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**THE NATURE OF ARBITRAL  
AUTHORITY:  
A COMMENT ON LESOTHO HIGHLANDS**

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**The Nature of Arbitral Authority:  
A Comment on *Lesotho Highlands***

**William W. Park\***

I. Drawing Lines

For pure intellectual challenge, few endeavors match the task of setting principled standards to distinguish an arbitrator's good faith mistakes from an excess of authority. In bargaining for out-of-court dispute resolution, parties to arbitration agreements commit themselves to respect the result regardless of who wins. The award is intended to be final even if one side thinks that the arbitrator got it wrong.

Arbitration is a consensual process, however, unfolding within an enclosure created by the contract and applicable arbitration law. The litigants accept the risk of arbitrator mistake only for decisions falling within the borders of arbitral authority.

Great practical importance attaches to how lines are drawn between arbitrator mistake and excess of authority. Indeed, the distinction that goes to the heart of what arbitration is all about. A simple error is normally not subject to appeal, since the litigants have asked an arbitrator, not a judge, to decide the legal and factual merits of their disputes. By contrast, no court should recognize an award falling beyond the arbitrator's authority. Thus some measure of judicial scrutiny over arbitral jurisdiction remains a vital safeguard to the integrity of the process, and constitutes an essential corollary to enforcement of legitimate awards.

II. The Lesotho Highlands Decision

A. Error of Law or Excess of Powers?

The House of Lords decision in *Lesotho Highlands v. Impreglio*<sup>1</sup> serves as a prism

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through which to separate several of the themes that inhere in the nature of arbitral authority. In rejecting arguments that an error about the currency of an award represented an excess of jurisdiction, their Lordships confirmed a healthy appreciation that arbitrators do not exceed their powers simply by making a mistake.

Construction of a dam in the African nation of Lesotho gave rise to a dispute between the builder and the owner. The dispute was submitted to arbitration by a three member tribunal sitting in London. The builder claimed amounts which, had they been paid when due, would have been payable largely in Lesotho Maloti.

By the time of the award, however, the project was finished, and the contractors had no need of Maloti. The arbitrators, therefore, denominated the award entirely in four hard European currencies that the contract had indicated for non-Maloti payments, using the historic exchange rates provided in the contract.<sup>2</sup> Since the Maloti had collapsed between the contract payment date and the award, the owner suffered the downward slide of the Maloti.

Understandably disappointed, the owner challenged the award. A frontal attack, however, was not possible. As permitted under the 1996 Arbitration Act,<sup>3</sup> the parties had excluded appeal on questions of law by electing to arbitrate under the rules of the International

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<sup>1</sup> *Lesotho Highlands Development Authority v. Impreglio SpA* [2005] UKHL 43 (30 June 2005), reversing the Court of Appeal decision found at [2004] All ER (Comm.) 97 (CA 2003). The decision is reprinted in 20 INT'L ARB. REP. C-1 (July 2005). Thanks are due to Ian Glick for helpful conversations about the case. For a comparative view of jurisdictional limits, see ADAM SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION (1989).

<sup>2</sup> The four currencies indicated in the parties' contract were British Sterling, French Francs, Deutsche Marks and Italian Lire. The Francs, Marks and Lire were then valued in Euros, which had replaced the national currencies in France, Germany and Italy. The contract provided for 58.35% payment in Maloti, with remaining payments 5.95% in Deutsche Marks, 13.38% in French Francs, 10.97% in Italian Lira and 10.35% in British Pounds.

<sup>3</sup> 1996 Arbitration Act, Section 69. For arbitrations in London, the "question of law" subject to appeal must be a matter of English law. See Section 82, 1996 Arbitration Act.

Chamber of Commerce, which provide for the finality of awards.<sup>4</sup>

The Arbitration Act, however, also permits awards to be set aside for “serious irregularity”, defined to include “the tribunal exceeding its powers”.<sup>5</sup> The owner argued that the arbitrators went beyond their powers by the way they fixed the award in European currencies.<sup>6</sup>

Article 48 of the Arbitration Act permits arbitrators to “order the payment of a sum of money in any currency.” The owner argued that the hard currency award was an improper exercise of this power, and misapplied the contract and applicable law. According to this view, the Arbitration Act simply clarified that awards need not be made in Sterling.

Their Lordships decided that the award’s choice of currency did *not* constitute an excess of powers. In so doing, they looked to the radical nature of recent changes in English arbitration law, evidencing an intent to restrict judicial intervention in the arbitral process. The result was an affirmation that a mere error of law will not amount to an excess of power. In both policy and logic, this result seems correct. Arbitration would not be binding if awards could be vacated simply because arbitrators misinterpreted the contract or imperfectly exercised their powers.<sup>7</sup>

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<sup>4</sup> See Article 28(6), Arbitration Rules of the International Chamber of Commerce

<sup>5</sup> Under Act Section 68(2)(b), that procedural irregularity must causes substantial injustice. Compare Section 67, permitting award vacatur for excess of “substantive jurisdiction.” For a case that involves challenge both under section 67 and 68 see *Westland Helicopters Ltd. v. Al-Hejailan*, [2004] EWHC 1625 (Comm.), reprinted in 17 *World Trade & Arb. Mat’ls* 245 (February 2005). A dispute over legal fees was submitted to an arbitration, engendering further controversy about the arbitrator’s authority to award interest. Arguments were made that the arbitrator either (i) had no jurisdiction to give interest or (ii) had engaged in procedural irregularity due to lack of submissions on the matter. Mr. Justice Colman held that the arbitrator had jurisdiction to award interest only from 1995 and that there was no procedural irregularity.

<sup>6</sup> The House of Lords also confirmed the arbitrators’ right to give pre-award interest, albeit with less controversial conclusions. The broad power to award interest under Section 49 of the 1996 Arbitration Act gave rise to no disagreement among their Lordships.

<sup>7</sup> Speech by Lord Steyn, Paragraph 32, HL decision of 30 June 2005.

## B. Prohibition on Bootstrapping

The decision in *Lesotho Highlands* does not stand for the proposition that arbitrators can create their own jurisdiction. While the principal speech by Lord Steyn suggested that the Arbitration Act gave “unconstrained” power to make an award in any currency,<sup>8</sup> his colleagues disagreed.<sup>9</sup> Lord Steyn then went on to posit that the power was not unconstrained, and that arbitrators had erred in interpreting either the contract or the Arbitration Act. In either event, he said, the arbitrators would have done no more than commit error of law.<sup>10</sup>

That a mistake in contract interpretation should not be reviewable seems uncontroversial. The arbitrators’ job is to interpret the parties’ agreement.

The possibility of a mistake interpreting the Arbitration Act, however, might be more troublesome. Interpretation of arbitration statutes normally falls to courts. Arbitrators cannot, simply by their own bare assertion, create powers they do not have. If an arbitration statute requires awards to be denominated in Sterling, it is hard to see how an arbitrator’s *ipse dixit* can generate authority to award Swiss Francs.

Lord Steyn, however, makes clear that the most that might have occurred in *Lesotho Highlands* was erroneous exercise of powers that actually existed.<sup>11</sup> An award of Swiss Francs might be an imperfect exercise of arbitral power, but would not be a jurisdictional invention.

The contours of arbitrator power may be more difficult to ascertain in some situations

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<sup>8</sup> *Id.*, at Paragraph 22.

<sup>9</sup> Lords Hoffmann, Scott and Rodgers agreed that error of law does not equal excess of power. However, they disagreed with Lord Steyn’s construction of Section 48 concerning an arbitrator’s power to order payment of money in any currency. Lord Phillips (at paragraphs 43-54) went further and stated that the arbitrators had purported to exercise a discretion that the statute did not give them.

<sup>10</sup> Paragraph 23, HL decision of 30 June 2005.

<sup>11</sup> Paragraph 24, HL decision of 30 June 2005.

than in others. For example, a contractual choice-of-law clause might designate a legal system that prohibits arbitrators from awarding punitive damages.<sup>12</sup> Such a clause, however, might be read to designate substantive only state contract law, not including arbitral procedure.<sup>13</sup> Moreover, as the United States Supreme Court has noted, it is not always obvious when damages are punitive rather than compensatory.<sup>14</sup>

Finally, the decision in *Lesotho Highlands* cannot stand for the proposition that arbitrators may purposefully ignore their mandate. The arbitrators awarded currencies considered “appropriate in the circumstances” after having taken careful note of the contract stipulations,<sup>15</sup> and looked only to currencies and exchange rates in the parties’ agreement. Nothing suggests that their award was a fig leaf to cover intentional disregard of the contract.

### III. Who Decides What?

#### A. First Principles

*Lesotho Highlands* serves as a springboard for examining several analytic wrinkles in arbitral jurisdiction. Most modern arbitration statutes prohibit appeals related to the substantive merits of an award. Unlike judges, arbitrators do not normally find their decisions reversed for mistake of law. Arbitration statutes do, however, allow challenge to awards that go beyond the

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<sup>12</sup> See, e.g., New York law as expressed in *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354 (1976).

<sup>13</sup> *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), upholding an award for punitive damages in a dispute covered by a New York choice-of-law clause.

<sup>14</sup> See *Pacificare Health Systems v. Book*, 538 U.S. 401 (2002), where a unanimous Court upheld the right to compel arbitration of claims under the Racketeer Influenced and Corrupt Organizations Act, which provides for treble damages, notwithstanding a contractual prohibition on punitive damages. The Court suggested that treble damage awards sometimes serve “remedial purposes” that are compensatory in nature.

<sup>15</sup> See portions of award cited in Paragraph 10, HL decision of 30 June 2005.

arbitrators' mission,<sup>16</sup> whether described as an “excess of jurisdiction,” “excess of authority” or “excess of powers.”<sup>17</sup>

A party disappointed by an award will sometimes attempt a “backdoor” appeal, through arguments which depict the arbitrator’s mistake as an excess of authority rather than a contract misinterpretation. Errors of law in contract interpretation seem to lend themselves to being portrayed as excess of jurisdiction. An award allowing lost profits, for example, might be portrayed as an arrogation of power not granted by the contract.<sup>18</sup>

Sound distinctions between simple mistake and excess of authority rest on two fundamental principles. First, an agreement to arbitrate normally means accepting that the arbitrator might make a mistake in evaluating the merits of the parties’ claims and defenses. It would make little sense to say that an award will be binding if litigants automatically get a second bite at the apple, turning arbitration into foreplay to court proceedings.

Equally important, however, is the principle that litigants in arbitral proceedings do not expect to be bound by overreaching intermeddlers. Decisions on matters never submitted to

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<sup>16</sup> Some arbitral regimes permit annulment for excess of authority only when a tribunal “manifestly” goes beyond its powers. See Article 53(1)(b) of the 1965 Washington (ICSID) Convention, insightfully discussed in Philippe Pinsolle, *Manifest Excess of Power and Jurisdictional Review of ICSID Awards*, in ICSID Annulment, 2 TRANSNAT’L DISPUTE MANAGEMENT 39 (April 2005).

<sup>17</sup> For the purpose of this analysis, the terms jurisdiction, authority, and powers are used interchangeably. Slight nuances might exist in certain contexts. For example, “excess of jurisdiction” might apply to *what* the arbitrator is authorized to decide, and “excess of powers” to *how* the decision is made. However, each expression describes arbitrator behavior that goes beyond what is permitted by the relevant legal and contractual framework. On possible differences, see Lord Phillips in *Lesotho Highlands* (paragraph 51) discussed *supra*, acknowledging that “the concept of an excess of power that is not an excess of jurisdiction is not an easy one”, but still suggesting that an award in the wrong currency constitutes the former if not the latter.

<sup>18</sup> See *Parsons & Whittemore Overseas v. Société Générale (RAKTA)*, 508 F.2d 969 (2d Cir. 1974).

arbitration deserve no more deference than the opinions of a random commuter passing through the Paris *Métro* or New York's Grand Central Station.

The world of legal education might provide an illustration of the distinction between a simple mistake and a jurisdictional error. In American law faculties, the professor who teaches a course normally bears responsibility for assigning grades. If the professor gives one of her students a "B" then, that is the grade. It matters little that a colleague who teaches in that field might find the grade severe, and evaluate the exam as "A" quality. The faculty has granted each teacher authority to grade his or her exams.

The language of jurisdictional challenges can create a risk of loading the analytic dice by using the term "arbitrator" to refer to an individual who might never have received a mandate from the parties. Yet labeling someone an arbitrator does not in itself confer authority to decide disputes, any more than calling a tail a leg adds to the limbs of Abraham Lincoln's proverbial dog.<sup>19</sup> A document styled "Award" might rest on an alleged arbitration clause that was forged or signed by someone without authority, or which explicitly covers a different dispute. In this context, to speak of "award" enforcement presumes that the author of the document was authorized to decide the dispute, which is precisely the matter in controversy.<sup>20</sup>

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<sup>19</sup> Abraham Lincoln is said to have asked, "If I call a tail a leg, how many legs does a dog have?" He then answered, "Five? No, four. Calling a tail a leg does not make it so."

<sup>20</sup> This linguistic problem is easier to see when a controversy surrounds the existence of the arbitration clause than when it concerns the clause's scope. Most observers have no difficulty in seeing that an individual who hears a claim for loan repayment is not an arbitrator if the purported arbitration clause was forged. However, when questions arise about the scope rather than existence of the clause, the analysis becomes trickier. Imagine that First Bank and Second Bank enter into a narrowly drafted agreement to arbitrate a letter of credit dispute. Later another difference between the two institutions arose, which First Bank prefers to submit to a court rather than an arbitrator. If Second Bank succeeds in convincing an arbitral institution to entertain the claim, the resulting "award" would represent nothing of the kind.

## B. Party Expectations vs. Voodoo Jurisprudence

Arbitrators might exceed their authority in least three different ways. First, they might join a non-signatory<sup>21</sup> that never agreed to arbitrate.<sup>22</sup> Second, they might fail to respect the scope of their arbitral mission by making an award on matters never submitted to arbitration, or by intentionally disregarding the clear procedural mandates on how the case was to be decided.<sup>23</sup> Finally, an arbitral tribunal might go beyond its jurisdiction through decisions not permitted by mandatory arbitration law, whether as to subject matter (e.g., employment disputes) or remedies (e.g., punitive damages).

In many of these instances, defining jurisdictional excess often bring to mind a “we know it when we see it” approach.<sup>24</sup> While this provides a convenient starting point, the absence of intellectual rigor will not make it satisfying for very long. Most thoughtful people accept the

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<sup>21</sup> In some cases arbitration agreements may be concluded by reference to an unsigned document. Nevertheless, the term “nonsignatories” remains useful shorthand to designate those persons whose relationship to the arbitration may at first blush be unclear, and who cannot easily be called “non-parties” given that their status as “party” is exactly what is asserted, often through theories such as agency.

<sup>22</sup> In some instances (albeit rarely), an implied obligation to arbitrate may arise from trade usage. See BGH, Urt. V. 3.12.1992, III ZR 30/91, discussed in 1993 DEUTSCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 465 (commentary by Klaus-Peter Berger) where Germany’s highest court, *Bundesgerichtshof*, decided that a duty to arbitrate might be implied through custom in the sheepskin trade.

<sup>23</sup> An arbitration clause giving a tribunal power to decide controversies arising from one contract would not necessarily apply to disputes arising from a prior or subsequent commercial relationship between the same parties. And an agreement to settle disputes through ICC arbitration in Paris could not normally be satisfied through AAA arbitration in New York.

<sup>24</sup> See *Jacobellis v. Ohio*, 378 U.S. 184 (1964) at 197 (Potter Stewart concurring opinion), using that approach in connection in reversing an obscenity conviction for showing the Louis Malle film *Les Amants* (about a woman in an unhappy marriage) fell outside Constitutionally protected speech. Some British judges apparently apply a less risqué “elephant test” suggested by Lord Justice Scrutton in deciding whether a floating crane was a “ship or vessel” for purposes of insurance policy. He referred to the gentleman who could not define an elephant but knew one when he saw one. See *Merchants Marine Insurance Co. Ltd. v. North of England Protecting & Indemnity Association*, [1926] 26 Lloyd's Rep. 201, at 203.

difficulty of completely eliminating cultural blinders in decision making. Few suggest, however, that the answer lies in a purely subjective approach incapable of principled articulation.

The parties' intent serves as the proper touchstone for deciding challenges to arbitral authority. Courts should ask, "Does the controverted decision address a question that the parties submitted to arbitration?" If so, arbitrators have not exceeded their power unless the decision is otherwise off limits due to constraints imposed by the applicable arbitration law.

Not everyone, however, admits that a line can be drawn between mistake of law and excess of authority. Commenting on judicial review of administrative actions and statutory arbitrations, Lord Denning once suggested that "Whenever a tribunal goes wrong in law it goes outside the jurisdiction conferred on it and its decision is void."<sup>25</sup> According to this view, since mistakes are not authorized, by definition they constitute an excess of authority.

The logic of Denning's position might, of course, be extended to commercial arbitration. The argument would run that arbitrators are never asked to commit error, and thus in making a mistake they go beyond their mission.<sup>26</sup> Happily, the decision in *Lesotho Highlands* rejected such an approach.

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<sup>25</sup> See LORD DENNING, *THE DISCIPLINE OF THE LAW* 74 (1979). See also *Pearlman v. Keepers and Governors of Harrow School*, [1978] 3 W.L.R. 736, 743 (C.A.) ("The distinction between an error which entails absence of jurisdiction and an error made within jurisdiction is [so] fine . . . that it is rapidly being eroded."). See generally the House of Lords decision in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208.

<sup>26</sup> On the distinction between error of law and excess of powers in English commercial arbitration, see MUSTILL & BOYD, *COMMERCIAL ARBITRATION* (2nd ed. 1989), at 35, 554-555 and 642. Compare Christopher R. Drahozal, *Default Rule Theory and International Arbitration Law*, 5 INT'L ARB. NEWS 2 (ABA), arguing for the right to expand judicial review to include arbitrator error of law. Professor Drahozal suggests that by relying on provisions in the Federal Arbitration Act which permit review of arbitral excess of authority, litigants should be able to "obtain court review of arbitrators' legal rulings . . . by defining legal errors as exceeding the scope of the arbitrator's authority. Under such contractual language [expanding review] legal error in an arbitration award is beyond the arbitrators' authority." *Id.* at 4.

Normally, the allocation of functions between judges and arbitrators explains itself by reference to contract principles.<sup>27</sup> Agreements to arbitrate are enforced to protect expectations.<sup>28</sup> When business managers agree to settle differences by arbitration, judicial deference to the arbitral process commends itself by virtue of the same policies that justify enforcement of contracts in general: giving effect to the parties' legitimate choices.

On occasion, jurisdictional tools can be misused, clouding sound analysis. The well-known principle of *Kompetenz-Kompetenz* permits arbitrators to determine their own jurisdiction as an initial matter.<sup>29</sup> Sometimes, however, this principle has been misapplied to suggest that courts need not investigate the parties' real intentions on the existence or scope of arbitral authority.<sup>30</sup> The temptation to such voodoo jurisprudence, which expects verbal formulae to change rights independent of context,<sup>31</sup> must be resisted. Agreements to arbitrate are made by

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<sup>27</sup> Regulatory impulses also come into play, at least at the margins, when courts hesitate to enforce private decision-making that runs afoul of public policy, either by virtue of touching subjects too sensitive to be removed from courts (e.g., claims of discrimination) or because the decision-making process is tainted with bias or corruption.

<sup>28</sup> In the United States, so-called "court-annexed arbitration" rests on a different footing, since the parties retain a right to *de novo* trial. See 28 U.S.C. § 655 (1994). It is also misleading to apply the term "arbitration" to state delegation of minor claims to organizations such as the American Arbitration Association. See, e.g., MINN. STAT. § 65B.525 (requiring arbitration of motor vehicle accident claims not in excess of \$10,000).

<sup>29</sup> See William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L 137 (1996).

<sup>30</sup> See *Sphere Drake Ins. v. All American Ins.*, 256 F3d 587 (7th Cir. 2001).

<sup>31</sup> See e.g., *Contec Corp. v. Remote Solution Co. Ltd.*, 398 F.3d 205 (2d Cir. 2005), finding that it was for arbitrators, not courts, to decide whether a corporation that had not signed an arbitration clause could compel arbitration. The result in the case may be unobjectionable, since the non-signatory was the surviving entity from a merger involving a contracting party. However, it might have been more prudent for the court to order arbitration on its own finding of jurisdiction under the relevant facts. Compare *JSC Surgutneftegaz v. Harvard College*, 2005 WL 1863676 (S.D.N.Y. 2005), involving investors' class action arbitration over dividend policy of a Russian company whose shares were evidenced by American Depository Receipts (ADR's) held

entities and individuals, not pieces of paper.

### C. Ripeness and Staleness

On occasion, arbitral jurisdiction is contrasted with notions of admissibility, a term used to describe constraints on the right to file claims in cases clearly subject to arbitration. Since the matter is properly before the arbitrators, their decisions would usually *not* be reviewable in court.<sup>32</sup> Admissibility might relate to whether a claim is ripe enough (or too stale) for adjudication, or to arbitral preconditions (such as mediation) or time bars (a prohibition on claims more than six years after the alleged wrong).<sup>33</sup>

In some instances, jurisdictional and admissibility questions may overlap. For example, a brokerage contract might be subject to rules that make an investor's claim ineligible for arbitration unless filed within six years after the allegedly inappropriate advice or trade. Although there is no grumbling as the stock rises, when the market goes sour years later the investor complains his savings were lost due to an improper purchase.<sup>34</sup> Sometimes the parties'

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in New York. Here the contest was not about who had agreed to arbitrate, but rather the scope of an arbitration clause that had clearly been signed by both sides.

<sup>32</sup> There might, however, be some situations in which valid jurisdictional challenges could be mounted to improper decisions on admissibility. If a contract says no actions may be filed before 2010, a putative award in 2005 would appear to most observers as an *excès de pouvoir* (subject to annulment) rather than simply an unreviewable mistake about calendars.

<sup>33</sup> For a comparison of jurisdiction and admissibility in investment arbitration, see Ian A. Laid, *A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in Salini v. Jordan and Methanex v. USA*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 201* (T. Weiler ed. 2005). See also contribution by Jan Paulsson to the forthcoming *Festschrift* in honor of Robert Briner.

<sup>34</sup> In this regard, one recalls the scene from the movie *Casablanca*, in which the French police captain says he is "shocked" to find gambling in "Rick's Café" – all the while quite happy to take his winnings.

by agreement will say who decides (judge or arbitrator) whether the time period has run.<sup>35</sup> In some cases, however, time bars derive from the statute of limitations in the law applied to the merits of the dispute (usually chosen by the parties) and thus fall to the arbitrator as part of their decision on the merits.<sup>36</sup>

Preconditions to arbitration do not always lend themselves to facile analysis. In one intriguing case, *Vekoma v. Maran Coal*,<sup>37</sup> Switzerland's highest court annulled an award in which the arbitrators had declared themselves competent to hear a claim arguably brought after the contractually stipulated time limits. The contract required claims to be filed within thirty days after the parties agreed that their differences could not be resolved by negotiation. The arbitrators found that settlement negotiations had broken down in April 1992, and thus a May filing was timely. The respondent took the position that failure to settle occurred in January, when a letter from the claimant met with silence.

The court vacated the award, finding the arbitration clause lapsed by May when the claim

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<sup>35</sup> See *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002), giving arbitrators a green light to determine whether to hear cases under the NASD arbitration rules, when then required an arbitration to be filed within six years from the event that triggered the claim.

<sup>36</sup> Statutes of limitations relating to arbitration law (rather than the underlying claim) are for judges. For example, in a motion to compel arbitration opposed on the basis that it was made too late, an American court found that the Federal Arbitration Act failed to provide its own statute of limitations, and thus borrowed analogous limitations from state law principles at the place where the court was sitting. See *National Iranian Oil v. Mapco Int'l*, 983 F.2d 485 (3d Cir. 1992).

<sup>37</sup> See *Tribunal fédéral (Bundesgericht)* decision in *Transport-en Handelsmaatschappij Vekoma B.V. v. Maran Coal Co.*, Civil Division I, 17 Aug. 1995, reprinted 14 (No. 4) ASA BULL. 673 (1996) with commentary by Philippe Schweizer. See generally, Paul Friedland, *Swiss Supreme Court Sets Aside an ICC Award*, 13 (No. 1) J. INT'L ARB. 111 (1996); Pierre Karrer & Claudia Kälin-Nauer, *Is There a Favor Jurisdictionis Arbitri?*, 13 (No. 3) J. INT'L ARB. 31 (1996); François Knoepfler & Philippe Schweizer, *Jurisprudence suisse en matière d'arbitrage international*, 1996 REV. SUISSE DR. INT'L & DR. EUROPÉEN 573. Compare an arbitral tribunal's treatment of missed deadlines, deemed not to rise to the level of a jurisdictional defect. *Tribunal fédéral* Decision of 24 March 1997, 15 ASA BULLETIN 316 (1997).

was filed. Saying that negotiations might fail as a matter of either fact or law (“*tatsächlich oder normativ*”), the court found failure as a matter of law when the January offer went unanswered.<sup>38</sup> Whether the court was right to review the arbitrators’ determination about time limits depends largely on the parties’ intention in drafting their contract. Here as elsewhere, jurisdictional determinations often remain very fact sensitive.

One questionable aspect of this decision is that the Swiss court apparently deemed its review powers greater on questions of law than of fact, perhaps analogizing to review of cantonal court decisions. As a policy matter, this distinction is highly problematic. If arbitrators wrongly assume Company A acted as agent for Company B in signing an arbitration clause, they exceed their authority as to Company B whether from misunderstanding the law of agency or from a factual mistake about who signed the contract.

#### IV. The End of Litigation or the Beginning?

Defining jurisdictional excess in arbitration implicates a tension between the principle that awards should be final on the merits and the equally important rule that arbitration is consensual. An unhappy loser in a fair proceeding should not be permitted to renege on the bargain to arbitrate. However, no one should be denied access to courts absent a clear agreement on the matter.

Applying these principles in practice can call for the dexterity of an intellectual high-wire artist, who must avoid leaning too much to one side or another in balancing finality against procedural integrity. The decision in *Lesotho Highlands* furthers proper equilibrium, affirming that English courts do not re-decide matters the parties entrusted to arbitrators.

Their Lordships’ decision brings to mind a case handed down by the United States

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<sup>38</sup>See 14 ASA BULLETIN 676-78, at ¶ 3.

Supreme Court a century and a half ago in a case titled *Burchell v. Marsh*.<sup>39</sup> After a series of oppressive lawsuits (including arrest) filed by a New York merchant against an Illinois store owner, the two businessmen agreed to arbitrate their differences before arbitrators who ultimately awarded damages to the ill-treated storekeeper. When the New Yorker succeeded in having the award set aside, the Supreme Court reversed with the following reasoning:

If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor [the judiciary] in place of the judges chosen by the parties [the arbitrators], and would make an award the commencement, not the end, of litigation.<sup>40</sup>

Intelligent application of this approach remains vital to health of commercial arbitration.

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<sup>39</sup> *Burchell v. Marsh*, 58 U.S. 344 (1855).

<sup>40</sup> *Id* at 349.