Chartered Institute of Arbitrators

Reflections on the English Arbitration Act 1996 after fifteen years

Article 12 of the UNICTRAL Model Law provides that grounds for removal exist if there are justifiable doubts as to the independence or impartiality of an arbitrator. Section 24 of the English Arbitration Act 1996 contains a similar provision, though for reasons that I shall return to, we confined ourselves to reasonable doubts as to impartiality and said nothing about independence.

Although I am not appearing here as an arbitrator, there are clearly reasonable doubts whether I can provide an independent or impartial review of the English Arbitration Act over the fifteen years since it came into force. I was Chairman of the Committee (following Lord Mustill and Lord Steyn) that was responsible for preparing the Act, and wrote two reports describing how we set about the task and why the Act was drafted in the way that it was. Thus those listening to me this afternoon would be wise to assume that my starting position is likely to be that the Arbitration Act is probably the best thing since sliced bread.

On that basis, I would like to start by seeking to explain the philosophy behind the Act. In the Act itself, this is set out in Section 1 in the form of three principles. These are that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; that the parties should be free to agree how their disputes are resolved,, subject only to such safeguards as are necessary in the public interest, and that in matters governed by the relevant part of the Act, the court should not intervene except as provided by that part. I should add that we resisted attempts to add a fourth principle, that arbitrators should never be required to be overworked or underpaid.

In 1999 the Chartered Institute held a Millennium Conference in London, entitled *Dispute Resolution – The Challenges.* During the course of that Conference Michael Moser of Baker & Mackenzie Hong Kong, presented a paper on the strong, indeed dramatic, growth of arbitration and arbitral institutions in Asia.. That growth has continued throughout the following twelve years and looks set to continue in the future.. But the reason I refer to this

paper is that, in a sentence, Michael Moser encapsulated the reason for commercial arbitration. As he put it, *"people go to arbitration because they do not want to go to Court."*

This leads me to the first of my reflections. Section 69 of the Arbitration Act makes it very difficult, without the agreement of the parties, to appeal to the court from an arbitration award on a question of law, and only permits such appeals on a question of English law. Among other things, unless the parties agree, it has to be readily demonstrable that the tribunal were obviously wrong, or, where the matter is one of general public importance, that their decision is open to serious doubt. This has led to a sharp diminution in successful appeals to the court and thus a significant diminution in court cases expounding and developing English commercial law. The fear has been expressed that by this means, English commercial law runs the risk of atrophying and losing its world-wide reputation as about the most developed system of laws governing international trade and commerce.

There is undoubtedly force in this point, at least from the point of view of the development of English commercial law. But from the point of view of the majority of those using arbitration, I believe things look rather different. Commercial entities do not generally choose to resolve their disputes by arbitrating in order, at of course their expense and with added delay, to contribute to the body of English commercial law. They have chosen arbitration, as Michael Moser put it, because they do not want to go to court. I do find some difficulty (as did Lord Devlin many years ago) in accepting the proposition that those seeking a resolution of their disputes by arbitration rather than litigation should somehow be obliged nonetheless to finance the development of English commercial law by dragging their dispute from their chosen tribunal to the court, and possibly on to the Court of Appeal and even the Supreme Court. Based on the same need to support the development of English commercial law, it could, of course, be argued that parties should be prohibited from settling their disputes, at least in any cases raising important points of law, since by doing so they are depriving English law of the means to develop and keep up to date.

There are, conversely, those who would urge the abolition of any appeal at all on questions of law, on the grounds that what the parties have agreed is to abide by the award of the arbitral tribunal, so that the fact that a court would or might have reached a different answer is neither here nor there.

We considered this proposal, bearing in mind that in many countries no such rights of appeal exist, but in the end decided to retain the very limited right of appeal in Section 69.

This is something of a compromise, but perhaps does have some intellectual respectability, on the basis that where the arbitrators are employed to decide a question of English law, and it can be demonstrated that they have manifestly failed to do so, or where (in cases of general public importance) it is seriously doubtful whether they have done so, they have not reached the result contemplated by the arbitration agreement made by the parties.

The question of appeal on questions of law can of course, be dealt with by the agreement of the parties, either by way of allowing such an appeal, or by way of excluding any right at all. Different Arbitral institutions have incorporated either opt in or opt out provisions dealing with the question of appeals on questions of law.

I have considered whether we were wrong to preserve even a limited right of appeal on questions of law. As I have just said, this was something of a compromise, for there were those on the committee who were keen to retain or even increase the existing right of appeal, while others wished to abolish it altogether. The government timetable was such that unless we could reach agreement in the committee, we were going to lose the opportunity to get a new arbitration statute. What we did all agree on was that there was a crying need for a new arbitration statute and to achieve this, members were persuaded to depart from what were previously somewhat entrenched positions and to seek a middle path on which we could all agree. Hence Section 69. On balance, my own personal preference, for what it is worth, was to get rid of appeals on questions of law altogether, unless the parties expressly agreed to take that course, but the compromise reached seems to have worked reasonably well. The Report on the Arbitration Act prepared for the English Commercial Court Users' Committee, the British Maritime Law Association and others in 2006 concluded, after wide consultation, that it did not consider that any changes to the Act were necessary or desirable.

May I return, as my next reflection, to the question of independence and impartiality? This UNCITRAL requirement of arbitrators has given and continues to give rise to great difficulties. The International Bar Association has issued what it calls Guidelines on Conflicts of Interest in International Arbitration. It starts with what it describes as *"the fundamental principle in international arbitration that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator and must remain so during the entire course of the arbitration proceedings."* There then follow some twenty pages of other general standards regarding impartiality and independence and a

somewhat complex discussion of what should be or need not be disclosed to parties before accepting an appointment or when circumstances arise after an appointment has been made.

These guidelines have been carefully drafted and I have no doubt are of great value to those practising as arbitrators in international arbitration. However, with great temerity, I question the starting point, the need for independence as well as impartiality.

The need for impartiality is encapsulated in the judicial oath that I took when I was appointed a High Court Judge in England and retook when I became a member of the new English Supreme Court, namely to do right to all manner of people, after the laws and usages of the realm, without fear or favour, affection or ill will. I pause here to note that one of my Supreme Court colleagues, when taking this oath in 2009, doubtless by a slip of the tongue, undertook to do right without fear or favour, affection or goodwill!

Arbitrators as well as judges must not only act impartially but must be seen to do so. Thus the test is not only impartiality in fact, but also the appearance of impartiality. Thus an arbitrator should not accept an appointment or can be removed if circumstances exist that give rise to reasonable doubts as to impartiality.

What then is the additional need for independence? It presumably is intended to cover something over and above impartiality and the appearance of impartiality, for otherwise there would be no need for this requirement and the phrase would be tautologous. Thus it cannot cover cases where an actual or reasonably perceived lack of independence gives rise to reasonable doubts about impartiality, because this is already comprehended in the need for impartiality. What then does it cover?

When we were drafting the 1996 Arbitration Act we sought in vain to discover the answer to this question. We concluded, as we said in paragraph 102 of our Departmental Advisory Committee on Arbitration law report of February 1996, *"We can see no good reason for including 'non-partiality' lack of independence as a ground for removal and good reasons for not doing so. We do not follow what is meant to be covered by a lack of independence which does not lead to the appearance of partiality. Furthermore, the inclusion of independence would give rise to endless arguments, as it has, for example, in Sweden and the United States, where almost any connection, (however remote) has been put forward to challenge the 'independence' of an arbitrator."* We pointed out that the oath taken by those appointed to the International Court of Justice; and indeed to the English High Court of

Justice, refers only to impartiality. As a Supreme Court Judge, I was paid by the Government, I was provided with a courtroom by the Government and my staff were Government civil servants. I was not, therefore, in those senses independent of Government, but this did not mean that in cases where the government was a party, I was or should be reasonably regarded as being unable to perform my judicial oath.

Independence and impartiality are fine-sounding words. They form a phrase that sounds good. It has a ringing tone. But to my mind the phrase creates serious problems, because it contains two words where one would do on its own. The object is to ensure that arbitrators act fairly and even-handedly between the parties. The object is met by requiring impartiality and the appearance of impartiality. Independence adds nothing of value; on the contrary it provides a tool for those anxious to avoid or delay arbitration.

My next reflection relates to the question whether arbitrators should have the power to grant interim measures of protection *ex parte*, i.e. on the application of one party without notice to the other or giving the other the opportunity to attend and make representations. In other words, the intentional exclusion of one party from an application affecting that party made by another party to the arbitration agreement.

My Committee was resolutely opposed to giving arbitrators any such powers. I remain of the view that it would be wrong to do so.

To my mind, any such powers would contradict some of the basic principles of arbitration. The arbitrators are enjoined to treat all parties with equality; to give each a fair hearing and a reasonable opportunity to put its case and answer that put against it; not to permit unilateral contact between the tribunal and a party; in short, to act impartially.

Those supporting the giving of such powers to arbitrators point out, correctly, that *ex parte* interim measures are sometimes essential, in order to avoid, for example, the destruction of evidence or the spiriting away of assets, which could themselves frustrate the arbitral process. It is suggested that provided the power is strictly limited, for example by imposing safeguards such as a requirement to inform the excluded party immediately an order is made; giving the excluded party an opportunity to make its representations as soon as possible; requiring the applicant to provide appropriate security and to inform the tribunal of all circumstances; and imposing a short validity period for the order, would sufficiently protect the excluded party.

I remain wholly unconvinced by these points.

Ex parte interim measures of protection can have far reaching and sometimes irreversible effects. Freezing of bank accounts or prohibitions against disposing of goods can have immediate catastrophic effects on businesses and livelihoods; and indeed on third parties. The experience of courts has been that exercising such powers requires extreme caution and is hedged about with safeguards, including in particular professional codes of conduct which impose duties to the court owed by advocates seeking *ex parte* orders. No such codes or duties apply as a matter of course in international arbitrations. Whole textbooks are devoted to the many and complex issues that arise when such relief is sought. It must always be remembered is that the grant of *ex parte* relief runs counter to perhaps the most basic rule of justice, *audi alteram parte,* hear all sides. Unlike courts, the same arbitral tribunal granting *ex parte relief* will hear the substantive case, with the obvious objection that this could lead to doubts about its impartiality, or if you like, and its independence.

I am not aware that international arbitration has been hampered by the inability of arbitrators to grant *ex parte* measures of protection. I see no need for it; indeed I see it as providing a malign opportunity for serious injustice to be done.

My next reflection relates to the consolidation of arbitrations. The 1996 Act permits this with the agreement of all parties concerned, but not otherwise.

There are many contractual situations where consolidation would be highly desirable. The classic example is that of construction contracts, where often main contractors make a number of sub-contracts with sub-contractors. All the contracts contain arbitration clauses. Disputes arise with the various parties blaming each other. In court, of course, there is power to bring all the parties into one proceeding, but in arbitrations this power does not exist, without the agreement of all concerned. Unless all the parties involved can be brought together in one proceeding or in concurrent proceedings, there is a real danger of different tribunals reaching inconsistent or conflicting results, or at least of substantial delays in resolving the problems.

When drafting the 1996 we considered whether to give arbitrators or the courts power to order consolidation or concurrent hearings of arbitrations in order to avoid these dangers, but we were firmly of the view that this would amount to a negation of the principle of party autonomy, on which the 1996 Act is built. The parties to any particular contract have chosen

for any disputes between them to be resolved by their own private tribunal, not by a tribunal or tribunals involving other parties. However, the solution lies with those drafting standard forms of contract, or contracts involving numerous parties, to put into arbitration clauses provisions empowering arbitrators to order consolidation or concurrent hearings in appropriate cases, so that the parties are agreed at the outset that this can be done. My own experience is that this course is now more often taken than it was in the past.

This leads to the last of my reflections, namely that of privacy and confidentiality.

The general view is that commercial arbitration is a private method of resolving disputes and that the arbitral proceedings and outcome should be confidential. There is no doubt that many choose arbitration because of these perceived attributes. We were pressed when preparing the Arbitration Act to include provisions enshrining the principle of privacy and confidentiality in the legislation.

We concluded that it would be unwise to take this course. There are many problems, such as the means for enforcing privacy and confidentiality. More importantly, there would have to be many exceptions and qualifications, because many third parties are likely to have a legitimate interest in knowing of the existence of arbitration and its subject matter, let alone the result. These could include a parent company, a guarantor, a partner, shareholders, debenture holders and so on. The exceptions would have to take into account the duties of companies to make proper disclosure of their financial position; and any legislation would have to deal with the fact that the arbitral proceedings and award may become public in court proceedings, such as enforcement under the New York Convention.

There was yet a further difficulty, which was, and is, that countries applying the common law have reached different conclusions on the legal basis for privacy and confidentiality and that non-common law countries have also adopted different approaches. English courts rest the principle on the implication of an implied term. Australia has rejected this basis, and requires express agreement between the parties. I would commend to those interested the comprehensive review of the present situation contained in Michael Fesler's article on the subject in the February edition of the International Journal of the Chartered Institute.

The UNICTRAL Model Law and Rules contain nothing about privacy or confidentiality. I suspect those responsible for drafting these provisions came to the same

conclusion as we did, namely that the difficulties in encapsulating the principles were such that it would be difficult if not impossible to frame simple rules in the abstract.

We accordingly said nothing about privacy and confidentiality in the Arbitration Act. Section 81 of the Act, however, contains a saving for rules of law that are consistent with the Act. Privacy and confidentiality are principles that in our view are constantly being developed pragmatically on a case by case basis, particularly with regard to exceptions and qualifications. I remain convinced that we took the right course in refraining from attempting to crystallize the position in 1996.

There are many other matters which I could discuss, had I the time. But, though I would of course be the first to say so, the English Arbitration Act does seem to have worked reasonably well. I hope it continues to do so. It is easy sometimes, when discussing arbitration and arbitral procedures, to lose sight of the wood for the trees, and to forget that arbitration has proved a popular and indeed efficient method of dispute resolution. Never forget the example of Sherlock Holmes and Doctor Watson travelling in the Sahara and camping in the desert. At 3.15 in the morning Holmes woke Watson and said, "Watson, look up, what can you see and what does it mean?" Watson looks up and seeking to impress Holmes, says, "I can see the stars. Astronomically, there is infinity of stars stretching an infinite distance into space and those known as the Plough are directly above us. Astrologically, Mars is in conjunction with Venus. Horologically, it is 0315 hours. Meteorogically, it is a clear night and will be clear tomorrow. Is that what you meant?" Holmes replied, "No, you idiot, I meant someone's stolen the tent!"