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Where we are now: Trends and Developments since the Arbitration Act (1979)

by

THE LORD HACKING

WHERE WE ARE NOW: TRENDS AND DEVELOPMENTS SINCE THE ARBITRATION ACT (1979) *

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If our Arbitration Act of 1979 did nothing else, it concentrated attention on the state of our arbitration law. It has also, I believe, played a part in the recent worldwide development of commercial arbitration. Therefore, for those of us who were directly concerned in its passage through our Parliament, it is gratifying to note in the six years, which have elapsed since this Act received the Royal Assent on 4th April 1979, that, within our shores, there has continued to be interest in our arbitration law and, without our shores, there have been several important developments in the arena of international commercial arbitration. While we, in England, have been giving further attention to our arbitration law and to the establishment of London as a centre for international commercial arbitrations, so have other leading trading countries and their commercial capitals [1] been giving similar attention to their arbitration law and the attractions, to the international community, of the taking of commercial arbitrations in their cities. The matter of international commercial arbitration has also taken the attention of the United Nations Commission on International Trade Law who adopted on 21st June 1985, at its meeting in Vienna, the proposed UNCITRAL Model Law on International Commercial Arbitration. This Model Law is bound to have considerable influence on the further worldwide development of international commercial arbitration. Those therefore, with their eyes on the future development at home and abroad, of commercial arbitration law should give study to the UNCITRAL Model Law.

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[1] New York, Hong Kong, Stockholm, Singapore and others.

Before going further into this paper, it may be helpful if I outlined the circumstances which brought our Arbitration Act of 1979 onto our Statute Book and the essential provisions which are contained in it. Prior to the passing of the 1979 Act, two forms of judicial review were causing concern to the international community and were thought to be a disincentive to the choice of London as the forum for international arbitrations. While I was in New York in 1978, I certainly was a bit stung by the comment of a New York Lawyer, from a most eminent firm, who told me that it was deemed to be "an act of professional negligence" for anybody in his firm to permit an English arbitration clause in any of their clients' contracts!

The two forms of judicial review, which were causing concern and criticism abroad, were the case stated procedure and the procedure in which the English Court was entitled to set aside arbitrators' awards on the grounds "of errors of fact or law on [their] face". The case stated procedure owed its source, as far as English arbitration law was concerned, to the Common Law Procedure Act 1854 which gave arbitrators, for the first time, the power to state Awards, or part of them, in the form of "a special case for the opinion of the Court". Actually under the Common Law Procedure Act 1854 this power could only be exercised at the choice of the arbitrator. There was no power then in the Court to order the statement of a special case and moreover, parties could, in their arbitration agreements, deprive the arbitrator of his right to state a case. However in Section 19 of our Arbitration Act 1889, power was given to the Court to order the statement "of a special case for the opinion of the Court [relating to] any question of law arising in the course of the reference" and later, in a decision of the Court of Appeal, it was held that parties could not contract out of the special case procedure. Although the case stated procedure undoubtedly contributed to the development of English commercial law—particularly in the maritime and commodity fields—it was by the 1970's being used by some parties as an instrument of delay. It was also an unsatisfactory procedure principally because the Court had to order the statement of the case before it was able to examine the merits of it.

The procedure, entitling the Court to set aside awards on the grounds of error of fact or law, owed its history to the 18th Century Writ of *Certiorari* which was used to bring before the King's Bench Court decisions of both arbitrators and inferior Courts so that awards, decisions or judgments could be quashed "for error of fact or law upon [their] face". Then no distinction was made between arbitrations and Courts although concerning arbitrations the parties had voluntarily selected their forum but concerning Courts they have been compelled to resort to it. Considering the difficulties we were facing by the late 1970's, it is, perhaps, of some amusement to note that in 1857 Mr. Justice Willes expressed regret that the Writ of *Certiorari* had been extended to arbitral awards adding, somewhat pessimistically, that it was too late to stop this development!

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, then it could not be said that there was "an error of fact or law on the face" of it. Thus many arbitrators either made their awards without reasons or adopted the device of giving reasons separately from their awards. Although the latter procedure, widely used in maritime arbitrations, was and is more satisfactory than the former, it remained and remains an awkward procedural device. Second, the 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. Thus, if the Court allowed a Writ of *Certiorari,* it was limited to setting aside the award and, in so doing, leaving the parties to start their arbitration all over again. Although it was the case stated procedure which was used as the instrument of delay, the right to apply to set aside awards on the grounds of error of fact or law was not conducive to the efficient conduct of arbitrations in England.

Thus in response to overtures from the commercial and legal community from home and abroad, the case stated procedure and the setting aside of awards on the grounds of "errors of fact or law on their face" were replaced in the 1979 Act by new and limited appeal and reference procedures. These are contained in Sections 1 and 2 of the 1979 Act. There was also contained in Section 1 of the Act a power in the Court for an arbitrator or umpire to be ordered to state his reasons "in sufficient detail to enable the Court. . . to consider any question of law arising out of the award" should an appeal come before it. Thus it was hoped that the norm, in England, would be for arbitrators to state their reasons which is generally the practice abroad. Indeed in some Civil Law countries, such as Germany, a failure to give reasons can be a ground for setting aside an arbitral award. Moreover the 1979 Act has enabled parties to international contracts—that is to say contracts in which one or more of the parties reside or are controlled (this refers to "bodies corporate") from outside the United Kingdom—to exclude all forms of judicial review by, or reference to, the English Courts. This right to contract out of judicial review by the English Courts has been withheld, for the present, from parties to international agreements which relate to admiralty, insurance and commodity matters. Although the Secretary of State for Trade has power under Section 4(3) of the 1979 Act to issue an Order which would enable parties to these international contracts also to contract out of judicial review, he has not exercised this power and it is clear, except with insurance matters, there is no pressure upon him to do so. Concerning this point I draw attention to the recently issued *Working Paper of the Sub-Committee on Arbitration of the Commercial Court-Committee* [1A] in which the question is raised whether "the time has come to consider whether

[1A] *Commercial Court Committee: Sub-Committee on Arbitration: Working Paper:* 1st February 1985 (paragraphs 14 and 15).

insurance contracts could be properly excluded from (these three) special categories".

The 1979 Act did carry out a few other, less important, reforms to our arbitration law. It gave power, in Section 5, for Court Orders when parties have failed to comply with orders of arbitrators and, in doing so, enable an arbitrator or umpire to continue with a reference when one party has, for example, been in default of appearance. It reformed certain provisions in the Arbitration Act 1950 to enable three arbitrators to sit as three arbitrators and not as two arbitrators and an umpire. It also sought to make a few other improvements in the support which the Court gives, under the Arbitration Act of 1950, in the setting-up of Arbitral Tribunals. These, however, were the limit of the reforms contained in the 1979 Act as they effected English arbitration law.

Yet the impact of the 1979 Act has, I suggest, been rather greater. Indeed the Act should be viewed in the wider context of the role of our Parliament in the development of our arbitration law. Here several comments can be made. First, our arbitration statutes do not set out a code of English arbitration law. As one of the authors of Mustill and Boyd on *"Commercial Arbitration"* has stated [2]:

> " . . . 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 arbitrator's powers and a court's power to intervene whether or not an arbitration has gone wrong. But of procedure in an arbitration, or of duties of the parties and the arbitrators, he will learn almost nothing".

Thus while our arbitration Statutes set out the circumstances in which the Court—not of its own motion but on application—can intervene in arbitration proceedings they provide little assistance upon arbitration procedure, the duties of the parties and arbitrators and the substantive application of our arbitration law.

Second the provisions which are actually contained in our various arbitration Statutes represent our Parliament's response, when Parliamentary time has been available, to specific initiatives from our commercial and legal community. Thus the two major innovative Arbitration Acts of this century, the Arbitration Acts of 1934 and 1979 represent the response of our Parliament, as to the first Act, to the *Report of Committee on the Law of Arbitration* [3] (known as the *MacKinnon Report* because it was chaired by Mr. Justice MacKinnon) of

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[2] Stewart Boyd Q.C.: *"Innovation and Reform in the Law of Arbitration":* Civil Justice Quarterly (2nd Edition) at pp 151-152. Also contained in the paper read by Mr. Boyd to the Annual Conference of the Chartered Institute of Arbitrators in October 1984.

[3] *Report of Committee on the Law of Arbitration* H.M. Stationery Office: Command 2817: March 1927.

March 1927 and, as to the second Act, to the *Commercial Court Committee Report on Arbitration*[4], chaired by Sir John Donaldson (then presiding Judge of Commercial Court) of July 1978.

To digress for a moment, there was in 1927, relating to the conduct of arbitrations, several problems which concerned the commercial community. There were problems of delay caused by arbitrators not promptly taking up their responsibilities and there were, for another example, problems concerning the respective roles of arbitrators in three arbitrator panels. On the latter subject the *MacKinnon report* did not restrain its criticism.

> " . . .arbitrators are only too often selected as partisans or advocates who are not likely to agree and perhaps are not intended to do so . . . we are all of us familiar with the experience that (these) arbitrators are passengers in the boat who give no real assistance to the umpire, and whose sole reason for attending appears to have been to inform the umpire at the conclusion of *his* labours of the fees which they desire him to include in the award on their behalf".

In seeking to get Parliament to respond to specific initiatives for arbitration law reform, there is nothing more likely to attract Parliament than arguments 'in the interests of the nation'. Thus in our very first Arbitration Act of 1698 we find from the preamble that Parliament was persuaded to pass this statute in the interests of "promoting trade". Thus the claim by one noble lord —not me—in the debate which I introduced in the House of Lords on the 15th May, 1978 that there was a loss to our national economy of £ 500,000,000 per annum because of defects in our arbitration law, almost provided the motor which propelled the 1979 Act through our Parliament.

Before passing from this observation, on the response of Parliament to outside initiatives, I should mention, to those who may be questioning how Parliament found time after the war for our main Arbitration Act of 1950, that this Act is exclusively a consolidation Act which consolidated almost all of our Arbitration Acts which were then on our statute books. We have, in fact, in Parliament, a Joint Committee of both Houses for the Consolidation of Bills of which in the early 1970's I was a member. Taking subject matter by subject matter, this Committee painstakingly labours through our old statutory law and the fruits of its labour, insofar as arbitration was concerned, was produced in the Arbitration Act of 1950.

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[4] Commercial Court Committee: Report on Arbitration: H.M. Stationery Office: Command 7284: July 1978.

My third observation is that Parliament, albeit responding to initiatives from the commercial and legal community, has consistently sought to support effective arbitrations. Parliament may have been interventionalist, in the Arbitration Acts of 1889 and 1934, in enacting the case stated procedure but the central theme through all our Arbitration Acts is one of support of effective arbitration. Hence there is to be found in the 1950 Act many provisions, relating to the appointment of arbitrators and the like, where Parliament, through the Courts, is offering to assist in the setting up and conduct of arbitrations. These statutory provisions are important and are, indeed, an almost unique feature of English arbitration law. Our statutory law may not provide a code of English arbitration law, but it does provide much support for the effective conduct of arbitration in England. It is worth from time to time turning over the pages of the 1950 Act. There are a variety of powers to be found. There is, for example, the power for parties to apply to the Court for the removal of indolent arbitrators who have not proceeded with an arbitration with "reasonable despatch" (Section 13(3)). There is even power, under this Section, then to deprive the indolent arbitrator of his fees! Another example of the support given to English arbitrations by our statutory law is to be found in Section 27 of the 1950 Act which enables the Court to extend the time for the commencement of an arbitration. In other words, the English Court can enable an arbitration to take place even though it has not been commenced within the time period laid down in the contract. In *The Virgo Shipping Case* [5] in 1978, this proved to be important. Here the cargo owners had chartered a vessel from the shipowners for the carriage of goods from Rumania to Abu Dhabi and Dubai. In the Charterparty 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 the shipowners' insurers, in the words of one the Lord Justices of Appeal "soothed [them] into inactivity". In the circumstances the 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 Charterparty and prevent the cargo owners from proceeding with the arbitration.

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[5] *Consolidated Investment and Contracting Company v. Saponaria The Virgo Shipping Company Limited* (1978) 3 AER 988.

As long ago as our first Arbitration Act of 1698, to which I have earlier referred, Parliament stated in the preamble its underlying policy:

> "Where it hath be found by experience, that references made by rule of court have contributed much to the ease of the subject, in the determining of controversy, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt in case they refuse submission: Now therefore for promoting trade and rendering the awards of arbitrators 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 be more effectual in all cases" and "the final determination of controversies referred to them" are objects, with a few exceptions, which have been maintained to the present day. Moreover, and more significantly, in providing support for the proper conduct of arbitrations Parliament specifically has, since the Arbitration Act 1889 given wider powers to arbitrators than are given to judges in the conduct of litigation in our Courts, under our adversary procedure of the common law trial. I quote from Clause (f) of the First Schedule of the Arbitration Act 1889 which set out "Provisions to be Implied in Submissions" for arbitrations:

> "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*".

Thus Parliament gave in this Act, and still gives, inquisitorial powers to arbitrators which it has not given to judges. This provision is now to be found in Section 12(1) of the 1950 Act.

My fourth observation, relating to the role of Parliament in the development of English arbitration law is that, while Parliament—through the medium of legislation—has provided an important mechanism under which our arbitration law has developed (albeit a mechanism representing a response to outside forces of influence) it has *not* been the most significant mechanism of reform. Thus, as identified by Stewart Boyd Q.C. in his excellent address to the Annual Conference of the Chartered Institute of Arbitrators in Guernsey in October 1984, there have been and are other more significant forces which have helped to shape our arbitration law. These are international conventions, decisions of the English Courts, and changes in commercial and arbitral

practices, particularly as now effected through trade associations and arbitration institutes.

Thus, as mentioned earlier, we cannot look to the future of English arbitration law without having much regard for the UNCITRAL Model Law as adopted at the Vienna Convention at which the Chartered Institute of Arbitrators, under the leadership of Lord Wilbeforce, was given special observer status. Thus we also have to look back, in earlier times of this century, to the Conventions of the League of Nations which resulted in our Arbitration Clauses (Protocol) Act 1924 and our Arbitration (Foreign Awards) Act 1930 and more recently, to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 1958 (which albeit rather belatedly) resulted in our Arbitration Act 1975.

In truth the real advance in the recent development of our arbitration law is not to be found in the provisions of the 1979 Act but in the role undertaken by the English courts since the Act came into force. During these last six years our Courts have not simply applied the terms of the Act but have also sought to apply its underlying principles . . . as it has perceived them. To put it another way, judges of the English Courts have treated the 1979 Act as representing a shift in public policy from an insistence on strict legality to a recognition of the need for commercial efficacy, speed and finality in the conduct of arbitration. In a recent case, the *Arab African Energy* [6] case of 1983, Mr. Justice Leggatt put this shift in public policy as follows:

> "True it is, that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and their awards. But that aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency. Since public policy has now changed its stance I see no reason . . . to adopt an approach . . . which might well have been appropriate before it had done so."

Actually the first important case, after the 1979 Act was passed, concerned an arbitration which had been commenced some time before the Act had become law and did not fall under the provisions of it. It gave, however, an opportunity to the House of Lords to assert that the Court should not intervene in arbitration proceedings when the parties or the arbitrator have the necessary powers for the proper conduct of them. Hence in the BREMER VULKAN [7] in

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[6] *Arab African Energy Corp. Ltd. v. Olieprodukten Nederland B.V.* (1983) 2 Lloyds' Law Reports 419.

[7] *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corpn.* (1981) 1 All ER 289.

1981, the House of Lords held that the Court has not got jurisdiction to dismiss one party's claim in arbitration proceedings on the grounds of the other party's wanton delay in pursuing the claim because it is the duty of all the parties in an arbitration to ensure it proceeds without unreasonable delay. The decision in the House of Lords in *Bremer Vulkan* was placed, in fact, on a narrow base. The majority of the law lords concluded that in arbitration proceedings—such proceedings being consensual and voluntary—there was a mutual contractual obligation on all parties not to be dilatory. On the other hand the minority opinion in the House of Lords concluded that the true contractual agreement between the parties was to engage in arbitration proceedings which were, by their nature, adversarial. Thus if one party in that adversarial process has not progressed his case as he should have done and, as a result, it was be no longer possible to conduct a fair arbitration then the party who has been put to serious disadvantage should be entitled (according to the minority view) to ask the court to intervene and have the claims dismissed. While the point before the House of Lords in *Bremer Vulkan* did not fall under the terms of any section in the Arbitration Acts and while the point had not, as such, been previously decided by the English courts, the clear policy hitherto (both under the Arbitration Act 1950 and in earlier court decisions) was to support effective arbitration and to intervene when, for whatever reason, an arbitration was not being, or could not be, effectively conducted. Thus *Bremer Vulkan* clearly broke new ground and enabled the House of Lords, at a very early stage after the 1979 Act had become law, to establish a new policy of non-intervention by the courts.

The first case to reach the Court of Appeal, which fell under the actual provisions of the 1979 Act, gave an early opportunity for the Court of Appeal further to develop English arbitration law. Thus in the *Nema* [8] in 1981 the Court of Appeal, as later supported in the House of Lords, established the principle that leave for appeal—relating to arbitrations in which judicial review had not been excluded pursuant to Section 3 of the Act—should only be granted when "either (i) the arbitrator misdirected himself in a point of law or (ii) that the decision was such that no reasonable arbitrator could reach" it. The establishment by the House of Lords in the *Nema* of the principle that the court should only accept appeals under the 1979 Act in exceptional circumstances was followed by the Court of Appeal in the *Rio Sun* [9] in 1982 and in the *Antiaos* [10] in 1983. In the *Rio Sun*, where the Court of Appeal agreed that the application for

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[8] *Pioneer Shipping Ltd. and others v. BTP Tioxide Ltd.: The Nema* (1981) 2 All ER 1030.

[9] *Italmare Shipping C. v. Ocean Tanker Co. Inc.: The Rio Sun* (1982) 1 All ER 517.

[10] *Antaios Cia Naviera SA v. Salen Rederierna AB; The Antaios* (1983) 3 All ER 777.

leave to appeal had been properly granted, a further test was applied by one of the Lord Justices in which he held that it was a reason for granting leave to appeal when a decision of an arbitrator would "have repurcussions in the commercial community far beyond the interests of the parties in this particular litigation". In the *Antaios*, where the Court of Appeal agreed that leave to appeal had been correctly refused, the Master of the Rolls applied the test that leave to appeal should be refused when the court formed the "firm view that the arbitrator (was) probably right" even if the Court of Appeal might have taken a different view. On the other hand, if it was known there was pronounced differences of opinion amongst the judiciary upon the point then, provided the issue substantially effected the rights of one or more of the parties, leave to appeal should be granted.

Interestingly when the *Antaios* reached the House of Lords [10A] the law Lords even rejected the second test of the Master of the Rolls and held, that when there was a difference of opinion amongst the judiciary (as opposed to conflicting dicta), leave for appeal should not be granted unless "a strong *prima facie* case had been made out that the arbitrator had been wrong". Thus even when there is put before the Court a question of law, over which the judiciary have different views, and even though the question of law "could substantially affect the rights" of the parties the House of Lords has ruled that there should be no judicial intervention by the English Court.

In drawing attention to the decisions reached in the House of Lords and Court of Appeal in these three cases, I am not asserting that our courts have been incorrectly developing English arbitration law. Nor am I, as one of those who was behind the 1979 Act and who is now amongst those who would like to see further developments in our arbitration law, making a complaint. I do, however, argue that in each of these cases the House of Lords and Court of Appeal went well beyond the actual terms of the 1979 Act. As a matter of statutory construction the trial judge, Mr. Justice Robert Goff in both the *Nema* and the *Rio Sun* was surely correct in holding that the only test in Section 1(4) of the 1979 Act was whether firstly there was a "question of law" to be determined and secondly whether the determination of that question of law "could substantially effect the rights of one or more of the parties to the arbitration agreement". Thus, I suggest, the House of Lords and Court of Appeal in these, and other cases, have been patently further developping English arbitration law. Their justification has been to give effect to "Parliamentary intention" and to a perceived change in public policy relating to

[10A] *Antaios Cia Naviera SA v. Salen Rederierna AB: The Antaios* (1984) 3 All ER 229.

the relationship between arbitrations and the courts. Indeed in the *Nema* Lord Diplock put it in this way:

> "My Lords, in weighing the rival merits of finality and meticulous legal accuracy there are, in my view, several indications in the Act itself of a Parliamentary intention to give effect to the turn of the tide in favour of finality in arbitral awards . . .".

Since the passing of the 1979 Act the English courts have also taken up other opportunities to develop English arbitration law and, indeed, London as a centre for international commercial arbitrations. For example, in *Bank Mellat* [11] the Court of Appeal held in an arbitration where there was a Greek Claimant and an Iranian Respondent, being conducted pursuant to the Arbitration Rules of the International Chamber of Commerce that it was not appropriate for an order for security for costs to be made by the English Court, on the application of the Iranian Respondent against the Greek Claimant. Another example is the *Arab African Energy* case [6], from which I have already quoted an excerpt from the judgment of Mr. Justice Leggatt. Here the English Court held that an agreement, which was confirmed in an exchange of telexes and which incorporated the ICC Court of Arbitration Rules (where there is a waiver of any form of appeal), did constitute a written exclusion agreement pursuant to the 1979 Act.

It should, however, be recorded that the English courts have not always felt able, since the 1979 Act, to develop English arbitration law as they felt it right to do so. For example in *Eastern Saga* [12] the trial judge, Mr. Justice Leggatt, held there was no power in the Court to order the consolidation of arbitrations unless the parties agreed to it. As another example in judicial restraint, the House of Lords held in *La Pintada* [13], that an arbitrator does not have power, as a matter of general damages, to order the payment of interest when the debt had been paid late but before the commencement of the arbitration proceedings for its recovery. Here the House of Lords stated that this "anomaly" in the law could only be rectified by Parliament in its legislative function.

In citing these recent Court decisions, I am not attempting to produce a definitive—let alone comprehensive—statement on the current status of English arbitration law. In the 40 or 50 arbitration cases which have been reported since the 1979 Act became law, some have been relevant to the points

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[11] *Bank Mellat v. Helliniki Techniki S.A.* (1983) 3 All ER 428.

[12] *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha: "The Eastern Saga"* (1984) 3 All ER 835.

[13] *President of India v. La Pintada Cia Navegacion S.A.* (1984) 2 All ER 773.

which I have been making in this paper and some not. I have cited these cases because I believe they represent clear evidence of the English Court's determination firstly not to intervene in the arbitral process unless there are very strong reasons for doing so and secondly to continue to provide its support for the effective setting up and conduct of arbitrations which take place in the United Kingdom. These cases, which is my other reason for citing them, also illustrate the limitations on the use of Court decisions for the development of our law. In the first place the Court cannot claim powers which it has not been given by Statute. Thus in *Eastern Saga* [12] the trial judge had to acknowledge he had no power to consolidate arbitrations without the express authority of Parliament (such as contained in the Hong Kong Arbitration Ordinance 1981 which gives express power [14], in certain circumstances, for the Courts in Hong Kong to order consolidation of arbitration proceedings). Thus in *La Pintada* [13], the House of Lords held that an arbitrator cannot order, under general damages, the payment of interest except when making an award of the principal sum or when the principal sum has been paid after the commencement of arbitration proceedings. The role of the Court is also limited by the cases which it tries—by the chance of a particular case coming before it and by the facts of that case. Thus the law in England concerning when the Court will order security for costs is still uncertain despite the decision of the Court of Appeal in *Bank Mellat* [11]. Indeed in the absence of the adoption by the parties of arbitration rules which expressly or by implication exclude the right of a respondent to seek security for costs, it should be assumed that a respondent English or foreign can successfully ask the Court to order security for costs against a foreign claimant.

Yet out of all of this judicial activity there can clearly be identified not only the trends and developments, which I have attempted to cover in this paper, but also what Stewart Boyd' calls the spread of "consumerism" into our courts of law and arbitration. Let me quote again from his excellent address to the Chartered Institute of Arbitrators in October 1984:

> "Finally, the spirit of consumerism . . . has begun to pervade even the law of procedure. Arbitral tribunals, and even the Commercial Court 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 litigants the consumers. Indeed, the analogy of the market place has become so firmly established that it is now frankly acknowledged that the Commercial Court and English arbitrations are in open competition on the international scene with the courts and arbitrators of other countries, and that the need to ensure that London remains an attractive forum for

[14] Section 6B Hong Kong Arbitration Ordinance 1981.

> 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."

Actually this is nothing new for a trading nation such as ours. Martin Hunter my colleague in the London International Arbitration Trust, whose learning on matters of arbitration now take us to Tacitus, Horace and Ovid, recently cited [15] the Chancellor in the famous Star Chamber of 1475:

> "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 trial by 12 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."

In my review of the development of English arbitration law since the passing of the Arbitration Act 1979, I have not yet referred to the impact which commerce, arbitrators and, if I may add, lawyers have had on recent developments of our arbitration law both before and after the 1979 Act. Nor have I referred to the impact which has been made by the London International Arbitration Trust, the Commercial Court Committee, together with its Sub-Committee on Arbitration, and the trade associations and arbitral bodies in England among whom has stood the Chartered Institute of Arbitrators as a major contributor. Nor have I referred to the considerable work which the Chartered Institute of Arbitrators has put into its own procedures, including the issuing of not one but two new International Arbitration Rules in 1981 [16] and in 1985.[17] The activities of all these persons and institutions has been important and will continue to be so. Indeed, as I mention at the end of this paper, there is considerable scope for individual arbitrators to develop and improve the conduct of the arbitrations over which they preside. However as far as the development of arbitration law is concerned—in contrast to the development of arbitration procedure—the mechanism for reform lies in the actions taken by Parliament and by the courts. Since, however, the courts can only take opportunities (such as they exist) for the development of arbitration law as it comes case by case to them, there is powerful argument that Parliament, after all the activity of recent years, should now bring together an omnibus reform of English arbitration law either by adopting the UNCITRAL Model Law or otherwise by codifying and consolidating our arbitration law.

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[15] J. Martin H. Hunter: *"Arbitration procedure in England: past, present and future"*: Arbitration International Volume 1 Number 1: April 1985.

[16] London Court of Arbitration: *International Arbitration Rules: 1981 Edition.*

[17] London Court of International Arbitration: *LCIA Rules: 1985 Edition.*

Since the 1979 Act, Parliament has passed some correcting provisions arising out of it and one new provision relating to the award of interest. These are to be found in Section 148 of the Supreme Court Act 1981, in Section 15 and Schedule 1 Part IV Administration of Justice Act 1982 and, as just enacted, Section 58 Administration of Justice Act 1985. These provisions, respectively, concern the circumstances in which the grant or refusal of leave for appeal can itself be the subject of an appeal,[18] the award of interest when the principal sum has been paid after the commencement of the arbitration proceedings but before the award is made [19] and applications to the court for assistance when one of the parties, in three arbitrator panels, has failed to appoint his arbitrator.[20]

During this period it was not intended that Parliament should be involved in any substantive arbitration reforms. However as identified in the Working Paper of the Sub-Committee on Arbitration of the Commercial Court Committee [1A] there are a number of reforms in arbitration law which are worthy of consideration. For example should an arbitrator be given power to adjudicate on his own jurisdiction or to rectify the terms of the contract under which he has been appointed? Should he also have the power to appoint an expert witness? Should there, also, be power in the court or in the arbitrator for consolidating arbitrations and, in what circumstances, should this be exercised? Whether or not these and other reforms should be made—the Sub-Committee on Arbitration is not enthusiastic about many of them—is all part of the wider question relating to whether we should adopt the UNCITRAL Model Law or codify and consolidate our arbitration law. The answer, I suggest, must be that the UNCITRAL Model Law and further reform of English arbitration law should be considered together. The assistance, therefore, that those of us in Parliament need for further Parliamentary reform (and to obtain Parliamentary time for it) is for the present momentum for arbitration reform to be maintained. We are increasingly living in the age of the Parliamentary lobbyist. Thus we need the 'arbitration lobby', led by the Chartered Institute of Arbitrators or the London International Arbitration Trust or others, to keep up the pressure upon us.

In the meantime I believe there is a lot of opportunity for arbitrators to be innovative and, in doing so, to use their full powers, including their 'inquisitorial' powers under Section 12(1) Arbitration Act (1950), when conducting arbitrations before them. I would urge, therefore, all arbitrators

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[18] Incorporated as new Sections 1(6A) and 2(2A) in Arbitration Act 1979.

[19] Incorporated as new Section 19A in Arbitration Act 1950.

[20] Incorporated as new Sub-Section 10(3) in Arbitration Act 1950.

decisively to steer their arbitrations away from strict court procedures however familiar those procedures are to the lawyers appearing before them. I would also urge all arbitrators vigorously to control discovery and the use of pleadings. All such actions by arbitrators to improve the efficiency and expedition of arbitration proceedings will, under the present view of the judiciary, have its full support provided, of course, the arbitrator is fair and even handed in his overall conduct of the arbitration. The truth is that court procedures have, over the years, developed into a mass of technical, and sometimes complicated, rules. This is a problem that the Supreme Court Rules Committee itself is tackling. This is a problem that the Commercial Court is tackling by cutting out (where appropriate) impediments to the efficient and fair adjudication of disputes. It is perhaps, too, worth remenbering that a few centuries ago all pleadings were oral. Indeed in the seventeenth century Chief Justice Bereford is recorded as admonishing counsel:

> "Get to your business. You plead about one point. They plead about another so that neither of you strikes the other".