point of view is debatable, and in order to better understand we have to go in more depth in contract law's principles.

Analyzing the general conditions of validity, we will find that any contract in order to be valid must cover a licit object for a licit cause agreed upon willingly by a person who has the legal capacity to sign such contract. Trying to apply this statement to the arbitration agreement, we can say that an arbitration agreement is valid when the person who has the legal capacity chooses by his free will to refer disputes to an arbitral panel rather than the national courts for a specific reason. Usually, this specific reason presents some advantages to the signing party.¹¹⁰ In arbitration, logically, such advantages cover one or more of the advantages of the arbitration mechanism.¹¹¹ Accordingly, we can illustrate the nature of the arbitration agreement is an agreement where two disputing parties *agree (consent) to refer their (capacity) disputes to an arbitral panel instead of national courts (object) in order to benefit from the advantages of the arbitration mechanism (cause)*. Actually, most of the arbitrations acts disregarded the *cause* in their definitions to the arbitration agreement. Taking article 7(1) of the UNCITRAL Model Law of the year 1985, as amended in 2006, as an example, we will find that the arbitration agreement is defined as

*“An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”*¹¹²

As it is apparent, the definition covered only the capacity, the consent, and the

¹⁰⁹ The inclusion of extra grounds for arbitral vacatur is treated in Chapter 3.

¹¹⁰ *Supra* note 105, at. 272.

¹¹¹ *See* Chapter 1.

¹¹² In the same context, article 4 of the Egyptian Arbitration Act no. 27 for the year 1994, which define the term “*arbitration*”, the article reads, the word “*arbitration*” as used in this Law denotes the arbitration agreed upon by the parties to a dispute of their own free will, whether the body to which the arbitral mission is entrusted by virtue of an arbitral agreement is an institution or permanent arbitration center or not.

object of the agreement. For that reason I will only address the cause briefly.

Comparing deeply the conditions of validity of the agreements to the argument mentioned at the beginning of this section that the parties accepted by their free will the terms and conditions of the arbitration clause including the non-adoption of *the error of law or the disregard of a rule of law* as grounds for arbitral awards' vacatur, one could conclude that the latter argument is flawed.

In fact, the object and the cause of the arbitration agreement are not in consistency with the aforementioned argument. Beginning with the arbitration agreement, we will find that the object of the agreement is referring disputes to an arbitral panel, while in the first assumption the object of the agreement focuses on the grounds of arbitral vacatur. The same confusion happened with the cause, the parties signed the arbitration agreement in order to benefit from the advantages of the arbitration mechanism, not to define an exhaustive list for the grounds of arbitral vacatur.

It is possible the fact that the parties gave their consent on the arbitration agreement without including *the error of law or the disregard of a rule of law* as extra conditions of arbitral awards' vacatur may arise some confusion in readers' mind, however this confusion could be clarified by going thoroughly through the meaning of the *consent* as a condition of validity of a contract.

In the fourteenth century, there was a famous debate between the French doctrine and the German doctrine with regards to the nature of the consent. On the one side, France's scholars were supporting the idea that the valid consent is the consent that arises from the willingness of the contracting parties. On the other side, the German scholars were supporting the idea that the willingness cannot be evaluated unless by what is explicitly stated in the contract.¹¹³ I, personally, do not find the German explanation convincing. It is true that it is difficult to know what people have in mind in order to suspend the reality of the consent on the willingness of the parties, however, adopting the German definition of "consent" may provoke a lot of fraud while signing agreements. That is the reason, for which I am convinced

¹¹³ STEPHANIE PROCGY-SIMON, DROIT CIVIL 2e ANNEE LES OBLIGATIONS, (4th ed. 2006), Dalloz, at. 65.

by the French legislature's approach when adopted the standard of the willingness of the contracting parties as a ground of *consent*. In addition, the French legislature provided definite methods in order to prove such willingness. In my view, the French legislature succeeded to balance between the strict points of view of both scholars.¹¹⁴ The French law praised the consent and its importance that it allows the nullity of the contract in the event of a defect in the consent of the parties.

The different vice of consent, which allow the annulment of the contract, were stated in article 1109 of the French Civil Code.¹¹⁵ The vice of consent is covered by six situations stated exhaustively in the French civil code. These six cases are divided into two main categories, traditional methods to protect the consent, and new methods to protect the consent.

Beginning with the traditional methods, we will find that it covers three cases, *error*¹¹⁶, *fraud*, and *violence*.¹¹⁷ It is logical that instances of fraud and violence that accompany the consent can provoke the nullity of the contract, and can even justify criminal sanctions.¹¹⁸ However, the "*error*" standard may raise many questions, all of which relate to, "How the person could benefit from his own fault?"

To answer this question, we had to go throughout the law provisions and the scholars' explanations that discussed the *error* as grounds for the nullity of the contract. According to Stephanie, the *error* is the status of believing that what is wrong is right.¹¹⁹ The French law categorized the *error* under various categories. The category that fit our case it is called "*error in substania*" which means error built on the substance, which constitutes the object of the contract. This kind of errors was treated in the French civil code in article 1110, by stating that the contract cannot be annulled on the basis of the *error* standard unless it is based on the substance, which constitutes the object of the contract. Scholars and judges defined the "substance" by the characteristics that belong to the object and pushed the contracting parties to sign

¹¹⁴ Similarly to the French law, the Egyptian civil law.

¹¹⁵ Error, violence, fraud.

¹¹⁶ The error in the Egyptian law is similar to France, *see supra* note105, at. 242-48.

¹¹⁷ *Supra* note 113, at. 64.

¹¹⁸ *Id.* at. 66.

¹¹⁹ *Id.*

the contract.¹²⁰ This explanation could be easily understood if we apply it to simple contracts like sales agreement. So if the object of the contract is a Porsche car, we can say that the substance is the performance of the car in terms of speed, stability, and safety on high speeds. Consequently, if any of these elements were not present, regardless the matter of proof, the contract could be annulled. However, the situation becomes more complicated when it concerns abstract matters. For example, in several cases (most notably, Com. 1er oct. 1991, *JCP* 1992. II. 21860, note A. Viandier ; Com. 17 oct. 1995, *D.* 1996. 167, note J. Paillusseau), the court of cassation declared that in terms of sale of securities, the substance of the object is the possibility to realize a social object¹²¹ and to have an economic activity. Accordingly if the securities that the person bought had no value, the contract could be annulled.

French scholars adopted two methods in order to evaluate the substance. Firstly, they suggested that the substance should be evaluated on an *abstracto* perspective, in which the common opinion would be the substantive of the consent. The other notion is built on the *concreto* perspective, which doesn't look at abstract substance according general common sense, but instead considers what was really looked for by the victim of the *error*, even if these reasons do not seem essential for other people.¹²²

The French courts actually adopted the *concreto* perspective.¹²³ Adopting the *concreto* perspective highlights to what extent judges believe in the importance of the *consent* standard when constituting a contract, although proving the *concreto* is extremely difficult.¹²⁴

Applying this explanation on the arbitration agreement after agreeing that the object of the contract is "*referring disputes to the arbitration mechanism rather than national courts,*" it becomes logic that the substance of the object is at least one of the advantages of the arbitration mechanism, or at least this could be raised as an argument. Especially that the *meeting of will*, which constitutes the contract, must

¹²⁰ *Id.* at 67.

¹²¹ The social object is the activity that the company proposes to work in, *see supra* note 32, at. 396.

¹²² *Supra* note 113, at. 67-8

¹²³ *See, v. affaire <<du Poussin>>*, Civ. 1er, 22 févr. 1978, *Grand arrêt*, vol. 2, n^{os} 148-149); Cass. Civ., 28 janv. 1913.1.487; rappr. Cass. Com., 20 oct. 1970, *JCP* 1971, II, 16916 note J. GHESTIN; Cass. 1^{er} mars 1988, *Bull. Civ. I*, n^o 56, p 37

¹²⁴ *See also* The Egyptian Civil Law Art. 120; The Swiss Obligation Law Art. 23.

rely on a precise offer that mentions all the essential elements of the contract, while arbitration agreements do usually mention nothing with regard to the grounds of arbitral awards' vacatur.¹²⁵ In that case, the arbitration agreement will not be valid and could be subject to annulment.

It is also important to be highlighted that the *error* standard is protected even in case of *error of law* – if the latter situation satisfies the general conditions of the *error*. Noting that the *error of law* does not contradict the *nemo censetur ignorare legem*. In case of the *error of law*, the parties do not use their ignorance of law as a defense to avoid application of a rule of law. However, it gives the contracting parties the right to seek the annulment of the contract they concluded in case it binds them with obligations they do not know.¹²⁶

To conclude, the agreement of the parties to refer their disputes to an arbitral panel rather than national courts does not justify awards that disregard the rule of law. The wrong analysis of contract law's principles in general, and the consent in specific led to this confusion to many scholars and judges. In my view, the issue could be handled solely by contracts law principles. However, the solutions will not be more than arguments before the court, but not as complimenting as they should be. The *error of law* or the *disregard of a rule of law* is not just a legal principle, but it is fundamental for any country to ensure a state of law that respects human rights.

I believe that *the error of law* or *the disregard of a rule of law* is still an *hors marché*, or an off-market object that cannot be withdrawn by the will of the parties. It is true that the arbitration mechanism was created exclusively for the benefit of the merchants; however, the proper application of the law is not a negotiable object.

Although, however, the confusion raised by article 219 of the Egyptian procedural law, which allowed the opponents to a conflict to withdraw their rights in appealing courts' decisions. The appeal mechanism is a mechanism that allows the court to review the facts of the case and analyze the reasoning of the lower court,¹²⁷ not only the proper application of the rule of law. For that reason, Egyptian

¹²⁵ Cass. 3^e civ., 27 juin 1973, *Bull. civ.* III, n^o 446, p. 324

¹²⁶ *Supra* note 105, at. 255

¹²⁷ See Chapter 1

Procedural law did not allow the opponents to withdraw their rights in resorting Cassation. Ensuring the fair trial during the arbitration process goes beyond the review of the award; it concerns the proper application of the rule of law rather than reviewing the arbitral panel's reasoning. It is also important to note that the parties to the arbitration can agree that their disputes will be solved according to the general rules of equity, or to the customs of the market. In my understanding, this allowance indirectly proves my point of view, as the legislature wanted to protect the characteristics of the arbitration mechanism: a mechanism that was adopted to serve merchants' interests, so it allowed them to go beyond applying the rule of law. Nevertheless, once the parties decide by their own will to adopt a specific law, such law should be respected and followed. Otherwise, giving options to the parties to the arbitration, whether to choose a governing law, or the rules of equity, is a useless inclusion, unless the legislature wanted to protect the proper application of the rule of law.

IV. A Different Approach Towards Pragmatic Solutions

Throughout the history of commercial arbitration, many people faced unfair judgments, judgments not in conformity with the rule of law. Actually, the number of those cases is not much that the one can wonder that we are facing a pandemic situation. However, as I believe that the arbitration mechanism is the ideal in resolving disputes related to commercial matters, I did not want just to highlight the problem, but I wanted to suggest solutions before the problem spreads and affects the mechanism negatively especially as those cases increase by time.

Initially some may think that there are different solutions to avoid such problem. In fact, however, most of the solutions are complicated in both theory and practice. This chapter will highlight the possible and expected solutions, it will begin by the actual solutions that could be adopted within the present legal rules; and then it will suggest some amendments that could be adopted in order to enhance the mechanism as a whole.

A. Solutions within the Present Laws

Although both *the error of law* and *the disregard of a rule of law* are not grounds for which an arbitral award could be vacated, people may think that there are still solutions for this problem within the present laws. However, these solutions are limited to only two solutions. On the one hand the parties to the arbitration may look for arbitration acts that adopt *the error of law* or *the disregard of a rule of law* as a ground of arbitral awards' vacatur. On the other hand they may include in their arbitration agreement the error of law or the disregard of a rule of law as additional grounds of vacatur. In this section I will analyze both solutions and try to highlight if they are effective solutions.

1) Choosing the law

As previously mentioned, most of the arbitration acts, whether national or international, do not adopt *the error of law* or *the disregard of a rule of law* as grounds of arbitral awards' vacatur, however that does not mean that all arbitration acts do not adopt such grounds. For example a 2003 arbitration act enacted in the US state of Georgia acknowledged the manifest disregard of the law as a ground of

arbitral awards' vacatur. The state of Georgia did not create this standard from the ground up. It adopted a standard that was been pronounced by the US Supreme Court more than fifty years ago.¹²⁸ Although the court considered the proper application of the law as a public policy¹²⁹ since the 1950s, the manifest disregard of a rule of law has been applied infrequently.¹³⁰ The courts claimed that the Supreme Court did not give a clear definition for the manifest disregard of a rule of law nor a clear methodology by which the courts could identify the cases where the law was not applied properly.¹³¹

In *DiRussa v. Dean Witter Reynolds Inc.*,¹³² the court enlightened that arbitral awards could be vacated in all cases on the grounds of the manifest disregard of a rule of law if: (i) the parties prove that the arbitrators were aware of the rule of law and deviated from applying it; and (ii) the law the arbitrators ignored was clearly defined and clear.¹³³ However, the characteristics of the manifest disregard of a rule of law remain unclear for judges that they limited the application of this ground to a small number of cases.¹³⁴ Moreover, in *McIlroy v. PaineWebber, Inc.*, the Fifth Circuit of the Federal Court refused explicitly to adopt of the manifest disregard of a rule of law as an effective arbitral awards' vacatur.¹³⁵

In addition to the ambiguity of the manifest disregard of a rule of law, some scholars were praising the court decisions by not adopting the latter standard as a ground for an arbitral award vacation. They believe that this ground expands the judicial review on arbitral awards, and contradicts with the essential goals of the arbitration mechanism,¹³⁶ as opening the door in front of an appellate challenge affect the rapidity, the certainty and the costs of the arbitration.¹³⁷ Professor Michael H.

¹²⁸ *Wilko v Swan* 346 U.S. 427 (1953)

¹²⁹ See Stephen L. Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, J. Disp. Resol. 117 (1998), footnote 4.

¹³⁰ Brent S. Gilfedder, "A Manifest Disregard of Arbitration?" *An Analysis of Recent Georgia Legislation Adding "manifest Disregard of the Law" to the Georgia Arbitration Code as a Statutory Ground for Vacatur*, Ga. L. Rev. 259 (2004-2005), at. 260.

¹³¹ *Id.* at. 260-61.

¹³² 121 F.3d 818, 821 (2d Cir.1997)

¹³³ *Supra* note 11, at. 3.

¹³⁴ *Id.* at. 4.

¹³⁵ 989 F.2d 817, 820 (5th Cir. 1993)

¹³⁶ See *supra* note 130, at. 261.

¹³⁷ *Id.* at. 287.

LeRoy raised a question, which responds to all these arguments, “Are arbitrators above the law?”¹³⁸ According to the Fifth Amendment of the United States Constitution “No man in this country is so high that he is above the law.”¹³⁹ The finality of the arbitral award, even in case of disregarding a rule of law, situates the arbitrators above the law.

The state of Georgia is the only state that adopted the manifest disregard of a rule of law as a ground of vacatur.¹⁴⁰ However, the adoption of the latter ground was not as beneficial as it should be. The lack of clear guidance for application of the manifest disregard of a rule of law standard was an obstacle that the courts in Georgia faced.¹⁴¹ The unclear guidance derives from the informality of the arbitration process, which results, in most of the cases, awards that lack clear reasoning of findings,¹⁴² especially given that the law in the United States of America does not require the arbitrators to support their awards with their reasoning to the facts of the case.¹⁴³ For these technical reasons as well as other theoretical reasons, scholars suggested that the state of Georgia should repeal the manifest disregard of a rule of law from the grounds of arbitral awards’ vacation.¹⁴⁴ Actually, regardless the theoretical reasons that I was not convinced by, the amendment the state of Georgia adopted is worthy of study and to be taken into consideration. However, the technical obstacles presented above compromised the effectiveness of the amendment.

In my view, the critics the scholars raised against the adoption of the manifest disregard of a rule of law are not as objective as they should be. These scholars are defending the arbitration mechanism no matter its defects

On the one hand, some scholars argued that the adoption of the error of law or the disregard of a rule of law within the grounds of arbitral awards’ vacatur will lead to an appellate challenge that is contrary to the fundamental principles of the arbitration mechanism disregarding that the grounds of arbitral awards’ vacatur,

¹³⁸ Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of The Law” Standard*, B.C. L. Rev. 137 (2011), at. 137.

¹³⁹ *United States v. Lee*, 106 U.S. 196 (1882)

¹⁴⁰ *Supra* note 130, at. 275.

¹⁴¹ *Id.* at. 277.

¹⁴² *Id.* at. p. 282

¹⁴³ *Greene v. Hundley*, 468 S.E.2d 350, 353 (Ga. 1996)

¹⁴⁴ *See supra* note 130, at. 288

generally, do not open the door for appellate challenges. The vacation of arbitral awards is not more than reviewing essential principles without going into the details of the case. Exactly like the Cassation mechanism in civil law countries; the cassation ensures the proper application of the procedures as well as the rule of law without going through the facts of the case.¹⁴⁵

On the other hand, the argument that the adoption of the error of law or the disregard of a rule of law as grounds of arbitral awards' vacatur will affect negatively the arbitration mechanism as cases may take longer time in courts, disregarded two important points.

Firstly, scholars who believe in this argument based their beliefs on the negative effects that may affect the arbitration mechanism in terms of "*rapidity*." However, this is not true because, in normal circumstances, there are statutory grounds upon which an arbitral award could be vacated, and these grounds usually take time in courts. Nevertheless, the time the courts take in order to review the demands of vacations is still not comparable to the time a case is solely presented before normal courts. Otherwise, we should criticize the idea of vacating arbitral awards in general, and consider all arbitral awards binding and enforceable regardless what defects could accompany the award. The disregard of a rule of law will need as much time as any other ground of vacatur; keeping in mind that none of the scholars criticized the present vacatur grounds on the basis of "*rapidity*."

Secondly, scholars, in my view, are judging an actual situation without thinking about the future consequences. Favoring one of the advantages of the arbitration mechanism over the credibility of the system as a whole is a serious mistake. As people when choosing arbitration they believed that they would get similar awards, if not better,¹⁴⁶ to the awards they may get from the court. However, when the number of executable awards that disregard the rule law increases, people may lose confidence in the mechanism itself. Afraid of getting wrongful awards, people will return over time to national courts, despite their slow proceedings, in order to avoid

¹⁴⁵ See Chapter 1.

¹⁴⁶ As the parties can choose arbitrators who are more familiar with the subject matter rather than judges who may not be fully aware of the nature of the conflict.

uncertain final and binding decisions.¹⁴⁷

- **Critiques**

Although I am defending the adoption of the error of law or the disregard of a rule of law in national laws, choosing the law of a country that adopts the latter standards as ground of arbitral awards' vacatur is not an effective solution. Irrespective of the technical problems that may accompany the applicability of the law, like the lack of sufficient of clear guidelines for the courts in the state of Georgia, the enforcement of arbitral awards rely on the laws of the place of execution more than the applicable laws chosen by the parties.¹⁴⁸ So, if the parties chose a law that adopts the error of law or the disregard a rule of law within its grounds of arbitral awards' vacatur, such grounds will not be applied unless the place of execution of the award is the country the parties chose its law, or at least a country that adopt the same error of law as a standard of arbitral awards' vacatur. This was apparent in *In re Chromalloy Aeroservices*,¹⁴⁹ where Chromalloy entered into an agreement with the Egyptian Air Force and chose to refer their disputes to an arbitral panel in accordance to the Egyptian law. Getting an award, Chromalloy sought the enforcement in the United States. The Egyptian Air Force sought, and succeeded to vacate of the arbitral award in Egypt. However, the United States enforced the award and stated that any arbitral award could be enforced in the United States every time it satisfies the enforcement standards stated by the American laws.¹⁵⁰

Applying those rules to the “choosing the law” approach, the one may find that if the parties chose, for example, the law of the state of Georgia they will not benefit from the manifest disregard of a rule of law as ground of vacatur unless the arbitration is national and the arbitral award is enforced in Georgia.¹⁵¹

2) Including the disregard of a rule of law in the arbitration clause

¹⁴⁷ See Hamid G. Gharavi, *Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention*, J. Transnat'l L. & Pol'y 93 (1996-1997).

¹⁴⁸ E.g. Art. 36 of the UNCITRAL Model Law 1985 with amendments as adopted in 2006.

¹⁴⁹ 939 F. Supp. 907 (D.D.C. 1996)

¹⁵⁰ see also *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999)

¹⁵¹ As U.S. courts dined the manifest disregard of a rule of law when enforcing foreign arbitral awards. See *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974).

Another solution that may seem be useful is when the parties to the arbitration agree on including the error of law or the disregard of a rule of law as additional grounds of vacatur in their arbitration clause. Actually, this solution is debatable.

Most of the arbitrations acts, if not all of them, did not state explicitly that the parties have the right to add grounds of vacation other than stated in the law. This raises the question of whether the articles that cover the vacation of arbitral awards provide exhaustive or non-exhaustive situations. In common law countries, like the United States,, courts have concluded explicitly that the parties do not have the right to expand the scope of the grounds of vacatur. The court pronounced that the parties are limited by the “options” stated in the FAA¹⁵², and did not take into consideration the volition of the parties when they agreed that any error of law or error of findings would allow the vacation of the award.¹⁵³ The situation is more complex in civil law countries. In civil law countries, the courts cannot create new legal rules, and are not bound by precedents, which means that, unlike common law countries, the parties to the arbitration will be facing unexpected decisions every time the case concerns an issue that is not explicitly handled by the law. For example, countries like Egypt or France, allow the parties to the arbitration to agree that the arbitral award would be appealable,¹⁵⁴ but neither of them allowed the parties to include extra grounds for vacatur. It is true that the law did not prevent the parties from adopting extra grounds, but no one knows how the judges will interpret the articles, which cover the grounds of arbitral awards’ vacatur.

- **Critiques**

Although including the disregard of a rule of law as an additional ground in the arbitration clause seemed an effective solution, the uncertainty of its application may have risked its effectively. That was apparent in the United States, when the parties agreed on extra grounds for arbitral vacatur, and got court decisions that prevented them from expanding the judicial review beyond what is stated in the FAA. Not allowing the parties to adopt additional grounds to vacate arbitral awards explicitly

¹⁵² *Lapine Technology Corp. v. Kyocera Corp.*, 909 F.Supp. 697 (N.D. Cal. 1995)

¹⁵³ *See Fils et Cables d'Acier de Lens v. Midland Metals Corp.* 584 F. Supp. 240 (S.D.N.Y. 1984); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995)

¹⁵⁴ *See* Chapter 1.

runs against the certainty of the application when the issue is raised in courts. No one could tell how the interpretation of the court would be, and the door would always be open for the court to reject the extra grounds of arbitral vacatur agreed upon by the parties. By way of explanation, the disregard of a rule of law is a serious matter that must not be dealt with on uncertain grounds. Even Swiss law dealt with the situation where the parties want to limit the conditions under which proceedings may be set aside, but did not mention anything about the expansion of the grounds.¹⁵⁵

Moreover, suspending the matter upon the acceptance of the other party, who might hold a stronger position, is not a comfortable situation especially if the arbitration clause is a clause “compromis.”¹⁵⁶ The negotiation process plays an important role in achieving mutual compromises between the contracting parties, however, I believe that the disregard of a rule of law as a ground of vacatur is an important matter that must not to be left to the discretion of the parties as it touches constitutional and international principals.¹⁵⁷

As presented in this section, none of the possible outcomes provide a satisfying solution for the issue. While the scope of the “choosing the law” solution is very limited, the “inclusion of extra grounds of arbitral vacatur” solution is debatable and uncertain. Therefore, it is important to go beyond the actual solutions and search for legal amendments that can fill the gaps of the actual legislation.

B. Legal Amendments May Lead to Effective Solutions

The negative consequences of the non-adoption of the disregard of a rule of law as a ground of arbitral vacatur maximize when the actual law, as our case, provides no guaranteed solutions. The situation becomes complicated, as the parties to the arbitration will not have the luxury to enjoy the advantages of the arbitration mechanism without taking the risk of executing an award that is not in accordance with the rule of law, or disregarding the rapidity of the arbitration by acknowledging that the arbitral award will be appealable. For these reasons, one should work on defining the possible solutions that can, one day, work in favor of the arbitration

¹⁵⁵ Swiss Private International Law Act, Art. 192(1) (Dec. 18, 1987)

¹⁵⁶ When the parties agree to refer a dispute already raised to an arbitration panel.

¹⁵⁷ See Chapter 1.

mechanism and enhance it. This section will focus on all the suggestions, even the unrealistic ones, which may cure the flaw, which afflicted the mechanism when it set aside the error of law and the disregard of a rule of a law from the grounds of arbitral awards' vacatur.

1) National laws

One of the suggestions that may seem effective is the adoption of the error of law or the disregard of a rule of law in national laws as public policy. The lack of satisfactory national laws was the main reason behind the problem faced. The problem appeared when the law did not acknowledge the error of law or the disregard of a rule of law as grounds of arbitral awards' vacatur. Yet, if countries adopted in their laws the latter grounds as public policy, the problem would not have roots or existence, even with the supremacy of the New York Convention over national laws. Nevertheless, the question that should be answered is whether adopting the error of law or the disregard of a rule of law in national laws now will cure the defect or not.

From the first sight, some may believe in Dorothea Brande's quotation when she said, "*A problem clearly stated is a problem half solved.*" However, sometimes the problem is clearly stated too late, as our case. With approximately 196 countries in the world,¹⁵⁸ it is not easy to say that the adoption of national laws is the suitable solution. I do not deny that if the countries adopt the error of law or the disregard of a rule of law in their laws as grounds of arbitral vacatur the problem would be solved; my concern is about the applicability of this solution. This concern applies to *the inclusion of the disregard of a rule of law in the arbitration agreement*, the solution depends on the will of 196 different countries. Especially that this solution must be adopted by, at least, the majority of countries because, as stated in the "choosing the law approach," the law of the place of execution is more important than the applicable law during the process of the arbitration itself. Consequently, the more countries adopt the error of law or the disregard of a rule of law in their national laws the more the solution becomes effective. Otherwise, we will be puzzled by an ambiguous situation such as Georgia's, in which we have a perfectly written law, but we do not have a clear mechanism to apply it.

¹⁵⁸ <http://www.worldatlas.com/nations.htm>

2) Institutional rules

One of the solutions that one may think about is the adoption of the error of law or the disregard of a rule of law within the institutional rules. Due to the unlimited flexibility of the ad-hoc arbitration mechanism, parties may prefer to refer their disputes to a regional, international, or specialized institution.¹⁵⁹ Institutions usually ensure a definite framework for the procedural rules,¹⁶⁰ expedited proceedings,¹⁶¹ and qualified arbitrators.¹⁶² However, one of the most important advantages of the institutional arbitration is, in my opinion, the default rules. The default rules are rules that are automatically applied in case one of the parties attempted to delay the arbitration process for no serious reason,¹⁶³ for example, article 26 (2) of the ICC Rules, which gives the arbitral panel the power to proceed with the hearings in case one of the parties failed to attend without a valid excuse.

The ad-hoc arbitration does not enjoy such supervision that any of the parties can, at any time, delay the process of the arbitration case by not fulfilling his obligations. For example, in the case of one of the parties failing to choose his arbitrator¹⁶⁴ within the time limit agreed upon in the arbitration clause. In this situation, only the intervention of national courts can handle such delay by appointing itself an arbitrator for the defaulting party.¹⁶⁵

Another important advantage is the reputation of the institution. Having an award from a reputable institution always facilitates the enforcement of the arbitral award. The national courts take into consideration the reputation of the institution that was not gain haphazardly, but by a lot of organized and administered work.¹⁶⁶

In addition, some institutions may supervise and scrutinize the arbitral awards before publishing them to the parties. The International Chamber of Commerce (ICC)

¹⁵⁹ Sundra Rajoo, *Institutional and Ad hoc Arbitrations: Advantages and Disadvantages*, The L. Rev. (2010), at. 549-50.

¹⁶⁰ Gordon Blanke, *Institutional versus Ad Hoc Arbitration: A European Perspective*, ERA Forum (2008), at. p 277.

¹⁶¹ *Id.* at. 281.

¹⁶² *Id.* at. 279.

¹⁶³ *Supra* note 159, at.557.

¹⁶⁴ In case the number of arbitrators is three.

¹⁶⁵ *E.g.* article 17 of the Egyptian Arbitration Act.

¹⁶⁶ *Supra* note 159, at. 554.

is one of the famous institutions that apply such scrutinization.¹⁶⁷ The ICC established a court that belongs to the institution and entitled it the International Court of Arbitration. The role of this court is close to the role of the Court of Cassation in civil law countries. It does not itself resolve disputes, but it reviews the form of the arbitral award.¹⁶⁸ It also does not review the facts of the case, or affect the arbitrators' decisions, although it has the right to highlight some points on substance.¹⁶⁹

Having defined rules, default procedures, and a supervision body, institutional arbitration might continue its support to the arbitration mechanism in general by ensuring that the notion of the *error of law* or the *disregard of a rule of law* will be respected. For example, if the ICC expands the role of the International Court of Arbitration and allowed it to review the conformity of the award to the rule of law, the parties may find a resort to get out of the deadlock of having binding awards even if such awards are not in consistency with the rule of law.

However, despite the fact that this solution is worthy of support, it is not free of defects.

On the one hand, not all the arbitration cases are institutional. Those who will benefit from the certainty of the application of the rule of law are those who choose, not only institutional arbitration, but also the institution, which adopts the “respect of the rule of law” within its rules. Nonetheless, this is not a necessary disadvantage, as the parties, regardless of their nationalities or the place they live, are free to refer their arbitration case to any institution. Therefore, those who care about having fair trials can refer their dispute to an institution that scrutinize the proper application of the law.

On the other hand, the institutions themselves do not have the power to execute awards. The supervision of the institutions on the arbitral awards like the IIC is not more than a supervision for the reputation of the institution. Maybe this supervision will lead to the same goal, but the reason behind the supervision defines the priority and the methodology the institution adopts. For example, the scrutinization

¹⁶⁷ *Id.* at. 556.

¹⁶⁸ *See*, Art. 1 of the ICC Rules.

¹⁶⁹ *See*, Art. 33 of the ICC Rules.

mentioned in the article 33 of the ICC rules mainly focuses on the form the award.¹⁷⁰ However, it does not prevent the national courts from vacating arbitral awards for the disrespect of proper form of the award. This case makes us think widely in order to separate between the internal rules of the institution and its effects on the application in real life.

It is true that this solution is still better and more realistic than the adoption of the error of law or the disregard of a rule of law within the grounds of arbitral vacatur in national laws. However, the disadvantage of this solution could be summarized in the lack of the enforceable body, and the non-coverage of all the arbitral decisions.

3) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

As a final attempt, one may think about the adoption of the disregard of a rule of law as a ground of arbitral vacatur. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is one of the key instruments in international arbitration. With 146 signatories in 2011, the New York Convention could be considered as one of the most concerted conventions.¹⁷¹ That was apparent, even, in most of the national arbitration acts¹⁷² when stating the general rules of the enforceability of arbitral awards, national laws adopted most of the provisions of the convention. The popularity of the convention, as shown by the number of the contracting states, makes the inclusion of the error of law or the disregard of a rule of law as grounds for which an arbitral award could be vacated a magical solution for the problem, especially that the New York Convention itself has stated in its article V the cases for which the recognition and the enforcement of the arbitral awards could be refused.¹⁷³

In my view, this is the best solution. Once adopted in article 5 of the New York

¹⁷⁰ Art. 33 of ICC rules, “*Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal’s liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.*”

¹⁷¹ <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>

¹⁷² Albert Jan Van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation*, Deventer/Netherlands: Kluwer Law and Taxation Publishers, 1981, at. 528.

¹⁷³ See Chapter 1.

Convention, the disregard of a rule of law will be automatically respected and taken into consideration, as a ground of arbitral vacatur, in more than 140 countries. However, that does not mean that including the disregard of a rule of law in article 5 of the New York Convention is the ideal solution; the terms of the New York Convention have no effects on national arbitration cases. That means that the disregard of a rule of law will not be taken into consideration unless the arbitration is international.

V. Conclusion

There is no doubt that the advantages of the arbitration process make it the most suitable mechanism when it comes to commercial matters. However, those advantages should not tempt the legislatures to permit the possibility of infringing the rule of law. The arbitration mechanism provides a shorter path than the litigation with a more flexible methodology in terms of the constitution of the arbitral panel, but while reaching these goals it marginalized the safeguard that protects the person from being arbitrarily sentenced: the right to a fair trial. Legislatures disregarded the purpose of adopting the notion of the fair trial in constitutions and international conventions, and ensured that arbitral decisions will be, generally, final and binding. The arbitration acts generally do not allow the parties to vacate arbitral awards for the *error of law* or the *disregard of a rule of law*, while permit the vacation for procedural matters. In my view, this is not logic, as the proper application of the law is more important than respecting the procedures; the procedures were drafted and adopted in order to ensure that the rule of law will be respected, and that the state of law will be praised. It is true that the arbitration mechanism is still successful, however the notable increase in the number of cases in which faulty awards are pronounced and executed will definitely decrease the mechanism's popularity soon.

For that reason, it was important, not only to find a solution, but also one that is quick and universally applicable. Adopting the *error of law* or the *disregard of a rule of law* within the grounds that allow the arbitral awards' vacatur in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards seems to be the best solution for the present, although it is not the ideal. However, a strong starting point like the adoption in New York Convention will certainly encourage many countries to adopt the same criterion in their national laws, so the notion will be adopted quickly and effectively.

Hopefully, the international community realizes the increasing danger on the mechanism itself, and work on avoiding the predicted fall before it happens. Scholars

and legislatures did not pay attention to an old court's statement, which states that arbitrators *"may believe what nobody else believes, and he may disbelieve what all the world believes. He may overlook or flagrantly misapply the most ordinary principles of law, and there is no appeal for those who have chosen to submit themselves to his despotic power."*¹⁷⁴ Now we have to recover their one hundred year lack of attention.

¹⁷⁴ Scotland Mitchell v. Cable, [1848] 10 D. 1297