



Arbitrators & the Doctrine of Precedent  
For: Singapore Chamber of Maritime Arbitration  
Hosts: Rodyk & Davidson LLP

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Arbitrators applying English law:  
Inferior Tribunals or a Law Unto Themselves?

Theoretical and Practical Issues

My answer (§70):

- *Arbitrators are neither inferior tribunals nor a law unto themselves.*
- *They are not inferior tribunals within any court system.*
- *They are also not a law unto themselves.*
- *They owe a duty to follow the law in the sense of finding rules of law to apply in determining the parties' dispute, by reference to the legal materials, evidence and/or argument put before them by the parties.*

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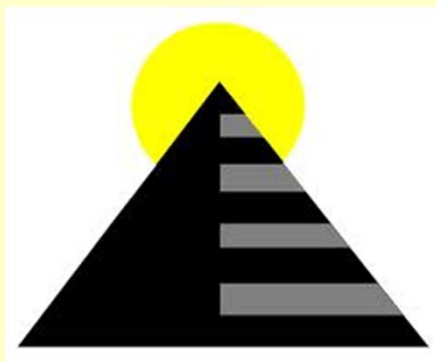


My answer (§70):

- *The English court system is not just a system for resolving disputes that come before it from time to time, as it were de novo each time, but is also law-making machinery.*
- *Arbitrators, not being part of that machinery, even if they are sitting in England, let alone if they are sitting elsewhere, e.g. here in Singapore, sit outside the English court system, and independently of it.*
- *As such, they are entitled and may be obliged to consider in the round what the English court system, as law-making machinery, would say on an issue put before them if tested now at the highest level.*
- *They are not bound to follow what some particular court within that machinery may have said on that issue to date.*
- *There is thus indeed a sense in which they are “superior tribunals”!*

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Considerations:

- Duty: to resolve dispute, fairly and impartially.
- “Retrospectivity” of common law (*Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 AC 349).
- Statute-law and “undecided” points of common law.
- Non-English governing law.
- Appeal hierarchy ≠ precedent hierarchy.
- English seat – appeals under English 1996 Act.
- Non-English seat – typically, no appeals at all (e.g. Singapore International Arbitration Act).

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Consequences:

- Arbitrators: is cited case-law challenged as wrongly decided?; if not, record that it was common ground.
- Arbitrators: do not allow parties to “reserve their rights” as to correctness of case-law.
- Arbitrators: if cited case-law is challenged as wrongly decided, receive submissions, decide the issue and award accordingly.
- Counsel: if case-law is against you, cite it, accept it, move on **OR** cite it, challenge it, ask the arbitrators not to follow it, **DO NOT** “reserve the rights” – your client has none to reserve!

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