



RUSSELL ON ARBITRATION, 23RD EDITION

As I quoted in my review of the 21st edn of *Russell on Arbitration*, for which the new editors were David Sutton, John Kendall and Judith Gill, “[n]o apology is needed for the fresh appearance of a standard textbook. Law, like a never-ending stream, bears all its editions away”. These were the words of Anthony Walton in his preface, as editor, of the 17th edn of *Russell on the Law of Arbitration*. I liked Anthony Walton’s editorship and was amused by his quotations although I did think his quotation, when opening chapter 1 of several of the editions of *Russell on Arbitration*, for which he was editor, “[h]onest men dread arbitration more than they dread law suits” was not an appropriate introduction for the reader of a book which was intended to extol the virtues of arbitration! The fact is, however, when Anthony Walton left the editorship, *Russell on Arbitration* had become out of date and had been without a new edition for 15 years.

Thus the new editors, in 1997, needed “to sweep away the text of the earlier editions of this important work” and in my judgement, in my book review in *International Arbitration Law Review* in February 1998, produced a “superb” new edition of *Russell* which had “a logical sequence from its beginning to its end”. The current editors of *Russell*, David Sutton, Judith Gill and Matthew Gearing, have to a large extent, in this the 23rd edn, swept away their editions of 1997 and 2003. Several of the major chapters have been rewritten. I refer to the chapters on “The Arbitration Agreement” (Ch.2), “The Role of the Court Before and During the Arbitration” (Ch.7) and “The Role of the Court After the Award” (Ch.8). They have also significantly revised much of the other text. Indeed this new edition has the appearance of over half of it being re-written.

Those of us who were closely involved in the reform of English arbitration law, as I was, may wonder why. Is not the UK Arbitration Act 1996 still the definitive source for English arbitration law? Have not the judges stood back and left the arbitral tribunals to take charge of the arbitration process unless, for one reason or another, they gravely erred? While both of these propositions are, I believe, true there have been nonetheless a number of

important cases, the most recent of which to reach the House of Lords being the *Fiona Trust* case, that have further developed our arbitration law establishing important principles consistent with, but going beyond, the principles established in the Arbitration Act 1996. I am told, in preparing this edition, the editors considered in excess of 400 new cases which, since the last edition of *Russell*, have come before the English courts and overseas courts when the latter provides useful guidance.

In a sensible and measured Foreword, Professor Julian Lew Q.C. identifies four main areas “covered” by the English courts in developing our arbitration law under our Arbitration Act 1996. As Julian Lew puts it, these are the preservation of party autonomy and the obligation on parties to adhere to their commitment to arbitration; injunctive relief by way of anti-suit or anti-arbitration injunctions; the doctrine of separability and the performance by arbitrators of their duties under s.33 of the Arbitration Act 1996. It is with that background that the reader of this new edition of *Russell* can much benefit from the new chapter on “The Arbitration Agreement” (Ch.2) dealing lucidly and clearly with such matters as non-contractual claims, illegality, mutuality, exclusivity of the proceedings before courts or arbitral panels. Similarly the chapter on “The Tribunal” (Ch.4) provides much assistance and practical advice. There is very good guidance, for example, in conflict of interest issues in para.4–114 onwards. I liked here particularly the comments on the IBA Guidelines on Conflict of Interests and was amused in para.4–014 by the advice of taking out insurance cover in case members of the arbitral tribunal die or become infirm. For my part, while we may never know when death will take us, I think the wiser course is to avoid appointing arbitrators who are old or in ill health!

“The Conduct of the Reference” Ch.5 is another good chapter with good advice relating to managing the proceedings in para.5–046 and in what should be done, or not done, in assisting a party to put his case in para.5–048. There is much other good advice in this chapter but the one that caught my eye was the conduct of a hearing when a party is absent in para.5–194. The new section in this chapter on interim measures, beginning at para.5–074 is a very welcome addition. Of course a reviewer can point to advice which is absent. From my part I would like to have seen some advice

about what is the proper function of the chairman of a tribunal and the proper function of the co-arbitrators in a tribunal. It has been my experience that some arbitrators do not understand the proper function of these roles which can be quite disruptive in the functioning of a tribunal. I liked too the chapter on “The Award” (Ch.6) but would have liked to have seen here advice to an arbitrator who is faced with the problem of whether or not to write a dissenting opinion. In my career as an arbitrator, I have only written one dissenting opinion and would have much liked to have had the benefit of advice from the editors of *Russell* upon when, and in what circumstances, it is proper and appropriate for an arbitrator to write a dissenting opinion. The chapter on “The Role of the Court Before and During the Arbitration” (Ch.7) contains much useful guidance, through the reported cases, when the courts are taking applications under ss.24, 67, 68 and 69 of the Arbitration Act 1996 and is a very helpful chapter in this edition of *Russell*. However there does now come a point in *Russell* where there has to be a lot of cross referencing back to the provisions, for example, relating to the appointment of arbitrators when considering challenges against them. This is an inevitable problem in a text book, such as *Russell*, but the editors for the next edition may like to give consideration upon how the chapters in *Russell* can be best linked or cross referenced one to the other. For my part I would prefer the cross-referencing to appear in the main text rather than the footnotes which the reader may or may not pick up. Thus in the example which I cite a cross-reference (referring forward) would appear in para.4–116 and a cross-reference (referring back) would appear in para.7–112. Before leaving this chapter I must express my delight that the editors cited the words of Lord Steyn in the *Lesotho Highlands* case

in which Lord Steyn quoted from Lord Wilberforce’s speech in the second reading of the Arbitration Bill that Lord Wilberforce described as giving to “the court only those essential powers which I believe the court should have”. Those of us, in the House of Lords, who worked with Lord Wilberforce in the reform of English arbitration law owe so much to him.

Before closing this review, I must refer to the appendices. As a practical matter, it is most helpful to have appendices that provide immediate access to valuable material which support the text of a book such as *Russell*. I am glad, therefore, the editors heeded to my advice (if they noticed it!) in my review of the 21st edn and removed the texts of the Arbitration Acts of 1950, 1975 and 1979 except the provisions in Pt II of the Arbitration Act of 1950 relating to the enforcement of foreign awards. It was also an excellent decision for the 22nd and for this edn of *Russell* to include the texts of the DAC reports of February 1996 and January 1997 which were so valuable during the passage of the Arbitration Bill of 1996. I am sad, however, we have lost the glossary which I thought was rather useful particularly for those less familiar with English arbitration.

This new edition of *Russell*, as the pre-eminent authority on our arbitration law, continues to well carry “the Standard” of English arbitration law. Perhaps, therefore, the editors should be forgiven for increasing the number of pages of the book by nearly 100. They should, however, warn themselves that further increases in the length of this good book will mean that it can no longer be held in one hand or slipped neatly into a briefcase!

DAVID HACKING