

The “Stated Case” Abolished: The United Kingdom Arbitration Act of 1979

Introduction

In his address to the American Bar Association in August 1978, now published in *The International Lawyer*,¹ Mr. Mark Littman, Q.C., stated that he thought the prospect for reform of the English “stated case” procedure, by which the awards of arbitrators can be made subject to judicial review, was “quite good.”² It indeed proved to be. The British Government moved with great alacrity. On November 28, 1978 the Lord Chancellor presented the Arbitration Bill to the House of Lords. The first debate on the Bill took place on December 12, 1978 and the House of Lords finished work on it on February 15, 1979. It received the Royal Assent on April 4, 1979 and then came into force as the Arbitration Act (1979) on August 1, 1979.

For those interested in our constitution yet unfamiliar with its workings, it will seem strange that the burden of taking this Bill fell upon the House of Lords.³ We became the Bill’s guardian due to the resignation of Mr. Callaghan’s Labor Government before the House of Commons was able to consider it. It could, therefore, have been lost all together because no Bill can pass through the Houses of Parliament without being presented in both Houses. However, in the short interregnum between the resignation of the

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¹Litmen, *England Reconsiders the Stated Case*, 13 INT’L LAW. 253 (1979)

²*Id.* at 258.

³During the preparation of the bill, life was quite hectic for some of us in the House of Lords. Between Aug. 1, 1978 and May 1, 1978, as work on the bill progressed, I made no fewer than eighteen air journeys across the Atlantic from my place of work in New York. If, therefore, any reader has heard our ancient chamber unkindly described as “some living proof of life after death,” he should be told that we are alive and active.

Labor Government and the dissolution of Parliament, the House of Lords agreed to accept a few politically uncontroversial Bills of the House of Commons without scrutiny and, by a similar token, the House of Commons took a few politically uncontroversial Bills of the House of Lords. Hence, acting on trust, the House of Commons passed the Arbitration Bill.

The Arbitration Act is not a perfect Act. It became unnecessarily complicated when attempts were made to please all those concerned in England with the conduct of arbitrations. However, the Bill did receive very close scrutiny by the House of Lords. Numerous amendments were proposed, and considered. Important and significant progress was made. Let us note the Act's two chief objectives: first, to reform the procedure for judicial review of domestic arbitration awards (and those international arbitration awards still subject to judicial review) in order to end abuse and to create efficiency and efficacy; and second, to enable parties to international agreements subject to two exceptions to contract out of *any* judicial review of arbitration proceedings taking place in England.

I. Legal History of the Stated Case Doctrine

Judicial review of an arbitrator's award, when there has been no dishonesty, impartiality or gross irregularity by the arbitrator, is unique to English jurisprudence. It is found only in England and in certain Commonwealth countries who have adopted our arbitration law. The history traces back for 200 years and more. In the eighteenth century a writ of certiorari was used to bring before the King's Bench Court decisions both of arbitrators and of inferior courts, (such as Justice Courts and Courts of Sessions) with the request that the award, decision or judgment be quashed for an error of fact or law on its face. No distinction was made between arbitration and courts, although in the former the parties had voluntarily selected a form of dispute resolution and in the latter they had been compelled to resort to it. As early as 1857, Willes J. expressed his regret that the writ of certiorari had been extended to arbitral awards.⁴ He added, however, somewhat pessimistically, that it was too late to alter the procedure.⁵

The use of the writ of certiorari as a means of obtaining judicial review of arbitral awards had two grave disadvantages. First, it effectively excluded the giving of reasoned awards. If an arbitrator stated his award without reasons, it was hard to mount the claim that there was an error of fact or law on the face of the award. On the other hand, if he gave his reasons for the award, then his award could be subject to the writ of certiorari. An award without supporting reasons is almost unknown in civil law countries; and in Germany a failure to give reasons is a ground on which an arbitral award may be set

⁴Citation omitted.

⁵*Id.*

aside by a court.⁶ The second great disadvantage of the writ of certiorari was that it gave no opportunity to the court to amend the award or to remit it back to the arbitrator. Unless the court decided that it should dismiss the writ of certiorari, the court’s power was limited to setting aside the award. The parties, if they had the energy for it, were then left to start all over again.

In an attempt to evolve a more satisfactory form of judicial review, the Common Law Procedure Act (1854)⁷ gave, for the first time, the arbitrator power to state the award, or part of it, in the form of a special case for the opinion of the court.⁸ This power was exercised at the arbitrator’s discretion. Indeed, the court then had no power to order him to state a special case. Moreover, the parties could by the terms of their arbitration agreement eliminate the arbitrator’s discretion to state a case.

Later, however, parties were prevented from contracting out of the special case procedure which was extended not only to seeking the opinion of the court on the award but also to any question of law arising in the course of the reference. Although the courts, through Acts of Parliament, were pressing forward their frontier into the land of arbitration, certain stands were taken which held the ground for arbitration. In the nineteenth century case of *Scott v. Avery*,⁹ the parties were permitted to contract out of judicial review until the dispute had been submitted to arbitration. In other words, they were entitled to assert their contractual right for arbitration before the court was permitted to interfere. The crunch came, however, in the case of *Czarnikow & Co., Ltd. v. Roth Schmidt & Co.*¹⁰ There a clause in a standard agreement drawn up by the Refined Sugar Association purported to exclude the parties’ rights to have any question of law stated in the form of a special case for the opinion of the Court. The Court of Appeal, to put it mildly, was outraged.

Arbitrators, unless expressly otherwise authorised, have to apply the laws of England. When 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 own 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 Courts think it 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 English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. There must be no *Alsatia* in England where the King’s Writ does not run.¹¹

Having noted the pomp of the judgment, two points must be made. First, the common law right to set aside an award for errors of fact or law on its face

⁶ZIVILPROZESSURDNUNG [ZPO] § 1041(5) (W. Ger).

⁷Common Law Procedure Act, 1854, 17 and 18 Vict.

⁸*Id.* § V, at 978.

⁹10 Eng. Rep. 1121 (H.L. 1857).

¹⁰[1922] 2 K.B. 478.

¹¹*Id.* at 488 (Scrutton, L.J.).

has been used infrequently because it was considered a nuisance that the court's power or remedy, if it can be so called, was limited to quashing the award. Second, for many years the stated case procedure worked well. It provided a useful reference procedure through which the arbitrator and the parties could seek the assistance of the courts on difficult points of law, and thus provided a bridge between the tribunals of arbitration and the courts of law. The traffic over this bridge greatly assisted the evolution of English commercial law. In contrast with other countries, such as the United States where the commercial law has developed separately under the awards of the arbitrators and court judgments, England developed one commercial law.

However, the last decade presented mounting pressures upon the stated case procedure which was increasingly being abused. For example, massive construction contracts, with enormous sums at stake presented overwhelming temptations to use the stated case procedure as an instrument of delay, and such became the abuse that the legal departments of many major international companies, including British companies, forbade inclusion of an English arbitration clause in any agreement into which they entered. A distinguished Wall Street lawyer has even stated informally that in his firm it was an act of professional negligence to allow an English arbitration clause in any of their clients contracts!¹²

It was this problem of judicial review, both on the domestic as well as the international front, that the Arbitration Act (1979) tackled. Before giving closer study to the judicial review reforms in the Act, it is important to understand English arbitration law. The most significant feature of English arbitration law is its strong support of the proper conduct of arbitrations in England. It is supportive in two ways. First, as with many other jurisdictions, it gives parties recourse to the courts when an arbitration has been improperly conducted. Thus, English law permits removal of an arbitrator (or umpire) where he has conducted the proceedings improperly.¹³ This section also provides the courts with the power to set an award aside if it has been otherwise improperly procured. Similar powers can be found in most jurisdictions, including the United States.¹⁴

The second way in which English courts support the proper conduct of arbitrations is by providing assistance to the arbitrator, and to the parties in the arbitration, during the arbitration proceedings. For example, after an arbitrator has issued a discovery order, a party can go directly to the court and ask for enforcement of the discovery order.¹⁵ As a result, in matters of discovery, English arbitrators effectively have powers coextensive with those of the English courts. Under another section it has power to remove indolent arbitrators who have not proceeded with an arbitration with "reasonable

¹²Personal conversation of author.

¹³English Arbitration Act, 1950, 14 GEO. 6, c. 27, § 23.

¹⁴United States Arbitration Act of 1925 § 10, 9 U.S.C. § 10 (1976).

¹⁵English Arbitration Act, 1950, 14 GEO. 6, c. 27, § 12.

dispatch."¹⁶ Under this section, the indolent arbitrator can even be deprived of his fees. Other sections of the Arbitration Act (1950) provide help when there has been default in the appointment of the arbitrator.

The most interesting example of assistance, however, lies in the power of the court to extend the time for the commencement of arbitration proceedings.¹⁷ In other words, the English courts can keep alive an arbitration which has not been commenced within the time period laid down in the contract. Recently, in order to do justice between the parties, the Court of Appeal in London exercised this power. In *Consolidated Investment & Contracting Co. v. Saponaria the Virgo Shipping Co.*,¹⁸ the cargo owners had chartered a vessel from the shipowners to carry goods from Rumania to Abu Dhabi and Dubia. The charter party released the shipowners 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 the shipowner's insurers, in the words of one of the Lord Justices of Appeal, "soothed . . . (them) into inactivity. . . ."¹⁹ The Court of Appeal unanimously held that the cargo owners should be entitled to an extension of time. In reaching this decision, the court 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.

In a sense, therefore, as the House of Lords began work on the Arbitration Bill in late summer of 1978, it was faced with the problem of the English courts being oversupportive of the conduct of arbitrations. Somehow, after more than two hundred years, the English courts were not allowing the children of arbitration to grow to full maturity.

II. The New Arbitration Act

The Arbitration Act (1979)²⁰ begins by abolishing the stated case procedure allowed under the old act²¹ as well as the common law right to have an award set aside on the ground of errors of fact or law on its face.²² The immediate benefit of abolishing the right of setting aside an award on the grounds of errors of fact or law is to encourage the arbitrator to give his reasons for the award. He need no longer fear that all his work (and the work of everyone else

¹⁶*Id.* § 13(3).

¹⁷*Id.* § 27.

¹⁸[1978] 3 All E.R. 988 (C.A.).

¹⁹*Id.* at 994.

²⁰English Arbitration Act, 1979. As mentioned, the work on the arbitration bill was performed by the House of Lords. A number of leading judges took part in the debates: Lord Diplock, Lord Scarman, Lord Wilberforce, and Lord Denning all took leading parts as did the then Lord Chancellor, Lord Elwyn-Jones and the present Lord Chancellor, Lord Hailsham. If the talent was not always in agreement—and it was not—there was certainly a lot of it available for the act.

²¹English Arbitration Act, 1950, 14 GEO. 6, c. 27 § 23.

²²English Arbitration Act, 1978, § 1(1).

involved in the arbitration proceedings) will be brought to naught by the successful issue of writ of certiorari. In addition to freeing the arbitrator to make a reasoned award, in certain circumstances the new Act provides the court with certain powers to order the arbitrator to state his reasons.²³ These reasons need not be formalized. It is sufficient for the arbitrator to set out the facts as he found them and then to state informally that he made his decisions for certain reasons.

The stated case procedure and the common law right to have an award set aside on the grounds of errors of fact or law are replaced by a new appeal procedure²⁴ and by a new reference procedure²⁵ which is to be used during the course of the arbitration proceedings. Both procedures are restricted to questions of English law. Foreign law is treated in England as a fact question. Moreover, the appeal to the High Court on the question of law can only be brought with leave, which in turn can only be granted when "the determination of the question of law . . . could substantially affect the rights of one or more of the parties."²⁶ The court is also permitted to grant leave only upon the applicant "complying with such conditions as it considers appropriate."²⁷ Thus, the High Court can order a party, who is seeking to obtain leave to appeal an arbitrator's award, to bring into court some or all of the award made against him. An appeal from the High Court to the court of appeal can only be made on further leave and upon the High Court certifying "that the question of law to which its decision relates either is one of general public importance, or is one which, for some other special reason, should be considered by the Court of Appeal."²⁸

The reference procedure under Section 2 of the Act²⁹ has special importance because it will enable the arbitrator to seek the assistance of the court during the course of an arbitration when a difficult point of law arises. Nonetheless, the High Court is not permitted to take an application under Section 2 unless it is satisfied that the determination of the question of law "might produce substantial savings in costs to the parties" and the question of law itself "could substantially affect the rights of one or more of the parties."³⁰ There are similar restrictions, as with the appeal procedure, for taking the appeal. Under the reference procedure, there are restrictions for taking the reference from the High Court to the Court of Appeal similar to those involved with the appeal procedure.³¹ Hence, the old form of judicial review has now been replaced by judicial review which should only permit resort to the courts in those cases where there is at issue a genuine point of law of sufficient importance.

²³*Id.* § 1(5).

²⁴*Id.* § 1(2).

²⁵*Id.* § 2.

²⁶*Id.* § 1(4).

²⁷*Id.* § 1(4).

²⁸*Id.* § 1(7).

²⁹See note 25 *supra*.

³⁰English Arbitration Act, 1978, § 2(2).

³¹*Id.* § 2(3).

Parties to all agreements containing an arbitration clause are permitted to exclude by written agreement (called an Exclusion Agreement) all judicial review if the Exclusion Agreement is made after the commencement of arbitration proceedings.³² For parties who enter into international agreements and wish to arbitrate in England, the Arbitration Act enables them (with three categories of exceptions) to exclude judicial review in their original written agreement or in a written agreement anytime thereafter.³³ The Act also frees parties to these agreements from having their arbitration taken to court after an allegation of fraud has been made.³⁴

This draws attention to a curious feature of our arbitration law which is still in effect for domestic arbitrations. Since fraud is considered an allegation of the most serious caliber, section 24(2) of the Arbitration Act (1950) enables either party to insist upon transfer of the arbitration proceedings to the court. This will no longer be possible, however, if the parties in an international agreement have it for arbitration taking place in Britain. An international arbitration is defined by reference to a "domestic arbitration agreement." If the agreement does not fall into the "domestic arbitration" category, it is deemed to be an international arbitration agreement. A "domestic arbitration agreement" is defined as an agreement providing for arbitration in England where no party is a national of another state, habitually resides outside the United Kingdom, is incorporated in another state, or has central management and control outside the United Kingdom. The character of the agreement is determined according to the status of the parties when the agreement is made.³⁵ Hence, there can be no conversation if the parties or their status later change.

Thus far we have established that the Act has replaced the old forms of judicial review by a new appeal and reference procedure. In bringing in these new provisions it has permitted all parties to all arbitration agreements to exclude judicial review after the commencement of the arbitration proceedings and has given the special right to parties of international agreements to be permitted, at any time, to exclude judicial review. The parties, however, to three categories of agreements, otherwise international in character, are not permitted, for the present, to be released from judicial review.³⁶ I refer to agreements which could give rise to admiralty disputes, or are insurance contracts and commodity contracts. All three of these categories of agreements are treated, for the operation of this Act, as if they were domestic agreements. There is no logic in this special treatment of these agreements. It simply represents a compromise between strongly held but differing views. The matter, however, has been left open for further consideration.³⁷ In due course, the Secretary of State, if he thinks right, can revoke the special treat-

³²*Id.* §§ 3(1), (6).

³³*Id.* § 3(1).

³⁴*Id.* § 3(3).

³⁵*Id.* § 3(7).

³⁶*Id.* § 4.

³⁷*Id.* § 4(3).

ment of these three categories of agreements and place them into the normal treatment for international agreements.

Other provisions of the Act, although less important, deserve brief mention. Section 5 provides for judicial enforcement of an arbitrator's order (for example, an order concerning filing an answer) upon application to the court by the arbitrator or a party.³⁸

While some of the provisions of the new Arbitration Act are painfully complicated, I hope it will be judged that England has truly repented of its sin of mandatory judicial review of all arbitrator's awards, and has provided a means by which overseas parties can conduct their arbitration proceedings in England without fear of being dragged unwillingly into its judicial system. I hope that the reader, can join with the Wall Street lawyer, review all their agreements which contain English arbitration clauses, write in the exclusion clause, and report to their insurers that, in this matter at least, one's professional indemnity policy is protected.

³⁸*Id.* § 5.