The Journal of the Chartered Institute of Arbitrators
Volume 63 Number 4 November 1997

Arbitration Law Reform: The Impact of the UNCITRAL Model Law on the English Arbitration Act 1996

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Introduction

In the second half of this century there have been three major events in the development of international arbitration: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York on 10 June 1958 ('the New York Convention'), the Arbitration Rules of the United Nations Commission on International Trade Law adopted by the UN General Assembly on 15 December 1976 (the 'UNCITRAL Arbitration Rules') and the Model Law on International Commercial Arbitration adopted by United Nations Commission on International Trade Law in Vienna on 21 June 1985 and by the UN General Assembly on 11 December 1985 ('the UNCITRAL Model Law'). Another important event has been the enactment in England[1] of the Arbitration Act 1996[2] ('the 1996 Act') which received the Royal Assent on 17 June 1996 and which came into force on 31 January 1997. The central rationale of each of these measures has been to facilitate the conduct of international trade. As was stated in the UN Assembly Resolution which adopted the UNCITRAL Arbitration Rules:[3]

> 'The General Assembly
> ... Being convinced that the establishment of rules for ... arbitration, that are acceptable in countries with different legal, social and economic systems, would significantly contribute to the development of harmonious international economic relations ...,'

The development, therefore, of international arbitration law has not been, *per se*, to provide an alternative to litigation (although it does do that) but to provide an acceptable forum for resolving disputes in the interests of international commerce. Thus it was under the auspices of the United Nations, as earlier it had been under the auspices of the League of Nations in Geneva in 1923 and 1927[4] for the validity of arbitration agreements and the enforcement of arbitral awards, that the New York Convention in 1958, the UNCITRAL Arbitration Rules in 1976 and the UNCITRAL Model Law in 1985 emerged.

The kinship between arbitration and trade has long existed. In the Preamble of the first English Arbitration Act of 1698 it is to be found:

> 'Now therefore for promoting trade and the rendering the awards of arbitrators to be more effectual in all cases, for the final determination of controversies referred to them by merchants and traders or others, concerning matters of account or trade or other matters'

Thus the three objects of 'promoting trade', 'rendering the awards of arbitrators to be more effectual in all cases' and 'the final determination of controversies referred to them' have remained objectives of arbitration up to the present day.

As Mr Stewart Boyd, one of the Editors of Mustill & Boyd, said in an address[5] to the Chartered Institute of Arbitrators in October 1984, '... the spirit of

† I should like to express special thanks to one of my partners, Harold D. Shapiro, for his interest in this article and for his many helpful comments upon it.

1 The Arbitration Act 1996 legislates for the jurisdiction of England, Wales and Northern Ireland. However, in this article, for ease of reference the jurisdiction of England, Wales and Northern Ireland is referred to as 'England' or 'English'.

2 Chapter 23 Statutes 1996.

3 Resolution 31/98 adopted by the General Assembly on 15 December 1976.

4 Protocol of the Assembly of the League of Nations in Geneva of 24 September 1923 on the Validity of Arbitration Agreements and Convention of the League of Nations in Geneva of 26 September 1927 on the Enforcement of Arbitral Awards.

5 Address by Mr Stewart Boyd Q.C. to Annual Conference of Chartered Institute of Arbitrators in Guernsey in October 1984.

consumerism has begun to invade even the law of procedure. Arbitral tribunals, and even the Commercial Court[6] itself, are no longer perceived simply as the administrators of justice but rather as functionaries in a service industry in which justice is the commodity and litigators the consumers ... the need to ensure that London remains an attractive forum for foreign litigants is a legitimate and cogent reason for reforming the procedures of civil justice so as to meet the requirements and expectations of those who resort to them.' This is nothing new for a trading nation like England. As the Chancellor in the famous Star Chamber of 1475[7] stated:

> 'This dispute is brought by an alien merchant ... who has come to conduct his case here, and he ought not to be held to await trail by twelve men and other solemnities of the law of the land but ought to be able to sue here from hour to hour and day to day for the speed of merchants'[8]

Almost every major trading nation has become a signatory to the New York Convention of 1958 and its provisions are now to be found in the national laws of most countries of the world. The recognition and enforcement of foreign arbitral awards, properly made under the law of the country of the award, is well established. Similarly the UNCITRAL Arbitration Rules have been widely adopted by, among others, the International Chamber of Commerce (the 'ICC') in Paris, the London Court of International Arbitration (the 'LCIA') and the American Arbitration Association (the 'AAA'). In the shorter period available to it, so it is that the UNCITRAL Model Law has been well taken up. National legislation based on the Model Law has been enacted in many countries from Australia to Peru from Scotland[9] to Mexico. It has also been adopted in the USA by a number of States including law of California, Connecticut, Oregon, Texas.

The Model Law

The UNCITRAL Model Law in its presentation and in its content is indeed 'a model'. It commences by identifying an international arbitration and continues in a logical order through the whole process of arbitration down to the enforcement of arbitration awards. Its language is simple and its text short. Of the matters of substance, which it contains, there is

(i) the severability of the arbitration clause which enables it to be used even if the main contract (in which it is contained) is 'null and void': (Article 16(1));

(ii) the autonomy given to the arbitral tribunal to rule on its own jurisdiction (hence, in the first place, arbitrability is for the arbitral tribunal and not for the Court: Article 16) to make interim orders (Article 17) and to 'conduct the arbitration in such a manner as it considers appropriate' (Article 19);

(iii) the autonomy given to the parties for the setting up the arbitral tribunal (Articles 10 and 11), for agreeing the procedure under which an arbitrator can be challenged (Article 13), for determining the procedure under which the arbitration is conducted (Article 19) and for selecting the government law or, as their sole prerogative, for permitting the arbitral tribunal to make its decisions on equitable principles (Article 28);

(iv) the freedom for arbitrations to be conducted without the formality of rules of procedure and evidence and, provided every party is treated equally and accorded a full opportunity of presenting its case, any procedures (inquisitorial and/or adversarial) can be brought into play: Articles 18 and 19;

(v) the enforcement of all arbitral awards, when properly made, by the Courts (Article 35).

In extending the principle of separability to the arbitration clause, in permitting the arbitral tribunal to decide issues of arbitrability and in coupling the autonomy given to the arbitral tribunal to the autonomy given to the parties the UNCITRAL Model Law goes significantly further than established arbitration law in England and in the United States. Under the UNCITRAL Model Law, the form and content of arbitrations are materially different from the form and content of proceedings in Courts of Law. At the same time under the UNCITRAL Model Law arbitration remains within the enforcement of the law.

English Arbitration Law and the Model Law

Under the Chairmanship of Lord Mustill (the other Editor of Mustill & Boyd), the Department of Trade and Industry's Departmental Advisory Committee on Arbitration Law ('the DAC') gave study for four years to how arbitration law should further be developed in England. In its Report[10] of June 1989, it concluded that the UNCITRAL Model Law should not be adopted into English law but there should be a new Arbitration Act setting out 'in statutory form ... the more important principles of the English law of arbitration ... in logical order, and expressed in language which is sufficiently clear and free from technicalities to be readily comprehensible to the layman'. This decision,

[6] The Commercial Court is part of the Queen's Bench Division of the High Court of Justice of England and Wales and has assigned to it High Court Judges who have particular experience in trying complex commercial cases. All cases tried by the Commercial Court are specially listed in the Commercial List.

[7] YB13 Edward IV, p. 96.

[8] See further; Potter, *Historical Introduction to English Law and its Institution, 2nd edition (1943) p. 160.*

[9] Section 66 and Schedule 7 Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

[10] Report of June 1989 of the Departmental Advisory Committee on Arbitration Law under Chairmanship of Lord Justice Mustill (now Lord Mustill).

not to adopt the UNCITRAL Model Law into English law, was not to spurn it. Indeed, recognising that the text of the Model Law, arranged in a logical order, with provisions expressed in simple language, was of benefit to international users of the arbitration process, the decision was taken, when the DAC was preparing the 1996 Act, to adopt significant portions of the Model Law. The perceived difficulty was that English arbitration law had advanced, in serving the international commercial community, beyond the frontiers of the UNCITRAL Model Law. While the DAC acknowledged that not all of the developments in English arbitration law had been welcomed by the international community, it though it better for England to remedy the deficiencies in its arbitration law and, given the torch by the UNCITRAL Model Law, further to develop international arbitration law. Hence the 1996 Act brings together all existing English statutory arbitration law, codifies the principles established in English arbitration case law, reforms and adapts both and, where possible, follows and reflects the UNCITRAL Model Law.

Arbitration under the shadow of public coercion

Unlike other dispute resolution outside the judicial process, arbitration 'exists in the shadow of public coercion'.[11] In alternative dispute resolution ('ADR'), such as in conciliation and mediation, the parties are free to walk away if the process or result is not to their satisfaction and, if so desired, then exercise legal rights in Court. Not so for arbitration: if the agreement is valid and binding, the parties are bound by their arbitration agreement! The State lends it power to support the arbitral process, Court proceedings are stayed and arbitral awards enforced. In every jurisdiction, therefore, there is a delicate relationship between the Court and arbitral process. Properly operating the Courts should support the arbitral process but not interfere with it.

Development of English arbitration law

In providing support for the proper conduct of arbitrations the English Parliament, since the Arbitration Act 1889, has given wider powers to arbitrators than to Judges in the conduct of litigation in English Courts. For example in clause (f) of the First Schedule of the Arbitration Act 1889 which set out 'Provisions to be Implied in Submissions' for arbitrations there can be found:

> 'The parties to the reference ... shall, subject to legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute and shall produce before the arbitrators or umpires all books, deeds (etc) ... within their possession or power ... and do all other things which during the proceedings on the reference the arbitrators or umpire may require' (emphasis added)

This provision found its way into section 12(1) of the English Arbitration Act 1950 and now into section 34(2) of the 1996 Act particularly in sub-sections (f) and (g). The difference, however, in the development of English arbitration law to the development of arbitration law in other jurisdictions, particularly the United States of America, is that the English Court has also undertaken, as it still does, a supervisory role over the decisions (as opposed to the processes) of arbitration. Generally in the United States when an arbitral award is wrong in law it is not reviewable. While the distinction can become blurred, in the United States, between an arbitral award which is wrong in law and one which has been rendered in excess of the arbitrator's authority, it is only on the latter basis that an arbitral award in the United States is subject to judicial scrutiny.

The supervision exercised by the English Courts over arbitration decision making came to a head in the English Court of Appeal in 1922 in *Czarnikow v Roth Schmidt and Company*.[12] The issue there was whether the parties were entitled in an arbitration agreement to contract out of a statutory Court review under a procedure in which the arbitrator had to state his award to the Court in the form of a special case. Lord Justice Scrutton would have none of it:

> 'Where there are persons untrained in law, and especially when as in this case they allow persons trained in law to address them on legal points, there is every probability of their going wrong, and for that reason Parliament has provided in the Arbitration Act, that, not only may they ask the Courts for guidance and the solution of their legal problems in special cases stated at their instance, but that the Courts may require them, even if unwilling, to state cases for the opinion of the Court on the application of a party to the arbitration if the Court thinks proper. This is done in order that the Courts may ensure the proper administration of the law by inferior tribunals. In my view to allow citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. There must be no Alsatia where the King's Writ does not run.'

This attitude prevailed, although in less pugnacious language, until the reforms of the late 1970s. By then major international arbitrations, being conducted in London, were being sucked into the judicial process. It had become commonplace for parties to have arbitrations referred to Court and such was the resultant expense that the General Counsel of a major US company wrote a letter which was read in the House of Lords Debate[13] of May 1978:

> 'The purpose of utilising arbitration in lieu of litigation is generally thought to be that arbitration proceedings will be

[11] Paper by Professor William W Park, Professor of Law, Boston University: Arbitration International 1996 Volume 12 No 2.
[12] [1922] 2 KB 478.
[13] Lord Hacking: House of Lords Official Report 18 May 1978 Columns 91 and 92: Volume 392: Session 1977–78.

speedy, inexpensive and private. Perhaps there are private, but they are certainly neither inexpensive, nor speedy in the United Kingdom ...

While I recognize that some of the delays may be attributable to the specific arbitrators appointed by the parties, I am told that even when arbitrators with a sense of urgency are handling the case, defendants may delay proceedings by frequent appeals back to the judicial system ...

Therefore I have issued instructions in my department that counsel are never to agree to the United Kingdom as a site for an arbitration'

The first step, therefore, in the reform of English arbitration law (which culminated in the 1996 Act) was the English Arbitration Act 1979 (the '1979 Act'). Its purpose was to reduce the involvement of the English Courts in the arbitration decision process. The 1979 Act repealed two forms of Judicial Review (the 'Case Stated' procedure and another procedure under which an arbitral award could be set aside or remitted on the ground of 'errors of fact or law on (its) face') and replaced them by a limited right of appeal and by a limited right to make an application to the Court for the determination of a preliminary point of law. However, with the exception of domestic arbitrations and arbitrations relating to shipping, insurance or commodities ('special category disputes'), parties to arbitrations were given the right, under 'exclusion agreements', to contract altogether out of judicial review by the English Courts. It was also possible under the 1979 Act for the parties to domestic and special category disputes to contract out when the exclusion agreement had been entered into after the commencement of the arbitration, and, in the case of the special category disputes when the arbitration agreement was governed by a foreign law. The reality, however, under the 1979 Act was that the parties, if they wished to exclude Judicial Review by the English Courts, had to do so expressly in writing in the arbitration agreement or fall back on the unlikely situation of being able to reach agreement for excluding the jurisdiction of the Courts after the arbitration had commenced.

There was another problem facing the users of English arbitration law. Although the law, relating to arbitration, had been developed over centuries (in statutory and case law) it had become piecemeal. As Mr Stewart Boyd also stated in his 1984 address:

'... but anyone hoping to derive a complete picture of (our) law of arbitration by reading the statutes in force is certain to be disappointed. He will learn something, but not all, about the arbitrators powers and the Court's power to intervene whether or not an arbitration has gone wrong. But of the procedure in an arbitration, or of the duties of the parties and the arbitrators, he will learn almost nothing.'

Thus, while English arbitration statutes set out the circumstances in which the Court – not of its own motion but on application – could intervene in arbitration proceedings, they provided little assistance upon arbitration procedure, the duties of the parties and arbitrators and the substantive application of English arbitration law. Indeed the arbitration statutes represented Parliament's response, when Parliamentary time had been made available, to specific initiatives from the commercial and legal community. Thus the two major English innovative arbitration acts of this century, the Arbitration Acts of 1934 and 1979 represented the response of Parliament, as to the first to the MacKinnon Report[14] of March 1927 and, as to the second, to the Donaldson Report[15] of July 1978. As Lord Justice Saville, the current Chairman of the DAC, put it in a very recent paper:[16]

'To a large degree (English arbitration) legislation was reactive in nature, putting right perceived defects and deficiencies in the case law. Thus it was not easy for someone new to English arbitration to discover the law which was spread around a hotchpotch of statutes and countless cases'

An interesting justification for the Judicial Review of English arbitral awards lay in the strongly held view that the review by the English Courts of arbitral awards was the fountain of the development of English commercial law. In the words of Lord Diplock in the House of Lords debate[17] of May 1978, the Court's review of arbitral awards 'has played a major role in the development of English commercial law'. The former Master of the Rolls, and Chairman of the Donaldson Committee of 1978, Lord Donaldson of Lymington, still subscribed to that view in the House of Lords in Committee on the 1996 Act on the 28 February of last year:[18]

'I know that (Lord Diplock) felt very strongly, as I do, that it is important there should be a body of case law stemming from arbitrations, and it is important that it should not be possible for arbitration law, if one can call it that, to go off into free orbit unrelated to the law administered by the Courts.'

However if that view is taken to its logical conclusion, the development of law suffers from all decisions on debatable points which are not published in the law reports. As the great English Jurist, Lord Devlin, stated:[19]

'So there must be an annual tribute of disputants to feed the Minotaurs. The next step would, I suppose, be a prohibition

[14] Report of Committee on the Law of Arbitration chaired by Mr Justice MacKinnon: HM Stationery Office: Command 2817: March 1927.

[15] Commercial Court Committee: Report on Arbitration chaired by Mr Justice Donaldson (now Lord Donaldson of Lymington): HM Stationery Office: Command 7284: July 1978.

[16] Address by the Rt Hon Lord Justice Saville to Arbitration Conference in London: 4 July 1996.

[17] Lord Diplock: House of Lords Official Report 15 May 1978 Column 105 Volume 392: Session 1977. 78.

[18] Lord Donaldson of Lymington: House of Lords Official Report: 28 February 1996. CWH Column 24 Volume 569 Session 1995–96.

[19] 'The Judge' by Lord Devlin p106.

placed on the settlement of cases containing interesting points of law'.

The English Arbitration Act 1996

The scope of the 1996 Act is identified in Sections 2 and 3. The basic concept is that the 1996 Act applies to all arbitrations where the 'seat of the arbitration' is in England. The 'seat of arbitration' is a familiar concept in international arbitrations. It derives from the theory of 'siège d'arbitrage' developed by Professor Sauser-Hall as the rapporteur of the Institut de Droit International Commission on Arbitration and Private International Law in the late 1950s. The seat is the juridical place of the arbitration notwithstanding the geographical location or locations where the arbitration hearings may take place. Hence, it has long been recognised that an arbitration must be attached to some jurisdiction. English law has never accepted the concept of delocalised or floating arbitrations. As Lord Justice Kerr unequivocally stated in 1984 in *Bank Mellatt -v- Helleniki Tecniki SA*:[20]

> 'Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the trans-national firmament, unconnected with any municipal system of law.'

The 1996 Act also applies to arbitrations which do not have an English 'seat' to enable parties to overseas arbitrations to apply to stay legal proceedings in England (Section 2(2) and Section 9) and to enforce foreign arbitral awards (Section 2(2) and Section 66). Assistance is also given under the 1996 Act to overseas arbitrations when there is a need to secure the attendance of a witness in England or to preserve, or assist in the obtaining of, evidence in England (Sections 2(3), 43 and 44).

The substantive provisions of the 1996 Act apply to all arbitral proceedings which are commenced after the Act came into force whether or not the arbitration agreement has been made before that date (Section 84). It, therefore, applies (except in the case of honourable engagement clauses) to all arbitration agreements, which also were already in existence but not activated prior to 31 January 1997.

The Act 1996 and the development of international arbitration

The 1996 Act contributes to the development of international arbitration law in several important ways. First it contains a complete statement of principles of English arbitration law – indisputably the most developed commercial arbitration law of the world. Secondly it uses relatively simple and straightforward language. Thirdly, like the UNCITRAL Model Law, its Sections run in a logical order starting with principles of arbitration law and ending with the recognition and enforcement of arbitral awards. Fourthly it has, unique to English statutory law, easy cross-references so that the reader can refer from one section of the Act to another and fifthly it is supported by a detailed commentary on its provisions which was published as a 'Report'[21] on the 1996 Act by the DAC in February 1996. As was stated in the House of Lords at Second Reading on 18 January 1996:[22]

> 'It measures up to some of the great statutes at the end of the nineteenth century, the Bills of Exchange Act 1882 or the Sales of Goods Act 1893.'

The logical order of the 1996 Act compares most favourably to the last English consolidated arbitration enactment, the Arbitration Act 1950, which started, in section 1, with the revocation of the authority of the arbitrator and went on, in section 2, to the death of a party to the arbitration!

As, however, it was stated at Second Reading of the 1996 Act in January of last year in the House of Lords, 'all is not perfect in the garden'.[23] Some of the drafting of the Act has been overworked. Issues relating to the arbitrators fees, costs and expenses are expressed with such particularity that the text of the 1979 Act loses its straightforward readable flow. It is too long. Compared to the UNCITRAL Model Law which is contained in 35 Articles, the 1996 Act stretches in Part 1 (the similar provisions to the UNCITRAL Model Law) to 84 sections. Unlike with the UNCITRAL Model Law, where there is no judicial review of arbitral awards, the parties under the 1996 Act must expressly agree to exclude judicial review. If not, the English Courts are entitled (albeit in limited circumstances) to judicially review arbitral awards.

The principles of the 1996 Act

General principles

In identifying the principles, governing the 1996 Act, section 1 sets the scene:

'(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties shall be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in the matters governed by this [Act] the Court shall not intervene except as provided by [the Act].'

[20] [1984] QB 291 at page 301.

[21] Departmental Advisory Committee on Arbitration Law: Chairman The Rt Hon Lord Justice Saville: Report on the Arbitration Bill: February 1995.

[22] Lord Hacking: House of Lords Official Report 18 January 1995 Column 769 Volume 568: Session 1995-96 and Lord Fraser of Carmyllie *ibid* at Column 788.

[23] Lord Hacking *ibid* at Column 770.

Thus, the three principles, upon which the 1996 Act is founded, are:

Principal A : Fair, speedy and cost-effective resolution of disputes by impartial tribunals
Principal B : Party autonomy
Principal C : Court support for the arbitration process with the minimum intervention.

Principal A: the duties of arbitrators and the parties
To achieve these principles, more specific provisions are contained in the Act. In section 33 the arbitral tribunal is charged to:

'(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.'

Similarly in section 40 the parties in arbitrations are charged to:

'(1) ... do all things necessary for the proper and expeditious conduct of the arbitral proceedings [including]
(2) (a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal ... '

The duties, imposed on the arbitral tribunal in section 33, are buttressed in section 24 which provides for the removal of the arbitrator by the Court, in circumstances where 'substantial injustice has been or will be caused' when he is in breach of his arbitral duties. They are also buttressed in section 68 where a party to arbitration proceedings can have the arbitral award set aside by the Court on the specific grounds of failure by the arbitrator to comply with his duties under section 33.

Similarly powers rest with the arbitral tribunal if a party is in breach of section 40. Under section 41, in the case of a claimant being in breach of his duties, the arbitral tribunal can dismiss his claim and, in the case of a defendant being in breach, the arbitral tribunal can, in his absence or in the absence of written evidence and submissions from him, proceed to make an award on the basis of the evidence so far submitted to it.

Principal B: party autonomy
Party autonomy is to be found throughout the 1996 Act. The parties are free to decide where, when and how they want their arbitrations to be conducted. This freedom goes to the constitution of the arbitral tribunal (Section 15) the appointment of arbitrators (Section 16) the power to revoke the arbitrator's authority and/or remove him (Sections 23 and 24) the right to select the procedures (including how the evidence, if any, is taken) which should be followed in the arbitration (Section 34) the right to choose the governing law or the equitable principles under which the arbitrator will decide the dispute (Section 46) and the right to exclude altogether references on points of law under section 45, and appeals on points of law under section 69, going to the Courts (see Section 87).

However, the question, which can legitimately be asked, is how can the mandatory duties (enforceable by the Courts) laid upon the arbitrators and the parties sit beside the parties freedom to have their arbitrations conducted in whatever way they like best? The answer is that this question is more theoretical than practical. Suppose the parties agree a form of procedure which is unfair, or which is unnecessarily expensive or time consuming or choose procedures which are unsuitable for the case in dispute. In such a situation parties would be in breach of section 40 and would be causing the arbitrator to be in breach of his duties under section 33. Is, however, this scenario likely to arise? It would require both (or all) parties to agree upon unsatisfactory procedures which go right against the very purpose of there being an arbitration agreement between them. This is not to state that one or more parties in an arbitration may want procedures, in terms of delay or expense, to go to their advantage to the disadvantage of another party. However, under sections 33 and 34, the arbitral tribunal is under a duty to obtain agreement between the parties upon how the arbitration should be conducted. If, therefore, under that duty the arbitrator cannot get agreement from the parties which would enable him to conduct the arbitration consistent with the obligations imposed upon him under section 33, the arbitrator resigns and seeks protection from the Court against any claims unjustly being made against him (Section 25). In any event, since the very basis of an arbitration is consensual, an arbitral tribunal can never be given statutory right to override the agreement of the parties.

Principal C: court support with minimum of intervention
Where the powers of the arbitral tribunal are not sufficient to deal with the problem which has arisen in the arbitration, the arbitral tribunal or the parties can seek the Court's assistance. Sometimes this will arise when a party is in breach of a peremptory order of the arbitral tribunal (Section 42) or when it is necessary to secure the presence of a witness or the taking or preservation of evidence (Sections 43 and 44). There is also a unique power in which the arbitral tribunal can discharge a Court Order without it being necessary for the parties (or the arbitral tribunal) to go back to the Court (Section 44(6)).

There are other important provisions in the 1996 Act

which follow the UNCITRAL Model Law and which facilitate the smooth running of arbitrations and restrain Court intervention. These provisions crystallize in section 73. The basis of them is that a party must promptly object to breaches in the arbitration process or keep his peace. If he does not do so then neither the arbitral tribunal nor the Court will permit objection later being raised. In popular parlance the party must either 'put up or shut up'.

There are also valuable provisions in the 1996 Act which are not in the UNCITRAL Model Law. For example there are powers under Section 12 and Section 79 for the Court to extend the time under which arbitral proceedings can be commenced and under which any stage of the arbitral process can to be taken. The importance of this can be demonstrated in a case under a similar provision[24] contained in the English Arbitration Act 1950. In the *Virgo Shipping* case,[25] the cargo owners had chartered a vessel from the shipowners for the carriage of goods from Romania to Abu Dhabi and Dubai. In the charter party the shipowners were to be free from all liability if the cargo owners did not institute arbitration proceedings within one year of the delivery of the cargo. The cargo owners did submit their claim before the expiration of the year following the delivery of the goods but did not institute arbitration proceedings within either the year, or the agreed three month extension, because they were, in the words of one of the Lord Justices of Appeal, 'soothed into inactivity' by the shipowners' insurers. In the circumstances the English Court of Appeal unanimously held that the cargo owners should be entitled to an extension of time, and in coming to this decision, the Court of Appeal rejected the contention of the shipowners that they were entitled to rely upon the charter party and prevent the cargo owners from proceeding with the arbitration.

Separability, arbitrability, inquisitability and equity

The three subjects, of the greatest practical importance, which are contained in the UNCITRAL Model Law, and in the 1996 Act, are:

(i) the separability of arbitration agreements and their arbitrability;
(ii) the inquisitorial role of Arbitral Tribunals; and
(iii) the right of arbitral decisions to be decided under equitable principles (ex aequo et bono) or the right of the arbitral tribunal to act as 'amiable compositeur'.

Separability and arbitrability

For years there have been difficulties facing arbitral tribunals when the arbitration agreement is contained in an agreement which is challengable as being invalid or ineffective or when the jurisdiction itself of the arbitral tribunal is being challenged. On the former, both the UNCITRAL Model and the 1996 Act give express power for the arbitration agreement to be treated as effective even if the agreement in which it is contained is invalid, or has not come into existence or is ineffective (Article 16 Model Law and Section 7 of the 1996 Act). On the latter, the arbitral tribunal is given express power under to 'rule on its own substantive jurisdiction' with the right to parties to object to the arbitral tribunal's jurisdiction and to challenge it in Court (Article 16 Model Law and Sections 30, 31 and 32 of the 1996 Act). This facilitates decisions on arbitrability of an arbitral tribunal in a way which, under the May 1995 decision of the US Supreme Court in *Options of Chicago -v- Kaplan*,[26] US law does not. In the *Kaplan* case the Supreme Court held that the scope of the arbitration agreement was a matter for the court to decide independently from the arbitral tribunal.

Inquisitability and other powers

As earlier identified English arbitrators have had the right since 1889 to examine 'on oath or affirmation' the parties to an arbitration although not the witnesses (see Clause (f) of First Schedule of the 1889 Act and section 12(1) of the 1950 Act). Following Article 19(2) of the UNCITRAL Model Law and Article 15(1) of the UNCITRAL Arbitration Rules, arbitrators, working in agreement with the parties, can exercise a wide discretion under the 1996 upon receiving evidence and upon taking its own initiatives to ascertain the facts and the law (Section 34(2)(f) and (g)). Arbitrators under the 1996 Act can also, unless the parties otherwise agree, take a number of other initiatives like appointing experts, legal advisers and assessors (Section 37) ordering a claimant to provide security for costs, giving directions as to the inspection and preservation of property as to the taking of samples and as to examination of witnesses (Section 38). Under the 1996 Act, with the consent of the parties, arbitrators can consolidate the arbitration proceedings with other arbitration proceedings (Section 35) and grant interim relief (Section 39). Arbitrators even have a power, unless the parties otherwise agree, to limit the recoverable costs in an arbitration (Section 65) which means that whatever a party intends to spend on the arbitration he will only be able to recover, if the arbitrator gives an order under section 65, a fixed amount of costs from the other side. He may, therefore, think it prudent to limit his expenditure on the arbitration to the amount which he will be able to recover from the other party. There is, therefore, under the UNCITRAL Model Law and the 1996 Act, considerable powers for the arbitral tribunal to conduct arbitrations with greater speed, greater efficiency and at less cost.

[24] Section 27 Arbitration Act 1950.
[25] *Consolidated Investment and Contracting Company v Saponaria The Virgo Shipping Company Limited* [1978] 3 AllER 988.
[26] *First Options of Chicago v Kaplan* 115 S.Ct 1920 (1995).

Equity principles

There has always been some concern, in arbitrations conducted in Common Law jurisdictions, that arbitrations should not be decided under unascertainable 'equity' principles and that the arbitral tribunal should not be allowed to act as an 'amiable compositeur' or a mediator. Therefore, under both the UNCITRAL Model Law and the 1996 Act, arbitration proceedings are not let loose to be decided *ex aequo et bono* nor under a free rein given to the arbitrator as an 'amiable compositeur' but the arbitral tribunal is allowed, with the agreement of the parties, to decide arbitrations 'in accordance with such other considerations as are agreed' (Section 46(1)).

The 1996 Act and the 'special category disputes': shipping, insurance and commodity arbitrations

In enacting the reforms to the English procedures for judicial review, the 1979 Act separated out arbitrations in three categories of dispute (the special category disputes) from other international arbitrations whose parties were permitted, in the new provisions of the 1979 Act, to 'exclude' judicial review by the English Courts. The reason why this exception was made with shipping, insurance and commodity arbitrations, was because it was perceived that the parties to these disputes wanted to remain, on matters of law, under the supervision of the English Courts and that the adjudication of these disputes was making a major contribution to the development of English commercial law. It has to be recorded that the views of the parties to the special category disputes was, at best, extracted on a straw poll. The views, however, of leading members of the English Judiciary (Lord Diplock, Mr Justice Donaldson – as he then was – and others) were clear and unequivocal. They believed these disputes provided the fountain for the development of English commercial law! It was, however, the intention only to separate out these disputes for a period of two or three years when the matter could be revisited.[27]

This revisitation took rather longer than two or three years and it has only been in the 1996 Act that the separate treatment for special category disputes has been terminated. The major impact, therefore, of the 1996 Act is to enable parties to these disputes, if they wish to do so, to contract out of judicial review by the English Courts. Should, therefore, these parties choose to contract out of judicial review, their disputes will no longer be decided under established law. There is a further dimension relating to arbitration clauses in reinsurance treaties. It is a characteristic of reinsurance treaties for arbitrators to be empowered to decide disputes viewing the contract as an 'honourable engagement' and, therefore, to base their decisions on market or equitable principles consistent with the spirit of good faith rather than in accordance with the strict rules of a defined legal system. However, thus far, the English Court has only given limited support to 'honourable engagement' clauses taking the view that they did not entitle arbitrators to embark upon their own enquiries or generally give them 'a free hand'.[28] Indeed, under existing law it has recently been ruled that a clause in an insurance contract, which purports to free arbitrators to decide without regard to the law and according to their own motions of what would be fair, is invalid.[29]

The significant change, therefore, under the 1996 Act relating to insurance arbitrations is twofold: first parties to insurance contracts can contract out of judicial review and secondly, even if they do not, they are entitled under section 46(1)(b) to agree to the resolution of disputes 'in accordance with such other considerations as are agreed by them or determined by the tribunal'. Since the decision-making by arbitral tribunals under 'honourable engagement' or equity clauses are not decisions made under law the parties to these disputes, in the words of Lord Justice Saville, in his 1995 Denning lecture:

> '... will obviously deprive themselves of any right to challenge the award by way of appeal, for there can be no question of law for the Court to decide.'

However, in bringing the Act into force, the UK Government stipulated that section 46(1)(b) only applies to arbitration agreements entered into after the commencement date of 31 January 1993. Thus, the interpretation by an arbitral tribunal of 'honourable engagement' clauses, which have been entered into before 31 January, will remain subject to challenge before the Courts.

There are also other provisions in the 1996 Act which pertain particularly to arbitration clauses in reinsurance disputes. The problem often encountered in reinsurance disputes is that a reinsurance or retrocession agreement incorporates, or purports to incorporate, the terms of an underlying contract. For example, in 1987 in *Pinetop -v- Unione Italiana Anglo Saxon Reinsurance Co*[30] the question was whether the incorporation of 'terms, clauses and conditions' as originally stipulated in a retrocession slip, had the effect of binding retrocedants to an arbitration clause found in the underlying reinsurance cover. In this case and in the most recent case in 1995 of *Excess Insurance Company Limited -v- Mander*[31] the Court held that underlying slips (or 'back-to-back' wording contained in different documents) did not create an arbitration clause which was enforceable by the court. Attention should, therefore, be paid to section 5 of the 1996 Act where a more liberal interpretation is placed

[27] Donaldson Report of July 1978. (See note as above.)
[28] See *Overseas Union -v- AA Mutual* [1988] 2 Lloyd's Rep 63.
[29] *Home -v- Mentor* [1989] 1 Lloyd's Rep 475.
[30] [1987] Lloyd's Rep 478.
[31] [1995] Lloyd's Rep 359.

upon the making of an arbitration agreement. The terms of section 5 have wider application than the equivalent article (Article 7) of the UNCITRAL Model Law. Thus, under the 1996 Act, while an arbitration agreement has to be 'made in writing' or 'evidenced in writing' (Section 5(2)) parties can be held to have made 'an agreement in writing' where they have reached an agreement 'not in writing, but by reference to terms which are in writing' (Section 5(3)). This has been expressly defined to cover an agreement reached by conduct.[32] Therefore, if A orally agrees to buy services from B with reference to written terms (including an arbitration clause) which are sent to B, then B is bound by those terms (whether he has acknowledged them or not in writing) by delivering those services to A. Similarly, under section 5(4):

> 'an agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.'

It should, therefore, be much more possible for the arbitral tribunal or the Court to hold that related documents, in chains of reinsurance, can be bought together to form a binding arbitration.

Judicial review under 1996 Act

While the 1996 Act does preserve judicial review of arbitration proceedings in enabling the court, upon the application of one of the parties, to determine a question of law arising during the course of the proceedings and to take an appeal on a question of law arising out of an award, there are a number of limitations to the exercise of either of these powers. The court will not intervene unless, for example, the issue in question 'substantially affects the rights of one or more of the parties'. Moreover, it is now possible for parties to any domestic or international arbitration to exclude, by agreement, these two forms of judicial review. The exclusion agreement can be made before the commencement of the arbitration proceedings or after their commencement. It does, however, require the parties expressly to 'contract out' of judicial review. If they do not, their arbitration proceedings will remain subject to judicial review.

The message

The message which should go out to all arbitrators is that, in the words of the preamble to the 1996 Act, 'the objective of arbitration is to provide for the fair, speedy and cost effective resolution of disputes by an impartial tribunal'. This is not the conduct of arbitrations before silent, inactive and ineffective tribunals. The whole value of arbitration is that it can be conducted under the authority of law but, without (in the words of 500 years ago of the Star Chamber) its 'solemnities'. Hence arbitrators effectively working with the parties can cut out the written and oral verbosity under which so much of litigation is burdened. The arbitrator does not have to immerse himself in the pleadings, he can refuse to read lengthy written briefs or to listen to long oral submissions. He does not have to apply strict rules of evidence or indeed any rules of evidence provided he is acting fairly. He can make his own inquiries and appoint his own experts, legal advisers and assessors. As he pleases, he can examine the parties and the witnesses or not do so.

Let all parties to arbitrations remember there was a time when it was known how to deal with the burdensome pleader. Take the English case of *Mylward -v- Weldon*[33] of 1596 where the pleader had been unwise enough to draw up a replication occupying:

> 'Six score sheets of paper, and yet all the matter thereof, which is pertinent, might have been well contrived in sixteen sheets of paper'.

The Court would have none of this truck and sharply brought the pleader's attention to the errors of his ways. They ordered him to be committed to Fleet Prison! But there was more punishment in store for him. The warden of the Fleet Prison was then directed to take him to Westminster Hall at 10.00 am on the following Saturday

> '... and then and there shall cut a hole in the midst of the same engrossed Replication which is delivered unto him for that purpose, and put the said [pleader's] head through the same hole, and so let the same Replication hang about his shoulder with the written side outward, and then the same so hanging shall lead the said [pleader] bareheaded and barefaced round about Westminster Hall, whilst the Courts are sitting, and shall shew him at the Bar of every of the three Courts within the Hall, and then shall take him back again to the Fleet, and keep him prisoner until he shall have paid 10 pounds to Her Majesty for a fine, and twenty nobles to the defendant for his costs in respect of the aforesaid abuse.'

[32] DAC Report on Arbitration Bill (see Note 21 above) paragraph 36 on page 15.

[33] Cited in Megarry, R.E. *Miscellany at Law*, 1955, pp 8–9.