

Commercial Arbitration

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The Law and Practice of Commercial Arbitration in England

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Preface

This book has a long history. Throughout, we have received advice, help and encouragement from a great number of people: too great for them all to be acknowledged by name. We would, however, like to recognise the particularly valuable contributions of the following:

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Finally, we would acknowledge with gratitude the limitless patience of our Publishers during the preparation of the manuscript, and the speed with which they have brought the book to press.

An account of the scope and purpose of the book is set out in the Authors' Note which follows.

Ardèche

M.J.M.

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Authors' Note

At the time when the work was first planned, the law of arbitration had been almost static for half a century. On almost every aspect, the principles were clear, and in no great need of elaborate discussion. There did, however, seem to be room for a fresh appraisal of the way in which these principles were carried into practice in contemporary commercial life. This we set out to achieve. Today, however, the picture has changed almost beyond recognition. There has been an important shift in the relationship between the courts and the arbitral process, of which the Arbitration Act 1979 was a reflection, rather than a cause. The law of arbitration is on the move, but in precisely what direction it is impossible to say. In this new situation, if practice and theory are not to part company, it will be necessary to pay closer attention than before to the foundations of the subject. This being so, although the purpose of the book remains the same, we have thought it appropriate to include much more in the way of theoretical exposition than had originally been foreseen. In this respect, we draw attention particularly to Chapters 2, 4, 12, 17, 31, 32 and 37.

The title of the work serves to describe its subject-matter. We have chosen the word 'commercial', not because the word identifies any separate body of law, but to emphasise that we have set out to fill what appeared to be a gap, by discussing those proceedings of the more informal type which make up the majority of arbitrations conducted in England. This is not to say, however, that there is no treatment of arbitrations situated at the other end of the procedural spectrum. On the contrary, we have endeavoured to state the principles in terms which apply to all types of voluntary arbitration. The only subjects deliberately omitted are statutory arbitrations and arbitrations in the county court.

The limitation to the law and practice in England and Wales also calls for comment. (Throughout the work, we refer to England by way of abbreviation.) It would have been possible to draw on decisions and texts from abroad, for two distinct reasons. First, as a possible source of future developments in English law. With two limited exceptions, in Chapter 37 and Appendix 4, we have refrained from using the foreign material in this way, not because the English system has nothing to learn from abroad, but because it is the result of a long historical process which has no counterpart elsewhere. The English law and practice of arbitration is not necessarily better or worse than can be found elsewhere, but it is certainly different, and it will not readily accommodate ideas drawn from a different theoretical context. Certainly, the process of change which has been going on for the past ten years may not have come to an end, and it seems likely that part of the impetus for any further changes will come from foreign users of English arbitration. Nevertheless, we believe that for the time being any progress is likely to take place within the framework of the existing regime, rather than by a piecemeal harmonisation of English arbitral law with systems in force elsewhere.

The second possibility was to use the foreign materials as the medium of an exercise in comparative law and practice, designed to illuminate the more individual aspects of the English system. This was a more tempting alternative, but one which we felt obliged to reject. To be of any value, the summary would have had to embrace a world-wide selection of jurisdictions. We concluded that the labour involved in ensuring that the materials were sufficiently comprehensive and accurate, and the extra space which would have been needed for an adequate discussion in the text, would not be commensurate with any increase in the value of the book to the reader. The material would be interesting, and perhaps useful, but this is not the place for it.

We should mention here the possibility that some readers may regard the choice of titles as a sign that the authors have from the outset been looking in the wrong direction. More than any other country, England is the home of arbitrations whose parties are drawn from abroad. A book published here in 1982 should recognise a new spirit in the field of arbitration, which conceives of international arbitrations as de-localised, and regulated not by the law of the place where they happen to be conducted, but by a new *lex mercatoria* of international commerce and international arbitration. To take it for granted that an arbitration in England must be conducted according to English municipal law, except in those rare cases where there is a choice of foreign curial law, is retrograde and insular. A work on commercial arbitration should look outward, not inward.

We would answer this comment by saying that we have not taken it for granted that arbitration must be territorial in character. Careful note has been taken of the arguments advanced to support the thesis that international arbitration should be permitted to cut itself loose from any connection with domestic substantive and curial law. The reason why we have not discussed them, apart from a brief treatment in Chapter 37, is that the present work is intended to offer practical guidance to persons engaged upon arbitrations conducted in England. We venture to think that the eloquence and vigour with which the arguments have been presented have not so far been matched by their practical impact on the conduct of arbitrations abroad or, until very recently, in the attitude of the domestic courts to the arbitral process. Be that as it may, what is quite clear is that the concept of the trans-national arbitration has found no place at all in the law and practice of England. The debate will continue, and we would have been glad to join in, but here again this is not the occasion.

The position as regards material drawn from Scotland and the Commonwealth is not the same. This would have provided a useful source of guidance on how new problems could be solved in terms of systems which resemble those prevailing in England. We had therefore intended to cite a substantial number of Scottish and Commonwealth authorities, and a selection had been prepared for this purpose. Regrettably, the upheavals which have recently taken place in English arbitration law have made it necessary to adopt a narrower focus, and the interests of bringing the book to press have taken precedence over the task of reviewing the Scottish and Commonwealth cases in the light of the changed situation. The Publishers have, however, indicated their intention to issue a Supplement to the present work, so that it may be brought up to date by reference to subsequent decisions, and we hope that this will prove an opportunity to reinstate at least some of the material which we have had to omit.

The enactment of the 1979 legislation, and the manner in which it has been interpreted by the courts, have allowed certain topics to be treated as obsolescent, if not quite obsolete. Instances of applications to set aside an award for error of law on the face are now so infrequent that the modern law on this difficult subject is no longer worth exploring. On the other hand, appeals by way of case stated will continue to take place for a few years, and we have included a summary of the relevant law in Appendix 3. The value of the large number of authorities on the distinction between questions of fact and questions of law has been much diluted by recent decisions, but they are not necessarily to be discarded in toto, and we have included them in the shape of an itemised list in Appendix 5, in the hope that they may form a useful quarry from which guidance may be obtained when similar questions arise in the future.

There are three particular features of the book which it may be helpful to note. The first is a chronological account of the development of judicial control, set out in Chapter 29. The delicately balanced role of the court in the arbitral process is the most conspicuous, and we believe the most valuable, feature of the English system, and it cannot be understood, or safely altered, without an appreciation of how the law came to take its present shape.

Second, we have set out in Chapter 1 a summary of the main features of English law and practice in the field of arbitration. We hope that this 'Descriptive introduction', which is entirely separate from the remainder of the book, will prove useful to readers who, as parties to arbitrations or lawyers, are brought into contact for the first time with the English arbitral process. The object is to provide a general perspective of the English system, not a full statement of the law on each topic. Some degree of over-simplification has been inevitable, and the reader for whom completeness and accuracy is important is referred to the Index.

Third, the Table of Contents will be found to contain not merely a list of chapter titles but a list of all the subject-headings used to introduce new topics as they occur throughout the book. We hope that this will not only provide a convenient synopsis of the scheme of the work, but will also prove to be of assistance, when used in conjunction with the Index, in locating discussion of any particular topic in which the reader has an interest.

We have bowed to convention in referring to an arbitrator, throughout the book, as 'he' rather than 'she or he'.

Unless otherwise indicated, references to 'the Act' or to sections without any statute being named, are to the Arbitration Act 1950.

We have endeavoured to state the law as it existed on 1 July 1982.

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