Meeting the Architect of the English Arbitration Act 1996

The English Arbitration Act 1996 is now part of the legal landscape. Lord Saville of Newdigate, one of its chief architects, gives Timothy Cooke his reflections on the Act and on the world of international arbitration

TC: Prior to the enactment of the Arbitration Act 1996, one of the critical decisions reached in reforming arbitration legislation was not to adopt the UNCITRAL Model Law on International Commercial Arbitration, then in its relative infancy. With the benefit of hindsight, was it the correct approach to not adopt the Model Law?

LS: 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, or cater for domestic or non-commercial arbitrations.

Furthermore, in 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 as far as possible the same structure and language as the Model Law.

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.

If we were to go through the same process today, I have no doubt that such a committee would reach the same decision, since the reasons for the original decision remain valid and compelling.

TC: In any event, is there a case to say that England is in reality now a Model Law country but for the limited appeal provisions in the 1996 Act?

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

TC: Since the Act came into force, the growth in popularity of international arbitration as a means of resolving disputes has been enormous. Counsel from different cultural and legal backgrounds frequently interact to resolve the same disputes. Do diverse cultures engaged in arbitration pose an insoluble problem that must be moderated, to the process's detriment, through compromise?

LS: I do not believe the problems are insoluble. The solutions probably lie in continuing the sort of international co-operation in framing model provisions, standards and principles that led to the Model Law itself.

The purpose of Section 33 was to take advantage of the fact that arbitration is a dispute resolution method that can be tailored to the particular dispute, in a way that it is difficult for litigation to do. One of the chief purposes of the Act is to encourage arbitral tribunals not slavishly to follow court or other set procedures.

The parties are free to agree on how their arbitration is to be conducted. But if the tribunal considers, for example, that the lawyers employed by the parties are proposing procedures that are not conducive to resolving the dispute without unnecessary delay or expense, and that other procedures are preferable, it should make its views known, and ensure the parties themselves – not just their lawyers – are agreed on the procedures to be followed.

TC: International arbitration has attracted criticism in recent years for its excessive cost and delay. Similar criticisms were levelled at litigation in the English courts 15 years ago, and have surfaced again more recently. The reality is that many arbitrations resemble litigation. How did concerns at the time about litigation costs, and the perceived need to reform the civil procedural rules, influence the Departmental Advisory Committee on Arbitration Law, and how did this filter through to the drafting of the 1996 Act?

LS: We had this very much in mind when drafting the 1996 Act. This was a chief purpose of Section 33 and Sections 59-65. The tribunal is given the power in Section 65, unless otherwise agreed by the parties, to put a cap on the recoverable costs of the arbitration.

TC: In the absence of binding codes of conduct and a reluctance on the part of some arbitrators to get tough with recalcitrant parties (as perceived by some users), would arbitration benefit from some form of procedural reformto deal with criticisms of cost and delay?

LS: In my view, there are already provisions in the 1996 Act that a tribunal can, and should, employ to control costs and delays. But equally, arbitral institutions can, and should, buttress these provisions in their own rules. Some, of course, already do so. For example, the ICC Commission on Arbitration has produced a report, "Techniques on Controlling Time and Cost in Arbitration" which is provided to all parties in ICC arbitration proceedings.

Arbitrators should be required to actively manage their cases; see, for example, Sections 33 and 34 of the 1996 Act.

TC: Should parties be able to invoke a summary judgment-style procedure to deal with appropriate cases swiftly and efficiently?

LS: Such a procedure could be developed by arbitral institutions for inclusion in their rules. But care should be taken not to crystallise procedures, for to do so frustrates one advantage of arbitration – the ability to tailor procedures to the particular dispute.

TC: Should arbitration offer something different from litigation in terms of its procedure? What should arbitration's distinguishing features be?

LS: The ability to tailor procedures to the particular dispute. In some cases, court-like procedures may be appropriate; in other cases, other procedures are much more likely to achieve the objective of arbitration set out in Section 1 of the Act – to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

TC: Here in Singapore, the courts have gone hi-tech. Judges take notes and draft orders on computers in court; the courts are wired up for taking evidence by video-link and for live transcription of hearings. What can technology offer to arbitration to improve efficiency and cost?

LS: The same enormous advantages as in courts. Information technology offers not just ways of speeding up existing procedures, but entirely new methods of achieving dispute resolution, especially in international arbitrations, where the parties and tribunal members are often physically far apart.

TC: What will arbitration look like in 15 years' time?

LS: Aside from procedure, arbitration is beginning to bear other similarities to litigation. For example, the current trend for emergency arbitrator provisions in institutional arbitration mirrors the emergency applications courts in many jurisdictions, and caters for *ex parte* applications for freezing and search and seizure orders. Concerns over the time and cost of arbitration may encourage more active case management by arbitrators.

I am opposed to the granting of powers to arbitrators to make *ex parte* orders without the knowledge or consent of the affected party. This seems to me to be the antithesis of party autonomy, and of the principle that arbitration is founded upon agreement.

TC: There has been recent debate over suggestions that arbitral institutions, and not the parties, should determine the constitution of tribunals. Is a vision of arbitral institutions employing full-time arbitrators to resolve disputes brought before them where international arbitration is heading?

LS: I hope international arbitration does not develop into international litigation, thereby risking losing its flexibility to tailor procedures to the particular dispute. Whether arbitral institutions choose to develop in this way depends on whether it is likely to appeal to those who incorporate institutional rules in their contracts. I am not in a position to offer a view on whether this is likely to occur.

What should be borne in mind is that arbitration, unlike litigation, is a consensual method of dispute resolution. Parties go to arbitration because they do not want to go to court.

Timothy Cooke is a Foreign Registered Counsel at Stamford Law Corporation.
