International Commercial and Maritime Arbitration

Edited by
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Introduction

The subject of this book is an activity which was commonly regarded formerly as having been carried out quite frequently in private, although its extent was largely a mystery and it was not something that was generally talked about. Times have changed. Recent years have seen an expansion of the types and volume of commercial enterprise, an increase in the number of legal disputes, and a burgeoning of literature on the law and its practice. In this climate, it is to be expected that there has been a significant and urgent increase of interest in arbitration, its variety and development, expecially in the international arena.

The United Kingdom has traditionally played a leading role in the settlement of matters of actual or potential dispute by means of arbitration. An excellent example of this is the long-established and highly successful system of referring matters arising out of maritime salvage operations to arbitration under the auspices of Lloyd's in London. By the very nature of the situation, there is limited time for the careful negotiation of the terms of the parties' relationship and the settlement of points of difference arising therefrom. By signing Lloyd's Standard Form of Salvage Agreement, the parties can both postpone such matters, by referring them to expert consideration under a relatively sophisticated form of procedure, and adopt a legal regime to govern their relationship which has been developed alongside the arbitral provisions of the Form in the light of practical experience of substantive issues of law. With constant revision and, moreover, the anticipation of solutions to matters of current or potential practical concern, the Lloyd's Form system has taken from the courts the rôle of determining the majority of international maritime salvage questions, having thus a procedural and a substantive importance. This is described by Gerald Darling Q.C., the Lloyd's Appeal Arbitrator.

The success of one system of arbitration is no guarantee that it necessarily has or will continue to enjoy predominance and all those who are concerned with arbitration must at least monitor the progress of arbitral systems elsewhere in the world. Of particular interest in the maritime context, as the international trading activities of the Soviet Union increase, is the scheme for maritime

arbitration under the U.S.S.R. Merchant Shipping Code. Until now, little has been known in the west about arbitration organised by the Soviet Maritime Arbitration Commission (MAK), though, as Professor W. E. Butler demonstrates, it has a number of features which are of interest not only to maritime lawyers but to all serious students of arbitration.

No matter how genuine the proclaimed advantage of relative cheapness, arbitrations anywhere in the world have a particular commercial significance as a means of earning income from abroad. Where, therefore, international trade is concerned, there is an especial need for eternal vigilance to ensure that the procedures of the general municipal law of arbitration are both up-to-date and not unattractive to consumers of the national arbitral system. Such factors prompted the recent statutory reforms of the English law of arbitration in the Arbitration Act 1979. Sir John Donaldson M.R. describes the essential details of the legislation, prompted by the Report on Arbitration of the Commercial Court Committee, which he chaired, and outlines the early judicial responses to it. A healthy, statutorily directed system of arbitration requires a judiciary that is both responsive to its aims and creatively responsive to deficiencies which emerge. However, the common law system is not perfectly suited to comprehensive and decisive reform as illustrated, *e.g.*, by the continuing debate over the effect on arbitration of silence or inactivity, recently exemplified in the Court of Appeal's decisions in *The Leonidas D* [1985] 1 W.L.R. 925 and *Food Corp. of India* v. *Antclizo Shipping Corp. (The Antclizo)* [1987] 2 Lloyd's Rep. 130. The value of a standing body continually to review the law of arbitration and to effect necessary amendments is reasserted, together with reference to progressive reforms in Hong Kong.

Recent legislative efforts to improve the quality of national dispute resolution processes, both arbitral or curial, have been accompanied by major legislation inspired by the Treaty of Rome's policy of simplifying the reciprocal recognition and enforcement of judgments and arbitration awards throughout the European Communities. This has been achieved in part by the implementation of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, enacted in the Civil Jurisdiction and Judgments Act 1982. The legislation, containing concepts unfamiliar to British lawyers, is complex, if not cumbersome, and has a profound effect on matters within its purview. It has rightly attracted detailed comment and criticism. But one, vitally significant, practical deficiency of the recent reform, albeit explicable within its terms of reference, is its

failure to deal with the recognition and enforcement of arbitration awards and arbitration agreements within the European Communities. James Young examines the relationship between these matters and the Judgments Convention, considering the extent to which the Convention should apply to them, together with the particular treatment which should be accorded within the European Communities to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Geographically more far-reaching and more controversial is the subject of transnational arbitration. The law and practice of international trade have traditionally been influenced by a desire to follow an approach which takes account of the rules and practices of other jurisdictions and of international business. Ultimately, however, whenever an issue is determined and whatever proper law or laws are potentially applicable, the law governing any given matter is essentially that of a particular legal system. Recently, however, increasing attention has been concentrated on the possible development of a modern international *lex mercatoria.* Of immediate interest are the various theories behind the idea of international commercial arbitration as an autonomous juristic entity independent of all national legal systems, discussed by Sir Michael Mustill, with reference to the UNCITRAL Model Law on International Commercial Arbitration. Proposals for radical change may not fit easily into well tried areas of law and practice. This year, however, in considering a rule of the International Chamber of Commerce giving arbitrators freedom to designate the law applicable to the arbitration, the Court of Appeal recognised that it was within the mandate of an arbitrator under the applicable rules to choose, as the proper law, a common denominator of principles underlying the law of various nations governing contractual relations (*Deutsche Schachtbau- und Tiefbohrgeselleschaft m.b.H.* v. *Ras All Khaimah National Oil Co.* [1987] 2 All E.R. 769). It can be predicted, therefore, that the notion of transnational arbitration is destined to play an increasingly important part in the future of commercial arbitration.

The future pursuit of new directions will inevitably be accompanied by reconsideration of perennial difficulties encountered whatever the nature of the arbitration or of the detailed rules applicable to it. Such issues may be important whether the arbitration has a predominantly international or domestic flavour and often carry implications from and for the general law. Of continuing concern to arbitrators as well as to the parties is the extent to which arbitrators are or are not liable for the consequences of their actions, discussed by Susan McLaughlin. This is

part of the wider contemporary debate on the liability of members of various professions and is analysed with regard to the applicable rules of common law and also with reference to economic theory and, in particular, to concepts of professionalism.

Earlier versions of the papers by Sir John Donaldson and Sir Michael Mustill were delivered in the Current Legal Problems lecture series at University College London and their reproduction here is gratefully acknowledged. The future can only require more extensive discussion of the principles and rules governing the law and practice of arbitration both internationally and domestically. It is hoped that the present collection will be of interest and utility in this important area of commercial activity.

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Francis Rose

Michaelmas Day, 1987

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Commercial Arbitration—1979 and After

SIR JOHN DONALDSON M.R.

In 1950, Parliament passed the principal Act which governs the law of arbitration. What induced it to do so, rather than to devote its time to other measures with a greater popular appeal, is now a mystery. A quarter of a century later, it had become clear that there was a real need for further reform. However, it had become equally clear that, in the absence of substantial pressure and more than a fair share of luck, nothing would be done. This was the background to the 1979 Arbitration Act.

The pressure was generated by various bodies with an interest in arbitration and crystallised in a report of the Commercial Court Committee which was published in July 1978. This report identified the principal reforms which were needed. The luck, without which nothing might have been achieved, was unusual and decisive. The Government of the day was in its fifth year of office. Governments in that situation do not usually want to appear to have no further legislative programme, but equally they do not wish to be involved in controversy. Reform of the law of arbitration must have filled the bill nicely. But, even so, time was limited and there was a risk that, in a non-party battle between conflicting interests, all might be lost. Happily, at the moment at which the Arbitration Bill had almost completed its consideration by the House of Lords, the Prime Minister decided to recommend the dissolution of Parliament and, by agreement between both major parties, the Bill was approved by the House of Commons without debate.

One of the Commercial Court Committee's most important and least successful recommendations was contained in paragraph 55 of its report. It called for the creation of an Arbitration Rules Committee. This was not intended to be quite the animal which its name suggested—a committee to make procedural rules—but the truth was revealed to those who chose to read the small print, and some did. The role of the Committee was—and I quote—"to relieve Parliament of the need to consider detailed amendments to the Act both now and in the future." As the author of the suggestion, I should not perhaps be saying that it was very sound.

But it was. The art and science of arbitration is a living and changing thing. Even if we were to get the legal framework right in 1978/79, something different would be required by the mid 1980s and something different still in the 1990s. Yet the chances of getting Parliament to introduce amending legislation to take account of these changes as they occurred would be minimal.

The constitutional pundits were horrified at the suggestion. They said that Ministers and Committees could be allowed to produce subordinate legislation, but they could never be allowed to amend an Act of Parliament. And so the suggestion died. The most that could be achieved was a power for the Secretary of State to relax the fetters on the effectiveness of exclusion agreements which were contained in section 4 of the Act. What neither I nor the Commercial Court Committee knew, and what I suspect the constitutional experts did not know either, was that this was not a constitutional innovation. Under section 4(7) of the Hallmarking Act 1973, the Secretary of State is authorised to supplement or replace the whole section of the Act and the whole of the Second Schedule and even, by amendment, to empower himself to make Regulations under the amended section. This is a power to amend an Act of Parliament with a vengeance. Had all concerned known of this precedent, my suggestion might have received the consideration which I think that it merited.

I mention this abortive attempt to procure sensible machinery for updating the law on arbitration because I want to do what the Arbitration Rules Committee would have been doing—looking at the working of the Arbitration Act 1979 and seeing whether any further changes in the law are needed. As the law stood before the passing of the 1979 Act, errors by an arbitrator could be corrected in two main ways. First, the award could be quashed if an error of fact or law appeared on its face. This procedure was open to a number of objections. Arbitrators are no different from judges in that they prefer not to be reversed. An award which did not explain either the dispute or the reasons for the decision was unlikely to disclose any error on its face, however erroneous the conclusion might be. Accordingly, arbitrators avoided giving reasons. This in turn suggested that sound reasons were of secondary importance compared with some, possibly esoteric, notion on the part of the arbitrator of what the justice of the case demanded. Last, but by no means least, the procedure of quashing an award was a very blunt instrument. The court was faced with a stark choice between affirming the award or quashing it completely, thus leaving the parties free to start all over again.

The second main way of correcting errors of law by an arbitrator

was more sophisticated and more satisfactory. It consisted of requesting or requiring him to state a case for the opinion of the High Court on questions of law which were in issue in the arbitration. This was the method usually adopted and for a long time it worked well. Unfortunately, in the post-War years those who wished to delay the evil day when they had to meet their commitments came to realise that the special case procedure could be manipulated to produce very considerable delay. As a result, English arbitration was beginning to fall into disrepute, particularly with foreigners who, by their use of English arbitration and English services, contributed not insubstantially to the balance of payments.

The solution proposed by the Commercial Court Committee and adopted by Parliament in the 1979 Act involved abolishing both the right to set aside an award for error of fact or law on its face and the special case procedure[1] and substituting a right of appeal to the High Court on questions of law.[2] In addition, section 2 enabled the court to determine a preliminary point of law arising in the course of an arbitration and so avoided the necessity for postponing any appeal until after the whole arbitration had been completed and a final award issued.

When the Act was passed, one or two American lawyers expressed doubts as to whether English judges would not seek to avoid the effect of the reforms. Section 23 of the Arbitration Act 1950 contains wide and necessary powers enabling the court to set an award aside where an arbitrator has misconducted himself or the proceedings and section 22 contains an almost unfettered discretion to remit an award to the arbitrator for further consideration. The Americans' suggestion was that the judges would seek to hold that, for an arbitrator to make an error of law, even if it did not emerge on the face of the award but was only proved by extrinsic evidence, constituted misconduct and so entitled the court to set the award aside. Alternatively, they would remit the award with a direction on the law.

A variant of this suggestion was that the judges would use what has been referred to as the Anisminic doctrine[3] and hold that, since the parties in agreeing to arbitration conferred authority on the arbitrator to decide the dispute in accordance with law and not otherwise, any error of law constituted an excess of jurisdiction. The judges would then restrain enforcement of the award, thus producing the same result as if the award had been set aside, save that the parties would be unable to begin again. I am happy, but not in the least surprised, to be able to report that no such thing has happened.

Let me return to the new right of appeal. As I have said, arbitrators had adopted a practice of refusing to give any reasons for their awards, although a few did so confidentially and on terms that they should not be used as a basis for an application to set the award aside for error on its face. Once this power of setting aside was abolished, there was no need for such reticence and much to be said for letting the parties know why they had succeeded or, as the case might be, had failed. Furthermore, if there was any question of an appeal to the High Court, it would be necessary to know what were the arbitrator's reasons in order to determine whether there had been error of law. The Act itself does not require the giving of reasons, but it empowers the court to order an arbitrator "to state the reasons in sufficient detail to enable the court, should an appeal be brought... to consider any question of law arising out of the award."[4] This power is subject to the limitation that, before the award was made, one of the parties should have notified the arbitrator that a reasoned award was required or that there was some special reason why such notice was not given.[5]

The reason for this limitation is that arbitrators, like judges, tend to forget why they have decided disputes in a particular way and it would be a hardship to expect them to set out their reasons for an award long after it was given. In practice, the provisions of the Act with regard to reasons have worked very well and increasingly arbitrators are giving reasons, irrespective of whether an appeal is anticipated. The only reported case of the court ordering the giving of reasons in the absence of a request to the arbitrator before the award was made is *Hayn Roman & Co. S.A.* v. *Cominter (U.K.) Ltd.*[6] Robert Goff J. found that a prior request for reasons did not reach the arbitrator because of a misunderstanding between the solicitor for the party concerned and the Secretary of the Coffee Trade Federation, which was the institution responsible for administering the arbitration. There had been very little delay in repeating the request once the award had been made and the judge had no difficulty in holding that this was a special reason within the meaning of section 1(6)(*b*).

All has not run as smoothly in relation to the right of appeal itself. The Commercial Court Committee had recommended that the right of appeal should not be unrestricted, since any such right would have enabled reluctant debtors to achieve the same delays as were prevalent when the special case procedure was operative. It thought that the right of appeal to the High Court should be restricted to cases in which all parties agreed or the High Court gave leave and that the High Court should give leave only if