Arbitration and the Courts Singapore 2012

The title of this talk is "arbitration and the courts." This gives me a very wide scope indeed and encompasses far more than I could hope to begin to cover in the time that I have. I thus propose to confine myself to some particular aspects of the relationship between these two methods of dispute resolution.

In the nature of human affairs disputes often arise. In a civilised society there are ways and means of resolving those disputes without recourse to violence or to other methods which are regarded as inconsistent with the principles which underlie such societies. In a democratic country one of those principles is the rule of law, which in turn requires there to be a state judicial system available to all and which is independent of the legislature and the executive. At the same time, in a free society, those who want it should have the right by agreement to choose, if they wish, their own means of resolving their disputes, without recourse to the state system provided, of course, that this does not offend other basic principles of the society in question.

It has been said that apart from war, civil litigation is the most expensive method of resolving disputes that has ever been devised. Like war, it can be lengthy and its outcome uncertain and unsatisfactory. Civil litigation is often for all practical purposes only available for the very rich and the very poor, as only the former can afford it and only the latter may be supported by the state. Systems that operate on a no win, no fee basis may provide some help sometimes, but all too often impose heavy and often unbearable burdens on defendants who are not well off and are thereby forced into unjust settlements.

Yet those of us in democratic countries regard the courts as the bastion of civil rights and as an essential element for the upholding of the rule of law. So they are, but this should not blind us to the fact that they are not perfect, and that continuous efforts must be made to improve our legal systems in an attempt to make justice truly available to all.

Arbitration, and here I am referring to consensual commercial arbitration, is not perfect either. It can be as expensive and slow as the courts, but it is a form of dispute resolution chosen by the parties and as such stands on a different footing from the court systems of any country.

So my starting point is that neither of these two methods of dispute resolution is to be regarded as wholly satisfactory. Sometimes they work well, sometimes not. So both methods must be kept under constant review with the object of seeking improvements. In these days of rapid change and the vast strides made by information technology there are great opportunities for improvement.

Looking at consensual arbitration, founded as it is on the agreement of those concerned, that agreement must in my view itself form the main basis of the general principles on which any statutory framework is to rest. This is clearly the basis of the UNICTRAL model law adopted in 1985 and now incorporated, in whole or in part, into the laws of many countries. But the question immediately arises, if the basis is agreement, what is the need for any statutory framework at all, saves to exclude arbitration where the public interest so dictates. Surely, if the parties wish to arbitrate and not litigate their disputes, they can make their own agreement as to how to proceed and there is no need for, by way of example, all the many provisions in the first part of the English Arbitration Act 1996.

Like most general principles the concept of agreement, known as party autonomy or as the "contractual" as opposed to "juridical" theory of arbitration, is far easier to state in the abstract than to apply in the real world.

There are two extreme positions which can perhaps be stated in the following way. It can be said on the one side that if parties agree to resolve their disputes through the use of a private rather than a public tribunal, then the court should play no part at all, save perhaps to enforce awards in the same way as they enforce any other rights and obligations to which parties have agreed. To do otherwise is unwarrantably to interfere with the parties' right to conduct their affairs as they have chosen.

The other extreme position reaches a very different conclusion. Arbitration has this in common with the court system; both are a form of dispute resolution which depends on the decision of a third party. Justice dictates that certain rules should apply to dispute resolution of this kind. Since the state is in overall charge of justice, and since justice is an integral part of any civilised democratic society, the courts should not hesitate to intervene as and when necessary so as to ensure that justice is done in private as well as in public.

Both these extreme positions are in my view open to criticism. If the courts refuse to intervene at all in arbitrations, on the grounds that to do so is to interfere with the agreement

of the parties, there is an assumption that the procedures adopted or the results reached in any given case are or are to be treated as being part of that agreement. But is that necessarily so? If, for example, the parties agree that their private tribunal will resolve their dispute according to English law, how can it be said that they have agreed to be bound by a result that English law would not reach? Can it not be said that such a result would be unjust, in the sense of falling outside the agreement that the parties have made; and that since the courts exist for the purpose of preventing or correcting injustices, they should be allowed to put things right. To a certain but very limited extent, English law presently accepts this argument, in cases where it is readily demonstrable that the arbitral tribunal, purportedly applying English law, has signally failed to do so.

This argument is not accepted in many other jurisdictions as justifying any interference by the courts in the decisions reached by the arbitral tribunal on the dispute in question. In such jurisdictions the courts confine themselves to interfering only if there has been a failure of what can be described as due process i.e. if the tribunal has failed to treat the parties fairly in the conduct of the arbitration. In the view of such jurisdictions, the fact that the parties have agreed that their dispute shall be decided in accordance with a particular law does not entail or imply more than that the tribunal will apply its understanding of that law; not that it will reach the same conclusion as the courts. Thus from this point of view, if the courts intervene and impose on the parties the court solution, the agreement to use a private rather than a public tribunal would seem to be more or less wholly subverted. The parties have agreed that a private tribunal shall determine their rights and liabilities. By doing so they have expressed their agreement not to use the courts. Can it not be said that it would be unjust to override that agreement?

Looking at the history of arbitration and the courts in the United Kingdom, it is easy to find cases which lean towards the one extreme position or the other as time has gone by. From a very early stage, statute law has been used to assist in the enforcement of awards; and for over a hundred and fifty years to hold parties to their agreement to arbitrate. At the same time, common law was for a long time reluctant to allow parties to usurp, as it was put, the jurisdiction of the courts by choosing arbitration, while courts of equity were not prepared specifically to enforce most forms of arbitration agreement, on the grounds that arbitrators did not have such essential means of doing justice as ordering discovery. The law adopted *"error of law on the face of the record"*, and what was known as the special case procedure, and expanded notions of what was called arbitral misconduct, to keep control through the

courts over both the procedure of arbitrations and the decisions reached by arbitral tribunals. Fashions in fact tended to change quite rapidly, and every decade or so there seemed to be quite a change in the attitude of the courts. For example, the answer to the question whether the courts should extend time to arbitrate in cases where the parties have agreed that claims will be barred unless arbitration is commenced within a fixed period, sometime very short, varied considerably over the decades preceding the formation and introduction of the English Arbitration Act in 1996.

In the early 1990s, the Departmental Advisory Committee on Arbitration Law, which I chaired, was faced with the problem of advising on the structure and content of new legislation on arbitration. There was near universal agreement on the unsatisfactory nature of the existing legislation, which had built up over many decades in a piecemeal fashion. Anyone reading the previous Arbitration Acts would gain very little useful knowledge about arbitration in England, most of which was contained in voluminous case law.

We were all agreed that the way to go would be to restate the law in as user friendly a fashion as possible, while taking the opportunity to make improvements and changes that, after very wide consultation, seemed to us to be desirable.

Very careful consideration was given to the question whether we should simply adopt the UNCITRAL Model Law. In the end, we decided not to do so. I have no doubt that this was the correct approach. The Model Law is a magnificent example of what can be achieved through international co-operation, but it does not provide a complete code, nor does it cater for domestic or non-commercial arbitrations. Furthermore, in a country like England, there was already a highly developed body of arbitration law, which dealt with many of the topics on which the Model Law is silent. The major defect of English law was that it was mainly contained in case law; the various arbitration statutes dealt piecemeal with some matters and nowhere could be found a clear statement of the rules and principles developed over a very long time. The solution reached was to set out the law in a new statute, in as clear and logical a way as we could, adopting so far as possible the same structure and language as the Model law. This is what we tried to do in the Arbitration Act 1996. We took the opportunity to make a number of changes to the existing law, where we were convinced that change was needed. In our Report on the Arbitration Bill of February 1996 we explained in detail the reasons for drafting the Bill in the form that it took. In a further Report of January 1997 we commented on a number of changes that were made during the passage of the Bill through Parliament,

changes that we suggested following further consideration and discussion with interested parties.

The 1996 Act incorporates a great deal of the Model Law and does so using the same or much the same language. There are additional provisions and we still retain a very limited right of appeal on questions of English law, but to my mind we can properly be described as a country that has sought to harmonize its arbitration laws so as to bring them within the shape and philosophy of the Model law and thus international norms.

As will be seen from our Report of February 1996, we were not convinced that it was a good idea to preserve the distinction between international and domestic arbitration, but felt that since others took a different view and since we had not had an opportunity to make all the soundings we would have liked to make on the subject, it would be right to include in the legislation provisions applying only to domestic arbitration. These appear in Part 2 of the Act.

During the course of its passage through Parliament, we sought further views on whether the distinction between international and domestic arbitration should be preserved. The majority of those who responded were in favour of abolishing the distinction and applying the same rules to domestic arbitration as we had set out for international arbitration. At the same time the English Court of Appeal made clear that an arbitral regime that applied only to domestic arbitrations was incompatible with European Community law. The only two solutions available were accordingly either to extend the concept of domestic arbitrations to all European Community countries, or to abolish the distinction between domestic and international arbitrations. There seemed little sense in taking the former course, so we took the latter. Accordingly Part 2 of the Arbitration Act has never been brought into force. Unlike Singapore, therefore, we do not have separate regimes for international and domestic arbitrations, though of course the Arbitration Act 1996 preserves consumer rights in relation to arbitration.

We were also agreed that while the basic principle to be applied was party autonomy, there was an undoubtedly need for a number of statutory provisions. There have to be rules, for two simple reasons.

The first of these arises from the very fact that arbitration in most cases is chosen and agreed to by the parties when they make their bargain, rather than when a dispute arises

between them. When parties make a bargain, they proceed, at least in most cases, on the assumption that they are buying or selling something or providing or receiving something, from which both will benefit and profit. What they are generally not contemplating in any detail is what exactly is to happen if something goes wrong with the deal. In other words, they make the bargain in the expectation that it will succeed, not that it will fail. Thus in the nature of things there are many cases where all that the parties will stipulate is that if disputes do arise, they will be settled by *"arbitration."* What in many cases they will not do, because at this stage they are intent on success, not failure, is to spell out what they mean by their agreement to arbitrate and all the ramifications of such an agreement.

By an agreement *"to arbitrate"* it is clear that the parties have chosen a private rather than a public tribunal in the event that disputes arise in the future. But how does this work if a dispute does arise? Is there to be one arbitrator; and if so, how is that arbitrator to be chosen? If each party is to have an arbitrator, is there to be a third if the two disagree; and again, how is the third to be chosen? What if one party fails or refuses to join in choosing an arbitrator or fails or refuses to nominate his own arbitrator? Can the arbitrator who has been appointed proceed on his own? If these matters have not been spelt out in the arbitration agreement, what is to happen? To make the agreement to arbitrate effective, either it must expressly deal with such matters, or there must be rules applicable from elsewhere.

As to the second reason, again in the nature of things, once a dispute has arisen, it is often very difficult indeed for the parties to agree on how to proceed, for each is likely to be suspicious of proposals by the other, imagining, with more or less justification, that the other is seeking to gain some advantage. Thus it is unlikely in many cases that they will be able to agree on how gaps in their original agreement to arbitrate are to be filled. Indeed, it is not uncommonly the case that the party facing a claim in arbitration will be reluctant to take any step that might bring forward the day of judgment.

To a significant extent, arbitral institutions have provided a valuable service in formulating arbitration rules and regulations, including arbitration agreements which the parties can incorporate into their contracts. These fill in many of the gaps that the parties would otherwise never get round to agreeing among themselves.

But those contemplating arbitration legislation have a basic choice whether or not to provide a fall-back position. They can either say simply that if the parties wish to use arbitration then it is necessary for them to spell out all the ramifications of this in their

agreement, or do so by incorporating institutional rules; and that if they do not do so, their simple agreement to arbitrate will be unworkable and has simply to be ignored as such; or they can construct rules and principles that fill the gaps in their agreement if they are unable to do so for themselves. English law, and the laws of many other jurisdictions, have taken the latter course, led and aided of course, by the same international approach adopted by UNICTRAL.

A more formidable problem is the extent to which statutory rules and principles should go. Here there has been and continues to be lively debate as to the proper boundary between the concept of party autonomy and the imposition of rules laid down by statute. Again, by way of example, there were considerable discussions in the United Kingdom over the question whether arbitrators should have the right to strike out claims for want of prosecution, or the power to order security for costs. Some took the view that these were matters exclusively for the court, on the grounds that the arbitrators' job was to decide the dispute on its merits, not otherwise. In fact, the law in England now is that arbitrators and not the courts should have these powers.

There are a number of cases where the interface between arbitration and the courts has given rise to problems. Until the Arbitration Act 1996, there was a statutory provision to the effect that a court could refuse a stay of legal proceedings where it was satisfied that *"there was not in fact any dispute between the parties with regard to the matter agreed to be referred."* These words do not appear in the New York Convention or the UNICTRAL Model Law. Some courts took the view that if it could be demonstrated that there was no valid defence to a claim, the matter was *indisputable"* and accordingly there was no dispute and the court could refuse a stay and give summary judgment.

In 1990 I had the opportunity, as Commercial Judge, to challenge this reasoning. In a case called *Hayter v Nelson*, I said this:

"Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputable wrong does not, in my view, entail that there was therefore never any dispute between them."

In the Arbitration Act 1996 we simply applied the wording of the New York Convention and the Model Law. A stay of legal proceedings where there is an arbitration agreement is now mandatory unless the court is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

Another instance of the interface between arbitration and the courts was the question whether the courts could intervene to extend the time for the commencement of arbitration proceedings. The justification for time limits is that they enable commercial concerns (and indeed others) to draw a line beneath transactions at a much earlier stage than ordinary statutory limitations allow. In English law, the courts were given power to extend time under the Arbitration Act 1934, and under the 1950 Arbitration Act the test was whether *"undue hardship"* would result if the time was not extended.

Many felt that the courts were using this power excessively, thereby overriding the parties' bargain and unwarrantably interfering with the concept of party autonomy. When preparing the Arbitration Act 1996 we considered whether to abolish the right to extend time altogether, but in the end adopted new wording to cover the two cases where we felt that applying time limits would produce a wholly unjust result. The wording we adopted was to give the court power to extend the time to arbitrate only if it was satisfied either that the circumstances were such as were outside the reasonable contemplation of the parties when they agreed the provision in question and that it would be just to extend the time; or where the conduct of one party made it unjust to hold the other party to the strict terms of the provision in question.

There has been and indeed continues to be substantial differences of opinion over the question whether arbitrators should have the right to make interim orders *ex parte*, i.e. deliberately without prior notice to the other party. These are generally referred to as *"ex parte interim measures of protection."* Those in favour of giving arbitrators the right to make such orders point to the fact that a party can frustrate the whole purpose of an arbitration, by removing assets or taking similar steps; and that the only way to stop such behaviour is to obtain an order preserving the position. To give the party in question notice that such an application is to be made would obviously be self-defeating.

I am among those who would oppose giving arbitrators any such powers, unless the parties in their arbitration agreement have expressly agreed otherwise. Here English law has drawn the line, on the grounds, among other reasons, that absent agreement, to permit

arbitrators to act in this way would be contrary to the basic principle of party autonomy underlying consensual arbitration. To my mind, such powers should be left to the courts. Arbitral tribunals have, in English law, a duty to act fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent (Section 33 of the Arbitration Act 1996), while Section 44 gives the courts power to grant *ex parte relief*. I remain of the view that this was the correct course to take. I repeat, that if the parties wish to give the arbitrators such powers, they can do so by specific agreement. But not otherwise.

There is one particular matter where, as it seems to me, the courts have to be involved; and that is the question of jurisdiction. Since the basis of the type of arbitration I am discussing is agreement, the power of an arbitral tribunal to determine disputes between the parties rests on the agreement of those parties to give the tribunal that power. If one party denies that agreement, how can the tribunal proceed?

The practical solution reached in many countries throughout the world is to allow the tribunal to make an initial decision as to whether or not it has jurisdiction i.e. what is known as the doctrine of competenz-competenz. This, if the arbitrators conclude that they have jurisdiction, enables the arbitral proceeding to continue, thus avoiding the situation where a recalcitrant party can, by taking jurisdiction points, delay or sometimes even frustrate the arbitral purpose. But to my mind it is self-evident that the tribunal cannot have the last word on its own jurisdiction, unless of course the parties agree. If in truth one party has not agreed that the tribunal is empowered to deal with the dispute, or a particular aspect of the dispute, then the tribunal has no power over that party, for such power only comes from agreement. Thus, unless the party in question has so conducted itself that it would be inequitable to allow it later to challenge jurisdiction, it should always be able to challenge in court any purported assumption of jurisdiction by an arbitral tribunal. Thus those resisting enforcement of a foreign award under the New York Convention have the right, if they can to establish to the satisfaction of the relevant court that, whatever contrary conclusion may have been reached by the arbitral tribunal on jurisdiction, that tribunal did in fact lack jurisdiction.

The interface between party autonomy and rules imposed by legislation gives rise, as I have said, to problems, some countries drawing different boundaries from others. Our attempt, in the United Kingdom, is contained in the Arbitration Act 1996. To a significant degree, we moved away from the previous law and did our best to ensure that court processes

existed for the purpose of supporting the arbitral process and party autonomy, rather than imposing solutions that ran counter to this basic principle. Whether we succeeded is hardly for me to say.

There is a recent development in international commercial arbitration on which I would like to comment; and this is the use of what used to be called equity clauses i.e. provisions in arbitration agreements which empower the arbitral tribunal, instead of applying the law of any particular country, to decide the matter on general considerations of justice and fairness. Sometimes the parties agree to the tribunal applying what is described as the lex mercatoria, meaning thereby a set of trans-national rules and principles. Much work has been done in recent years in developing these concepts. They are popular in international commerce for the obvious reason that they provide, or at least appear to provide, a neutral basis on which arbitral tribunals can found awards.

English law now has no objection to the parties, if they wish, choosing such a basis. Section 46 of the Arbitration Act provides that the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, or *"if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal."*

This was not always the case. In the 18th Century Lord Mansfield declared that arbitrators were bound to apply the law, though there are other authorities that were inclined to give the arbitral tribunal a rather wider scope. In more modern times the attitude hardened. Lord Justice Scrutton stated that arbitrators had to apply the law of the land for, as he put it, *"there must be no Alsatia in England where the King's Writ does not run."*

This attitude no longer applies. It was an example of the courts being over jealous of their powers, and resistant to what they considered to be the risk of arbitral tribunals usurping their jurisdiction. However, it is perhaps interesting to recall that even in the 19th Century, there was a now long forgotten example of arbitration by statute wholly usurping the jurisdiction of the courts.

In the 1860s there was a social catastrophe in England. In 1869 the Court ordered the winding up of the Albert Life Assurance Company; and in 1872 the winding-up of the European Assurance Society. Each of these companies had grown rapidly in the previous years, taking over, by amalgamation or otherwise, a large number of small life assurance

companies. Each became hopelessly insolvent. There was, again in each case, a highly complex web of cross-indemnities between the various companies involved, which numbered dozens. On the face of it, some of the companies that had been taken over or absorbed remained solvent, some insolvent. The companies had in each case had claims and cross-claims against each other – while creditors of companies, policy-holders, beneficiaries and contributories were obviously heavily involved and affected by what had happened. The social effects were grave –many of the policy-holders were very poor people indeed – who had scraped together a penny or so a week in order to make what provision they could by wy of life policies to help their dependants. The legal and social ramifications were, again in each case, simply horrendous, so much so that Parliament concluded that the law, the courts and legal processes then available were simply not able properly or expeditiously to begin to do justice to all the parties involved. Parliament decided, in effect, to usurp the function of the courts. In 1871 there was enacted the Albert Life Assurance Company Arbitration Act and in 1872 the European Assurance Society Arbitration Act.

In those Acts the arbitrator was given extraordinary powers. Section 11 of the Albert Assurance Act provided as follows:

"The arbitrator may settle and determine the matters by this Act referred to arbitration, not only in accordance with the legal or equitable rights of the parties as recognised in the Courts of Law or Equity, but on such terms and in such manner in all respects as he in his absolute and unfettered discretion may think most fit, equitable, and expedient, and as fully and as effectually as could be done by Act of Parliament."

All other legal proceedings relating to the matter were stayed (save with the consent of the arbitrator); the arbitrator was given power to make and vary such general rules, regulations and orders as he might from time to time think fit as to parties, mode of procedure, notices, evidence or costs. Finally the arbitrator's position was made totally secure by the following provision which appears as Section 21 in the Albert Life Assurance Arbitration Act.

"All awards, orders, certificates, or other instruments made by or proceeding from the arbitrator shall be binding and conclusive on all parties to all intents and purposes whatsoever and shall not be removed by certiorari or by other writ or process, into any of her Majesty's Courts of Law or Equity, and the proceedings or acts of the arbitrator shall not be liable to be interfered with by way of mandamus, prohibition, injunction, or

otherwise, and no such award, order, certificate, or other instrument shall be subject to review or appeal, or be liable to be questioned on any ground before or after the making of the final award in any court of law or equity, or elsewhere, by any proceeding against any of the scheduled or absorbed companies, or against the arbitrator, or otherwise."

Some arbitrators may wish they could possess similar powers and immunities. But on a lighter note, the only material difference of substance in the two Acts which I have been able to find relates to the all-important matter of the remuneration of the arbitrator. In the Albert case, Section 28 of the Act provided that the expenses of the arbitration should include a sum of not less than £2000 for the arbitrator for, I quote, *"his personal trouble,"* to be determined by the arbitrator and paid in such manner as he should direct, whereas in the European case, the arbitrator was limited to a sum of not more than 3500 guineas, again for his personal trouble. Why the arbitrator under the former Act was trusted not to charge too much, but not the latter, I have been unable to discover.

It is clear from these Acts that it was hoped that by the means employed the disputes, differences and problems that had been thrown up could be resolved quickly. In the end this did not happen. The European Assurance arbitrator died and was succeeded by another – and the proceedings dragged on for many years. Some enterprising soul even published a book containing many of the awards that were issued, a copy of which I managed to find in the archives of the Middle Temple library. However, given the then state of the English Courts, it is likely that without taking this extraordinary step, it is doubtful whether there would ever have been an end to the litigation. I should add as a footnote that in a later Act, the Albert Arbitration Act of 1874, the arbitrator was given the power to strike out claims for want of prosecution, a power which arbitrators acting under the ordinary law were not to possess for another 120 years.

This was an example of what was not so much consensual as compulsory arbitration. Far from giving the courts scope to oversee the resolution of these disputes, they were entirely removed from the processes of the courts.

The topic of arbitration and the courts is, as I said at the outset, wide in the extreme. Some consider that there is necessarily some tension between these two forms of dispute resolution, criticising courts for what they regard as unwarranted interference in the arbitral process. But arbitration needs the support of courts, and courts need to support arbitration. In the end, both have the same objective, which for arbitration we spelt out as the first principle

of arbitration in Section 1 of the Arbitration Act 1996:as being "***to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense."*** Provided the courts comply with the third of our principles, set out in the same section, that in matters governed by Part 1 of the Act, "***the court should not intervene except as provided"*** in that Part, I would hope that these two methods of dispute resolution can work together as we intended and hoped that they should.

I have spoken for long enough. There are many points of detail on the exact line that should be drawn between the powers that should be possessed by arbitrators and those confined to the courts and likely to be disagreement on where that line should be drawn in any given instance. But given the courts pay proper respect to the parties' agreement to arbitrate rather than litigate, and seek wherever possible to uphold that agreement rather than subvert it, I see no reason why arbitration and the courts should not work together in reasonable harmony.

I have not in this talk said anything about one of my hobbyhorses, information technology. In my view the advances are such as to provide enormous scope for improving our systems, both in court and in arbitrations. Singapore courts are leading the way in taking advantage of information technology, not just in speeding up and improving procedures, but in devising entirely new ways of dispensing justice. International arbitration lends itself to the use of advances in computing power. The latest technology can be used to organise documents, provide a record of proceedings and enable meetings to take place without the need for parties, their lawyers and the tribunal to travel long and expensive distances to meet, but instead to do so in virtual arbitration rooms. However, despite my enthusiasm for information technology, I have to say that I am very glad to be physically rather than virtually here in Singapore this afternoon, with the opportunity of meeting with old friends here from long ago, and of making new friends during my visit.